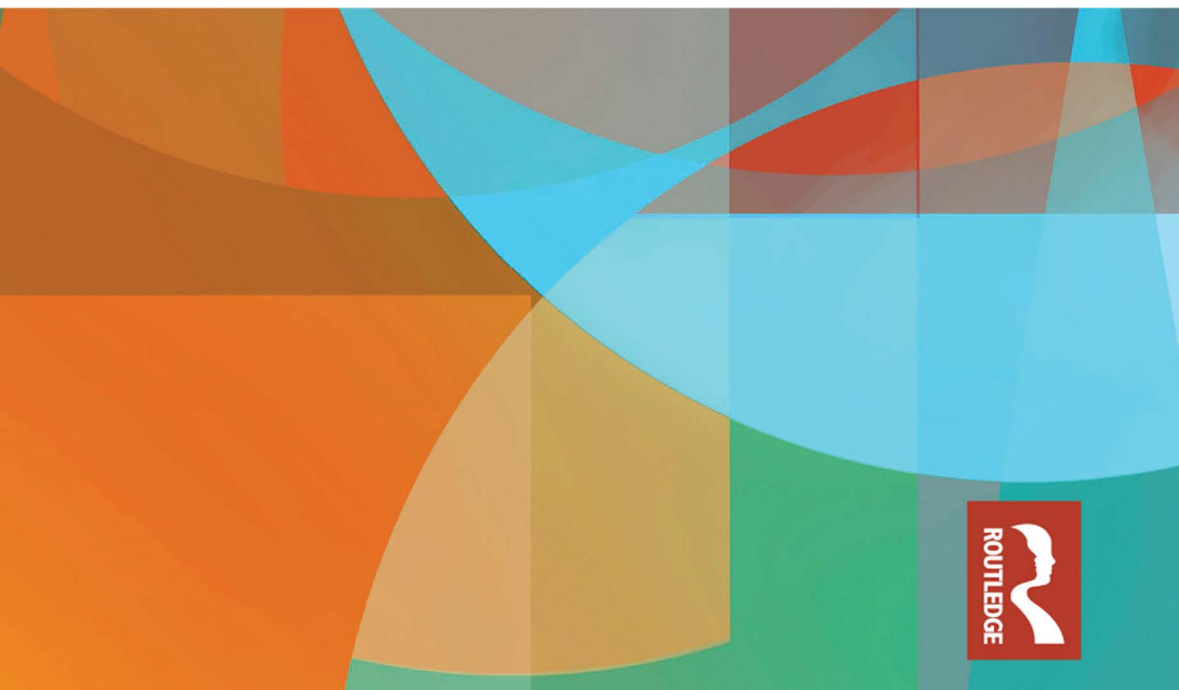
LEGAL THEORY OF AUCTION

Kristijan Poljanec



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The widespread understanding of auction structure considers auction as consisting of three contracts: contract between the seller and the auctioneer, contract between the auctioneer and the buyer and the sale contract between the seller and the buyer. The book challenges this concept, arguing that the traditional tripartite concept of auction is too narrow and does not correspond to the actual structure of auction relations.

Demonstrating that an auction structure consists of a plethora of legal relationships, including noncontractual relations, this book explores the legal concept of auction sale and the structure of accompanying relations. The book provides a historical overview of auctions and different auction models. Following a brief introduction to the economic theory, auction models are examined against the following legal criteria: price formation, publicity, parties' autonomy, legal form and applied technology to find a legal concept and nature of auction. The book explores the legal position of key auction figures and auction objects to identify the categories of legal relations that appear at auction. It explores the legal nature of the main contract, as well as the relations between the consignor and the auctioneer, the auctioneer and the bidders, the bidders themselves, the consignor and the bidders. The book covers relations arising from droit de suite, financial and bidding agreements to provide a comprehensive overview of lesser-known legal relations that commonly arise in auction practice.

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To my beloved Ron, the most charming golden retriever that ever lived.

Contents

Preface

I discovered art and cultural heritage law during the last year of my graduate studies. Since then, I have been in love with this fascinating legal area, which perfectly combines my passions for history, art and law. This fascination culminated in a doctoral thesis titled 'Formation of sale contract by auction'. This book is a continuation of my doctoral research. Whereas the thesis focused on the areas covered herein in Chapters 1 to 3, this book has added three important but under-researched topics: the artist's resale royalty right, the auction guarantees and the price-influencing tactics at auction.

What inspired me to write this book was the knowledge of the apparent lack of comprehensive legal studies of auction sales in English language, especially comparative studies of the law of auction sale. I hope the book will successfully fill this gap and bring home to its readers a comprehensive and comparative overview of some of the most interesting aspects of auction sale. I also hope this book will foster studying and teaching of auction law in universities across the world. Of course, comments, suggestions and critiques that could make this book an even better piece of academic work are welcomed.

Writing this book was challenging for many reasons. Most books on auction sales law cover auction sale in German law, whereas this topic is far less researched in other jurisdictions covered in the book. This required a great deal of independent research to familiarise with different statutes and cases dealing with auction sales in other jurisdictions concerned in this book.

Furthermore, 'auction law' is not a single body of law. It is a patchwork of usually a few auction provisions and fragments of different branches of law, most notably the law of sales and the law of agency. The unsystematic and fragmentary character of 'auction law' made it difficult to identify, analyze, select and systematise the sources which were relevant for this book, as well as to fit them into the context of auction.

Also, the auction provisions lack a definition of *auction*, while the auction may appear in different formats. This made the conceptualisation of the auction in a legal sense quite demanding and required a great deal of interpretative creativity to come up with a solution.

Lastly, many phenomena in the auction world are (still) not regulated by law or at least interpreted in case law, making it difficult to give any authoritative

conclusions thereon. However, I hope I have managed to provide the readers with comprehensive, readable and accurate insight into this complex legal field.

Throughout all these years, I received support from my family, friends and colleagues. I wish to thank my parents, Silva and Zvonko, and my sister Ivna for their love, support and understanding. I am also grateful to Professor Hana Horak for her support and patience during the preparation of this book.

Particular thanks goes to the research institutes that I visited during my doctoral and postdoctoral research: the Cegla Center for Interdisciplinary Research of the Law at Buchmann Law Faculty in Tel Aviv, the Europa-Institut Saarbrücken and the Max Planck Institute for Comparative and International Private Law in Hamburg. I wish to thank Professor Assaf Likhovski at Tel Aviv University, Mr Filip Matković at Europa-Institut and Mrs Elke Halsen-Raffel at Max Planck Institute for their hospitality and help.

I wish to thank my editor, Mrs Siobhan Poole, and her editorial team at Routledge for recognizing the importance of this book, and for their kindness, patience, editorial and technical assistance with the manuscript. Working with them on this book has been a valuable experience for me.

If it were not for this book, I would not meet four wonderful people whom I am proud to call my friends. We met in summer 2021 at Max Planck Institute in Hamburg and spent two unforgettable months together despite the difficult circumstances caused by the COVID-19 pandemic. Our lunches and coffees at Max Cafe, our Sylt adventure and canoeing at the Alster, as well as occasional evening drinks at Pony Bar, remain some of my best memories of the time spent over the pages of this book. Alex, Caterina, Damla and Moritz, thank you.

During my research stay in Hamburg, I lost my beloved Ron, the most charming golden retriever that ever lived. He followed me faithfully during the last twelve years and had been a great source of strength and love in many difficult times. Unfortunately, he did not live long enough to see this book coming out of the print. And to celebrate it with a long walk. To you, my dear companion, I dedicate this book.

Zagreb
February 2022

Acronyms

ABAA	Auctions (Bidding Agreements) Act
ADD	Antitrust Damages Act
AGB	Allgemeine Geschäftsbedingungen
AMLP	Anti-Money Laundering Programme
ARRR	The Artist's Resale Right Regulations 2006
A2C	auctioneer-to-customer
BGB	Bűrgerliches Gesetzbuch
BGE	Bundesgericht
BGH	Bundesgerichtshof
BFH	Bundesfinanzhof
B2A	business-to-administration
B2B	business-to-business
B2C	business-to-consumer
C2C	consumer-to-consumer
CISG	Convention for the International Sale of Goods (Vienna Sales Convention)
CJEU	Court of Justice of the European Union
CLDCI	The Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments [Amendment]) Regulations 2017
CPI	Code de la propriété intellectuelle
CRD	Consumer Rights Directive
EC	European Community
ECD	Electronic Commerce Directive
EEA	European Economic Area
EEC	European Economic Community
ER	English Reports
EU	European Union
DCFR	Draft Common Frame of Reference
GewO	Gewerbeordnung
G2C	government-to-consumer auction
HGB	Handelsgesetzbuch
IPRG	Bundesgesetz über das Internationale Privatrecht

KG	Kartelgesetz
KG	Kammergericht
LG	Landesgericht
MLPP	Model Law on Public Procurement
MMR	Multimedia und Recht
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht
OLG	Oberlandesgericht
OJ	Official Journal
OR	Obligationenrecht
QB	Law Reports, Queen's Bench Division
RRD	Resale Right Directive
Rn	Randnummer
SoGA	Sale of Goods Act
SWD	Staff Working Document
UCC	Uniform Commercial Code
UK	United Kingdom
UNCITRAL	United Nations Commission for International Trade Law
UrhG	Urheberrechtsgesetz
USC	United States Code
U2C	user-to-customer
US	United States
VerstV	Versteigererverordnung
ZGB	Zivilgesetzbuch
ZR	Zivilrecht

List of abbreviations

arg ex	argumentum ex
Contr.	contrary
JurionRS	jurion Rechtsprechung
Rest 3d Agen	Third Restatement on Agency

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England

European law

France

Germany

1896 Civil Code (*Bürgerliches Gesetzbuch*) (BGB) (BGBl. I S. 42, 2909; 2003 I S. 738 2021 I S. 5252), para 116; 117(1); para 122(1); para 123(1); para 130; para 133; para 142(1); para 144(1); para 146; para 147; para 147(1); para 151; para 156; para 157; para 164(1) and (2); para 181; para 241(2); para 249(1); para 280(1); para 281(1) and (5); para 278; para 311(2)(1), para 346(1); para 446; para 613; para 652(1); para 653(3); para 666; para 667; para 668; para 669; para 670, para 675(1); para 812(1); para 873(1); para 929

1897 Commercial Code (*Handelsgesetzbuch*)(HGB)(RGBl. I S. 219, 2021 BGBl. I S. 3436), para 56; para 99; para 93(1); para 239; para 354; para 384(1) and (2); para 385(1) and (2); para 392(1); para 393(1), para 396(1) and (2); para 400(1) and (2); para 403

1965 Act on Copyright and Related Rights (*Gesetz über Urheberrecht und verwandte Schutzrechte*) (UrhG) (BGBl. I S. 1273, 2021 BGBl. I S. 1858), para 26(1)

1999 Regulation on Entrepreneurship (*Gewerbeordnung*) (GewO) (BGBl. I S. 202; 2021 BGBl. I S. 3504), para 34(b)(1); para 34(b)(6)(1); para 34b(6)(1)(3); para 34(b)(10)(3)

2003 Regulation on Commercial Auctions (*Verordnung über gewerbsmäßige Versteigerungen* (VerstV) (BGBl. I S. 547 2017 I S. 626) para 1(2); para1(5); para 7; para 8(1); para 9

Switzerland

1911 Amendment to the Swiss Civil Code (Fifth Pt: Obligations Law) (*Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches AS 27 317 (Fünfter Teil: Obligationenrecht*)) (OR), Art 18; Art 20(1); Art 23(1); Art 28(1); Art 31(1) and (3); Art 32(1), (2) and (3); Art 41; Art 41(1); Art 42(2); Art 43(1); Art 50(1); Art 101(1); 185; Art 229(1), (2) and (3); Art 230(1); Art 231(2); Art 234(2), Art 235(1); Art 397; Art 397(2), Art 398(3); Art 400(1) and (2); Art 401(1); 402(1) and (2); Art 412(1); Art 413(1); Art 414; Art 425(2); Art 428(1); Art 429(1), (2); Art 431; Art 436; Art 432(1) and (2); Art 665; Art 675

1907 Civil Code (*Zivilgesetzbuch*) (ZGB) (AS 24 233) Art 2; Art 656(1); Art 714(1)

Swiss Federal Law of 18 December 1987 on the International Private Law (IPRG) law, AS 1988 1776, Art 112; Art 113; Art 118

1995 Cartels and other Restraints of Competition Act (KG) (*Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen AS 1996 546*), Art 5(1); Art 12(1)(a) and (b)

United States

Uniform Commercial Code (UCC 1951), s 1–201(20); s 1–301(c); s 1–304; s 2–328(1); s 2–328 (2), (3) and (4), s 2–721

Others

Introduction

Price-determination methods

In principle, there are three main approaches to the determination of the sale price.

Under the 'take-it-or-leave-it' approach, the supplier fixes the price in advance of the sale, leaving the buyer with no opportunity to discuss the price. This is typical for consumer contracts. On the other hand, under the 'private-treaty' approach, prices are the result of bargaining taking place between the potential seller and the buyer. This is typical for commercial contracts and contracts between private individuals.[1] However, fixed pricing and private-treaty pricing will not always yield best results.

In some cases, the supplier is not able to fix the price, since there are no objective parameters to value the object at the time of the contract formation – e.g. it is difficult to precise the value of coal in a recently discovered mine, an airport slot or Picasso's painting. Unlike consumption commodities, such objects do not have a standardised value seen as the function of the costs of material and labour force. Their market value is influenced either by yet-to-be-determined quantity and quality (coal), by location and volume of traffic (slots) or by rather-fluid criteria like the object's age, authorship, rarity, provenance, craftsmanship, prestige and affection (art and antiquities).

Beside the peculiarity of the object, another problem the sellers might face is that the market for precious sources or objects is scattered, with many potential buyers located all over the world. Confining the bargaining over the price to a single buyer or a few of them would mean closing the doors to a global competition.

Therefore, when the price of a good or service cannot be determined in a traditional way, the economically reasonable solution is to let the potential buyers decide on their own how much they praise the good or service. Thereby, 'the value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give'.[2] The buyer-made price-determination method enabling this revelation is called an auction sale (*Versteigerung*; *vente aux enchères*).[3]

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Brief note on the auction history

People have been using auctions for thousands of years. Auction dates back to the ancient civilisations of Babylon, Greece, China and Rome, where it was used for marketing precious artefacts, collecting taxes, selling slaves, cashing the war booty and organizing bride contests. A highly developed auction format was Roman private auction (*auctio*). As the name indicates, this used to be an ascending competitive bidding.[4] It started with a public call (*proscriptio*)[5] which contained terms and conditions of the sale.[6] The call was considered an invitation to negotiate (*invitatio ad offerendum*).[7] It was followed by a public bidding (*licitatio*). The offerors were bound by their offers until someone else offered a better price, or until the time lapsed for the auctioneer (*praeco*) to accept the final bid.[8] The final step was a knock-down of the good (*addictio*) to the highest bidder.[9]

During the Middle Ages, trade in valuable commodities rose and auctions (re)gained popularity. France and England introduced taxes on auction sales and made the auctioneers responsible for collection thereof.[10] Auction was also present in German and Italian states.[11] It dominantly served for selling seized goods.[12] Following the reception of Roman law in German states, it also became a popular form of voluntary private sale.[13]

Auctioneering flourished in the eighteenth century in Holland and Britain. This was mainly due to the increased interest of Europeans in colonial goods and antiquities.[14] The world's oldest auction houses – Sotheby's, Christie's, Phillips, Son & Neale and Dorotheum – were founded at that time.

Modern auctioneering dates back to the late-nineteenth-century Holland and Germany.[15] At that time, the middlemen had a dominant position on the markets, forcing sellers to supply their goods through their distributing channels. The manufacturers wanted to strengthen their market position vis-à-vis powerful middlemen and distributors. By putting their products at public auctions, the suppliers managed to avoid the middlemen and establish a free market where goods and services were offered directly to the customers.[16]

In the twentieth century, auction became an important tool for marketing a variety of products: fish, art and antiquities, books, wool, cars, furs, mobile phones and radio spectrum licences, raw materials, natural resources, import quotas, locations for public buildings, airport slots, stocks, treasury bills, real estate, cattle, etc.

Nowadays, the emergence of the internet has contributed to democratisation and popularisation of the auction sale, as anyone with an internet connection can participate in what used to be a high-end secret marketplace for a narrow class of people.[17]

The rationale for this book

With the rise of the economic importance of auction in the twentieth century, auction has become the subject of intense economic research. Since the 1960s, economic theory has been developing the economic concept of auction and various

auction models. This culminated in 2020 when the Nobel Prize in economics was jointly awarded to US economists Paul R. Milgrom and Robert B. Wilson for their improvements to auction theory and inventions of novel auction models.[18]

On the other hand, legal theory of auction remains under-researched by legal scholars. So far, no general legal theory of auction has been developed that would provide a comprehensive and comparative outlook on the legal concept of auction, auction models in law, legal differences between the auction and similar contracting methods and the structure of legal relationships arising before, during and after the auction. This gap is primarily a consequence of the fact that almost the entire legal scholarship on auctions focuses on analysing national auction rules and institutions, with no pretension to develop the more general principles of auctions law.

In order to overcome this gap, this book develops a general legal theory of auctions which rests on a comparative research of auction laws. The aim thereof is to present common features of sales by auction which define the auction in a legal sense. It also aims to offer a comprehensive study of various contractual and extracontractual legal relationships that arise before, during and after the sale by auction.

The research focuses on the auction sales of goods as the most frequent type of contract being formed at auctions. Furthermore, the book focuses on private law aspects of auction, leaving the forced auctions aside. Also, the book is not concerned exclusively with art auctions and specific questions related thereto. It tends to be as general as possible. However, art auctions are the most representative example of auction sales. Many legal institutions and problems related to auctions arise in the context of art auctions. Hence, the book will often refer to art auctions.

About the comparative legal method adopted in this book

This section explores the reasons behind the rather-poor interest in comparative auction law and explains the comparative method applied in this book.

Lack of comparative researches

Broadly speaking, *comparative law* is a discipline that examines similarities and dissimilarities between various legal systems.[19] Comparative contract law, in particular, the sales law, lies at the heart of this discipline.[20]

Despite being part of sales law, auction sale so far has not been a subject of extensive comparative research. Most scholarly works in the area of auction law are concerned with national law and practice,[21] especially with German law.[22] Notable exceptions, to the best of my knowledge, are *Sophie Vigneron's* study on auction sales in English and French law,[23] *Anne Laure Bandle's* study on the sale of misattributed art and antiques at auction in Swiss, English and US law[24] and *Alla Belakouzova's* study of (internet) auction sales in German, English, Russian and Belarussian law. Beside the three authors, *Joëlle Becker* compares the

Anglo-American doctrine of undisclosed principal and the continental doctrine of representation in her study on auction sale in Swiss private law.[25]

Unfortunately, literature is silent on the reasons for poor interest in comparative auction law – term used herein to denote study of similarities and differences between rules and institutions governing the sale of goods by auction. This book argues that the absence of auction from comparative law could be the result of the presumption of the local character of auction sale, dominantly self-regulatory origin of auction rules and the fragmentation of auction law.

Local character of auction sales

In the second half of the twentieth century, auction sale was perceived as a transaction of local character, i.e. a transaction that gathers local audiences and is deeply rooted within specific legal rules (especially rules on agency) and customs of the place where the auction takes place. As a 'local thing', it was argued, auction should be regulated by local laws.[26] Therefore, the auction sale was left out of the uniform sale rules like CISG[27] and remained governed by the law of the place where the sale took place as the law of the 'closest connection' (*lex loci acti*).[28]

Since comparative sales law is primarily concerned with practical problems of cross-border commercial transactions, local transactions like auction sales were left out of the comparative research. However, with the rise of international art auctions in the last couple of decades, and in particular, with the rise of internet auctions such as eBay in the late 1990s, auctions stopped being treated as local transactions. They became an important instrument for transnational flow of goods.[29] The practical problems that started to arise from international auction sales prompted the need for comparative research into auction laws of major auction markets.

For instance, the frequent art sales taking place between sellers and buyers located in France and England, alongside the presence of UK auction houses in France resulting from the liberalisation of the French art market in 2001, urged the need for a comparative study of English and French auction rules. *Vigneron's* study of the auction laws of England and France appeared in 2006, aiming at the harmonisation of the legal rules for cross-border art sales between those two markets.[30]

Furthermore, the international fine art market has witnessed a 'boom' during the last two decades. The proper attribution of artwork has become extremely important. This prompted the need for comparative research of the auctioneer's liability for misattribution of art. *Bandle* analyses current legal regimes for disputes arising out of sale of misattributed art at auction in major art auction hubs – Switzerland, England and the US – which take different views of the matter, affecting international art trade.[31]

Lastly, as a result of growth in the number of cross-border internet auction sales, legal scholarship has recognised the need for a comparative examination of the nature of internet auction and the European approach regarding the consumer's

right to cancel a contract formed at such auction. In order to find the answers to these questions, in 2015 *Belakouzova* conducted a comparative research into the laws of Germany, England, Russia and Belarus,[32] thereby broadening the scope of comparative research to legal systems of former socialist countries.

Self-regulatory character of auction rules

The auctions law has been primarily a self-regulatory body of rules and trade customs autonomously developed by the auctioneers, with little or no state intervention. State laws cover a limited number of issues relevant for the analysis of the parties' relationships.[33] Moreover, at the time when major art markets of England, France, Switzerland, Germany and the US enacted their first auction laws, the auctioneers had already developed their own codes of conduct, customs and practises. With the enactment of statutory auction laws, self-regulatory solutions were transposed into state laws.

For instance, *Tentler* reports that, in order to better understand the legal nature of the call for bids at auction, the authors of the German Civil Code 'received clarifications from auctioneers from all over Germany . . . arguing that the auctioneer's call for bids is not an expression of binding offer, but mere invitation to treat'.[34] Likewise, the Draft German Civil Code mentioned that its proposed solutions were the result of 'the common opinions and regular aims of the auction', 'harmonisation with the leading opinions expressed in science and practice', as well as 'opinions that had already gained value' in earlier drafts of that law.[35]

The self-regulatory rules have influenced each other across various auction markets. For instance, the most prominent body of self-regulatory rules – the terms and conditions of major auction houses[36] – take a similar approach to key legal issues in the leading markets of US, England and Switzerland.[37]

Traditional comparative law primarily focuses on similarities and differences arising out of statutory laws and the accompanying case law.[38] Trade usages, soft laws or autonomous legal sources typical for auctions are significantly less represented in comparative studies. Hence, it seems that the 'nonstate' character of auction rules contributed to the exclusion of auction from traditional comparative research.

Fragmentary character of auction law

Auction law is a fragmentary and unsystematic body of law. It usually comes down to a few special provisions on the formation of contract by auction[39] and prohibition of unfair and collusive behaviour, leaving other aspects of auction sale to general obligations law, sales law, tort law, agency law and competition law. Therefore, it is hard to speak of 'auction law' as a comprehensive body of law. It is more 'a collection of fragments of various branches of law . . . although no small part of it is a subdivision of the law of contract'.[40] This fragmentation

makes it difficult for scholars to get a full understanding of the auction and the related legal relationships in one legal system, let alone in several different legal systems.

The comparative method

The comparative method consists of two steps. In the first step, comparative lawyers describe the object of their research, i.e. the rules and institutions of a foreign legal system. The aim thereof is to understand the object concerned. Following the description, they engage into systematisation and comparison of the similarities and differences between legal rules or institutions concerned.[41] This comparison may take four different approaches.

Basic approach consists in a general study of similarities and differences of legal rules and institutions of contract law.[42] The three other approaches are more specific. They either look into similarities between contract laws of different countries in order to find a 'common core' of contract law,[43] investigate possibilities for harmonisation of legal systems on the basis of the identified 'common core' of contract law[44] or investigate influences of one country's contract law on another legal system.[45] Studies directed towards harmonisation or unification of national laws are particularly often in the law of sales.[46]

As regards comparative legal research cited in this book, the general approach is represented in Bandle's study; Vigneron's and Belakouzova's studies follow all three purpose-specific approaches. Becker's study investigates influences of the undisclosed principal doctrine on practice of Swiss auction houses and applicable conditions of sale.

Comparative studies are traditionally confined to the two most prominent Western legal families: the Anglo-American and civilian (continental) legal family. Within the Anglo-American legal family, English and US (federal) laws are usually taken as the two leading legal systems. Within the civilian legal family, German, Swiss and French laws take the lead.[47] This reflects the prevailing 'Eurocentric' or 'occidentalistic' approach in comparative law. This is, however, understandable, considering the practical side thereof: wide availability of materials in widely accessible languages,[48] and avoiding difficulties arising from conceptual differences between Western and other legal systems.

In the area of auction law, the Westernisation of comparative research has also a lot to do with the fact that major auction markets are located in countries like the US, UK, Switzerland, Germany and France. The rise of these countries as leading auction markets was followed by the enactment of auction laws, development of case law and academic writings, making the analysis of these five jurisdictions worthwhile from a scientific point of view. Apart from that, those systems are conceptually different enough to make the comparative research worthwhile.[49]

The four comparative studies mentioned above follow the traditional pattern, with the exception of Belakouzova, as she broadens the research into laws of former USSR countries.

As regards the comparative method applied in this book, the book examines the legal rules and institutions of all five prominent auction markets: German, Swiss, French, English and US. In this aspect, it advances the current comparative research. Those countries have been chosen because they are major auction hubs. They have developed special rules on auction sales and auctioneering. They belong to the two major but different legal traditions, which makes them suitable for the comparative research this book intends to pursue.

Following a description of the legal rules and institution concerned, the narrative turns to the formulation and analysis of described similarities and differences between legal systems concerned. The research is primarily concerned with addressing similarities between auction rules in those countries that can be considered the 'common core' of the law of auction sale.

The objectives of the comparison

The objectives of the comparative analysis can be divided into five groups.

First objective of the comparison can be the unification or harmonisation of legal rules or institutions within various legal systems.[50] Finding similarities between analysed legal systems serves to establish a common, minimum level of protection for parties taking part in cross-border transactions. This objective is expressly addressed in *Vigneron's* work. Furthermore, this objective is addressed in the EU harmonisation project known as *The Principles, Definitions and Model Rules of European Private Law*.[51] Comparative notes annexed to the full edition of the project briefly analysed the auction across EU member states, recognised it as a specific 'offer-acceptance model' of contract formation and presented basic similarities and dissimilarities between various legal systems in the EU regarding auction[52] in order to contribute to legal science, research and education.[53]

The second objective of the comparison can be fixing the problem arising out of a specific legal rule or institution. When a certain local rule or institution seems to cause problems, comparative lawyers turn to another legal system(s) in order to discover how the respective system solves the same problem.[54] This objective is addressed in Vigneron's, Bandle's and Belakouzova's studies.

The third objective of the comparison can be the successful application of foreign law. In order to apply a certain foreign law on a legal institution which is, however, not regulated by the applicable law or the law of the forum, courts, tribunals or parties to a legal relationship sometimes have to search for the origins of that institution to see which institution of the applicable law or which law of the forum it resembles most closely.[55] This objective is not addressed in comparative auction studies concerned. The reason for this is the circumstance that the law applicable to auctions is usually the *lex loci acti*, which is usually also the law of the court seized with the jurisdiction in cross-border disputes.[56] Hence, in principle, the problem of application of foreign legal institutions before the local courts will not arise.

The fourth objective of the comparison can be to help parties with the choice of suitable law for their legal relationship. The comparative research serves to

provide future parties to a legal relationship with knowledge about the advantages and disadvantages of legal systems concerned. On the basis of this knowledge, the parties can opt for a 'better law', i.e. the law that suits their (economic, social or other) needs best.[57] This objective is not a matter of concern for comparative lawyers. The auction sale contract is traditionally attached to the *lex loci acti*, as the law of the closest connection and parties do not consider opting for another law.

The fifth objective of the comparative research can be understanding the legal systems concerned and improving knowledge thereof. This approach is not primarily concerned with the practical application of law.[58] Understanding the legal systems of Germany, Switzerland, France, England and US, i.e. discovering and explaining the rationales underlying differences and similarities in national legal solutions, has been the objective of all comparative studies concerned. This is also the key objective of the comparison employed in this book.

Contents of this book and the problems covered

Many theoretical issues remain open concerning auction. The book will try to cover six key theoretical problems in six thematic chapters.

Defining the legal concept of auction

Defining *auctions* in a legal sense is a challenging task due to several reasons. Firstly, auctions are a rather under-regulated area of private law, with no or little auction provisions. Most solutions relevant for auctions should be looked for in general contract law, general sales law, brokerage law and agency law. Secondly, even if there are some auction provisions, they do not contain any legal definition of *auction*.[59] Thirdly, a variety of auction models make it difficult to grasp the general concept and nature of auction.

The first chapter tries to develop a comparative legal concept of auction. Following a brief outline of the economic concept of auction in the first section, it turns to the legal analysis of auction in the second section. It seeks to define similarities between ascending (English) and descending (Dutch) auctions in order to establish the general legal concept of auction. It argues that the legal concept of auction is narrower than the economic concept of auction and covers only those buyer-made price-determination schemes that are based on a public, overt and successive bidding run by a neutral third person (the auctioneer). The third section compares the established legal concept of auction to similar bidding methods which are sometimes confused with auctions: the games of chance, public procurement, stock (commodities) exchange and public offers of a reward. It aims to find out how these bidding methods differ from auction. It argues that those methods should not be confused with auction since they lack the genuine competitive bidding essential for the legal concept of auction.

Defining the structure of auction relationships

The second chapter offers a comparative survey of legal relationships at an auction. The focus is on legal relationships at English auctions, while legal relationships at Dutch auctions are covered insofar as they depart from the English auction. Key auction participants are outlined in the first section. The second section covers objects that can be sold at auctions. The third section examines the structure of auction relationships. There is a great deal of debate over the number and legal nature of relationships at an auction. This is mostly a result of specific capacities in which the auctioneer can intervene in the bidding process. This chapter aims to identify the basic legal relationships at an auction, define their legal nature and systematise basic rights and duties of the parties thereof. This chapter argues that a typical auction sale consists of at least four basic legal relationships: the consignment agreement between the seller/consignor and the auctioneer, the contract between the auctioneer and the bidders, the agreement between the bidders and lastly, the sale contract. The fourth section covers peculiarities of the legal relationships at a Dutch auction.

Defining the legal concept of internet auction

The third chapter explores internet auctions. There is a great deal of debate over the legal nature of internet auctions. This is due to the absence of a traditional auctioneer and traditional knock-down. First section covers the legal concept of internet auction. It distinguishes internet auctions from other online sales, discusses basic models of internet auctions and outlines differences between internet and physical auction. It aims to clarify whether internet auction is an auction in a legal sense. It argues that the prevailing view that internet auction is not an auction holds true regarding user-to-customer (intermediary) platforms but not regarding auctioneer-to-customer (agent) platforms. The second section refers to disadvantages of internet auction arising from digitalisation and delocalisation of internet auction. The third section covers legal relationships at internet auctions. It aims to clarify the legal nature of user agreements and the formation of the contract for sale. It argues that user agreements combine elements of brokerage and services agreements. It also argues that the automatic closure of the auction is constitutive for contract formation.

Filling the gaps in the EU resale right regime

The fourth chapter deals with the application of the EU Resale Right Directive to auctions. The first section explores the origins of the resale right. The second section gives the civil- and common-law perspective on the resale right. The third section covers the EU Resale Right Directive. Following a brief note on the directive's history, it explores the scope of the application thereof. It explores how the directive is to be interpreted and applied to auctions. It aims to fill some gaps in the wording of the directive that can affect its application at auctions. Firstly, it

considers under what conditions this regime applies to online auctions. It is argued that the EU resale right applies to online sales if at least the seller or buyer is an art market professional. Secondly, it problematises 'shared liability' of the auctioneer and the seller for the royalty payment. It is argued that the 'shared' liability can cover joint and several liability, joint but not several liability and supplementary liability of the auctioneer. It also suggests how to circumvent the strictness of the liability regime adopted by the member state to the benefit of the seller. Thirdly, it considers who can be the final bearer of the royalty. It is argued that 'passing-on' clauses are valid unless they affect the statutory legal relationship between the artist and the debtor and are used to secretly pass on the buyer costs other than royalty. Lastly, this chapter discusses the deductibility of auctioneer's fees from the basis for royalty calculation. It is argued that the directive allows the seller to deduct taxes whereas auctioneer's fees remain part of the calculation basis.

Defining the legal nature of auction guarantees and the influence thereof on the position of the auctioneer

The fifth chapter covers the three basic models of auction guarantees: in-house auction guarantee, third-party guarantee and stand-by auction guarantee (irrevocable bid). The first section analyses the basic models and defines the perplexing legal nature thereof. It argues that auction guarantee is a combination of sale under a deferring condition and the financial insurance contract. There is a great deal of debate over the influence that auction guarantees have on the auctioneer's fiduciary position towards the consignor. It argues that auction guarantee is a supplementary arrangement to the consignment agreement and does not affect the auctioneer's fiduciary position. The second section aims to define the reasons for the absence of auction guarantees from continental auctions. It argues that the lack of auction guarantees results from the structure of the European art market and unfavourable legal environment. There is also a great deal of debate over the negative impact of auction guarantees on the integrity of the art market, most notably, on the price levels and sound competition. The third section discusses it and aims to show the advantages and disadvantages of the auction guarantees and find out possible means of reform thereof. It argues that the disadvantages of the auction guarantees can be solved by switching to collective art funding schemes like crowdfunding.

Finding a demarcation line between licit and illicit price-influencing tactics at auction

The last, sixth chapter covers price-influencing tactics at auction. It discusses the civil-law and competition-law implications thereof. Such tactics, in principle, distort the competition. However, it is not always clear whether and, if so, under which conditions these tactics are illicit. The aim of this chapter is to find the demarcation line between licit and illicit price-influencing tactics.

The first section covers fictitious bidding by or on behalf of the seller (sham bidding). The second section covers agreements on the abstention from bidding. It covers bid-rigging for the account of a single bidder (*pacta de non licitando*), bid-rigging for the account of several bidders (auction rings) and bona fide partnerships for the joint account of the bidders' consortium. It is argued that price-enhancing tactics should be allowed with respect to the sale with reserve until the bidding reaches the reserve, if the existence of the reserve and the seller's right to bid were disclosed to the bidders before the sale. It is also argued that *bona fide* partnerships should be allowed, since pooling financial assets into a single bidding consortium strengthens the overall financial capacities of the bidders to the benefit of the seller.

Based on the foregoing chapters, the conclusion summarises the key findings of the research and provides answers to key theoretical issues covered in the book. It outlines the auction's basic legal features compared to the economic concept of auction. It presents the basic auction relationships and the legal nature thereof. It explains under what conditions internet auction is to be considered an auction in a legal sense and outlines the basic auction relationships thereat. It suggests how the uncertainties regarding the interpretation and application of the Resale Right Directive (RRD) to auctions should be resolved. It clarifies the legal nature of auction guarantees and suggests solutions for solving controversies related thereto. Lastly, it outlines the conditions for lawful use of price-influencing tactics at auction both at the sellers' and the bidders' side.

Notes

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4 Lat. *augere* = to increase.
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11 Hans Wicher, *Der Versteigerer: Systematischer Kommentar zu den einschlägigen gewerberechtlichen Vorschriften* (Dr. Ernst Hauswedell & Co. 1986) 16.

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13 Wicher (n 11) 16.
14 Werner (n 12) 1.
15 Cassady (n 1) 36–37.
16 Likewise ibid 40.
17 Werner (n 12) 2.
18 'Press Release: The Prize in Economic Sciences 2020' (*NobelPrize.org*., 12 October 2020) <www.nobelprize.org/prizes/economic-sciences/2020/press-release/> accessed 29 January 2022.
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24 Anne Laure Bandle, *The Sale of Misattributed Artworks and Antiques at Auction* (Edward Elgar Publishing 2016).
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27 United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 11 April 1980) 1489 UNTS 3, entered into force on 1 January 1988, Art 2(b). On the scope of this exclusion see Poljanec (n 26) 146–58.

28 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, Art 4(1)h. The regulation is still applicable in the UK, where it was retained by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment, etc.) (EU Exit) Regulations 2019, No. 834. Amendments thereto did not affect the rules relevant for auction sales. For Switzerland, see Convention on the Law Applicable to International Sales of Goods (The Hague, 15 June 1955) 510 UNTS 147, Art 3(3), applicable to auction sales by virtue of the Swiss Federal Law of 18 December 1987 on the International Private Law (IPRG) law, AS 1988 1776, Art 118. Also Pestalozzi (n 21) 21. In the US, such a rule could be extrapolated from the 'appropriate relation' rule. See Uniform Commercial Code (UCC 1951) s 1–301(b).
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30 Vigneron (n 10) 331.
31 See Foreword by Pierre Tercier in Bandle (n 24) xix.
32 Alla Belakouzova, *Widerrufsrecht bei Internetauktionen in Europa? Eine vergleichende Analyse des deutschen, englischen, russischen und belarussischen Rechts unter Berücksichtigung der Rechtsentwicklung in der EU und der GUS* (Mohr Siebeck 2015) 335.
33 Ibid 130.
34 Tentler (n 7) 18–19.
35 Hermann Jatzow (ed), *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Band 1., Allgemeiner Theil, Amtliche Ausgabe* (Verlag J. Guttentag 1888), para 90.
36 Sometimes addressed as 'the hallmark of the auction' (Kresse [n 21] 41) or 'meat at the bones of the auction' (Harvey and Meisel [n 21] 189).
37 Bandle (n 24) 100.
38 Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 895.
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46 Peter Huber, 'Comparative Sales Law' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2008) 939.
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48 Ibid 411.
49 Ibid 409.
50 Ibid 402.
51 Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* vol 1 (Full edn, OUP 2010).
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53 DCFR, Introduction, 2.
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59 Christine Riefa, *Consumer Protection and Online Auction Platforms: Towards a Safer Legal Framework* (Routledge 2015) 13.

1 Legal concept of auction

Introduction

The economic importance of auction has stimulated extensive economic research of auctions during the last sixty years.[1] Over the years, the economic theory of auctions has defined the economic concept of auction, identified and developed different auction models and analysed pros and cons of each model. This culminated in 2020, when the Nobel Prize in economics was jointly awarded to US economists Paul R. Milgrom and Robert B. Wilson for their improvements to auction theory and inventions of novel auction models.

Unfortunately, no similar studies have yet taken place in the legal scholarship. In order to fill this gap, this chapter develops the legal concept of auction.

The first section briefly provides the economic definition of auction, outlines basic auction models and explains the revenue equivalence theorem. The second section covers the English and Dutch auction from a legal point of view. It seeks to define similarities between them in order to establish the legal concept of auction. It argues that the legal concept of auction is narrower than the economic concept of auction and covers only those buyer-made price-determination schemes that are based on a public, overt and consecutive bidding run by a neutral third person (auctioneer). The third section compares the established legal concept of auction to similar bidding methods which are sometimes confused with auctions: the games of chance, public procurement, stock exchange and public offers of a reward. It aims to find out how these bidding methods differ from auction. It argues that those methods should not be confused with auction since they lack the genuine competitive bidding essential for the legal concept of auction. The conclusion summarises the main findings of the chapter.

Economic concept of auction

Imagine the following situation. Inheritors of an estate library want to sell it. They are, however, uncertain about the potential price they could get for it. On the other side, bibliophiles and dealers are able to estimate the library's potential value, and they place their bids accordingly. However, each bidder is uncertain about valuations of other competing bidders. Also, each bidder is uncertain about the

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minimum price at which the seller is willing to sell the library. Hence, each potential bidder is uncertain whether she or he can outbid the rivals and meet the seller's expectations at the same time.

Both sides of the market have thus found themselves in the situation of informational asymmetry. The economically rational way out of it is auction – a market institution with an established set of rules that determine the allocation of resources and prices on the basis of the buyer's bids.[2]

Models

In order to find an auction that could maximise the expected revenue for the seller, auction theory has developed several models.[3] Three common auction models will be presented below.

One-sided and double-sided auctions

In a typical auction, there is one seller on the supply side and two or more potential buyers at the demand side of the market. This monopolistic auction model is known as the one-sided auction.[4] Art auction is a good example of this auction model.

Double-sided auctions, on the other hand, consist of two or more participants on both sides of the market. At the same time, multiple sellers place their calls for bids and multiple bidders place their bids in response to those calls.[5] The competitive bidding occurs on both sides of the market.[6] This is typical for stock (commodity) exchanges.[7]

Private value and common value auctions

Bidders can build their bidding strategies on private or common valuations of the object. In case of private value auctions, a bid reflects the bidders' personal valuation of the object. This valuation is a function of their tastes, affections or prestige affiliated with the object. It is known only to the bidder and is independent from the attitudes of the competitors.[8] In fact, the competitors are not sure about the private values of other competitors.[9] Objects bought at such auctions are rarely meant to be resold; people buy them for their personal 'consumption', i.e. pleasure.[10] Typical examples of private valuation auctions are memorabilia auctions.

On the other hand, common value auctions are auctions of objects having some (approximately) common value for all bidders.[11] This value is the function of objective criteria, e.g. expected economic benefits from winning the object. However, the auction should help the bidders to identify the exact market value of the object.[12]

Auctions of natural resources like coal or oil are examples of this auction model.[13] The objective value of a mine depends on the quantity and quality of the resource. Each bidder has private information ('tip') on the resource's potential quantity and quality, usually by commissioning a geological study. The study

enables the bidders to estimate the potential economic returns from winning the mining concession.

However, at the beginning of the auction, nobody knows the exact value of the mine.[14] The bidders only know its potential value, measured by objective economic benefits from extracting the resource, which are approximately the same for all bidders. These assumptions will, however, change during the bidding due to the signals showing how much other rivals value the object. The more signals one bidder receives from the competitors, the closer this bidder will be to the actual value of the object.[15] The exact economic value will, however, become known only after the auction, once the best bidder starts exploiting the mine.[16] The best bidder may discover that the mine concession was overpaid if the actual economic value departs from the perceived one. This phenomenon is known as the 'winner's curse'.[17]

Open-bid auctions and sealed-bid auctions

At open-bid auction, each bidder knows the price offered by any other competitor.[18] In an ascending-bid auction (also known as the 'English' auction),[19] bids are placed overtly and consecutively. Each new bid must exceed the previous bid. The successful buyer will be the one whose price was not outbid by any higher bid. This auction model is commonly employed at sale of goods.[20]

In a descending-bid auction (also known as the 'Dutch' auction),[21] the auctioneer overtly announces the starting price and calls for a corresponding bid. If nobody places the corresponding bid, the auctioneer will begin decreasing the price until someone finally accepts the current offer.[22]

On the other hand, at sealed-bid auctions, all bids are placed covertly. Following the call for bids, sealed bids must be placed by a certain date. Each bidder can bid only once.[23] As the bidders do not know their rivals' bids, the order of bids has no significance for the relationships between the bids.[24] Typical examples of this auction are 'governmental auctions': public procurement and tender.[25]

Unlike open-bid auctions, sealed-bid auctions may result in the object being knocked down for the price offered in the last bid (*first-price sealed-bid auction*) or for the second-to-last price (*second-price sealed-bid auction/Vickrey auction*).

In the first case, the auctioneer knocks down the object to the best bidder for the price of the latter's offer. The best ('first') price is at the same time the price that the winning bidder owes to the seller.[26] A good example of this model is a sealed-bid tender.[27] E.g. following a municipal tender for a lease of a publicly owned garage, the municipality has decided to knock down the garage to the bidder who offered the highest leasing fee.

On the other hand, at a second-price sealed-bid auction, the winning bidder owes the seller the price of the second-highest bid, i.e. the second-highest price.[28] Notable examples of this auction model include business-to-business auction platforms.[29]

E.g. bidder A wants to buy a car for 100,000 pounds. A is willing to pay that sum of money and places the bid accordingly. A is not familiar with the competing

bids. A's bid reflects only A's valuation of the car. On the other hand, bidder B offers 90,000 pounds, while bidder C offers 76,000 pounds. After all bids are opened, A's bid is declared the best bid and the object is knocked down to A. Nonetheless, under this model, A has to pay less than the winning offer – only 90,000 pounds.

This auction model wants to stimulate the bidders to compete until they reach their personal valuation cap, without fear of facing the winner's curse. Although this makes second-price auctions appealing to the bidders, they are rare in practice. The main reason for this is their unrewarding financial effect for the sellers. Moreover, this auction model is vulnerable to bidders' collusion, resulting in depressing auction prices. Furthermore, the buyers risk disclosing their financial capacities. This may jeopardise their future business plans. E.g. if the winning company places the highest bid only to win the company's shares at a corporate-takeover auction, thereby disclosing its financial strength, it may expect tough post-sale negotiations with the trade union of the targeted company over workers' rights.[30]

Revenue equivalence theorem

The theorem

Suppose an auction house has organised a sale of da Vinci drawings. All bidders that convened at the auction are passionate art dealers. Their bidding strategies are driven solely by their private values, and they disregard other people's valuations of the drawings. Furthermore, they are confident in their bidding strategies and financial strength. Therefore, they are risk-neutral, having no fear of losing the object if they wait too long to place the winning bid.[31] Lastly, the sum the winning dealer will pay is a function of the winning bid, with no additional fees owed to the seller (e.g. resale royalty fee[32]).

On the condition that these four variables are met – independent private values, bidders' risk neutrality, bidders' symmetry and payment as a function of bids – the English auction, the Dutch auction, the first-price sealed-bid auction and the second-price sealed-bid auction arguably yield *on average* the same price for the seller.[33] This theory is known as the revenue equivalence theorem.

Indeed, it seems that on average, all auction models bring the same revenues to the seller. At English auctions, the price increases until all but one bidder drops out of the bidding. The highest bidder wins the object and pays the offered price.[34] However, the bidders usually bid below their true valuation, hoping to win the object anyway. Hence, the highest bid (price) usually equals the amount presumed to be the highest valuation of the second-highest bidder and not the actual valuation of the winning bidder. Hence, the highest bid (price) is lower than the best bidder's highest valuation and equal to the second-highest valuation. The difference between the highest and the second-highest valuation is an economic rent belonging to the winner.[35]

Likewise, at Dutch auctions the price decreases until one bidder accepts the seller's offer. The price the winner pays equals the winning bid. However, the winner presumably values the object more but decides to wait until the price meets the level that fits her or his higher valuation and equals the presumed second-highest valuation. Hence, the price paid is lower than the best bidder's highest valuation and equals the second-highest valuation.

The first-price sealed-bid auction yields the same outcome. The highest bidder wins the auction and pays the price equal to the winning bid.[36] However, the highest bidder has estimated the second-highest (covert) valuation and decided to submit a bid that equals the estimate but which is below the winner's actual valuation.[37] Thereby, the winner has escaped the winner's curse.

At the second-price sealed-bid auction, bidders place bids which are functions of their valuations. Hence, the best bidders' bids correspond to their higher valuations. However, they do so only to secure the object. In this auction model, they know that they will have to pay the second-highest price, i.e. the price that is the true function of the second-highest valuation.[38] This knowledge stimulates them to bid more, thereby bringing the seller the same revenue as if the auction were organised as the first-price auction.[39]

The critics of the theorem

Despite its theoretical appeal, the revenue equivalence theorem falls short of practical meaning for several reasons.

Firstly, each auction model brings a different level of risk aversion.

At Dutch auctions, there is no overt competitive bidding. All bids remain secret until the end of the auction. Bidders can only rely on their valuations and speculate about their rivals' valuations. If they wait too long to accept the auctioneer's offer, they may lose the object.[40] The bigger the fear of losing the object, the closer the winning bids to the winning bidders' valuation than to their rivals' valuations.[41] This may result in the overestimation of the rivals' valuations.[42]

At the first-price sealed-bid auction, the situation is similar.[43] Having a fear of losing the procurement job, the bidders tend to offer more than they would offer were the auction overt. Their bid is again closer to their valuation of the lot than to their rivals' valuations.

On the other hand, the overtness of the English auction enables competitors to check competing bids.[44] Transparency of the bidding allows them to know their rivals' valuations, revise their own bids accordingly and reduce risk aversion.[45] However, the overtness of the English auction makes the ascending bidding more careful and, perhaps, weaker than the descending bidding, allowing the best bidder to secure the lot at a less-high price.[46]

At second-price sealed-bid auctions, the situation is similar, as the best bidder does not have to be afraid of overpaying the object.

Hence, in case of informational asymmetry the first-price sealed-bid auction and the Dutch auction yield higher revenues for the sellers than the English

auction and the second-price sealed-bid auction due to stronger competitive pressure and higher risk aversion.[47]

Secondly, a typical auction is rarely an ideal-type private value auction.

It is usually a mix of private and common value auctions.[48] This is a consequence of the fact that the audience rarely consists of symmetric bidders. It usually consists of asymmetric bidders with different values: professional dealers and laypeople, locals and foreigners, individuals and corporations. Their valuations are contingent on different experiences, motifs, expertise and information level.

Furthermore, bidders are not always confident in their personal valuations or do not exclude the possibility to resale the object in the future.[49] This forces them to consider private valuations of other bidders, resulting in the mutual affiliation or 'objectivisation' of individual values. In such cases, the auction models that enable disclosure and exchange of information about rivals' private valuations will arguably yield better results for the seller than the covert models.[50]

Thirdly, access to auctions is usually contingent on fulfilment of entrance barriers.

These barriers may include participation fees or deposits for the bidders, high minimum selling price,[51] time limits for placing the bids[52] and minimum bid increments.[53] These constraints affect the bidders' number, structure, ability to compete and consequently the revenue outcome. E.g. the lower the constraints, the higher the number of bidders, the stronger the competition and the closer the second-highest valuation to the highest valuation. This results in higher revenue for the seller.[54]

Lastly, tradition plays an important role when making a decision on which auction model to choose. Some auctioneers may prefer one model over another, irrespective of the fact that the other auction model yields better results.[55]

Therefore, the auction theory and the revenue equivalence are primarily theoretical concepts with a limited practical application.[56]

Legal concept of auction

The foregoing discussion has shown that the economic concept of auction is broad. It covers sales by bidding and procurement of goods by bidding, open and sealed bidding, successive and one-off competitive bidding, as well as one-sided and two-sided bidding.

On the other hand, legal theory usually argues that auction is a process of contract formation assisted by an auctioneer, which consists of public, open and successive competitive bidding between two or more persons, and aims at knocking down the object to the last, highest bidder.[57] Hence, auction, in a legal sense, is arguably much narrower than its economic counterpart. There is a line between auctions on the one side and other price-determination competitive bidding mechanisms on the other side.

This section will try to establish the legal concept of auction with the help of comparative analysis. First, it examines the English auction as regulated in the auction rules of major auction markets – Germany, Switzerland, France, the UK

and the US. Secondly, it examines the Dutch auction. Thirdly, it compares these two leading auction models in order to identify similarities between them which can help build the general concept of auction in a legal sense.

Typical models

Ascending (English) auction

FEATURES

English auction is the modern version of *auctio*. It owes its present name to the late-eighteenth-century English auctioneers, who often used it for art and antiquities sales.[58] Until today, it has remained the most popular auction model.

The English auction is an open, ascending, successive and competitive bidding, assisted by an auctioneer and followed by a knock-down.[59] Bids are placed one after another in the ascending order (*Aufwärtsversteigerungen; vente aux enchéres ascendantes*). Each new bid must exceed the previous one by a certain percentage known as the bid increment (*Bietschritt*). With each new bid, the previous one ceases to exist. The auctioneer knocks down the object to the highest bidder for the price of the latter's bid.[60] All legal systems concerned in this book have chosen the English auction as the normative auction model.[61]

PUBLIC AND PRIVATE AUCTIONS

English auctions are usually held in public. The organisation of the auction usually starts with a public advertisement of the call for auction in the media and via personal channels (e.g. letters to established buyers).[62] The announcement contains information about the auction venue and the time, the description of auctioned goods,[63] the sales catalogue with terms and conditions of the auction sale.[64]

At public auction, anyone can inspect the goods during the presale exhibition and attend the auction.[65] Nonetheless, the auctioneer may, at his discretion, introduce a qualification procedure to check the seriousness of potential bidders (e.g. by asking them to pay a deposit or submit a bank guarantee),[66] to better plan the course of the bidding (e.g. by asking the bidder to disclose her or his intention to bid online) and to prevent unwanted outcomes (e.g. interruption, the risk of the buyer's insolvency).[67] However, this does not preclude the publicness of the English auction, as it remains open to all attendees who meet the qualification criteria.[68]

Laws usually mention 'public auctions', suggesting that auctions could be also organised as private auctions.[69] At private auctions, the call for auction is distributed across a predefined class of persons,[70] usually with the aim to settle some internal dispute.[71] E.g. these kinds of auctions usually take place between the successors of an estate (so-called 'Amish' auctions),[72] co-owners,[73] priority shareholders regarding the subscription of a new pile of stocks,[74] members of a club,[75] entrepreneurs who procure objects for their own undertakings,[76] liquidation

auctions among ring members.[77] Unlike public auctions, private auctions are subject to the general contract law and the law of sales.[78]

'Private' auctions should not be confused with 'sealed-bid' auctions, nor should 'public auctions' be confused with 'overt' auctions. Both private and public auctions can be organised as open auctions as long as all bids are placed overtly.[79] On the other hand, both private and public auctions can be organised as sealed-bid auctions as long as all the bids are placed covertly, i.e. in a written form. The difference between private and public exists, hence, in the addressees of the call and the circle of persons who can bid, rather than in the way the bids are placed.

WRITTEN AND ORAL AUCTIONS

Regarding the form, auctions can be organised as written or oral auctions.

Written auction includes submission of written bids before or during the auction and the submission of electronic bids displayed at the screen in the saleroom or submitted via a digital platform. Oral auction, on the other hand, includes placement of live, oral (including telephone) bids during the auction. Both forms can be combined, with some bidders placing written (including electronic) bids and some bidders placing oral bids.[80]

Auctions are usually held orally, as this form fosters publicity, transparency and aggressiveness of the competition. However, the choice of form depends on the parties' will. Auction laws do not require any particular form.[81]

ABSENTEE BIDS

Auctions usually take place among the bidders attending the auction in person or between their legal representatives. The floor or saleroom bids may be placed expressly or tacitly, i.e. by using signals (nodding, unfolding buttons, rising up from the chair, etc).[82]

However, auction houses allow bidding by absentee bidders. This can be done in two ways. Absentee bidders may leave a single bid with the auctioneer in advance of the sale. Such bids are, however, impractical. The bidders place a one-off written bid. Since they are not present in the saleroom and are not familiar with their rivals' bids, they are precluded from raising their bids in response to their rivals' bids.[83]

For these reasons, the absentee bidders rarely place a one-off 'absentee written bid' (*schriftliches Gebot; offre d'achat*) to buy a certain object for a certain price. The written 'bid' is usually placed in the form of a written mandate ('book', 'commission' or 'proxy' bid; *Kaufauftrag*, *Bietauftrag*, *Ersteigerungsauftrag; ordre d'achat écrit/ mandat d'encherir*) so the auctioneer could bid for a certain object on the absentee bidders' behalf during the auction.[84]

In handling those bids, the auctioneers may act as legal representatives[85] of the absentee bidders or as mere transmitters of their bids.

As legal representatives, the auctioneers act as *alter egos* of the bidders. They can react directly and immediately on any floor bid as if they were the absentee

bidders themselves. Thus, the bids placed by the auctioneers within the limits of their mandate bind the absentee bidders directly.

On the other hand, as mere messengers of the absentee bidders (*Bote, messenger*), the auctioneers cannot react on their own on any floor bid but have to inform the absentee bidders on the competing saleroom bids and wait for their instructions.

Unfortunately, terms and conditions of the leading auction houses are not clear enough regarding the position of the auctioneer in carrying out absentee bids.[86]

E.g. Christie's 'will take reasonable steps to carry out written bids'.[87] Koller accepts written bids from potential purchasers who cannot attend the auction in person.[88] Dorotheum, on the other hand, is more clear. It says it 'shall bid for the client'.[89]

However, absentee bids usually authorise the auctioneers to immediately advance floor bids by placing counterbids on behalf of absentee bidders. This speaks for their status as legal representatives of the absentee bidders rather than as messengers.[90]

In this aspect, absentee bids differ from phone bids. Although phone bidders are also bound to announce their intention to bid over the phone before the sale,[91] the auctioneers do not bid on their behalf. The phone bidders bid on their own and the auctioneers merely communicate their bids to the saleroom.[92] Hence, bidding for the phone bidders is mere transmittance of their will and not actual bidding on their behalf.[93]

Limited and unlimited absentee bids Absentee bids placed with the auction houses usually have a maximum bidding price (*limitierte Bietaufträge*).[94] For example, the absentee bidder instructs the auctioneer to bid for a post stamp until the price reaches 15 pounds. If someone bids 5 pounds from the floor, the auctioneer bids 6 on the behalf of the absentee bidder; if someone else bids 7 pounds, the auctioneer bids 8, and so on, until the price reaches 15 pounds.[95]

However, an absentee bid may mandate the auctioneer to offer any price to win the object (unlimited or 'best-buy' bids).[96] Examples of this practice are referential or tied bids. These bids mandate the auctioneer to bid a fixed amount in excess of any current best bid which the auctioneer received from another bidder.[97]

Unlimited bids are problematic from the point of the auctioneer's duty to provide a level playing field for all potential buyers. They are controversial for several reasons. If undisclosed, they represent a misleading business practice, since they cause all competitors but one to believe that participating at auction can make them the winner. If disclosed, they discourage all competitors but one to bid since the winner is *de facto* already known. Furthermore, auctions with two or more unlimited or referential bids may result in perpetual bidding without clear result.[98]

Therefore, reasons of sound competition argue for an auctioneer's right to decline unlimited mandates, or at least to limit them during the bidding.[99] However, in the second case, the auctioneer's right to convert the unlimited bid into a limited bid must be clearly mentioned in the auctioneer's sale conditions. Otherwise, unilateral limitation at a certain point of the bidding that resulted in the

object being knocked down to somebody else in the saleroom instead of the absentee bidder will make the auctioneer accountable for damages suffered by the absentee bidder.

Since absentee bidders would most probably win the object, the auctioneers shall try to place them in a position they would probably be but for the breach of mandate. It practically means that the auctioneers should try to repurchase the objects from the buyers and reoffer them to the absentee bidders for the price exceeding the auction price by a single-bid increment.[100] Thereby, absentee bidders would receive the desired object and pay the price they would have presumably paid had the object been knocked down to them in the first place.

This, however, implies that the buyers are willing to resell their objects to the auctioneers at reasonable prices, i.e. the prices which do not make the repurchases unproportionally burdensome for the auctioneers. E.g. in Germany, a reasonable buy-in price equals from 175 up to 200 per cent of the knocked-down price, dependent on the auctioneer's guilt for malperformance of the unlimited bid.[101] If the restitution price would show unreasonable, the absentee bidders could seek monetary compensation under the general provisions of the civil law.[102]

Descending (Dutch) auction

FEATURES

The Dutch auction was originally used in the Dutch flower trade.[103] Nowadays, it can be found in Europe, US, UK overseas territories and some Middle East countries.[104] It is often used in wholesale trade,[105] for instance, in the trade in fish, tobacco, tickets, vehicles, oriental rugs,[106] as well as for the liquidation of enterprise.[107] In the US, the Dutch auction (or 'sale by decrease') is used for auctions of treasury securities organised by the US Treasury Department.[108]

Unlike the English auction, the Dutch auction is a method of descending bidding (*Abwärtsversteigerung; vente aux enchéres descendantes; vente au rabais*).[109] It begins with a starting price which is offered by the auctioneer on behalf of the seller.[110] If nobody accepts the suggested price, the auctioneer will start reducing the price consecutively until someone accepts his offer.[111] The buyer can accept the offer by shouting 'Mine!' or by pressing the button on an electronic remote control.[112] At the moment of acceptance, the digital clock on the screen will stop and the first and the only bidder will become the buyer.[113]

SUBCATEGORIES

Apart from the simple Dutch auction, well-known models of Dutch auction are also combined English-Dutch auction[114] and Dutch-English auction.[115]

The first method helps the auctioneer to fix the starting price when this cannot be done by referring to a pre-established market price (e.g. art auctions).[116] In such cases, the auctioneer will first organise an English auction to get the highest

price. This price will serve as the starting price in the following bidding round – the descending bid calling.[117] By setting a high starting price, the auctioneer has secured a favourable starting position. The high price achieved in the English round will psychologically affect the potential bidders. It shows there are bidders with high valuations and there is no time to lose for accepting the auctioneer's offer in the Dutch round.

In the Dutch round, the price obtained in the English around is doubled,[118] and it begins to fall until it reaches the price obtained in the English round.[119] In order to get the object, the highest bidder from the English round should bid the same price in the Dutch round.[120] If the highest bidder bids the same price, position from the previous round is confirmed. The best bid in the Dutch round is equal to the best bid in the English round. Otherwise, the price will continue falling, as in any other Dutch auction.

As attractive as it may seem from an economic perspective, the combined auction is abandoned in continental Europe due to its complexity and the amount of time needed for its implementation.[121]

The Dutch-English model works in an opposite way. The first part of the process is a descending-bid auction, which may result in an offer amounting to zero. If so, the auction will start again, however, this time as an ascending-bid auction.[122] The purpose of this model is to test the level of interest among the bidders to win the item already in the Dutch phase. The fact that nobody showed interest to buy the item in the first round could help the auctioneer design the selling strategy before the auction enters into the English phase, where the bidders will get the chance to place their own bids.

IS DUTCH AUCTION AN AUCTION AT ALL?

Unlike in the Anglo-American and Swiss doctrine, where the Dutch auction is considered as an alternative type of auction,[123] French and German scholars argue that the Dutch auction is not an auction, but rather a special public sale. For instance, it is argued that this kind of bidding does not affect the price, which is firmly attached to the auctioneer's offer.[124] It is also argued that it lacks successivity, as the new bid is not precluded by the previous one.[125] Dutch auction is sometimes also seen as a 'sale against the highest bid' (*Verkauf gegen Höchstgebot*). This is explained by the fact that the Dutch auction does not provide transparency of the competitors' bids, possibility for a bidder to get familiar with the competing bids and possibility to outbid the rivals. In other words, Dutch auctions lack genuine competitive bidding.[126]

These views apparently take the ascending-bid model as the only genuine auction model, leaving no room for alternatives. However, the fact that the Dutch auction departs from the normative concept of auction is irrelevant for the typology of auction. The English auction is merely a default auction model in the auction rules concerned. Current auction rules do not preclude the auctioneer whatsoever from departing from the normative concept of auction and organizing the auction in an alternative way.[127] Hence, unlike normative concepts, the legal concept of

auction is broader. It is not confined to the English auction but is open to various bidding models, including the Dutch auction.

At Dutch auctions, the bidders publicly compete to see who will be the first bidder to accept the auctioneer's offer at the desired price and, thereby, win the object.[128] This competition, however, is not based on competing with the rivals' bids, but rather on competing with the bidders' own perception about their rivals' bidding strategies.[129] This competition is, hence, 'dormant' rather than expressed.[130]

The bidding strategies are overt. Every bidder knows the current price level[131] and at least knows which price other competitors are not willing to pay. Thereby, bidders can develop their own bidding strategies.[132]

The buyer's decision to accept the auctioneer's offer and pay the (first and) final price is the result of competitive pressure, mutuality and interdependence of the bidders' (assumed, though) 'moves'.[133] This makes the final price a result of the 'silent competition' rather than private-treaty pricing.[134]

It follows that the English and Dutch auctions do share several common features. They are buyer-made price-determination methods, they are run by an auctioneer and they are based on a public, overt, competitive and successive bidding. These three common elements of the two most popular auction models build the legal concept of auction. In this sense, the so-called 'one-man auction' (*Ein-Mann Versteigerung*) – where the auctioneer asks a single bidder at a time to place an offer that the auctioneer will consider and eventually accept – is not an auction. It lacks competitive bidding and is equal to running separate, individual negotiations typical for private-treaty sales.[135]

Auction and auction-like bidding mechanisms

Competitive bidding is a common denominator of several methods of allocation of objects and prices, auction being among them. Besides auction, competitive bidding is inherent in the games of chance, public procurement, stock (commodity) exchange and public offers of a reward. However, whereas economic theory considers these methods as auctions – especially public procurement (governmental or reverse auction) and stock exchange (double auction) – the legal concept of auction established in the legal theory and in this book confines auction in a legal sense to an open, one-sided and consecutive method of sale. This section tries to find out how 'auction-like' bidding methods or auctions in an economic sense differ from auction in a legal sense, and consequently, why these methods should be left outside the legal concept of auction.

Games of chance and auctions

As stated earlier, game is an economic concept and covers auction as a game with asymmetric information. However, a game is also a legal concept.[136] Therefore, it seems appropriate to examine whether game as a legal concept also covers auction as a legal concept.

Games include pure games of chance (lotteries, roulettes and slot machines), mixed games of chance (poker) and games of skill (sport). Games of chance can be further divided into natural obligations (privately organised games, bets and lotteries) and legally binding obligations (state lotteries, games and bets).

In terms of contract law, a game is usually seen as a game of chance.[137] This is a competitive activity that people do for fun, hoping to receive a monetary benefit in return for the invested stake. The likelihood of receiving the monetary benefit (and duty to give it) depends on an uncertain event (chance or luck) which was chosen by the parties.[138] It follows that the contract of game of chance is an aleatory contract that furnishes at least one contracting party with an eventual claim (promise) for a monetary benefit against the counterparty once the uncertain condition is met.[139]

Comparing games of chance to auctions, it can be seen that the former are different from the latter in several aspects.

'Controlled' uncertainty

The outcome of the game depends on chances rather than on the activity of the parties.[140] Success at the auction, on the other hand, depends mostly on skill, experience, information, financial capacities, values, etc. of both sides of the market rather than on the prevailing role of chance or randomness.[141]

Besides, the uncertainty about the demand – which is inherent in auctions as in any other contracting method[142] – can be leveraged at auction by setting a starting price, reserve price, bidding increments, bidding time and auction guarantees.[143] Thereby, the seller and the auctioneer can reduce or even completely exclude the risk of the sale abortion due to poor demand.[144]

Lastly, uncertainty about the bidders' opportunity of winning the object and paying the price as well as uncertainty on whether the seller will furnish the object and claim the price are not actually dependent on a future and unforeseeable event decided by the parties. Uncertainty rather depends on the auctioneer's willingness to accept the best offer or reject it.[145] However, this is an arbitrary condition (*Potestativbedingung*; *condition potestative*) rather than an actual condition. Hence, the uncertainty of the outcome inherent in auctions is not of the same sort as the one inherent in games of chance, resulting in the auction not being a category of a game of chance.[146]

No risk of losing the stake

Another important aspect of games of chance is the risk of losing the stake and getting nothing in return. Each party to a contract of games of chance hopes to win the prize (or collect the bet) at the expense of the losing party.[147] Unlike games of chance, the best bidder at auctions does not win the object and the auctioneer does not collect the bet at the expense of other competitors. The latter do not lose their bets.[148] Even if they placed 'bets' in the form of a financial deposit to secure their

seat at the saleroom, they would receive it back in case they lost.[149] For that reason, an auction is not a game of chance.

Purpose

Auction sale has a specific and serious legal and economic purpose, namely, a determination of price and, thereupon, the formation of a legally binding sale contract.[150] On the other hand, parties to a contract of games of chance enter the contract in the mere expectation of winning the monetary prize and/or to have fun.[151] They do not necessarily make any legally binding promise. E.g. their promise may come down to mere moral duties, like in the case of private games, bets or lotteries.[152] Therefore, auction cannot be considered a category of game of chance.

Competitive bidding

Lastly, games of chance differ from auction also in terms of the nature of the competitive bidding. Unlike auctions, lotteries, roulettes, sports bets and especially slot machines do not provide a chance for the players to bid directly against each other in order to outbid the second-highest bidder. Hence, they cannot directly influence the game's outcome. This is a consequence of the mechanism featuring games of chance. It lacks transparency, which would allow players to know who bought (how many) tickets, placed bets or inserted coins and how much the other player has invested.

On the other hand, English and Dutch auctions provide bidding transparency. Each bidder can find out what is the current level of bid,[153] as the case may be, even the bidder standing behind it. This is a basic prerequisite for the genuine competitive bidding, where bidders place bids one after another, directly influencing their chances to outbid their rivals and win the auction.

Public procurement and auction

The seller at auctions aims to sell the object to the best (highest) bidder. On the other hand, the procuring entity at public procurement aims to buy the object or service from the best (cheapest) bidder.[154] For this reason, the economic theory sees public procurement as a governmental or reverse auction (*umgekehrte Versteigerung*).

However, from a legal point of view, the two forms of biddings are different.

Firstly, the result of public procurement is a public contract made directly between the procuring entity and the supplier, irrespective of the purpose of the procurement.[155] On the other hand, the result of the auction sale is a contract made between the intermediary and the best bidder, which can but does not have to be entered into directly between the seller and the buyer.

Secondly, the legal purpose of an auction is to sell the object at the best possible price. The price element is the only criterion for knocking down the object to the bidder. On the other hand, the best (cheapest) price is not the only criterion

for choosing the best bidder at public procurement. Modern public procurement is often grounded on the principle of 'best value for money'.[156] For that reason, the procurement entity considers the price, but also the supplier's expertise, deadlines, guarantees, payment schemes, repair costs, staff training, solvency and social, environmental, technical and other qualitative elements of the bid.[157]

Third, and the most important difference between auction and public procurement, lies in the character of the auction bidding.

Successive or consecutive bidding, i.e. competing against each other with ever higher bids (*gegenseitiges Überbieten*; *Unterbieten; surenchérissent*), is a key feature of auction.[158] The interaction between the rivals and the auctioneer that comes out of this bidding results in a multilateral and simultaneous competitive bargaining. This makes the auction a special type of multilateral negotiations.[159] In order to make this possible, there should be at least two bidders (*Wettbewerb*)[160] who will have a chance to know the competing bids.[161]

On the other hand, public procurement is a nonconsecutive bidding mechanism.[162] It fits well within the legal concept of 'buying against the highest bid' (*Kauf gegen Höchstgebot*). Such a method allows the bidders to place a one-off sealed bid without the possibility of knowing the competing bids. Thereby, they have no chance to react to competing bids and revise their own bids accordingly to outbid the rival.[163] Moreover, any kind of negotiation between the procuring entity and the bidders over the bids is seen unwelcomed in public procurement procedures, as it would result in the 'auction effect' and put the bidders under pressure to reduce their prices or otherwise revise their bid.[164]

Therefore, public procurement is a separate price – formation procedure based on a mere submission or aggregation of secret written bids (*vente avec soumission cachetée*; *vente sur offre*) and not auction.[165]

This view is also supported by procurement laws at international level. The MLPP differentiates between the tender and so-called electronic reverse auction. Whereas tender is a standard public procurement procedure, the electronic reverse auction is a real-time purchase method over the internet which the procuring entity employs to select the best offer. It covers submission of successively reduced or otherwise revised bids during a certain period of time and the automatic evaluation of bids.[166] The consecutive bidding inherent in this procurement method is an important departure from the standard, one-off tender.[167] It shows that electronic reverse auction is not a traditional public procurement. This is a genuine auction (*Absteigerung*), featuring successive and descending bidding (*Unterbieten*), where the object is knocked down to the lowest bidder.[168]

Stock exchange and auction

Stock or commodity exchange (*Börse*, *marché de bourse*) is an organised market in goods, services, money or securities where multiple suppliers compete against each other to attract the bidders and multiple bidders compete against each other to attract the suppliers. In economic terms, it fits within the concept of double auction.[169] This prompts the question whether stock exchange should be qualified

as auction sale in a legal sense or whether the legal meaning of *auction* should be confined to one-sided auctions, having one seller on the offer side of the market and many competing bidders on the demand side of the market.[170]

The commodity exchange acts as an institutional intermediary between the supply and demand side of the market. However, unlike auctions, stock exchange does not act on behalf of the parties. It is not a legal representative for either party whatsoever but a mere trade facilitator.

Apart from that, bidding at commodity exchanges does not allow the competitor to react directly to the competing bid. He cannot continue bidding for the same stock to outbid the rival in the same way he could bid at auction. Therefore, stock exchange is not to be qualified as an auction in legal terms. It is rather a subtype of a regular contract formation in the form of a quick and consecutive exchange of offer and acceptance.[171]

Lastly, stock exchanges are limited to sales of standardised commodities rather than specific objects, which also differs them from typical auctions.[172]

It follows that stock exchanges are not auctions in legal sense and should be differentiated therefrom.[173]

Auction and the public promise of a reward

Public offer of a reward is a publicly made promise that a certain consideration ('reward') will be given to a person who performs best on a certain task, makes the best achievement or successfully meets another condition. Typical example is a prize-winning sports competition or a competition for the best technical solution.

Since the outcome of the public offer of a reward depends on the competitor's active performance, this legal institute resembles the auction.[174] This has made some authors believe that the rules on the public offer of a reward could be analogously applied to auctions.[175]

Public offer of a reward distinguishes from auction in several ways, making the analogous application of the rules thereof unsuitable.

First, the competition is run directly by the promissor (city council, the sports committee, etc.) without an intervention of a neutral third party.

Secondly, the concrete outputs of the competition remain undisclosed until the end of the competition, preventing the competitors from outperforming the best player.

Thirdly, the public offeror makes a binding promise to give the consideration to the best competitor,[176] whereas the auctioneer makes only a nonbinding call for bids. Therefore, the public offeror becomes a debtor of the reward once the offeree meets the condition,[177] whereas an auctioneer is under no obligation to knock down the object even if he receives the best bid.[178]

Fourthly, if more than one offeree meets the offeror's condition, the offerees shall split the reward into fair shares. This is, however, not the case with auctions. The auctioneer shall either ask for further bids, hoping to receive a higher bid, or will choose among the bids in order to knock the object to a single best bidder if, of course, entitled to do so under the applicable terms and conditions.[179]

Interim conclusion

Auction is used for the sale of goods whose value cannot be measured against standard production criteria and/or whose demand is global. Auction helps the seller to efficiently allocate the objects to buyers who value them most and who are willing to confirm this by offering the highest bids.

In an economic sense, auction is a price-determination method that covers sales and procurements featuring some sort of competitive bidding. It covers ascending and descending bidding, one-sided and two-sided bidding, open and sealed bidding. This concept is thus broad enough to cover procedures like art auctions, governmental procurements of vehicles and stock or commodity exchanges.

However, the legal concept of auction is much narrower. A comparative analysis of five major legal systems has shown that auction in a legal sense covers only buyer-made price-determination methods featuring elements of a public, overt, competitive and successive bidding over the highest purchase price brokered by a third party acting as a neutral middleman. These elements are present in the two most popular auction models: the English and Dutch auctions.

On the other hand, bidding methods which lack all or some of these elements are not auctions in a legal sense despite their auction-like nature. In this sense, games of chance, public procurements, commodities' exchanges and public offers of a reward should not be confused with the legal concept of auction but should be rather treated as separate legal categories.

Notes

1 First fundamental paper in the area of auction theory was written by William Vickrey in 1961. William Vickrey, 'Counterspeculations, Auctions and Competitive Sealed Tenders' (1961) 16 (1) Journal of Finance 8.
2 This classical definition was given by Randolph P McAfee and John McMillan, 'Auctions and Bidding' (1987) 15 Journal of Economic Literature 701, 704; Flavio Menezes and Paul Monteiro, *An Introduction to Auction Theory* (OUP 2005), 9.
3 McAfee and McMillan (n 2) 712; Menezes and Monteiro (n 2) 23.
4 McAfee and McMillan (n 2) 701.
5 Ibid 702.
6 Ralph Cassady Jr, *Auctions and Auctioneering* (UCP 1980) 13.
7 McAfee and McMillan (n 2) 702.
8 Paul R Milgrom, 'The Economics of Competitive Bidding: A Selective Survey' in Leonid Hurwicz, David Schmeidler and Hugo Sonnenschein (eds), *Social Goals and Social Organization: A Volume in Honor of Elisha Pazner* (CUP 1985) 265; McAfee and McMillan (n 2) 705; Menezes and Monteiro (n 2) 13; Bernhard Kresse, *Die Versteigerung als Wettbewerbsverfahren* (Mohr Siebeck 2014) 14.
9 Jacob K Goeree and Theo Offerman, 'Competitive Bidding in Auctions with Private and Common Values' (2003) 113 (489), The Economic Journal 598.
10 McAfee and McMillan (n 2) 705; Goeree and Offerman (n 9) 598.
11 McAfee and McMillan (n 2) 705; Menezes and Monteiro (n 2) 12.
12 McAfee and McMillan (n 2) 705; Menezes and Monteiro (n 2) 39; Kresse (n 8) 14.
13 Goeree and Offerman (n 9) 598; Menezes and Monteiro (n 2) 39; Kresse (n 8) 15.
14 McAfee and McMillan (n 2) 705.

15 Ibid; Kresse (n 8) 15.
16 Milgrom (n 8) 265; Menezes and Monteiro (n 2) 39.
17 McAfee and McMillan (n 2) 720–72; Menezes and Monteiro (n 2) 39.
18 Kresse (n 8) 16.
19 For the sake of brevity, the following sections and chapters will use the term 'English' instead of 'ascending auction'.
20 McAfee and McMillan (n 2) 702.
21 For the sake of brevity, the following sections and chapters will use the term 'Dutch auction' instead of 'descending auction'.
22 McAfee and McMillan (n 2) 702.
23 Ibid.
24 Kresse (n 8) 20.
25 McAfee and McMillan (n 2) 701.
26 Ibid 702.
27 McAfee and McMillan (n 2) 702; Menezes and Monteiro (n 2) 11; Kresse (n 8) 21.
28 Milgrom (n 8) 262; McAfee and McMillan (n 2) 702; Kresse (n 8) 16; Alla Belakouzova, *Widerrufsrecht bei Internetauktionen in Europa? Eine vergleichende Analyse des deutschen, englischen, russischen und belarussischen Rechts unter Berücksichtigung der Rechtsentwicklung in der EU und der GUS* (Mohr Siebeck 2015) 11.
29 Menezes and Monteiro (n 2) 11.
30 Michael H Rothkopf, Thomas J Teisberg and Edward P Kahn, 'Why Are Vickrey Auctions Rare?' (1990) 98 (1) Journal of Political Economy 94, 101–03 <http://dx.doi.org/10.1086/261670> accessed 2 February 2022.
31 Ibid 99.
32 McAfee and McMillan (n 2) 701.
33 Ibid 707; Menezes and Monteiro (n 2) 5, 20; Kresse (n 8) 19.
34 McAfee and McMillan (n 2) 702.
35 Ibid 707.
36 Ibid 706.
37 Ibid 710.
38 Ibid 708.
39 Belakouzova (n 28) 11.
40 Cassady (n 6) 67; Brian W Harvey and Frank Meisel F, *Auctions Law and Practice* (3rd edn, OUP 2006) 2; Kresse (n 8) 319.
41 Kresse (n 8) 19.
42 Cassady (n 6) 63.
43 Kresse (n 8) 19.
44 McAfee and McMillan (n 2) 702.
45 Ibid; Kresse (n 8) 317.
46 Harvey and Meisel (n 40) 2.
47 McAfee and McMillan (n 2) 719; Kresse (n 8) 19.
48 McAfee and McMillan (n 2) 705.
49 Ibid 731.
50 Ibid 722; Kresse (n 8) 19.
51 McAfee and McMillan (n 2) 702; Menezes and Monteiro (n 2) 22–25.
52 McAfee and McMillan (n 2) 702.
53 Ibid.
54 Ibid 711.
55 Menezes and Monteiro (n 2) 22; Cassady (n 6) 66.
56 Kresse (n 8) 15.
57 Joseph Bateman, *A Practical Treatise on the Auctions; With Forms, Rules for Valuing Property, Useful Tables and Directions to Auctioneers* (6th edn, Melbourne and Sydney 1882) 1; GD Nokes, *An Outline of the Law Relating to Sales by Auction* (The Estates Gazette Ltd. 1925) 5; Annette Schneider, *Auktionsrecht: Das Rechtsverhältnis zwischen Einlieferer, Versteigerer und Ersteigerer* (Nomos Verlag 1999) 71; Helmut

Marx and Heinrich Arens, *Der Auktionator: Kommentar zum Recht der gewerblichen Versteigerung* (2nd edn, Luchterhand 2004) 243; Stefan Ernst, 'Gewerberechtliche Einordnung von Online-Versteigerungen' in Gerald Spindler and Andreas Wiebe (eds), *Internet-Auktionen und Elektronische Marktplätze* (2nd edn, Verlag Dr Otto Schmidt 2005) 13; Harvey and Meisel (n 40) 1–2; Sophie Vigneron, *Étude Comparative des Ventes aux Enchères Publiques Mobilières: France et Angleterre* (L.G.D.J. 2006) 15–18, 24; Kresse (n 8) 1; Heinrich Honsell, 'Die Online Auktion' in Theodor Baums, Johannes Wertenbuch, Marcus Lutter and Karsten Schmidt (eds), *Festschrift für Ulrich Huber zum siebzigsten Geburtstag* (Mohr Siebeck 2006) 355; Belakouzova (n 28) 225.

58 Kresse (n 8) 16.

59 Ibid; Schneider (n 57) 78; Vigneron (n 57) 18, 24.

60 Bateman (n 57) 2; Cassady (n 6) 56–57; Schneider (n 57) 78; Vigneron (n 57) 18; Kresse (n 8) 16.

61 For German law 2002 Civil Code (*Bürgerliches Gesetzbuch*) (BGB) (BGBl. I S. 42, 2909; 2003 I S. 738 2021 I S. 5252), para 156; the same Schneider (n 57) 73; Marx and Arens (n 57) 29; Kresse (n 8) 24, 325; 73; Belakouzova (n 28) 16. For Swiss law see 1911 Amendment to the Swiss Civil Code (Fifth Pt: Obligations Law) (OR) (Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches AS 27 317 (Fünfter Teil: Obligationenrecht)), Art 229(2)–(3); the same Anton Pestalozzi, *Der Steigerungskauf: Kurzkommentar und Zitate zu Art. 229–236 OR* (Schulthess Polygraphischer Verlag 1997) 18, 33, 79–80. For French law see 1807 Commercial Code (Code de commerce), Art L320–2. For English law Sale of Goods Act 1979 (SoGA 1979) s 57(2). For US law see Uniform Commercial Code (UCC 1951) s 2–328(2)–(3).

62 Code de commerce, Art L321–1(1); New York City Administrative Code, Title 20: Consumer Affairs, c 2 Licenses, sub-c 13 Auctioneers (May 2009), s 20–282 <https://www1.nyc.gov/assets/dca/downloads/pdf/about/auctioneer_law_rules.pdf> accessed 3 February 2022; Pestalozzi (n 61) 36; Joëlle Becker J, *La Vente aux Enchères d'Objets d'art en Droit Privé Suisse: Représentation, Relations Contractuelles et Responsabilité* (Schulthess 2011) 11.

63 2003 Regulation on Commercial Auctions (*Verordnung über gewerbsmäßige Versteigerungen* (VerstV) (BGBl. I S. 547 2017 I S. 626) para 3; Code de commerce, Art R321–33; Pestalozzi (n 61) 33.

64 Martin Blättler, *Versteigerungen über das Internet: Rechtsprobleme aus der Sicht der Schweiz* (Schulthess 2004) 10.

65 Pestalozzi (n 61) 33; Vigneron (n 57) 15; Kresse (n 8) 11.

66 E.g. Christie's, 'London Conditions of Sale: Buying at Christie's' (standard) (Christie's 2022), Pt B, Art 1(b) <www.christies.com/buying-services/buying-guide/conditions-of-sale> accessed 2 February 2022.

67 Cassady (n 6) 78–79. See e.g. Koller, 'Auction Conditions Koller Zürich' (Koller, July 2018), Art 5.3., <www.kollerauktionen.ch/en/kaufen_verkaufen/auktionsbedingungen/> accessed 2 February 2022.

68 Becker (n 62) 11.

69 Arg ex OR, Art 229(3); Code de commerce, Art L320–2(2); Pestalozzi (n 61) 37; also Rolf H Weber and Martin Skipsky, 'Online-Auktionen – Neues Geschäftsmodell in schwierigem rechtlichem Umfeld' (2001) (3) Insolvenz-und Wirtschaftsrecht 93; Schneider (n 57) 76; Kresse (n 8) 330.

70 Weber and Skipsky (n 69) 93; Marx and Arens (n 57) 28; Blättler (n 64) 6; Vigneron (n 57) 15; Becker (n 62) 11; Kresse (n 8) 11, 330; Belakouzova (n 28) 129.

71 Hans Wicher, *Der Versteigerer: Systematischer Kommentar zu den einschlägigen gewerberechtlichen Vorschriften* (Dr. Ernst Hauswedell & Co. 1986) 51.

72 Yvan Lengwiler and Elmar G Wolfstetter, 'Auctions and Corruption' (2000) CESifo Working Paper Series, Working Paper 401/2000, 1, 15 <www.econstor.eu/handle/10419/75726> accessed 2 February 2022.

73 Pestalozzi (n 61) 32.

74 Ibid 37.
75 Blättler (n 64) 10.
76 1999 Regulation on Entrepreneurship (*Gewerbeordnung*) (GewO) (BGBl. I S. 202; 2021 BGBl. I S. 3504), para 34(b)(10)(3).
77 See ch. 6.
78 Wicher (n 71) 51; Blättler (n 64) 33–34; Becker (n 62) 10; contr. for German law Schneider (n 57) 77, arguing that the German GewO equally applies to private auctions as long as conditions envisaged in GewO are met.
79 Schneider (n 57) 77.
80 About live auctions as a type of internet auction, see ch 3.
81 Becker (n 62) 168.
82 Cassady (n 6) 149; Pestalozzi (n 61) 44.
83 Pestalozzi (n 61) 45; Schneider (n 57) 73.
84 Cassady (n 6) 152; Vigneron (n 57) 238–39; Bundesgerichtshof (BGH), VIII ZR 186/81 of 20 October 1982, NJW 1983, 1168, 9; Kresse (n 8) 67; Schneider (n 57) 90; Marx and Arens (n 57) 235; Becker (n 62) 173. See e.g. Koller's Conditions of Sale, Art. 6.4; Christie's Conditions of Sale London, Pt B, Art 6(c); Vasari, 'Conditions Generales de Vente' (Vasari 2021), Ordre d'achat, <www.vasari-auction.com/vente/115649> accessed 2 February 2022.
85 On types of representation regarding absentee bids, see more ch 2.
86 Also Kresse (n 8) 85–86.
87 Christie's New York Conditions of Sale, Art 4(c).
88 Koller's Conditions of Sale, Art 6.4.
89 Dorotheum, 'Allgemeine Geschäftsbedingungen' (Dorotheum, March 2021), Art 24(1), <www.dorotheum.com/fileadmin/user_upload/Download/Agb/AGB_Versteigerung.pdf> accessed 2 February 2022.
90 The same Cassady (n 6) 152; Becker (n 62) 174.
91 E.g. Lempertz's Conditions of Sale, Art 6; Koller's Conditions of Sale, Art 6.5.
92 Kresse (n 9) 126.
93 Schneider (n 57) 93; Becker (n 62) 174; Kresse (n 8) 127.
94 Pestalozzi (n 61) 45; Schneider (n 57) 90; Vigneron (n 57) 238; Becker (n 62) 173. See e.g. Lempertz's Conditions of Sale, Art 7; Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 24(1).
95 Cassady (n 6) 152–54.
96 Kresse (n 8) 86.
97 Pestalozzi (n 61) 116.
98 Ibid 117.
99 Kresse (n 8) 106; e.g. Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 24(1).
100 Kresse (n 8) 114.
101 Ibid 125.
102 Ibid 115.
103 Ibid 17.
104 Cassady (n 6) 60.
105 Schneider (n 57) 80; Marx and Arens (n 57) 29.
106 Kresse (n 8) 313.
107 Marx and Arens (n 57) 242.
108 See <www.treasury.gov/initiatives/fsoc/Documents/Glossary.pdf> accessed 2 February 2022.
109 Kresse (n 8) 18.
110 Ibid 313.
111 Schneider (n 57) 79; Marx and Arens (n 57) 29; Vigneron (n 57) 19.
112 Bateman (n 57) 2; Cassady (n 6) 62; Harvey and Meisel (n 40) 2; Kresse (n 8) 17.
113 Kresse (n 8) 318.

114 Cassady (n 6) 76.
115 Schneider (n 57) 82.
116 Cassady (n 6) 77.
117 Ibid; Harvey and Meisel (n 40) 2.
118 Cassady (n 6) 77.
119 Audrey Hu, Theo Offerman and Liang Zou, 'How Risk Sharing May Enhance Efficiency of English Auctions' (2016) 128 (610) The Economic Journal 1235, 1236.
120 Cassady (n 6) 77.
121 Harvey and Meisel (n 40) 2.
122 Schneider (n 57) 82; Marx and Arens (n 57) 31; Markus Lunk, *Internet-Auktionen. Aspekte des Gewerbe-, Wettbewerbs- und Vertragsrechts* (Dr. Hänsel-Hohenhausen 2006) 23.
123 Harvey and Meisel (n 40) 2; Cassady (n 6) 60; Pestalozzi (n 61) 18.
124 Schneider (n 57) 76.
125 Belakouzova (n 28) 138–39.
126 Similarly Vigneron (n 57) 19.
127 Bundesfinanzhof (BFH), II 169/52 of 7 January 1953, JurionRS 1953, 10175, para 4; Kammergericht (KG) Berlin, 29 U 30/01 of 15 August 2001, JurionRS 2001, 28657, para 10; KG Berlin, 8 U 310/03 of 17 May 2004, JurionRS 2004, 32123, para 15; see also Schneider (n 57) 81; Marx and Arens (n 57) 30; Kresse (n 8) 9.
128 Schneider (n 57) 81; Marx and Arens (n 57) 30.
129 Likewise Cassady (n 6) 60.
130 Ibid 63.
131 Belakouzova (n 28) 133.
132 Schneider (n 57) 83.
133 likewise ibid 80; Marx and Arens (n 57) 30.
134 Likewise Belakouzova (n 28) 24.
135 Schneider (n 57) 74. Contr. Marx and Arens (n 57) 26, arguing that it is enough that the auctioneer merely provides an opportunity for competitive bidding, irrespective of whether it actually takes place.
136 BGB, para 762; GewO, para 33(c)-(d); OR, paras 513–15; 1804 Civil Code (*Code Civil*), Art 1965.
137 BGB, para 762; Landgericht (LG) Münster, 2 U 58/00 of 14 December 2000, NJW 2001, 1142, para 144; OR, Arts 515–515a; Code civil, Art 1964.
138 For lotteries, see cases *Schindler*, C-275/92, EU:C:1994:119, para 27; *Zenatti*, C-67/98, EU:C:1999:514, para 18; Christine Riefa, *Consumer Protection and Online Auction Platforms: Towards a Safer Legal Framework* (Routledge 2015) 63; Kresse (n 8) 191.
139 E.g. expressly Code civil, Art 1965.
140 LG Münster, NJW 2001, 1142, para 145.
141 Riefa (n 138) 63–64.
142 BGH, VIII ZR 13/01 of 7 November 2001, NJW 2002, 363, para 55.
143 On starting price, reserve price, bidding increments and bidding time, see ch 2. For auction guarantees, see ch 5.
144 BGH, VIII ZR 13/01, para 55.
145 Kresse (n 8) 193.
146 BGH, VIII ZR 13/01, para 55.
147 Kresse (n 8) 190–91.
148 Ibid 198. However, this is not the case at penny internet auctions (also known as Scandinavian auctions), where a potential bidder must pay a fee to participate at auction, with a chance of losing it just like at lotteries. Riefa (n 138) 5; Belakouzova (n 28) 133.
149 E.g. Koller's Conditions of Sale, Art 5.4.
150 BGH, VIII ZR 13/01, para 55; LG Münster, NJW 2001, 1142, para 146; Heinrich Beumann H, 'Die rechtliche Natur der Versteigerung' (Dphil thesis, Universität Erlangen 1911) 7; Kresse (n 8) 192.

151 LG Münster, NJW 2001, 1142, para 146.
152 BGB, para 762; OR, Art 513; Code civil, Art 1965.
153 Belakouzova (n 28) 237.
154 UNCITRAL Model Law on Public Procurement 2011 (MLPP), Art 43 (3)(b)(i); Pestalozzi (n 61) 15; Ulrich G Schroeter, 'Die Anwendbarkeit des UN-Kaufrechts auf grenzüberschreitende Versteigerungen und Internet-Auktionen' (2004) Zeitschrift für Europäisches Privatrecht 20, 31–32; Beumann (n 150) 32; Blättler (n 64) 5; Kresse (n 8) 340.
155 MLPP, Art 2(k).
156 Claudia Fuchs, 'Öffentliche Vergabe' in Gregor Kirchhof, Stefan Korte and Stefan Magen (eds), *Öffentliches Wettbewerbsrecht* (C.F. Műller 2014) 483.
157 MLPP, Art 11(2).
158 Belakouzova (n 28) 71; Schneider (n 57) 73–74; Blättler (n 64) 6; Vigneron (n 57) 15.
159 Pestalozzi (n 61) 15; Broome J in *Estate Francis v Land Sales (Property) Ltd* [1940] NPD 441, 457; likewise Schneider (n 57) 75; Blättler (n 64) 96; Hans Dechange, 'Die öffentliche Versteigerung im Bürgerlichen Gesetzbuch' (DPhil thesis, Hohe Rechtswissenschaftliche Fakultät der Universität Köln 1934) 1, 9.
160 Schneider (n 57) 75; Belakouzova (n 28) 133.
161 LG Hamburg, 315 O 144/99 of 14 April 1999, MMR 1999, 678, para 2; Cassady (n 6) 8, 12, 54; Pestalozzi (n 61) 16; Schneider (n 57) 71–72; Vigneron (n 57) 17; Belakouzova (n 28) 132.
162 Fuchs speaks of 'parallel competition' ('Parallelwettbewerb der Bieter'), Fuchs (n 156) 482.
163 Ernst (n 57) 16–17; Vigneron (n 57) 20; Harvey and Meisel (n 40) 4; Cassady (n 6) 13; Blättler (n 64) 6. For the same reason, so-called simultaneous (Japanese) auctions – where bidders place their maximum single bids at the same time by using hand signals – are not auctions in the legal sense. Schneider (n 57) 83; Belakouzova (n 28) 12. Contr. Cassady, who argues that the bidders could revise their bids if they were quick enough to notice the competitor's hand move and immediately increase their initial bid. Cassady (n 6) 64.
164 MLPP, Art 44.
165 Schneider (n 57) 72; Marx and Arens (n 57) 27; Schroeter (n 154) 26; Harvey and Meisel (n 40) 4; Kresse (n 8) 340; Belakouzova (n 28) 130; Blättler (n 64) 6; Vigneron (n 57) 20.
166 MLPP, Art 2(d). *Reverse auction* is sometimes used as a synonym for *Dutch auction*. This is due to its descending character. Kresse (n 8) 17. Some authors use the term *reverse auction* to denote both public procurement and Dutch auction. Ernst (n 57) 6–7. Dutch auction, however, should not be confused with the electronic reverse auction, as electronic auction features an actual competitive bidding rather than dormant.
167 Also Sue Arrowsmith, 'Public Procurement: An Appraisal of the Uncitral Model Law as a Global Standard' (2004) 53 (1) The International and Comparative Law Quarterly 17, 40.
168 See UNCITRAL, 'Guide to Enactment of the UNCITRAL Model Law on Public Procurement' (United Nations 2014) 226; Marx and Arens (n 57) 456; Klaus Ferdinand Gärditz, 'Öffentliche Versteigerung' in Gregor Kirchhof, Stefan Korte and Stefan Magen (eds), *Öffentliches Wettbewerbsrecht* (C.F. Műller 2014) 526.
169 McAfee and McMillan (n 2) 702.
170 Paul Klemperer, 'Auction Theory: A Guide to the Literature' (1999) 13 Journal of Economic Surveys 227.
171 'UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods: 2016 Edition' (United Nations 2016), Art 2(7). Schroeter (n 154) 25; Rolf Herber, 'Art. 2 CISG' in Peter Schlechtriem (ed), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn

in translation, Clarendon Press 1998) 34; Ulrich Magnus, 'Wiener UN-Kaufrecht (CISG)' in Michael Martinek (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen: Wiener UN-Kaufrecht (CISG)* (Sellier – de Gruyter 2013) 111.

172 Blättler (n 64) 25.

173 The same distinction has been made in Convention on the Law Applicable to International Sales of Goods (The Hague, 15 June 1955) 510 UNTS 147, Art 3(3). With respect to the interpretation of the notion, 'auction' in United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 11 April 1980) 1489 UNTS 3, entered into force on 1 January 1988, Art 2(b), it is considered that this notion does not cover commodity exchanges. See more in Kristijan Poljanec, 'Auctions and Auctionlike Selling Mechanisms in International Sale of Goods: A Call for Revisiting Article 2(b) CISG?' in Zvonimir Slakoper and Ivan Tot (eds), *EU Private Law and the CISG: The Effects for National Law* (Routledge 2021) 151.

174 Pestalozzi (n 61) 20; Kresse (n 8) 163–64.

175 Kresse (n 8) 164.

176 Pestalozzi (n 61) 21.

177 Harvey and Meisel (n 40) 48.

178 About the legal nature of the auctioneer's call for bids, see more in ch 2.

179 About the problem of equal bids, see more in ch 2.

2 Auction relationships

Introduction

Apart from the contract for sale, a typical auction entails many other legal relationships involving the seller (consignor), the auctioneer and the bidders. The formation of these relationships at auction is essential for the realisation of the auction purpose; they serve as transactions 'assisting' the formation of the sale contract. However, it is not clear which legal relationships arise at a typical auction, let alone their legal nature. Inconsistent (and rather confusing) opinions on this issue may be found across legal scholarship dealing with auctions.

It is often argued that a standard auction in English law consists of three relationships: the contract between the seller (consignor) and the auctioneer, contract between the auctioneer and the buyer (best bidder) and the contract between the seller and the best bidder (the buyer).[1] However, some English authors argue that a typical auction sale consists of potentially four contracts: the contract between the bidders, the contract between the auctioneer and each bidder, the sale contract between the seller and the best bidder and potentially the contract between the auctioneer and the buyer (best bidder).[2] However, the consignment contract is apparently missing from this systematisation, whereas contract between the bidders is added thereto.

Likewise, in Germany and Switzerland, some argue that a standard auction consists of the contract between the seller (consignor) and the auctioneer, a contract between the auctioneer and the bidders – in particular, between the auctioneer and the best bidder – and lastly, a contract between the seller and the best bidder.[3] However, some German authors deny the existence of the legal relationship between the auctioneer and individual bidders. They claim that the structure of legal relationship is confined to two contracts: the contract between the seller (consignor) and the auctioneer and the sale contract between the auctioneer and the best bidder (buyer).[4]

The foregoing considerations show a lack of consensus about the number and type of legal relationships at auction not only between different legal systems but even within the same legal system. Therefore, there is a need for a comprehensive comparative study of basic legal relationships arising at a typical auction.

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This chapter examines the structure and legal nature of the basic legal relationships that arise at auction. The focus is on the legal relationships at the English auction, while legal relationships at the Dutch auction are covered insofar as they depart from a typical English auction. Such a study aims to provide a clear outline of the basic structure of the legal relationships at auction and define their legal nature.

It is argued that the typical auction structure is neither tripartite nor quadripartite. A typical auction covers *at least* four basic categories of legal relationships which are often accompanied by many other contractual and extracontractual legal relationships.[5] This chapter will cover the four basic relationships at auction: the consignment agreement between the seller/consignor and the auctioneer, the contract between the auctioneer and the bidders, the agreement between the bidders and the sale contract.

Key auction participants are outlined in the first section. It analyses the legal position of the auctioneer, the auctioneer's staff, the associates, the seller, the bidders, and the buyer. The second section covers potential auction lots. The third section presents the four basic legal relationships. It defines their legal nature and outlines the basic rights and duties of the parties thereof. The fourth section covers peculiarities of the legal relationships at Dutch auction. The chapter ends with a conclusion.

Auction participants

Three categories of persons are involved in an auction sale: the seller (*Verkäuferer*, *vendeur*), the auctioneer (*Versteigerer*, *Auktionator, vendeur aux enchères*) and the best bidder/buyer (*Käufer*, *acheteur*).

Seller

The seller is a person who sells the object at auction, i.e. the person who enters the sale contract with the best bidder (*Höchstbieter*, *mieux-disant*). The seller is the auctioneer's consignor (*Auftraggeber*, *Einlieferer, Veräusserer*, *fournisseur*), unless the auction house sells its own objects.[6]

Some argue that the seller (*Verkäufer*) and the consignor (*Veräusserer*) could be different persons. For instance, the owner of the object could authorise another person (e.g. the estate manager) to sell the object.[7] However, if the consignor acted in her own name but for the account of the seller, the consignor formally sold the object by consigning it to the auctioneer. In this case, the seller in a legal sense and the consignor are the same person. If, on the other hand, the consignor consigned the object in the name and for the account of the seller-owner, the actual seller would be formally both the consignor and the seller. Hence, in legal terms, the seller and the consignor are one person, irrespective of who might be the ultimate beneficiary of the transaction.

Auctioneer

The notion

The term *auctioneer* can be understood in two ways.

In a narrow sense, an auctioneer is a natural person who physically or virtually conducts the auction sale, i.e. who organises and prepares the auction event, moderates it and knocks the object down to the best bidder.[8] An auctioneer can be a self-employed person, an employee or a commissioned mandatee of an auction house, i.e. a company registered for providing auction services.

In a broader sense, the auctioneer is any natural or legal person who organises auctions as the consignor's mandatee.[9] In this sense, the term *auctioneer* also covers auction houses.[10] The term *auctioneer* in auction laws is to be understood in this broader meaning.[11]

Most auctions, in particular the prestigious ones, are run by auction houses. They enter into consignment agreements with the sellers, prepare terms and conditions of the sale, run the bidding and, finally, knock down the object. They organise the auction while their employees merely conduct the bidding on behalf of the auction house as moderators or directors of sale (*der Leitende*).[12]

A concrete legal qualification of an auctioneer depends, on one part, on the content of the consignment agreement with the seller and, on another part, on the content of the relationship with the bidders. The legal position of the auctioneer in these relationships will be discussed in detail below.

Consigned and property auction

The seller and the auctioneer are usually two different persons. The auctioneer puts up at auction the object which belongs to the consignor as the latter's fiduciary. This type of auction is called a 'consigned auction' or 'auction for account of another person' (*Fremdversteigerung*).[13]

However, the auctioneers can also sell their own objects. In this case, the seller and the auctioneer are the same person.[14] The auctioneers enter the sale contract with the best bidder in their own name and for their own account. For instance, auctioneers can sell their own object or objects on which they hold a legal interest.[15] Or they can sell objects that they were forced to purchase as auction guarantors.[16] This type of auction is called a 'property auction' or 'an auction for the auctioneer's own account' (*Eigenversteigerung; vente pour propre compte*).[17]

Property auctions are allowed in England,[18] Switzerland[19] and Germany.[20] In France, however, property auctions seem to be an exemption. A public auction under French law is an auction intervened by a third-party agent of the consignor or her/his representative with the aim of selling the object to the highest bidder.[21] Hence, the French concept of auction is, in principle, confined by virtue of law to consigned auction. Moreover, there is a strict rule saying that the auction house shall not directly or indirectly sell for its own account the goods offered at public auctions.[22]

However, French auction houses can exceptionally sell the objects they have bought earlier as guarantors of the minimum price.[23] In this case, they can resell the objects via auction, mentioning their ownership in them.[24] They can also buy the object and resell it via auction later to terminate the dispute that might have arisen between the seller and the best bidder. In this case, the auction house has to disclose in a clear and unambiguous way that it owns the auctioned object.[25]

Bidders

A bidder (*Bieter*, *Steigerer*, *encherissuer*) is a person who shows interest in buying the auctioned object by placing bids during the auction.[26] The person whom the object will be knocked down to – the buyer (*Ersteigerer, mieux-disant*) – is the bidder who has placed the highest bid at the English auction or accepted the auctioneer's last bid at the Dutch auction.

Bidders usually bid in their own name and for their own account. However, bidders at auctions can bid for somebody else. In principle, the bidders then act in their own name and only for the account of the potential buyers. Thereby, the contract will be directly concluded between the proxy bidder and the seller. The advantage of this approach is that the auctioneer does not have to worry about the identity and financial situation of the third party. The proxy bidder is the only debtor.[27]

Auction houses, however, may allow the bidders to bid directly for the account of another person, resulting in the sale contract being entered into directly between the seller and that person. However, this is allowed only if such an arrangement was communicated to the auctioneer beforehand, if the identity of the buyer was disclosed to the auctioneer, if the auctioneer accepted the absentee principal as the potential buyer and if the agreement was put into writing by the auctioneer and the bidder.[28] Otherwise, it shall be presumed that the proxy bidder bid in her or his own name, i.e. as indirect proxy, and entered into the sale agreement with the seller as the end buyer.

Objects

Objects that are put up at auction can be movables (e.g. art and antiquities, wool, coffee, tea, fur, electronics, cars), immovables (e.g. real estate, such as a mansion), property (economic) rights (e.g. corporate stocks, mine or telecom concessions, airport slots) and digital assets (e.g. non-fungible tokens, NFTs[29]).

Objects can be sold as individual pieces or as a part of a group of items (e.g. an estate sale, including a country manor with the furniture and library). An item or group of items sold at auction is called an auction lot or auction number (*Versteigerungslos/Versteigerungsnummer*).

In Anglo-American law, each lot is presumed to be the subject of an individual sale.[30] The presumption implies that the knock-down should follow separately for each lot and not at the end of the whole auction session. In the continental laws concerned, the same presumption could be inferred from the legal texts.

In Swiss law, the title in movable (or, by analogy, a right) is conveyed to the buyer at the moment of the knock-down.[31] Since the title cannot pass to the buyer unless the contract of sale was formed, it follows that each lot is a subject of a separate contract for sale.[32]

In German law, the auction mandate has to individualise the lot meant to be sold at auction either by describing it separately or as a single group of items (e.g. a flock of sheep).[33] Hence, each consigned lot will be covered by a separate auction mandate, a separate bidding and a separate sale contract.

In French law, the objects can be sold as retail goods, in lots or as wholesale goods.[34] Code de Commerce, Art L320–2(1) suggests that one knock-down results in one sale contract. Hence, it could be argued that auction sale per lots in French law would mean that each lot is a subject of a separate sale, rather than that all lots being covered by one big sale.

The 'one sale per lot' presumption also implies that the 'auction sale' or 'sale by auction' in all legal systems concerned should be distinguished from the term *auction*. Whereas the former refers to a separate contract for sale concluded per auction, the latter refers to the whole auction event or method covering formation of several different sale contracts (*Versteigerungsveranstaltung*).[35] Hence, legal implications of each auction sale (extinction of a second-best offer, duty to collect the object, duty to pay the price, etc.) arise as soon as the auctioneer knocks down the object to the best bidder, rather than at the end of the whole auction session.

Legal relationships at English auction

The legal qualification of contracts arising at a typical auction primarily depends on the content of the applicable conditions of sale.[36] It will be shown that the content of a contract at auction is usually a mixture of elements of two or more standard contracts. However, the conditions of sale are sometimes silent or not clear enough regarding the parties' rights, duties and liabilities. In case of a dispute, the competent court has to subsume the factual elements of the relationship under the appropriate default rule of the applicable civil law relevant for the contract concerned.[37]

Consignment agreement

Continental law

INTERMEDIATION

The seller approaches the auctioneer with a written mandate authorising the latter to sell the object at auction (*Versteigerungsauftrag; mandate*).[38] However, at that point, the mandate is only a proposal to the auctioneer to carry out the sale on behalf of the seller.[39] If the auctioneer accepts it, the seller and the auctioneer will enter a consignment agreement (*Einlieferungsvertrag; contrat*

d'envoi). This agreement authorises and obliges the auctioneer (consignee) to organise and carry out the auction sale on behalf of the seller-consignor in line with the mandate, the terms and conditions of the auction sale and the applicable auction laws.[40]

Duty to organise and carry out the auction covers the auctioneer's liability for running the auction sale (*Wirken, Leistung, obligation d'agir*) and providing the bidders with a chance for buying the object.[41] This includes, e.g., attribution of the object, preparation of the auction catalogue and campaign, exhibition of the object, estimation, insurance, putting the object up for sale, calling bids.[42]

On the other hand, the auctioneer makes no promises to the consignor that the object will be sold at the auction (*Leistungserfolg; obligation de résultat*).[43] Moreover, the auctioneer could not validly make such a promise, since the auction success depends on the bidders' demand and the price they are willing to offer.[44] Furthermore, such a promise would imply that the consignor could ask the auctioneer to knock down the object, although the auctioneer suspects there is a valid reason for denying the knock-down (e.g. the object's flaw or the bidders' collusion).[45] Therefore, the consignment contract is not a contract to produce a work (*Werkvertrag; contrat d'enterprise*).[46]

The consignment agreement seems closer to the contract for the provision of services (*Dienstvertrag, contrat de service*). However, the service recipient owes the service provider a fee for the performance of the service, whereas the consignor owes the auctioneer a fee only if the object was sold.[47] Therefore, the consignment agreement is not a services contract either.

The auctioneer's position resembles that of a broker (*Makler, courtier*) negotiating the contract between the seller and the potential buyers.[48] The problem with this qualification is, however, that a standard broker is not obliged to take active care over the formation of a contract (*Vermittlungstätigkeit; servir d'intermediaire pour la négotiation*). As any other intermediary, brokers intervene in the contract formation on a case-by-case basis, dependent on their expectations to earn profit.[49] The auctioneers, on the other hand, must take active care over the contract formation by stimulating parties to enter a sale contract (*Herbeiführen der Abschlussbereitschaft*).[50] This is, moreover, inherent in their position *vis-à-vis* the consignors. As only one auctioneer holds the consigned object at a time, the consignor is precluded from consigning it to another auctioneer, or from selling it directly to the buyer.[51]

It follows that the consignment agreement is neither a typical contract for provision of services nor a brokerage contract.[52] It is rather an exclusive mandate agreement under which the auctioneer must act (*Alleinauftrag; courtage exclusif*).[53] This duty, however, has elements of the brokerage contract and service contract (*Vermittlungsmaklerdienstvertrag; contrat de service de courtage négociateure*).[54] This makes the auctioneer an atypical broker close to the German concept of active commercial broker (*Handelsmakler*),[55] the Swiss concept of *Vermittlungsmäkler* (*courtier négociateur*)[56] and the French concept of merchandise broker (*courtier de marchandises)*.[57]

REPRESENTATION

Obligation to prepare and carry out the auction is the internal aspect of the consignment agreement. This, however, says nothing about the auctioneers' authority to conclude the contract for the consignor and about the capacity in which they knock down the object. This issue belongs to the external aspect of the consignment agreement – the representation.

The authority of the auctioneer to knock down the object on behalf of the consignor is, in principle, expressly granted to the auctioneer in German, Swiss and French law.[58] In principle, the auctioneers can act as the consignor's direct (agency, *Stellvertretung*, *contrat de mandat*) or indirect (commission agency, *Kommissionvertrag*, *commission*) representatives, as well as in their own capacity (*Eigenhändler*).[59]

Direct representation As a direct representative or agent (*Stellvertreter; mandataire*), the auctioneer acts in the name and for the account of the consignor (*Abschlussvollmacht*, *pouvoir de répresentation directe/mandat*).[60] The sale will be concluded directly between the consignor and the buyer (*Käufer*, *acheteur*).[61]

The auctioneer usually has no permanent authority to sell all the consignor's objects, but rather the authority to sell a single lot. Hence, direct representation by the auctioneer is a 'one-off', occasional representation (*Gelegenheitsagentur*), rather than a commercial agency (*Handelsvertretung; Agenturvertag*).[62] It usually terminates by virtue of law once the auctioneer has carried out the auction mandate, irrespective of whether the auction ended up successfully or not (*functus officio*).[63]

Parties may, however, agree on a prolonged relationship. E.g. the consignors could expressly authorise the auctioneers to carry out post-sale financial transactions on their behalf, or to carry out another auction sale or private-treaty sale on their behalf following the object being passed in.[64]

The consignor – especially a professional dealer – could also enter a longer-term contract with the auctioneer. If so, the auctioneer could sell different lots for a specific period of time.[65] Such a contract could be made in the form of a framework consignment agreement (*Rahmenvertrag*). In that case, individual 'mandates' would be individual instructions to sell rather than new consignment agreements.

Direct representation does not mean that the auctioneer shall disclose the consignor's name. The consignor's name can be disclosed to the bidders if the auctioneer finds it beneficial for the former's interest. In most cases, however, the identity of the consignor is kept secret, even if the circumstance that there is a consignor was expressly disclosed to the public.[66] Therefore, acting 'in the name' of the consignor comes down to disclosure of a blanket information that a third party will be the seller and not the auctioneer.[67]

However, keeping the consignor's identity secret has certain limits. Since the agency produces direct rights and obligations for the consignor and the buyer, the consignor's name will eventually have to be disclosed to the buyer, at least

at the latter's request. This will usually follow after the contract conclusion. Otherwise, the buyers would be prevented from enforcing their rights (e.g. seeking liability for material and/or legal warranties) against the sellers with whom they entered the contract.[68]

If the auctioneers refused to disclose the consignors' names, they would knowingly prevent the buyers from enforcing the effects of direct representation, since those effects cannot emerge in the absence of the disclosure of the consignor's identity. They would place the buyer in a position as if there were no direct representation, but rather indirect representation. Therefore, in case of refusing to disclose the consignor's identity, the auctioneers would become directly bound by the contract, as they leave an impression that they are willing to assume personal liability for the execution of contract.[69]

Unlike German and Swiss law, French law of agency does not support the idea of postponed identity disclosure. If a third party doubts the scope of the agent's authority, the third party may seek the consignor to confirm that the agent is authorised to conclude certain transactions.[70] However, the third party can do that only if the auctioneer disclosed the identity of the consignor. It follows that the auctioneer shall disclose the consignor's name even before the knock-down, possibly even before the actual bidding has started, if any bidder asks the auctioneer to do so in order to reach the consignor.

Indirect representation Whereas under French law the auctioneer shall act as an agent,[71] a German or Swiss auctioneer can choose between agency (*direkte Vertretung*) and indirect representation or 'commission' agency (*indirekte Vertretung, Verkaufkommission, commission*). Indirect representation is frequent in the auction business,[72] especially in the art and antiquities trade.[73]

As in the case of direct representation, the auctioneers acting as indirect representatives are vested with a 'one-off' authority to sell (*Einzelauftrag; fallbezogene Geschäftsbeziehung*).[74] However, unlike in the case of an agency, the auctioneers sell lots in their own name, but for the account of the consignors. It means that the auctioneer enters the sale contract with the buyer and not the consignor. The sale contract has no direct effect on the consignor until the auctioneer cedes claims and transfers obligations from the sale contract on the consignor.[75] This arrangement has several benefits for the consignors and the auctioneers.

First, it allows the auctioneers to hide the fact that they are acting for the account of the consignors and the identity thereof.[76] This provides confidentiality and discretion for those consignors who prefer staying undisclosed for reasons of security (e.g. fear of robbery or kidnapping), tax evasion, escaping warranties owed to third parties, etc.[77]

Secondly, auctioneers prefer commission agency to direct representation, as the former allows them to hide the consignor's identity during and after the auction sale. Commission agency prevents the potential buyers from circumventing the auctioneer and negotiating directly with the seller, thereby exposing the auctioneer to risk of losing the buyer's premium and the fee.[78]

Thirdly, the commission agency allows the auctioneers to keep their procurement channels hidden from competing auctioneers, in particular regarding the most attractive artefacts.[79]

Since auctioneers–commission agents ultimately act for the economic benefit of their consignors, taking care about the latter's and not their own economic interest (*Geschäftsbesorgung*),[80] an auctioneer fits within the concept of a 'negotiations broker' – *Vermittler*.[81] Hence, the relationship between the consignor and the auctioneer–commission agent is a mixture of elements of custody over the consignor's economic interests (*Geschäftsbesorgungsvertrag)*[82] and a services-brokerage contract (*Maklerdienstvertrag*).[83]

Auctioneer acting as sole contractor Auctioneers may also sell the objects put up at auction in their own name and for their own account (*Eigenhändler)*.[84] An example of such an auction is the aforementioned proprietary auction, where the auctioneers sell their own goods (*Eigenwäre*).

A subcategory of sole contracting is a sole contracting in combination with a commission agency. Auctioneers who act as commission agents for the consignors can also act in their own capacity towards the bidders as sole contractors (*Kommission durch Selbsteintritt*).[85] In this case, the auctioneers first buy the lot from their consignors and later resell it to the bidders acting in their own name and for their own account.[86]

Under this concept, the auctioneers act for themselves and not for the benefit of the consignor.[87] However, this relationship is a special way of enforcement of the commission agency.[88] Hence, the law of commission agent applies alongside the sales law.[89] It means that the auctioneers have to follow the consignor's instructions. Furthermore, they have to achieve the best possible price for the consigned object,[90] part of which they will later have to transfer to the consignor. Lastly, if they sell the object, they are entitled to a commission fee[91] and compensation of the incurred expenses, which payment is governed by the law of commission agency.

Sales law is, on the other hand, relevant for the payment of the price, the implied warranties for the fitness and the transfer of risk.[92] Also, in case of conflict between the auctioneer's duties as a commission agent and as a buyer/reseller, the sales law would be given priority.[93]

Auctioneers as sole contractors can contract with themselves by virtue of law. However, there are certain limits. Firstly, they can act in this capacity unless this would harm the consignor's interests, or unless stated otherwise by the contract.[94] Secondly, sole contracting puts the auctioneers in a conflicting position. They might have to choose between their interest to pay the lowest possible price to the consignor and the consignor's interest to receive the best possible price for the object. In order to protect the consignors against the auctioneers' undue influence on the buying price, the auctioneers can act in their own capacity only if the consigned lots have an objective, official stock exchange or market price.[95]

Therefore, the price the auctioneers will have to pay to the consignors following the auction sale must be calculated in line with the market or stock price,[96]

implying that the minimum part of the hammer price transmitted to the consignor shall not be less than the market price. Furthermore, the imposition of the market price implies that the auctioneers can act as sole contractors only concerning generic goods (commodities) and not unique objects, such as art and antiquities.[97] The latter do not have a market price but rather a situational (*Gelegenheitpreis*) or one-off price (*Einzelpreis*).[98] That is not to say that the parties cannot agree otherwise, having in mind the defaultness of the obligations law.[99]

Ambiguities concerning representation The French law on representation distinguishes direct representation (*mandat*) from indirect representation (*commission*).[100] However, as stated earlier, the Commercial Code says expressly that the auctioneers are direct representatives of the owners or their representatives (*mandataires*).[101] Therefore, the French auctioneers should be treated as agents of the consignor rather than commission agents (*commissionnaires*).

The situation in German and Swiss law is less straightforward. The auctioneers can act as agents or commission agents. In general, if conditions of sale are not clear on the type of representation, the court should seek for the true intention of the parties at the time when they entered the consignment contract, rather than the literal wording of the contract. The true intention of the parties depends on the factual circumstances of the case.[102] The correspondence between the parties exchanged during the preparations for the auction could be helpful in identifying their true intention.

Ambiguities regarding the type of representation could be also solved with the help of the presumption of commission agency.

Under German law, if the intention to act in the name of another person is not clearly discernible (e.g. from the sale conditions or from the auctioneer's statements), it cannot be assumed that there was no intention on the side of the agents to act in their own name.[103] Therefore, in case of doubt, it should be assumed that the intention of the auctioneers was to act in their own name, i.e. as commission agents.[104]

Similar presumption exists under Swiss law. If the auctioneers did not disclose that they were acting as agents, the consignors would become the parties to the sale contract only if the buyers ought to know, considering the circumstances of the agency relationship, with whom they entered the contract or if they felt indifferent about the identity of the sellers.[105] However, if the auctioneers did not disclose the agency relationship and the buyers either did not have to know that they entered the contracts with the consignors or did feel it important who the sellers were (and thought they were the auctioneers), the auctioneers shall 'cede the rights or transfer the obligations' onto the consignor.[106] It follows that in the case of undisclosed and unidentifiable agencies, the auctioneers presumably act as commission agents rather than agents.

Giving priority to the commission agency in auction matters fits with the principle of fairness and established habits in the auction business.[107] The buyers usually know only the identity of the auctioneer with whom they communicate and whom they treat as their counterpart.[108] Furthermore, the commission agency is a

frequent type of representation at auctions in the two countries, especially at art and antiquities auctions, to which parties are already accustomed.

RIGHTS AND DUTIES OF THE AUCTIONEER

The rights, duties and liabilities of the auctioneer – and the corresponding duties, rights and liabilities of the consignor – depend on the conditions of the auction sale, which are part of the consignment agreement. Besides, the auctioneer's legal position as an intermediary should be evaluated in light of the applicable auction rules and the general law of mandate, brokerage and representation,[109] to the extent not already covered by the consignment terms. This section will, however, discuss only the fundamental, general rights and duties of the auctioneer and the corresponding duties and rights of the consignor, respectively. Other, more specific rights and duties of the parties will be analysed elsewhere in this book, where appropriate, considering the type of the legal relationship discussed.

Fiduciary duties of the auctioneer In the broadest sense, an auctioneer is a fiduciary of the consignor, namely, a person of her or his trust.[110] The fiduciary position covers several duties.

PERSONAL ENGAGEMENT IN CARRYING OUT THE MANDATE The auctioneer shall personally carry out the mandate received from the consignor (*delegatus non potest delegare*).[111] However, the auctioneers do not have to execute each mandate literally by themselves. They frequently hire paid clerks to help them with the auction. Moreover, in the case of auction houses, this is necessary; otherwise, the legal person could not operate.

The employed clerks are not, however, submandatees or subagents of the auctioneers. They act as their assistants in the execution of the mandate (*Erfüllungsgehilfe*, *Hilfsperson, salarié*).[112] For instance, an employee in charge for the auction session (*Leitende*, *préposé aux enchère*; *directeur des enchères*) conducts the auction on behalf of the auctioneer.[113] Also, internal experts providing expertise of the good are employees carrying out individual tasks on behalf of the auctioneer.[114] The auctioneer, however, is liable for their work.[115]

AVOIDANCE OF CONFLICT OF INTEREST The auctioneers shall avoid conflicts between their private interests and the consignors' interests.[116] Therefore, under German and French law, the auctioneers cannot bid for or buy the objects they are selling.[117] In Swiss law, such a prohibition arises from the rule on the sound process of auction.[118] If it were not for this prohibition, the auctioneers or persons close to them could try to purchase the object at the cheapest possible price rather than selling it at the highest possible price.[119] They would also be in the position to use confidential information received from the consignor for their own benefit.

ADHERENCE TO THE CONSIGNOR'S INSTRUCTIONS The auctioneers shall follow the consignor's instructions.[120] Otherwise, they will be liable for damages (if any)

while the consignor may be relieved of the contract.[121] However, the auctioneers may depart from the instructions if it can be assumed that the consignors would approve this if they knew for the circumstances of the case (e.g. suspicion of a bidding cartel; inauthenticity of the object) and if the auctioneers could not get prior approval from the consignors.[122]

RECEIPT OF THE PRICE The auctioneers shall provide the consignor relevant information about the status of the object and the sale result, prepare reports and turn in the sale price, if authorised to receive it in the first place.[123] On the other hand, if the object remains unsold, they shall return the object to the consignor.[124]

The auctioneers' right to collect the price depends on whether they acted as agents or as commission agents.

As agents, the auctioneers do not assume any rights under the sale contract.[125] They neither have a claim to the payment of the price or authorisation to receive it, unless authorised by the consignor (*Inkassoermächtigung*)[126] or by virtue of law.[127] If authorised to receive the price, they shall receive it and thereupon hand it over it to the consignor, less commission and expenses.[128] Otherwise, they shall pay the consignor the interests calculated from the day they used the money.[129]

If the auctioneers act as commission agents, they have an original payment claim against the buyer. However, since the consignors are ultimate beneficiaries of the auction sale, the auctioneers should, in theory, cede their claims against the purchasers to the consignors, including the claims for payment.[130]

However, cession of a claim from the auctioneer to the consignor implies that the auctioneer should disclose the consignor's identity to the buyer. This is, nonetheless, against the rationale underlying the use of commission agency at auction. Therefore, in reality, no cessation will take place. Frequently, the consignor and the auctioneer agree that the latter will keep the payment claim and continue to act as representative for the consignor concerning the price receipt.[131] Such a departure from the rules on cessation of rights is possible, since these rules are default. In this case, the auctioneers have not only a right but also a duty to receive money. Otherwise, there would be no other way for the consignors to get the money, as they have no direct claim against the buyer.[132]

The auctioneers shall keep separate accounts for each transaction, make notes, collect documents and receipts.[133] French auctioneers, moreover, shall keep a separate custodian, escrow account (*compte destiné à recevoir les fonds*) with a credit institution with a purpose to deposit the funds received for the benefit of the consignor and make payment therefrom as soon as the object is dispatched to the buyer.[134]

Unless there was an agreement or custom to the contrary, the auctioneer shall not sell the object on credit and transfer the object before the price was fully paid.[135] However, the legal implications of breach thereof differ in German and Swiss law on one hand, and French law on the other hand.

Under German and Swiss law, the auctioneers will assume personal liability for payment of the price in case the buyer fails to pay the price for the lot received.[136] On the other hand, in French law, the auctioneers are merely responsible to secure

the payment of the price and to receive it for the consignors. They are not liable for the payment of the price in case of the buyer's default. Hence, if they have delivered the object before the receipt of the price, they shall not be liable for the payment. The consignor can then rescind the contract in order to recover the object.[137]

Rights BROKERAGE FEE The right to brokerage fee (*Maklerlohn*, *Courtage, salaire*) is the basic economic right of the auctioneer. The auctioneers may charge it if the sale was concluded.[138] The commission is usually defined in the consignment contract as a percentage of the sale price. Lacking that, the auctioneer is entitled to a customary commission.[139]

However, the auctioneers who acted as commission agents would be entitled to receive a commission only if the conclusion of the sale contract was also followed by the execution thereof, i.e. by payment of the price (*Ausführungsprovision*).[140] Otherwise, they would not be entitled to receive a commission. They could, instead, claim a fee for the mere delivery of the object on the market (*Auslieferungsprovision*). However, this is again possible only if the contract was at least concluded with the buyer and payment of such a provision is usual in the place where the auction took place.[141] This approach confirms that a commission fee is in one way or another dependent on (at least) the formation of the contract between the auctioneer and the best bidder, thereby indicating strong presence of the brokerage element in the consignment agreement.

The legal systems concerned are also familiar with the *quantum meruit* fee. In case the consignor withdrew (fully or partially) the auction mandate[142] or the object remained unsold[143] or the fulfilment of the sale contract failed due to reasons beyond the auctioneer's sphere of influence (e.g. unforeseeable custom export or import ban with respect to the lot) or due to reasons on the part of the consignor, the auctioneers can claim a fee for efforts they made to sell the object[144]

DAMAGES The auctioneers are entitled to seek damages they suffered as a result of the enforcement of mandate if damages are the consequence of the consignor's fault (e.g. detrimental instructions, nondisclosure of information relevant for the sale).[145] Moreover, in that case they can seek damages corresponding to the amount of due commission.[146] For instance, the consignor authorised another person to sell the lot, precluding the auctioneer – who acts as an exclusive agent for the consignor – from selling the lot and earning the commission. Due to the breach of exclusivity of the mandate, the auctioneers in such cases can claim commission in a percentage of the sale price or, hypothetically, even a higher sale price, if they can prove that the higher price would be obtained if they sold the object.[147]

ADVANCES The auctioneer is also entitled to receive an advance of and recovery of necessary costs for the enforcement of the mandate.[148] This covers expenditures incurred in the regular performance of business activity related to the concrete auction (e.g. liability insurance premium,[149] warehouse costs,[150] transport costs,[151] illustration of the catalogue,[152] reparation costs,[153] estimation costs[154]).

Anglo-American law

AGENCY

Under Anglo-American law, the consignment agreement is formed as soon as the auctioneer accepts the consignor's mandate, i.e. the instructions and authority to sell.[155] Like the auctioneers operating under the continental laws concerned, the Anglo-American auctioneers have a mandate to carry out the auction in order to bring the consignor into the contractual relationship with the buyer.[156] However, they are not obliged to succeed with the auction sale.

Once the sales contract is concluded, the consignment agreement and the one-off authority to sell will terminate by virtue of law (*functus officio*).[157] Parties, however, may agree to the otherwise. The principal can authorise the auctioneer to cancel or amend the sales contract, arrange post-sale terms of the transfer of ownership, etc.[158] If the auction sale was unsuccessful, the consignment agreement will also terminate by virtue of law, since the auctioneer fulfilled a duty to carry out the sale.

The auctioneer cannot sell the object via private-treaty sale unless he reserved a right to do so,[159] or to sell to a bidder with a lower bid.[160] The unsold object shall be passed in, i.e. returned to the consignor. Otherwise, the seller could bring an action for conversion[161] or *assumpsit* for unjust enrichment.[162] However, parties can agree to the otherwise, and the principal can authorise the auctioneer, e.g. to arrange a post-auction private-treaty sale.[163]

The consignment contract is governed by the law of agency.[164] The Anglo-American agency law is based on the 'single-agency' doctrine. The doctrine does not differentiate between direct representation (agency proper) and indirect representation (commission agency). Therefore, the Anglo-American auctioneers appear as direct representatives of the consignor – however, not as commercial agents, since they lack permanent authority to sell.[165]

The agency may appear in three forms.

Firstly, an auctioneer can act as the consignor's disclosed agent. In this capacity, the auctioneer discloses details of the existence and the identity of the consignor. E.g. the auctioneer has announced the sale of Lady Grey's country estate. In such a case, the auctioneer sells the estate in the name and for the account of the consignor, meaning that the auctioneer is not a party to the sale.[166]

Secondly, the auctioneer can be an undisclosed agent. In this capacity, the auctioneer refuses to disclose the fact that there is somebody else standing behind the auctioneer (the doctrine of undisclosed principal). The reason for this secrecy may be tax or security reasons or the auctioneer's intention to prevent the potential buyer from negotiating the sale directly with the consignor and, thereby, circumventing the auctioneer.

Like in the case of commission agency of the continental law, the auctioneers acting for undisclosed consignors act as if they were the owners of the objects. They sell the objects in their own name, but for the account of the undisclosed consignor.[167] Hence, they directly enter a legally binding agreement with the buyer and assume liability thereof.[168] However, there is one important difference

between the continental commission agent and the Anglo-American undisclosed agent.

Once the Anglo-American auctioneer enters a sale contract with the buyer, a latent contractual relationship will simultaneously arise between the undisclosed consignor and the buyer, despite the fact that the latter does not even know that the former exists, let alone her or his identity.[169] This legal construction will allow the consignor to directly intervene into the sales contract and seek the fulfilment of the contract directly from the buyer as a typical seller.[170] If the consignor discloses herself or himself, rights and duties arising from the sale contract will automatically pass onto the consignor.[171] This lack of privity of the undisclosed agency results from the fact that the Anglo-American concept of undisclosed agency is a mere variant of the standard concept of agency proper rather than some special type of indirect agency.[172]

Thus, the consignor can enforce the contract directly against the buyer, while the buyer may choose to enforce the contract either against the consignor[173] or the auctioneer. The latter remains bound by the contract.[174] The liability of the consignor and the auctioneer is alternative rather than joint and several liability.[175] Once the buyer sues one of them, the buyer is precluded from enforcing the contract against the other.

Likewise, the auctioneers may disclose the fact that they are acting for another person but hide the latter's identity (the doctrine of unnamed principal). For instance, the auctioneer puts up artworks from a 'private collection of a gentleman' or ship models from 'a private collection of an admiral'. The situation is governed by the same rules as the ones for the undisclosed agency.[176]

RIGHTS AND DUTIES OF THE AUCTIONEER

The authority of the auctioneer The scope of authority given to the auctioneers by the consignors determines their rights, duties and liabilities.[177]

In terms of the form, the authority to sell can be explicit (written or oral) or implicit.[178] In the second case, the auctioneer has the authority to bind the principal, which, however, arises from the circumstances of the case, existing practice or trade customs. Such authority is tacitly recognised (implied) by the law.[179] E.g. the authority could be granted by delivery of the object in a manner and to the place that indicates the consignor's wish to authorise the auctioneer to sell.[180]Alternatively, the consignor could ratify the sale contract concluded by the unauthorised auctioneer and, thereby, grant the auctioneer a 'constructive' authority.[181]

In terms of the scope of the authority, the law differentiates between the real and apparent authority.

'Real authority' covers powers that the consignor has actually given to the auctioneer in certain form. The powers are usually expressly written in the mandate and the conditions of sale.[182] However, they can also come in the form of an implicit authority. Implicit authority usually covers powers which are either

supplementary to the express powers or reasonably required for the execution of the express authority.[183]

An auctioneer is often vested with a usual or customary authority. This is a subcategory of implied authority.[184] Usual authority covers all powers which may regularly be attributed to the auctioneer.[185] Since they act as general agents of the consignors,[186] the auctioneers can take any factual or legal action which auctioneers usually take in order to sell the object.[187] For instance, auctioneers usually put up objects with a reserve price, receive payment and calculate the resale royalty fee.

Any internal restrictions to usual authority should be disclosed to the bidders. Otherwise, the consignor will be bound by the actions taken by the auctioneer which contravene the internal restriction but lie within the customary scope of the auctioneer's 'apparent' or 'ostensible' authority.[188]

Fiduciary duty The auctioneer is the consignor's fiduciary. Broadly speaking, this requires acting with loyalty,[189] in line with the consignor's instructions,[190] in good faith and with respect to the consignor's economic interests.[191] Fiduciary duties may be concretised as follows.

PERSONAL ENGAGEMENT OF THE AUCTIONEER Authority given to the auctioneer is personal, precluding the auctioneer to transfer it to another person without the consignor's consent (*vicarius non habet vicarium*).[192] In case of breach thereof, the consignor is relieved from actions taken by the unauthorised subagent.[193]

Nonetheless, an auctioneer does not have to carry out the auction alone. Consignors usually choose the auction house to sell their object. The relationship between the consignor and the auctioneer is the first-level agency relationship.[194] The auction house entrusts the actual sale to its staff and/or external associates. This is the second-level agency (or subagency) relationship.[195] This is considered lawful since the consignor has implicitly authorised the auction house to entrust the sale to the subcontractors.[196] The auctioneers, however, remain fully liable for the subcontractors' actions as their own.[197]

RECEIPT OF THE PRICE The auctioneer shall keep the financial accounts of the sale and notify the consignor on the auction result.[198] Otherwise, the consignor can sue the auctioneer either by bringing an action of *assumpsit* for breach of an implicit promise to file reports or by bringing a general action of account.[199] The information received during the agency shall be kept confidential and shared exclusively with the consignor.[200]

Position of the Anglo-American auctioneer-agent is equivalent to the position of the continental auctioneer-agent in terms of the price receipt. Since auctioneers are agents rather than parties to the contract, they shall not collect the price,[201] sell on credit, receive a collateral[202] or give a sale guarantee[203] unless expressly authorised[204] to do so. If they are, however, authorised to collect the payment, they must immediately inform the consignor of the price receipt, calculate their brokerage

fee and other charges and transfer the net amount to the consignor.[205] Otherwise, the consignor could bring an action of *assumpsit* for unjust enrichment,[206] plus interests,[207] or bring a general action of account.

Rights BROKERAGE FEE Like the continental auctioneer, the Anglo-American auctioneer is entitled to a brokerage fee if the sale contract was concluded.[208] The commission is usually fixed in the consignment contract as a percentage of the highest bid.[209] Lacking that, the auctioneer is entitled to a reasonable[210] or customary[211] commission.

The auctioneer can also claim commission in case the seller sold the object directly to the buyer by private-treaty sale, if the success thereof can be attributed to the auctioneer's efforts during the auction (doctrine of effective cause).[212] For instance, after the unsuccessful auction, the consignor has managed to sell the object as a result of the auctioneer's past convincing selling tactics to one of the leading bidders for a price which approximates the one reached at auction.

INDEMNITIES If the consignor unjustifiably prevented the auctioneer from earning the brokerage fee, the auctioneer can seek indemnity as a compensation for the loss of a reasonably expected commission.[213] However, right to this type of indemnity is possible if expressly envisaged by the consignment contract, or it could have been inferred therefrom.[214] For instance, there is an implied contractual term that the consignor shall not prevent the auctioneer from earning the fee by breaking the validly concluded sales contract.[215]

Likewise, the auctioneer has the right to compensation for the loss of fee in case the object itself has been withdrawn from the auction (*withdrawal charge*). This is possible if the auctioneer either consented to the consignor's proposal for withdrawal or the auctioneer had to withdraw the object for reasons such as dubious authenticity or title.[216] Otherwise, the unilateral and unjustifiable withdrawal of the lot by the consignor would be treated as the case of unjustifiably preventing the auctioneer from earning the brokerage fee and would entitle the auctioneer to indemnity for loss of commission.

Furthermore, the auctioneer can recover necessary expenses such as insurance, valuation, marketing, preparation of the auction catalogue, advertisement, unless those costs are already covered by the fee.[217] However, the auctioneer can only recover costs incurred as a result of representation (*ex causa mandati*).

The auctioneer also can ask the consignor to restitute the money that the auctioneer paid to the buyer in case the latter sued the auctioneer for a defect in title the auctioneer did not know of.[218]

The Anglo-American law has recognised the need to compensate the auctioneers for efforts they have made during the auction that unfortunately resulted in default (or nonperformance of the sale contract), leaving the auctioneer short of the fee. The auctioneers can seek compensation for their services thrown away during the auction (*quantum meruit*).[219] The doctrine of *quantum meruit* is grounded on the idea that the one who benefits from another person's services shall not get unjustifiably enriched, i.e. spared of paying consideration.[220] However, this right exists

unless there already is a contractual term on a fixed charge for past services[221] and on the condition that the sale default is attributable to the consignor (e.g. nondelivery of the lot, sham bidding, insisting on a high reserve price).[222]

The loss of commission due to the consignor's default may be also subsumed under the aforementioned indemnity for loss of the reasonable expected commission. In this sense, indemnity and *quantum meruit* are two types of actions applicable to the same set of facts[223] or alternative actions.[224] However, the amount of *quantum meruit* will be calculated differently from the indemnity.

If the auctioneers sue on the ground of *quantum meruit*, they ask the consignor to pay them the amount equivalent to 'how much they deserve', i.e. the compensation of incurred expenses and fee for the actually performed services (actual damage). On the other hand, if they sue on the ground of indemnity for the loss of expected commission, they claim the amount they would earn but for the breach of the consignment contract (loss of foreseeable profit).

Relationship between the auctioneer and the bidders

Continental law

The function of the auction announcement is twofold. Firstly, it is a public call for bids (*invitatio ad offerendum*). This will be discussed in more detail below. Secondly, the auction announcement is the auctioneer's invitation to potential bidders to register for the bidding, i.e. to enter into a separate contract with the auctioneer, which is the basis for their participation in the auction.

By registering for the auction or mere appearance in the saleroom, bidders express their willingness to participate in the bidding.[225] They place an offer to the auctioneer to enter into a legally binding agreement with the auctioneer for carrying out the auction bidding.[226] On the other hand, the allotment of the registration numbers, entry on the bidders' list or any similar gesture indicates the auctioneer's acceptance of the bidders' offer to participate in the bidding.[227] The exchange of the bidder's offer and the auctioneer's acceptance during the registration phase will result in the formation of a legally binding auction contract[228] between the auctioneer and each bidder (*Versteigerungsvertrag*).[229] This contract lasts until the auctioneer concludes the auction sale by knocking down the object to one of the bidders, or when the auction terminates without a knock-down.[230]

The auctioneer's primary concern under this contract is to carry out the auction[231] in a way that will provide each bidder with an equal chance to buy the object (*Erwerbschance*).[232] The auctioneer, however, does not guarantee that any bidder will buy the object.[233] In fact, any contractual provision to the contrary would be void since the auctioneer cannot guarantee the same result to all bidders. Therefore, the auction contract cannot be qualified as a work contract.[234]

The auction contract is not a precontract to the sale contract either (*pactum de contrahendo*).[235] This would imply the existence of the auctioneer's obligation to form the sale contract with some of the bidders, which, as will be seen in detail below, does not exist.

From an organisational point of view, the auctioneer must carry out the auction and bring potential buyers into (indirect) contact with the consignor. If it were not for the auctioneer, the best bidder would not have a chance to buy the object, since the object is not circulating in the primary market. In this regard, the auctioneer is a single access point, a gateway to the supply side of the market. In exchange for the auctioneer's service, the winning bidder owes the auctioneer the buyer's premium (*Aufgeld; Mäklerlohn; commission-acheteur*).[236] This is usually a percentage of the sale price.[237] Therefore, the auctioneer acts as an active sales broker (*Vermittlungsmäkler*) – however, this time for the account of the bidders.[238]

This makes the auction contract a sort of a brokerage contract (*Mäklervertrag)*.[239] However, unlike standard brokerage contract, it binds the auctioneer to work on the conclusion of the contract. Furthermore, it leaves no chance for the best bidder to finally decide whether to enter into the sale contract or not. The final offer represents a binding offer to buy, and the formation of contract lies in the hands of the auctioneer.[240] Also, at the time of concluding the auction contract, the auctioneer already found a person willing to enter a contract with the bidder. It means that the 'intermediation' service was being provided before the auction contract was entered into.[241]

Therefore, the brokerage element is mixed with the elements of the contract for the management of the bidder's economic affairs, which is performed through provision of auctioneering services (*Geschäftsbesorgungsvertrag mit Dienstvertragscharakter)*.[242] To conclude, the auction contract is a specific *Vermittlungsmaklerdienstvertrag*.

Unlike the German and the Swiss doctrines, which at least partly accept the idea of the auction contract, the French doctrine does not mention it. Firstly, the relationship between the auctioneer and the bidders is confined to the legal relationship between the auctioneer and the best bidder (*l'adjudicataire*). Secondly, this relationship is considered as an extracontractual relationship. It is argued that the breach thereof leads to the auctioneer's extracontractual liability (*responsabilité délictuelle*).[243] Hence, it seems that the French doctrine does not recognise the existence of a contractual relationship between the auctioneer and all the bidders. Such a view seems to have grounds in the provisions on the auction sale. Those provisions point out that the auctioneers act as mandatees of the consignors or their representatives,[244] leaving the impression that the auctioneer cannot act as the mandatee or broker for anyone else.

However, the fact that the French Commercial Code speaks about the auctioneer as an agent of the seller should not be interpreted as precluding the possibility for the auctioneer to act as the broker (*courtier*) or even the agent (*mandataire*) of the bidder.

Firstly, the general rules on combating the agent's conflict of interest and the special rules on combating the auctioneer's conflict of interest do not preclude the auctioneer from providing any service to the bidders. Those rules ban the agent and the auctioneer, respectively, only from buying directly or indirectly the object consigned for sale for their own account.[245] The auction rules also allow the agent to act for the third party's account as agent if the consignor approved this,[246] e.g.

by accepting the conditions of sale, which envisage absentee bidding. Therefore, bidding and buying for someone else's account, in this case, for the absentee bidder's account, with the approval of the consignor is allowed. If so, the mere brokering for the bidders should be allowed all the more.

Secondly, the French auctioneer – as any other auctioneer – in principle charges the buyer's premium (*commission acheteur*, *frais de vente*) following the knock-down, suggesting that there apparently was a brokerage legal relationship which gave rise to such payment.[247]

It follows from the foregoing considerations that the concept of auction contract (*contrat d'enchère*) – as a combination of brokerage and services contract – also exists under the French law.

The auction contract should be distinguished from a legal relationship based on a written absentee bid, i.e. mandate to bid (*Bietauftrag; mandate de soumission des offres*).[248] Whereas the auction contract is a basic legal relationship between the auctioneer and the bidders, a contract for the execution of a written absentee bid is an accessory legal relationship between the auctioneer and one or several absentee bidders who decided to bid from a distance.[249]

The execution of a written bid is usually gratuitous.[250] However, the auctioneer could charge the absentee bidder a fee for the mere execution of the absentee bid irrespective of the result thereof. If so, this would be a contract for custody of the absentee bidder's affairs through providing the bidding service (*Geschäftsbesorgungsvertrag mit Dienstvertragscharakter)*.[251]

The auctioneer can also charge an extra commission fee in case the sale contract is concluded as a result of the bid the auctioneer placed in lieu of the absentee bidder. Such an arrangement would make the relationship between the auctioneer and the bidder a combination of services and brokerage contract (*Maklerdienstvertrag*).[252]

In French law, the mandate to bid for someone else's account as an agent (*mandataire*), as already stated, is allowed. This mandate is gratuitous unless otherwise agreed.[253] In case the provision of bidding service is for a fee, the contract between the auctioneer and the absentee bidder would correspond to a services contract (*contrat de service*) or a combination of services and brokerage contract in case of additional fee charged for placing a successful bid (*contrat de service de courtage négociateure*).

It has been argued that paying the buyer's premium precludes the special commission payable to the auctioneer for placing a successful absentee bid, as both charges compensate the auctioneer for the same result.[254] However, the buyer's premium should be distinguished from the special commission for placing a successful absentee bid.

The buyer's premium is a basic fee which serves to remunerate the auctioneers for enabling the buyers to use their infrastructure in order to buy the desired object which could not have been bought elsewhere. The buyer's premium is chargeable to every successful bidder, irrespective of whether she or he bids from 'the floor' or from a distance. On the other hand, charges payable to the auctioneer in the case of successful absentee bidding should remunerate the auctioneer for efforts

they have invested into execution of the absentee bid beyond the auctioneer's normal tasks.

Thus, the payment of the buyer's premium does not preclude the auctioneer from charging an additional fee in case the absentee bid was successful; otherwise, there would be no difference between the basic auction contract and the contract for the execution of a written bid.

In case of a written absentee bid, the auctioneer acts as an agent[255] or indirect representative for the buyer.[256] At the same, the auctioneer acts as an agent or indirect representative for the consignor, as explained earlier. This may result in four different scenarios.

Firstly, suppose that the auctioneer acted both as an agent for the consignor and the agent for the absentee buyer. In this case, the consignor and the absentee buyer entered directly into the sale contract. Secondly, suppose the auctioneer acted as an indirect representative for the consignor and agent for the absentee buyer. In this case, the auctioneer was formally the seller and the agent for the absentee buyer in the same contract. Thirdly, suppose an auctioneer appeared as an agent for the consignor and indirect representative of the absentee buyer. In this case, the auctioneer bought the object from the consignor but did so for the account of the absentee buyer.[257] Lastly, suppose an auctioneer acted as both an indirect representative of the consignor and the absentee buyer. In that case, the auctioneers formally entered the sale contract with themselves.[258]

Those four situations are problematic for at least two reasons.

Alongside the usual fiduciary duty to take care of the economic interests of the consignor, i.e. selling the object at the highest possible price, the auctioneer is now actively involved in taking care of the economic interests of the absentee bidders, i.e. getting the object at the cheapest price. Hence, the auctioneer acts as a fiduciary of both sides (*Treuhandfunktion*) whose interests are confronted.[259] However, the publicity of the bidding guarantees that the auctioneer will stay neutral.[260]

Furthermore, the double-representation situations result in the auctioneers contracting with themselves (*Insichgeschäft; Selbstkontrahierung*). They enter into the same agreement for the account of absent parties, sometimes even in their own name. Although self-contracting is in principle forbidden,[261] it will be allowed regarding auction if the consignor and the bidders authorised the auctioneer (expressly or tacitly) to act in this capacity.[262]

Carrying absentee bids for absentee buyers is a standard practice nowadays. The seller knows or at least should know of this,[263] especially because this possibility is usually expressly mentioned in the conditions of sale. By accepting the conditions of sale, the consignor has also consented to absentee bidding, tacitly discharging the auctioneer from prohibition of self-dealing.[264] Furthermore, the possibility for an auctioneer to receive absentee bids is beneficial for the consignor as well, since it allows the auctioneer to broaden the circle of potential bidders and raise demand.[265]

On the other hand, auctioneers act as agents or indirect representatives of the sellers. This is a well-established practice each bidder knows or at least should know of.[266] Hence, with a submission of the absentee bid, they implicitly discharge the auctioneer from the prohibition of self-contracting.[267]

Thereby, the absentee bidding practice should be treated as an exemption from the principle of forbidden self-contracting.[268] Nevertheless, the double-representation capacity of the auctioneer should be clearly mentioned in the sale conditions to avoid possible suspicion of undisclosed conflict of interest.[269]

Self-contracting in cases of double-commission agency under Swiss and German laws raises questions whether the auction resulted in the sale or not.[270] At the moment of the knock-down, the auctioneers simultaneously sell the lot in their own name for the account of consignor A (the seller) and buy the same lot in their own name for the account of consignor B (the buyer).[271] Hence, the seller and the buyer have become fused in the person of the auctioneer, which usually results in the absence of the sale contract.

However, this kind of contractual scheme is treated as an auction sale as a result of the concept of 'fictitious sole contractor' (*fiktive Selbsteintritt*).[272] This concept simulates that there were two sale contracts: it takes as if at the moment of the knock-down the sale consignor sold the object to the auctioneer and that the auctioneer at the same moment resold it to the buyer.[273] This legal fiction is, thus, a clearing (*Verrechnung*) of the two mandates.

Anglo-American law

The existence of a special contractual relationship between an auctioneer and the bidding public, which arises from the conditions of sale governing the conduct of auction, has also been recognised in the Anglo-American law and practice.[274] As any other contract, it has the three basic elements: offer, acceptance and consideration.

The auctioneer and the bidder enter into the auction contract as soon as the auctioneer accepts the bidder's offer to participate in the auction. For instance, the auctioneer can accept the bidder's offer by accepting the registration form,[275] by allotment of the number or a bidding paddle.[276]

Acceptance of the offer by the auctioneer implies two promises. First, the auctioneer promises that every bidder will have an equal chance to compete with other co-bidders. Secondly, that the auctioneer will conduct the auction according to the published terms and conditions.[277] The auctioneers would violate these promises if they disregarded the offer placed by the highest bidder, e.g. by giving priority to a lower bid, or to a bidder who offered a higher price, if the second-highest bidder was prevented from further bidding.[278] In particular, the auctioneers would violate given promises if they secretly placed fictitious bids on behalf of the consignors or knowingly allowed another person to place such bids.[279]

As a consideration for the auctioneer's promises, the bidders tacitly promise to compete with each other in order to push the price upwards, or at least to refrain from price-depressing tactics.[280] Thereby, they enable the auctioneer to earn a (higher) commission fee.[281]

Apart from the promise to bid or abstain from collusion, bidders have also promised to pay the buyer's premium if they end up being the successful bidder.[282] In this sense, the auction contract shows elements of a brokerage contract rather than agency relationship, since the auctioneer does not act as the buyer's *alter ego*.

Besides the basic auction contract, the Anglo-American auction houses accept the absentee bids[283] and, thereby, act as the bidders' agents. Since the consignor aims to obtain the highest possible price and the absentee bidder aims to pay the lowest possible price, the auctioneer – acting as an agent for both sides – should inform the consignor about possible double representation and seek the consignor's permission to avoid the objection of breach of fiduciary duty. Like in the case of continental auction houses, the permission can be granted (and usually is) tacitly, that is, by acceptance of the conditions of sale for sellers, providing for a possibility that the auctioneer may also represent the absentee buyers.[284]

The relationships between the bidders

Imagine a sailing racing competition where yachtsmen compete against each other to win the trophy. Their main task is to defeat each other. However, they cannot do it at any cost. There are certain rules of sailing established by the yachtsmen themselves, i.e. by their sports association. These self-regulating rules reflect standards of behaviour which have been widely acceptable in the sports community concerned. By voluntary participation in the competition, the racers accept these rules as the 'rules of the game' and are expected to obey them. These rules dictate what a competitor shall and shall not do to make the race safe and fair for other competitors. The rules impose different penalties for the breach thereof. In this sense, the rules establish a system of rights, duties and liabilities between the competitors.

Auction bidding under any legal system works pretty much the same as a sports competition.[285] As soon as the bidders get into the bidding, they form a network of mutual legal relationships – plurilateral 'taking-part' agreements.[286] These agreements are governed by the conditions of sale for the bidders ('self-regulating rules') and the general principles of the law of obligations -– e.g. the principle of prohibition of chicanery, the prohibition to cause damages to other competitors and duty to act in good faith. It means that a bidder should refrain from pushing other competitors out of the bidding,[287] e.g. by applying aggressive bidding tactics, spreading malwares designed to harm the network or the competitors' devices, spreading false information about the goods to prevent further bidding and depress the final price,[288] entering into agreements with other bidders merely to inflate the price and make things harder for the another bidder (*pacta de licitando*),[289] threatening and disrupting the bidding.[290]

Contract of sale

Continental law

THEORY OF INVITATION

The exact moment of the formation of a sale contract at auction has been a long-time dispute in German doctrine.

According to the theory of offer (*Offerttheorie*), which was advocated by Kindervater, an auctioneer's call for bidding is a binding offer (*Proposition eines Vertrages*; *bindende Offerte*) addressed to an unlimited number of people (*ad incertam personam*).[291] On the other hand, the bid (*Gebot*) is an acceptance (*Annahme*) of the auctioneer's offer.[292] Hence, it was argued, the sale contract is formed when the bidder accepts the auctioneer's offer, and not by knock-down.[293] However, the contract is concluded under a deferring condition, that is, in the absence of a better offer.[294] In such circumstances, a knock-down has only declaratory meaning.[295] It merely confirms the absence of a better offer within a predetermined time span.

An opposite view was taken by von Jhering. According to his theory of invitation (*Auskündigungstheorie*), an auctioneer's call for bids is a mere invitation to place an offer. It is a nonbinding statement of will.[296] The bidder's offer, on the other hand, is a binding offer.[297] According to this theory, the last offer does not affect the second-to-last offer. The auctioneer is allowed to choose among them. A knock-down is a decisive act of formation of the contract, i.e. an acceptance of the best offer.[298]

Unger gave a compromise view. He thought that the nature of the auctioneer's will depends on whether the auctioneer opened the bidding with a starting price or not (*Ausrufpreis; prix de départ*).[299] If there was a starting price, a call for bids was a binding offer addressed to an undetermined group of people.[300] According to this view, the starting price should be treated as a definite price (*pretium certum*). Hence, the contract is formed when the bidder offers the starting price rather than with the knock-down, unless there is an even higher offer.[301] On the other hand, if there was no starting price, the invitation to place an offer was a mere invitation to bid.[302] In this case, the auctioneer can stop the bidding at any time and has a right to choose between the offers. The contract will be formed with the knock-down.[303]

Likewise, Regelsberger and Bahn argued that the auctioneer's statement should be interpreted on a case-by-case basis, depending on the circumstances of the case. However, in doubt, priority should be given to the theory of invitation.[304]

Modern German rules have accepted the theory of invitation.[305] This solution incorporated the customary auction practice at the time when BGB was enacted.[306]

Apart from Germany, the theory of invitation has been widely accepted in other continental jurisdictions concerned in this book. The sale contract is concluded once the auctioneer knocks down the object to the best bidder by the fall of the hammer (*Zuschlag, adjudication*).[307] It follows that the knock-down is an acceptance of the last bid (*Anahmerklärung*; *Akzept, l'acceptation*),[308] resulting in a formation of the sale contract (*Vertragsperfektion*).[309]

The bids (*Gebots, enchères*) are mere proposals to enter into a contract at a specified price (*Vertragsantrag*). That is, they are binding offers to buy (*Offerte; Angebot; l'offre*).[310]

Promotional materials announcing the auction and the call for bids are, on the other hand, only invitations to potential bidders to bid under the published terms (*Aufforderung zur Stellung von Angeboten*, *Ausgebot*; *invitatio ad offerendum;*

appel d'offres).[311] They are not firm and precise offers to sell, as they do not indicate fixed prices.[312]

The estimated price from the catalogue (if any) serves only to indicate the potential market value of the consigned object, which, however, will be finally decided by the bidders. The starting price (*Ausrufpreis*) announced at the beginning of the auction does not imply that the auctioneer wished to commit to sell to the bidder who bid that price.[313] Such a price – which is usually set very low, around half the object's estimated value[314] – serves only to 'warm up' the bidding (*calor licitantis*) and eliminate insignificant offers.[315]

Since a call for bids is a mere invitation to treat, the auctioneer does not have to accept any bid, including the highest bid, unless agreed otherwise in the sales conditions.[316] The auctioneers accept or decline bids according to their margin of discretion.[317] They do not have to give explanations.[318]

Likewise, they can withdraw the object from the auction and stop the bidding.[319] This would not be against their obligation to provide equal chances to bidders to buy the object. The auctioneer shall not be precluded from deciding whether to knock down or not the object, depending on the circumstances of the case (e.g. suspicion of a bidding cartel).

Therefore, the best bidder has no enforceable claim against the auctioneer for the conclusion of the contract.[320] However, the auctioneer must be careful with decisions to decline the best bids. The rejection of the best bid does not revive the previous bid.[321]

Conditions of sale can, however, depart from the default auction rules and attribute different meaning to the parties' expressions of will.[322] E.g. sale conditions can provide that the auctioneer's call for bids shall be a binding (general) offer, the bid shall be an acceptance under a deferring condition of absence of a better offer and knock-down shall be an external sign that the contract has been formed.[323] Such a solution would limit the auctioneer's margin to decide whether to sell the object or not. However, it would increase the best bidders' chances to buy the objects, as they would be given enforceable claims against the auctioneer to knock them the object.[324] Hence, such a solution could be a good marketing tool for encouraging more bidders to attend the auction.

THE EXISTENCE OF AN OFFER

The call for bids and the bids at an auction are subject to the general rules of the law of obligations on the expressions of will.[325] A binding offer or bid shall contain a proposal to enter into a contract showing a clear, unconditional and unreserved intention to buy the object in case of a knock-down.[326]

Apart from being genuine, a valid bid shall be serious, i.e. it shall not be placed as a result of a joke, mental reservation, speculation, fictitious bidding, etc.[327] If the bidders are clearly making fun of the bidding (e.g. use unusual or funny bid signals, sounds or faces; draw cartoons over the bidding paddle; place satirical comments or ridiculously high bids for a low-end object) or this can be inferred from the circumstances (e.g. from their tone, mimics), or if the bid is meaningless

(e.g. they explicitly announce that they have no money to pay the object but nevertheless compete for fun), the placed bid is invalid.[328]

However, if the lack of seriousness of the bid cannot be clearly detected by the auctioneer or other bidders, the bid will remain an objective fact for third parties they can reasonably rely on, whereas the bidder's subjective, secret intentions become irrelevant. Any subsequent claim that the intention was not serious shall be declined, since this contravenes the principle of prohibition of inconsistent behaviour (*venire contra factum proprium*).

THE EFFECT OF THE LAST (IN)VALID BID FOR PREVIOUS BIDS

In principle, legal implications of an offer can arise only if the offer is valid.[329] However, the nature of bid calling requires a different approach regarding the validity of auction bids. The auction is a fast, repetitive bidding mechanism meant to lead to immediate extinguishment of prior bids with every higher bid.[330] It does not allow the auctioneer to check the validity of every single bid just to see whether it extinguished the previous bid or not.

Therefore, in relation to previous bids, each consecutive bid should be treated as a fact. Questions about the validity of the higher bid (e.g. legal capacity of the bidder, defects in her or his will) or the solvency of the highest bidder should be exceptionally left aside for the purposes of consecutive bidding.[331] The risk of invalidity of the last bid or insolvency of the last bid should remain with the auctioneer,[332] unless it was obvious that the last bid was invalid or the auctioneer immediately rejected the apparently invalid last bid.[333]

Any other approach would jeopardise the legal certainty. Waiting for the validity check would make all previous bids pending.[334] The previous bidders would not know whether they are still bound by their bids,[335] since it may happen that some of the subsequent bids have been declared invalid, thereby leaving the previous bids unaffected. Bidders would then have to wait until the end of the auction to see whether the auctioneer has found some of the subsequent bids invalid,[336] only to realise that some of their bids happens to be the last valid bid, putting the last valid bidder at risk of paying the bid price.[337]

Nonetheless, the relationship between the highest and second-highest bid can be arranged otherwise due to default character of auction laws.[338] Conditions of the sale could give the auctioneer the discretionary powers with regard to the knock-down.[339] For instance, it could be arranged that the auctioneer can choose between two bids,[340] defer the lapse of the previous bid until the auctioneer checks on the validity and suitability of the subsequent bid,[341] provide the right for the auctioneer to withhold the knock-down until the auctioneer and/or the consignor checks the validity and suitability of the last bid (*Zuschlagvorbehalt*),[342] reject the higher bid as a result of the bidder's default to deliver a solvency certificate,[343] reject the best bid if the best bidder declines to subject the bid to validity check,[344] hold the second-best bidder liable until the highest bidder fulfils her or his bid.[345] In these cases, the second-best bid is still pending and susceptible for acceptance.

HIGHER BID

Placing a 'higher bid' (*Űbergebot*, *meilleure enchère*) requires that every subsequent bidder offers a price which is higher than the previous offer, unless there is a different clause in the sale conditions.[346] Other features of the subsequent bid, such as creditworthiness of the bidder, are not relevant for the bid itself.[347]

A higher bid has to comply with parameters stipulated in the sale conditions.[348] For instance, the new bidder has to place a bid according to the rules on bid increments (*Bieterschritte*, *Steigerungsätze*, *incréments d'enchères*).[349] If the bidder placed a higher bid but not high enough considering the next bid increment, such bid would not be considered a 'higher bid'. The previous bid would continue to bind the last bidder, leaving the auctioneer with an option to call for new bids or knock down the object to the last bidder.[350]

It could happen that two or more bidders bid the same price. In such cases, there is no single higher bid. All bids are pending. General rules on parties' autonomy say that negotiations are not binding for either party; moreover, the offerees may accept or decline any offer they have received during negotiations, including the last one. Hence, if the auctioneers could decline all bids received for the account of the consignor, the more they could decline all but one bid, i.e. pick one bid according to their discretion,[351] unless stipulated otherwise in the sale conditions.[352]

DURATION OF A BID

The bid is placed with the auctioneer if the auctioneer received a written bid or if the auctioneer knew the existence of an oral or tacitly placed bid (e.g. by customary signals).[353]

In principle, a bid addressed to the offeree who is present at the place of negotiations ceases to exist if the offeree does not accept it immediately after receipt.[354] At auction, however, a bid lapses if a higher bid (*Űbergebot*) is made or if the auction is closed without the knock-down.[355] Hence, the bidder remains bound by the bid from the moment when the auctioneer received it[356] until the knock-down, unless meanwhile someone else has placed a higher bid.[357]

This shows, firstly, that the current best bid is pending longer than it is generally prescribed for bids exchanged among people physically present during negotiations. In this aspect, the auction rules depart from the general rules on the termination of binding effect of bids.[358] Secondly, it shows that duration of the binding effect of one's offer at auction is not dependent only on the action of the auctioneer-offeree but also on the action of a third party, i.e. the competing bidder.

NOTIFICATION OF THE KNOCK-DOWN

In principle, an offeror shall receive the notification of the acceptance of her or his bid.[359] Usually, the auctioneer announces the knock-down during the auction in the presence of the bidders.[360] However, the best bidder shall remain bound by the best bid, and the acceptance thereof shall be valid even if the best bidder

temporarily or permanently left the saleroom before the announcement of the knock-down.[361] The sale contract will be formed, although the best bidder has not received a notification of the knock-down.[362]

It shall be considered that the best bidder tacitly waived the right to receive the notification of the acceptance.[363] Such an exemption is justified to keep the integrity of the auction, maintain confidence thereof and prevent abuse of rights. Otherwise, a fickle best bidder could – after regretting the decision to buy the object – renounce the last bid, leave the auction room and thereby disrupt the bidding procedure.[364] This would cause damages to the consignor, as not only would the consignor not earn the price but would also be left with an object of ill repute due to the sale fiasco.

Leaving the auction room before the knock-down would also cause damages to the auctioneers, as they would be denied the buyer's premium and the commission while suffering reputational damage. Furthermore, they would be under pressure to accept any eligible bid the sooner the better to escape potential auction fiasco with some subsequent bid.[365]

The same situation would cause damage to other co-bidders, as they invested certain time and money to attend the auction while losing an opportunity to bid at another auction.

AUCTION SALE WITH A 'RETENTION OF HIGHER OFFER' CLAUSE (IN DIEM ADDICTIO)

If an auction ends with a knock-down, in principle it means that the sale contract has been formed finally and unconditionally, with all legal consequences for the parties.[366] However, the default character of the auction rules allows the seller to frame the auction so as to make the knock-down only a conditional acceptance. E.g. earlier experience has shown that the auctioneer should leave a certain period following the knock-down to see whether someone else will place an even higher bid and reserve a right to either stay with the earlier highest bidder, reopen the auction or accept the newly placed bid and conclude the contract with the third party (*in diem addictio*). Auction sale featuring a 'retention of higher offer' serves to protect the seller's and the auctioneer's interest to sell the object if someone places an even higher bid.[367] It renders the auction sale subject to the auctioneer's margin of discretion and is a sort of a quasiconditional auction sale.[368]

The *in diem addictio* effect could be also achieved under the general law of obligations, by introducing the unilateral right to rescind the auction sale in the terms and conditions,[369] a deferring or resolute condition[370] or a consensual termination agreement between the auctioneer and the best bidder.

Irrespective of the way this clause is introduced into the sale conditions, it allows the auctioneer to revoke the knock-down and rescind the auction sale contract with the best bidder. Given that such contractual terms are atypical for auction sale, their incorporation into the applicable sale conditions shall be valid only if the bidders were conspicuously warned thereof.[371]

LEGAL IMPLICATIONS OF THE AUCTION SALE

Once concluded, the contract of sale by auction does not differ from any other sale contract. The auctioneer has to deliver the object to the buyer and transfer the ownership while the buyer has to collect the object and pay the price. Therefore, the auction sale is, in principle, subject to the general sales law.[372] However, sale conditions and some special auction provisions depart sometimes from the general sales regime. This is particularly the case with the transfer of risk and conveyance of property.

TRANSFER OF RISKS AND CONVEYANCE OF PROPERTY

Under German law, the transfer of risk for accidental loss of and damage to the object in principle coincides with the transfer of possession in the object.[373] However, conditions of sale can depart therefrom. They can stipulate that the transfer of risk will coincide with the knock-down, even though the buyer has not yet taken possession of the consigned object. This solution is possible due to the default character of the BGB, para 446.[374]

On the other hand, in Swiss and French laws, the transfer of risk coincides with the formation of contract, in this case with the knock-down, unless agreed otherwise in the sale conditions.[375]

Continental legal solutions also differ regarding the transfer of property.

Under French law, transfer of property in movables and immovables coincides with the formation of the sale contract (*solo consensu*).[376] In terms of auction, it means that the knock-down leads to an immediate transfer of ownership in the object.[377]

The same situation exists in Switzerland concerning auction sales of movables. As an exemption to the general rule on the transfer of ownership in movables, which is contingent on the transfer of the possession in the object (*traditio*),[378] transfer of ownership at Swiss auctions coincides with the knock-down on the basis of a special auction provision.[379] In this aspect, Swiss law differs from other Germanic systems. Likewise, the cession of a monetary claim via auction sale does not require a post-sale written statement, unless a certain form of assignment is needed to transfer the respective right (e.g. endorsement).[380] The rationale underlying such an exemption lies in the circumstance that the public character of the auction sale replaces the public character of the traditional transfer of possession in object.[381]

Unlike under French and Swiss laws, knock-down under German law results merely in the formation of a contract. The transfer of property is governed by the general rules which require physical transfer (*traditio*) of the object into possession of the buyer.[382]

However, the rules on transfer of property in movables are default rules under all three legal systems concerned. Hence, the parties may depart therefrom.[383] For instance, it is possible (and often practised) to contract for a right of the seller to retain the ownership in the good until the full price is paid (‘retention of title’

clause, *reservatio dominii*, *Romalpa clause*).[384] In that case, the transfer of ownership will be postponed even after the object has been knocked down and perhaps even transferred to the buyer.

THE RESERVE PRICE

Reserve price *(Einliefererlimit; Reservepreise; prix de réserve)* is the price below which the seller is not willing to sell the lot. It serves to protect the seller from getting lower prices than expected (e.g. due to a low demand).[385] Hence, the auctioneer shall not sell the object if the best bid does not meet (at least) the reserve price.[386]

If the auctioneer sells the lot below the reserve, the sale contract is nonetheless valid. However, the auctioneer shall compensate the consignor the difference between the lower price at which the lot was sold and the higher reserve price,[387] unless selling below reserve was necessary to remove damage from the consignor and the situation prevented the auctioneer from seeking new instructions from the consignor.[388]

The auctioneer shall disclose the existence of the reserve price. However, the amount thereof remains confined to the consignment relationship.[389] Keeping the reserve price secret allows the auctioneer to prevent collusive bidders from depressing the price after the object reaches the reserve.[390] Besides, keeping the reserve price secret should prevent the potential bidders from being discouraged in case the reserve price is set above their personal valuations. This may result in the lack of interest and the sale fiasco.[391] Lastly, keeping the reserve price secret also helps the auctioneer to encourage aggressive bidding and drive the price above the minimum.[392]

Auctioneers regularly publish the low and high auction estimates for each lot in the auction catalogue (e.g. from 25,000 to 50,000 pounds). This low estimate should not be set lower than the secret reserve price.[393] Otherwise, the bidders would get a false impression that they could buy the object – in case nobody else bids higher – already at the low estimate, despite the fact that the minimum price has been set (much) higher.[394] Therefore, by reading on the published lower estimate, the bidders can indirectly draw conclusions that the secret reserve price should be placed either below or maximum at the level of the low estimate (e.g. 80 per cent of the low estimate).[395]

It can happen that the auctioneer did not disclose the existence of the reserve price, let alone the amount thereof. The auctioneer's silence on the existence of the reserve price may be interpreted among the bidders as if the seller is willing to accept any price, i.e. as if the sale was declared as being without reserve. If the auctioneer rejected to knock down the object at any given price lower than the secret reserve price, the auctioneer would break the pre-existing relationship of trust in the auction negotiations. However, auction negotiations are not binding. The auctioneer does not guarantee under the auction contract that any bidder will actually get the object. Moreover, the highest bidder has no enforceable claim against the auctioneer for knocking down the lot. What the auctioneer, however,

does guarantee that each bidder will have an equal chance to become the buyer. Therefore, the legal implications of the breach of trust and good faith during the auction negotiations come down to the auctioneer's extracontractual liability for damages for depriving the best bidder a chance to become the buyer without a valid cause (*culpa in contrahendo*).[396]

The calculation of the damages requires a reconstruction of the hypothetical course of auction in the absence of the breach of trust. It can be argued that the best bidder would most certainly get the lot were there no secret reserve price and accompanied rejection of the knock-down. Hence, despite not being able to force the auctioneer to sell the lot, the last bidder could seek damages in the amount of the actual costs suffered by attending the auction concerned, plus statutory interests.

Anglo-American law

English and US laws are familiar with two concepts of sale: sale with and without reserve. Under English law, the auctioneer may notify that the sale is subject to a reserve (upset) price.[397] It follows that, unless the auctioneer expressly and clearly stated that the auction is with reserve price before the bidding started, the auction would, by default, be considered as being without reserve.[398] On the other hand, UCC assumes that an auction sale is with reserve price, unless the auctioneer expressly stated to the otherwise[399] when the object was put up for sale. Therefore, it has introduced the sale with reserve price as a default auction model,[400] leaving to the seller and the auctioneer to decide whether they want to organise the sale without reserve price.[401]

SALE WITH RESERVE

At sale with reserve, the auctioneer can knock down the object only to the bidder whose bid meets (or exceeds) the minimum reserve price agreed with the consignor.[402] Selling the object at a price below the reserve price is valid; however, the auctioneer will be liable for the breach of the mandate and shall pay the difference between the hammer price and the reserve price.[403]

The existence of the reserve price should be disclosed to the bidders. However, the amount thereof remains confidential[404] to the auctioneer and the consignor. The amount will eventually become known to the bidders, i.e. at the moment when the auctioneer signals to the audience that the reserve price has been bid (e.g. 'the item is now in the room').[405] Furthermore, since the price estimation is a regular part of the auction catalogue[406] and the reserve price shall not exceed the low estimate,[407] bidders can conclude about the tentative amount of the reserve price.

The sale with reserve is grounded on the theory of invitation. The call for bids is a mere invitation to treat.[408] No bid – including the one that meets the reserve price – constitutes an enforceable claim against the auctioneer to accept the bid and sell the object.[409] Therefore, in case none of the bids reached the reserve price, the auctioneer could withdraw the object (*passing in*).[410] If authorised to do so, the

auctioneer could reauction it later or sell it via private-treaty sale.[411] If, however, someone bids the reserve price, the auctioneer can knock down the object to the best bidder, decide to continue bidding to obtain a higher price[412] or decline the knock-down.

The auctioneer and the bidders are also allowed to revoke their actions at any time before completion of the sale.[413] The revocability of actions is permitted under the theory of consideration. According to the theory, nobody is bound by her/his promise unless she/he received a promise from the opposite party. Until the knock-down, the seller has not received a binding promise from the bidder to pay the price, nor has the bidder received a binding promise from the seller to transfer him the object.[414]

Therefore, until the announcement of the knock-down, the auctioneer could withdraw the object from the sale at any time, including at the moment when the bidding has reached or even exceeded the reserve price.[415] On the other hand, the best bidder could revoke the bid before the knock-down by notifying the auctioneer thereof.[416] However, the second-best does not revive.

Furthermore, under UCC, until the announcement of the completion of the sale, the auctioneer can reopen bidding where a new bid is made while the hammer is falling in acceptance of a prior bid.[417] What matters is that the new bid has arrived during the fall of the hammer (or in other customary manner). Therefore, even if the auctioneer has already accidentally knocked down the object to the second-best bidder, the auctioneer will still be allowed to reopen the bidding.[418]

Reopening of the bidding, however, does not mean that the auctioneer has implicitly accepted the new bid whatsoever. Instead, the recognition of the new bid is only a ground for continuation of the bidding. Alternatively, the auctioneer can disregard the new bid and declare the object sold under the bid on which the hammer was falling. This solution shows – as an exception to the general rule on extinguishing effect of subsequent bids – that the new bid does not automatically extinguish the prior bid but rather makes it conditional on the final decision of the auctioneer.

The fall of the hammer or other customary manner of adjudication (e.g. hitting the table, shouting specific words like 'Going, going, gone') constitutes an acceptance[419] of the bid (i.e. an offer).[420] It marks the completion of the auction sale with all its binding legal implications.[421]

The foregoing considerations show that the Anglo-American law of auction sale with reserve and the continental law of auction sale are both grounded on the theory of invitation. A notable difference, however, lies in the revocability of the best bid until the announcement of the knock-down, which is a peculiarity arising from the Anglo-American theory of consideration.

CONDITIONAL AUCTION

A subtype of sale with reserve known in the US auction practice is the so-called 'conditional' or 'no sale condition' auction. The seller reserves the right to accept or reject the last bid which the auctioneer has already accepted and, thereby,

finalised the auction sale.[422] The reason for reserving this right might lie in the seller's wish to retain a margin to accept a higher, post-auction offer, which makes this legal institute similar to the continental institute *in diem addictio*.

Despite not being explicitly mentioned in the UCC, the US federal courts tolerate such auctions. It is argued they result from the parties' contractual autonomy and fit within the UCC provision allowing the auctioneer to conclude the auction in any 'customary way'. However, the auctioneer and the consignor must be careful in their moves, since the rejection of the last bid does not revive the second-to-last bid.[423]

SALE WITHOUT RESERVE (ABSOLUTE AUCTION SALE)

The announcement that the sale is without reserve (or equivalent presumption thereof) implies that the seller is willing to accept any price for the object. It follows that the auctioneer shall knock down the object to any highest bidder, even if the last offer does not meet the seller's expectations.[424]

Looking from the auctioneer's perspective, the call for bids at this auction is not an invitation to treat. It includes the auctioneer's general firm offer to all potential buyers to sell the object at whatever price.[425] At the same time, it includes a separate, unilateral collateral promise to sell the object to whoever bids the highest offer.[426] The concept of collateral promise complements the sale without reserve, since it precludes the auctioneer from playing tricks on the best bidder who relied on the auctioneer's publicly announced willingness to sell to whoever bids the highest price.[427]

After the call for bids, the auctioneer is precluded from withdrawing the promise to sell to the best bidder[428] or withdrawing the object[429] if the seller is not pleased with the price offered. Likewise, the auctioneer is precluded from secretly introducing a reserve price or conducting any other equivalent action, such as placing secret bids on behalf of the consignor ('chandelier bidding').[430]

Apart from that, the concept of collateral promise imposes an obligation on the consignor to abstain from withdrawing the auctioneer's authority to sell without reserve, since the consignor would have to compensate the auctioneer for any liability the latter would incur against the best bidder as a result of the withdrawal of the authority.[431]

Looking from the bidders' point of view, by placing a bid, the best bidder simultaneously (1) places an offer to enter a sale contract,[432] (2) conditionally accepts the auctioneer's general firm offer to sell[433] and (3) accepts the auctioneer's separate collateral promise to sell the object to any best bidder.[434] Consequently, placing the best bid immediately results in the formation of two conditional contracts.

First, a separate collateral contract between the auctioneer and the best bidder which binds the auctioneer to sell the object to the current best bidder at whatever price the latter offered under mutual contingent assent that no one else will bid more.[435] Secondly, it results in the formation of the contract for sale with the seller-consignor under mutual contingent assent that no other bidder bids more.[436]

If no one else bids more, the current collateral contract remains in force. This results in final and unconditional obligation of the auctioneer to sell the object to the best bidder, unless the best bidder withdraws the bid until the knock-down and thereby prevents the contract from remaining in force.

For all the foregoing reasons, it is clear that a sale declared to be without reserve price does not fit within the theory of invitation. Unlike sale with reserve, the sale without reserve is based on the theory of firm offer and legal construct of collateral contract. However, that is not to say that there is no knock-down to mark the completion of the sale. As in any auction sale, knock-down is inherent in this sale too. The sale is 'completed' by a knock-down.[437] Nonetheless, unlike in the case of the sale with reserve price, this knock-down is merely a declaratory confirmation of the sale completion, i.e. a contract formation, rather than a constitutive act of contract formation.

SALE WITHOUT RESTRICTIONS

Sale 'without reserve' and implications thereof should not be confused with a sale 'without restrictions'. A sale without reserve does not preclude the auctioneer to introduce restrictions to sale, including the one that refers to the eligibility of the best bid (e.g. proof of solvency, proof of deposit).[438] Furthermore, the 'without reserve' clause does not preclude the auctioneers to withdraw their collateral promises if they noticed a collusive behaviour among the competitors directed at depressing prices.[439] Besides, such clause does not preclude the auctioneer to reject the best bid which does not meet the minimum bid increments, an obviously invalid bid (e.g. by a person lacking legal capacity), a bid placed by an affiliated person (e.g. the auctioneer's employee) and an illegal bid (e.g. sham bid).[440]

TRANSFER OF RISKS AND CONVEYANCE OF PROPERTY

Under Anglo-American law, the conveyance of ownership in a movable from the seller to the buyer, in principle, coincides with the formation of the contract (*solo consensu*), i.e. with a knock-down, and not with the transfer of possession.[441] The same is true for transfer of risk for the damage or loss of the object.[442] Therefore, the passage of title shall not be affected by, for instance, sale term providing the buyer with an option to return the object by a certain deadline (*money-back guarantee*).[443] In this aspect, the Anglo-American system resembles the French-Swiss legal solutions. Sale conditions, however, may depart from the general solution and, e.g., introduce a retention of title clause.[444]

Legal relationships (Dutch auction)

The structure of legal relationships at a Dutch auction corresponds to the structure of legal relationships at an English auction. The consignor and the auctioneer enter a consignment agreement in which the auctioneer acts as representative of

the consignor. Besides, there is an auction contract between the auctioneer and the bidders,[445] the relationships between the bidders and the sale contract.

However, as a result of the descending character of Dutch auction, the legal nature of the parties' statements of will departs from the corresponding statements of will at English auction.

Unlike at English auctions, the price specified in the auctioneer's call for bids is not merely an initial price to start with. This is the price the consignor is hoping to receive from the buyer (*pretium certum*). Hence, the auctioneer's call for bids is not an invitation to treat. It already includes the seller's (or the auctioneer's, in case of a commission agency) binding offer to enter into a contract with whoever accepts the price specified therein.[446] If nobody bids the price, the next call for price is a retraction of the seller's previous offer and placement of a new one.

Whoever bids first, and as soon as she or he does so, has made an unconditional acceptance of the seller's offer,[447] resulting in an immediate conclusion of the contract.[448] Therefore, the knock-down is merely a declaratory act, a tangible confirmation of the fact that the contract has already been formed between the seller and the buyer.[449]

The auctioneer, however, does not have to continue reducing the price to the lowest possible levels in case nobody bids his current price. The auctioneer can stop auctioning the object at any point in time.[450] E.g. unless agreed otherwise with the consignor, the auctioneer could do it by rejecting the final bid or announcing that the auction is closed without a knock-down.[451] The auctioneer does not have to disclose this possibility to the bidders. This is implied in the general rules on contractual freedom.[452] The bidders cannot reasonably assume that the seller wishes to let go of the lot just because the auctioneer did not explicitly state otherwise and then claim they were misled if the auctioneer would decide to stop reducing the price. Otherwise, the auctioneer would be forced to make continuously reduced offers to bidders just to provide them with an opportunity to buy the object, even if the continuous reduction would result in absurdly low prices.

Interim conclusion

A typical auction under all legal systems concerned in this book consists of *at least four* basic categories of contractual relationships.

Firstly, there is a consignment agreement between the consignor (seller) and the auctioneer. Under this contract, the auctioneer promises the consignor to carry out the auction for the latter's account in order to sell the lot to the best bidder. On the other hand, the consignor promises to pay the auctioneer a fee for brokerage services. However, the auctioneer does not guarantee that the lot will be actually sold.

In the internal aspect of this relationship, the auctioneer acts as an atypical active sales broker. In the external aspect, the auctioneer acts as *ad hoc* legal representative for the consignor. Under German and Swiss laws, the auctioneer can act as direct representative (agent) or indirect representative (commission agent),

whereas under French and Anglo-American laws the auctioneer acts as agent for the seller.

Secondly, there is an auction contract between the auctioneer and each bidder. This contract regulates the participation of the bidder in the auction bidding. On the one hand, the auctioneer promises the bidder to carry out the auction so as to enable the latter to get a chance to buy the object in an open competition. The bidder, on the other hand, promises to refrain from anticompetitive bidding practises and pay the auctioneer the buyer's premium in case she or he wins the lot. However, the auctioneer does not guarantee that any bidder will actually buy the object.

Since the auctioneer provides the bidders with access to the seller, the auction contract is a combination of active brokerage and services contracts. In case the auctioneer bids for the account of the absentee bidder, the relationship between the auctioneer and the absentee bidder is complemented with an accessory contract for representation. Whereas under German, Swiss and French laws this legal relationship can be formed as an agency or commission agency, in the Anglo-American law it is an agency agreement.

Thirdly, there is a 'taking-part' agreement between the bidders themselves. By participating at auction, each bidder enters a network of plurilateral agreements with all other bidders. Under these agreements, each bidder promises other bidders to refrain from activities that might prevent the latter from freely competing in the auction (squeezing out from the bidding, closure of access to the auction, etc.).

Fourthly, there is a sale contract. All legal systems concerned in this book are familiar with the concepts of sale with reserve and sale without reserve. However, whereas under the continental systems the sale 'with' and 'without' reserve are just two emanations of the single concept of auction sale, sale with or without reserve in the Anglo-American law are two distinct concepts of auction sale with different legal implications for the seller, the auctioneer and the bidders.

Under the continental law, auction sale is grounded on the theory of invitation. Unless agreed otherwise, the call for bids is not a binding promise to sell but rather an invitation to treat, irrespective of whether the sale is announced as sale with or without reserve. On the other hand, each bid is a mere offer to buy while the knock-down is a constitutive act of acceptance of the best bid. Therefore, the best bidder has no enforceable claim against the auctioneer (seller) whatsoever to sell the lot. The auctioneer is free to decide whether to knock down the lot and form the contract or decline the best bid and withdraw the lot. Unjustified decline of the best bid, however, constitutes a breach of trust during the negotiations and could result in the auctioneer's obligation to pay precontractual damages (*culpa in contrahendo*).

On the other hand, in the Anglo-American law, the call for bids is a nonbinding invitation to bid only at sales with reserve, whereas at sales without reserve it represents a binding collateral promise that the lot will be sold to the best bidder. Once the best bidder places the bid, the sale contract is automatically formed, unless another bidder places a higher bid. Therefore, the auctioneers cannot

choose whether to pay damages or sell the lot to the last highest bidder; they are bound to sell the lot. Otherwise, they will become liable for breach of collateral contract. Therefore, the Anglo-American sale without reserve is grounded on the theory of firm offer and legal construct of enforceable collateral contract rather than on the theory of invitation.

It follows that the continental auction and the Anglo-American auction are conceptually close regarding the sale with reserve, whereas quite different regarding the sale declared to be without reserve. However, in both legal traditions, the Dutch auction is grounded on the theory of firm offer, irrespective of the existence of the reserve price. The call for bids at such an auction is a general offer to sell, whereas the first bid is the constitutive acceptance of the offer. The knock-down has merely a symbolic, declaratory meaning.

As a consequence of dichotomy between agency and commission agency, under German and Swiss laws, the sale contract can be formed either between the original seller (consignor) and the best bidder or between the auctioneer and the best bidder. Two implications arise therefrom.

Firstly, it is wrong to argue that there is always a contract between the original seller (the owner) and the end buyer. The sale contract between the original seller and the best bidder will arise only in case of direct representation. Therefore, instead of equating the contract between the seller and the buyer with the sale contract, the fourth legal relationship should be simply referred to as 'the sale contract' or 'the principal contract', irrespective of who might be the parties thereto.

Secondly, an argument that the structure of auction relationships encompasses a separate contractual relationship between the auctioneer and the buyer holds true only in case of a commission agency. If so, the relationship between the auctioneer and the buyer is not some additional legal relationship but rather the sale contract. It should not be confused either with basic auction contract or absentee bidding contract, which exists or can exist, respectively, between the auctioneer and each (interested) bidder.

On the other hand, under French and Anglo-American laws, the contract will be formed between the consignor and the best bidder. Under Anglo-American law, an additional contractual relationship between the auctioneer and the buyer exists only in case of an undisclosed (unnamed) consignor or if the sale was declared to be without reserve. However, these two cases should not be confused either with basic auction contract or absentee bidding contract.

Therefore, under continental and Anglo-American laws, the existence of the relationship between the auctioneer and the highest bidder is not a basic, necessary constituent of the typical auction but rather a potential legal relationship dependent on the legal status of the auctioneer.

The formation of the sale by auction results in the same legal effects as any other sale contract. In terms of obligations law, in all legal systems concerned the auctioneer shall transfer the lot and the ownership thereof to the buyer for the account of the consignor-seller while the buyer shall pay the price to the seller via the auctioneer. In terms of property law, in all jurisdictions concerned except for Germany, the principle is that the ownership in goods and the related risks

pass onto the buyer already with the knock-down (*solo consensu*), unless the seller retains the title until the buyer pays the price in full. In German law, on the other hand, the ownership in the goods and the risks pass onto the buyer a bit later, once the lot is handed over to the buyer (*traditio*), unless the seller retains the title until the buyer pays the price in full. The rationale behind the dominance of the principle of *solo consensu* lies in the publicity of the auction sale from the moment the lot is put at auction until the knock-down, which symbolically replaces the transfer of possession.

Notes

1 Lyndel Prott and Patrick J O'Keefe, *Law and the Cultural Heritage: Movement*, vol 3 (Butterworths 1989) 342; Christine Riefa, *Consumer Protection and Online Auction Platforms: Towards a Safer Legal Framework* (Routledge 2015) 36, referring to the case *Chelmsford Auctions Ltd v Poole* [1973] QB 542, and arguing that similar tripartite structure exists in EU countries.

2 James Brown and Marc Pawlowski, 'How Many Contracts in an Auction Sale' (2016) 25 Nottingham Law Journal 1, 3 <https://www4.ntu.ac.uk/nls/document_uploads/188672.pdf> accessed 5 February 2022.

3 Bernhard Kresse, *Die Versteigerung als Wettbewerbsverfahren* (Mohr Siebeck 2014) 29; Marc-André Renold,'Die Auktion' in Peter Mosimann, Marc-André Renold and Andrea FG Raschèr (eds), *Kultur, Kunst und Recht: Schweizerisches und Internationales Recht* (2 edn, Helbing Lichtenhahn Verlag 2020) 821–22.

4 Annette Schneider, *Auktionsrecht: Das Rechtsverhältnis zwischen Einlieferer, Versteigerer und Ersteigerer* (Nomos Verlag 1999) 6–7, 85; Anne Laure Bandle, *The Sale of Misattributed Artworks and Antiques at Auction* (Edward Elgar Publishing 2016) 107.

5 A typical auction, as the case may be, may include many other legal relationships. The most important ones will be covered in separate chapters of this book. These include auction guarantees (ch 5) and the agreements on the absentee bidding (ch 6). In case of auction of modern art, a typical auction includes another mandatory legal relationship: the relationship arising between the seller and the artist from the resale royalty right (ch 4).

6 Anton Pestalozzi, *Der Steigerungskauf: Kurzkommentar und Zitate zu Art. 229–236 OR* (Schulthess Polygraphischer Verlag 1997) 35. The term 'seller' will be used throughout this text in discussions related to the conclusion of the sale contract, while the term 'consignor' will be used with respect to the seller's relationship with the auctioneer.

7 Ibid; Joëlle Becker, *La Vente aux Enchères d'Objets d'art en Droit Privé Suisse: Représentation, Relations Contractuelles et Responsabilité* (Schulthess 2011) 25–26.

8 Ralph Cassady Jr, *Auctions and Auctioneering* (UCP 1980) 93; Alla Belakouzova, *Widerrufsrecht bei Internetauktionen in Europa? Eine vergleichende Analyse des deutschen, englischen, russischen und belarussischen Rechts unter Berücksichtigung der Rechtsentwicklung in der EU und der GUS* (Mohr Siebeck 2015) 199.

9 Pestalozzi (n 6) 35, 63.

10 Cassady (n 8) 93.

11 Ibid. E.g. the French term 'les opérateurs de ventes volontaires de meubles aux enchères publiques' expressly covers natural and legal persons. See 1807 Commercial Code (*Code de commerce*), Arts L321–2 and 321–4. For the sake of simplicity, and unless expressly stated otherwise, in this book the term 'auctioneer' will be used in the broader sense.

12 Belakouzova (n 8) 129.

13 Martin Blättler, *Versteigerungen über das Internet: Rechtsprobleme aus der Sicht der Schweiz* (Schulthess 2004) 11.
14 Ibid 65.
15 Pestalozzi (n 6) 75.
16 See ch 5.
17 Blättler (n 13) 11; Gerald Spindler, 'Vertragliche Haftung und Pflichten des Marktplatzbetreibers und der Marktteilnehmer' in Gerald Spindler and Andreas Wiebe (eds), *Internet-Auktionen und Elektronische Marktplätze* (2nd edn, Verlag Dr. Otto Schmidt 2005) 129; Belakouzova (n 8) 129.
18 Sophie Vigneron, *Étude Comparative des Ventes aux Enchères Publiques Mobilières: France et Angleterre* (L.G.D.J. 2006) 236.
19 Arg ex 1911 Amendment to the Swiss Civil Code (Fifth Pt: Obligations Law) (OR) (*Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches AS 27 317 (Fünfter Teil: Obligationenrecht*)), Art 229(2), suggesting that the seller and the auctioneer could be a single person.
20 1999 Regulation on Entrepreneurship (*Gewerbeordnung*) (GewO) (BGBl. I S. 202; 2021 BGBl. I S. 3504), para 34(b)(1) does not preclude property auctions, since professional auctioneering does not assume that the auctioneer must sell objects belonging to another person. The same Schneider (n 4) 27–28.
21 Code de commerce, Art L320–2(1).
22 Code de commerce, Art L321–5, II(1).
23 See more ch 5.
24 Code de commerce, Art L321–12(3).
25 Code de commerce, Art L321–5, II(1).
26 Pestalozzi (n 6) 35; Blättler (n 13) 65; Belakouzova (n 8) 19.
27 See e.g. Christie's, 'London Conditions of Sale: Buying at Christie's' (standard) (Christie's 2022) Pt B, Art 4(b) <www.christies.com/buying-services/buying-guide/conditions-of-sale> accessed 2 February 2022.
28 Becker (n 7) 172; see e.g. Christie's, 'London Conditions of Sale' Pt B, Art 4(a); Vasari, 'Conditions Generales de Vente' (Vasari 2021), La vente, para 5 < www. vasari-auction.com/vente/115649> accessed 2 February 2022.
29 According to Forbes, an NFT is a digital asset representing traditional objects like artwork, music, videos. They are traded online, usually with cryptocurrency, and they are usually built with the same code as cryptocurrencies. See more at <www.forbes.com/advisor/investing/nft-non-fungible-token/> accessed 9 February 2022.
30 Uniform Commercial Code (UCC 1951) s 2–328(1); Sale of Goods Act 1979 (SoGA 1979) s 57(1).
31 OR, Art 235(1).
32 Pestalozzi (n 6) 79.
33 2003 Regulation on Commercial Auctions (*Verordnung über gewerbsmäßige Versteigerungen* (VerstV) (BGBl. I S. 547 2017 I S. 626) para 1(2).
34 Code de commerce, Art L321–1(1).
35 Arg ex 1896 Civil Code (*Bürgerliches Gesetzbuch*) (BGB) (BGBl. I S. 42, 2909; 2003 I S. 738 2021 I S. 5252), para 156; arg ex OR, Arts 234(2), 235(1); Bundesfinanzhof (BFH), II 169/52 of 7 January 1953, JurionRS 1953, 10175, para 3; also Kresse (n 3) 166; Paul Tentler, *Der Juristiche Konstruktion der Versteigerung unter Berücksichtigung des §156 des Bürgerlichen Gesetzbuch für das Deutsche Reich* (Verlag von Struppe & Winckler 1898) 22–23; Hans Dechange, 'Die öffentliche Versteigerung im Bürgerlichen Gesetzbuch' (DPhil thesis, Hohe Rechtswissenschaftliche Fakultät der Universität Köln 1934) 18.
36 Schneider (n 4) 13; Helmut Marx and Heinrich Arens, *Der Auktionator: Kommentar zum Recht der gewerblichen Versteigerung* (2nd edn, Luchterhand 2004) 166.
37 Becker (n 7) 53.
38 Code de commerce, Arts L320–2(1), L321–5(1); Pestalozzi (n 6) 55; Schneider (n 4) 13; Becker (n 7) 56.

39 Schneider (n 4) 13.
40 VerstV, para 7; OR, Art 229(2) and (3); arg ex Code de commerce, Art L321–3(2); Pestalozzi (n 6) 63; Schneider (n 4) 14; Kresse (n 3) 32.
41 Becker (n 7) 130.
42 Schneider (n 4) 14–15; Kresse (n 3) 32; Becker (n 7) 63; Kathrin Heitbaum, *Zur Anwendbarkeit des §156 BGB sowie zur Inhaltskontrolle bei Privaten Online-Auktionen* (Peter Lang 2003) 31.
43 OR, arg ex Art 229(3), saying that the auctioneer is entitled but not obliged to sell the goods; arg ex Code de commerce, Art L320–2(1), suggesting that knocking-down the object is a purpose of the auction not an obligation. Also Becker (n 7) 57; Kresse (n 3) 31.
44 Schneider (n 4) 25; Becker (n 7) 54.
45 Schneider (n 4) 42.
46 Ibid 17.
47 VerstV, para 1(1) and (3); BGH, IVa ZR 31/80 of 25 September 1980, JurionRS 1980, 12703, 4; Schneider (n 4) 15; Becker (n 7) 68; Kresse (n 3) 32.
48 Schneider (n 4) 18; Pestalozzi (n 6) 52; Becker (n 7) 71; Kresse (n 3) 32.
49 Bernd Westphal, 'Handelsvertreterrecht in Deutschland' in Friedrich Graf von Westphalen (ed), *Handbuch des Handelsvertreterrechts in EU-Staaten und der Schweiz* (Verlag Dr. Otto Schmidt 1995) 160; Schneider (n 4) 18; Becker (n 7) 64.
50 Oberlandesgericht (OLG) Brandenburg, 12 U 198/07 of 25 September 2008, juris, para 18; OLG Saarland, 4 U 131/14 of 3 September 2015, NJW-RR 2016, 58, 10; Schneider (n 4) 18; Heitbaum (n 42) 32; Becker (n 7) 64.
51 Schneider (n 4) 19; Becker (n 7) 64.
52 Also Schneider (n 4) 23.
53 Ibid 19; Becker (n 7) 64.
54 BGH, III ZR 304/98 of 22 July 1999, NJW-RR 1999, 1499, 10; Spindler (n 17) 135; Becker (n 7) 139 Kresse (n 3) 66.
55 See 1897 Commercial Code (*Handelsgesetzbuch*)(HGB)(RGBl. I S. 219, 2021 BGBl. I S. 3436), para 93(1). Schneider (n 4) 18; Marx and Arens (n 36) 167; Andreas Wiebe, 'Vertragsschluss und Verbraucherschutz bei Internet-Auktionen und Anderen Elektronischen Marktplätzen' in Gerald Spindler and Andreas Wiebe (eds), *Internet-Auktionen und Elektronische Marktplätze* (2nd edn, Verlag Dr. Otto Schmidt 2005) 61; Kresse (n 3) 35.
56 OR, Art 412(1).
57 Code de commerce, Art L131–5.
58 VerstV, para 7; OR, Art 229(3); Code de commerce, Art L321–2; Becker (n 7) 69.
59 Schneider (n 4) 14; Vigneron (n 18) 219; Becker (n 7) 74–75.
60 Pestalozzi (n 6) 60; Schneider (n 4) 14; Vigneron (n 18) 219; Becker (n 7) 79; Kresse (n 3) 34. See Vasari, 'Conditions Generales de Vente' para 2; Koller, 'Auction Conditions Koller Zürich' (Koller, July 2018) Art 1 <www.kollerauktionen.ch/en/kaufen_verkaufen/auktionsbedingungen/> accessed 2 February 2022.
61 BGB, para 164(1); OR, Art 32(1); Code de commerce, Art 1154; Kammergericht (KG) Berlin, 8 U 310/03 of 17 May 2004, JurionRS 2004, 32123, para 7; Schneider (n 4) 85; Marx and Arens (n 36) 246; Becker (n 7) 80. See e.g. Koller, 'Auction Conditions Koller Zürich', Art 1.
62 BFH, V 208/57 U of 18 September 1958, BFHE 67, 475, para 6; Schneider (n 4) 18; Becker (n 7) 62–63.
63 Schneider (n 4) 34. In French law, the auctioneer's mandate is confined to two purposes – putting up the object for sale and knocking it down – implying that the consignment agreement ends with the knock-down or sale default. See Code de commerce, Art L320–2(1).
64 Also Schneider (n 4) 35; Marx and Arens (n 36) 434. French law explicitly regulates the possibility to prolong the consignment relationship. Under French law, the auctioneer is entitled to proceed with the private-treaty sale (*vente gré à gré*; *vendre à l'amiable*). Code de commerce, Art L321–9.

65 Schneider (n 4) 18.
66 Becker (n 7) 95.
67 Ibid 96.
68 Schneider (n 4) 32; Becker (n 7) 98, 101.
69 Becker (n 7) 109.
70 1804 Civil Code (*Code Civil*), Art 1158(1).
71 Code de commerce, Art L320–2(1) in conjunction with Art 1984(1).
72 Schneider (n 4) 31; e.g. Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung' (Dorotheum, March 2021) Art 1(1) <www.dorotheum.com/fileadmin/user_upload/Download/Agb/AGB_Versteigerung.pdf> accessed 2 February 2022.
73 Pestalozzi (n 6) 51; Heitbaum (n 42) 30; Becker (n 7) 310; Kresse (n 3) 36. E.g. Lempertz, 'Conditions of Sale' (Lempertz 2022) Art 1 <www.lempertz.com/en/conditions-of-sale.html> accessed 2 February 2022; Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 1(2). However, Becker mentions a tendency in Switzerland to introduce agency in a consignment relationship. Becker (n 7) 79, 116. See Koller, 'Auction Conditions Koller Zürich', Art 1.
74 Schneider (n 4) 25; Westphal (n 49) 164.
75 Schneider (n 4) 25; Marx and Arens (n 36) 246; Becker (n 7) 116.
76 Becker (n 7) 118–19.
77 Schneider (n 4) 32; Becker (n 7) 60; likewise Kresse (n 3) 38–39.
78 Schneider (n 4) 32.
79 Kresse (n 3) 39.
80 Schneider (n 4) 25.
81 Ibid 102.
82 Dechange (n 35) 23, 27; Schneider (n 4) 25; Kresse (n 3) 36.
83 Likewise Hans Wicher, *Der Versteigerer: Systematischer Kommentar zu den einschlägigen gewerberechtlichen Vorschriften* (Dr. Ernst Hauswedell & Co. 1986) 117.
84 Schneider (n 4) 26.
85 HGB, para 400(1); OR, Art 436.
86 Schneider (n 4) 26; Wiebe (n 55) 63–64; Kresse (n 3) 37. E.g. Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 15(5).
87 Marx and Arens (n 36) 167.
88 Arg ex HGB, para 400(2).
89 Also Schneider (n 4) 26.
90 Ibid 27.
91 Ibid.
92 Kresse (n 3) 37.
93 Schneider (n 4) 27; Wiebe (n 55) 64.
94 Becker (n 7) 175.
95 HGB, para 400(1); OR, Art 436.
96 Arg ex HGB, para 400(2).
97 Schneider (n 4) 26; Kresse (n 3) 37–38.
98 OLG Frankfurt am Main, 16 U 31/03 of 3 November 2003, NJW-RR 2004, 835, para 26; Kresse (n 3) 38.
99 Pestalozzi (n 6) 59; Schneider (n 4) 26; Becker (n 7) 175; Kresse (n 3) 38.
100 Code civil, Art 1154; Code de commerce, Art L132–1.
101 Arg ex Code de commerce, Art L321–5(1) in conjunction with Art 1984(1). Also Vigneron (n 18) 219.
102 BGB, para 133; OR, Art 18; also Becker (n 7) 40; Kresse (n 3) 38;
103 BGB, para 164(2); Schneider (n 4) 25.
104 Schneider (n 4) 30; Kresse (n 3) 39.
105 OR, Art 32(2).
106 OR, Art 32(3).
107 BGB, para 157, also Kresse (n 3) 38.
108 Schneider (n 4) 30; Kresse (n 3) 40.

109 Pestalozzi (n 6) 64.
110 Schneider (n 4) 119; Pestalozzi (n 6) 64; Becker (n 7) 125; 139–40.
111 BGB, para 613 in conjunction with para 675(1); OR, Art 398(3); Code de commerce, Art L321–5, I(2); Dechange (n 35) 38.
112 HGB, para 56; OR, Art 101(1); Code de commerce, Art L321–5, II(2).
113 Code de commerce, Art L321–5, II(2); Pestalozzi (n 6) 64; Becker (n 7) 27.
114 Becker (n 7) 146.
115 BGB, para 278; OR, Art 101(1); Code civil, Art 1994; Dechange (n 35) 39; Marx and Arens (n 36) 415.
116 Marx and Arens (n 36) 55; Vigneron (n 18) 233; Becker (n 7) 140.
117 GewO, para 34(b)(6)(1); Code civil, Art 1596; Code de commerce, Art L321–5, II(1). Marx and Arens (n 36) 5; Vigneron (n 18) 233.
118 OR, Art 230(1).
119 Vigneron (n 18) 233.
120 HGB, paras 384(1) and 385(2); BGB, para 675 in conjunction with para 665; OR, Art 397; Code civil, Art 1991(1); Schneider (n 4) 134; Becker (n 7) 141.
121 HGB, para 385(1); Code civil, Art 1156(1) in conjunction with Art 1991(1); likewise, OR, Art 397(2), however, the mandate shall be considered duly executed (and, hence, the sale contract validly concluded) if the auctioneers take the responsibility for the damage.
122 BGB, para 675 in conjunction with para 665; also Schneider (n 4) 41; OR, Art 397. Under Code de commerce, Art L321–5(2), the possibility to depart from the instructions should be allowed in light of the auctioneer's duty to take 'all appropriate measures to ensure for their customers the security of voluntary public auction sales'.
123 HGB, para 384(2); BGB, paras 666, 667; OR, Art 400(1); Code civil, Art 1993; Code de commerce, Art L321–14(1); Pestalozzi (n 6) 63; Schneider (n 4) 134; Vigneron (n 18) 245; Becker (n 7) 126.
124 Arg ex Code de commerce, Art L321–9(3); Pestalozzi (n 6) 63; Vigneron (n 18) 239; Becker (n 7) 140.
125 BGB, para 164; OR, Art 32(1); Code civil, Art 1154(1).
126 E.g. Koller, 'Auction Conditions Koller Zürich', Art 9.
127 The latter situation exists under French law, where the auctioneer is both entitled and bound to take care about the receipt of the payment for the benefit of the seller. Code de commerce, Arts L321–6 and L321–14.
128 OR, Art 400(1); Code de commerce, Art L321–14(4); Pestalozzi (n 6) 63; Schneider (n 4) 134; Becker (n 7) 154.
129 BGB, para 668 in conjunction with para 675(1); OR, Art 400(2); Code civil, Art 1996.
130 HGB, para 384(2); OR, paras 400(1), 401(1); Becker (n 7) 259–60.
131 Becker (n 7) 261. See e.g. Lempertz, 'Conditions of Sale', Art 10.
132 HGB, para 384(2) in conjunction with para 392(1); OR, Art 425(2) in conjunction with Art 400(1). Becker (n 7) 259.
133 VerstV, para 8(1); HGB, para 239.
134 The payment of those funds has to be insured or guaranteed by a credit/financial/insurance company against the risk of the auctioneer's default. Code de commerce, Art L321–6 in conjunction with R321–10.
135 HGB, para 393(1), (2); OR, Art 429(1), (2); Code de commerce, Art L321–14(2). Schneider (n 4) 56; Becker (n 7) 251; Vigneron (n 18) 193. However, a bank guarantee or check should be an acceptable substitute for effective payment. In this direction for French law expressly Code de commerce, Art L321–14(2); for Swiss law Pestalozzi (n 6) 184. See also Koller, 'Auction Conditions Koller Zürich', Art 7; Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 16(2); Lempertz, 'Conditions of Sale', Art 12.
136 HGB, para 393(3); OR Art 429(1); Schneider (n 4) 56.
137 Vigneron (n 18) 193.

138 BGB, para 652(1); implicitly HGB, para 99; OR, Art 413(1); Code civil, Art 1986 in conjunction with (implicitly) Art 1999(2); BGH, IVa ZR 31/80 of 25 September 1980, JurionRS 1980, 12703; Pestalozzi (n 6) 59, 62; Schneider (n 4) 17; Becker (n 7) 66; Kresse (n 3) 32; see e.g. Koller, 'Auction Conditions Koller Zürich', Art 2.5.
139 BGB, para 653(3); HGB, para 354; OR, Art 414; Pestalozzi (n 6) 63.
140 HGB, para 396(1); OR, Art 432(1); Schneider (n 4) 55; Becker (n 7) 68.
141 HGB, para 396(1); OR, Art 432(2); Schneider (n 4) 57.
142 VerstV, para 1(5); Marx and Arens (n 36) 171; Becker (n 7) 156–57. In French law, this situation should be covered by the general rule from Code civil, Art 1999(2), asking the consignor to pay the promised fee to a prudent auctioneer even if the contract has not been formed.
143 Arg ex Code civil, Art 1999(2); Pestalozzi (n 6) 62; Schneider (n 4) 55.
144 HGB, para 396(1); OR, Art 432(1); arg ex Code civil, Art 1999(2); Schneider (n 4) 55.
145 BGB, para 280(1); OR, 402(2); Code civil, Art 2000; Becker (n 7) 159–60.
146 Arg ex BGB, para 280(1); arg ex Code civil, Art 1999(2); likewise Schneider (n 4) 61.
147 Becker (n 7) 157.
148 BGB, paras 669 and 670 in conjunction with para 675(1); HGB, para 396(2) in conjunction with paras 670 and 675; HGB, para 403; OR, Arts 402(1) and 431; Code civil, Art 1999(1). Becker (n 7) 65.
149 Schneider (n 4) 44, 56; Becker (n 7) 48. Under French law, the auctioneer must contract for professional liability insurance. Code de commerce, Art L321–6(2).
150 In French law, the auctioneer is treated as a depositary of the consigned object from the moment of receipt of the object until the delivery to the buyer. The auctioneer shall receive an additional remuneration for deposit. Vigneron (n 18) 239–40.
151 HGB, para 396(2); OR, Arts 402(1), 431(1) and (2); Becker (n 7) 48, e.g. Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 23(2).
152 Schneider (n 4) 56; Becker (n 7) 48.
153 Schneider (n 4) 56.
154 Ibid.
155 GD Nokes, *An Outline of the Law Relating to Sales by Auction* (The Estates Gazette Ltd. 1925) 16.
156 Ibid 18; Cassady (n 8) 94.
157 Joseph Bateman, *A Practical Treatise on the Auctions; With Forms, Rules for Valuing Property, Useful Tables and Directions to Auctioneers* (6th edn, Melbourne and Sydney 1882) 28; Nokes (n 155) 22; Brian W Harvey and Franklin Meisel, *Auctions Law and Practice* (3rd edn, OUP 2006) 62.
158 Bateman (n 157) 28; Harvey and Meisel (n 157) 62–63.
159 Bateman (n 157) 27; Nokes (n 155) 103.
160 Nokes (n 155) 19.
161 Bateman (n 157) 232; Nokes (n 155) 117; Vigneron (n 18) 241.
162 Hugh G Beale, William D Bishop and Michael P Furmston, *Contract: Cases and Materials* (5th edn, OUP 2008) 482.
163 Vigneron (n 18) 225.
164 UCC, s 2–328(3); Sotheby's, Inc. v. Stone, 388 F. Supp. 3d 265, 272 (S.D.N.Y. 2019), para 273; Bateman (n 157) 20; Nokes (n 155) 15; Harvey and Meisel (n 157) 35; Christie's, 'London Conditions of Sale', Preamble, para 2.
165 Also Harvey and Meisel (n 157) 72.
166 HLE Verhagen, *Agency in Private International Law: The Hague Convention on the Law Applicable to Agency* (Martinus Nijhoff's Publishers 1995) 33; Roderick Munday, *Agency: Law and Principles* (OUP 2010), 59, 301; Thomas Krebs, 'Some Thoughts on Undisclosed Agency' in Louise Gullifer and Stefan Vogenauer (eds),

English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale, London (Hart Publishing 2014) 170.
167 Krebs (n 166) 171.
168 Verhagen (n 166) 38.
169 IGH Karsten, *Explanatory Report on the Convention on the Law Applicable to Agency* (13th session, Vol 4, 1976) 383 <https://assets.hcch.net/upload/expl27.pdf> accessed 10 February 2022; Krebs (n 166) 162.
170 Karsten Report (n 169) 384.
171 Ibid.
172 Verhagen (n 166) 38; Beale, Bishop and Furmston (n 162) 1194; Krebs (n 166) 161.
173 Krebs (n 166) 162.
174 Nokes (n 155) 24; Krebs (n 166) 171.
175 Verhagen (n 166) 48; Krebs (n 166) 171.
176 Bateman (n 157) 26; Nokes (n 155) 25; Verhagen (n 166) 34.
177 Harvey and Meisel (n 157) 36.
178 Bateman (n 157) 20–21; Nokes (n 155) 17; Vigneron (n 18) 221.
179 Munday (n 166) 48.
180 Vigneron (n 18) 220–21.
181 Bateman (n 157) 21; Nokes (n 155) 17.
182 Also Harvey and Meisel (n 157) 41.
183 Ibid 37.
184 Bateman (n 157) 24; Harvey and Meisel (n 157) 37.
185 Verhagen (n 166) 28; Harvey and Meisel (n 157) 37.
186 Bateman (n 157) 24; Nokes (n 155) 19.
187 Nokes (n 155) 19.
188 Bateman (n 157) 34; Harvey and Meisel (n 157) 38.
189 The American Law Institute, *Restatement (Third) of Agency* (Rest 3d Agen) (2006) s 8.01 <https://studylib.net/doc/8168533/restatement-of-the-law–agency-restatement–third–of-a . . .> accessed 10 February 2022.
190 Rest 3d Agen, s 8.09 (2); Harvey and Meisel (n 157) 105–06; Munday (n 166) 150.
191 Rest 3d Agen, ss 8.02–8.04, 8.08; Cristallina S.A. v. Christie, Manson & Woods Int'l, 117 A.D.2d 284 (N.Y. App. Div. 1986), para 292; Bateman (n 157) 35; Nokes (n 155) 20; Harvey and Meisel (n 157) 106.
192 Rest 3d Agen, s 8.01; Bateman (n 157) 29; Nokes (n 155) 21; Paula Dalley, 'A Theory of Agency Law' (2011) 72 (3) University of Pittsburgh Law Review 495, 536.
193 Peter G Watts and FMB Reynolds, *Bowstead and Reynolds On Agency* (20th edn, Sweet & Maxwell 2014) ch 5, point 5–004; contr. Mohammed S Korotana, 'Privity of Contract and the Law of Agency: A Sub-Agent's Accountability to the Principal' (2002) 23 (3) Business Law Review 73.
194 Cassady (n 8) 93.
195 Bateman (n 157) 29; Nokes (n 155) 21; Bateman (n 157) 29.
196 Cassady (n 8) 93; Bowstead and Reynolds (n 193), ch 5, point 5–002.
197 Bateman (n 157) 37.
198 Rest 3d Agen, s 8.12; Bateman (n 157) 233.
199 Beale, Bishop and Furmston (n 162) 8.
200 Rest 3d Agen, s 8.05(2); in general for an agent Munday (n 166) 167.
201 Bateman (n 157) 27; Harvey and Meisel (n 157) 55. Contr. Nokes (n 155) 19; Cassady (n 8) 95.
202 Bateman (n 157) 28.
203 Nokes (n 155) 19.
204 E.g. Christie's, 'London Conditions of Sale', Pt F, Art 4(a).
205 Bateman (n 157) 232; Nokes (n 155) 20; Cassady (n 8) 95; Vigneron (n 18) 246.
206 Beale, Bishop and Furmston (n 162) 482.
207 Bateman (n 157) 232.

208 Ibid 219; Nokes (n 155) 21, 98.
209 Nokes (n 155) 100; Harvey and Meisel (n 157) 67; Rules of the City of New York: Title 6 Department of Consumer Affairs, c 2 Licences, sub-c M Auctioneers (May 2009) 2–122 (b)(1)(i) <https://www1.nyc.gov/assets/dca/downloads/pdf/about/auctioneer_law_rules.pdf> accessed 3 February 2022.
210 Bateman (n 157) 219; Nokes (n 155) 112; Harvey and Meisel (n 157) 78.
211 Bateman (n 157) 221; Nokes (n 155) 113; Vigneron (n 18) 247.
212 Bateman (n 157) 221; Nokes (n 155) 100–01, 104, 105.
213 Bateman (n 157) 32; Nokes (n 155) 99. This is a usual fee according to the applicable tariff. Harvey and Meisel (n 157) 81.
214 Munday (n 166) 197, 199.
215 *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] QB 290, [1981] 1 All ER 482, cited according to Harvey and Meisel (n 157) 70; also Munday (n 166) 197, 199.
216 Clay v. Sotheby's Chicago, 257 F. Supp. 2d 973 (S.D. Ohio 2003) paras 984–85.
217 Bateman (n 157) 220; Nokes (n 155) 98; Harvey and Meisel (n 157) 81.
218 E.g. Rules of the City of New York, s 2–124(a) in conjunction with s 2–122(b)(2); Bateman (n 157) 229–30; Nokes (n 155) 114; Harvey and Meisel (n 157) 82–83.
219 Bateman (n 157) 219; Nokes (n 155) 21; Harvey and Meisel (n 157) 79; Beale, Bishop and Furmston (n 162) 42.
220 Robert N Corley and Peter J Shedd, *Fundamentals of Business Law* (5th edn, Prentice Hall 1990) 130.
221 Lord Killowen in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 125, cited according to Harvey and Meisel (n 157) 79; Nokes (n 155) 97; Corley and Shedd (n 130) 130.
222 Bateman (n 157) 225; Nokes (n 155) 99.
223 Nokes (n 155) 100.
224 Beale, Bishop and Furmston (n 162) 743.
225 Pestalozzi (n 6) 169; Kresse (n 3) 41, 54.
226 Kresse (n 3) 54.
227 Ibid 54.
228 Marx and Arens (n 36) 403; Kresse (n 3) 41; likewise also Schneider (n 4) 98, arguing, however, that the moment of conclusion of such agreement is the moment of placement of the bid, not the moment of registration.
229 There is another term – *Auktionsvertrag*. However, this term is used inconsistently in German-speaking literature. For instance, Renold uses it as a term for the sale (i.e. the main contract). Renold (n 3) 821. Pestalozzi uses it as a term for the consignment agreement. Pestalozzi (n 6) 52.
230 Schneider (n 4) 107; Marx and Arens (n 36) 415.
231 Schneider (n 4) 104.
232 Schneider (n 4) 101; Heitbaum (n 42) 32.
233 Also Dechange (n 35) 36; Schneider (n 4) 104.
234 Schneider (n 4) 101, n 546.
235 Contr. Tentler (n 35) 12.
236 Since the auctioneer is not receiving this fee as a part of the price in a strict sense but in addition to the price as a remuneration for the services provided to the bidder under the auction contract, the auctioneer is not bound to hand this fee over to the consignor alongside price, as would be generally the case with mandatees according to OR, Art 400(1). Contr. Becker, arguing that this fee is only in theory a value additional to the price (Becker [n 7] 200) but actually a part of the price. Hence, it is argued, fee should be handed over to the consignor (ibid 204), unless the auctioneer expressly announces to the consignor the intention to keep the percentage fee (ibid 205–06).
237 Pestalozzi (n 6) 99; Schneider (n 4) 98; Heitbaum (n 42) 36; Becker (n 7) 193; Kresse (n 3) 56. See e.g. Koller, 'Auction Conditions Koller Zürich', Art 2.1; Lempertz, 'Conditions of Sale', Art 9.
238 Pestalozzi (n 6) 51; Schneider (n 4) 98; Kresse (n 3) 56, 65; Renold (n 3) 822.

239 Likewise Pestalozzi (n 6) 99, calling the buyer's premium a 'brokerage fee' (*Mäklerlohn*); Schneider (n 4) 99; Renold (n 3) 822. Contr. Becker (n 7) 198, denying the brokerage character of the auctioneer. Becker argues that auctioneers cannot act as buyers' brokers, since their position as the consignors' fiduciaries prevents them from simultaneously executing loyalty duties towards the potential buyer, ibid 331. However, these two roles do not seem to conflict because the level of the loyalty owed to the bidder is much lower than the one owed to the consignor. Whereas loyalty towards the bidders practically comes down to providing equal chances to bid, the fiduciary relationship between the consignors and the auctioneers acting as their alter egos encompasses a much firmer connection.
240 Schneider (n 4) 101.
241 Becker (n 7) 199.
242 Schneider (n 4) 103.
243 Vigneron (n 18) 257ff.
244 Code de commerce, Art L320–2(1).
245 Code civil, Art 1596; Code de commerce, Art L321–5, II(1).
246 Code civil, Art 1161(2).
247 See e.g. Vasari, 'Conditions Generales de Vente', Frais et taxes, para 1.
248 See ch 1.
249 Schneider (n 4) 104; also Kresse (n 3) 70. General provisions on the mandate apply to it. Becker (n 7) 201.
250 Ibid 200; E.g. Vasari, 'Conditions Generales de Vente', Ordre d'achat et ordre téléphonique, para 1; Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 24(1).
251 Schneider (n 4) 90–91; Kresse (n 3) 68.
252 Kresse (n 3) 130.
253 Code civil, Art 1986.
254 Pestalozzi (n 6) 99.
255 Vigneron (n 18) 238; Becker (n 7) 200; Kresse (n 3) 80.
256 Pestalozzi (n 6) 52. In German and French laws, parties can choose any type of representation for their relationship, including the commission agency.
257 Heitbaum (n 42) 35.
258 Also Pestalozzi (n 6) 54.
259 Schneider (n 4) 119; Vigneron (n 18) 238; Becker (n 7) 195.
260 Vigneron (n 18) 238.
261 BGB, para 181; Code civil, Art 1161(1).
262 Kresse (n 3) 86; Schneider (n 4) 91; Becker (n 7) 173; arg ex Code civil, Art 1161(2).
263 Also Kresse (n 3) 86.
264 Schneider (n 4) 91.
265 Likewise Kresse (n 3) 86.
266 Schneider (n 4) 91; Kresse (n 3) 86.
267 Schneider (n 4) 91.
268 Bundesgerichtshof (BGH), VIII ZR 186/81 of 20 October 1982, NJW 1983, 1168, 9; Marx and Arens (n 36) 235.
269 Also Pestalozzi (n 6) 132; Schneider (n 4) 91.
270 Also Pestalozzi (n 6) 53.
271 Ibid.
272 Ibid 53, 131.
273 Ibid 56.
274 Harvey and Meisel (n 157) 223; Brown and Pawlowski (n 2) 3.
275 Harvey and Meisel (n 157) 223.
276 Christie's, 'London Conditions of Sale', Pt B, Art 1(a).
277 Brown and Pawlowski (n 2) 6.
278 Ibid. However, the breach of the auction contract does not affect the validity of the sale contract entered into with the lower bidder since the contract is validly concluded with the knock-down. Vigneron (n 18) 156.

279 See ch 6.
280 Ibid.
281 Harvey and Meisel (n 157) 125; Vigneron (n 18) 280; Brown and Pawlowski (n 2) 5.
282 Harvey and Meisel (n 157) 223; Prott and O'Keefe (n 1) 365–66; Vigneron (n 18) 281. E.g. Christie's, 'London Conditions of Sale', Pt D, Art 1. The buyer's premium was introduced in mid-1970s by Christie's and Sotheby's as a reaction to the reduction of incomes due to lower commission fees charged to consignors. Brenda Adler, 'The International Art Auction Industry: Has Competition Tarnished its Finish?' (2003) 23 (2) Northwestern Journal of International Law & Business 433, 454.
283 E.g. Christie's, 'London Conditions of Sale', Pt B, Art 6(c).
284 Harvey and Meisel (n 157) 124.
285 Also Cassady (n 8) 134; Brown and Pawlowski (n 2) 3.
286 Brown and Pawlowski (n 2) 3–4.
287 Ibid 4. Therefore, the excluded competitor could sue another competitor for damages due to lost chance for bidding. Ibid.
288 Cassady (n 8) 170.
289 Ibid; Prott and O'Keefe (n 1) 363; Harvey and Meisel (n 157) 265; Renold (n 3) 822.
290 Prott and O'Keefe (n 1) 363; Harvey and Meisel (n 157) 265; Vigneron (n 18) 306.
291 Eugen Kindervater, 'Ein Beitrag zur Lehre von der Versteigerung' (1865) 7 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1, 5.
292 Ibid 13.
293 Ibid 9–10; Kresse (n 3) 133.
294 Kindervater (n 291) 10–11; Dechange (n 35) 23; Kresse (n 3) 133.
295 Kindervater (n 291) 15; Dechange (n 35) 23; Kresse (n 3) 133.
296 Also Wilhelm Reuling, 'Noch ein Beitrag zur Lehre von der Versteigerung' (1871) 10 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, 355; Dechange (n 35) 12–13.
297 Heinrich Beumann, 'Die rechtliche Natur der Versteigerung' (Dphil thesis, Universität Erlangen 1911) 5.
298 Tentler (n 35) 22; Beumann (n 297) 5.
299 Joseph Unger, 'Noch ein Wort zur Lehre von der Versteigerung' (1866) 8 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, 134.
300 Ibid 135. Contr. Reuling (n 296) 357; Tentler (n 35) 17.
301 Unger (n 299) 135.
302 Ibid.
303 Ibid.
304 Beumann (n 297) 6.
305 BGB, para 156; Schneider (n 4) 85.
306 Tentler (n 35) 18–19; Beumann (n 297) 10; Kresse (n 3) 131.
307 OR, Art 229(2); Code de commerce, Art L320–2(1).
308 Pestalozzi (n 6) 82, 84; Schneider (n 4) 86; Marx and Arens (n 36) 167; Vigneron (n 18) 141; Kresse (n 3) 132.
309 Code de commerce, Art L321–1(1); Blättler (n 13) 189; Vigneron (n 18) 141; Becker (n 7) 185; Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 15(3).
310 Code de commerce, Art L321–1(1); Schneider (n 4) 86; Vigneron (n 18) 139; Becker (n 7) 170. Kresse (n 3) 132; expressly Koller, 'Auction Conditions Koller Zürich', Art 6.1.
311 Code de commerce, Art L321–1(1); Pestalozzi (n 6) 41; Schneider (n 4) 86; 82; Vigneron (n 18) 140; Becker (n 7) 170; Kresse (n 3) 135.
312 Pestalozzi (n 6) 84; Becker (n 7) 169–70; Vigneron (n 18) 140.
313 Tentler (n 35) 17; Kresse (n 3) 224–25.
314 Kresse (n 3) 224–25. Koller, 'Auction Conditions Koller Zürich', Art 6.1.
315 Reuling (n 296) 356.

316 Arg ex BGB, para 156; Schneider (n 4) 88; Blättler (n 13) 189; Kresse (n 3) 141–42; Belakouzova (n 8) 31.
317 Arg ex BGB, para 146; also Tentler (n 35) 32; Dechange (n 35) 25; Schneider (n 4) 89.
318 Marx and Arens (n 36) 442; Belakouzova (n 8) 31. Koller, 'Auction Conditions Koller Zürich', Art 6.2; Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 15(2).
319 Heinrich Honsell, 'Die Online Auktion' in Theodor Baums, Johannes Wertenbuch, Marcus Lutter and Karsten Schmidt (eds), *Festschrift für Ulrich Huber zum siebzigsten Geburtstag* (Mohr Siebeck 2006) 356. Contr. Schneider (n 4) 107, arguing that withdrawal would be against the auctioneer's duty to provide the bidders with a chance to bid even if there was a clause in the conditions of sale authorizing the auctioneer to withdraw.
320 Tentler (n 35) 19; Dechange (n 35) 23; Schneider (n 4) 16; Marx and Arens (n 36) 233; Kresse (n 3) 132, 140–41; Belakouzova (n 8) 31.
321 Schneider (n 4) 88; Marx and Arens (n 36) 239; Kresse (n 3) 150.
322 Also Schneider (n 4) 86; Blättler (n 13) 116.
323 Beumann (n 297) 17; 29; Dechange (n 35) 15; Pestalozzi (n 6) 80.
324 Schneider (n 4) 86.
325 Ibid; Belakouzova (n 8) 32.
326 Beumann (n 297) 20; Schneider (n 4) 86; Marx and Arens (n 36) 234; Code civil, Art 1114.
327 Pestalozzi (n 6) 174.
328 Kresse (n 3) 155.
329 Also von Jhering, Planck, Düringer-Hachenburg, Enecerus and Riezler, supported by Beumann. See more in Beumann (n 297) 19, 21–23; see Code civil, Art 1128 in conjunction with Art 1131.
330 Arg ex BGB, para 156 in conjunction with para 146; also Vigneron (n 18) 142. However, the previous bid shall not cease to exist if the auctioneer declines the last bid immediately upon arrival. Also Beumann (n 297) 15; Schneider (n 4) 86.
331 Arg ex BGB, para 156. Pestalozzi (n 6) 79; Schneider (n 4) 86; Marx and Arens (n 36) 238; Kresse (n 3) 155; in French law, this argument can be supported by Code de commerce, Art L320–2(1), which states that the highest bidder 'acquires the knocked object' and 'shall pay the price'. Such a strict wording suggests that the legal implications of the auction arise already with the knock-down, irrespective of the subjective characteristics of the last bidder.
332 Beumann (n 297) 24; Dechange (n 35) 22.
333 Marx and Arens (n 36) 238.
334 Also Schneider (n 4) 87.
335 Likewise Schneider (n 4) 87; Marx and Arens (n 36) 238.
336 Dechange (n 35) 19.
337 Kresse (n 3) 157–58, 161.
338 Pestalozzi (n 6) 173; Kresse (n 3) 149.
339 Schneider (n 4) 16.
340 Pestalozzi (n 6) 79; Schneider (n 4) 86; Marx and Arens (n 36) 247; Koller, 'Auction Conditions Koller Zürich', Art 6.1.
341 Kresse (n 3) 151, 160, 163.
342 Pestalozzi (n 6) 83; Schneider (n 4) 86; Marx and Arens (n 36) 244. This kind of reserve should be distinguished from the knock-down under reserve (*Zuschlag unter Vorbehalt*), where the auctioneer has already knocked down the object but has also reserved the right to ask for the consignor's final approval. Schneider (n 4) 88. Koller, 'Auction Conditions Koller Zürich', Art 6.3.
343 Pestalozzi (n 6) 174.
344 Schneider (n 4) 109.

345 Pestalozzi (n 6) 175.
346 Expressly OR, Art 231(2); also Kindervater (n 291) 14; Beumann (n 297) 20; Pestalozzi (n 6) 174; Kresse (n 4) 153.
347 Pestalozzi (n 6) 174.
348 Ibid 80; Kresse (n 3) 149.
349 Pestalozzi (n 6) 47; Kresse (n 3) 161.
350 Kresse (n 3) 163.
351 Beumann (n 297) 21; Dechange (n 35) 25; likewise Kresse (n 3) 165. Contr. Pestalozzi (n 6) 87, proposing to repeat the call.
352 Koller, 'Auction Conditions Koller Zürich', Art 6.1.
353 Arg per analogiam ex BGB, para 130.
354 BGB, para 147(1); OR, Art 4(1); Code civil, arg ex Art 1122.
355 BGB, para 156; OR, Art 231(2). Also Tentler (n 35) 21; Beumann (n 297) 18; Schneider (n 4) 86. In French law, the successivity of the bidding on the one hand and the nonbinding character of the call for bids on the other hand arise from Code de commerce, Art L320–2(1) ('pour proposer [. . .] un bien au mieux-disant des enchérisseurs').
356 Code civil, Art 1115. Dechange (n 35) 17; Schneider (n 4) 86; Marx and Arens (n 36) 233.
357 Or on rare occasions, the bidder has declined the binding effect of the bid (*Freiklausel*) or has reserved the right to revoke the bid (*Widerrufsvorbehalt*). In such a case, the bid is not an offer but rather a call for the counterbid from the auctioneer.
358 Also Dechange (n 35) 19; Schneider (n 4) 86; Marx and Arens (n 36) 237; Becker (n 7) 171.
359 E.g. BGB, para 147; Code civil, Art 1121.
360 Dechange (n 35) 24; Kresse (n 3) 185; Dechange (n 35) 24.
361 Blättler (n 13) 190; Belakouzova (n 8) 32.
362 Pestalozzi (n 6) 81; Schneider (n 4) 87; Marx and Arens (n 36) 244; Becker (n 7) 186; Kresse (n 3) 184, in n 184.
363 BGB, arg ex para 151. Also Schneider (n 4) 87.
364 Beumann (n 297) 28; Dechange (n 35) 24; Becker (n 7) 186.
365 Beumann (n 297) 18.
366 Pestalozzi (n 6) 86.
367 Hermann Jatzow (ed), *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, Band 1., Allgemeiner Theil, Amtliche Ausgabe* (Verlag J. Guttentag 1888) 177.
368 Kindervater (n 291) 11; 13; Tentler (n 35) 26–27; Beumann (n 297) 2–3; Dechange (n 35) 8. In general about this institute Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co 1990) 735–37; Tomislav Karlović and Ivona Rapić, 'Kupoprodaja uz pridržaj boljeg kupca (in diem addictio) u rimskoj pravnoj tradiciji' (2018) 34(3–4) Pravni vjesnik 9, 10–16.
369 For German law Karlović and Rapić (n 368) 21.
370 For French law, ibid 18.
371 Also Martin Skripsky, *Die Online-Kunstauktion* (Schulthess 2006) 121, 123.
372 Tentler (n 35) 11; Vigneron (n 18) 179; 191.
373 BGB, para 446.
374 Schneider (n 4) 110.
375 OR, Art 185(1). Becker (n 7) 258. In French law, the transfer of property coincides with the formation of the contract (*solo consensu*), i.e. with the knock-down, while transfer of risk coincides with the transfer of property. Code civil, Art 1196(2). Therefore, the risks shall too pass onto the buyer with the knock-down. Vigneron (n 18) 175–76.
376 Code civil, Arts 1196(1) and 1583; Vigneron (n 18) 167.
377 Vigneron (n 18) 169.
378 1907 Civil Code (*Zivilgesetzbuch*) (ZGB) (AS 24 233), Art 714(1).

379 OR, Art 235(1). Also Pestalozzi (n 6) 220; Blättler (n 13) 190; Becker (n 7) 253.
380 Pestalozzi (n 6) 228.
381 Blättler (n 13) 191.
382 BGB, para 929; Dechange (n 35) 32; Schneider (n 4) 71, in n 354; Marx and Arens (n 36) 246.
383 Pestalozzi (n 6) 222; Schneider (n 4) 112; Vigneron (n 18) 166.
384 Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 16(2); Lempertz, 'Conditions of Sale', Art 8; Koller, 'Auction Conditions Koller Zürich', Art 8; Schneider (n 4) 112; Blättler (n 13) 191; Vigneron (n 18) 166, 176; Pestalozzi (n 6) 222.
385 Pestalozzi (n 6) 138; Vigneron (n 18) 226.
386 Code de commerce, Art L321–11(2). Pestalozzi (n 6) 137; Schneider (n 4) 41; Marx and Arens (n 36) 244; Becker (n 7) 28. However, even if it does, the auctioneer is not bound to accept it. Marx and Arens (n 36) 245; Dorotheum, 'Allgemeine Geschäftsbedingungen Versteigerung', Art 7(2).
387 Pestalozzi (n 6) 139; Schneider (n 4) 42; Vigneron (n 18) 227; Becker (n 7) 137. See also in general for commission agency OR, Art 428(1).
388 Also Becker (n 7) 137. For instance, the auctioneer realised during the auction that the reserve was set too high and insisting on it could result in the auction fiasco, to the detriment of the seller's reputation and the lot's future marketability.
389 Pestalozzi (n 6) 138; Vigneron (n 18) 150; Becker (n 7) 44; Kresse (n 3) 219.
390 Becker (n 7) 44; Vigneron (n 18) 227; Kresse (n 3) 219.
391 Kresse (n 3) 220.
392 Becker (n 7) 239; Kresse (n 3) 219–20, 238.
393 Pestalozzi (n 6) 138.
394 Ibid 139.
395 Code de commerce, Art L321–11(2). Pestalozzi (n 6) 139; Vigneron (n 18) 141; Becker (n 7) 44; Kresse (n 3) 220. Such a rule implies that if the object is not subject to any estimation – which is highly unlikely – the seller could freely fix the reserve price. Vigneron (n 18) 227.
396 For French law, the same Vigneron (n 18) 228–29, referring to Code civil, Art 1382. For German law, arg ex BGB, para 311(2)(1) in conjunction with para 241(2); for Swiss law, arg ex ZGB, Art 2.
397 SoGA 1979, s 57(3).
398 Bateman (n 157) 140; Melvin A Eisenberg, 'The Revocation of Offers' (2004) Wisconsin Law Review 271, 289. The declaration does not require use of the word 'with' or 'without' reserve; it suffices to make clear that the object is subject to reserve price. Michael Mark and Jonathan Mance (ed), *Chalmers Sale of Goods Act 1979 Including the Factors Act 1889 & 1890* (18th edn, Butterworths 1981) 258. E.g. Christie's, 'London Conditions of Sale', Pt C, Art 2.
399 UCC, s 2–328(2); However, New York law requires that the auctioneer notifies the public about sale being with reserve in written materials or before the start of the bidding. See Rules of the City of New York, s 2–122 (f)(1).
400 Melvin A Eisenberg, 'Expression Rules in Contract Law and Problems of Offer and Acceptance' (1994) 82 (5) California Law Review1127, 1172.
401 E.g. Christie's, 'New York Conditions of Sale', Pt C, Art 2. Explicit departure from the default model does not necessarily involve using the expression 'without reserve'. It is enough to use any customary expression with the same effect (e.g. 'the seller does not reserve the right to reject all and any bids', or 'the seller does not reserve the right of subsequent approval of the bids'). Short v. Sun Newspapers, Inc., Minn. 1980, 300 N.W.2d 781, para 787. It is enough to state that the object will be sold to the 'highest bidder' or similar expression. Ibid. Contr. See Drew v John Deere Co. 19 App Div 308, 241 NYS2d 267, para 311, saying that sale to the 'highest bidder' merely declares that the object will be sold at auction at which bids will be received.

402 Adler (n 282) 437.
403 Vigneron (n 18) 228.
404 E.g. Christie's, 'London Conditions of Sale', Pt K, Glossary.
405 Cassady (n 8) 228.
406 Moreover, in New York City it is mandatory to disclose the estimate prior to the auction. Rules of the City of New York, s 2–122(j).
407 Rules of the City of New York, s 2–123(d); Christie's, 'London Conditions of Sale', Pt C, Art 2.
408 Eisenberg (n 398) 277; Harvey and Meisel (n 157) 47; Vigneron (n 18) 145; Pyles v. Goller, Md.App.1996, 674 A.2d 35, 109 Md.App. 71, para 82.
409 Nokes (n 155) 2; Cassady (n 8) 210; Specialty Maintenance & Const., Inc. v. Rosen Systems, Inc., Tex.App.-Hous. (1 Dist.) 1990, 790 S.W.2d, para 838.
410 Nokes (n 155) 69; Cassady (n 8) 228; Adler (n 282) 442; Belakouzova (n 8) 73. Under New York law, the auctioneer must inform the public that the lot was fictively bought-in. Rules of the City of New York, s 2–123(a).
411 Bateman (n 157) 2, 125–26; Brown and Pawlowski (n 2) 6.
412 Bateman (n 157) 126.
413 Vigneron (n 18) 144.
414 Ibid.
415 UCC, s 2–328(3); Pyles v. Goller, para 82; see also Christie's, 'London Conditions of Sale', Pt C, Art 3(c).
416 SoGA 1979, s 57(2); UCC, s 2–328(2). Nokes (n 155) 68.
417 UCC, s 2–328(2).
418 Callimanopulos v. Christie's Inc., S.D.N.Y. 2009, 621 F.Supp.2d 127, motion denied 2009 WL 1741579, para 130.
419 Bateman (n 157) 2; Nokes (n 155) 71; Harvey and Meisel (n 157) 48. Outpost Cafe, Inc. v. Fairhaven Sav. Bank, Mass.App.Ct.1975, 322 N.E.2d 183, para 3; Christie's, 'London Conditions of Sale', Pt C, Art 8.
420 Nokes (n 155) 2, 67; Eisenberg (n 398) 289; Brown and Pawlowski (n 2) 6.
421 SoGA 1979, s 57(2); UCC, s 2–328 (2); Brown and Pawlowski (n 2) 6.
422 Cuba v. Hudson & Marshall, Inc., Ga.App.1994, 445 S.E.2d 386, 213 Ga.App. 639, para 640.
423 Nokes (n 155) 71.
424 Cassady (n 8) 53; Belakouzova (n 8) 73.
425 Harvey and Meisel (n 157) 49; Eisenberg (n 398) 290; Pyles v. Goller, para 82.
426 UCC, S 2–328(3); Pyles v. Goller, para 82; Eisenberg (n 398) 277, 239; Harvey and Meisel (n 157) 49.
427 Harvey and Meisel (n 157) 53.
428 Eisenberg (n 400) 1175; Belakouzova (n 8) 73.
429 UCC, s 2–328(3); Eisenberg (n 398) 277; J & L Inv. Co., L.L.C. v. Department of Natural Resources, Mich.App.1999, 593 N.W.2d 196, 233 Mich.App. 544, para 552.
430 UCC, s 2–328(4); SoGA 1979, s 57(4); Pyles v. Goller, para 83; Harvey and Meisel (n 157) 49.
431 Harvey and Meisel (n 157) 53.
432 Ibid 49.
433 Ibid 48.
434 Corley and Shedd (n 220) 160; Harvey and Meisel (n 157) 49; Belakouzova (n 8) 74.
435 Pyles v. Goller, para 82; Cassady (n 8) 211; Belakouzova (n 8) 73.
436 Harvey and Meisel (n 157) 48; Brown and Pawlowski (n 2) 7.
437 Arg ex UCC, s 2–328(2); SoGA, s 57(2).
438 United States v Von Cseh (1972, SD Tex) 354 F Supp 315, 73–1 USTC 9238, para 319.
439 Harvey and Meisel (n 157) 50.
440 Nokes (n 155) 69–70.

441 SoGA 1979, s 18, rule 1; Hawaii Jewelers Ass'n v. Fine Arts Gallery, Inc., 51 Haw. 502 (1970), para 505; Harvey and Meisel (n 157) 158; Vigneron (n 18) 166.
442 SoGA, s 20(2); Nokes (n 155) 119; Harvey and Meisel (n 157) 158, 221; Vigneron (n 18) 176. However, since auctioneer's conditions usually retain the transfer of property until the full payment of the price, the passage of the risk shall be postponed until the seller receives the full sales price. Vigneron (n 18) 176. Christie's, 'London Conditions of Sale, Pt F, Art 2.
443 Hawaii Jewelers Ass'n, para 505.
444 Harvey and Meisel (n 157) 158; Vigneron (n 18) 170.
445 Kresse (n 3) 35.
446 Schneider (n 4) 90; Kresse (n 3) 326; Belakouzova (n 8) 138.
447 Kresse (n 3) 326; Belakouzova (n 8) 138.
448 Schneider (n 4) 90; Wiebe (n 55) 77.
449 Schneider (n 4) 90; Kresse (n 3) 326.
450 Schneider (n 4) 90.
451 Marx and Arens (n 36) 242.
452 However, if the parties have agreed on a reserve price, this price shall be specified in the auction mandate. Ibid.

3 Internet auction

Introduction

Auctioneers started using primitive technological tools in the seventeenth century. In England, auctioneers organised auctions by an inch of a candle. Once the candle burnt out, the object was automatically knocked down to the best bidder.[1] Likewise, clocks and hourglasses were used at auctions to signalise the knock-down. When the time or sand ran up, the best bidder automatically became the buyer.[2] Nowadays, these methods are mostly abandoned[3] and replaced with a digital version – the internet auction.

This chapter deals with the legal concept of internet auction and its accompanying legal relationships.

The first section deals with the legal concept of internet auction. First, it distinguishes internet auctions from other online sales. Secondly, it covers basic models of internet auction. Thirdly, it outlines the differences between the internet and physical auction. It aims to clarify whether internet auction is an auction in a legal sense.

Most scholars compare physical auction to intermediary auction, like eBay, and conclude that internet auction is not an auction in a legal sense. However, this approach is too narrow. It draws conclusion by confining internet auction to one auction model and disregarding the existence of the alternative model of 'auctioneer-to-customer' internet platforms. Therefore, this section examines the model of 'auctioneer-to-customer' platform to see whether it may change the traditional understanding of internet auction. It is argued that the prevailing view of internet auction as 'mere facilitator' of distance sale is acceptable inasmuch as it refers to intermediary auctions. On the other hand, if the online platform acts as an agent for the seller, the platform operator is an auctioneer in legal terms.

The second section tackles several disadvantages of internet auction: the anonymity, increased risks of mistake, security risks, conflict of law issues and host platform's immunity from civil liability for illegal content and activities. With respect to the conflict of laws issues, this section discusses the legal status of internet auction under the Rome I and Brussels I bis regulations. With respect to immunity issues, this section covers the immunity regime under the EU e-commerce rules.

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Third section covers legal relationships at internet auctions. Firstly, it aims to clarify the legal nature of user agreements and the formation of the contract for sale. It argues that user agreements combine elements of brokerage and services agreement. It also argues that automatic closure of the auction has a constitutive meaning for the formation of sale contracts.

The conclusion summarises the main findings of the chapter.

The legal concept of internet auction

Internet auction and other distance sales

Internet auction is an auction held over the internet during a defined time span.[4] It should be distinguished from the use of the internet for purposes of online advertising of objects intended to be put at physical auction.[5]

Also, internet auction should be distinguished from a 'buy-it-now' (*sofort-kaufen*) option available to the bidders at auction platforms. In this case, the seller offers the bidders a time-limited option to buy (new) objects at a fixed price which is indicated beside the objects. This allows the buyer to accept the price offered immediately by pressing the button and, thereby, prevent the start of the online bidding.[6] However, if someone decides to offer a higher price, the 'buy-now' option ceases to exist and the auction starts.[7]As the case may be, the buy-it-now option can exist in parallel to the online bidding. In this case, the bidder can choose the option to buy the item at a fixed price, until the bidding reaches the reserve price.[8] Sales involving the 'buy-now' option are similar to a typical distance sale.[9]

Lastly, internet auction should be distinguished from the 'name-your-price' option (*Preis vorschlagen*). Instead of buying the object at a fixed price, the bidders have a chance to counteroffer their own price, which the seller can accept or decline by placing a new offer.[10]

Auction models

English (ascending) and Dutch (descending) auction

The two typical auctions – English and Dutch auction – are also present in the online world. English auction prevails,[11] involving typical open and successive bidding, where the object is automatically knocked down to the highest bidder at the end of the prescribed bidding time.[12] As at any other auction, the bidding may start at a certain price, continue in predefined bid increments and involve a reserve price to prevent the undervaluation of the object.[13] However, internet auctions can also be organised as Dutch auctions. This is the case with sales of multiple units of the same object in a single auction. In this case, the bidding starts from an initial price and falls successively until someone places an electronic bid.[14] Such auctions seem to be rather rare in practice.[15]

Sealed-bid auctions

Internet auction may also be run as a sealed-bid auction, including Vickrey auction.[16] However, the use of such auctions also seems to be rather rare in practice.[17]

Live auctions and combined internet auctions

Apart from internet auctions being run exclusively via an online intermediary platform (*Lang-Zeit Auktionen*), internet auction may operate as so-called 'live auction' (*Live-Auktion*).

This model is basically a traditional saleroom auction moderated by a physical auctioneer from a 'brick-and-mortar' auction room. However, the saleroom is equipped with a streaming technology ('virtual auction room'). The auction is audiovisually broadcasted over the internet in real time (*Echtzeit-Auktion*) to absentee bidders and allows electronic bidding.[18]

A subcategory of live auction is so-called 'combined physical-virtual auction'. It combines elements of a traditional saleroom auction and electronic means of communication. Usually, it is divided into two stages. The first, virtual phase includes remote bidding. The aim thereof is to establish the initial price for the physical auction. At physical auction, the price established during the remote bidding may be outbid or not. In the latter case, the object will be knocked down to the best bidder from the first phase.[19]

Business-to-consumer auction

At business-to-consumer (B2C) auctions, there is an undertaking acting as a seller[20] on the one side and a consumer acting as a buyer on the other. Contract for sale formed at such auctions is a consumer contract. This auction usually serves for sale of remaining stock of tickets or second-hand goods. It has seen an increase in volume over the last few years.[21]

Consumer-to-consumer auction

Consumer-to-consumer (C2C) auctions are auctions held between consumers, i.e. private individuals. On both sides of the platform are consumers selling or buying second-hand goods for personal purposes. In terms of law, a contract formed at such platforms is an ordinary civil contract for sale, where payment and delivery are regulated by the parties.[22]

However, the line between B2C and C2C auctions has become rather vague with the intensification of online auctioneering. Possibilities offered by internet auctions stimulate many individuals to get involved more intensively and regularly in online auctioneering as sellers. Eventually, individuals become skillful in trading at auction platforms; they are well familiar with the platforms' terms and conditions, trade customs, tricks, technological aspects of online trading, etc. This allows them to reach trade volumes and income thresholds which are well beyond incomes earned from casual, hobby sales. Hence, at a certain point they

should stop being treated as private individuals. Professionalisation of their role – reflected in the apparent 'entrepreneurial' elements[23] – has converted consumers to 'hybrid' consumers or 'hybrid businesses', depending on the perspective.

The result of this change is that contracts entered into by hybrid consumers with 'pure' consumers will lose their C2C qualification. As a consequence, the seller may become subject to new rules on income taxes, while the sale contract may be governed by consumer protection laws. Most notably, the rules on unfair contractual terms, information duties towards the buyer, misleading advertising,[24] rescission of contract and strict rules on conflict of laws.

Business-to-business auction

At business-to-business (B2B) auctions, professionals are on both sides of the platform.[25] Although less common than B2C and C2C platforms,[26] B2B platforms are used for trade in stock surpluses, remaining stock at warehouses and goods with a short expiration deadline (e.g. agricultural products).[27] However, unlike B2C and C2C platforms, which are in principle open to everyone, B2B auctions may operate as 'closed shops', i.e. private auctions intended to gather only a limited number of participants.[28] In any case, contracts concluded between businesses are commercial contracts.

Business-to-administration (business-to-government) auction

Internet auction may be used by the state or other public authority for purposes of purchasing goods and/or services from entrepreneurs (B2A/B2G).[29] An example of this is a reverse electronic auction in public procurement.

Government-to-consumer auction

At G2C auctions, private individuals bid for goods put at sale by public authorities. An example thereof is a customs auction of seized goods.[30]

Proprietary and intermediary auctions

With respect to the legal status of the consigned object, internet auction can be proprietary auction (*Eigenversteigerung*) or intermediary auction (*Fremdversteigerung*).

In the first case, the platform operator sells its own object on its own behalf. The operator acts both as the seller and the auctioneer with no consignor. The sale is thus concluded directly between the operator and the buyer.[31] However, online auctions are usually merely intermediary auctions – eBay is the best example. At such auctions, platform operators merely act as intermediaries between the sellers (consignors) and the buyers. Operators provide their platforms to the third parties, enabling them to sell their property over a longer period of time (*Lang-Zeit Auktionen*).[32] At the end of the auction, the sale contract is automatically formed between the consignor (seller) and the buyer.

Although often used in the literature, the term *intermediary auction* is not a true antonym to the term *proprietary auction*. It would be more appropriate to use the expression 'consigned' auction. This would stress the fact that the platform puts up for sale someone else's objects rather than its own. Whether it does so as a mere intermediary or agent is a different question.

User-to-customer and auctioneer-to-customer auctions

Operators of online auction platforms at consigned auctions usually act as mere intermediaries. They are not involved in the placement of the object at platform and the auction negotiations. The auction bidding takes place directly between the seller (user) and the customer ('user-to-customer auction' or U2C e-auctions). Also, post-sale arrangements such as delivery and payment take place directly between the seller and the buyers.[33]

However, not all consigned auctions are intermediary auctions. The platform operator may place items for sale on the website on behalf of the seller and inform other users that it acts as an auctioneer ('auctioneer-to-customer auction' or A2C e-auctions). In this case, the platform acts as an agent for the seller and interferes with the bidding process as a typical auctioneer.[34] The differences between the two models are explored in detail in the next section.

'Pay-to-sell' and 'pay-to-buy' auctions

With regard to persons liable for payment of fee for the use of the platform, there is a difference between 'pay-to-sell' and 'pay-to-buy' auctions.

Pay-to-sell auction obliges the sellers to pay the fee proportionate to the initial price of the object concerned if they wish to sell the object over the platform. The buyer does not have to pay any fee for taking part in the bidding. This is the typical model of internet auction used by intermediary platforms.[35]

On the other hand, pay-to-buy auction obliges the buyers to pay the fee if they wish to bid via platform. This model is typical for proprietary platforms, as there is no consignor from whom this fee can be collected.[36]

Differences between internet and physical auction

Auction platform as a neutral intermediary

As stated earlier, the auction platform usually does not interfere in the sales process. It acts as a mere trade venue for the parties to meet and directly negotiate the sale. It also does not knock down the object in any of the traditional ways. At physical auction, on the other hand, the auctioneer has a central role in and responsibility for the contract formation.[37] Auction rules require the contract being concluded as a result of the auctioneer's acceptance of the best offer on behalf of the seller, most notably, by physical acceptance of the highest bid in the saleroom in the form of a knock-down (*Zuschlag*; *adjudication*).[38]

These fundamental differences between a typical internet auction and typical traditional auction have prompted questions of the legal nature of the internet auction and the applicability of the law of auctions to internet auctions.

The Anglo-American scholarship and practice take a liberal position on the legal meaning of auction. It is argued that even intermediary (U2C) auctions such as eBay could be, to some extent, treated as auctions in a legal sense.[39]

On the other hand, German and Swiss scholarships – where this issue has been discussed by far most extensively – take a conservative approach. Building their arguments around eBay-style auctions, they argue that internet auctions are not auctions in a legal sense. This is usually supported by two main arguments.

Firstly, it is argued that at internet auctions there is no active involvement of the platform operator in the contract formation.[40] Unlike traditional auctioneers, the platform has no direct influence on the preparation of the auction catalogue, photos, description of goods, call for bids, starting price, reserve price, duration of the auction, payment sale guarantees, international shipping, etc.[41] The platform operator's main task is to put the platform's technological infrastructure at the parties' disposal for auction purposes.[42] The platform performs organisational and informational services. These include, for instance, establishment of search functions, registration of offers, bid management, matching the offer and demand within the platform's system, control of the platform activities and feedback, as well as providing information about the reserve price, current bid and hammer price.[43]

It follows that the formation of the contract via auction platforms lies in the users' hands. The parties directly exchange offers and acceptances over the platform. Therefore, the platform operator is not liable for breach of the sale contract and material/legal failures of the object. This remains the liability of the parties (users) to the sale contract.[44] In this case, the platform operator remains liable for breach of the sales contract or failures thereof only if this breach can be indirectly imputed to the platform operator as a consequence of the breach of its own information and discovery duties from individual user contracts (e.g. prior check on the bidder's legal capacity, creditworthiness).[45]

Secondly, an important difference between the traditional and internet auction lies in the role of the platform regarding the contract conclusion. Unlike a traditional auctioneer, the platform operator does not knock down the object at the end of the internet auction. The object is knocked down automatically when the digital clock signals the end. It is argued that mere lapse of time accompanied by a confirmation email is not a statement of will and, hence, cannot be considered an acceptance.[46]

To conclude, the prevailing opinion is that, as a result of the absence of the platform's active involvement in the contract formation in the capacity of an agent and the absence of traditional knock-down, the auction platform is not an auctioneer.[47] Instead, it is generally argued that such an auction platform is a mere facilitator or supporter of the sale.[48] It acts as a sort of virtual messenger for receiving parties' expressions of will (*Erklärungsbote*)[49] and, thus, fits within the broader notion of electronic marketplaces.[50]

Consequently, it is argued, internet auction is not an auction in legal terms either and should not be governed by the same legal provisions as offline auctions.[51] It is an ordinary (distance) sale.[52] As such, it should be treated under the special rules on e-commerce, consumer protection law[53] and general contract law.

Auction platform as an auctioneer

Whereas it is true that the dominant, intermediary auction model is not an auction in a legal sense for the reasons just mentioned, this conclusion is not applicable to all internet auctions. In order to get a full picture of the legal nature of internet auction, attention should be also given to the less prominent yet existing alternative to standard intermediary auctions: the auctioneer-to-customer (A2C) auctions.

THE AGENCY CHARACTER OF AN AUCTION PLATFORM

Although internet auctions are usually only intermediary (U2C) platforms, it can happen that they act as agents.[54] E.g. major international auction houses like Koller, Dorotheum and Christie's have maintained traditional elements of auctioneering even at their virtual auction sales. Unless explicitly stated to the contrary, three auction houses place auction objects on their internet platforms on behalf of the seller. It is important to note that this service refers to the genuine internet auction, i.e. sales conducted only by means of the platform operator's 'online-only service' rather than to hybrid live auctions. Therefore, under this model, the three houses are acting as agents for the sellers and not mere intermediaries.[55]

It means they have the same responsibilities as if they were physical auctioneers.[56] E.g. if they act as commission agents, they are liable to the buyer as any other seller.[57] If, on the other hand, the platform acts as a direct agent, the contract arises directly between the users, meaning that the platform is not directly liable for breach of the contract and material/legal failures of the object sold.[58] In this case, the platform operator remains liable for breach of the sales contract or failures thereof only if this breach can be indirectly imputed to the platform operator as a consequence of the breach of its own informational/explanatory duties arising out of individual user contracts.[59]

French law seems to be the only foreign legal system explored in this book which expressly recognises the dichotomy between U2C and A2C auctions. On the one hand, lack of knock-down to the best bidder and the intervention of a third person acting as an agent into the description of the object is mere intermediation in the online bidding process (*courtage aux enchères à distance par voie électronique*).[60] In this case, the platform merely provides a digital service, i.e. places its organisational infrastructure at the seller's disposal.[61] This corresponds to the U2C auction.

On the other hand, the platform operator may put the good at public bidding by electronic means in the capacity of the mandatee, i.e. agent of the owner with the aim of knocking it down automatically to the best bidder. Such agency is a

proper auction sale; it encompasses two key features of a typical auction: open and successive bidding as well as the knock-down (*vente aux enchères par voie électronique*). Therefore, such internet auctions shall be governed by the same rules as traditional auctions.[62]

VIRTUAL KNOCK-DOWN: FUNCTIONAL EQUIVALENT TO THE TRADITIONAL FALL OF THE HAMMER

It seems that the final obstacle to the full recognition of the possibility for an online platform to act as a proper auctioneer still lies in the nature of the virtual knock-down.

Traditional auction presumes the presence of the auctioneer. However, who shall be the auctioneer is not clearly defined in the auction laws concerned, let alone confined to the traditional auctioneer with a legal personality.[63] In this aspect, it seems that the auction laws do not preclude handling a knock-down by a software acting instead of a physical auctioneer.

This software collects, stores and publishes the bids at the platform website. It identifies the best bidder and, thereby, generates the contract. As the case may be, the software may also carry out post-sale arrangements, e.g. collect payments via PayPal or escrow accounts. Hence, the software may – in functional terms – act as a substitute for a traditional auctioneer, i.e. as a sort of 'electronic agent' acting on behalf of the sellers, according to their instructions and under their control.[64]

But even if the ultimate existence of a traditional auctioneer having a legal capacity is required for a valid knock-down, these elements exist when the bidding is processed by a software agent.

Humans design the software. They programme it in advance of a sale in a way that will result in a knock-down of the object at a certain point. Humans also control the software. Legally, the software acts as a mere communication tool for expression of the legal will of the creator of the software agent, i.e. the company acting as the platform operator. All 'statements of will' generated by the software agent will be ultimately attributed to its creator, i.e. the platform operator,[65] which may act as an agent.[66]

Speaking of a format of the knock-down, it should be recalled that most auction laws allow the object being knocked down in any customary form even if this would result in the object not being knocked down by the fall of the hammer. In this sense, the expiration of the bidding time is nowadays a customary method of knock-down (*Zuschlag durch Zeitablauf*).[67]

Even in case of German law – regarding which insisting on the traditional *Hammerschlag* seems to be the strongest – confining the knock-down to the fall of the hammer and rejecting automatised time lapse would contravene the general freedom of contractual form provided under the BGB, para 145. This article complements the legal provision on auction in BGB, para 156.[68]

Conditioning the knock-down to fall of the hammer would also be a negation of the default character of BGB, para 156, as the fall of the hammer is not a condition for the application of that article but rather one of the possible results thereof.[69]

From an organisational point of view, the virtual knock-down has not affected the customary flow of auction either.

Internet auction still meets criteria of limitation in terms of space and time. Auction takes place in virtual salerooms, which are bound by the number of computers connected to the platform.[70] It ends with the expiration of a precisely predefined moment in time (*Zeitlauf-/Dauerauktion*)[71] which is agreed between the consignor and the auctioneer.[72] Furthermore, internet auctions allow the bidders to check the current state of the offers and the current best price. Hence, they are in a position to outbid the rivals by placing a higher bid until the digital clock signals the end. This makes internet auction as competitive and successive a bidding as any other auction[73] and not a 'sale against the highest price'.[74]

Lastly, those who argue against virtual knock-down as a functional equivalent to the traditional knock-down seem to forget that knock-down by passage of time has been used and recognised for a long time as a valid form of knock-down, especially in case of absentee bidding. One just has to remember the candle auctions, which auction character has never been questioned for the mere reason of lacking a physical knock-down.

For all foregoing arguments, automatic, digitally handled expressions of will should be treated as true expressions of will.[75] Consequently, internet auction should not be disqualified from being considered as an auction for the mere reason of lacking the traditional knock-down.[76] Instead, the automatic closure of the auction by passage of time, accompanied by an email message of 'Congratulations', 'You made it' or 'You won it', should be qualified as a modern way of accepting the best bid,[77] meaning that a transfer of data via the internet is an effective form of knock-down.[78]

Closing remarks

It has been shown that the prevailing understanding of internet auction as 'mere facilitator' of a distance sale and, hence, not an auctioneer is acceptable inasmuch as it refers to user-to-customer platforms like eBay. As long as the online platform acts as agent for the seller, however rare that may be, the platform operator can also act as an auctioneer in legal terms.[79] Therefore, *ex ante* exclusion of the internet auction from the legal concept of auction is wrong and has no grounds in auction laws and practice.

The discussion has also shown that the form of the knock-down is not confined to any particular form, let alone a physical knock-down. Any customary form of bid acceptance is acceptable, as long as it results in the formation of a sale contract. This is a consequence not only of the default character of most auction laws but also of the fundamental principle of freedom of contract. In this sense, the virtual knock-down resulting from the automatised time lapse shall be construed as a functional equivalent of the traditional knock-down.

It follows that internet auction should be treated as auction in a legal sense as long as it entails the competitive bidding, the agency of the auctioneer and the existence of a knock-down. As a specific type of auction, it should be included

in an already-complex legal meaning of auction,[80] and the existing auction provisions should apply accordingly to internet auctions.[81]

Disadvantages of internet auctioneering

The emergence of the internet has enabled a broader use of auction over the last two decades.[82] Unlike traditional auctions, which are usually high-end events, internet auctions have broadened the circle of potential bidders and, hence, 'democratised' the auction. Internet auctions are open to everyone. Any person with an internet connection may participate in the bidding from any corner of the world, at no or very small cost in terms of travel, accommodation, organisation (e.g. lease of auction room), time, etc.[83]

Furthermore, virtual presence enables longer duration of auctions, since the bidders do not have to travel and stay at one place.[84] A longer duration of auction allows the bidders to connect thereto at any point of time during the bidding, rather than to stay connected all the time.

Lastly, consumers at standard, intermediary internet auctions may cancel their contract in fourteen days' time with no explanation. This is a departure from the cancellation regime applicable to physical auctions, which prohibits the buyer to cancel the contract if the object does not comply with the exhibit or if the buyer has changed his mind regarding the object. The rationale for this prohibition is the belief that the buyers at physical auction had a chance to inspect the object beforehand. This excludes the possibility for them to depart from the contract due to inaccurate description or due to disappointment with the object bought. Moreover, cancelling the contract would turn the auction into a farce. By placing the best bid, the buyer decided the price of the object on her or his own and, thereby, immediately excluded other competitors from buying it.[85]

Despite these benefits, the use of internet auction has several disadvantages arising from digitalisation and delocalisation of internet auction as well as from the immunity of internet platforms from liability for damages caused to platform users.

Anonymity

At traditional auctions, participants get together in the same saleroom, communicate with each other, share information and rumours and watch each other bidding. Furthermore, traditional, high-end auctions usually attract a relatively small circle of affluent sellers, dealers and buyers who already know each other from before or have heard second-hand information. Hence, it is difficult to stay unnoticed or anonymous at traditional auctions, at least for a long time.

On the other hand, internet auctions are less transparent. Firstly, internet auction lacks direct contact between the seller or his auctioneer and the bidders.[86] Secondly, sellers and buyers can create fake identities, establish several usernames and open several user accounts in order to bid at internet auctions. This anonymity is considered a major threat for undistorted bidding at internet auctions.[87]

Compared to physical auctions, it allows the participants to be less concerned about their perhaps unfair bidding being attributed to them.

E.g. it makes it easier for the sellers and the buyers to engage into fictitious bidding aiming at driving up the prices ('bid shilling') or depressing the prices ('bid shielding'). Bid shilling is a scam by which the seller and his accomplice secretly place fake bids to artificially inflate the price, to the detriment of the winning bidder. The winning bidder, encouraged by the bidding fever, places higher bids than those he would place were the competition fair.[88] Finally, the winner pays a higher price than the price she or he would have paid had there been no shill bidding.

Shield bidding is a strategy by which one bidder places a very low bid while his accomplice places a very high bid, deterring other, noncolluding competitors to bid any further. At the very end of the bidding, the high, 'shielding' bidder withdraws the bid, leaving the lower bidder as the winner and forcing the seller to sell the object to the lower bidder.[89] Such practice distorts the price that could have been reached but for the shield bidding. Furthermore, it discourages potential bidders from participating at auctions operated by the same platform and, presumably, aims to direct the disappointed bidders to a competing platform run by the collusive bidders.[90]

Anonymity also makes internet auctions less immune to risks of unsuccessful enforcement of payment claims against defaulting buyers and/or unsuccessful delivery claims against defaulting sellers.[91] In order to mitigate these problems, online platforms have introduced payments services like escrow (custodian) accounts.[92]

Online auctions are also vulnerable to manipulation with the search engines and bidding software. Unlike a traditional auction, an online auctioneer may set the search engine to privilege only certain objects (e.g. brands) and move attention from others.[93] The bidders may use a 'sniping' software to register the winning bid just before the expiration of the bidding deadline, disabling the competitors to place a higher bid.[94] This may create an impression of unfair competition and deter other competitors from bidding. Therefore, platforms such as eBay forbid their use.[95]

Risks of mistakes

The inability of the bidders to inspect the lots on the spot and convince themselves that the auction catalogue or online description is accurate increases chances of getting an object which departs from the one the buyer was hoping to get.[96] In addition to that, the platform operator is not involved in the description of the object. The seller may be a layperson with little or no professional knowledge about the object. This increases the risk of misattributions of the object or even fraudulent representation, to the detriment of buyers. In order to deal with this problem, internet platforms have developed feedback devices, enabling the sellers and the buyers to rate each other and, thereby, help other users check their prospective counterparties beforehand.[97]

Security risks

The use of internet auction also includes security risks, such as interference in the transmission of data from the users' computers (*spoofing*),[98] integrating viruses into users' computers (malwares) and web apps (*cross-site scripting*),[99] internet financial frauds (*phishing*),[100] abuse of identity and misrepresentation (e.g. bidding under someone else's username),[101] breach of copyright (e.g. sale of fake goods, unlicensed use of a trademark or protected industrial design)[102] and moral rights (e.g. defamatory reviews at auction sites).

Delocalisation of auction sale and the problem of applicable law

General principle: the lex loci acti. As any other contract, a contract for the sale of goods by auction will be governed by the law chosen by the parties to the contract. In the absence of choice, the law applicable to auction sales shall be the law of the place where the auction took place (*lex loci acti*),[103] rather than the law of the place where the provider of the characteristic performance – the seller – has its habitual residence.

Two main reasons speak in favour of this solution.

Firstly, the auctioneers intervene in the negotiating process between the bidders and the seller. They usually do so as the sellers' commission or undisclosed agents. Hence, the bidder, the potential buyer, is unable to foresee who is the undisclosed seller and know where the latter's habitual residence is, at least until the contract is formed. Consequently, the potential buyer cannot foresee whether the contract will have an international element and, thus, which law will apply to the contract.[104]

Secondly, *lex loci acti* is generally considered as the law having the closest connection to the auction.[105] Auctions are firmly rooted within regulations, traditions and customs of the venue where they take place.[106] They are especially rooted within the local agency rules, which differ significantly from one legal tradition to another.

However, delocalisation of internet auction sales makes it difficult for the courts to detect the exact *locus acti* of the internet auction and, hence, determine the law applicable to auction-related dispute. The following lines will consider this problem from the perspective of the Rome I Regulation, which expressly deals with this issue.

THE ROME I REGULATION

The general regime for (internet) auction sales Rome I Regulation applies to 'conflict of laws' issues regarding contractual obligations in civil (including consumer) and commercial matters.[107] Hence, the Rome I Regulation applies to civil, commercial and consumer auctions.[108]

Unless the parties have chosen the applicable law in accordance with Rome I Regulation, Art 3, a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined.[109]

The first problem that may arise in respect of this provision is the meaning of the term *auction*. No definition has been provided in the regulation itself. The term must be interpreted autonomously, i.e. independently from the meaning given thereto in the national laws of the member states.[110]

Auction in terms of EU secondary law is generally understood as a voluntary physical sale where the object is knocked down to the best bidder after a public, transparent and competitive bidding run by an auctioneer.[111] The same meaning should be given to the term *auction* in the Rome I Regulation.[112] Moreover, it is clear from the wording of Art 4(1)(g) that the Rome I Regulation refers to conventional, physical auctions, whose place may be easily determined.

However, no auction is automatically excluded from its scope of application. What matters is whether the auction's place is determinable rather than whether it is physical or virtual.[113] This implies that the term *auction* for the purposes of Rome I Regulation should be given broader meaning to cover internet auctions as well.

The place of internet auction does not have to be indeterminable. It can be determined, e.g. by referring to the physical location of the server[114] or the residence of the internet auctioneer, if this was made visible to the potential bidder prior to the auction.[115] Hence, if the place of the internet auction is determinable, Rome I Regulation, Art 4(1)(g), shall also apply to internet auctions,[116] placing the internet auction within the reach of *lex loci acti*.

Nevertheless, this applies only to internet auctions within the autonomous meaning given above, i.e. only to actual, *auctioneer-to-customer* internet platforms and live auctions. It does not apply to mere intermediary online platforms. The latter are mere (distance) sales. Thus, they are covered by Rome I Regulation, Art 4(1)(a) (place of the seller's habitual residence), or, in case of consumer auctions, Rome I Regulation, Art 6.[117]

However, if it is clear from all the circumstances of the case that the auction is apparently more closely related with a country other than *locus acti*, the law of that other country shall apply.[118] For instance, as the case may be, the seller and the buyer may come from the same country which is different from the country where the (internet) auction took place.[119] In this case, instead of *lex loci acti*, the court may find it more appropriate to apply the law of the country of the (more) 'closer connection'.

If the *locus acti* of the internet auction cannot be determined, two solutions are possible.

In this case, the law applicable to internet auction cannot be determined pursuant to Rome I Regulation, Art 4(1)(g). Hence, the contract formed at internet auction shall be governed by the law of the country with which the auction is most closely connected.[120] However, reference to the law of the closest connection might cause problems in case there is no single, firm connecting point to one

jurisdiction, for instance, parties' common nationality or clear indication of the platform operator's establishment.

Therefore, in order to maintain legal certainty and ease the determination of the applicable law, it seems more appropriate to subsume the internet auction under the general rule on the law applicable to the sale of goods – the law of the country where the sellers have their habitual residence.[121]

This solution would correspond to the general rationale underlying Rome I Regulation, Art 4: finding a law of the country where providers of characteristic performance (in this case, sellers) have their habitual residence.[122] Unlike traditional auctions, where the identity of the seller might be undisclosed to the buyer even after the sale, the identity of the seller at online auctions will be usually disclosed to the buyers once they receive the confirmation email with the purchase details. This is in fact necessary, if not for other reasons, then at least for payment purposes.

Special regime for consumer (internet) auctions If the buyer at the auction sale was a consumer, which is often the case with internet auctions, the applicable law shall be determined in accordance with the special regime stipulated in Rome I Regulation, Art 6.[123]

The contract for (internet) auction sale shall be governed by the law of the country where the consumer has a habitual residence, provided that the professional (a) pursues the commercial or professional activities in the country where the consumer has the habitual residence or (b) by any means directs such activities to that country or to several countries including that country and the contract falls within the scope of such activities.[124]

These requirements shall be fulfilled, for instance, in case of the contract formed via the local branch of eBay pursuing auctions at the place of the consumer's habitual residence, or via eBay's selling service provided from abroad but offered to consumers in countries of their habitual residence with no local eBay branch.

The special rules on the law governing consumer contracts do not, however, preclude parties from choosing the law applicable to their (internet) consumer auction sale, in accordance with Rome I Regulation, Art 3. Such a choice may not, however, result in depriving consumers of the protection provided to them by strict provisions of the law of the country where the consumer has a habitual residence.[125] For instance, the choice of law shall not deprive consumers from invoking their fourteen days' right to cancel the contract without explaining the reasons thereof – a fundamental right provided to by DCR, Art 9(1).

The jurisdiction: principle of forum loci acti The determination of the forum for (internet) auction disputes causes less problems for the parties. The forum is decided by the parties themselves or connected with the physical location of the parties concerned, which is usually easy to establish.

The court jurisdiction for (internet) auction-related disputes is usually determined in the applicable sale conditions. Auction houses usually provide for the jurisdiction of the courts of the place where their registered or representative

office, which was in charge for the (internet) auction concerned, is located.[126] Additional contracting for mediation of arbitration is rare,[127] with the exception of eBay's and Christie's online auctions.[128]

Failing the parties' choice of competent court, the competent court could be the court of the defendant's place of residence, registered or real seat, depending on the legal character of the defendant.[129] Since auction is a special type of sale of movables, alternative courts could be the courts of the place of the contract performance (delivery of object).[130]

In case of (internet) consumer sales, the competent court shall be the court of the defendant-merchant registered or real seat, or the plaintiff-consumer's place of residence. In case of the proceedings brought against the consumer (e.g. for payment default), the competent court shall be the court of the consumer's residence.[131]

Platform's immunity from liability

The fact that standard platform operators merely put their platforms at users' disposal and abstain from interference with the sale process itself has influenced the legal approach to the liability of intermediary platform operators for the placement of the illegal content at their sites. In this paragraph, close attention to this issue will be given with respect to EU law.

In terms of EU law, intermediary platform operators like eBay should, in principle, be classified only as host service providers.[132] Under the eCommerce Directive (ECD), a *host service provider* is a provider of the information society service who merely stores the external content placed on the platform on request of the service recipient, i.e. the user.[133] Host platforms shall be exempted from liability to the buyers and/or third parties for the placement of the illegal content or for the illegal activity conducted via the platform on the condition that:[134]

(a) the platform had no actual knowledge of the illegal activity or information[135] and, as regards the claim for damages, i.e. civil liability, was not aware of facts or circumstances from which the illegal activity or information was apparent; or (b) that the platform, upon obtaining such knowledge or awareness, acted expeditiously to remove[136] or to disable access to the information.

Introducing the 'safe harbour principle' into EU law was motivated by the need to protect (at that time) novel business models, such as neutral intermediary platforms, against damage claims which, it could be assumed, would often arise as the result of the tortfeasors' anonymity, the platform's better financial capacities[137] and the fact that the infringement occurred because the platform operator enabled access to the platform in the first place.[138]

However, in order to check whether this immunity regime applies to internet intermediary platforms, the Court of Justice of the EU (CJEU) has further introduced two additional tests: test of neutrality of the platform operator regarding the content placement[139] and the 'diligent economic operator test'.[140]

First, neutrality implies that the platform should abstain from an active role in the listing of the object, allowing it to have knowledge or control of the data stored. It should, therefore, confine itself to a merely technical and automatic processing of the external content rather than to provide material assistance.[141] The meaning of the term *assistance* was, however, only indicatively addressed in the case law. *Assistance*, in particular, refers to the case where the platform assists the seller with the marketing of the object, i.e. optimisation of the presentation of the offers for sale or promotion thereof.[142] As a matter of principle, it is argued, the 'assistance' should be considered in the light of the type of relationship between the user and the platform, the degree of the help provided by the platform and the degree of knowledge and control this relationship gives to the platform over the information stored thereon.[143]

The neutrality test will, in principle, be met with regard to intermediary platforms. Automatisation and routinisation of the bidding process at such platforms does not allow the platform operator to actively intervene in the auction.[144] Furthermore, the platform operator usually has no factual knowledge about the content placed at millions of users' profiles, let alone their possible unlawfulness.[145] Lastly, the volume of transactions and number of users' profiles make it difficult for the platform operator to control what is happening at the platform.

Secondly, the threshold for exemption from civil liability for damages requires not only the lack of actual knowledge of the illegal activity or information but also the lack of awareness of facts or circumstances from which the illegal activity or information is apparent. Whether the platform should have identified the apparent illegality of the content arising from the facts or circumstances of the case shall be judged according to the standard of a 'diligent economic operator' – a test introduced in *L'Oreal v. eBay*.[146]

Lacking any further explanation of its true meaning, it could be argued that this standard goes beyond the standard of a reasonable man. It could refer to a proactive 'duty of care to remove all material this operator can identify as illegal, not simply when the material is clearly illegal but also when a little more hard work may be required to uncover this illegality.'[147] However, this shall not impose on the platform operator any general, *ex ante* obligation to actively seek facts or circumstances which would signal unlawful activity.[148] It means that, for example, a platform operator is under no general pre-emptive obligation to install a filter of textual or graphical content in order to control the content published at the users' profiles; it is up to the platform operator to decide whether to install it or not.[149]

This way, the ECD has taken into concern the intermediary platform's wish not to be involved in any way into the process of content placement. The intermediary platform's responsibility is, hence, limited to delisting of the illegal content once it became aware thereof, most notably, via notification of court orders or via 'notice-and-takedown' procedures launched by the victims.[150] In order to trigger the awareness of illegality, notice has to be sufficiently precise and adequately substantiated.[151] Only then should the platform invest diligence to identify the suspicious material as illegal.

This viewpoint was confirmed in the Belgian[152] and US case law.[153] On the other hand, French, German and UK courts are more strict regarding monitoring obligations of intermediary platforms.

French courts held that platforms like eBay are more than passive hosts of external content; hosting is inherent in eBay's broader editing or brokerage service. Hence, eBay should provide adequate technical measures to combat trademark infringements.[154] A similar position was in the UK case law.[155]

German courts respect the principle of host's immunity from civil liability for damages and criminal liability for infringements as well as for the prohibition on the imposition of general monitoring obligations on platforms. However, by reference to ECD, Art 14(3), the German court practice held that the national legal system is not precluded from allowing the national court to issue an injunctive relief against the defaulting platform, asking it not just to terminate the infringement but also to introduce preventing technical measures such as filter software against specific future infringements (*ex post* monitoring duties).[156]

In this regard, instalment of a filter software would be a rational precautionary measure if it were highly likely for the tortfeasor to register again at the platform under a new user account and repeat the infringement.[157] In such cases, it is considered justified to impose on the platform a duty to supervise the users' activity.[158] Such an approach may be characterised as an act of a 'diligent economic operator'.[159]

To sum up, the immunity of intermediary internet platforms from civil liability for illegal content or activity requires that the platform is (a) merely a host provider, (b) neutral concerning the content placement, (c) diligent in noticing signals of apparently unlawful content or activity and (d) expeditious in removing the said content or disabling access thereto upon the notification. If all four criteria are met, the platform will be relieved from the civil liability for damages resulting from the placement of illegal content or activity. The burden of actively seeking for possible breaches of law and notifying thereof lies, then, primarily with the victims, including platform users who suffered damage due to the illegality of their purchase or the illegal activity of their counterparties. Those victims are also forced to seek damages directly from the tortfeasors, whose identity, place of residence/establishment and property, however, might be difficult to trace. Hence, the current immunity regime for intermediary platforms may be considered another disadvantage of internet auctioneering, threatening to discourage users from engaging into e-commerce. This is also an important departure from the civil liability of traditional auctioneers. Since they always act as active sales intermediaries, they will be, in principle, liable for unlawful content (e.g. sale of stolen or forged artwork) and activity (e.g. sham bidding) taking place in their salerooms.

Legal relationships

User framework agreements

The structure of legal relationships at standard, intermediary internet auction[160] consists of three categories of contractual relationships: framework agreement

between the seller[161] and the operator of the auction platform, framework agreement between the operator of the internet platform and the bidders and the contract for sale between the two users – the seller and the best bidder (the buyer).[162]

When users register on the platform for the first time, they enter a framework user agreement with the operator of the auction platform (*Rahmennutzungsvertrag*).[163] For instance, a prospective eBay user agrees to the Bay user agreement in the form of a click-wrap agreement. The users have to scroll down the webpage to the end of the interface displaying the platform's terms and conditions of sale. They have to press 'Accept' to confirm their willingness to enter the agreement and become obliged by the terms and conditions.

Following that, the user will receive an email confirming the successful registration with eBay and the acceptance of the applicable user terms and conditions.[164] The email confirmation, however, is merely a contractual offer to enter the user agreement. For the user contract to arise, the platform operator still has to notify the users that it entered their registration form in the platform's system. This recording is the final acceptance of the user's offer.[165]

The framework agreement that will arise is a long-term contract.[166] It obliges the platform operator to place its organisational and technical infrastructure at the users' disposal, enable communication between the users and enable transmission of the users' statements of will so they could put up and offer their objects for sale (sellers) and, respectively, attend the online auction and bid (bidders).[167] It is up to the parties to decide whether to use the platform or not.

In this aspect, this is an agreement on provision of digital (information society) services.[168] Furthermore, since it enables the parties to use the platform's infrastructure in order to communicate with each other,[169] it also has elements of intermediation or brokerage contract (*Maklerei*, *courtage aux enchères*).[170] It follows that the framework user agreement is a long-term agreement combining elements of the contract for provision of digital services and brokerage contract (*Rahmenmaklerdienstvertag*).[171]

This qualification also holds true as regards the user framework agreement with the bidders, despite the fact that the bidders usually do not pay the operator's brokerage fee. What matters is the duty of the platform operator to provide access to the platform's infrastructure so the potential buyer could actually enter into a sales agreement with the seller. Hence, the existence of the intermediation as such, rather than the fact whether the relationship is chargeable or not, is relevant.[172] Secondly, the default character of the general intermediation and services rules allows the operator not to charge a fee to the buyers.

Thirdly, the bidders share their personal data (e.g. social media and email accounts) with the platform operator. Despite not being a direct monetary consideration for the service, these data are redeemable. They have commercial nature and can be used by the platform operator for making profit. In this sense, the term *remuneration* in the context of the provision of information society service should be interpreted broadly to cover any sort of intangible monetised value given in exchange for the right to access the platform's services.[173] In this sense, the legal relationship between the platform and the bidder corresponds with the concept of a contract for provision of 'free' digital services.[174]

Individual user agreements

Seller-auctioneer relationship

A framework user agreement serves as a general contractual basis for conducting individual internet auction sales.[175] Each time the sellers put up a concrete offer to sell certain objects on the auction platform (i.e. on their user profile), they activate their contractual rights to use the platform under the framework agreement. This activity is as an offer subject to the operators' acceptance.

The acceptance usually comes in the form of a confirmation email or a pop-up message on the screen. Thereby, the seller and the platform operator enter an individual user agreement (*Nutzungsvertrag)*. It concretises the general rights and duties of the parties arising from the framework agreement.[176]

Internet auction usually works as a 'pay-to-sell auction'. The seller owes a certain fee to the platform operator for providing a concrete IT service (i.e. for putting up the object for sale) irrespective of the auction result (*Einstellgebühr; Angebotsgebühr*).[177] Since the internet auctioneer shall, on the one hand, place the platform on the seller's disposal as neutral intermediary but, on the other, charges a 'listing' fee even if the contract has not been concluded, the individual user agreement between the seller and the auctioneer is neither a pure intermediation or services contract. It is a combination of both types of contract (*Maklerdienstvertrag*). In this construction, the 'listing fee' is not a commission fee but rather a compensation for the platform operator's concrete operative expenses (*Aufwandsentschädigungsklausel*). This fee the intermediary is allowed to receive under the general law of obligations, irrespective of the result of the intermediation.[178]

Bidder-auctioneer relationship

By analogy, each time the bidders express their will to take part in the bidding for a certain object (e.g. by submitting a request to register for a particular auction or by asking permission to inspect the seller's user profile), they place a contractual offer to the internet auctioneer. By placing such an offer, the bidders are essentially asking the platform operator to provide them with the technical assistance to place their prospective bids. Such an offer the operator has yet to accept.[179] Again, this can follow in the form of an email or a pop-up message on the screen confirming successful registration for a particular auction, or simply by allowing access to the auction concerned.

Once the platform operator accepts the bidder's offer, the platform and the bidder will enter an individual user agreement. Unlike the user agreement between the seller and the auctioneer, this agreement is usually free of charge. The platform operators do not charge a fee for provision of information technology services.[180] Hence, this agreement is not a typical services contract.

However, the platform collects the bidder's personal data (e.g. concrete searching activities and buying preferences) each time the bidder registers for a particular auction and uses them later for marketing purposes. E.g. the fact that a bidder once bid for a porcelain figure of a golden retriever will be used to advertise sale of the same or similar objects in the future. In this sense, each individual platform

service is performed in exchange for a certain consideration in the form of information, which has indirect commercial value.

Since the platform operator is bound to intermediate on the one hand and receives a 'consideration' in the form of bidders' personal data for usage of the platform irrespective of the outcome of the auction on the other hand, the user agreement between the bidders and the platform operator is a special type of *Maklerdienstvertag*.[181]

Contract for sale

A typical internet auction is a distance private-treaty sale. The seller makes the first step by registering the call for bids with the internet auctioneer and setting the deadline for bids placement.[182] The sellers set the deadline autonomously, thereby expressing their willingness to sell the object to whoever ends up being the best bidder at the moment of the lapse of time.[183]

Thus, putting up the object on the platform is not a mere call for bids.[184] It is the seller's firm offer to all participating bidders, proposing them to enter the sale contract with any person who becomes the highest bidder,[185] unless stated otherwise in the sale conditions.[186] This offer is determined in terms of the object but merely determinable in terms of the buyer and the price. The buyer is whoever places the best bid at the closure of the auction, and the price is the highest price at that moment.[187]

Best bid that arrives during the auction session is, on the other hand, a conditional acceptance of the seller's offer (*Annahme durch Abgabe eines Gebots*).[188] The acceptance is contingent on the absence of an even higher bid until the lapse of the bidding time.[189] Once the time lapses, the deferring condition is unconditionally fulfilled. The seller and the last bidder will automatically enter into the binding sale contract (*Zuschlag mittels Zeitablauf*).[190] In this sense, automatic closure has a constitutive meaning for the formation of contract, as no other bidder can prevent the highest bidder from entering the contract anymore.[191]

Interim conclusion

In technological terms, internet auction is a competitive bidding which is run exclusively online and terminated by lapse of a predefined bidding time. It should be distinguished from 'buy-now' and 'name-your-price' sales methods, which are variants of 'take-it-or-leave-it' and 'bargain price' sales, respectively.

In legal terms, however, internet auction covers only those time-framed online competitive bidding methods where the operator of the auction platform ('internet auctioneer') takes an active role in the auction as agent for the seller. This is an 'auctioneer-to-customer' auction (A2C) and is typical for online auction sales run by major art auction houses. Since A2C auctions include online competitive bidding, agency of the auctioneer and virtual knock-down, they should be covered by the rules applicable to traditional auctions.

On the other hand, intermediary auction platforms like eBay are not auctions in a legal sense. The key difference between traditional auctions and intermediary

internet auctions lies in the legal nature of the platform operator. Unlike traditional auctioneer-agent, the operator of an intermediary platform is a sales facilitator. It merely puts the platform's technological infrastructure at the users' disposal for bidding purposes ('user-to-customer' auctions, U2C). For this reason, sales at intermediary platforms are ordinary distance sales which should be considered in light of the rules on e-commerce, consumer law and the general law of contracts.

Internet auction has turned auctions into a democratic, inclusive and economically efficient sale method. Nevertheless, internet auctions have several disadvantages arising from digitalisation and delocalisation of internet auction.

Digitalisation. The anonymity of the cyberworld makes it easy for the parties to engage in collusive and unfair bidding practises but makes it difficult for the victims to trace detected scams and enforce legal claims. Furthermore, absence of a professional auctioneer from sale increases the risk of misattribution, illegal content placement and illegal activities. Also, security threats generated by sophisticated software may distort the integrity of auction bidding and cause technical and financial damages to the users. Lastly, a host intermediary platform which acts as a neutral and diligent economic operator shall be immune from civil liability for illegal content or activity. Hence, the burden of disclosing violation of law and subsequent prosecution of (often anonymous) tortfeasors lies primarily with the platform users and other victims. All these issues may divert the potential users from engaging into e-commerce, especially into a cross-border one.

Delocalisation. Delocalisation of internet auction sales makes it difficult for the courts to establish the exact place of the internet auction and, hence, determine the law applicable to auction-related disputes. Unless there is a clear connecting point to refer to – e.g. the location of the server or residence of the platform operator – the courts will have to turn to the law of the country of the seller's habitual residence.

The legal structure of legal relationships at standard, intermediary auctions includes two levels of contractual relationships. On the one hand, the platform and the users enter a user framework agreement. Under this agreement, the platform operator shall place its organisational and technical infrastructure at the users' disposal and enable communication between them so they could put up and offer their objects for sale (sellers) or bid (bidders). This contract is a mixture of elements of contract for the provision of information society services and the intermediation contract (*Rahmenmaklerdienstvertag*).

On the other hand, individual user agreement between the platform operator and the user (seller and buyer) arises as soon as the user launches the platform for selling (seller) or bidding (buyer) purposes. The individual contract is also a mixture of the contract for the provision of information society services and the intermediation contract (*Maklerdienstvertag*). Whereas the seller pays for the service with money, the bidders 'pay' for the use of the platform by sharing their personal data.

The seller's call for bids is an offer to sell, whereas the bidders' bids are acceptances to buy, contingent on the absence of a higher bid. Having in mind the openness of the auction rules to any customary way of acceptance of the best bid, the

automatic closure of the auction by passage of time is just another customary way of accepting the best bid, while a transfer of data via internet is an effective form of a virtual knock-down (*Zuschlag mittels Zeitablauf*).

Notes

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3 Harvey and Meisel (n 2) 3.
4 Ibid 14; James Brown and Mark Pawlowski, 'How Many Contracts in an Auction Sale' (2016) 25 Nottingham Law Journal 1, 12 <https://www4.ntu.ac.uk/nls/document_uploads/188672.pdf> accessed 5 February 2022.
5 Harvey and Meisel (n 2) 14.
6 Dennis Werner, 'Überblick; Anbieter und Arten von Internet-Auktionen' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 8.
7 Isabelle Désirée Biallaß, 'Der Vertragsabschluss bei Internet-Auktionen' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 17.
8 Riefa (n 2) 5–6.
9 Andreas Wiebe, 'Vertragsschluss und Verbraucherschutz bei Internet-Auktionen und Anderen Elektronischen Marktplätzen' in Gerald Spindler and Andreas Wiebe (eds), *Internet-Auktionen und Elektronische Marktplätze* (2nd edn, Verlag Dr. Otto Schmidt 2005) 69; Harvey and Meisel (n 2) 17; Nick Moustakas, 'Going, Going, Gone: Online Auctions, Consumers and the Law – A Report for the Communications Law Centre' (Communications Law Centre 2006) 119 <https://ug1lib.org/book/2853784/75b2a6> accessed 5 February 2022.
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11 David Lucking-Reiley, 'Auctions on the Internet: What's Being Auctioned, and How?' (2000) 48 (3) The Journal of Industrial Economics 227, 237; Markus Lunk, *Internet-Auktionen: Aspekte des Gewerbe-, Wettbewerbs- und Vertragsrechts* (Dr. Hänsel-Hohenhausen 2006) 15; Werner (n 6) 5; Riefa (n 2) 6; Brown and Pawlowski (n 4) 14; Dorotheum, 'Versteigerungsbedingungen Online Auction' (Dorotheum, March 2021), line 6, <www.dorotheum.com/fileadmin/user_upload/Download/Agb/Vstg-Bed-Online-DE-final-2021.pdf> accessed 5 February 2022; Lempertz, 'Conditions of Sale' (Lempertz 2022), Art 7, <www.lempertz.com/en/conditions-of-sale.html> accessed 2 February 2022; Vasari, 'Conditions Generales de Vente' (Vasari 2021), La Vente, <www.vasari-auction.com/vente/115649> accessed 2 February 2022; Koller, 'Online Auction Conditions Koller Zürich' (Koller, September 2018), Art 3.1, <www.kollerauktionen.ch/en/kaufen_verkaufen/auktionsbedingungen/> accessed 2 February 2022; Christie's, 'London Conditions of Sale Online-Only Sales: Auctions and Buy-Now' (Christie's, February 2022), Pt C During the Sale, Art 11, <www.christies.com/pdf/onlineonly/ECOMMERCE%20CONDITIONS%20OF%20SALE%20-%20LONDON.pdf>.
12 Lucking-Reiley (n 11) 238; Rolf H Weber and Martin Skripsky, 'Online-Auktionen – Neues Geschäftsmodell in Schwierigem Rechtlichem Umfeld' (2001) 3 Insolvenz- und Wirtschaftsrecht 93, 94; Werner (n 6) 5; Brown and Pawlowski (n 4) 14.
13 Kathrin Heitbaum, *Zur Anwendbarkeit des §156 BGB sowie zur Inhaltskontrolle bei Privaten Online-Auktionen* (Peter Lang 2003) 79; Werner (n 6) 5.
14 Werner (n 6) 7; Riefa (n 2) 6–7.
15 Lucking-Reiley (n 11) 240.
16 Werner (n 6) 6.

17 Lucking-Reiley (n 11) 239; likewise, Lunk (n 11) 22; Riefa (n 2) 7.
18 Martin Schulze, *Internetauktionen aus vertragsrechtlicher und wettbewerbsrechtlicher Sicht* (Tectum Verlag 2004) 17, 21; Lunk (n 11) 24 (however, calling this auction as combination of typical and live, i.e. streamed auction); Harvey and Meisel (n 2) 14–15.
19 Werner (n 6) 6.
20 Ibid 3.
21 Ibid 4.
22 Ibid 3.
23 E.g. high monthly trade volume, diversification of offer, offering new goods, launching an online shop at platform (e.g. eBay-Shop). Georg Borges, 'Unternehmerbegriff und Internet-Auktion' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 91ff; Stephan Klein, 'Wettbewerbsrechtliche Aspekte der Internet-Auktion' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 217.
24 Klein (n 23) 217–18.
25 Werner (n 6) 4.
26 Lunk (n 11) 13.
27 Werner (n 6) 4.
28 Ibid.
29 Ibid.
30 Ibid 5.
31 Gerald Spindler, 'Vertragliche Haftung und Pflichten des Marktplatzbetreibers und der Marktteilnehmer' in Gerald Spindler and Andreas Wiebe (eds), *Internet-Auktionen und Elektronische Marktplätze* (2nd edn, Verlag Dr. Otto Schmidt 2005) 129; Werner (n 6) 5; Riefa (n 2) 3.
32 Schulze (n 18) 17; Werner (n 6) 5; Riefa (n 2) 3.
33 Moustakas (n 9) 38.
34 Ibid 37.
35 Riefa (n 2) 4.
36 Ibid 4–5.
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38 1896 Civil Code (*Bürgerliches Gesetzbuch*) (BGB) (BGBl. I S. 42, 2909; 2003 I S. 738 2021 I S. 5252), para 156 in conjunction with 2003 Regulation on Commercial Auctions (*Verordnung über gewerbsmäßige Versteigerungen* (VerstV) (BGBl. I S. 547 2017 I S. 626), para 7; Sale of Goods Act 1979 (SoGA 1979) s 57(2); 1911 Amendment to the Swiss Civil Code (Fifth Pt: Obligations Law) (OR) (*Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches AS 27 317 (Fünfter Teil: Obligationenrecht)*), Art 229(2); Uniform Commercial Code (UCC 1951) s 238(2); 1807 Commercial Code (*Code de commerce*), Art L320–2(1); Hans Wicher, *Der Versteigerer: Systematischer Kommentar zu den einschlägigen gewerberechtlichen Vorschriften* (Dr. Ernst Hauswedell & Co. 1986) 151.
39 Harvey and Meisel (n 2) 17; Brown and Pawlowski (n 4) 15, 18.
40 Bundesgerichtshof (BGH), VIII ZR 305/10 of 8 June 2011, NJW 2011, 2643, para 1; OLG Frankfurt am Main, 12 U 51/13 of 27 June 2014, juris, para 24; Oberlandesgericht (OLG) Hamm, 28 U 199/13 of 30 October 2014, MMR 2015, 25, para 46; Heinrich Honsell, 'Die Online Auktion' in Theodor Baums, Johannes Wertenbuch, Marcus Lutter and Karsten Schmidt (eds), *Festschrift für Ulrich Huber zum siebzigsten Geburtstag* (Mohr Siebeck 2006) 357; Martin Skripsky, *Die Online-Kunstauktion* (Schulthess 2006) 65; Biallaß (n 7) 24; Alla Belakouzova, *Widerrufsrecht bei Internetauktionen in Europa? Eine vergleichende Analyse des deutschen, englischen, russischen und belarussischen Rechts unter Berücksichtigung der Rechtsentwicklung in der*

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42 Helmut Marx and Heinrich Arens, *Der Auktionator: Kommentar zum Recht der gewerblichen Versteigerung* (2nd edn, Luchterhand 2004) 458; Wiebe (n 9) 60; Honsell (n 40) 357; Skripsky (n 40) 65; Werner (n 6) 13; Biallaß (n 7) 61; Kresse (n 41) 347; 382; Belakouzova (n 40) 44.

43 Spindler (n 31) 131.

44 Ibid 130.

45 Ibid 130, 168.

46 Landesgericht (LG) Wiesbaden, 13 0 132/99 of 13 January 2000, MMR 2000, 376, para 5; AG Itzehoe, 57 C 361/04 of 18 May 2004, MMR 2004, 637, paras 22; 27; BGH, VIII ZR 375/03 of 3 November 2004, NJW 2005, 53, paras 15, 17, 19, 20, 29, 33; LG Bonn, 1 O 307/04 of 12 November 2004, openjur.de, paras 91–92; OLG Nürnberg, 12 U 336/13 of 26 February 2014, MMR 2014, 592, para 187; Amtsgericht (AG) Dieburg, 20 C 945/14 of 15 April 2015, openjure.de, para 27; BGH, VIII ZR 100/15 of 24 August 2016, NJW 2017, 468, para 35; Wiebe (n 9) 67; Kresse (n 41) 387–88.

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48 Spindler (n 31) 136; Biallaß (n 7) 24.

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51 Biallaß (n 7) 28; expressly Code de commerce, Art L321–3.

52 Ulrich G Schroeter, 'Die Anwendbarkeit des UN-Kaufrechts auf grenzüberschreitende Versteigerungen und Internet-Auktionen' (2004) Zeitschrift für Europäisches Privatrecht 20, 31; Jochen Hoffmann, 'Teil 3: Vertrags- und Haftungsrecht. Die einzelnen Vertragsbeziehungen' in Stefan Leible and Olaf Sosnitza (eds), *Versteigerungen im Internet* (Verlag Recht und Wirtschaft GmbH 2004) 70–71; Harvey and Meisel (n 2) 17; Kresse (n 41) 404; Riefa (n 2) 16.

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54 Expressly Wiebe (n 9) 64; Spindler (n 31) 129. On the possibility that the operator of the auction platform acts as an agent for the parties positively Biallaß (n 7) 23–24.

55 Moustakas (n 9) 37, 39, 50. See Koller, 'Online Auction Conditions Koller Zürich', Art 1; Dorotheum, 'Versteigerungsbedingungen Online Auction', line 2; Christie's, 'London Conditions of Sale Online-Only Sales: Auctions and Buy-Now', Preamble, line 4. On the possibility of agency relationship between the consignor and the auctioneer in UK law, also Belakouzova (n 40) 79–80.

56 Moustakas (n 9) 70.

57 Spindler (n 31) 129.

58 Ibid 130.

59 Ibid.

60 Code de commerce, Art L321–3(2); Sophie Vigneron, *Étude Comparative des Ventes aux Enchères Publiques Mobilières: France et Angleterre* (L.G.D.J. 2006) 21.

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64 Martin Blättler, *Versteigerungen über das Internet: Rechtsprobleme aus der Sicht der Schweiz* (Schulthess 2004) 78; Ernst (n 63) 17.
65 Emily M Weitzenboeck, 'Electronic Agents and the Formation of Contracts' (2001) 9 (3) International Journal of Law and Information Technology 204, 214 <https://ssrn.com/abstract=2173226> accessed 6 February 2022; Blättler (n 64) 79; Skripsky (n 40) 109–10; likewise Belakouzova (n 40) 46–47.
66 However, since the software operates with the direct intervention of human beings and under their control, the Internet platform could not be classified as an autonomous, intelligent agent. On the general features of intelligent agents see Weitzenboeck (n 65) 207. Due to the lack of autonomy but also the legal personality and ability to consent to mandate, the software agent cannot be qualified as an agent in terms of law either.
67 Ernst (n 50) 5; Biallaß (n 7) 27; Riefa (n 2) 48; Belakouzova (n 40) 43 79; Brown and Pawlowski (n 4) 15, in n 60.
68 Belakouzova (n 40) 238.
69 Ibid 32.
70 Ernst (n 63) 14; Belakouzova (n 40) 21.
71 MMR 1999, 678, paras 20–21; Kammergericht (KG) Berlin 5 U 9586/00 of 11 May 2001 NJW 2001, 3272, para 2, letter (a); BGH, VIII ZR 13/01 of 7 November 2001, NJW 2002, 363, para 55; Ernst (n 63) 15; Belakouzova (n 40) 10–11; Blättler (n 64) 192.
72 Belakouzova (n 40) 79.
73 Wiebe (n 9) 68; Belakouzova (n 40) 22–23, 25.
74 Belakouzova (n 40) 42.
75 Honsell (n 40) 361.
76 Harvey and Meisel (n 2) 17; likewise Riefa (n 2) 48.
77 *Peter Smythe v Vincent Thomas* [2007] NSWSC 844, para 35. On knock-down in the form of time lapse as moment of contract formation also Christie's, 'London Conditions of Sale Online-Only Sales: Auctions and Buy-Now', Pt D During the sale, Art 11; Dorotheum, 'Versteigerungsbedingungen Online Auction', line 7; Koller, 'Online Auction Conditions Koller Zürich', Art 1; Honsell (n 40) 359; Belakouzova (n 40) 39, 40, 79.
78 BGH, NJW 2002, 363, para 28; Honsell (n 40) 361, arguing that the Federal Court's understanding of auction as procedure necessarily including a traditional fall of the hammer is formalistic and incomprehensible.
79 On a possibility that the platform operator acts as an agent or commission agent, also Marx and Arens (n 42) 464.
80 MMR 1999, 678, para 26; Ernst (n 63) 18.
81 AG Osterholz-Scharmbeck, 3 C 415/02 of 23 August 2002, juris, para 5; Heitbaum (n 13) 104; Wiebe (n 9) 68; Skripsky (n 40) 83; Belakouzova (n 40) 236.
82 Harvey and Meisel (n 2) 14.
83 Blättler (n 64) 100; Ernst (n 50); Werner (n 6) 9–10.
84 Werner (n 6) 10; Lunk (n 11) 12.
85 Honsell (n 40) 362.
86 Werner (n 6) 10.
87 Skripsky (n 40) 90–91; Harvey and Meisel (n 2) 18; Werner (n 6) 254; Biallaß (n 3) 71; Riefa (n 2) 180.
88 Harvey and Meisel (n 2) 18; Moustakas (n 9) 82; Riefa (n 2) 170.
89 Harvey and Meisel (n 2) 18; Moustakas (n 9) 82–83; Riefa (n 2) 169.
90 Riefa (n 2) 169.

91 Harvey and Meisel (n 2) 18; Moustakas (n 9) 83.
92 Harvey and Meisel (n 2) 20; Werner (n 6) 10.
93 Biallaß (n 3) 71.
94 Harvey and Meisel (n 2) 16; Biallaß (n 3) 62; Klein (n 23) 222.
95 Biallaß (n 3) 62.
96 Likewise Werner (n 6) 10.
97 Harvey and Meisel (n 2) 18; Werner (n 6) 254.
98 Jörg Schwenk, 'Angriffe auf Internet-Auktionen' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 352.
99 Ibid 353–54.
100 Ibid 355–59.
101 See more in Georg Borges, 'Zivilrechtliche Aspekte des Identitätsmissbrauchs in Internet-Auktionshäusern' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 389–96.
102 See more Stefan Weidert, 'Schutzverletzungen bei Internet-Auktionen' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 274–94.
103 Convention on the Law Applicable to Agency (The Hague, 14 March 1978) (1977) 16 ILM 775 Art 11(2)(c); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Reg) [2008] OJ L177/6, Art 4(1)h. The regulation is still applicable in the UK, where it was retained by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, No. 834. Amendments thereto did not affect the rules relevant for auction sales. For Switzerland, see Convention on the Law Applicable to International Sales of Goods (The Hague, 15 June 1955) 510 UNTS 147, Art 3(3), applicable to auction sales by virtue of Swiss Federal Law of 18 December 1987 on the International Private Law (IPRG) law, AS 1988 1776, Art 118. In the US, such a rule could be extrapolated from the 'appropriate relation' rule. See Uniform Commercial Code (UCC 1951) s 1–301(c) (Territorial Applicability; Parties' Power to Choose Applicable Law).
104 Likewise, Ulrich Magnus, 'Chapter II, Uniform Rules, Art 4' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law ECPIL, Vol. II Rome I Regulation* (Otto Schmidt 2017) 302; Zheng Tang, 'Law Applicable in the Absence of Choice: The New Article 4 of the Rome I Regulation' (2008) Modern Law Review 71 (5) 785, 790.
105 Tang (n 104) 790.
106 Likewise Magnus (n 104) 302.
107 Rome I Reg, Art 1(1) in conjunction with Art 6.
108 The wording of Rome I Reg, Art 6, does not prejudice the role of the consumer and seller, respectively, in the sale. It suggests that the consumer may be either a lay seller or buyer, while the professional may also be either a professional seller or buyer.
109 Rome I Reg, Art 4(1)(g).
110 Magnus (n 104) 302.
111 E.g. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Text with EEA relevance) (DCR) [2011] OJ L304/64 Art 2(13) (on physical presence as key feature of the term 'public auction' under DCR also Riefa [n 2] 45); Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1 Art 311 (1)(6)–(7); Christian von Bar C and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* vol 1 (Full edn, OUP 2010) 322.
112 Magnus (n 104) 302. Likewise McParland, however, put doubts on the need for 'publiciness' of the auction. Michael McParland, *The Rome I Regulation on the Law*

Applicable to Contractual Obligations (OUP 2015) 406. The term covers both English and Dutch auctions. Ibid.

113 McParland (n 112) 407.

114 Ibid.

115 Peter Stone, 'Internet Transactions and Activities' in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2015) 6.

116 Güngör Güneysu Gülin, 'Article 4 of the Rome I Regulation on the Applicable law in the Absence of Choice – Methodological Analysis, Considerations' in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2015) 184; McParland (n 112) 405.

117 Also, Magnus (n 104) 303.

118 Rome I Reg, Art 4(3).

119 Magnus (n 104) 303.

120 Rome I Reg, Art 4(4).

121 Rome I Reg, Art 4(1)(a); Tang (n 104) 794; Gülin (n 116) 182; Magnus (n 104) 303; McParland (n 112) 407. For the purposes of Rome I Reg, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration at the time of contract formation. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business at the time of contract formation. Rome I Reg, Art 19(1) in conjunction with Art 19(3).

122 Magnus (n 104) 277.

123 Ibid 302.

124 Rome I Reg, Art 6(1).

125 Rome I Reg, Art 6(2).

126 Renold (n 40) 820; Christie's, 'London Conditions of Sale Online-Only Sales: Auctions and Buy-Now', Pt H, Art 11; Dorotheum, 'Versteigerungsbedingungen Online Auction', line 36; Koller, 'Online Auction Conditions Koller Zürich', Art 12.7; eBay UK, Art 16.

127 Renold (n 40) 820.

128 Christie's, 'London Conditions of Sale Online-Only Sales: Auctions and Buy-Now', Pt H, Art 11; eBay UK, Art 16.

129 Renold (n 40) 820; e.g. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Reg) OJ L35171, Art 4(1); likewise IPRG, Art 112.

130 Renold (n 40) 820; e.g. Brussels I Reg, Art 7(1); IPRG, Art 113.

131 E.g. Brussels I Reg, Art 18; likewise IPRG, Art 114.

132 Andreas Rühmkorf, 'The Liability of Online Auction Portals: Towards a Uniform Approach?' (2010) 14 (4) Journal of Internet Law 3, 8; Lee (n 41) 304; Sesing (n 41) 329; Riefa (n 2) 176.

133 *Storage* implies holding data supplied by the users in the platform's server memory. Judgement of 12 July 2011, L'Oréal SA and Others v eBay International AG and Others, C-324/09, EU:C:2011:474 para 110.

134 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce', ECD) [2000] OJ L 178/1, Art 14.

135 E.g. defamatory reviews damaging the seller; unlawful use of protected trademark damaging its holder.

136 E.g. removal of the defamatory claims from the feedback section, or delisting of the items protected by copyright.

137 Rühmkorf (n 132) 4; Sesing (n 41) 314; Riefa (n 2) 175.

138 Rühmkorf (n 132) 4.

139 Riefa (n 2) 187.

140 Ibid 201.

141 L'Oréal SA and Others, para 113. On the other hand, the same immunity does not apply to proprietary platforms. They are liable for the content listed and the activity happening at their sites, since they are the sellers policing the whole trading process. Likewise Riefa (n 2) 175, n 3.
142 L'Oréal SA and Others, para 116.
143 Riefa (n 2) 216–17.
144 Biallaß (n 7) 21.
145 Lee (n 41) 304.
146 L'Oréal SA and Others, para 120.
147 Riefa (n 2) 201.
148 ECD, Art 15(1); Sesing (n 41) 330, 335; Riefa (n 2) 214–15.
149 ECD, Recital 40.
150 ECD, Art 14(3). Rühmkorf (n 132) 4; Riefa (n 2) 203–04. For instance, the trademark holder should report to eBay the listings of counterfeit objects via Verified Rights Owner (VeRO) programme so eBay could remove them from the platform. In order to trigger the awareness of illegality, notice has to be sufficiently precise and adequately substantiated.
151 L'Oréal SA and Others, para 122; Riefa (n 2) 205.
152 Rühmkorf (n 132) 5; Riefa (n 2) 183–84.
153 Rühmkorf (n 132) 7–8.
154 Ibid 5; Riefa (n 2) 182–83.
155 Rühmkorf (n 132) 7.
156 L'Oréal SA and Others, para 144; Rühmkorf (n 132) 6–7; Riefa (n 2) 214–15.
157 Sesing (n 41) 343.
158 Ibid 340.
159 Riefa (n 2) 210–11.
160 In case the platform operator acts as an agent for the seller (and perhaps even for the bidder), the structure and the qualification of the legal relationships between the seller, the internet auctioneer and the bidders are the same as the structure of legal relationships at conventional auction. Also, Ernst (n 63) 17. See Code de commerce, Art L321–3(3), which puts A2C auctions under the regime applicable for physical auction sales. This also includes the duty of the parties to exempt the online auctioneer from the self-dealing prohibition, at least by tacit approval. Biallaß (n 7) 24.
161 Given that the intermediary platform usually does not act as an agent, the seller is not the consignor either. On the other hand, in rare cases of A2C auction, the seller is also the consignor, and the platform is the agent.
162 Kresse (n 41) 348; 355; Riefa (n 2) 50.
163 Gerald Spindler, 'Vertrag mit dem Endkunden' in Gerald Spindler (ed), *Vertragsrecht der Internet-Provider* (Verlag Dr. Otto Schmidt 2000) 206; Heitbaum (n 13) str. 38; Schulze (n 18) 18; Skripsky (n 40) 129; Biallaß (n 7) 19; Kresse (n 41) 348; Belakouzova (n 40) 45.
164 Also Blättler (n 64) 124.
165 Hoffmann (n 52) 33–34; Wiebe (n 9) 61; Biallaß (n 7) 18; Contr. Skripsky (n 40) 132, 34, arguing that invitation for registration is an offer to enter the user agreement, whereas the submission of the registration form is the user's acceptance of the platforms' general offer.
166 Skripsky (n 40) 125; Biallaß (n 7) 20.
167 Schulze (n 18) 18; Lunk (n 11) 94; Wiebe (n 9) 61; Spindler (n 31) 132; Biallaß (n 7) 23; Kresse (n 41) 348–49, 382; Riefa (n 2) 38. In this sense also eBay UK; Code de commerce, Art L321–3(3).
168 On the intermediary platform as the provider of services (*le prestataire de services*) expressly Code de commerce, Art L321–3(3). On digital services contracts as long-term contracts in general Stefan Schuppert,' Vertragstypen von Provider-Verträgen' in Gerald Spindler (ed), *Vertragsrecht der Internet-Provider* (Verlag Dr. Otto Schmidt 2000) 11.

169 Code de commerce, Art L321–3(3); Skripsky (n 40) 73.
170 See expressly Code de commerce, Art L321–3(2). However, the platform does not guarantee the auction success. Biallaß (n 7) 22; Marx and Arens (n 42) 459.
171 Wiebe (n 9) 61; Spindler (n 31) 135, referring, though, only to seller-auctioneer relationship; arguing for mandate relationship between the buyer and the auctioneer, ibid 132. Cf in general for digital services contract Schuppert (n 168) 11, arguing for a services contract with custodian elements (*Dienstvertrag mit Geschäftsbesorgung*). However, the custodian element is not inherent in a typical platform operator, since it neither takes over the user affairs nor takes care of them for the user's account. Skripsky (n 40) 131.
172 Spindler (n 31) 132.
173 Skripsky (n 40) 132, arguing that the relationship between the platform and the bidder may be qualified as a free-of-charge loan of the platform website.
174 On concept of 'free digital services', see Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers, COM/2018/0183 final, 11 April 2018, s 2 (Modernising the Consumer Acquis), para 2, subpara 1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523866913149&uri=COM:2018:183:FIN> accessed 6 February 2022.
175 Biallaß (n 7) 20.
176 Gerald Spindler, 'Deliktische Haftung der Platformbetreiber' in Gerald Spindler and Andreas Wiebe (eds), *Internet-Auktionen und Elektronische Marktplätze* (2nd edn, Verlag Dr. Otto Schmidt 2005) 223; Skripsky (n 40) 73; Biallaß (n 7) 20; Kresse (n 41) 349.
177 Marx and Arens (n 42) 459; Heitbaum (n 13) 53; Wiebe (n 9) 60; Honsell (n 40) 357; Skripsky (n 40) 187; Biallaß (n 7) 21; Riefa (n 2) 40; Kresse (n 41) 353.
178 Wiebe (n 9) 63; Spindler (n 31) 132, 133–34; Skripsky (n 40) 188; Biallaß (n 7) 22.
179 Biallaß (n 7) 23.
180 Honsell (n 40) 358.
181 Contr. Skripsky (n 40) 197, arguing that user agreement with the bidder is neither a mandate nor a brokerage contract.
182 Biallaß (n 7) 16.
183 Kresse (n 41) 360.
184 Honsell (n 40) 358. Contr. Hoffmann, arguing that putting up the lot is a call for bids which incorporates anticipated acceptance, whereas the bids incorporate the offer. Hoffmann (n 52) 73–74. See also Schulze (n 18) 21–23; Biallaß (n 7) 29; Belakouzova (n 40) 40.
185 Heitbaum (n 13) 74; Lunk (n 11) 102; Kresse (n 41) 360; Belakouzova (n 40) 40, 138; on this possibility, also Wiebe (n 9) 70. Likewise, Blättler (n 64) 121, 180, 200, however, arguing that the conditional offer is, at the same time, anticipated acceptance of the highest bid, whoever this person will be.
186 E.g. conditions of sale may stipulate that puting the lot on the platform shall be treated as an anticipated acceptance of the highest bid. Heitbaum (n 13) 74; Wiebe (n 9) 70; Kresse (n 41) 361.
187 Wiebe (n 9) 73; Biallaß (n 7) 25.
188 Blättler (n 64) 180–81; 201. Contr. Honsell (n 40) 359, arguing for a binding offer.
189 Kresse (n 41) 360; Heitbaum (n 13) str. 74; Lunk (n 11) 105; Biallaß (n 7) 28; Belakouzova (n 40) 40,138; eBay UK, Art 7, point 2.
190 Heitbaum (n 13) 96; Marx and Arens (n 42) 460; Lunk (n 11) 94; Honsell (n 40) 359; Biallaß (n 7) 24; Belakouzova (n 40) 40, 138. The price can be paid directly to the seller's account or to the custodial account of the platform operator, its partnering bank or other third party providing escrow services (*Anderkonto*; *Treuhandkonto*) for the benefit of the seller. Marx and Arens (n 42) 460; Spindler (n 31) 182. Under

French law, for instance, such a payment model is mandatory for all auctioneers, while the existence of those funds has to be ensured or guaranteed by a third party. Code de commerce, Art L321–6. The price will be transferred to the consignor as soon as the consignor delivers the object in line with the description. Harvey and Meisel (n 2) 20; Moustakas (n 9) 158; Werner (n 6) 10.

191 Contr. Blättler (n 64) 194–95, 201, arguing that the passage of time is merely a declaration that the auction is over and that the pending contract of sale is now formed unconditionally. I.e. it is constitutive only in terms of changing the legal status of the sale from provisional to final and bringing certainty in the legal relationship between the seller and the buyer. However, it seems that by these words the author, in fact, confirms the constitutive nature of the virtual knock-down.

4 Auction and the EU artist's resale right

Introduction

Resale right is a nonassignable and unwaivable economic right of the authors of original works of visual art to continuously receive a percentage of the sale proceeds each time their artwork is resold on a secondary market.[1] The resale right 'follows' the original artwork, irrespective of the fact that the new owner does not stand in any legal relationship with the author. Therefore, resale rights resemble a pledge or similar security interest in tangible property.[2] For this reason, the French coined the term 'droit de suite' (literally, the 'follow-up right').[3]

The resale right is a product of European civil-law countries, where it was created in the first half of the twentieth century. On the other hand, it has been far less accepted in common-law countries. The first section deals with the origins of the resale right, while the second section explains civil- and common-law views on the resale right.

The EU is the only globally relevant art market that has introduced the resale right. The third section deals with the EU resale right. Following a brief historical note, it analyses the legal nature of the resale right and royalty claim, types of transactions covered by the EU resale right, liability for the royalty payment and calculation of the royalty. Since the EU resale right is already well-established across the EU – and so far has not been subject to any changes – this chapter does not question whether the EU art market needs the resale right or not. Also, it does not discuss whether the current concept of resale right should be revisited or abandoned.[4] It sticks to the normative reality.

The main areas of application of the resale right in Europe are public auctions.[5] Therefore, this section focuses on the application of the EU resale right to auctions. It addresses several gaps in the EU resale right regime that may affect the application thereof if art is resold at auctions.

Firstly, the EU resale right rules are silent on the applicability of the resale right to internet auctions. It is argued that the EU resale right applies to online sales if at least the seller or buyer acts as art market professional. Secondly, the term *shared liability* of the auctioneer and the seller for the royalty payment is rather vague. It is argued that 'shared' liability can cover joint and several liability, joint but not several liability and supplementary liability of the auctioneer, even if the auctioneer acted merely as an agent for the seller. Thirdly, EU resale right rules are

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silent on the identity of the final bearer of the royalty. It is argued that 'passing-on' clauses are valid if they do not affect the statutory legal relationship between the artist and the debtor and are not used to secretly pass on the buyer other costs than that the seller or the auctioneer might have towards the artists. Lastly, EU resale right rules are silent on the deductibility of auctioneer's fees from the royalty calculation basis. It is argued that the directive allows the seller to deduct only public levies, whereas auctioneer's fees remain part of the calculation basis.

The conclusion summarises the main findings of the chapter.

Origins of the resale right

At the beginning of the twentieth century, artists could not rely anymore on the patronage of the church and the state to earn a living. Poor socioeconomic conditions forced many young artists to make ends meet by selling their artwork cheaply. Many years later, when the artists became respected and famous, their once-cheap artwork started to bring significant profits on a resale to collectors and dealers. However, the artists or their offspring were denied any financial stake in the increased value of their art.[6]

The economic disbalance between the artists and the dealers called for state intervention that would force the sellers to share part of their profit in the resold artwork with the artist. In 1920, France introduced the resale royalty right.[7] Belgium, Czechoslovakia, Germany, Poland, Uruguay and Italy soon followed suit.[8]

In the 1960s, and especially in the 1970s, the resale right became popular across most civil-law jurisdictions.[9] At the international level, resale right was introduced in the Berne Convention for the Protection of Literary and Artistic Works.[10] The convention was amended in 1971 via a provision on an optional resale right which exercise is conditional on the principle of reciprocity.[11] Furthermore, under the influence of Franco-German solutions and the Berne Convention, in the mid-1970s the EU started working on a harmonised framework for resale rights. The aim thereof was to remove disparities between member states' legal systems that distorted competition in the internal market and impeded the free flow of artwork across the EU. After decades of debate on the economic implications of introducing such a right for the EU art market, the EU finally introduced it in 2001.

Civil-law and common-law views on the resale right

Civil law

Moral grounds for the introduction of the resale right

At the time when the resale right was adopted, the civil-law system of copyright, most notably, the French one, was based on the personality (personhood) theory of copyright. Since the work is a continuation of the author's personhood, it was argued that the artists should own intellectual property in the authored work.[12] They own moral (personal) rights in the work, e.g. the right to attribution of their

authorship of the work. Given the intrinsic personal link between the author and his work, moral rights are inalienable.[13]

Apart from the moral component, the personality theory provides the authors with economic benefits from the work. However, the economic rights are of secondary importance for the authors. They merely serve to acknowledge the author's primarily moral attachment to the work.[14]

The resale right fitted well into this dualistic concept of copyright. Resale right is a recognition of the artists' continuous personal attachments to their work, which influence the market value of the work. It is argued that the increased value of the art is a direct consequence of the late recognition of the authors' earlier artistic efforts, their genius and their reputation. These personal elements remain continuously present in the artwork from the moment of its creation, despite the fact that the artwork changed hands.[15] Since the dealers make profit on resale of this increased intrinsic value, they should share a fraction thereof with the authors to acknowledge their personal presence in the artwork.

However, the resale right departs from the pure civilistic concept of copyright. Whereas it is true that the resale right is a mixture of economic and moral (personal) rights, the reality is that the resale right is primarily concerned with the economic interests of the artist.[16] Thus, it departs from the moral grounds of personality theory. For this reason, the resale right did not find its place in general copyright laws but rather in separate codifications.[17] Nowadays, the resale right is generally considered a part of the copyright law.[18] However, its mixed nature makes the resale right a primarily economic (property) right to remuneration, with moral foundations of the personality theory.[19]

Need to fight social inequalities

Apart from the personal links between the authors and their work, the introduction of the resale right was triggered by the disadvantageous economic position of the artists vis-à-vis writers and composers.

E.g. the original manuscript or music piece can be reproduced many times. Each new reproduction or performance equally transmits the impression of the original work. The original incorporation of the authored work is, thus, only one of its incorporations.[20] Therefore, the nature of these works allows more people to enjoy them at a time. Each time the book is reproduced and sold, or the composition performed, the author receives royalty. The more popular the book or composition, the more times it will be reproduced or performed, and the more royalties the author will collect. The authors, thus, maintain continuous economic connection with their works and benefit from successive exploitation thereof.[21]

On the other hand, the increase in popularity of a unique piece of art and, hence, the increase in its value will not result in the artist receiving continuous economic benefits from its resale. There is only one original piece of the artwork. It can be marketed as such only once and enjoyed by one person at a time. There is no reproduction that can equally replace the work and keep at the same time its originality.[22] When artists transfer their works, this is the first and final occasion

for them to earn money therefrom.[23] As in case of any other sale, from that time on, the only person who can benefit from further increase of the artwork's value is the collector, despite the fact that those economic benefits derive from the (late, though) recognition of the artist's genius.

Such a position of the visual artists compared to the writers and composers was seen as disadvantageous for the former. By introducing the resale right, the civil-law systems wanted to correct this imbalance and put the artists on an equal footing with 'privileged' writers and composers.[24]

Common law

In common-law countries, visual artists are, in principle, denied the right to receive royalties on further resales of their artwork.[25] It is generally considered that imposing a mandatory resale right conflicts with the common-law theories of copyright and market freedoms, most notably, with the free alienation of property and freedom of contract.

Utilitarian theory of copyright

The utilitarian doctrine of copyright law protects the authors as exclusive copyright holders in order to encourage them to work more and produce better. Ultimately, this should benefit science and applied arts and help the state to achieve the public good.[26] Hence, the copyright protection is grounded on the economic rationale, whereas moral rights are not recognised as a separate category of rights. This makes the common-law copyright a monistic concept.[27]

The resale right apparently conflicts with the common law concept of copyright in several ways.

Aware that they will have to pay the additional resale royalty fee once they put the artwork on the secondary market, the first buyers will try to reduce the initial purchase price by an amount approximately equal to the present value of the foreseeable future royalty that the artist is entitled to, less the expected collecting costs. It results in the young artists giving up higher earnings at the beginning of their career – when they need the money the most – in favour of uncertain proceeds from the resale in the future.[28] Moreover, in case the sale of their art does not go as planned, not only will the artists lose higher earnings at the beginning of their career, but they will also lose royalties they hoped to earn due to the lack of wider recognition of their talent.[29]

Furthermore, since art dealers must share part of their economic success with the artist, they might decide to invest less effort in marketing the artwork. This could make the artwork less visible to the stakeholders, thereby lowering the demand for the young artist's work and depressing the potential resale price.[30]

It has also been argued that artists do not need favourable treatment.[31] Most well-established artists do not need late protection, as they are already receiving well-paid consignments on the primary markets at the time when they are supposed to benefit from their early work.[32] By benefiting from their earlier work, they are getting richer

at the expense of younger artists. The latter accept lower primary sales prices for their art and carry the burden of paying royalties to the wealthy artists. Thereby, the buyers-resellers offset future resale costs with lower supply costs.

It seems that the resale right suppresses the progressive creation of art rather than stimulating it.[33]

The utilitarian doctrine also claims that the art market has changed since the first decades of the twentieth century. Nowadays, dealers work on commission basis. They sell for the benefit of the artist and not their own. Besides, nowadays dealers invest a lot of money and efforts into promoting and supporting the artist's work. Hence, the interests of the artist and the dealer are no longer confronted but rather aligned.[34]

Lastly, it is argued that the late appreciation of the artist's work and, consequently, the increase of its value is not grounded only on the authors' genius.[35] At least part of their success should be ascribed to promotional efforts and funding opportunities provided by galleries and dealers.[36]

Free alienation of personal property

Resale right is also often seen as conflicting with the common-law principles of free alienability of property and contractual autonomy.

It is said that artists should be able to decide on their own whether they want to enjoy future benefits or rather give them up in favour of higher primary sales prices. Otherwise, the idea that artists should be put on par with writers and composers loses its meaning.[37]

Furthermore, it is said that the resale royalty right contravenes the broadly accepted 'first sale doctrine' of common law.[38] According to this doctrine, artists exhausted their exclusive property rights in the artwork when they sold it, and transferred it to the first buyer.[39] Whereas artists retain their control over the intangible intellectual property incorporated in the tangible object, they lose control over the distribution of the artwork as tangible property. The first (and any subsequent) buyers shall be free to dispose of the artwork in any way they please without having regard to the will of the artist.[40]

It is also argued that imposing a mandatory royalty on the sellers would mean interfering with the formation of resale prices in downstream markets. This would be to the detriment of free alienability of property and distribution thereof.[41] It would negatively affect the establishment and functioning of the secondary markets. First, it would prevent resellers from receiving the full value of their property.[42] Secondly, it would affect free competition among resellers.[43] Thirdly, it would discourage potential art investors from buying and reselling their art, knowing that any further resale would carry a duty to pay royalties to the artist.[44]

EU Resale Right Directive

The EU is the only globally relevant art market that has introduced the mandatory resale right. Therefore, the following sections will focus on the application of the EU Resale Right Directive[45] to auction in the EU market.

The legislative history

With the rise in popularity of the resale right across civil-law countries in Europe and beyond, in the mid-1970s the EU (at that time, the European Economic Community, EEC) started to consider introducing a Community-wide resale right. However, it soon faced legal disparities as regards the member states' approach to resale rights.

In the period before the enactment of the RRD, not all EEC countries effectively provided for resale rights. Austria, Ireland, the Netherlands and the UK did not have it.[46] Countries like Italy, Luxembourg and Portugal did have it; however, it was not effectively applied due to complexity of the legal solutions or lack of implementing measures.[47] Furthermore, even those countries that did apply resale rights provided different levels of protection to the artists with respect to the works covered, persons entitled to receive royalties, applicable rates, transactions subject to royalty payment and the grounds for calculation of royalty.[48]

The existence or nonexistence of the resale right, and the enforcement methods thereof, influenced the sellers' decision where to sell their artwork. Art transactions began to take place in countries where resale right was not applied, most notably in the UK and the Netherlands, or in countries that had provided less protection for the artists (e.g. by setting lower calculation rates).[49] For instance, the UK auctioneers avoided selling twentieth-century art through their local branch offices in countries with resale rights. Instead, they used those offices merely to advertise their London sales. They also directed their continental sales to the Netherlands. Consequently, these two countries got a significantly higher share in the Community art market than countries with the effective resale right.

This was seen as a clear signal that the absence of the Community-wide resale right directed the art sale to the nonresale right jurisdictions to the detriment of German, French, Belgium and Danish auctioneers and art dealers.[50] The free flow of artwork was affected, as the resale right discouraged the sellers from bringing their art into salerooms located in those countries. This also affected the provision of services of art professionals, most notably, the art dealers and auctioneers – established in countries applying the resale right. They found themselves in a competitively worse position than their counterparts in countries without resale rights.[51]

Discrepancies in national legal solutions on the resale right led to distortion of competition and displacement of sales[52] and affected the proper functioning of the internal market for artwork.[53] Therefore, the continental countries, particularly France and Germany, pushed the EEC Commission to do something to prevent further outflow of art transactions to the UK. They hoped that extending the resale right to the UK would abolish disparities in art market shares between the three major EU art hubs.[54]

Apart from the economic effects for the Community art market, legal disparities in the approach to resale rights led to social inequalities between visual artists from various states. Right to receive royalties depended on whether the artist's country of nationality or – in the case of France – country of habitual residence provided for such a right. If so, the artists could have claimed royalties in their country and in another Community country that provided the same right.

For instance, a Community artist from a no-resale-right member state would be denied a royalty in a host member state providing a resale right, as her or his home country did not provide equal rights for the nationals of the host country. On the other hand, the artist from the host country concerned would be granted the royalty. This meant that if the artists' home state did not provide for a resale right, the artists would be left without protection both in their own country and abroad.[55]

Unequal treatment of foreign Community nationals concerning resale rights not only put them in an unequal position to the visual artists from a resale right jurisdiction concerned but also to the writers and composers who continuously benefited from the exploitation of their work.[56] The EEC wanted to change that by introducing a Community-wide resale right that would be equally applied to all Community nationals.

In 1977, the EEC Commission emphasised the need to harmonise the resale right across the Community to remove discrepancies between national resale laws that distorted the competition in the Community and caused social inequalities between different types of authors.[57]

In June 1980, the first hearing on the future of the Community resale right took place – however, without concrete results. Whereas the representatives of artists' community supported a Community-wide resale right, the representatives of auctioneers and art dealers opposed, warning about negative implications of such right on the position of the Community art market in global art trade. Lacking concrete economic arguments for and against a Community-wide resale right, the work on the resale right was postponed for some future date.[58]

However, the need for introducing a Community-wide resale right did not disappear. In 1988, the EEC Commission argued that the future Community-wide resale right should cover only those questions that impeded the proper functioning of the common market and intra-Community competition.[59] In 1991, the EEC undertook a survey on the need of introducing a Community-wide resale right and possible content thereof.

Majority of respondents supported the idea of introducing a Community resale right, with only a minor opposition from UK auctioneers and art dealers.[60] They argued that the alleged distortions of the competition are dominantly grounded on reasons beyond different resale right rules. They mentioned, for instance, differences in taxation rules, auctioneers' commission fees, social insurances for artists, import and export rules for art and rules on the provision of auctioneering services.[61] The UK also opposed the introduction of the resale right, as it was worried that it would harm its position as one of the leading art markets and divert auctions to states without resale right, such as the US, Switzerland and Japan.[62]

The positive attitude of the public towards introducing a Community-wide resale right continued during the 1990s.[63] Tailwind to the EEC Commission's efforts to introduce a Community-wide resale right was also provided by two landmark cases: the CJEU *Phil Collins case* and BGH case in *Joseph Beuys*.

Whereas the *Phil Collins* addressed the discrimination of authors on the basis of their nationality when seeking copyright protection in other member states,[64] the *Beuys* case addressed the issue of the lack of EU-wide harmonisation measure,

resulting in the possibility for the sellers to avoid resale right jurisdictions in favour of nonresale right jurisdictions.[65]

Therefore, the EU Commission finally decided to harmonise the artist's resale rights. Lacking competences for introducing harmonisation measures in the field of cultural policies, including measures in the sphere of copyright,[66] the EU Commission justified its proposal by a need to combat obstacles to the establishment and functioning of the common market for artwork in the EU.[67]

The legislative proposal of a directive on resale right for the benefit of the author of an original artwork was issued in 1996 and, finally, adopted as directive in 2001.[68] It became an important piece of EU legislation, as it introduced a mandatory[69] resale right even in countries that did not apply it before.

Given the fact that the resale right was seen as a factor which contributed to the creation of distortions of competition and ~~outflow~~ of sales, harmonisation could have gone in the direction of abandonment of this right in all countries that already had it ('harmonisation to zero'). However, such an approach would conflict with the EU's obligation 'to take cultural aspects into account in its action under other provisions' of the TEU.[70] The action of removing trade and competition barriers, hence, had to go into a direction that would provide protection to creators of literary and artistic works across the whole EU.[71] The approach to harmonisation reflected the need for a flexible EU resale rights regime and respect for national divergences.

Scope of application of the EU resale right

Notion and legal nature of the resale right

Within the meaning of the RRD, a *resale right* is an inalienable right of the author of an original work of art, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for resale of the work, subsequent to the first transfer of the work by the author.[72] The definition requires some clarifications.

First, the term *inalienability* is sometimes used to describe a single concept which consists of nonassignable and unwaivable resale rights.[73] However, by emphasising the unwaivable character of a nonalienable resale right, the wording of the RRD suggests that these two concepts are distinct and should not be placed under a single concept.[74]

Nonassignable right implies that artists keep their resale right for the term of protection, meaning that they could not transfer it to other persons during their lifetime, for instance, by contract (transfer *inter vivos*).[75] However, the resale right is subject to succession (transfer *mortis causa*), as any other economic right of the copyright holder.

Nonassignability is a typical feature of resale rights in civil-law nations.[76] It reflects the Germanic monistic theory of copyright. Under this theory, the copyright as a whole is considered nonassignable, as well as the elements thereof.[77] In this regard, the RRD embraced general tendencies at the time of its adoption which were moving into the direction of adopting monistic solutions.[78] It also

showed that the resale right is closely related to personal rights (*droits moraux*),[79] which are always nonassignable. For reasons of nonassignability, any charge on the resale right shall be void, as it implies potential seizure and transfer of right from the artist to another person in the enforcement proceedings.[80]

The unwaivable character of resale rights is also typical for civil-law countries.[81] It implies that the authors could not give up their resale rights either before the resale or at the moment of first or any subsequent sale. Hence, they could not sell the work free of obligation to pay royalty.[82]

Due to its inalienability and unwaivable character, the EU-wide resale right is a mandatory economic right that the author could not freely dispose of.[83] The absence of free disposal can be justified in several ways.

Despite not being a pure personal right, it incorporates personhood elements.[84]

Furthermore, there is a need to prevent artists from bargaining away their rights too easily under the pressure imposed by the buyers.[85]

Also, an unwaivable resale right guarantees that artists will be committed to the development of their reputation as artists. If they succeed, they will raise the value of their whole opus, including the artwork already sold at an early stage of their career. This will not only benefit the artists – who will start receiving royalties due to increased appreciation of their earlier work – but will also benefit the current owner of the artwork concerned. Thereby, mandatory resale right reinforces the artist's role as a fiduciary of his own work.[86]

Furthermore, waivable resale rights would presumably lead to most artists being forced to give them up. In this case, the transaction costs for those artists who somehow managed to retain the right and enforce it would increase on a per-artwork basis. Hence, they, too, would be probably stimulated to waive it so as to avoid disproportionately high costs of administering the right, thereby creating a situation as if there was no resale right at all.

Lastly, the alienability and waivability of the resale right would be bad for the overall recognition of the resale right and the stronger exercise thereof.[87]

Transactions subject to resale right

Professional art sales

EU resale right covers all sales taking place during the term of protection following the first transfer of the artwork. Despite its name, resale right does not require the first transaction being a sale. Whereas the subsequent transactions must involve sales, the first transfer may involve a gift,[88] sale, exchange or any other transfer of work that entitles the buyer to resell it. However, the first transfer should include a transfer of a legal title (ownership) in the artwork on the buyer (reseller),[89] irrespective of whether it was made for money or any other consideration.[90]

The term *first transfer* should not include succession.[91] Succession is not a transfer 'by the artist' but rather a transfer by virtue of law. Furthermore, if the succession was caught by the term *first transfer*, the subsequent sale by the artist's heirs would be caught by the royalty claim. This would result in the successors'

obligation to pay the royalty to the artist's heirs, i.e. to themselves. The confusion of right to receive royalty and duty to pay it, respectively, would lead to cessation of the resale royalty right by virtue of law.

Resale right applies to all resales involving art market professionals acting as sellers, buyers or intermediaries.[92] This solution reflects German and French provisions.[93] What matters is that at least one participating person in a resale is an art market professional: saleroom, art gallery, any art dealer, auctioneer, etc.[94]

This way, the RRD removed differences in preharmonisation laws and practice. E.g. in Belgium, resale rights applied only to public auctions.[95] In France, as of 1957, the resale right nominally applied both to auctions and private sales intermediated via art dealers.[96] However, it was effectively applied only with respect to auctions. This was due to the inexistence of implementing bylaws in the area of private-treaty art sales.[97] In Germany, at least since the 1980s, the resale right was effectively applied in both areas.[98] Preharmonisation differences resulted in sales being outflowed to countries which private dealers were not effectively subject to resale right, to the detriment of auctioneers as well as auctioneers and dealers in countries that effectively put the resale right in place for both categories of art professionals.[99]

Under the RRD, the resale right applies to sales involving art market professionals as a seller and the consumer as a buyer. For instance, a gallery sells to private individuals during an exhibition. It also applies to sales involving a consumer as a seller and an art market professional as a buyer. For instance, an individual selling estate artwork to an art dealer. It also covers professional-to-professional sales, e.g. gallery-to-gallery sales. Lastly, it applies to sales intermediated by an art market professional irrespective of the legal status of the contracting parties. For instance, sales via auctioneers or art dealers.

On the other hand, pure civil-law sales involving private parties without the participation of an art market professional, or sales involving private parties and not-for-profit entities such as public museums, shall not be covered by the EU resale right.[100] The reason for this solution was motivated by practical reasons: individual sales were considered difficult to control.[101]

IS AN INTERNET AUCTIONEER AN 'ART MARKET PROFESSIONAL'?

At the time of the enactment of the RRD, sale of artwork was firmly connected to 'brick-and-mortar' salerooms. The sale of goods over internet platforms – including artwork – was just beginning. Nowadays, the situation is quite different. The volume of internet art auctions has significantly increased over the last two decades. With the outbreak of COVID-19, the number of online auctions has risen sharply, as health measures have forced major auction houses to move their sales from physical to online environments. The more frequent involvement of online auctioneers into art sales opens a question of applicability of the RRD to internet auctions.

As stated above, resales involving (online) intermediaries – irrespective of the fact whether they are auctioneers in legal terms – are, in principle, covered by

RRD as long as either the (online) intermediary, the seller or the buyer is an 'art market professional'.

In case of internet auctions held by auction houses such as Christie's, Sotheby's or Dorotheum, the auction house is an art market professional. Therefore, the internet art resale qualifies as a resale subject to resale right even if the seller and/or the buyer are private parties.

However, the situation is less clear with respect to eBay and similar online platforms. First, eBay can hardly be qualified as an art market professional, let alone an art dealer. Professionalism implies taking at least an active and direct part in art-related transactions. Furthermore, it implies specialised knowledge and application thereof during the art-related transaction. It also implies that dealing in art is the intermediary's primary occupation. However, intermediary platforms like eBay do not have this kind of profile. They do not take an active part in the art-related transaction, do not possess and apply any specific art-related knowledge in relation to the artwork being put on sale and do not sell art as their primary good.

It follows that eBay-style art auction sales are not subject to resale right unless at least the seller or the buyer is an art market professional.[102] Since eBay sales usually take place between private individuals who are not art market professionals, the number of cases where the resale right regime will apply is low.

Sales exempted from the resale right

Not all professional sales will be subject to the resale right. The RRD allows member states to exempt from the resale right resales of artwork that the seller directly acquired from the author less than three years before that resale and where the resale price does not exceed 10,000 euros.[103]

This refers mostly to art galleries that buy artwork directly from the artist. It wanted to encourage galleries to buy artwork from young artists, thereby paying them immediately, instead of taking the art on a commission basis.[104] Furthermore, the RRD wanted to support the promotional activity of galleries. Galleries usually display the artwork at the gallery premises and promote it in order to sell it in the primary market. In case the gallery manages to make a first sale in the primary market rather quickly, for a relatively small price, but makes a breakthrough for the benefit of a young author, it was found appropriate to exempt the gallery from royalties.

Persons liable for payment

Seller's liability – the principal model

The RRD makes the seller of the original work of art principally liable for payment of the royalty.[105] The underlying idea is that the one who receives the purchase price on a resale of the original artwork must share part thereof with the one whose genius presumably contributed to the increased value of the artwork.[106]

The term *seller* covers persons or undertakings on whose behalf the sale is concluded.[107] This covers natural persons acting in their private (e.g. private collectors)[108] or professional capacity (e.g. art dealers), a legal person (museums,[109] companies) and a single undertaking consisting of several minor undertakings (e.g. a consortium of galleries co-owning the artwork).

For the application of the resale right, it does not matter whether the sellers entered the sale themselves or someone else concluded the sale contract on their behalf,[110] i.e. as an agent. If the sellers acted via agents, they would be, in principle, fully liable for the payment and not the agent who merely acted in their name.[111]

Alternative liability regimes

Under the alternative harmonisation clause,[112] member states may depart from the seller's principal liability. They can envisage a professional buyer or intermediary – if they act as art market professionals – to be solely liable for payment of the royalty or to share the liability for payment of the royalty jointly with the seller.[113] By introducing the shared liability, the RRD made a compromise with the existing legal solutions in countries like Belgium, Italy, Spain and Germany, which already provided solutions on shared liability of the auctioneer or the art dealer with the seller.[114]

However, it is not clear whether 'shared' liability should be joint and several (solidarity), joint but separate or perhaps supplementary (subsidiary) to the seller's liability. Different translations of the text of the RRD make this answer even harder. Whereas English, Spanish, German and French versions speak of 'share liability', 'responsabilidad compartida', 'gemeinsame Haftung' and 'responsabilité partage', the Croatian and Italian version refer explicitly to the joint and several liability ('solidarna odgovornost', 'responsabilita solidale').

As a matter of principle, the need for a uniform interpretation of the provision of EU law means that, where there is divergence between the various language versions of the provision, the provision must be interpreted by reference to the context and purpose of the rules of which it forms a part.[115]

The joint and several liability implies that each codebtor – if asked – should pay the royalty in full, and the artists could ask full royalty equally from any of them until they receive the full compensation. In case of RRD, such sort of liability does not follow either from the majority of national versions of the text or from the purpose of the directive – as envisaged in its preamble. Moreover, EU secondary law usually explicitly refers to joint and several liability whenever it finds it appropriate to establish such liability. Recitals of directives introducing such liability usually mention the reasons for introducing it.[116]

Therefore, the broad term *shared*, *joint liability*, in conjunction with the minimum harmonisation character RRD, Art 1(4), allows the member states to make each debtor liable for full royalty (strict joint and several liability),[117] for a fraction thereof (joint but separate liability) or only in addition to the seller's liability, in case of the latter's default (supplementary liability).[118]

The auctioneer's liability for payment of royalty

It follows that the national implementing measure could render the auctioneer solely or jointly liable for the royalty payment, even if the auctioneer acted merely as an agent for the seller (consignor). With respect to the model of shared liability, the RRD does not preclude member states from regulating this liability either as joint and several, joint but separate or merely supplementary.

For instance, France made the auction houses and judicial auctioneers (*commissaires-priseurs judiciaires*) exclusively liable for the royalty payment.[119] On the other hand, the UK and Germany introduced a joint and several liability for art market professionals.[120]

The auctioneer's sole or joint liability for the royalty payment under national implementing measures covers the auctioneer's personal and direct legal liability to the artists or their legal representatives for the payment of the royalty rather than mere responsibility for the administration of payment. Therefore, it would be wise to stipulate in the auctioneer's consignment terms that the consignor will reimburse the auctioneer any royalty paid by the auctioneer.[121] In German law, however, the law is explicit in saying that the reseller is solely liable for the royalty in relation to her or his codebtor, implying that the paying codebtor (auctioneer) could ultimately claim reimbursement from the reseller.[122]

Joint and several liability should be given priority over other possible liability models. First, it strengthens the position of the artists, as they have a chance to enforce the full royalty against the auction house in case of the seller's solvency issues. Furthermore, it makes the position of the seller easier, as they can temporarily 'pass on' the economic burden (but not the legal liability) of the royalty to the auctioneers. Lastly, the joint and several liability owed to the artists is, in a way, beneficial for the auctioneers established in countries providing this sort of liability. In return for taking stricter liability, they may expect a higher volume of resales taking place in their jurisdictions. Hence, introducing joint and several liability instead of several liability may attract more art transactions to countries that have put such liability in place and trigger a sound regulatory competition between EU member states to the benefit of authors, sellers and auctioneers.

Circumvention of strictness of liability rules via indirect representation

If auctioneers concluded the sale in their own name and only for the account of the ultimate seller (consignor), formally they would be the sellers of the artwork[123] and would receive the benefit on a resale, not the consignor. Hence, they would owe the resale royalty to the artists. The duty to pay royalty would last at least until the auctioneers transfer all they have received from the sale contract to the consignor, including the sale price.

Hence, by giving the auctioneer the status of a commission agent, the consignor and the auctioneer could make the auctioneer solely liable for royalty payment, although the EU member state concerned did not opt for the auctioneer's sole liability in its implementing measure. Thereby, they may circumvent the strictness

of RRD, Art 1(4), and *de facto* depart from the principle of the (ultimate) seller's liability for royalty payment envisaged by the member state concerned.

The 'passing-on' of the royalty

The RRD is silent about the identity of the person who must definitively bear the cost of the royalty.[124] Therefore, the seller or other art market professional who owes the royalty could internally agree with the buyer that the latter shall definitely bear the burden of paying royalty, resulting in the buyer's 'economic' liability for royalty payment. For instance, such a contractual arrangement could be established in the auctioneer's conditions of sales for buyers.

However, this is subject to at least two constraints.

First, such a contractual arrangement shall not affect the obligations and liability which the person by whom the royalty is payable has towards the author.[125] The passing-on of the economic burden of the royalty is purely an internal matter between the seller or another art market professional and the buyer. This arrangement is based on a civil-law institute of 'overtaking the obligation of debt fulfilment' (*Erfüllungsübernahme*) rather than on the 'overtake of debt' itself (*Schuldübernahme*).

Hence, the 'legal' liability for the royalty payment, as provided under the member states' laws, always remains with the person by whom the royalty is payable. On the one hand, this implies that only the seller or another art market professional is liable towards the artist. On the other hand, it implies that neither the author nor the heirs or their authorised representatives thereof can seek fulfilment of the royalty claim directly from the buyer.

Secondly, the 'passing-on' clause shall respect the statutory term of protection of the resale right and shall not be used to secretly pass on the buyer other costs that the seller or his auctioneer might have towards the author. For instance, clauses saying that 'original artworks made after 1900 are subject to lump sum royalty of 2% of the hammer price payable by the buyer' also cover works of modern art for which the resale right has already terminated. For instance, if the author died in 1930, the resale right would terminate at the latest in 2000.

Irrespective of their wording, such clauses are not resale right clauses. After the expiration of the term of resale right protection, the author or persons entitled under her/him lose any protection whatsoever. The RRD leaves no room for art market participants (or even the member states) to extend the term of protection beyond the one prescribed by RRD, Art 8(1).

Works covered by the resale right

Unlike the Berne Convention, the RRD covers only original works of art. Given that the protection of the resale right lasts for the lifetime of the author and seventy years after her or his death,[126] the artworks covered by the RRD are original works of modern and contemporary art.[127] These are works of graphic or plastic art, such as pictures, collages, paintings, drawings, engravings, prints, lithographs,

sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.[128]

Claim for payment of royalty

Legal nature of the royalty claim. The resale right should be distinguished from an individual claim to receive royalties.[129]

Resale right is established by virtue of law 'for the benefit of the author'.[130] Therefore, the resale right, as such, is established as soon as the person concerned has become an artist, i.e. when the artwork was created.[131] From that moment on, resale right represents a legal source (*Stammrecht*) of the royalty claim (*Anspruch auf Erlösbeteiligung*) regarding each resale following the first transfer by the artist.[132]

On the other hand, a concrete royalty claim is a 'civil' fruit of the artist's resale right. It will, however, arise only if subsequent resale(s) of the original artwork take(s) place within the term of protection.[133] If it does, a concrete extracontractual (statutory) legal relationship between the author or her/his heirs and the royalty debtor will arise by virtue of law.[134]

The content of this relationship is a pecuniary claim.[135] It merely provides the artist with a continuing right to share in the economic benefits linked to the recognition of the artistic service.[136] It does not allow the artist to influence the legal relationship between the seller and the buyer, which was the cause for the establishment of the royalty claim. The sellers are free to dispose of the original work of art to whom they want and at the price they want. The artists cannot intervene in that transaction, let alone prevent it in case they oppose it.[137]

For this reason, the royalty payable on the basis of the resale right is not a sort of consideration, in the context of a legal relationship between the buyer and the seller, for an exchange of services which the artist would 'render' to the parties by not opposing the act of resale.[138] Therefore, payment of royalty is not subject to value added tax.[139]

Unlike the resale right, claim for royalty is assignable, waivable, subject to pledges and enforcement proceedings as any other pecuniary claim.[140]

Also, whereas the resale right lasts for the lifetime of the author and seventy years *post mortem auctoris*,[141] an individual royalty claim is subject to a much shorter limitation period. This period starts from the date of the concrete resale to which the claim is attached.[142]

The establishment of the royalty claim

The concrete royalty claim is established when the resale to which it is attached takes place. However, it is not clear when a resale actually takes place.

The problem of the timing of the term *resale* comes from various translations of the term *resale* in text of the RRD. For instance, the German variation refers to 'further transfer of ownership' (*Weiterveräußerung)*. This is a legal transaction

in addition to the sales contract.[143] It implies physical transfer of goods to the buyer (*traditio*). On the other hand, the English and French variations refer only to 'resale' (*revente*), a mere sales contract.

It follows that the German version makes the establishment of the resale royalty contingent on the due transfer of ownership following the conclusion of the resale contract, whereas the other two variations suggest that it emerges already with the conclusion of the resale contract.[144]

However, differences between the two interpretations exist only at first sight. In the French-Roman and the Anglo-American system, the transfer of ownership in tangible goods regularly coincides with the moment of the conclusion of the sales contract (*solo consensu*).[145] It means that the term *resale* in these systems already contains the effective transfer of ownership, without a need for additional transaction aiming at transfer of ownership.[146]

Therefore, it follows that under both interpretations, the 'resale' under the RRD is to be understood so as to include the effective transfer of ownership in the original artwork, meaning that the claim for payment of royalty shall arise with the execution thereof.[147]

However, the terms of EU laws should be interpreted autonomously rather than based on national preconceptions. In this regard, the wording of the RRD says that the right to receive royalty is based on the sale price 'obtained' for any resale of the work. The wording implies that the establishment of the royalty claim depends on the existence of a (valid) sales contract and the actual receipt of the price, i.e. the economic benefit of the sale for the seller.[148] Whether the buyer got the ownership is not relevant for payment of royalty; what matters is whether the seller received the economic benefit from the resale. This would correspond to the *ratio* of the resale right: share in the seller's enrichment from the artwork's increased market value.

Therefore, the autonomous term *resale* must be understood as cumulation of the existence of a (valid) sales contract and the actual receipt of the price, i.e. the economic benefit of the sale for the seller. However, the royalty claim could not arise if the seller, for instance, reserved the right to transfer the ownership until the buyer pays the price in full (reservation of title clause),[149] which is a usual practice at auctions. In this case, the seller has still not received the economic benefits from the auction sale, and hence, there is no legal and moral ground for the artist to seek royalty.

Basis for calculation

Royalty is based on the (net) resale price.[150] This means that the royalty rate is due on the total (net) resale price (*Erlösbeteiligung*) rather than on the portion of the capital gain (*Gewinnbeteiligung*) received from that resale, i.e. the increase (*Wertsteigerung*) in the original value of the artwork.[151] Moreover, the capital gain is not important for the payment of royalty. The royalty is owned on any resale price, even if this price does not contain any capital gain, either because the resale

price was lower than the price of the first transfer, causing a decrease in value of the artwork and economic loss for the reseller (initial buyer), or the resale price stayed the same as the price of the first transfer, causing no change in the value of the artwork and the economic position of the seller.[152]

The total price scheme reflects the French-German solutions,[153] which were prevailing in other major legal systems of the EU member states at the time of the harmonisation.[154] The reasons for the dominance of the total price scheme are both conceptual and practical.

At first sight, the total price method of calculation seems at odds with the original concept of the resale right, saying that the artist should take part in the economic success of the work. This success is reflected in the increase in value of the artist's original artwork.[155] However, introduction of the total price scheme in the EU resale regime was in line with tendencies in resale right law in the preharmonisation era.

At that time, the justification for resale rights turned away from the original idea of participation in the capital gain. It embraced the idea that the artist should participate in any economic exploitation of her or his artwork, irrespective of whether it brings any gain.[156] The mere fact that their work – a part of their personality – is being exploited by somebody else was considered enough to justify payment of royalties. This way, the legal systems wanted to put the artists on an equal footing with writers and composers.[157] By introducing the total price scheme, the EU followed suit. It addressed the economic imbalance between artists and other authors, the second objective of the resale right explicitly mentioned under the RRD, Recital 3.

Secondly, the introduction of the total price scheme seemed more practical from an enforcement point of view. The alternative capital gain system in those countries which had it (e.g. former Czechoslovakia) was based on a complicated sliding scale system of calculation and collection of royalties. Such a system could have been easily evaded.[158] For instance, by simulating resale prices. The seller could sell the artwork to an undisclosed buyer at no gain, or at an artificially low price, and thus practically avoid paying any (significant) royalty. The undisclosed buyer – usually a foreigner – could resale it in no-resale-right jurisdiction at a real market price and avoid the royalty payment.[159] The total price system discourages such behaviour, as the seller will have to pay (at least some) fee irrespective of how low he sets the price.

DEDUCTION OF AUCTIONEER'S FEES FROM THE CALCULATION BASIS?

The RRD is silent on the question whether royalty should be calculated on a net hammer price before or after deduction of the auctioneer's fees that the auctioneer may deduct from that hammer price.

The directive is clear that the sale price, which serves as a calculation basis for the royalty, is net of tax. However, it does not exclude from the calculation basis other (private) charges imposed by the auctioneer on the hammer price. Hence, the sale price to which the seller should apply the tapering rates is a hammer price

less tax, but including the commission fee and other sale costs, like exhibition, insurance, marketing of the artwork.[160] Otherwise, the calculation basis would be reduced beyond the level envisaged by the RRD, thereby lowering the royalties owed to the artists or their heirs.

Furthermore, the royalty rates apply to the total sale price and not only to the increase in value of the artwork sold. In other words, the royalty is not imposed only on the added value of the resale, i.e. net profit for the seller, but also on the cost items (i.e. auctioneer's fees) which the seller plans to pay from the total resale price. This is a reflection of the French theory, which does not regard the fact that the sellers had operational costs which they will try to cover from the sale proceeds.[161]

It follows that auctioneers should, after receipt of the gross hammer price, first deduct and pay the value-added tax to the treasury. Secondly, they should calculate the royalty fee on the net hammer price, which, however, includes the amount of auctioneer's fees imposed on the seller and incurred costs. Following the calculation of the royalty fee, the auctioneer should transfer it directly to the artist or her/his legal representative. This is not to say that the auctioneers could not already calculate and deduct their fees from the net hammer price; however, this shall not affect their duty to nominally include deducted sums in the calculation basis for the payment of the royalty. Lastly, the hammer price less tax, auctioneer's fees and royalty fee should be paid out to the consignor.

Calculation, collection and management of the royalty

Member states may set a minimum sale price from which resales of artwork will be subject to resale right.[162] The rationale behind this option is to avoid collection and administration costs that would be disproportionately high compared with the benefit for the artist.[163] For instance, collective management societies charge fees for the collection, management and distribution of royalties. The overall transaction costs of administration of smaller amounts of royalties could thus leave the author with a very small portion of royalty, making the whole process economically unsound and unsustainable.

The EU tried to establish a uniformity of application of resale right in order to avoid outflows of sales to more lenient resale right regimes.[164] The minimum sale price established by the member state may not exceed 3,000 euros.[165] This means that member states may set a minimum price at 3,000 euros or any level below that sum. This includes a zero threshold, i.e. no minimum price attracting the resale right.[166] In the latter case, it would mean that any resale of the original artwork would be subject to the royalty payment.

The RRD has established fixed rates at which the royalty shall be calculated. The system is based on the inverse proportionate (tapering) scale, i.e. the higher the price range, the lower the percentage rate applicable.[167] Each rate applies to a portion of the sale price within a certain price range rather than to the overall price.[168] For instance, for an original artwork resold for 100,000 euros, the auctioneer will not calculate 3% on the overall price of 100,000 euros. The auctioneer

shall apply two rates: 4% for the portion of the sale price up to 50,000 euros (2,000 euros) and 3% for the remaining portion of the price exceeding 50,000 euros, i.e. 3% on additional 50,000 euros (1,500 euros). The royalty is a sum of these two sums (3,500 euros).[169]

The RRD, however, sets an overall total amount of the royalty (the 'capping scheme').[170] The royalty may not exceed 12,500 euros, meaning that the member state could not go beyond this cap and give the author a higher fee, even for very high resale prices.

The tapering scale, rather low rates and royalty cap were introduced so as to reduce the outflow of art-related transactions to countries which do not recognise resale rights.[171] Hence, the EU wanted to introduce a certain economic balance between the interests of the artists and the interests of the art dealers.

The person liable for payment should do the calculation of the royalty. However, if the seller is liable for the payment but the resale was done via an intermediary such as an auctioneer, the person responsible for calculation will usually be the auctioneer.

The auctioneers' liability for the payment of royalty should not be confused with their responsibility towards the sellers for calculation, deduction and transfer of royalties to the artists or collective management societies. Unless the auctioneer was made personally liable for the royalty by the copyright act of the member state concerned, the auctioneer calculates, deducts and transfers the royalty to the author as the debtor's (consignor's) assistant (*Erfüllungsgehilfe*). The auctioneer merely manages the consignor's affairs regarding the latter's duties to the artist. The auctioneer does not stand in any legal relationship with the artist, as this exists only between the artist and the seller.

The auctioneer's failure to execute the royalty payment will make the auctioneer liable towards the seller for breach of the internal contractual duty arising from the consignment terms and conditions. However, the artist or her/his legal representative cannot claim the royalty directly from the auctioneer.

As stated earlier, the member states are solely responsible for establishment of collection, management and distribution of royalties. This can be regulated in two ways. Either the artists themselves will take care about their royalty claims or care about royalties will be taken collectively, through societies for collective management of the royalty. Usually, the collection, management and distribution of the royalties is done by collective management societies acting as fiduciaries for the account of the royalty claimants.[172] In this regard, the RRD allows member states to provide for compulsory or optional collective management of the royalty.[173] Most EU member states opted for collective management of resale rights.[174]

Persons entitled to royalty

The persons entitled to receive royalty are the authors of the original artwork and, after their death, those entitled under them[175] during seventy years following their death.[176]

The RRD is, however, silent on the meaning of the concept of 'persons entitled under the author'. This is in line with the viewpoint that it would not be appropriate to take Community action in relation to member states' laws of succession.[177] It follows that it is for every member state to define the scope of persons entitled to receive royalties after the artist's death.[178]

For instance, a member state may reserve the resale right only to the artist's heirs at law to the exclusion of persons having individual claims for receiving concrete items or right belonging to the deceased artist's estate (testamentary legatees).[179] Most states restrict the resale right only to the artist's heirs at law (e.g. spouse and direct heirs).[180]

The resale right does not cover artwork which first transfer was made by the persons untitled under the authors following their death. They are entitled to receive royalty only if the author herself/himself did the first transfer while she/he was still alive.[181] This shows that the resale right is established originally only for the author. The persons untitled under her/him only derive their royalty rights therefrom.

This resale right primarily refers to EU nationals. However, being part of the global art market, the EU took into account the need of providing resale rights with respect to resales of artwork of third-country authors that take place in the EU. Third-country artists and their successors in title enjoy the same resale rights as EU nationals – however, only if the legislation in the country of which the foreign artist or his/her successor in title is a national permits resale right protection in that country for artists from the member states and their successors in title.[182] This solution follows the principle of reciprocity from the Berne Convention, Art 14ter.

This privilege should be read in light of the EU attempt to make the introduction of a resale right a compulsory and not only optional under the Berne Convention.[183] By giving foreign artists the 'national treatment' on the condition of reciprocity, the EU has put indirect pressure on the nonresale right art markets, such as the US or Switzerland, to introduce the resale right into their national laws. This would allow their artists to participate in the sale proceeds from their EU sales.[184] Besides, this would also allow EU artists to participate in the proceeds from the sales of their artwork abroad and, consequently, prevent further outflow of art sales from the EU.

However, the resale right under this rule relates to artists and their successors in title to the exclusion of other persons who could be entitled under the artist after her/his death according to third-countries laws. It follows that, for instance, successors in interest such as trustee or executor of the late artist's estate would be excluded from this privilege.

Third category of potential resale right claimants cover third-party nationals with a habitual residence in the member state where the resale right is sought. Any member state may treat artists who are not nationals of that state but who have their habitual residence in that member state in the same way as its own nationals for the purpose of resale right protection.[185] If the member state concerned decides to provide a national treatment to foreign artists, they will be granted protection

in the respective member state. However, in this case they will enjoy protection even if their home country does not provide resale right protection to artists who are nationals of the member state concerned. This is a clear reflection of the pre-harmonisation French solutions.[186]

For instance, under this provision, an US artist could reside in an EU member state providing national treatment and enjoy royalties there as any national of the member state concerned, despite the fact that nationals of the host EU member state concerned do not enjoy the same rights in the US. By allowing member states to introduce such a nonreciprocity rule for third-country artists having their habitual residence in the member state concerned, the EU clearly wanted to attract foreign artists to settle in the EU and produce their art there. Furthermore, this privilege could eventually result in the introduction of the resale right by the artist's home state to prevent outflow of their artists to the EU. Hence, this privilege could be also read in light of the EU's attempt to broaden the scope of application of the resale right to third countries.

However, the privilege of national treatment may be given only to foreign artists and not persons entitled under them after their death.

In all other cases – where the royalty claimant is neither an EU national or a person having a habitual residence in the EU state or a national of a country providing resale right protection under reciprocity clauses – the harmonised regime does not apply. In these cases, as well as in cases of an artwork by an EU artist being sold in third countries, the regime of the Berne Convention applies.[187]

Disclosure requirements

The prerequisite for effective enforcement of resale right is disclosure of the information that the resale of the original artwork actually took place, the parties' identity, the sale price, etc. However, art sales are extremely secretive. This is particularly true for private sales via art dealers, which are practically impossible to trace.[188] Publicity of the auction makes it easier for the artists to get the information about the resale and the price. Nonetheless, information about the parties is usually kept secret and extremely difficult to trace,[189] especially at auction sales by the commission agency.

The RRD recognised this issue. It obliged member states to provide the persons entitled to royalties the right to seek for a period of three years following the resale any information that may be necessary in order to secure payment of royalties in respect of the resale from any art market professional related to the resale concerned.[190]

The disclosure requirement seems problematic for several reasons. According to the wording of this rule, any art market professional mentioned in RRD, Art 1(2), is bound to provide information necessary for enforcement of royalty rights. Therefore, the disclosure requirement refers not only to the person actually liable for the royalty payment but also to another person involved in the resale concerned. For instance, the auctioneer and the buyer would also be liable for

disclosing information about the sale, despite the fact that the seller is liable for the royalty payment.

However, the RRD Explanatory recital 30 says that the author (or her/his authorised representative, e.g. legal counsellor, collective management society[191]) may seek such disclosure 'from the natural or legal person liable for payment of royalties'. Thereby, the aim of the RRD was to reduce the disclosure liability only to persons actually liable for payment of royalty (the seller or alternative payee under national law), therefore protecting the confidentiality of the art sale.

The scope of information subject to disclosure is rather broad. The royalty claimant may seek even potentially important information about the resale. This may also affect the traditional confidentiality of the art-related transactions. Therefore, the range of information provided to the artist should follow the aim of the rule, i.e. the claim should stick only to those information which are strictly related to the resale concerned and may be necessary for the payment of royalty. For instance, in case the seller is liable for the royalty payment, information about the buyer or third-party guarantor should not be disclosed. What matters, then, is the information that the sale actually took place, the name and address of the seller and the sales price.

Therefore, having in mind a rather-loose wording of RRD, Art 9, the member states should choose an implementation model which will provide disclosure rights in line with the proportionality principle. This could be done e.g. by providing an indicative or enumerative list of information that may be considered relevant for the payment of royalty[192] and/or by ensuring that each resale is registered by the seller or her/his representative and information kept therein shared with the artist upon request.[193]

Interim conclusion

The EU resale right is an inalienable and nonwaivable right of the artists to continuously receive royalties from resales of their work following the first transfer of the work. It was introduced with the aim of preventing distortion of competition and displacement of sales in the EU art market resulting from discrepancies in the member states' approach to resale right.

Whereas the resale right is established as soon as the artwork is created, the royalty claim is a concrete, pecuniary claim deriving from the resale right with each valid sales contract for which the seller has received the price. As any pecuniary claim, the royalty claim is assignable and waivable, subject to pledges and enforcement proceedings. Apart from the artists, the right belongs to persons entitled under them, leaving, however, to the member states to decide who those persons could be.

The resale right applies to professional sales, including auctions. In this sense, it also applies to online art auctions as long as the seller, the buyer or the intermediary are art market professionals. Therefore, art auctions taking place over eBay and similar intermediary auction platforms will be covered by the EU resale right regime if the seller and/or the buyer are art market professionals.

The liability for resale royalty payment primarily lies with the sellers, since they enjoy the economic benefits of the resale. In case of auction, the calculation of resale royalty is done by the auctioneer, and it is based on total net sales price based on the principle of tapering scale rather than on the capital gain scheme. Whereas taxes should be deducted from the calculation basis, the auctioneer's fees due on the hammer price remain part of the calculation basis.

The member states are allowed to depart from the principal liability regime. They can, for instance, make the auctioneer liable for the royalty payment either solely or jointly with the seller. In the latter case, the liability of the seller and the auctioneer could be joint and several, joint but not several or the auctioneer's liability could be supplementary to the seller's liability. Joint and several liability should be given priority for several reasons. First, it increases the artist's chances for the enforcement of the royalty claim in case of the seller's solvency problems. Secondly, it allows the seller to temporarily pass the burden of paying royalty to the auctioneer. Thirdly, it benefits the market position of the auctioneer, since they may expect higher inflow of consignments into their respective jurisdictions.

Whichever liability regime the member state has chosen, it represents a mandatory regime. Therefore, the sellers and auctioneers cannot pass the legal liability for the royalty payment to the buyer and, thereby, circumvent the strict rules of the applicable law. They can only pass onto the buyer the economic burden of paying the royalty, resulting in the buyer's economic liability for the royalty payment. In legal terms, this transfer is done via the civil-law form of the overtake of the obligation for the fulfilment of another person's debt. Furthermore, any passing-on clause shall respect the statutory term of resale right protection and shall not cover payments of other costs owned by the auctioneers to the artists.

While EU resale right primarily refers to EU nationals, the EU decided to broaden the personal scope of the resale right also to third-country nationals. In this sense, the resale right covers third-country nationals under the conditions of reciprocity. It also covers third-country nationals having habitual residence of the EU – however, in this case without the reciprocity requirement. This solution clearly shows that the EU resale right is not merely an instrument of integration of the internal market for arts. It is also a cultural policy instrument. On the one hand, it aims to attract foreign artists to the EU. On the other hand, it is an instrument of regulatory competition aiming to put pressure on the nonresale right jurisdictions to consider introducing such a right in order to prevent outflows of young artists.

Notes

1 Jörg Schneider-Brodtmann, *Das Folgerecht des Bildenden Künstlers im Europäischen und Internationalen Urheberrecht* (Universitätsverlag C. Winter 1996) 32, 80; Henry Hansmann and Marina Santilli, 'Royalties for Artists Versus Royalties for Authors and Composers' (2001) Yale Law School Program for Studies in Law, Economics, and Public Policy Research Paper 250/2001, 1 <http://dx.doi.org/10.2139/ssrn.261392> accessed 7 February 2022; Najman Alexander Aizenstatd Leistenschneider, 'Consideraciones Sobre El Droit De Suite: Análisis Crítico Del Derecho De Los Artistas a Obtener Una Participación En El Precio De Reventa De Sus Obras' (2005) 24 Revista de Derecho de la Universidad Francisco Marroquín 21 <https://dx.doi.org/10.2139/

ssrn.1729406> accessed 7 February 2022; likewise Angelika Peukert, 'Folgerecht – Aktueller Stand und letzte Entwicklungen in Ősterreich und den Mitgliedstaaten der EU' in Kerstin Odendahl and Peter Johannes Weber (eds), *Kulturgüterschutz – Kunstrecht – Kulturrecht: Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars "Kunst und Recht"* (Nomos 2010) 436; Stephanie B Turner, 'The Artist's Resale Royalty Right: Overcoming the Information Problem' (2012) 19 (2) UCLA Entertainment Law Review 330 <https://ssrn.com/abstract=2009087> accessed 7 February 2022; Alexander Bussey, 'The Incompatibility of Droit de Suite with Common Law Theories of Copyright' (2013) 23 (3) Fordham Intellectual Property, Media & Entertainment Law Journal 1063, 1066 <https://ssrn.com/abstract=2248177> accessed 7 February 2022.

2 Schneider-Brodtmann (n 1) 70.
3 Aizenstatd (n 1) 21; Turner (n 1) 330; Bussey (n 1) 1066.
4 On pros and cons of the resale right see Aizenstatd (n 1) 25–29; Hansmann and Santilli (n 1) 4–9, 22.
5 Schneider-Brodtmann (n 1) 84.
6 Ibid 31; Peukert (n 1) 437; Turner (n 1) 335; Bussey (n 1) 1068; Jens Gaster (updated by Irini Stamatoudi), 'The Resale Right Directive' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary* (2nd edn, Edward Elgar 2021) 256.
7 Schneider-Brodtmann (n 1) 32; Aizenstatd (n 1) 21; Turner (n 1) 335; Bussey (n 1) 1068; Gaster (n 6) 256.
8 Turner (n 1) 336; Bussey (n 1) 1068; Gaster (n 1) 256.
9 Turner (n 1) 336–37; Bussey (n 1) 1069.
10 Berne Convention for the Protection of Literary and Artistic Works, Paris Act (Paris, 24 July 1971, as amended on 28 September 1979) TRT/BERNE/001.
11 Berne Convention, Art 14; Turner (n 1) 337; David E Shipley, 'Droit de Suite, Copyright's First Sale Doctrine and Preemption of State Law' (2016) UGA Legal Studies Research Paper 34/2016, 5–6 <https://ssrn.com/abstract=2847728> accessed 7 February 2022.
12 Bussey (n 1) 1093.
13 Ibid 1103.
14 Ibid 1093–94.
15 Aizenstatd (n 1) 22; Turner (n 1) 336, in n 40 (referring to the German theory of intrinsic value).
16 Also, Schneider-Brodtmann (n 1) 76.
17 Ibid 72.
18 Ibid 72–73.
19 Ibid 76; Bussey (n 1) 1094; Shipley (n 11) 4; Gaster (n 6) 256.
20 Schneider-Brodtmann (n 1) 79–80.
21 Aizenstatd (n 1) 24.
22 Schneider-Brodtmann (n 1) 71.
23 Ibid 32.
24 Ibid 80; Aizenstatd (n 1) 24; Shipley (n 11) 4–5.
25 Hansmann and Santilli (n 1) 1; Turner (n 1) 337. Exceptions to this are the US states of California, Puerto Rico, Georgia, as well as Australia. In 2006, the UK adopted resale right by implementing the EU rules on mandatory resale right, which became fully effective as of 1 January 2012. Therefore, whereas Christie's New York sales are not subject to resale right, their London sales are. Cf Christie's, 'New York Conditions of Sale: Buying at Christie's' (standard) (Christie's 2022) <www.christies.com/buying-services/buying-guide/conditions-of-sale> accessed 2 February 2022 and Christie's, 'London Conditions of Sale: Buying at Christie's' (standard) (Christie's 2022) <www.christies.com/buying-services/buying-guide/conditions-of-sale> Pt D, Art 3, accessed 2 February 2022
26 Bussey (n 1) 1095.
27 Turner (n 1) 337 in n 48.

28 Hansmann and Santilli (n 1) 4; Turner (n 1) 333 in n 25; Bussey (n 1) 1090.
29 Hansmann and Santilli (n 1) 4.
30 Ibid.
31 Turner (n 1) 333.
32 Bussey (n 1) 1091.
33 Ibid 1088.
34 Ibid 1073.
35 Turner (n 1) 346.
36 Bussey (n 1) 1088.
37 Turner (n 1) 346.
38 Bussey (n 1) 1089.
39 Ibid 1089; Shipley (n 11) 21.
40 Turner (n 1) 339, p. 62; Shipley (n 11) 21.
41 Bussey (n 1) 1089; Shipley (n 11) 21.
42 Shipley (n 11) 29.
43 Likewise, ibid 21.
44 Ibid 29.
45 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (RRD) [2001] OJ L 272/32.
46 Gaster (n 6) 259. For an overview of preharmonisation laws in those countries, see Schneider-Brodtmann (n 1) 61–66. From countries that entered the EU after the enactment of RRD, resale right was not applied in Malta and Cyprus. See Schneider-Brodtmann (n 1) 67; Peukert (n 1) 438.
47 Schneider-Brodtmann (n 1) 260.
48 RRD, Recital 9; Schneider-Brodtmann (n 1) 260.
49 Judgement of 15 April 2010, *Fundación Gala-Salvador Dalí, Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v Société des auteurs dans les arts graphiques et plastiques (ADAGP) and Others*, C-518/08, EU:C:2010:191, para 30; Schneider-Brodtmann (n 1) 267.
50 Schneider-Brodtmann (n 1) 268.
51 Fundación Gala-Salvador Dalí, para 30; Schneider-Brodtmann (n 1) 267.
52 RRD, Recital 9; Schneider-Brodtmann (n 1) 259; Peukert (n 1) 436.
53 RRD, Recital 10.
54 Brian W Harvey and Franklin Meisel, *Auctions Law and Practice* (3rd edn, OUP 2006) 26; likewise Bussey (n 1) 1076.
55 Reciprocity clause was contained, for instance, in German, French and Belgian law. Schneider-Brodtmann (n 1) 35, 41–42, 45.
56 Ibid 260–61.
57 Ibid 253.
58 Ibid.
59 Ibid 255.
60 Ibid 257.
61 Ibid 262.
62 Ibid; Harvey and Meisel (n 54) 26; Bussey (n 1) 1082.
63 Schneider-Brodtmann (n 1) 258–59.
64 The case referred to German legislation which denied the authors and performers from other member states, and those claiming rights under them, the right, accorded by that legislation to the nationals of that state, to prohibit the marketing in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory. Such legislation contravened the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality. Hence, domestic provisions of that sort could not be relied upon in order to deny nationals of other member states rights conferred on national authors. Judgement

of 20 October 1993, *Phil Collins and Others*, joined cases C-92/92 and C-326/92, EU:C:1993:847, paras 33–35. By analogy, the EU nationals from non-resale-right jurisdictions could have sought resale right protection in resale right jurisdictions even if their home state does not provide the same protection to nationals of the resale right jurisdiction concerned. Also, Schneider-Brodtmann (n 1) 246.

65 In this case, the resale of a painting by a German author took place between a German seller and German buyer in London. Despite being related to Germany, the resale was not subject to German resale right because of the principle of territoriality. Hence, the painter's heir was denied a royalty. Schneider-Brodtmann (n 1) 242–43; Gaster (n 6) 258;

66 Schneider-Brodtmann (n 1) 263; Gaster (n 6) 258. According to the Consolidated version of the Treaty on European Union (TEU)[2012] OJ C 326/13, Art 128, the EU activities were merely complementary to the member states' activities, since the EU action 'shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: . . . artistic and literary creation'. See also the consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47, Art 167(2).

67 RRD, Recital 11.

68 Gaster (n 6) 259.

69 According to the Berne Convention, resale right is optional, as state parties thereof are free to decide on the introduction of resale right in their laws. Ibid 257.

70 TEU, Art 128(4); TFEU, Art 167(4).

71 Schneider-Brodtmann (n 1) 271; RRD, Recital 5.

72 RRD, Art 1(1).

73 E.g. Turner (n 1) 336.

74 In general, for the resale right, also Hansmann and Santilli (n 1) 1.

75 Ibid.

76 Schneider-Brodtmann (n 1) 35, 40; Hansmann and Santilli (n 1) 1; Bussey (n 1) 1066; Peukert (n 1) 436.

77 Schneider-Brodtmann (n 1) 80.

78 Ibid 75. On the other hand, under French-Roman dualistic theory, the economic part of the copyright is usually transferable. Ibid 81.

79 Ibid 81.

80 Explicitly on voidability of charge on a resale right The Artist's Resale Right Regulations 2006 (ARRR 2006) s 7(2).

81 Schneider-Brodtmann (n 1) 80; Hansmann and Santilli (n 1) 1; Peukert (n 1) 436; Bussey (n 1) 1066. In favor of assignability and non-waivability Schneider-Brodtmann (n 1) 274.

82 Hansmann and Santilli (n 1) 1.

83 Critically on such a solution as inefficient and prone to evasion ibid 23.

84 Schneider-Brodtmann (n 1) 76.

85 Ibid 81; Hansmann and Santilli (n 1) 19.

86 Hansmann and Santilli (n 1) 20.

87 Ibid 20–21.

88 Judgement of 19 December 2018, *European Commission v Republic of Austria*, C-51/18, EU:C:2018:1035, para 32; Harvey and Meisel (n 54) 26 in n 30.

89 Explicitly on 'first transfer' as transfer of ownership by the author ARRR 2006, s 3(1); implicitly 1965 Act on Copyright and Related Rights (*Gesetz über Urheberrecht und verwandte Schutzrechte*) (UrhG) (BGBl. I S. 1273, 2021 BGBl. I S. 1858), para 26(1) (referring to 'Weiterveräußerung' or 'subsequent transfer of ownership'); 1992 Intellectual Property Code (*Code de la propriété intellectuelle*, CPI), Art R122–2 ('la première cession').

90 Explicitly ARRR 2006, s 12(1).

91 See, however, Harvey and Meisel (n 54) 26 in n 30, mentioning gift and succession as examples of first transfer. See also ARRR 2006, s 3(5)(a), explicitly referring to

'transfer of ownership by the author' as, inter alia, 'transmission of the work from the author by testamentary disposition, or in accordance with the rules of intestate succession'.

92 RRD, Art 1(2).
93 Schneider-Brodtmann (n 1) 35, 40.
94 RRD, Art 1(2).
95 Schneider-Brodtmann (n 1) 45.
96 Turner (n 1) 335.
97 Schneider-Brodtmann (n 1) 43.
98 Ibid 38–39.
99 Ibid 274.
100 RRD, Recital 18; Gaster (n 6) 261–62.
101 In favour of such a solution Schneider-Brodtmann (n 1) 275.
102 Arg ex RRD, Recital 18.
103 RRD, Art 1(3).
104 Schneider-Brodtmann (n 1) 275; Peukert (n 1) 443.
105 RRD, Art 1(4) in conjunction with recital 25.
106 RRD, recital 3 Directive; judgement of 26 February 2015, *Christie's France SNC v Syndicat national des antiquaires*, C-41/14, EU:C:2015:119, para 22.
107 RRD, Recital 25.
108 RRD does not exclude sales between private seller and private buyer as long as there is an art market professional (dealer or auctioneer). RRD, Recital 18.
109 RRD excludes only sales by private sellers to public, nonprofit museums, whereas sales by the museums acting as resellers to any other person are covered by RRD.
110 The term 'on behalf of' in French, German and Spanish translations of the RRD indicates that it should be understood as acting in the name of the seller.
111 Schneider-Brodtman (n 1) 84.
112 RRD, Art 1(4).
113 Harvey and Meisel (n 54) 28. A similar solution was proposed by Schneider-Brodtman (n 1) 276. However, the author suggested that the member state should be able to decide on the supplementary liability of the art professional for the royalty in case of the seller's default, rather than on alternative liability.
114 Schneider-Brodtman (n 1) 484–85.
115 See, to that effect, judgement of 26 April 2012, *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau*, C-510/10, EU:C:2012:244, para 45, and judgement of 25 April 2013, *Rose Marie Bark v Galileo Joint Undertaking*, C-89/12, EU:C:2013:276, para 40.
116 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (Text with EEA relevance) [2014] OJ L349/1, Recital 37 and Art 11(1).
117 E.g. ARRR 2006, s 13(1); UrhG, para 26(1); Slovenian Copyright and Related Rights Act (Official Gazette RS, no. 16/07 – consolidated text, 68/08, 110/13, 56/15, 63/16 – ZKUASP in 59/19), Art 35.
118 In favour of the last solution Schneider-Brodtman (n 1) 276.
119 CPI, Art R122–9(1).
120 ARRR, s 13(1) in conjunction with 13(2)(a); UrhG, para 26(1).
121 Harvey and Meisel (n 54) 28.
122 UrhG, para 26(1).
123 RRD, Recital 25.
124 Christie's France SNC, para 27.
125 Ibid para 32.
126 RRD, Art 8(1).
127 RRD, Recital 17.

128 RRD, Art 2(1). Copies of works of art covered by the directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of the directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist. RRD, Art 2(2).
129 Schneider-Brodtmann (n 1) 70.
130 RRD, Art 1(1).
131 Schneider-Brodtmann (n 1) 70.
132 Ibid.
133 Ibid.
134 Ibid 71.
135 Ibid.
136 European Commission v. Republic of Austria, para 22; RRD, Recital 3.
137 European Commission v. Republic of Austria, paras 47, 48; Schneider-Brodtmann (n 1) 76; Peukert (n 1) 437; Schneider-Brodtmann (n 1) 76.
138 European Commission v. Republic of Austria, para 51.
139 Ibid para 60. However, it can be subject to other taxes such as income tax for self-employed persons.
140 Schneider-Brodtmann (n 1) 35, 40.
141 RRD, Art 8(1). In favour of such a solution Schneider-Brodtmann (n 1) 274.
142 Ibid 35.
143 Ibid 82; Peukert (n 1) 448.
144 Schneider-Brodtmann (n 1) 82–83.
145 1804 Civil Code (*Code Civil*), Art 1583; Sophie Vigneron, *Étude Comparative des Ventes aux Enchères Publiques Mobilières: France et Angleterre* (L.G.D.J. 2006) 166.
146 Schneider-Brodtmann (n 1) 83.
147 Ibid.
148 Contr. German literature, arguing that it is enough that the royalty arises already when the payment of the price becomes due and not with the actual payment. See Peukert (n 1) 449.
149 For German and Austrian law Peukert (n 1) 449.
150 RRD, Art 1(1) in conjunction with Art 5.
151 RRD, Recital 20; Aizenstatd (n 1) 23.
152 Schneider-Brodtmann (n 1) 32, 72; Aizenstatd (n 1) 23; Gaster (n 6) 256.
153 Schneider-Brodtmann (n 1) 35, 40, 45, explaining the scheme in German, French and Belgium law. In favour of such a solution ibid 276.
154 Aizenstatd (n 1) 23. Only exceptions were former Czechoslovakia, Italy and Portugal. Ibid.
155 RRD, Recital 3; ibid 23.
156 Schneider-Brodtmann (n 1) 71.
157 Ibid 72.
158 Hansmann and Santilli (n 1) 1; Aizenstatd (n 1) 23; Turner (n 1) 336.
159 Likewise Aizenstatd (n 1) 23.
160 CPI, Art R122–5. About dissenting opinions, arguing for deduction of costs, Peukert (n 1) 443 in n 37.
161 In this sense Aizenstatd (n 1) 23. In preharmonisation French law, the calculation basis was total price without any deductions. See Schneider-Brodtmann (n 1) 40.
162 RRD, Art 3(1).
163 RRD, Recital 22.
164 In favour of such a solution Schneider-Brodtmann (n 1) 276.
165 RRD, Art 3(2).
166 E.g. Slovenian Copyright and Related Rights Act, Art 35.
167 Harvey and Meisel (n 54) 27.
168 RRD, Art 4(1).

169 Peukert (n 1) 439.
170 Gaster (n 6) 265.
171 Ibid.
172 Schneider-Brodtmann (n 1) 36, 43–44.
173 RRD, Art 6(2). In favour of such a solution Schneider-Brodtmann (n 1) 276.
174 Schneider-Brodtmann (n 1) 87; Gaster (n 6) 268.
175 RRD, Art 6(1).
176 RRD, Art 6(1) in conjunction with Art 8(1) and (now repealed) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [1993] OJ L290/1993, Art 1.
177 RRD, Recital 27.
178 Fundación Gala-Salvador Dalí, para 33. Cf Berne Convention, Art 14(1). In favour of such a solution Schneider-Brodtmann (n 1) 274.
179 Fundación Gala-Salvador Dalí, para 36.
180 Peukert (n 1) 451.
181 RRD, Art 1(1).
182 RRD, Art 7(1).
183 RRD, Recital 7.
184 Schneider-Brodtmann (n 1) 278.
185 RRD, Art 7(3).
186 Schneider-Brodtmann (n 1) 42.
187 Ibid 273.
188 Turner (n 1) 353.
189 Ibid 355.
190 RRD, Art 9.
191 RRD, Art 30.
192 For instance, the UK solution provides an indicative list by saying that the artists may particularly seek for the information necessary to determine the amount of royalty (i.e. the sales price) and the name and address of the liable person (i.e. the seller). See ARRR 2006, s 15(3). In Germany, on the other hand, the case law restricted the disclosure right to the name and address of the seller and the sales price. UrhG, art 26(5). In France, the royalty claimant can seek the name and address of the debtor as well as the date and price of the sale. CPI, Art R122–11(1).
193 In favour of a registration requirement for the US art market, Turner (n 1) 366, elaborating the scheme on pp. 367–70.

5 Auction guarantees

Introduction

Over the last fifty years, auctioneers have been providing various forms of financial support to consignors either by financing the sale with their own money or by procuring financial support elsewhere. The most prominent form of this support is an auction guarantee – the auctioneer's promise to pay the consignor the minimum price in case of the auction default.

The first section deals with the role, structure and nature of three basic forms of auction guarantees: in-house auction guarantees, third-party guarantees and irrevocable bids. The guarantees show elements of conditional private-treaty sale, unilateral promise to buy, 'restitute-or-buy' contract and a specific financial insurance contract. The focus of this part is on defining the perplexing legal nature of the guarantees. It is argued that auction guarantee is not a genuine guarantee but rather a combination of sale under a deferring condition and financial insurance contract.

The auction guarantees do not serve only to protect the consignor against the risk of sale default. In case the sale goes well, the auctioneer will earn a portion of the hammer price that would belong to the consignor were there no auction guarantee. Therefore, this section aims to check whether the auctioneer's direct financial interest in the outcome of the sale affects the auctioneer's fiduciary position towards the consignor. It is argued that auction guarantee is a supplementary arrangement to the consignment agreement and does not distort the auctioneer's fiduciary position.

Auction guarantees are products of the Anglo-American auction houses. No similar arrangements can be found on the European auction markets. The literature is silent on the reasons thereof. Therefore, the second section aims to define the reasons for the absence of auction guarantees from continental auctions. It argues that the lack of auction guarantees results from the structure of the European art market and unfavourable legal environment. Focus of this section is on the German law of auctions, which is the least favourable regime for introduction of auction guarantees.

The third section discusses the negative impact of auction guarantees on the integrity of the art market. Despite financial, economic and marketing benefits of

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the auction guarantees, auction guarantees could contribute to the financialisation of the art market and distort the competition. This section aims to show the pros and cons of the auction guarantees and find out possible means of reform thereof that would solve the controversies related to their use. It argues that auction guarantees should not be abandoned but rather reformed via a combination of self-regulatory means and targeted state intervention. In this sense, it is argued that much of the controversies of the auction guarantees can be solved by switching to collective art funding schemes as self-regulatory alternatives to auction guarantees.

The conclusion summarises the main findings of the chapter.

Auction guarantees

Types of auction guarantees

Auction houses provide three types of auction guarantees. Until the economic crisis of 2008–2009, auction houses like Sotheby's and Christie's guaranteed the minimum sale price with their own funds (*in-house guarantees*). As a result of the financial fallout of the economic crisis, auction houses have started procuring external guarantees, with third parties acting as guarantors (*third-party guarantees*). Lastly, there are irrevocable bids (*stand-by guarantees*) which, however, may be considered as a subtype of third-party guarantees.

In-house guarantees

Rise of the art market started in the 1970s. This was a result of stable economic circumstances in the period before the oil crisis. At that time, there was a fierce rivalry between Sotheby's and Christie's. In order to attract as many consignments as possible and squeeze out the competition, the two auction houses started offering new financial services to potential consignors.[1] In 1972, Sotheby's offered the consignors a special type of risk-sharing agreement – the auction guarantee.[2] Despite the initial scepticism regarding auction guarantees, Christie's followed suit. In 1990, it introduced its first auction guarantee.[3]

An auction guarantee obliges the auctioneer to pay a certain minimum price to the consignor for the consigned lot in case of unsuccessful sale.[4] The guarantee may cover a single object or entire collection (*block guarantee*).[5] In case the object is left unsold at the public auction, the auctioneer acts as a substitute for the buyer and buys in the object. The auctioneer will acquire the ownership and shall pay the guaranteed price to the consignor.[6]

The auctioneers, however, are not necessarily obliged to pay the price by themselves. For instance, in France the burden of payment of the activated guarantee is borne by credit institutions hired for such purposes.[7] Those institutions provide a special kind of bank guarantees serving as insurance[8] for the auctioneer's debt towards the consignor. This arrangement strengthens the position of consignors, as their claim for payment will be satisfied even in the case of the auctioneer's solvency problems.

The auctioneer and the seller can also agree that the former will sell the object even if the price offered is lower than the minimum guaranteed price. In this case, the auctioneer will not buy the object but will rather sell it to a third party and transfer to the seller the difference between the higher, guaranteed price and the lower, hammer price.[9]

Lastly, it is possible that the sales price corresponds to the guaranteed price. In this case, the buyer gets the object, whereas the auctioneer gets the buyer's premium and the commission fee.[10]

If the object is, however, sold to the best bidder for a price exceeding the guaranteed minimum, the auctioneer is entitled to receive a percentage (cca 20–50%, often 30%) of the difference between the minimum guaranteed price and the hammer price (upside, overage).[11] The rest of the overage (often 70%)[12] and the guaranteed price the auctioneer shall transfer to the consignor, less taxes, the regular commission fee[13] and as the case may be, the royalty fee.

Guaranteed sales price could be set below the low estimate (i.e. some percentage of the low estimate),[14] at a level equivalent to the low estimate,[15] or above the low or high estimate, respectively.[16] However, since the guarantee primarily serves to secure the consignor against the risk of sale not meeting the reserve price,[17] it makes sense to set the amount of the auction guarantee at the level of the reserve price, i.e. at the level below or around the low estimate.[18]

Placing the guarantee price above the low estimate (i.e. the reserve price) obliges the guarantors – who act as a substitute buyer – to pay more than regular buyers would pay for the object if they placed the winning bid. In case the object reaches the reserve price or exceeds it but remains below the guaranteed price, the auctioneer would owe the consignor the difference between the actual price and the guaranteed price. At a glance, such an arrangement is an economically unsound solution; however, it could serve as a good marketing tool for attracting high-end consignments.

The existence of an in-house auction guarantee shall be disclosed to the public. Thereby, the auctioneers disclose their own financial interest in the lot. This is usually done by placing a symbol next to the lot in the auction catalogue.[19] The meaning of the symbol is explained in the legend at the end of the auction catalogue. For instance, Christie's uses (º)[20] as a symbol for the auction guarantee. Alternatively, the auction house shall inform the audience immediately before the start of auction or the bidding for the lot about the auction guarantee. This will be the case if the catalogue has already been printed or in the absence thereof.[21]

Third-party guarantees

In the aftermath of the oil crisis in the 1970s, the market in auction guarantees crashed. It recovered in the 1980s as a result of reborn interest in buying art among Japanese buyers.[22] However, it crashed again in the 1990s due to a low demand among Japanese buyers.[23]

The beginning of the twenty-first century brought another recovery of the auction guarantees. This lasted until the economic crisis hit the art market in

2008–2009.[24] Auction houses faced a series of financial fallouts since they had to cover the guaranteed minimums or differences between the lower hammer prices and the higher guaranteed minimums.[25] However, the leading auction houses did not give up on auction guarantees. Financial fallouts urged them to design a new guarantee model which would benefit consignors. However, this time they decided to transfer the financial risk of a default sale from the auctioneer to third persons.[26]

In 2009, auction houses implemented a third-party guarantee.[27] Under this model, a third person – usually an undisclosed art collector – assumes obligation to buy the auctioned object at a prearranged minimum sales price in case the last bid fails to exceed the guaranteed minimum.[28] As a result of the introduction of third-party guarantees, the global art market recovered in the postcrisis period (2010–2011), with prices moving upwards, especially in the sector of postwar and contemporary art.

Third-party guarantee may appear in two forms.

Firstly, the auctioneer can issue a standard in-house guarantee. However, this guarantee is supplemented by an internal agreement between the auctioneer and the third party according to which the latter either assumes liability for fulfilment of the entire in-house guarantee[29] or assumes liability for the fulfilment of the part of the in-house guarantee (*split guarantee*).

The internal agreement between the auctioneer and the third party, however, shall not result in a transfer of the auctioneer's obligation to buy the object under the in-house guarantee to the third party (assignment of the debt per se). This is merely an internal agreement on the assignment of the auctioneer's duty of fulfilment of the guarantee to the third party. The third-party guarantee under this model serves primarily to financially back up the auctioneer and not the consignor. The involvement of the third party, hence, is of no concern for the consignor, since the auctioneer remains legally liable for the fulfilment of the auction guarantee.[30] Moreover, the consignor does not even have to know the identity of the actual financier.

Secondly, the consignor and the third party may directly enter the guarantee agreement. In this case, the auctioneer acts as a middleman between the consignor and the third party regarding the formation of the guarantee agreement. The auctioneer does not assume any liability for purchasing the object in case of the auction default.[31] However, this guarantee model is rare in practice.[32]

Third-party guarantees work pretty much the same as in-house auction guarantees. If someone bids higher than the guaranteed price, the object will be knocked down to the best bidder. The auctioneer gets the commission fee and the buyer's premium. The third party gets the percentage of the overage.[33] However, the guarantor and the auctioneer usually split 30% of the overage (usually 15% each),[34] while the 70% thereof is transferred to the consignor,[35] alongside the rest of the net hammer price.

In order to increase their chances of earning a premium, auction houses may allow the third-party guarantors to bid for the guaranteed object.[36] However, in principle, this is allowed only if the price has already exceeded the amount of the guarantee.[37]

In case the auction fails and no public bidder offers the guaranteed price, the third party buys the object, pays for the guaranteed price and the buyer's premium and acquires ownership over the object.[38] However, such an outcome does not necessarily mean a complete financial fallout for the third party.

Firstly, the auctioneer may agree to give the third party a fraction of the buyer's premium[39] and a monetary reward,[40] despite the fact that the third party ended up being the buyer. This 'toehold rule' aims to attract guarantors to back up the sale in the first place, without fear of losing (too much) money in case the auction fails. The amount of the premium and toehold commission, however, will not actually be paid, but rather set off against the buyer's premium and the hammer price. Thereby, the third party gets the piece at a discount.[41]

Secondly, it should be borne in mind that third-party guarantors are usually collectors of the same kind of artwork or artist they have agreed to support. Hence, the high price they agreed to pay for one guaranteed piece may result in the corresponding price increase of other artworks in their collections, or at least in stabilising the prices thereof.[42]

As with the case of auction guarantees, the existence of a third-party guarantee shall be published either by placing a symbol next to the lot[43] or by announcing the existence of the third-party guarantee (but not the amount) before the auction or the bidding takes place.[44] For instances, Christie's uses (º♦) to denote the third-party guarantee.

Irrevocable bid (stand-by guarantee)

Standard third-party guarantees are usually preauction sale arrangements. They do not include placing an actual bid before or during the auction. However, an auctioneer may internally arrange with a third party to place an actual, confidential, prearranged written offer with the auctioneer before the auction starts and, thereby, prepare her or him to back up the sale in case nobody else bids higher during the auction.[45] These types of 'stand-by' guarantees are referred to as irrevocable bids and were first introduced by Sotheby's in 2008.[46]

In functional aspects, irrevocable bids are not different from third-party guarantees.[47] For that reason, some auctioneers treat both guarantees as synonyms.[48] Reason for replacing standard third-party guarantees with irrevocable bids could be a purely marketing thing, since the expression 'bid' leaves an impression that the sale price is the result of a firm offer and bidding rather than a 'behind-the-scenes' deal.[49]

In case nobody outbids the irrevocable bid, the backer must buy the object. Besides, the backer owes the auctioneer the buyer's premium that can be reduced by the amount of the toehold commission.[50] If, on the other hand, the object sells for a price above the irrevocable bid, the backer is entitled to a percentage of the overage.[51] As in the case of third-party guarantees, the auctioneer is bound to disclose the existence of an irrevocable bid (but not the amount) to the public either before the auction or during the auction.

Legal nature of auction guarantees

Despite its name, an auction guarantee is not a guarantee in terms of suretyship (*Bürgschaft; cautionnement*).[52] Genuine suretyship covers a situation where the buyer has already bought the artwork from the seller and owes her or him the price as a principal debtor, for which payment, however, someone else has taken either subsidiary or joint and several liability with the buyer.

On the other hand, in case of auction guarantees, the auctioneers 'guarantee' to the sellers that they or third parties will buy the object and pay the prearranged price in case nobody else does. Hence, the auctioneer assumes personal, exclusive and conditional liability for the purchase of the object as the principal debtor in case nobody else bids (at least) the guaranteed price.[53]

AUCTION GUARANTEE AND UNILATERAL PROMISE TO BUY

At first glance, an auction guarantee resembles an auctioneer's unilateral promise to buy the object in case the auction fails. However, a prearranged unilateral promise to buy would require the consignor's consent to sell the object in case of failure.[54] This is, however, not the case with the auction guarantee. The consignor already agreed to sell the object to the auctioneer if nobody else bids the guaranteed minimum and the auctioneer already accepted the possibility to buy it. A knock-down, hence, is a mere declaratory confirmation of the prearranged sale.[55]

AUCTION GUARANTEE AND 'RESTITUTE-OR-BUY' CONTRACT

The auction guarantee also resembles a so-called 'restitute-or-buy' contract (*Trödelvertrag*; *contrat estimatoire*). This innominate contract is typical for sale of unique objects like art and antiques. Under this contract, the consignor transfers the artwork to another person for a specific period of time. During this period of time, the mandatee has alternative obligations.

The mandatee can keep the object and pay the fixed price to the consignor. Since the consignor is entitled only to a fixed price, the mandatee can pay it immediately or wait until the artwork is resold to a third party on the mandatee's behalf. The amount of the resale price, however, does not change the mandatee's fixed obligation towards the consignor. Alternatively, the mandatee can return the object after the expiration of a fixed time, without paying any price.[56]

The auction guarantee resembles this scheme insofar as the auctioneer assumes the liability to pay the predetermined sales price and keep the artwork if nobody else buys. However, at the same time the auction guarantee differs from the scheme in several ways.

Firstly, if the auctioneer managed to get a higher price, the auctioneer owes the consignor not only the fixed, guaranteed price but also the portion of the overage. Secondly, the mandatees under the restitute-or-buy scheme sell the objects in their own name and for their own account, which is not the case with the

auctioneers-guarantors. Thirdly, the mandatee under the restitute-or-buy scheme has an alternative to keep the good or return it free of charge. On the other hand, the auctioneer-guarantors shall keep it and pay for it at the end of the auction unless they have managed to sell it to the high bidder. This is also true for third-party guarantees, since the auctioneer and not the backer usually assumes the obligation towards the consignor. Finally, the mandatees under the restitute-or-buy scheme are not entitled to any commission in case they buy the artwork.[57] As stated before, this does not have to be the case with the auction guarantees. The buyers – third-party guarantors – might be given the reward even if they had to purchase the artwork themselves.

Thus, the auction guarantee is not a 'restitute-or-buy' contract either.

CONDITIONAL PRIVATE-TREATY SALE

It is also argued that auction guarantee is a prearranged private-treaty sale between the consignor and the auctioneer which coexists with the consignment agreement. The consignor and the auctioneer enter such a sale under a deferring condition that the object will not be sold to a bidder.[58] Under this view, the auction is considered to be a mere declaration of the 'behind-the-scenes' deal.[59]

This argument is true insofar as one looks at the auction guarantee from the perspective of a hypothetical sale failure. However, looking from a perspective of a hypothetical sale success, the auction guarantee is an aleatory financial insurance contract entered into by the consignor and the auctioneer.

In a typical insurance, the insured person pays the insurance premiums to the insurance company. In return, the company gives a binding promise to pay to the insured person the insured amount if the insured event arises. However, in case the insured event does not arise, the insurer still keeps the premiums and does not have to give anything in return to the insured person.

The auction guarantee works in a similar way. The auctioneer ('the insurer') accepts to pay the guaranteed price ('insured amount') to the consignor ('insured person') in case of the unsuccessful sale ('insured event'). If the best bid exceeds the guarantee and the sale happens to be successful, the insured event did not arise, meaning that the auction house may keep portion of the insured object's market value ('insurance premium')[60] for itself without having to pay anything to the consignor (unless agreed otherwise).

Hence, the 'auction guarantee' is an aleatory contractual arrangement consisting of the conditional sale under a deferring negative condition and a financial insurance agreement within a single clause of the consignment agreement.

This arrangement is not prejudicial for the basic rights and duties of the auctioneer as an agent for the consignor. Especially not in a way that would give reason to assume that they affect the fiduciary position of the auctioneer just because the auctioneer deducts an extra fee from the overage in case of auction success.[61]

On the basis of the auction guarantee, the auctioneer has established a supplementary right for the consignor and assumed supplementary duty to the consignor. The guarantee coexists with and complements the basic consignment agreement.[62]

The extra charge is merely a consideration for the extra risk taken by the auctioneer. Moreover, if it is perfectly acceptable to deduct a part of the hammer price for the regular agency services, it should be likewise acceptable to deduct part of the overage for supplementary services, especially since the consignor has agreed to such an arrangement and benefits therefrom. Otherwise, even the basic commission fee could be seen as against the auctioneer's fiduciary duty to the consignor, since it deprives the latter of the full auction price.

Auction guarantees at continental auction sales

Modern-day auction guarantees can be introduced in any segment of the auction market. However, since the 1970s their application has been associated mostly with high-end auctions of modern and contemporary art taking place in New York branches of Sotheby's and Christie's. Over time, the practice of auction guarantees has spread to their British and Canadian branch offices[63] and (to a lesser extent, though) into Australian auction houses such as Deutscher-Menzies.[64]

In the continental Europe, however, auction guarantees seem to be missing. It is not entirely clear for what reasons. Lack of their use might be related to the features of the European auction markets.

Firstly, the continental auctioneers are usually smaller or medium-sized entrepreneurs having no financial strength to offer expensive guarantees. Secondly, continental auctioneers are usually oriented to local and perhaps neighbouring markets. On these markets there is no oligopoly like the one that rules the international art market. Hence, there is no need to introduce auction guarantees to compete with one another. Thirdly, auction guarantees are associated exclusively with high-end auctions of well-known pieces of modern and contemporary art. Most European auction houses, however, are not strong players in this market niche.

Apart from the market structure, another reason for the absence of auction guarantees in Europe might lie in the unfavourable legal environments that seem to be at odds with the concept of auction guarantees.

Until the reform of the French law in 2000, the French Commercial Code did not allow the auctioneers to provide auction guarantees or advance payments to the sellers.[65] The situation changed, however, with the amendments to the Commercial Code in July 2000 as an attempt of the French legislator to make French auctioneers more competitive with their UK counterparts, where such a practice was already well-established.[66] Nowadays, the code explicitly allows in-house auction guarantees and regulates them.[67] In order to allow the proper functioning of the auction guarantees and make the French auctioneers fully competitive with their UK counterparts, the French legislator has also made an exemption to the rule that banned the auctioneer from buying for their own account the object he is auctioning.[68] However, the normative change has not taken hold in the auction practice,[69] either because the auctioneers are not accustomed to this rather-recent change or simply because they lack the financial strength to compete with the UK auctioneers.

Auction guarantees are rare in Germanic jurisdictions.[70] Major auction houses such as Koller, Lempertz and Dorotheum do not mention auction guarantees in their conditions of sale.

It seems there is no legal obstacle for introducing auction guarantees on the Swiss market. Auction guarantee can be subsumed under the general rules on conditional sales.[71] Hence, the absence of auction guarantees has probably more to do with different business orientations of Swiss auctioneers and perhaps the structure of the auction market, which is dominated by one leading auction house – Koller.

The legal environment in Germany seems the least favourable for auction guarantees. German law allows so-called 'bid guarantees' (*Ausbietungsgarantien*/*Bietgarantien*) at forced auction sales (*Zwangsversteigerungen*). A bid guarantee is a written contract authenticated by the public notary between a mortgagee (e.g. a bank) and a third party (guarantor). The latter promises the former to place a prearranged, minimum bid in the amount of the mortgagee's claim (or higher) during a forced auction sale of immovables.

The purpose of this guarantee is to avoid the failure of the forced auction sale and to secure settlement of the mortgagee's claim against the mortgagor.[72] Unless nobody else bids higher, the guarantor has to bid the promised price and buy the immovable. If, however, a third-party buyer bids the guaranteed price or more, the guarantor is released from the conditional obligation to buy the immovable property.

Auction guarantees, in principle, correspond to the concept and purpose of 'bid guarantee'. Hence, it could be argued that the use of (irrevocable) bid guarantees should be equally allowed at voluntary auction sales.

However, it seems that bid guarantees at voluntary auctions would conflict with the rules on professional auctioneering specially designed for voluntary auctions.

Unlike the mortgagee and the guarantor, the consignor and the auctioneer stand in a fiduciary relationship. To avoid conflict of interest, it is forbidden for the auctioneers to bid for their own account at their own auctions either alone or via other persons or to buy the auctioned goods either directly or via other persons.[73]

The concept of in-house and third-party guarantees conflicts with this ban since the auctioneer, in fact, places the highest offer before the sale. Thereby, the auctioneer bids for the trusted lot and may even become the buyer of the guaranteed lot, irrespective of the fact that the sale is perhaps backed by a third party.

Therefore, contracting for auction guarantees seems at odds with the strict norm of GewO, para 34b(6)(1). If the auctioneer guaranteed for the good and bought it in case of auction default, the auctioneer would break GewO, para 34b(6)(1). The auction could be annulled,[74] and the auctioneer can be fined up to 1,000 euros.[75]

However, the annulment of the auction is an administrative sanction. It implies declaration that the sale was illegal. On the other hand, it does not annul the guaranteed sale itself for a couple of reasons.

Firstly, the aim of GewO, para 34b(6)(1) is to prevent the auctioneer from self-dealing. The prohibition is, thus, directed only to the auctioneer and not to the consignor.[76] Secondly, VerstV, para 9 is a strict norm in the area of regulation of professional auctioneering rather than a private law provision.[77] It refers to the

validity of the auction as a sales event rather than to the contract for sale concluded thereat.

It follows that the acceptance of the auction guarantee should not affect the guaranteed sale in terms of civil-law annulment,[78] as this would be a sort of sanction for the consignor. The guaranteed sale would remain valid. Nonetheless, the risk of declaring the annulment of the auction and the expected financial and reputational damage therefrom for the auctioneer justify the auction houses' reluctance to use auction guarantees at voluntary auctions.

Hence, current German solutions on banning the auctioneers from bidding/buying at their own auction prevent the auctioneers from providing standard auction guarantees. However, it seems there is no obstacle for German auctioneers to contract for auction guarantees that would not include buying the lot but merely paying the difference between the lower hammer price and the higher guaranteed price.

Impact of the auction guarantees on the art market

Auction guarantees meet critics

Auction guarantees have been criticised for turning art into a speculative financial investment. Buyers have started seeing art as a source of speculative monetary gain rather than a source of artistic pleasure. This financialisation of the art market turned what was once a world of art into a world of art industry,[79] with art being treated as an integral part of one's individual wealth.[80]

In this new environment, the auctioneers have allegedly stopped acting as neutral sales brokers. They turned into financial middlemen with direct financial stake in the proceeds of the auction sale,[81] thereby prioritising the consignors' over the bidders' interests.[82]

Their new position may, furthermore, distort the prices. Earning the financial stake in the sale proceeds implies that the artwork must reach a price equal to the guaranteed minimum or – preferably – exceed it so as to either prevent the financiers from losing money in the former case or allow them to earn premiums in the latter case.[83] Reaching or exceeding the guaranteed price is, however, difficult. This price is usually set very high in order to attract the best consignments.

In order to overcome this conundrum, auctioneers may arguably engage into upwards adjustment of the low estimate, i.e. the reserve price up to the level of the guaranteed minimum to stimulate the potential bidders to bid closer to the guaranteed price, despite such adjustment not being grounded on objective criteria for estimation of art.[84] Apart from being deceitful, this might result in price overestimation and, consequently, price inflation.[85]

Auction guarantees have also been criticised for having adverse effects on the competition.

Firstly, the auction house might not be able to provide the auction guarantee to all consignors. Providing auction guarantees to some consignors may result in giving competitive advantage to guaranteed consignments over nonguaranteed

consignments. For instance, through engaging into more aggressive advertisement campaigns regarding the secured consignments or through channelling human and economic resources towards them. This stands, it is argued, in a conflict with the auctioneer's fiduciary duties to nonsecured consignors.[86] Furthermore, it could harm the market position of nonguaranteed objects and eventually result in their disappearance from the market.[87]

Secondly, auction guarantees could also discriminate against public bidders. Unlike affluent guarantors, public bidders do not know confidential information about the guaranteed price, reserve price (if these two are different), details about the provenance and identity of the undisclosed consignor.[88] This, as some argue, interferes with the principle of equality between the bidders.[89]

Moreover, confidential information such as the reserve price could be abused by guarantors, to the detriment of public bidders. For instance, the guarantors could advise their customers to buy the guaranteed artwork without disclosing their financial interest in the sale. Or they may use the information received from the auctioneer about the reserve price to improve the competitive position of their customers over other bidders during the auction.[90]

Thirdly, the guarantor could bid for the guaranteed object using confidential information received from the auctioneer.[91] For instance, the guarantor knows what is the minimum price which meets the seller's expectations. Since other bidders do not have the same information, the guarantor may heat the price above the guaranteed reserve price and, thereby, force others to bid more. Ultimately, this strategy should result in (higher) overage and, hence, bring the guarantor (higher) reward.

In case the guarantors buy the objects for guaranteed prices, they will have to pay a discounted price, while the public bidders in the same case would have to pay the full price. This may cause some public bidders to believe they are being placed in a worse position than the guarantor and, hence, discourage them from participating in the auction in the first place.[92]

Fourthly, auction guarantees might also hurt the competition between auction houses. Fight between Christie's and Sotheby's over which house will offer a better guarantee (e.g. whether the principal will have a stake in the premium or whether the guarantor will receive a 'toehold commission') and, hence, secure a better consignment threatens to squeeze out less powerful competitors that cannot or do not want to follow the same market policy. It is argued that a cut-throat competition threatens to result in monopolisation of the art market, to the detriment of the financially weaker auction houses.[93]

Lastly, the practice of omitting discounted prices from public indices of auction sale prices creates a false impression on the bidders and the general public that the knock-down price in the index is the price actually paid for the piece.[94] This helps create a general misconception about the price movements in the art market. It makes false all estimations of similar art and/or art created by the same author that rely on such indices. This may cause damage to those stakeholders who refer to publicly announced prices when calculating resale prices, taxes, insurance premiums, value of portfolios of art investment funds, damages, value of the art serving as collateral, etc.[95]

Economic advantages of auction guarantees

As a result of the foregoing concerns, auction guarantees are considered as one of the biggest threats to the reputation of the art market.[96] However, despite their weak points, auction guarantees are beneficial for the parties and the art market.

Auction guarantees are financially attractive arrangements for the consignors, the auctioneer and the buyers. Consignors receive the security that the auctioneer or somebody else will buy the object if nobody else does. This helps the sellers to easily cash in their artwork, at least for an estimated price,[97] which could be particularly important for those consignors that are forced to rapidly monetise their inherited collections to pay inheritance taxes.[98]

The auction guarantees also allow the best consignments to reach the most interesting buyers and vice versa, thereby facilitating art deals. Without auction guarantees, there would presumably be more scepticism on the side of the owners to consign their art, leading to less art market transactions and investments. By placing the guaranteed minimum bid, the auctioneer takes an active part in the art deal. The auctioneer secures the most attractive consignments and satisfies the demand side of the market. In return, the auctioneer is compensated for the risk taken by earning profit through the spread between the guaranteed bid and higher hammer price. Hence, an auctioneer is a sort of 'market-maker' – a practice generally acceptable under stock exchange laws.

Furthermore, the premiums on successful sales and discounts on aborted sales encourage third parties to back up the auction without fear of losing (too) much money.[99] This allows establishment of long-term business relationships between the consignors, auctioneers, guarantors and buyers.[100]

Also, premiums charged by the auction houses on overages have filled the gap which resulted from reducing standard commission fees and buyer's premiums. The reduction came as a result of harsh competition between major auction houses aimed at attracting new customers. Guarantees have become a new, stable source of income for major auction houses and, at the same, allow them to stay competitive in the high-end art market.[101]

Likewise, auction guarantees can become a valuable source of extra income for public galleries, collections and museums. Premiums earned on successful deals would allow museums to operate sustainably, reconstruct their inventories, keep experts and educate the public without the need of excessively reaching out for scarce public funds.[102]

Also, auction guarantees are important marketing tools. Auctioneer's or third-party willingness to back up the sale of a certain artwork makes an impression that the object is of high artistic quality, rare, important or otherwise worth having. Auction guarantees thus warm up the atmosphere even before the auction started.[103] The goodwill created this way may generate a demand for other works of the same author and stabilise the prices thereof, to the benefit of other collectors.[104]

Lastly, auction guarantees do not weaken the competition; moreover, the outcome of the guaranteed auction still depends on the pace of the competition. Furthermore, in most cases the announcement that the sale is guaranteed is part of

the marketing campaign of the auctioneer and – as the Salvator Mundi case has shown – could stimulate the competition with results exceeding the guaranteed price by far.[105]

Reforming the auction guarantees

For all the foregoing reasons, it seems that forbidding the auction guarantees would be an economically unsound decision. From a legal point of view, forbidding auction guarantees for reasons of the auctioneer's direct financial interest in the sale has no legal ground either. One might just as well say that the del credere agency should be forbidden, too, since the del credere agents are also given extra commission for providing the consignors with guarantees that they or somebody else will fulfil the third party's contractual duties to the consignor in case the third party fails to do so. Or that 'market-making' on the capital markets should be abolished since the stock or asset broker earns a profit from bid-ask price differences.

What is needed, however, is a reform of the auction guarantees to tackle the said controversies. Authors usually argue for,[106] or at least consider,[107] introducing some sort of public regulation.

For instance, it is argued that the auctioneer should be banned from bidding for the guaranteed lot.[108] Furthermore, it is argued that the guarantors' role, amount of guarantees and identities should be disclosed to the public.[109] Some argue that auctions should be supervised by an independent person and the auctioneers should be responsible to the state.[110] Lastly, some consider banning auction houses from giving rewards to the irrevocable bidder unless someone else bought the good[111] and propose introducing eligibility criteria for guarantors (e.g. only certified 'art market' brokers).[112]

The view taken in this book is different. Since the self-regulation of the auction industry has resulted in the aforementioned controversies in the first place, combatting the controversies regarding the auction guarantees should be primarily done through self-regulation as the natural legal habitat for the auction guarantees.[113]

For instance, Christie's has integrated in their global terms and conditions an obligation to disclose their or third persons direct or indirect financial interest in the object, although such legal obligation exists only for its New York sales. What remains a problem, though, is the use of ambiguous symbols. Since some auction houses use the same symbol for standard third-party guarantees, split guarantees and irrevocable bids, it remains unclear to what extent the auction house and the third party cover the risk of sale default.[114] As a result of this ambiguity, it remains unclear who has a (stronger) financial stake in the auction proceeds – the auctioneer or the guarantor/irrevocable bidder. In this regard, auction houses should introduce additional symbols which would – at least approximately – disclose not just the existence of the interest but also the proportion of the risk assumed by each co-guarantor (e.g. 50:50 %).

Another aspect of self-regulation is the adoption of soft-law regulations by the professional associations of auctioneers, art dealers and museums in the form of

recommendations, guidelines or codes of ethics. By referring to this 'light regulation', auctioneers, art dealers and museums could draft their own, internal rules of conduct.

State regulation should, however, complement this self-regulating activity of the auctioneers. But this does not necessarily require creating entirely new legislation. Most objections referred above could already be handled under the existing rules on contracts and competition. E.g. the objections related to the possible breach of fiduciary duties should be considered under the general rules on agency. Objections regarding the artificial overestimation of prices for the sake of meeting the guaranteed price should be dealt with under the general law of fraud. And objections related to the anticompetitive character of auction guarantees should be considered in light of the general competition rules on abuse of dominant position, most notably, the practises of applying dissimilar conditions to equivalent transactions with other consignors.

New state regulation should therefore address the issues not yet covered by the general legal provisions. For instance, state regulation should impose a duty on the auctioneers to disclose their direct or indirect financial interest in the results of the auction sale. New York City is a good example thereof. Besides, it should prescribe duty on the auctioneers to disclose discounted prices by publicising the price reduced by the fixed toehold commission fee (net sale price) rather than the nominal hammer price.[115] If this condition is met, the policy of discounting prices should be kept.[116] This should not make other bidders feel discriminated against by the auctioneer. After all, they are not taking the same risk as the guarantor and, thus, could not ask for the same treatment.

Furthermore, state regulation should recognise that offering financial services such as issuance of auction guarantees makes the auctioneers close to providers of financial and credit services. Hence, it is necessary to ask the auctioneers to start checking provenance of funds intended for financing the auction guarantees and identities of the guarantors in the same way as banks do. Regulatory steps in this direction have recently been taken on the EU, UK and US art markets.

New EU rules on anti-money laundering now apply to auctioneers, art dealers and other art traders in the same way as they have applied so far only to credit and financial institutions.[117] Same rules apply in the UK.[118]

Recently enacted US anti-money laundering rules have also broadened its scope of application to auctioneers and other antiquities dealers. Auctioneers are subject to similar rules on recording business transactions as banks, financial institutions, sellers of fine metals and jewellery.

The best way to implement the new anti-money rules should again be via self-developed anti-money laundering programmes (AMLP). Moreover, it is expected that the auctioneers design AMLPs so as to include restrictions on cash payments[119] and introduce card payments,[120] cheques,[121] bank transfers, digital payment methods or cryptocurrencies.[122] It is also expected from the auctioneers to check the identity of buyers and sellers (*know your client*), educate staff, notify suspicious transactions, etc.[123]

Collective funding campaigns: alternative to auction guarantees?

The postwar and contemporary art sector has seen a continuous growth in guaranteed sales since 2010, with the percentage of art under guarantees moving around 40–50%.[124] In 2018, the number of guaranteed sales exceeded half of the value of all low auctions estimates.[125]

Nonetheless, despite the continuous growth of third-party backed-up sales, the number of financially rewarding guaranteed sales has been falling continuously since 2017.[126] This is due to a general tendency of slowing down the trade in art, especially in the segment of impressionist, modern, postwar and contemporary art, where guarantees dominate.[127] The slowing-down of the art trade is the result of the nature of the art market: recent prices are not easy to surpass in the short-term.[128] The trend resulted in a decrease in the number of auction guarantees of postwar and contemporary art in the first half of 2019.[129]

The trends, unfortunately, continued in 2020 due to the outbreak of the COVID-19. In the first half of 2020, there was a sharp decrease in demand for art.[130] The profit in the postwar and contemporary sector – where auction guarantees dominate – fell by a high 54.1%.[131] At the time of writing this book, the global art market is slowly recovering thanks to online sales but still faces an overall decline in sales compared to the pre-pandemic 2019.[132]

If the economic crisis continues, there is a risk of reaching an unsustainable disproportion between the relatively high offer of guaranteed objects on the one hand and fall in demand thereof on the other hand. This could lead to the increasing number of financially unrewarding guarantees and result in the scenario similar to the one from 2008–2009. However, whereas the 2008–2009 crisis hit the auction houses, this time a similar crisis would cause major financial fallouts for third-party guarantors.

The ever-present vulnerability of the global art market to economic crises shows that the leading auction houses should at least consider coming out with a new solution for backing up auction sales. However, this time the auctioneers should come up with a solution which will not depend on their own or third party's individual financial means.

Possible solutions to this problem are *ad hoc* funds financed through members' contributions ('backers') and established with a purpose of financing auction sales. The amount of the fund should correspond to some prearranged minimum value agreed with the consignor. In case the hammer price exceeds the minimal price guaranteed by the fund, the overage would be paid into the fund and divided among the backers and the auctioneer as an income.

Another means of financing auction sales could be a collection of funds through platforms for collective financing (*crowdfunding*). For instance, the financiers could receive a share in the auction house or part in its profit or other sort of reward as a consideration for financing the sale. Eventual surplus would be paid out to the crowdfunders in proportion to their stake in the crowdfund.

Both types of collective funding would bring new liquidity in the art market and disperse the risk among many guarantors. Of course, there is always a risk

that the auctioneer will have to buy in the object from the members' contributions to pay out the consignor. In that case the backers would lose the invested money. However, this outcome can be mitigated by connecting the two forms of investment with structures of fractional ownership such as co-ownership or collective ownership. In case of a buy-in, the auction house – which in this case bought the object with someone else's money – could transfer fractions of the title in the object to the financiers to compensate them for the loss of the money invested.

The proposed forms of risk sharing would also remove much of the criticism related to the auction guarantees without a need for state intervention.

Firstly, collective funding enables participation of hundreds or even thousands of investors. In case of auction success, fractions of the overage are divided among all these investors, thereby making individual gains from the collective funding much smaller compared to the auction guarantees. On the one hand, this could discourage mere profit-seeking individuals from investing in the collective scheme and reduce the level of financialisation of the art market. On the other hand, funding an auction sale would primarily attract those who place art before profit. This shift in the structure of the backers would, however, not be to the detriment of the financial sustainability of the auction sales. The absence of one affluent backer would be set off with many medium- to small-sized backers.

Secondly, collective funding is an inclusive investment scheme. Introducing a large number of small- to medium-sized backers would remove the objection of the auction guarantees' democratic deficit. Even those with smaller budgets could participate in the scheme, having an opportunity either to earn a fraction of the overage or receive a fraction of the ownership in the artwork. This could increase the general demand for art[133] to the benefit of the consignors, auctioneers and buyers.

Thirdly, more backers means more persons interested in the object receiving a better price. If the backers themselves enter the competitive bidding, the final price would be the product of a healthy, genuine competition rather than artificially created pace of bidding resulting from a single backer's intervention.

Fourthly, collective funding allows financing more consignments at a time, as the auctioneer relies on multitude resources instead of one. This removes the discrimination objection.

Fifthly, collective funding would bring more transparency into auction sales.[134] It provides all those willing to fund the campaign – and all are allowed to do so – with information about the sale ('auction prospectus'). Since all share the same position with respect to confidential information, they can all use them in case they want to bid themselves. Thereby, no one improves his position, to the detriment of others.

Sixthly, collective funding removes the issue of discounting auctions sales, since the bidders receive a fraction in the art instead of a discount on the price. The value of this fraction is publicly accessible since it corresponds to the proportion of the cofounders' stake in the fund.

Lastly, replacing auction guarantees with collective funding schemes would remove the cut-throat competition, as even the financially weaker auctioneers

could organise the funding campaign. Moreover, collective funding campaigns serve the financially weaker persons to collect the initial capital for doing business in the first place.

Interim conclusion

Auction guarantees are aleatory contractual arrangements encompassing elements of a conditional private-treaty sale and a specific financial insurance contract.

The emergence of auction guarantees has influenced the standard position of the auctioneer. Unlike standard consignment (agency) agreement, guaranteed auction sale has made the auctioneer personally liable to the consignor for the outcome of the auction in case of a sale abortion. This arrangement either entitles the guarantor to an additional fee in case the auction turns out to be a success, or forces the guarantor to purchase the object in case of aborted sale.

However, the auctioneer's duty to purchase the object or right to charge an extra fee does not arise from the agency relationship but rather from an additional del credere agreement between the consignor and the auctioneer that complements the basic agency relationship. The aim thereof is to provide a financial service to the consignor that goes beyond the standard realm of consignment. Hence, the extra fee charged for this service in case of the auction success is a consideration for the extra risk taken by the auctioneers that is not part of their regular fiduciary relationship with the consignor. Therefore, the auction guarantee has not weakened the fiduciary relationship between the consignor in the same way as del credere arrangement does not weaken the fiduciary relationship in a standard agency contract.

Auction guarantees have not changed the legal nature of the auction either. The introduction of auction guarantees has not weakened the role of competitive bidding as an essential part of the auction. Moreover, the outcome of the auction sale, including the activation of the prearranged auction guarantee, remains contingent on the outcome of the competitive bidding.

Auction guarantees have financial, economic and marketing benefits for the consignors, buyers and auctioneers. They protect the consignors against risks of sale default, make the art a liquid asset, match the offer and demand for the most attractive pieces, fill the gap in auction houses' incomes, encourage third-party investments and serve as an attractive marketing tool that fosters competition. However, despite benefits, auction markets could result in price inflation and damage the competition.

Nonetheless, outlawing the auction guarantees would be economically unsound. Instead, auction guarantees should be reformed via self-regulatory schemes and targeted state intervention, most notably, through anti-money laundering laws. Possible self-regulatory alternatives to auction guarantees are collective funding schemes like investment funds and crowdfunding. Not only would these schemes disperse the financial risks inherent in the auction guarantees but would also remove much of the criticism attached to the auction guarantees. The pluralism inherent in these schemes would stop financialisation of the art, bring more

transparency, remove the democratic deficit of auction guarantees, raise demand for art and foster competition and remove the current cut-throat competition among the two major auction houses.

Notes

1 Anna Brouver, 'Auction Guarantees in the Contemporary Art Market' (Master thesis, University of Zurich 2015) 9; Graham Bowley, 'Auction Houses Bank on Price Guarantees; Reversal by Sotheby's and Christie's Is Seen as Reflecting Market Turmoil' *International New York Times* (New York, 9 January 2015) <www.lexisnexis.com> accessed 3 February 2022; Deloitte, 'Art & Finance Report 2019' (6th edn, Deloitte) 56 <www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-services/artandfinance/lu-art-and-finance-report-2019.pdf> accessed 3 February 2022.
2 Randi F Braun, 'The Legal Sustainability of Auction House Practices in the Twenty-first Century' (Master thesis, Sotheby's Institute of Art 2011) 26; Kira Sidorova, 'Insurance of the Auction Business: Third-Party Guarantees and their Application in the Art Market' (Master thesis, Sotheby's Institute of Art 2013) 26.
3 Shireen Huda, *Pedigree and Panache: A History of the Art Auction in Australia* (ANU E Press 2008) 30; Braun (n 2) 26; Sidorova (n 2) 27; Brouver (n 1) 10.
4 Brenna Adler, 'The International Art Auction Industry: Has Competition Tarnished its Finish?' (2003) 23 (2) Northwestern Journal of International Law & Business 433, 443; Sophie Vigneron, *Étude Comparative des Ventes aux Enchères Publiques Mobilières: France et Angleterre* (L.G.D.J. 2006) 242; Sidorova (n 2) 23; Brouver (n 1) 7; Joëlle Becker, *La Vente aux Enchères d'Objets d'art en Droit Privé Suisse: Représentation, Relations Contractuelles et Responsabilité* (Schulthess 2011) 44.
5 Megan E Bedford, 'Third Party Guarantees: Regulation in the Auction Market' (Master thesis, Sotheby's Institute of Art 2013) 4.
6 Braun (n 2) 25; Brouver (n 1) 9; Deloitte 'Art & Finance Report 2019', 56. Expressly 1807 Commercial Code (*Code de commerce*), Art L321–12(2).
7 Vigneron (n 4) 242.
8 Ibid 243.
9 Expressly Code de commerce, Art L321–12(2); Ventura Charlin and Arturo Cifuentes, 'Valuation of Auction Guarantees in the Art Market' (2019) Working Paper 1, 3 <http://dx.doi.org/10.2139/ssrn.3324297> accessed 3 February 2022; Vigneron (n 4) 242; Becker (n 4) 44.
10 Brouver (n 1) 9.
11 Expressly Code de commerce, Art L321–12(2); Brouver (n 1) 8; Deloitte, 'Art & Finance Report 2019', 56.
12 Brouver (n 1) 8.
13 Sidorova (n 2) 24; Brouver (n 1) 8; Charlin and Cifuentes (n 9) 3.
14 Charlin and Cifuentes (n 9) 3.
15 Brouver (n 1) 7. Such limitation is expressly provided in the Commercial Code if there is an estimated price. Code de commerce, Art L321–12(1); Vigneron (n 4) 242. Reasons for limiting the guaranteed price to a lower estimate is to prevent the auctioneer from promising artificially high prices, which might inflate the price beyond the levels reasonably attainable and relied on by the bidders.
16 Sidorova (n 2) 24.
17 Brouver (n 1) 12.
18 Ibid 28.
19 Expressly Rules of the City of New York: Title 6 Department of Consumer Affairs, c 2 Licences, sub-c M Auctioneers (May 2009) s 2–122(d) <https://www1.nyc.gov/assets/dca/downloads/pdf/about/auctioneer_law_rules.pdf> accessed 3 February 2022.
20 See Christie's, 'New York Conditions of Sale: Buying at Christie's' (standard) (Christie's 2022) Pt Important Notices and Explanation of Cataloguing Practice

<www.christies.com/buying-services/buying-guide/conditions-of-sale> accessed 2 February 2022.
21 Expressly Rules of the City of New York, s 2–122 (b), (d).
22 Brouver (n 1) 10.
23 Ibid.
24 Ibid.
25 Sidorova (n 2) 29; Bedford (n 5) 5; Bowley (n 1) 2015.
26 Brouver (n 1) 11; Eileen Kinsella, 'Why the Golden Age of Auction Guarantees Is Probably Over?' in Andrew Goldstein and Julia Halperin (eds), *Artnet Intelligence Report 2019: 'Welcome to the Age of Art Industry (The Art World is Over)'* (Artnet News 2019) 40 <https://news.artnet.com/market/introducing-artnet-intelligence-report-fall-2019-edition-1644430> accessed 3 February 2022; Bedford (n 5) 5.
27 Sidorova (n 2) 34.
28 The price offered in this case should be also equal to the reserve price, although its amount can be set at any level of the price scale (below, equal and above the reserve price i.e. lower estimate). Ibid 46.
29 Brouver (n 1) 20; Kinsella (n 26) 41.
30 Brouver (n 1) 19.
31 Charlin and Cifuentes (n 9) 4.
32 Brouver (n 1) 19.
33 Deloitte, 'Art & Finance Report 2019', 56; Sidorova (n 2) 39.
34 Sidorova (n 2) 41. The guarantor can get between 10% and 50% of the premium, often 20% to 30%. Kinsella (n 26) 41.
35 Brouver (n 1) 8.
36 Ibid 13.
37 E.g. Christie's Conditions of Sale, Pt Important Notices and Explanation of Cataloguing Practice. However, these notices say that 'the third party *may continue* to bid (emphasis added) for the lot above the irrevocable written bid', suggesting that the guarantor is allowed to bid up until the irrevocable bid and not only above thereof. Bedford (n 5) 7.
38 Brouver (n 1) 9; Kinsella (n 26) 41; Deloitte, 'Art & Finance Report 2019', 56.
39 Brouver (n 1) 9.
40 E.g. Christie's Conditions of Sale, Pt Important Notices and Explanation of Cataloguing Practice.
41 Brouver (n 1) 31; Sidorova (n 2) 39.
42 Sidorova (n 2) 43; Bedford (n 5) 14; likewise Brouver (n 1) 13.
43 Expressly Rules of the City of New York, s 2–122(d).
44 Ibid.
45 Ralph Cassady Jr, *Auctions and Auctioneering* (UCP 1980) 167.
46 Brouver (n 1) 12.
47 Braun (n 2) 37; Sidorova (n 2) 35; Brouver (n 1) 12.
48 E.g. Christie's treats both guarantees as one and uses the same symbol º♦ for both. Christie's Conditions of Sale, Pt Important Notices and Explanation of Cataloguing Practice.
49 Sidorova (n 2) 35.
50 Cassady (n 45) 167–68; Bedford (n 5) 6; Brouver (n 1) 12. Christie's Conditions of Sale, Pt Important Notices and Explanation of Cataloguing Practice.
51 Brouver (n 1) 12. The fee can be fixed or variable. E.g. Christie's Conditions of Sale, Pt Important Notices and Explanation of Cataloguing Practice.
52 Also Brouver (n 1) 14.
53 Becker (n 4) 58; Brouver (n 1) 17.
54 Becker (n 4) 58; Brouver (n 1) 18–19.
55 In this sense also Code de commerce, Art L321–12(2).
56 Becker (n 4) 61.
57 Ibid 69.
58 Also Brouver (n 1) 17.

59 Adam Levine, 'Art Museums and Auction Guarantees: Some Thoughts on a New Business Model' (2013) 28 (4) Museum Management and Curatorship 362, 365; Brouver (n 1) 24.
60 Brouver (n 1) 8; Sidorova (n 2) 48.
61 Braun (n 2) 43.
62 Also Brouver (n 1) 16; Becker (n 4) 58.
63 James Adams, 'Critics Charge New Auction Practice Obscures Market; Sotheby's is First Canadian House to Offer Guaranteed Prices. 'It's Like Cowboy Country . . . Something has to Be Done Federally' *The Globe and Mail* (Canada, 21 May 2008) < www.lexisnexis.com> accessed 3 February 2022.
64 Huda (n 3) 166.
65 Vigneron (n 4) 242.
66 Ibid.
67 Code de commerce, Art L321–12.
68 Code de commerce, Art L321–5, II (1).
69 E.g. Vasari expressly states that the lot estimate shall not constitute any guarantee. See Vasari, 'Conditions Generales de Vente' (Vasari 2021) Les biens mis en vente, para 5 <www.vasari-auction.com/vente/115649> accessed 2 February 2022.
70 Brouver (n 1) 9.
71 Becker (n 4) 58.
72 Gerd Nobbe, '§ 92. Garantie und sonstige Mithaftung' in Herbert Schimansky, Hermann-Josef Bunte and Hans-Jűrgen Lwowski (eds), *Bankrechts-Handbuch* (5th edn, Beck 2017) Rn 69; Walter Bachmann, '§ 71 Zurückweisung eines unwirksamen Gebots' in Peter Depré (ed), ZVG (2nd edn, Beck 2019) Rn 26.
73 1999 Regulation on Entrepreneurship (*Gewerbeordnung*) (GewO) (BGBl. I S. 202; 2021 BGBl. I S. 3504), para 34b(6)(1).
74 2003 Regulation on Commercial Auctions (*Verordnung über gewerbsmäßige Versteigerungen* (VerstV) (BGBl. I S. 547 2017 I S. 626), para 9.
75 GewO, para 144(3) in conjunction with (4).
76 Alla Belakouzova, *Widerrufsrecht bei Internetauktionen in Europa? Eine vergleichende Analyse des deutschen, englischen, russischen und belarussischen Rechts unter Berücksichtigung der Rechtsentwicklung in der EU und der GUS* (Mohr Siebeck 2015) 27; Annette Schneider, *Auktionsrecht: Das Rechtsverhältnis zwischen Einlieferer, Versteigerer und Ersteigerer* (Nomos Verlag 1999) 94–95.
77 Helmut Marx and Heinrich Arens, *Der Auktionator: Kommentar zum Recht der gewerblichen Versteigerung* (2nd edn, Luchterhand 2004) 258.
78 Schneider (n 76) 94–95.
79 Editors' Letter, 'Artnet Intelligence Report 2019: "Welcome to the Age of Art Industry (The Art World is Over)"' (Artnet News 2019) 2 <https://news.artnet.com/market/introducing-artnet-intelligence-report-fall-2019-edition-1644430> accessed 3 February 2022.
80 Deloitte, 'Art & Finance Report 2019', 28; Alexandra Darraby, *Art, Artifact, Architecture and Museum Law* (Westlaw 2017) para 2:8.
81 Braun (n 2) 28.
82 Adler (n 4) str. 443; Brouver (n 1) 27.
83 Brouver (n 1) 39.
84 Bedford (n 5) 17.
85 Adler (n 4) 443; Brouver (n 1) 34; Sidorova (n 2) 50. Contr. Kathryn Graddy and Jonathan Hamilton, 'Auction Guarantees for Works of Art' (2019) 133 Journal of Economic Behavior & Organization 187, 197–98 <https://doi.org/10.1016/j.jebo.2017.01.005> accessed 3 February 2022. They argue that the guarantees are provided for most valuable items anyway. For such objects, estimates are usually high; hence, the practice of auction guaranteeing does not affect the price movement.
86 Sidorova (n 2) 32.
87 Bowley (n 1).

88 Brouver (n 1) 12.
89 Bowley (n 1).
90 Adams (n 63).
91 Brouver (n 1) 27; Braun (n 2) 39; Sidorova (n 2) 40.
92 Graddy and Hamilton (n 85) 198; Bedford (n 5) 38; Brouver (n 1) 33.
93 Adler (n 4) 452.
94 Bedford (n 5) 7; Sidorova (n 2) 41.
95 Bedford (n 5) 8–10.
96 Deloitte, 'Art & Finance Report 2019', 206.
97 Sidorova (n 2) 49.
98 Diana Wierbicki, Amanda A Rottermund and Sarah Verano, 'UK: Sotheby's Goes Private: What It Means For The Art Market' *Mondaq Business Briefing* (London, 9 July 2019) <www.lexisnexis.com> accessed 3 February 2022.
99 Bedford (n 5) 26.
100 Brouver (n 1) 33.
101 Ibid 22.
102 Levine (n 59) 371–72.
103 Bedford (n 5) 24.
104 Ibid 33.
105 The secured pre-auction bid for Leonardo da Vinci's piece was said to be 100 million US dollars, while the final bid reached 450 million dollars. See Robin Pogrebin and Scott Reyburn, 'Leonardo da Vinci Painting Sells for $450.3 Million, Shattering Auction Highs' *New York Times* (New York, 15 November 2017) <www.nytimes.com/2017/11/15/arts/design/leonardo-da-vinci-salvator-mundi-christies-auction.html> accessed 3 February 2022.
106 Adler (n 4) 464; Brouver (n 1) 27.
107 Bedford (n 5) 31.
108 Brouver (n 1) 68.
109 Ibid.
110 Adler (n 4) 464.
111 Bedford (n 5) 33.
112 Ibid 34.
113 Ibid 47–48, arguing that imposing rules on the (New York state) auction houses would be economically ineffective.
114 Brouver (n 1) 26. Christie's uses symbol º♦, which does not state clearly how much risk does the guarantor bear. See E.g. Christie's Conditions of Sale, Pt Important Notices and Explanation of Cataloguing Practice.
115 E.g. Christie's Conditions of Sale, Pt Important Notices and Explanation of Cataloguing Practice
116 Contr. Graddy and Hamilton (n 85) 198.
117 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance) [2018] OJ L156/43, Art 2(1), point 3(i). More details in Deloitte, 'Art & Finance Report 2019', 202.
118 See more Julia Rodrigues Casella Hommes, 'Combatting Money Laundering in the Art Trade: Changes for Europe and the UK' (*Institute of Art & Law*, 10 January 2020) <https://ial.uk.com/combatting-money-laundering-in-the-art-trade-changes-for-europe-and-the-uk/> accessed 3 February 2022.
119 Cash payments are sometimes limited. E.g. Christie's New York accepts cash subject to a maximum global aggregate of 7,500 US dollars per buyer. Christie's Conditions of Sale, Pt F, 1 (c)(iii)
120 Ibid; Koller, 'Auction Conditions Koller Zürich' (Koller, July 2018), Art 9.1 <www.kollerauktionen.ch/en/kaufen_verkaufen/auktionsbedingungen/> accessed 2 February 2022.

121 E.g. Christie's Conditions of Sale, Pt F, 1 (c) (iv) and (v).
122 E.g. Christie's Conditions of Sale, Appendix A, Pt F, 3; Lempertz, 'Conditions of Sale' (Lempertz 2022), Art 9 <www.lempertz.com/en/conditions-of-sale.html> accessed 2 February 2022
123 More details at Kate Fitz Gibbon, 'Anti-Money Laundering Law Goes After Antiquities Trade' (*Cultural Property News*, 10 January 2021) <https://culturalpropertynews.org/anti-money-laundering-law-goes-after-antiquities-trade/> accessed 3 February 2022.
124 Kinsella (n 26) 40; Charlin and Cifuentes (n 9) 4.
125 E.g. 2018 was a record-breaking year, with the total estimated value of auction guarantees up to 1.29 billion US dollars (based on lower estimate). Fifty-eight per cent of the total lower estimated value of all artwork in the market was under guarantees. Deloitte, 'Art & Finance Report 2019', 57.
126 Kinsella (n 26) 40.
127 Ibid 42; Deloitte, 'Art & Finance Report 2019', 16, 54.
128 Kinsella (n 26) 42. According to some estimations, to earn a profit from the art resale by auction, one should wait at least ten years after the last auction. Deloitte, 'Art & Finance Report 2019', 29.
129 Deloitte, 'Art & Finance Report 2019', 57.
130 Melanie Gerlis, 'Art Market Report Shows the Severe Impact of Covid-19' *Financial Times* (London 9 September 2020) <www.ft.com/content/ff6530b4-1c40-497c-bd23-c5a70e552401> accessed 3 February 2022; Editors' Letter, 'Artnet News Intelligence Report Fall 2020: The Innovators Issue' (Artnet News 2020) 6 <https://storage.googleapis.com/artnet-interim-static-assets-repository/intelligence-reports/2020/fall_2020_intelligence_report.pdf> accessed 3 February 2022.
131 Artnet News, 'Artnet News Intelligence Report Fall 2020', 6.
132 Art Basel, 'Press Release' (Basel 16 March 2021) <www.artbasel.com/stories/art-market-report-2021> accessed 3 February 2022.
133 See more in Deloitte, 'Art & Finance Report 2019', 126, 150.
134 See more ibid.

6 Price-influencing tactics

Introduction

The economic rationale for choosing auction over other price-determination methods is to let the competing bidders decide the highest price for the object.[1] This implies, first, that the seller or the auctioneer shall not interfere in the competitive bidding. Second, it implies that the final price shall result from unrestricted competition involving all registered bidders.

However, sellers or auctioneers sometimes interfere in the bidding to create an impression among the bidders that the demand is high. Thereby, they stimulate the bidding pace and hope to enhance the price.[2] Buyers, on the other hand, can abstain from bidding to reduce the bidding pace and, thereby, depress the price.

This chapter covers price-inflating tactics of the seller and the auctioneer and price-depressing tactics of the bidders. It discusses the civil-law and competition-law aspects thereof. Both groups of tactics, in principle, distort the competition. However, it is not always clear whether and, if so, under which conditions such tactics are immoral or even illicit. The aim of this chapter is to find the demarcation line between licit and illicit price-influencing tactics.

The first section covers fictitious bidding by or on behalf of the seller (sham bidding). The second section covers agreements on the abstention from bidding. It covers bid-rigging for the account of a single bidder (*pacta de non licitando*), bid-rigging for the account of several bidders (auction rings) and *bona fide* partnerships for the joint account of the bidders' consortium. It is argued that price-enhancing tactics should be allowed with respect to the sale with reserve until the bidding reaches the reserve, if the existence of the reserve and the seller's right to bid were disclosed to the bidders before the sale. It is also argued that *bona fide* partnerships should be allowed since pooling financial assets into a single bidding consortium strengthens the overall financial capacities of the bidders to the benefit of the seller.

The conclusion summarises the main findings of the chapter.

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Sham bidding

Civil-law aspects

The bidding by or on behalf of the consignor is lawful if disclosed before the sale.[3] In that case, the bidders know that there is a possibility that the seller will interfere in the bidding and, hence, can assume that the continuous price increase may have something to do with the seller's intervention. This allows them to adapt their bidding strategies to the circumstances. E.g. if the seller's right to bid was disclosed before the sale, the bidders could decide to abstain from bidding at the auction and try to buy the same object later via private-treaty sale for a lower price. Alternatively, they could decide to bid less aggressively and buy the object at a lower price.

On the other hand, in order to secretly inflate the prices, consignors can place secret sham bids by themselves[4] or, more often, hire another person to place sham bids on their behalf (*pactum de licitando*)[5]. In the latter case, sham bidding is commonly known as puffing, by-bidding or shill bidding, while the person who places such bids is commonly known as a puffer, confederate, by-bidder, strowman or decoy duck (*inlicitator*; *Scheingeboter*; *Strohmann*, old German *Treiber; homme de paille; fol-enchérriseur*).

The auctioneers could also agree to act as the consignors' sham bidders in order to inflate the price, thereby improving their own chances to earn a higher commission fee and the buyer's premium, respectively. The auctioneers could do it either by pretending to have received a bid from the public (*chandelier bidding, bidding of the wall*) or by employing a puffer.[6]

Secret sham bidding aims to create a false impression on the bidders that there is an actual demand for the object. Thereby, they induce the bidders to bid more aggressively for the object than they would bid if they knew for the actual meaning of the seller's bids, or if there were no fictitious bids at all.[7] Hence, secret sham bidding is fraudulent in terms of civil law. The civil-law implications of the fraud, however, differ depending on whether the object has been knocked down to the best bidder, the seller or the puffer.

Continental law

KNOCK-DOWN TO THE BEST BIDDER

Annulment Irrespective of whether the sale took place as auction with or without reserve, secret sham bidding is prohibited[8] and makes the sale voidable (*anfechtbar*, *nul*). The buyer can annul (*Anfechtung*, *annulation*) the voidable contract for reason of fraudulent representation or misrepresentation of facts of the sale (*arglistige Täuschung*, *dol*).[9] Besides proving the manipulation in itself, the buyer has to prove that the manipulation actually affected the sale, i.e. that the result would be different but for the price manipulation. Since it is impossible to reconstruct the

actual development of the auction sale in the absence of price manipulation, it is enough to prove that the manipulation has likely affected the price.[10]

The action for annulment should be filed against the other contracting party. Who will that be depends on whether the buyer entered the sale contract directly with the consignor or the auctioneer.

If the auctioneer acted as agent for the seller, the contract is formed directly between the seller (consignor) and the buyer. Hence, the buyer shall seek the annulment against the consignor.[11] The fraud committed by the auctioneer or the puffer acting for the consignor affects the validity of the sale as if the fraud were committed directly by the consignor.[12]

If the auctioneer, however, acted as a commission agent, the auctioneer was the party to the sale contract. Hence, the buyer should seek annulment against the auctioneer.[13] The consignor who took part in the conspiracy, however, remains liable to the best bidder on the grounds of extracontractual damages (if any), assuming that the buyer knows the consignor's identity.[14]

In any case, the legal implication of the annulment is that the buyer will be free from the obligation to pay the rigged price, or – in case the price has already been paid – the buyer can ask for the money back, including the statutory interests chargeable during the period between the payment and the recovery of the price. On the other hand, the buyer shall return the object to the auctioneer.[15]

However, recovery of the purchase price should not automatically cover recovery of the buyer's premium. The buyer's premium is not part of the hammer price but rather a supplementary fee payable on the basis of a separate auction contract to the auctioneer for the services provided during the formation of the contract. Hence, unless the auctioneer knowingly took part in the sham bidding and thereby violated the fiduciary duty to the best bidder, the auctioneer should keep the premium.

Apart from the annulment, if the buyer suffered some damage as a consequence of the fraud, the buyer may seek reparation thereof from the persons involved in the fraud.[16] The buyer could ask for the recovery of actual costs, loss of profit and statutory interests. If the fraud was committed by the seller and/or the puffer, i.e. the persons who had no contractual relationship with the buyer at the time of fraud, their liability should be judged in accordance with the rules on extracontractual liability.[17]

Convalidation Instead of annulment, the buyer can keep the object and, thereby, convalidate the sale. The buyer is, however, still entitled to seek damages (if any) from the persons involved in the fraud, since the right to damages belongs to anyone who suffered it.[18] *Damages* refers to the difference between the higher price actually paid and the lower price the buyer would pay but for the sham bidding, plus statutory interests.[19] The reduction of the due price or recovery of the paid price should place the buyer in a position the buyer would have been had the sham bidding never happened (restitutionary damages).[20]

However, like in the situation of annulment, no one can be sure whether in the absence of the manipulation the buyer would buy the object and at which price.

Therefore, the causality between the manipulation and the damage relies on the probability of cause, while the quantum of damages relies on the estimation of the but-for price. This will require a reconstruction of the hypothetical course of auction and hypothetical monetary loss.

The buyer would most probably buy the object. If the buyer had a chance, willingness and money to pay more, the more so the buyer would have a chance, willingness and money to pay less in the but-for scenario. The hypothetical price difference between the actual and lower price depends on the type of the sale.

In case of sale without reserve, it may be assumed that the seller or the auctioneer secretly interfered in the bidding when they first felt the risk of getting a very low price through free demand.[21] Thereby, in functional terms, they secretly introduced the reserve price via higher sham bid.[22] In the absence of the sham bidding, the real competitive bidding would probably end one increment below the secretly introduced sham bid.[23] Therefore, in the case of a sale without reserve, the highest hypothetical amount of monetary loss caused to the buyer is hidden somewhere between the amount of the bid preceding the secret sham bid and the higher amount of the final bid.

The measure of damage at sale with reserve differs depending on whether the buyers were secretly induced to bid the reserve price or beyond. At sales with reserve price, no actual damage would occur to the buyers if they were induced to bid the reserve price. The reserve price is the price which the bidders would have to bid anyway if they wanted to get the object. Besides, the reserve is the lower estimate of the object. Bidding the lower estimate means that the best bidder paid the lowest estimated market value of the object which was decided by the expert. Hence, despite being fraudulent, secret sham bidding in this case does not cause actual damage to the buyer.

On the other hand, if the seller got the desired minimum price but then secretly induced the buyer to bid more than the reserve price, the seller, in fact, secretly increased the initial minimum valuation via sham bid(s). The highest hypothetical damage for the best bidder in this case is hidden somewhere between the initial reserve price – which reflects the actual market demand – and the higher final price, which is, however, an artificial result of the seller's (auctioneer's) interference.[24]

Of course, these sums are hypothetical. The buyers who wish to file a civil lawsuit should precise their claim. In this regard, they could use econometric techniques commonly used in competition law for the quantification of damages resulting from breaches of competition law.

If the auctioneer took part in the price-enhancing tactics, which is often the case, the auctioneer violated the auction contract with the best bidder. The auctioneer violated the obligation to provide the best bidder a chance to compete for the lot on equal terms with other bidders (*chancengleicher Wettbewerb*).[25] One bidder – the consignor – was given a chance to know the demand side of the market better than anyone else and made a secret profit out of it. By doing this, the auctioneer violated the obligation to act as a neutral middleman who is supposed to take care of the economic interests of all persons involved in the auction.[26]

The buyer, as former (best) bidder, can rescind the auction contract for a breach of contract and ask the auctioneer to return the buyer's premium and other charges that the best bidder paid to the auctioneer, believing that the latter acted in the buyer's best interest.[27] The best bidder could also seek (contractual) damages. The rescission of the auction contract does not preclude the buyer from doing so.[28]

If the buyer decided to stay with the main contract and asked for price reduction, this would entitle the buyer to ask for the proportionate reduction of the buyer' premium. If the buyer decided to ask for the premium reduction, the buyer would automatically convalidate the auction contract. This would result in the buyer owing the premium as if there had been no sham bidding, which is in line with the principle of restitutionary damages.

KNOCK-DOWN TO THE SELLER OR PUFFER

Suppose nobody from the audience has outbid the sham bid. In this case, the auctioneer will have to knock down the object to the person who placed the sham bid. The validity of such a contract depends on whether the auctioneer was aware of the sham bidding or not.

If the auctioneer was aware of the fact that the consignor was placing sham bids or, moreover, the auctioneer was putting those bids for the consignor or engaged a third person to place such bids for the consignor, the sale contract is simulated (*Scheingeschäft; contrat simulé*).[29] The auctioneer does not intend to enter and fulfil the sale contract with the fictitious buyer.[30] And *vice versa*, the fictitious buyer does not wish to enter the sale contract with the consignor.[31]

Moreover, there is an internal understanding between the seller and the puffer or the auctioneer, respectively, that the puffer or the auctioneer shall not be liable for fulfilment of the contract.[32] The whole arrangement is simulated. It served only to trick the real bidders by creating a false impression of high demand.[33] Hence, simulated bids, simulated knock-down and simulated contract for sale are void.[34]

However, suppose the auctioneer was not aware of the sham bidding by or on behalf of the seller. If so, the contract for sale is validly concluded[35] and enforceable against the fictitious buyer. The auctioneer did not know of the secret reservation of will (*geheimer Vorbehalt; réserve mentale*) on the side of the sham bidder. The auctioneer thought that the last bid was real. This makes the secret reservation of the last bidder irrelevant to the validity of the sale contract.[36]

Otherwise, the sellers would benefit from their own illicit actions, to the detriment of the auctioneers, as the latter would lose expected commission and buyer's premium.[37] This would be against the general principle of fairness, saying that no one can benefit from her or his own wrong (*nullum commodum capere potest quis de sua propria iniuria*).[38]

In this case, however, the auctioneer remains entitled to claim from the consignor the buyer's premium and the brokerage fee, respectively.[39] The seller, on the other hand, does not pay the price. Due to the confusion of creditor and the debtor in the same person, this obligation automatically ceases.

Anglo-American law

KNOCK-DOWN TO THE BEST BIDDER

Anglo-American law also bans undisclosed sham bidding by or on behalf of the seller, as well as the knowing acceptance thereof by the auctioneer.[40] However, auction laws are not clear about the type of auction sale to which this prohibition applies.

Sale without reserve certainly comes within the scope of prohibition. Sham bidding contravenes the collateral promise made by the auctioneer that the object will be knocked down to the highest real bidder.[41] Hence, the prohibition of sham bidding is implied in the very concept of sale without reserve.[42]

Sham bidding is also forbidden at sales with reserve.

Under US law, sale is presumed to be with reserve; however, the reservation of the right to bid has to be disclosed anyway.[43] Therefore, the presumption of the existence of the reserve price does not automatically cover the right to bid. Under English law, a sale by auction may be notified to be subject to a reserve price, and a right to bid may also be reserved expressly by or on behalf of the seller.[44] Therefore, mere announcement that the sale is with reserve does not imply that the sellers or other persons on their behalf can automatically bid at the auction.[45] This fact has to be additionally and expressly disclosed.[46] On the other hand, the announcement that the seller has reserved the right to bid for the object implies that the seller has a certain reserve price.[47] Hence, such announcement would suffice to meet the requirement that the sale with reserve has to be disclosed to the bidders.

Apart from disclosure, the reserved bidding should be allowed only up until the bidding reaches the reserve price.[48] Before this moment, the sellers should be given a mechanism which can help them reach the minimum price. This is not to the detriment of the potential buyers, as they will have to bid the minimum price anyway if they want to buy the object.[49] However, when the sellers manage to reach the reserve price, there is no reason to let them continue bidding.

From that moment on, it should be possible for the potential buyer to bid any price to get the object, and like in the case of sale without reserve, the seller should be ready to accept any price that arrives during the subsequent bidding. Otherwise, the seller should have placed a higher reserve price at the very beginning. Allowing the seller to bid above the reserve price would create a false impression about the level of demand for the object.[50]

If, however, reserve bidding has not resulted in achieving the reserve price, the auctioneer could withdraw the object.[51] This withdrawal, however, should be accompanied by a notice that the object was passed in.[52] Otherwise, the auctioneer could hide the fact that the sale was unsuccessful but – in order to save reputation – declare that someone has bid the reserve price. Such a fictitious price would enter the auctioneer's price index. This would leave a false impression about the strength of the market in certain lots and the value thereof. Consequently, all further valuations which take the fictitious price of the withdrawn object as a reference point would be false.[53]

Annulment Some argue[54] that sham bidding is not deceitful for the buyers but rather an inherent part of the auctioneer's fiduciary obligation to do the best he can to sell the object for the highest possible price. Furthermore, it is argued that even if the auctioneer's statement on the existence of a better bid could be treated as fraudulent misrepresentation of facts, the buyer could not sue the auctioneer on this ground because the latter does not act as fiduciary for the buyer but only for the seller.[55]

However, these arguments seem to overlook the fact that the auctioneer acts as a broker for the bidders. The bidders turn to the auctioneers as their only connection to the sellers. They have a right to believe that the amounts offered at auctions are true[56] and originate from genuine bidders.[57] This is not a mere moral right of the (best) bidder – as it is sometimes argued[58] – but rather an enforceable legal claim against the auctioneer. It arises from the auction contract, which, in return, entitles the auctioneer to the buyer's premium in case of contract formation.

Therefore, allowing the auctioneer to protect the seller's interests by any means, including tactics which, perhaps not by their aim but certainly by their outcome, deceive another person, would be against the auctioneer's position as the (best) bidder's broker. This would also contravene the general principle of acting in good faith during performance of contractual obligations, which manifests itself in the duty of sincere performance.[59]

Therefore, the underlying reason for outlawing undisclosed sham bidding lies in the auctioneer's fraudulent representation (misrepresentation),[60] i.e. false statements about the circumstances of the contract formation addressed to potential bidders aiming to induce them into contract.[61]

The sale affected by the sham bidding is voidable.[62] The buyer may treat it as fraudulent (*tort of deceit*) and avoid the sale,[63] irrespective of whether the seller himself or the auctioneer engaged in misrepresentation.[64] The buyer will no longer have to pay the price or could seek recovery of (part of) the price already paid,[65] plus statutory interests and damages,[66] in exchange for the object.[67] In addition to annulment of the sale, the buyer could rescind the auction contract entered into with the fraudulent auctioneer due to the breach of trust and seek damages.

Convalidation Instead of avoiding the sale, the buyers could convalidate the sale and ask for damages and statutory interests.[68] They can ask the seller for recovery of the difference between the price paid and the price they would have to pay but for the fraud[69] or – if they have not yet paid the price – pay only the but-for price. In this aspect, the Anglo-American solutions correspond to the continental ones.

Unlike other laws concerned in this book, the US law expressly states that the buyer can take the goods at the price of the last good-faith bid before the completion of the sale.[70] The rationale underlying such a solution is that the price offered in the last good-faith bid is the last real bid for the object that some bidder or perhaps the buyer himself has placed before the sham bid was placed.[71] Hence, this would actually be the winning bid but for the sham bidding. Therefore, the buyer shall pay the last good-faith price or seek recovery of the overpaid price equivalent to the difference between the last good-faith price and the price actually paid.[72]

If the sale was without reserve, the last good-faith bid would not be subject to any minimal amount. On the other hand, if the auction sale was with reserve, despite the collusion, the good-faith price should be at least equal to the reserve price, as this price should have been bid anyway. Hence, if the last good-faith bid was below the reserve price, the buyer cannot take the good at the price of the last good-faith bid.[73] In this case, the buyer could choose an option to avoid the sale or take the good at the reserve price.

Also, right to pay the last good-faith price or right to recover the overcharge implies that the good-faith buyer can prove, firstly, that the bid placed was under the influence of the sham ('bad faith') bid and, secondly, that she or he stopped bidding immediately after finding out about the secret bidding.[74]

If, however, the sham bid did not influence the buyer's decision to place the bid, since the buyer would place it anyway, or the buyer showed no concern whatsoever for the sham bid (e.g. the buyer continued to bid and paid the rigged price anyway), the buyer could not ask for the price reduction due to absence of fraud (*nemo volens fraudatur*).[75]

The US solution is sound, as it helps to reconstruct the most probable bidding scenario in the absence of fraud. Since it is grounded on economic logic rather than the peculiarities of US law, it could be applied in sham bidding cases decided under the English or even continental laws.

Punitive damages Despite not being expressly stated in the UCC and SoGA, the buyers could additionally seek punitive damages from the sellers and the knowing auctioneers for inflating the prices to the detriment of the buyers.[76] The auctioneers are liable for such a damage irrespective of whether they placed the sham bids themselves or merely knowingly received such bids. On the other hand, the sellers are liable for their agents' acts as long as they profited from them, however innocent themselves of any intent to defraud they might have been.[77]

Hence, the sellers shall, too, be liable for punitive damages. However, the liability of the auctioneer and the seller is separate rather than joint and several. It rests on different grounds: the auctioneer's on actual falsehood and the seller's on the adoption of the benefits thereof. Therefore, possible release of one defendant does not preclude the liability for damages of another.[78]

KNOCK-DOWN TO THE SELLER OR PUFFER

Secret bidding may result in the sham bid being the last bid. If such a bid comes from the seller, the validity of the contract depends on the auctioneer's role in the scheme.

If both the seller and the auctioneer took part in the collusion, the contract is simulated, hence, nonexistent. On the other hand, if the auctioneer did not know of the sham bids, the contract would be valid. There would be no legal ground for the seller to avoid the sale. Firstly, the right to avoid the sale belongs only to a buyer who was misled about the true purpose of sham bids. This is clearly not the case with the seller acting as a fictitious buyer. Secondly, avoidance of the sale is

possible only if the auctioneer knowingly received the seller's bids, which is also not the case here.

In case the puffer remains the last bidder, the validity of the contract also depends on the auctioneer's role in the scheme. If the auctioneer knowingly received the puffer's bid, which happened to be the last, the contract shall be invalid due to simulation of wills. Moreover, the puffer has a secret arrangement with the seller that the puffer shall not be bound by the bid if this bid happens to be the winning bid.[79] If, on the other hand, the auctioneer did not know about the puffer's bid, the contract would be valid, resulting in the puffers' obligation to pay the auctioneer both the price and the premium.[80]

Competition-law aspects

Auction is an ad hoc established market. At a certain place and at a certain point in time, two or more bidders concentrate their demand around the object being offered for sale.[81] Auction market is monopolistic,[82] either because the auctioneer is the only person capable of conducting the auction (e.g. 5G auctions, airport slots) or because the object being put up at auction is unique (e.g. artwork).[83]

However, even auctions of ordinary commodities are unique market structures. E.g. Kopenhagen and Sankt Petersburg fur auctions are competitors and mutually replaceable in the eyes of potential bidders. However, leaving the Kopenhagen auction and switching to the Sankt Petersburg auction or *vice versa* might be problematic for potential bidders as they will have to face different local rules, customs, export bans, etc. In this case, the potential bidders are in fact forced to stay with their current auctioneer, thereby making the latter – at least psychologically – a necessary contractual partner.

Since bidders have nobody else to turn to but to the auctioneer if they want to buy the object, they are vulnerable to the auctioneer's price manipulations. If it happened that the auctioneer engaged in sham bidding, this would damage the free competition.[84] More concretely, sham bidding is an abuse of dominant position in the auction market, resulting in the extracontractual civil liability for antitrust damages[85] against the seller and the auctioneer, assuming that both of them are undertakings.[86]

The damage suffered by the buyer due to the breach of antitrust laws consists in the difference between the price actually paid and the but-for price. This is the same damage which was described in the previous section – however, this time considered from a competition law aspect.

Therefore, the buyer could not cumulate damages resulting from the same material violation both under the antitrust rules and the general civil-law rules ('noncumulation rule'). The buyer could either invoke the rules on fraud and recover the overpaid sum under the general rules on compensation for damages or claim violation of the prohibition of abuse of dominant position and recover the same overpaid sum under the special rules on compensation for antitrust damages.

Invoking the special antitrust rules on damages is, in principle, more advantageous for the victim than launching the same procedure under the general rules. Special antitrust rules contain more favourable rules on the persons entitled to seek damages (any natural or legal person who suffered damage), scope of persons liable for the damage (direct tortfeasors and facilitators of damage), limitation period (postponed until both subjective and objective prerequisites are met), mandatory disclosure of evidence and burden of proof (presumption of breach, presumption of causality).

However, since antitrust rules do not contain exhaustive substantive rules on damages compensation, the general obligation law rules on damages explained hereinabove on issues like causality, culpability, imputability, restriction or exclusion of liability and methods of damages calculation apply in antitrust damages cases as well.[87]

The following section will, hence, focus only on peculiarities of competition law approach to damages resulting from sham bidding, without repeating abovementioned findings about recovery of damages under general civil law, which apply supplementary.

Continental law

PERSON ENTITLED TO SEEK DAMAGES

In EU member states and the UK – which all implemented the ADD – as well as in Switzerland, the compensation of antitrust damages relies on the continental principle of full compensation of damages for anyone who has suffered damages due to breach of competition law rules.[88]

Unlike under the general rules on fraud, where only the buyer can seek damages, antitrust damages for fraudulent abuse of the market can be sought also by persons who have not been in direct contact with the seller and the auctioneer but were somehow affected by the antitrust violation. E.g. the right to claim damages belongs to the direct buyer (i.e. the best bidder) and indirect buyers, on which the direct buyer has transferred the damage (e.g. consumers who bought the product made of fur obtained at a shammed auction).

Furthermore, the right to seek damages belongs to collateral victims of the sham bidding. For instance, municipal authorities which had financially supported the local car museum with respect to the acquisition of an old-timer at the auction concerned could seek damages from the seller and the auctioneer since the financial aid they had to provide to the museum was higher than it would have been had there been no sham bidding.[89]

PERSON LIABLE FOR DAMAGES

The victims can seek compensation from the seller and the auctioneer according to the principle of joint and severe liability for damages.[90] Apart from them, third parties who assisted the seller and the auctioneer with price manipulation will

be held jointly and severally liable for damages. E.g. this could cover various consultants or lawyers who facilitated the implementation of the sham bidding either actively (e.g. by providing advice) or passively (e.g. by not preventing the manipulation).[91]

Furthermore, persons who continue managing the undertaking of the tortfeasor as the legal successors thereof shall be held liable for the latter's acts.[92] In this regard, the auction house that acquired another auction house which participated in the sham bidding can be held liable for the damage caused by the latter.

SCOPE OF DAMAGES

According to the principle of full compensation for damages, victims of breaches of competition law can seek monetary compensation for all damages that they have suffered as a result of the breach. Three findings arise out of this principle.

First, antitrust damages protection is primarily concerned with monetary compensation. Moreover, antitrust remedies such as injunction claim, which generally may be introduced in addition to the damages claim,[93] would not be applicable in the case of auctions. Such remedies serve to force the seller to stop with a continuous breach of the competition law. This implies that the seller and the buyer have entered a longer-term business relationship (e.g. supply contract), which is not the case with the auction sale.

Secondly, the monetary damage covers all damages: actual damages (the difference between the price actually paid and the but-for price), loss of profit (e.g. resulting from a loss of customers due to the transfer of price difference) and statutory interests on each of these damages, chargeable from the moment of occurrence of damages until the payment.[94] Regular procedural costs (attorney's fees, court fees, etc.) should be added to this.

Thirdly, the victim cannot seek amounts that would go beyond the level of full damages. Thereby, there is a limit on the maximum compensable damages which excludes a possibility for the victim to seek punitive damages.[95]

Anglo-American law

Whereas continental legal systems (and the UK)[96] apply the principle of full compensation of damages, US law awards damages both to compensate the victim and punish the tortfeasor.[97] Any victim of a breach of competition law can seek monetary compensation of the direct purchaser overcharge, i.e. difference between the price actually paid and the but-for competitive price.[98] However, this amount can be multiplied by three to punish the tortfeasor (trebled damages).

Furthermore, the victim can ask for recovery of costs of the court procedure, which include the reasonable amount of attorney's fees.[99] Lastly, the court can also, if it finds appropriate, award simple interest on the actual damage starting from the moment when the victim filed the lawsuit until the judgment is reached or for some shorter period of time (prejudgment interest).[100] However, courts are

sceptical to award the lost profit,[101] which is, on the other hand, typical for full compensation of damages under continental rules.

Like under continental rules, the liability for damages can be sought from the seller, the auctioneer and their associates. Such liability is joint and several. However, unlike, under continental systems, the right of contribution between the tortfeasors is excluded.[102]

Proving causation and measure of damage in antitrust cases

This section covers the methods for proving causation in antitrust damages cases. By analogy, the same econometric methods could be employed for determination of but-for damages in regular civil-law cases. The overview of fundamental econometric methods is given by referring to the systematisation developed by the EU Commission. However, these methods are not confined to any specific legal system and can, in principle, apply to the calculation of damages in any jurisdiction.

Proving causation between the harmful event – in this case, the price manipulation – and the damage as well as proving the exact amount of the damage caused to the buyer by the harmful event are the two most problematic aspects of antitrust litigation. In order to establish whether and, if so, to what extent the harmful event has affected the price, the courts have to reconstruct the facts that would have taken place but for the price manipulation (*but for scenario*, *non-infringement scenario*, *counterfactual scenario*).[103] This scenario, however, cannot be established with certainty but rather as an ex post estimation of the 'alternative' past.[104]

The methods of establishing the causation and measure of harm are left to the discretion of the courts.[105]

Commonly used method is the comparator-based method. It allows the court to compare the market which was affected by the breach with a similar production market which was not affected by the same breach. Hence, the latter may serve as an example of a counterfactual market. The courts may compare different periods of time in the same market (e.g. the state of the market before and/or after the breach) or compare two similar markets across different time periods.[106] Prices, auction houses' market shares, their profit margins, costs, etc. usually serve as variables of comparison – the comparators.

For instance, a price bid for a Picasso painting from his 'blue phase' at an auction that happened to be affected by price manipulation can be compared to prices paid for other Picasso paintings from the blue phase at nonaffected auction(s) held before, at the same time or later by the same or another auctioneer.

The second method is simulation. This method requires development of an economic model of expected behaviour at the auction of a specific object in the absence of antitrust breach. The model must replicate the most important determinants of offer and demand in the circumstances of undistorted competition to enable the courts to estimate what could have been the expected price levels or other economic variables in the concrete auction had there been no breach.[107] Past,

unspoiled auctions held for the same or similar object by another auctioneer can serve as an economic model.

The third method is the cost-based analysis. This method considers normal production costs per unit of a certain object in the absence of a breach and adds the sum of a reasonable profit margin. The hypothetical price will be compared with the actually paid price to estimate the amount of overcharge.[108] In case of auction of a unique object, the production costs could be replaced with sale prices for the object concerned (based, e.g. on comparison of published price indexes) at unspoiled auction, plus the auctioneer's reasonable profit margin (i.e. the sum of commission and the buyer's premium).

Finally, the court may use a financial performance method. This method should show what are the profitability rates of the seller and the buyer in situations before and after the breach of competition rules. This is to show possible differences in the financial performance of both sides in the two time periods. The analysis may also introduce elements of comparative method and, for instance, compare profit margins of similar persons on comparative markets.[109]

However, all these methods have certain disadvantages when considered in the context of auctions.

The comparative method may show problematic for the lack of credible comparators. Auctions are occasional events. It may happen that at the time of estimation of damages, no comparable auction has taken place yet. Consequently, there is no comparable price to take. Or perhaps only one auction has taken place, meaning that the price obtained at this auction cannot serve as a credible comparator.

Furthermore, specific character of unique objects as well as specific atmosphere at each auction reduce chances that the comparative price is truly indicative.[110] This reduces the possibility of mechanical comparison between the markets.

Also, the development of a simulated auction model requires certain regularity in the offer and demand of a certain good to enable the creation of an objective pattern of behaviour which may be taken as a trustworthy indicator of foreseeable price developments at hypothetical auction. Such possibility usually exists only with respect to commodities like fish, coffee, tea, cotton, technology or fur. On the other hand, simulation of an art and antiquities auction is less feasible. Such auctions are held occasionally, and no firm pattern of behaviour can be developed to such auctions. Furthermore, the course of such auctions and the prices paid at such auctions are often affected by the unique nature of the item and private values of the bidders (affection, prestige). This makes each art auction a 'world of its own' and, hence, does not allow for the establishment of an objective auction pattern.

Cost-analysis method implies that the auctioned good has a standard price consisting of a production cost plus profit margin. This makes the cost-analysis method applicable only to calculation of but-for price of commodities and to not unique goods, since they do not have a standard production cost. Furthermore, the credibility of price indices published by the auction houses shall be called into question if the registered prices differ from the discounted actually paid for the

object under specific financial arrangements made between the consignor and the auctioneer.

Lastly, comparing the financial performance of the auction house and the seller before and after the alleged infringement might show an increase in their profits in the period following the affected sale. On the other hand, comparing the financial performance of the buyer before and after the affected sale might show a decrease of her or his profit. However, both increase and decrease in profits of various parties involved in the auction might be the result of many other factors that have nothing to do with the one-off sale. Hence, post-sale financial performance cannot be a trustworthy indicator of the measure of damage caused to the single buyer.

Given that the price at auction depends on several economic and behavioural factors, comparative analysis should check on the relationship between the affected economic variable, i.e. the price ('variable of interest') and other variables which might have affected the price irrespective of the sham bidding at the affected market ('variables of influence', 'explanatory variables').

This analysis is known as the regression analysis of alternative causes of damage. It aims to adjust the results produced under the method of simple comparison. It considers interaction of many different economic variables and reduces the mechanistic approach inherent in the standard, comparator-based method. It serves to establish a statistical probability that one or more factors different from the breach contributed to some extent to better auction results.

This allows the court to get a clearer image of the factual situation on the affected market. It shows only relative causation between the sham bidding and the price overcharge. E.g. the regression analysis may show that a high price achieved at the affected auction in comparison to the price achieved at a comparable unaffected auction is not the result of the sham bidding only. Introducing additional parameters might show that the higher price is partly the result of the increased interest in certain goods, economic prosperity, good marketing, untainted provenance of the good, etc.

Since regression analysis combines objective (financial) and subjective (behavioural) circumstances present at concrete auction, it is appropriate for analysis of both art auctions and commodities auctions. Furthermore, it allows a combination of a couple of previously mentioned econometric methods and reduces speculative calculation of damages.[111] Therefore, the regression analysis should be given advantage when calculating damages arising from distortion of competition at auctions.

Abstention agreements ('bid-rigging')

Bidders may enter horizontal agreements aiming at influencing the sale price or concentrating the buying power. There are three types of agreements: agreement on abstention from bidding for the benefit of a single bidder (*pactum de non licitando*), agreement on abstention from bidding for the joint benefit of

several bidders ('knockout' agreement or 'auction ring') and *bona fide* purchase for the joint account of several bidders (buyers' consortium, *Bietergemeinschaft*; *Einkaufsgemeinschaft*).

Save for the French[112] and the English laws,[113] there are no special statutes or at least provisions in other legal systems covered in this book that sanction specifically the bidding agreements. The questions about (il)licit character of such agreements in those countries shall be, thus, considered in light of the general provisions of the law of obligations and – in case of agreements between undertakings – competition law rules on cartels.[114]

Abstention from bidding for the benefit of a single bidder (pactum de non licitando)

Pactum de non licitando is an agreement between one bidder ('the leader') and other bidders (or at least some of them) according to which the latter promise to the former not to bid at the auction or not to bid for a concrete lot. In return, the leader promises to pay the abstaining bidder(s) a certain remuneration, e.g. a percentage in the resale price, a reward or a gift.[115] The aim of the agreement is to artificially reduce the competition for the object to help the leader to acquire the object at the lowest possible price (*chill bidding, bid-rigging*).[116]

Such an agreement is a fraudulent practice. It results in creating a false impression about the demand for the object. It causes the sellers and the auctioneers to believe that the final price reflects the actual market price. The sellers end up being bound by the sale contract they would have probably never entered into had they known about the real circumstances of the case.

Due to the immorality of such practice, these kinds of agreement are illegal[117] and invalid. However, the doctrine is divided on the type of invalidity of the bidding agreement, i.e. whether it renders the agreement void, voidable or unenforceable.

Pestalozzi argues that such agreement violates trade customs and is, hence, voidable (*anfechtbar*).[118] According to Vigneron, such agreement is invalid and unenforceable (*sans force obligatoire*).[119] However, given that French law does not recognise unenforceability in itself,[120] an illegal agreement should be considered absolutely null, i.e. retroactively annulled. For the majority of French doctrine, absolute nullity is an equivalent to voidness of English law.[121]

Under English law, bidding agreement is a criminal offense[122] and it should be treated as void rather than voidable. However, English courts are divided between the voidness and unenforceability of illegal contracts, with a prevailing opinion in favour of unenforceability.[123] Under US law, such agreements are considered illegal and void,[124] unless it was entered into solely with the purpose of enabling the purchase or realising a *bona fide* partnership.[125]

What remains to be seen now is how the invalid bidding agreement affects the contract for sale.

Civil-law aspects

CONTINENTAL LAW

Annulment of the sale The sale contract resulting from the rigged auction is voidable (*anfechtbar*, *nul*) under all three continental systems concerned. Anyone with an interest can ask for annulment (*Anfechtung*, *annulation*) of the sale for reasons of fraud.[126]

The annulment of the sale is, first of all, in the consignors' interest. Had they known of the fraud and the price implications thereof, they would not have entered into the sale contract. Annulment allows them to recover the object in exchange for the recovery of the paid price to the buyer.[127] This will allow the consignors to organise a new auction or to resell the lot via private-treaty sale.[128]

This is not to say that the consignors could not, in principle, seek damages (if any) as in any other case of annulment.[129] However, the damages claim should be confined to the eventual losses of profit and interests, whereas the actual damages should be omitted. This is because the consignors managed to recover the same estimated value that previously fraudulently left their assets by getting the object back.

Likewise, annulment of the sale is in the auctioneers' interest. However, since the annulment of the sale results in a state as if the sale contract had never been formed (*ex tunc* effect),[130] the legal cause for paying the auctioneers' fees will retroactively cease to exist. Hence, annulment of the sale contract implies that the auctioneers should return the commission fees to the consignors and the premiums to the buyers, respectively. However, this will allow the auctioneer to earn higher commission at a new auction of the same lot. Or if they also act in the primary market, they will have a chance to earn dealer's commission in case the consignors decide to sell privately and authorise the auctioneers to represent them.

Convalidation Annulment of the sale is only an optional remedy. Alternatively, the sellers may decide to stay with the contract and convalidate it.[131] For instance, they are not interested in getting back the object due to security reasons, lack of space to store it and/or means of preservation, public scandal, need to liquidate the family estate, ill memories associated with the object, etc. This, however, does not preclude them from seeking damages.

The right to seek damages is a general remedy available to anyone who suffered damages by an illicit behaviour of another person.[132] If convalidation of the sale would preclude them from claiming damages, the sellers would be forced to annul the contract so as to fix the harm suffered. This would make the annulment of the sale a mandatory remedy. This is, however, against the wording and the spirit of provisions on annulment. Moreover, this is against the general principle of contract law that the contract should be preserved whenever possible (*in favorem contractus*).

The sellers could, hence, seek damages from the leading bidders and other colluding bidders. The damages consist of the difference between the (lower) price

received and the hypothetical (higher) good-faith price the sellers would have received but for the bid-rigging (undercharge).[133] By receiving this price difference, the sellers will be placed in a position they would have been but for the harmful event, which is the primary way of restitution of damages.

Likewise, in the case of sham bidding, the basic problem the sellers will face is the determination of the referential hypothetical price.[134] It is not certain whether the sellers would manage to sell the object and charge any price. Even if they would, it cannot be said with certainty which price that would be. It is also uncertain whether the buyers would be solvent, etc.

Nonetheless, the fact that the leaders decided to restrain the demand so as to get the lots at the desired price indicates that they estimated that in the absence of bid-rigging, the open competition would lead to price increases. Since the bidding will finish as soon as the leader manages to secure the object at the reserve price, the price difference is hidden somewhere between the actual price bid (i.e. the reserve price) and the highest possible market price in the absence of bid-rigging. In case there was no reserve price, the leader could have bid any price. In this case, the price difference is hidden somewhere between the price actually bid and the highest possible market price in the absence of bid-rigging.

It may be claimed that the highest price that the seller could have reasonably expected is the high estimate, since this is the estimation already given by the expert valuer. Moreover, since this estimation was disclosed to the bidders, it may be assumed that the pace of the bidding would slow down after reaching it. It follows that each amount received below the high estimate is the actual damage[135] caused to the seller by the abstaining bidders.

The lower price also reduces the amount of the brokerage fee and the buyer's premium, which are both fixed as a percentage of the final price. Therefore, the auctioneers could also ask all colluding bidders to compensate them for the losses of profit. These should come in the form of differences between the commission and buyer's premium actually paid, and the commission and buyer's premiums they would have received but for the bid-rigging. Once the court establishes the hypothetical price difference, the calculation of the hypothetical commission fee and the buyer's premium should not be a problem, since they are both calculated as a percentage of the hammer price.

Lower sale prices may also be detrimental to third parties who provided financial guarantees.[136] If they provided the guarantee that the object will be sold at the reserve price – which is exactly the price at which the leader acquired the object – the damage consists in the loss of the guarantor's premium the third parties would have received had the final price exceeded the guaranteed price.

If they provided the guarantee for a certain amount exceeding the reserve price, the damage would consist in the fact that they will be personally liable for paying the difference between the actual sale price and the higher guaranteed price, alongside the fact they have lost the expected commission fee they would have earned had the object been sold above the guaranteed price.

Hence, third-party guarantors could be interested in annulment of the sale to get another chance to earn a reward at undistorted auction. Alternatively, they

could seek damages from the collusive bidders. Again, the amount of hypothetical price may serve as a reference to the guarantors when calculating the amount of hypothetical premium.

Competition implies that everyone is allowed to participate in the economic activity and has an equal position as another co-bidder with respect to the bidding process. The same is valid for auctions: each bidder shall have an equal chance to bid.[137] However, cartels force the bidders to waive their bidding freedom.[138] Therefore, even the colluding bidders could have an interest in annulment of the sale and damages if they were forced to enter the collusive agreement.[139]

However, unlike the seller, who in the absence of the violation would probably sell the object at a better price than the reserve, it is not sure whether any of the bidders would get the object. No bidder would not have a claim against the seller to sell him the object, even if he were the best bidder. Furthermore, it is not possible to determine whether one's offer would be lower, equal or higher than the hypothetically estimated best price. Therefore, the damage of the member of the agreement is unprovable and makes recovery of this kind of damages a theoretical possibility lacking, however, practical grounds.

ANGLO-AMERICAN LAW

The foregoing considerations about legal implications of bid-rigging in continental laws are, in principle, applicable to bid-rigging cases in England and the US. Therefore, the following lines will focus on specific features of the Anglo-American civil-law approach to bid-rigging.

Annulment of the sale Like in continental jurisdictions, a rigged auction sale shall be voidable under English law, allowing the seller to avoid (annul) the contract for reasons of fraud.[140] On the other hand, the situation is less clear under US law. UCC covers only cases of sham bidding. Nevertheless, if one considers bid-rigging as the 'mirror' case of sham bidding, which makes the sale voidable, then the seller could also annul the rigged sale by analogy with the avoidance of the sale in UCC, s 2–328(4). The legal implication of the avoidance under both laws is the recovery of the object by the buyer in exchange for the recovery of the price by the seller.[141]

With respect to the damages claims, US and English laws take different views. Under US law, the seller who annulled the sale could seek damages (if any),[142] plus statutory interests. The damages should be confined to the loss of profit since the actual damages were already recovered via restitution of the object.

On the other hand, it seems that the seller could seek damages sustained by reason of the operation of the agreement under English law only if the bidders did not recover the object of the avoided sale.[143] In other words, the recovery of an object is seen as compensation in itself since the sellers receive back the same value that previously unlawfully left their property. However, recovery of the object compensates only actual damages rather than the whole eventual amount of damage.

Therefore, the seller should have the right to recover the lost profit (if any) and costs of the organisation of the sale.

To conclude: the seller can recover loss of profit and the costs both under US and English laws. This corresponds to the scope of damages recoverable under the continental laws.

Although the auctioneers are not parties to the sale contracts but mere agents, and thus cannot avoid the sales, the avoidance of the sales will affect them too. Under Anglo-American law, the annulment of the sale has a retroactive (*ex tunc*) effect,[144] leaving the auctioneers without the legal cause for keeping the auctioneers' fees. Hence, annulment of the sale contract will result in the auctioneers' obligation to return the commission fees and the premiums, respectively. In this aspect, the situation corresponds to the situation mentioned hereinabove for the continental laws concerned.

Convalidation Like in the case of continental jurisdictions, the sellers may stay with the contract and convalidate it.[145] Also, they should be able to seek damages. Otherwise, they would be forced to annul the contracts so as to fix the harm suffered. This is against the alternative wording and the spirit of the provisions on annulment.

The seller could seek damages from all colluding bidders. The damages cover the difference between the price received and the hypothetical (higher) good-faith price they would have received but for the bid-rigging (undercharge).[146] The foregoing discussion regarding measurement of damages elaborated in context of the continental jurisdiction applies here as well.

Competition-law aspects

CONTINENTAL LAW

Bid-rigging agreements between nonprofessional bidders or among professional and nonprofessional bidders are rare. Those persons usually do not know each other and have no business contacts whatsoever. On the other hand, bid-rigging agreements between bidders-undertakings (e.g. art dealers) are more often.[147] They already know each other and find mutual economic interest in abstention from bidding.

By abstaining from bidding, they reduce the competitive pressure on the price and, thereby, affect the final price. In terms of competition law, abstention agreement is a price-fixing cartel which is unlawful and void as any other cartel (*nul de plein droit*, *nichtig)*.[148]

Competition law gives each person who has suffered damage due to the bidding cartel a right to seek damages.[149] In principle, victims can seek the actual damage (the imbalance between assets that left and entered the property due to the cartel), loss of profit, if any (loss of expected earning due to the cartel), and statutory interests on these amounts.[150]

In this regard, the sellers and upstream suppliers can seek actual damages in the form of difference between the price actually received (usually the low estimate, i.e. the reserve price) and the higher price that they would receive but for the cartel.[151] The auctioneers could seek damages in the form of loss of profit, i.e. the difference between the commission fee and buyer's premium, respectively, they would charge but for the cartel. Furthermore, among victims of the buying cartel are third-party guarantors who have either lost their expected fee in case of overage or will have to pay the difference between the reserve price and the higher guaranteed price in case the latter was set higher than the reserve. Also, the victims of the cartel may be persons who were forced to take part in the cartel due to their relatively economically weaker position vis-à-vis the leader[152] and who, hence, have lost their chance to buy the object in free competition.[153]

In cases of antitrust damages, all collusive bidders will be jointly and severally liable for all damages caused by their cartel,[154] alongside other persons who assisted them – actively or passively – with the implementation of the cartel. Common econometric methods of quantification of damages are also applicable to bidding cartels.[155]

ANGLO-AMERICAN LAW

Under Anglo-American laws, bid-rigging agreement is a price-fixing cartel. As such, it shall be considered unlawful and void.[156] This corresponds to the qualification of the bid-rigging cartel under continental laws concerned.

Each person who has suffered damage due to the bidding cartel can seek damages.[157] In principle, victims can ask for the actual damage, the loss of profit (if any) and the interests on these amounts.[158] In this sense, the sellers can seek actual damages as a difference between the price actually received (usually the low estimate) and the higher price that they would receive but for the cartel.[159] For the auctioneers, third-party guarantors and forced bid-riggers, everything that has already been said hereinabove in the context of continental laws applies here as well. Standard econometric methods of quantification of damages are also applicable to bidding cartels under English and US laws.[160]

Unlike under continental laws and English law, the actual damage (*direct supplier undercharge*) will be tripled under US law also with respect to bidding cartels.[161] Furthermore, the procedural costs, including reasonable attorney's fee, will be added to the actual damage.[162]

Despite the fact that the plaintiff in antitrust cases is, in principle, entitled to simple interests due on the undercharge from the moment of the lawsuit submission until the judgment, if the court considers payment of such interests as fair,[163] in cartel cases the payment of prejudgement interests is excluded. Instead, the interests will be due from the moment of judgment[164] onwards regarding the undercharge and, sometimes, even with respect to attorney's fees (postjudgement interest).[165] This is the result of the idea that the traditional function of the interest – monetary compensation for deprivation of the chance to use one's own money and for devaluation of money over time – will be achieved through treble (punitive) damages.[166]

In cases of antitrust damages, all collusive bidders will be jointly and severally liable for all damages caused by their cartel,[167] alongside other persons who assisted them – actively or passively – with the implementation of the cartel.

Bid-rigging for the joint account of several bidders ('auction rings')

In a standard bid-rigging, the leading bidder definitely acquires the object on her or his behalf, whereas in case of an auction ring, a single bidder acquires the consigned object at the lowest possible price on behalf of the whole group or 'ring' of colluding bidders. This, however, is done with the aim of reselling the lot later on within the group and division of the profit.[168] The scheme of a typical auction works in the following way.

Firstly, the abstaining bidders must choose a ring member ('the representative') who will bid for the group at a public auction. They must also define the maximum bidding price.[169] As in the case of 'ordinary' bid-rigging, the representative will be bidding only up to the reserve price, as this is the minimum price they have to bid if they want to secure the knock-down.[170]

After the representative buys the object at the public ('target') auction in his name, but for the account of the ring, the ring members will organise a second phase: private liquidation of the acquired object. The aim of the liquidation is to sell the object to one of the ring members who will offer the highest price for the object. This is usually done at a private liquidation auction ('knockout' auction, *révision*).[171]

At the liquidation auction, the ring member who placed the highest bid will finally get the object. This does not have to be the same person who acted as the ringleader at the public auction. Following the refundation of the costs of acquisition of the object between the ring members, the difference between the (lower) price paid at the public auction and the (higher) price paid at the liquidation auction (so-called 'rent', 'spoil' or 'dividend') will be divided among the ring members.[172] For instance, the ringleader bid 100,000 pounds at the public auction whereas the liquidation price reached 500,000 pounds; 100,000 pounds will be refunded to the bidders in proportion to their contributions, while 400,000 pounds will be divided among the ring members according to a predefined formula.

In principle, the liquidation can be done in two ways. The first option is to divide the rent among the ring members, including the winning bidder.[173] Mathematically, it is done by reducing the winning bid by the proportion of rent that belongs to the winning bidder. This is a sort of a discount on the final price. The remaining rent is then divided among the remaining bidders. Alternatively, the rent could be divided only among the remaining ring members, with the exclusion of the winning bidder.[174]

The ring may be organised as a series of private auctions. The first round may serve to eliminate financially weaker ring members, whereas the additional round(s) will eventually result in the final knock-down.[175] Famous example of such an auction ring is the auction of the library of baron Foxley in 1919 (Ruxley Lodge case).[176]

Alternatively, it is possible to organise a private pre-auction sale. In this case, the ring members will first choose the winning (knockout) bidder at a private auction. At private auctions, the ring members announce their valuations with respect to the object in a successive manner. The ring member with the highest valuation buys the object – however, under the condition that the ring succeeds during the public auction. If the ring acquires the object at the public auction, the winning member pays the hammer price to the auctioneer and divides among the ring members the difference between the pre-auction price and the price of the public bid.[177]

Price manipulation in the form of an auction ring is common at auctions, especially at art and antiquities auctions.[178] Like in the case of ordinary bid-rigging, such a behaviour is fraudulent. It forges the actual level of demand for the object, to the detriment of the consignor, the auctioneer and perhaps even the guarantor. Besides, such a behaviour aims to reduce the competitive pressure on the object and, hence, depress the price by excluding other potential competitors from the market ('cornering the market').[179] Therefore, the auction ring represents an immoral interference with the competitive bidding, which makes the abstention agreement illicit and invalid.[180]

The civil-law and competition-law implications for the sale affected by the ring under continental and Anglo-American laws are the same as for the ordinary bid-rigging explained hereinabove. Hence, everything already said applies here as well. Key difference, nonetheless, lies in the fact that the structure of an auction ring allows the court to reconstruct the referential hypothetical price more precisely than in the case of ordinary bid-rigging.

Damages under civil law

The liquidation price obtained in the private auction discloses how much the most interested ring member actually values the object and how much the ring member is willing to pay for the object once faced with the competition of other ring members. This is not to say that the liquidation price is exactly the same as the but-for price. The former is, in principle, lower than the latter; otherwise, rigging the public auction would not make sense.

However, the liquidation price is the approximation of the lowest possible but-for price that the ring member would be willing to offer at the public auction in case of undistorted competition. Therefore, the sum of the hypothetical damage caused to the consignor is at least the difference between the higher price that the ring member paid at the liquidation auction (P_{LA}) and the lower price that the ring representative paid at the rigged, public auction (P_{PA}). This difference may also serve other persons who calculated their fees as a percentage of the sale price (auctioneer, the guarantor) to calculate their own damages (reduced commission, loss of guarantor's premium, etc.).

However, it may happen that the rent that the winner will pay at the private auction is higher than the price the winner would be willing to pay at a nonrigged public auction. This surplus may result of valuation adjustments that the winner

had to make due to specific circumstances at the private auction (e.g. need for more aggressive bidding due to existence of an inner ring) or due to false declarations of the winner's valuations given at the pre-auction sale with the intent to increase chances to win the knock-out.

Therefore, in order to get a more precise sum of the actual damage, in this case the rent will have to be reduced by the sum for which this rent exceeds the sum that the ring member would have to pay at a nonrigged auction. By correcting the rent, the court will avoid overcompensating the victim, thereby adhering – at least in the context of continental law – to the principle of full compensation of damages.[181]

Damages under competition law

Auction rings are usually built between professional bidders, most notably, between dealers.[182] In this case, the ring operates as a bidding cartel.[183] An important 'advantage' of the ring from the perspective of the damages quantification consists in the possibility for the court to reconstruct the but-for price.

Functionally, the liquidation auction serves as a simulation of the actual competitive bidding in the absence of the cartel. Therefore, the P_{LA} indicates a simulated price (lowest, though) in the circumstances of open bidding. The difference between the P_{LA} and price paid at the public auction (P_{PA}) is the minimum 'cartel rent', i.e. the minimum amount of an undercharge owed to the consignor. Compensation thereof is a measure of damages suffered by the consignor.[184] Furthermore, it is a reference point for calculation of damages suffered by the auctioneer and the guarantor.

Bona fide partnership for the joint account of bidders (buyers' consortium, Bietergemeinschaft, Einkaufsgemeinschaft, convention d'association)

When individual financial means of a single bidder are not sufficient to succeed at auction, she or he may decide to pool resources with other bidders in a similar position in order to increase their chances to acquire the object at less cost.[185] E.g. several smaller galleries realise they are not strong enough to bid for a painting individually. Hence, they may decide to establish a partnership for the joint account of the bidders (buyers' consortium)[186] and agree that one of the galleries ('the leader') will use the pool of funds to buy the painting.

Unlike *pacta de non licitando*, this shall be done on behalf of all galleries. If the leading partner managed to get the painting, it would enter a joint fundus of the partner galleries as their collective property, which they may later share according to a predecided formula. For instance, the painting will be displayed from time to time in each of the galleries.

On the one hand, pooling the assets together results in the reduction of the overall number of individual bidders, thereby reducing competitive bidding. However, on the other hand, such an arrangement strengthens the overall financial capacities

of the bidders. The bidders – who would otherwise abstain from auction – will pool their assets and bid as a single 'bidding entity' alongside other bidders. This way, the auctioneer will get an additional bidder who will have a higher chance of placing a successful bid.[187]

Thereby, instead of weakening the competition, bidders' consortia, in fact, strengthen the competition to the benefit of the offer side of the auction market.[188] Furthermore, they do not cause damage to the consignor, auctioneer and guarantor. Every further proceeds earned by the consortium from the resale of the object result from a licit sale to a third person outside the consortium.[189] For these reasons, the bidders' consortia should be allowed as economically justified and meaningful bidding strategies.[190]

However, in order to exclude any doubt about the aim and the potential effect that such partnerships may have on competitive bidding, each partnership agreement should be notified to the auctioneer in writing before the auction.[191] This way, each participant at auction will know or at least should know of the existence, structure and aim of the bidding agreement.

Under this condition, *bona fide* partnerships should be treated as valid horizontal joint purchase agreements. The consignor could not successfully seek declaration of the agreement's voidness. Furthermore, the consignor could not avoid the auction sale entered into with a consortium representative[192] or seek damages. Likewise, the auctioneer and the guarantors could not seek damages due to lower commission fee and lower (or no) reward received due to potentially lower purchase price.

Interim conclusion

Irrespective of whether the auction is with or without reserve, the secret sham bidding is unlawful under all legal systems concerned both in terms of civil and competition law.

In terms of civil law, sham bidding represents fraud. Therefore, the auction sale which has been contaminated by such behaviour is voidable. The buyer can annul the sale and ask for recovery of actual damage (costs), eventual loss of profit and statutory interests, or convalidate the sale and ask damages. However, in case of convalidation, damages consist of a difference between the higher price actually paid and the lower price the buyer would pay but for the sham bidding (overcharge), plus statutory interests. Thereby, the buyers are placed in a position they would have been in but for the fraud (restitutionary principle).

In terms of competition law, sham bidding is an abuse of dominant position in all legal systems concerned, resulting in the possibility of the buyer to seek antitrust damages. In continental laws concerned and in English law, the measure of damages is based on the principle of full compensation for damage. This includes paying actual damages (recovery of overpaid sums), loss of profit and plus statutory interests, with the exclusion of any kind of monetary punishment. However, under US law damage reparation also covers punitive damages, which aim to punish the seller and the auctioneer for their abusive behaviour.

However, under three conditions, the seller's right to bid at auctions personally or via an auctioneer or a puffer will be allowed in all legal systems concerned.

Firstly, the reserved right to bid shall be disclosed to the bidders before the sale. Duty to disclose this reservation should be considered as a part of the seller's/auctioneer's precontractual obligation to provide the bidders with information relevant for entering into the contract. The information that the seller/auctioneer reserved the right to bid signalises to the bidders the former's possible doubts about the success of reaching the reserve price at open competition, i.e. doubts that the low estimate might not reflect the actual demand for the object. This enables the bidders to adjust their bidding strategy.

Secondly, reserved right to bid is allowed and meaningful only at sales with reserve prices. Thereby, the seller or the auctioneer is given a tool to reach the reserve price which the bidders would have to bid anyway. On the other hand, by-bidding at auctions without reserve – even if disclosed – would be contrary to the implicit promise that the seller is willing to sell at any price. It would, in fact, have the same effect as if the sale were announced as sale with reserve, given that the reserve of the right to bid implies that the seller apparently has a reserve price.

Thirdly, the seller, the puffer and the auctioneer can openly bid for the object only until the bidding reaches the reserve price, but not for the reserve price or above. The reserve price is the price the buyer has to bid anyway, since the law protects the seller's attempt to secure at least the minimum valuation of the object. However, after the seller has received the desired minimum, there is no reason to push the prices further, even if such an option would be disclosed to the potential buyers. Bidding above the reserve would result in ongoing and unfair increase of the initial reserve during the auction, making the initial reserve meaningless. Furthermore, placing higher bids would show that there is no actual demand for the object above the level of the seller's minimum valuation and, thus, result in an attempt to artificially create a demand.

Abstention or bid-rigging agreements are, in principle, forbidden under all legal systems concerned both under civil and competition laws. Under civil law, bid-rigging results in the sale contract being voidable. The seller may choose to annul the sale and ask damages in the form of actual costs, loss of profit and statutory interests or convalidate the sale and ask for damages in the form of the difference between the price received and the price that the seller would receive but for the bid-rigging (undercharge), plus interests.

In terms of competition law, bid-rigging agreements are void, and the parties may claim antitrust damages under the rules as for the 'mirror case' of sham bidding.

However, abstention agreements in the form of *bona fide* partnerships are lawful both in terms of civil and competition law. Pooling financial assets into a single bidding consortium results in the formation of a lawful horizontal agreement on joint purchase that strengthens the overall financial capacities of the bidders to the benefit of the seller and competitive bidding at auction.

Notes

1 Ralph Cassady Jr, *Auctions and Auctioneering* (UCP 1980) 8; Sophie Vigneron, *Étude Comparative des Ventes aux Enchères Publiques Mobilières: France et Angleterre* (L.G.D.J. 2006) 304.
2 Cassady (n 1) 212; Bernhard Kresse, *Die Versteigerung als Wettbewerbsverfahren* (Mohr Siebeck 2014) 266.
3 The same Joëlle Becker, *La Vente aux Enchères d'Objets d'art en Droit Privé Suisse: Représentation, Relations Contractuelles et Responsabilité* (Schulthess 2011) 240.
4 Ibid.
5 Martin Blättler, *Versteigerungen über das Internet: Rechtsprobleme aus der Sicht der Schweiz* (Schulthess 2004) 171–72; Becker (n 3) 239.
6 Cassady (n 1) 212; Blättler (n 5) 172; Randi F Braun, 'The Legal Sustainability of Auction House Practices in the Twenty-first Century' (Master thesis, Sotheby's Institute of Art 2011) 46; Kira Sidorova, 'Insurance of the Auction Business: Third-Party Guarantees and their Application in the Art Market' (Master thesis, Sotheby's Institute of Art 2013) 10.
7 Kresse (n 2) 269.
8 Continental codes are broad enough to cover all types of auctions sales. See 1911 Amendment to the Swiss Civil Code (Fifth Pt: Obligations Law) (OR) (Bundesgesetz vom 30. März 1911 betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches AS 27 317 (Fünfter Teil: Obligationenrecht)), Art 229(1); 1999 Regulation on Entrepreneurship (*Gewerbeordnung*) (GewO) (BGBl. I S. 202; 2021 BGBl. I S. 3504), para 34(b)(6)3; 1807 Commercial Code (*Code de commerce*), Art L321–5, I(2).
9 1896 Civil Code (*Bürgerliches Gesetzbuch*) (BGB) (BGBl. I S. 42, 2909; 2003 I S. 738 2021 I S. 5252), para 123(1); OR, Art 230(1); Anton Pestalozzi, *Der Steigerungskauf: Kurzkommentar und Zitate zu Art. 229–236 OR* (Schulthess Polygraphischer Verlag 1997) 106, 111; Helmut Marx and Heinrich Arens, *Der Auktionator: Kommentar zum Recht der gewerblichen Versteigerung* (2nd edn, Luchterhand 2004) 417; Becker (n 3) 240; Kresse (n 2) 267, 283–84. Under French law, a fraud is a ground for relative nullity (*nullité relative*). See 1804 Civil Code (*Code Civil*), Art 1130 in conjunction with Art 1131. It results in retroactive annulment of the sale, i.e. the sale contract will be treated as if it never existed and the object should be restituted to the seller. See Vigneron (n 1) 92–93; 98–99.
10 Becker (n 3) 237.
11 Ibid 238.
12 Arg ex Code civil, Art 1138; OR, Art 28(2); BGB, para 123(2).
13 Pestalozzi (n 9) 143; Becker (n 3) 238; Kresse (n 2) 284–85. This can, however, change if the auctioneer in the meantime assigned contractual rights and duties arising from the sale to the consignor.
14 Pestalozzi (n 9) 142.
15 Arg ex BGB, para 142(1) in conjunction with para 812(1); arg ex OR, Art 28(1); arg a contrario ex OR, Art 31(1); Code civil, Art 1178(3) in conjunction with Arts 1352 and 1352–6; Pestalozzi (n 9) 149; Vigneron (n 1) 93; Becker (n 3) 244; Kresse (n 2) 243, 272.
16 Arg ex OR, Art 41; by analogy BGB, para 122(1); also BGB, para 144(1) in conjunction with para 249(1); Code civil, Art 1240.
17 E.g. expressly Code civil, Art 1178(4).
18 OR, Arts 31(3), 41; BGB, para 144(1) in conjunction with para 249(1); Code civil, Art 1240. On the option of convalidation in case of relative nullity (voidability) of sale in French law also Vigneron (n 1) 92.
19 Pestalozzi (n 9) 114; Kresse (n 2) 243. On interests and damages as alternatives to annulment in case of misrepresentation in French law expressly Vigneron (n 1) 120.
20 In this sense also Marx and Arens (n 9) 415–16.

21 Kresse (n 2) 278.
22 Ibid 266.
23 Ibid 278.
24 Ibid.
25 Claudia Fuchs, 'Öffentliche Vergabe' in Gregor Kirchhof, Stefan Korte and Stefan Magen (eds), *Öffentliches Wettbewerbsrecht: Neuvermessung eines Rechtsgebiets* (C.F. Műller 2014) 499, 501.
26 Pestalozzi (n 9) 116, 120; Kresse (n 2) 282.
27 BGB, para 281(1) and (5) in conjunction with para 346(1). Also Kresse (n 2) 270.
28 On the auctioneer's liability for damages to the buyer for fraudulent representation in French law also Vigneron (n 1) 121, arguing, however, that this liability is extracontractual (tort) liability (*la responsabilité civil délictuelle*).
29 Pestalozzi (n 9) 122; Kresse (n 2) 267.
30 Also Kresse (n 2) 267–68.
31 Becker (n 3) 239.
32 Cassady (n 1) 212.
33 Becker (n 3) 240.
34 BGB, paras 116 and 117(1); Bundesgerichtshof (BGE) 112 II 337 of 4 November 1986, 343; Pestalozzi (n 9) 123; Marx and Arens (n 9) 240; Kresse (n 2) 268.
35 Becker (n 3) 240.
36 BGB, para 116; BGE 112 II 337, 345; Pestalozzi (n 9) 122; Kresse (n 2) 271.
37 Pestalozzi (n 9) 123; Kresse (n 2) 271.
38 Pestalozzi (n 9) 123; Becker (n 3) 241.
39 Ibid.
40 Uniform Commercial Code (UCC 1951), s 2–328(4); Sale of Goods Act 1979 (SoGA 1979) s 57(4) and (6); Rules of the City of New York: Title 6 Department of Consumer Affairs, c 2 Licences, sub-c M Auctioneers (May 2009) s 2–123(b) <https://www1.nyc.gov/assets/dca/downloads/pdf/about/auctioneer_law_rules.pdf> accessed 3 February 2022.
41 *Bexell vs. Christie* (1776) 1 Cowp 395, 98 ER 1150, 396–97; *Meadows v Tanner* (1820) 5 Madd 34. Veazie v. Williams, 49 U.S. 134, 12 L. Ed. 1018 (1850), Opinion, para 17; Pyles v. Goller, Md.App.1996, 674 A.2d 35, 109 Md.App. 71, para 83. See also Cassady (n 1) 213; Brian W Harvey and Franklin Meisel, *Auctions Law and Practice* (3rd edn, OUP 2006) 232, 239; Franklin Meisel, 'Upping the Ante': Market Distortion in Auction Sales' (1996) 59 Modern Law Review 398, 404.
42 In this sense, Harvey and Meisel (n 41) 238. Contr. Braun (n 6) 64–66, arguing that this issue should be stipulated in the contract.
43 UCC, s 2–328 (4); cf Rules of the City of New York, s 2–123(b).
44 SoGA 1979, s 57(3).
45 Joseph Bateman, *A Practical Treatise on the Auctions; With Forms, Rules for Valuing Property, Useful Tables and Directions to Auctioneers* (6th edn, Melbourne and Sydney 1882) 138; Harvey and Meisel (n 41) 238, 239.
46 SoGA 1979, s 57(3); Harvey and Meisel (n 41) 239.
47 Harvey and Meisel (n 41) 238.
48 Veazie, Opinion, para 17; Rules of the City of New York, s 2–123(b) and (c). Cassady (n 1) 213; Harvey and Meisel (n 41) 244; Braun (n 6) 49; Sidorova (n 6) 10. E.g. Christie's New York can bid for the seller up but not including the reserve price. Christie's, 'New York Conditions of Sale: Buying at Christie's' (standard) (Christie's 2022) Pt C, Art 5 <www.christies.com/buying-services/buying-guide/conditions-of-sale> accessed 2 February 2022.
49 Cassady (n 1) 213.
50 Harvey and Meisel (n 41) 245.
51 Alternatively, the auctioneer could buy it if agreed with the seller. About various auction guarantees, see more in ch 5.

52 Rules of the City of New York, s 2–123(a).
53 Cassady (n 1) 244; Pestalozzi (n 9) 121; Harvey and Meisel (n 41) 246; Kresse (n 2) 308. See more ibid 290–92.
54 Braun (n 6) 54.
55 Ibid 58.
56 Veazie, headnote 12.
57 *Bexell vs. Christie*, 396–97.
58 Braun (n 6) 61.
59 UCC, s 1–304 (Obligation of Good Faith) in conjunction with s 1–201(20) (General Definitions); *Bexell vs. Christie*, 396–97.
60 Expressly New York City Administrative Code, Title 20: Consumer Affairs, c 2 Licenses, sub-c 13 Auctioneers (May 2009), s 20–288 <https://www1.nyc.gov/assets/dca/downloads/pdf/about/auctioneer_law_rules.pdf> accessed 3 February 2022; *Bexell vs. Christie*, 396–97; Harvey and Meisel (n 41) 232.
61 Vigneron (n 1) 120.
62 UCC, s 2–328(4); implicitly SoGA 1979, s 57(5); Veazie, headnote 9; Cassady (n 1) 212; Harvey and Meisel (n 41) 239; Vigneron (n 1) 95, 120–21.
63 Implicitly SoGa 1979, s 57(5); UCC s 2–328(4); Veazie, headnote 11 and Opinion, para 14; Nevada Nat. Leasing Co. v. Hereford, Cal.1984, 203 Cal.Rptr. 118, 36 Cal.3d 146, 680 P. 2d 1077, para 151; Meisel (n 41) 405; Harvey and Meisel (n 41) 239; Vigneron (n 1) 95, 121–22.
64 Veazie, headnote 23; Vigneron (n 1) 121.
65 Harvey and Meisel (n 41) 239.
66 For English law Vigneron (n 1) 121–22; for US law by analogy UCC, s 2–721.
67 On restitution in integrum as a consequence of annulment Vigneron (n 1) 122.
68 The same ibid 95.
69 Implicitly SoGA 1979, s 57(5); UCC, s 2–328(4); Harvey and Meisel (n 41) 239; Meisel (n 41) 405.
70 UCC, s 2–328(4); Vanier v Ponsold, 251 Kan 88; 833 P 2d 949.
71 Lyndel V Prott and Patrick J O'Keefe, *Law and the Cultural Heritage: Movement*, vol 3 (Butterworths 1989) 359.
72 Nevada Nat. Leasing Co., para 151.
73 Re Wilson Freight Co. (1983, F BC SD NY) 30 BR 971, 36 UCCRS 1606, para 976.
74 Cf Pestalozzi (n 9) 114.
75 Vanier v Ponsoldt, para 949.
76 Nevada Nat. Leasing Co, para 153. By analogy, this right should also exist under English law.
77 Veazie, Opinion, para 20.
78 Ibid para 21; Harvey and Meisel (n 41) 239.
79 Cassady (n 1) 212.
80 Ibid.
81 Blättler (n 5) 24; Alla Belakouzova, *Widerrufsrecht bei Internetauktionen in Europa? Eine vergleichende Analyse des deutschen, englischen, russischen und belarussischen Rechts unter Berücksichtigung der Rechtsentwicklung in der EU und der GUS* (Mohr Siebeck 2015) 134.
82 Paul Klemperer, 'Auction Theory: A Guide to the Literature' (1999) 13 Journal of Economic Surveys 227; Kresse (n 2) 251, 298.
83 Blättler (n 5) 25 Kresse (n 2) 251, 298.
84 Pestalozzi (n 9) 111–12,116; Becker (n 3) 237; Kresse (n 2) 268.
85 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union (ADD) (Text with EEA relevance) [2014] OJ L349/1, Art 1(1); 1995 Cartels and other Restraints of Competition Act (KG) (*Bundesgesetz über Kartelle und andere*

Wettbewerbsbeschränkungen AS 1996 546), Art 12(1)(b); The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017, 385 (CLDCI 2017), s 47f, sch 8 A, Pts 1, 2 (2); 2006 United States Code, supp 5, title 15 (Commerce and Trade), c 1 (Monopolies and Combinations in Restraint of Trade) (15 USC) s 15 (Suits by persons injured), letter (a); 15 USC, s 15c (Actions by State attorneys general), letter (a)1.

86 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47, Art 102(a); KG, Art 7(2)(c); Competition Act 1998, c 41 (CA 1998) s 18(2); 15 USC, s 1 (Trusts, etc., in restraint of trade illegal; penalty) in conjunction with 15 USC, s 7 ('Person' or 'persons' defined).

87 ADD, Recital 11; KG, Art 12 in conjunction with Art 41ff. Lack of special provisions on the same issues in competition law statutes of the UK and the US, respectively, suggests that the court there should also follow the general rules on compensation of damages.

88 Judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, para 26; judgment of 13 June 2006, *Manfredi*, joined cases C-295/04 to C-298/04, EU:C:2006:461, paras 59, 60, 61, 63; judgment of 6 November 2012, *Otis NV and Others*, C-199/11, EU:C:2012:684, paras 41, 43; judgment of 6 June 2013, *Donau Chemie AG and Others*, C-536/11, EU:C:2013:366, para 21; judgment of 5 June 2014, *Kone AG and Others*, C-557/12, EU:C:2014:1317, para 22; judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paras 25, 26; ADD, Art 3(1); CLDCI 2017, s 47 f, sch 8 A, Pts 1, 2(2)(a); KG, Art 12(1)(b). Alison Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' (2016) A Dickson Poon Transnational Law Institute, King's College London Research Paper Series 10/2016, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715796> accessed 4 February 2022; Communication from the Commission – Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (Passing-on Guidelines) C/2019/4899 [2019] OJ C267/4, Recital 12.

89 Judgment of 12 December 2019, *Otis GmBH and Others*, C-435/18, EU:C:2019:1069, para 34.

90 ADD, Art 11(1); CLDCI 2017, s 47 f, sch 8 A, Pts 3, 12(3); OR, Art 50(1).

91 Judgment of 22 October 2015, *AC-Treuhand AG*, C-194/14 P, EU:C:2015:717, paras 36–39; Conor C Talbot, 'AC-Treuhand, the Scope of Article 101 TFEU, and the Future of Actions for Antitrust Damages' (2016) 23 (1) Commercial Law Practitioner 1, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2721928> accessed 4 February 2022; OR, Art 50(1).

92 Skanska Industrial Solutions, para 51.

93 Communication from the Commission: Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law 2020/C 242/01 C/2020/4829 [2020] OJ C242/1, para 2; Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Brussels, 14.12.2020., SWD (2020) 338 final, 5; KG, Art 12(1)a.

94 ADD, Art 3(2), already in Manfredi, para 95; Donau Chemie AG and Others, para 24; In Swiss law, the decision on the type of compensation, which is regulated in the general law of obligations, is left to the courts. OR, Art 43(1). With respect to the calculation of interests, EU member states should allow for charging compound interests if this is necessary for the achievement of the full compensation of damages. Barend Van Leeuwen and Giorgio Monti, 'EU Law and Interest on Damages for Infringements of Competition Law' in Giorgio Monti (ed), *EU Law and Interest on Damages for Infringements of Competition Law – A Comparative Report* (2016) EUI Working

Papers Law 11/2016, 8, 16 <https://dx.doi.org/10.2139/ssrn.2753528> accessed 4 February 2022.

95 ADD, Art 3(3); Ioannis Lianos, 'Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe' (2015) CLES Working Paper 2/2015, 46 <https://dx.doi.org/10.2139/ssrn.2564329> accessed 4 February 2022; CLDCI 2017, s 36.

96 As part of the harmonisation with the EU antitrust rules, the UK adopted the full compensation approach to compensation of antitrust damages. CLDCI 2017, s 7(2). By doing so, the UK law abandoned the possibility for the victim to seek punitive (exemplary) damages. CLDCI 2017, s 36. At the time of writing of this book, the UK solutions on antitrust damages have not been revisited due to Brexit. Therefore, the analysis of the Anglo-American approach to antitrust damages is confined to the US solutions.

97 15 USC ss 15 and 15c; Herbert J Hovenkamp, 'Quantification of Harm in Private Antitrust Cases in the United States' (2011) Faculty Scholarship at Penn Law, 1–2 February 2011 <https://scholarship.law.upenn.edu/faculty_scholarship/1860/> accessed 4 February 2022.

98 Martijn A Han, Maarten Pieter Schinkel and Jan Tuinstra, 'The Overcharge as a Measure of Antitrust Damages' (2008) Amsterdam Center for Law & Economics Working Paper 8/2008, 2 <https://dx.doi.org/10.2139/ssrn.1387096 > accessed 4 February 2022.

99 15 USC s 15(a) (for business entities); s 15c(a)2 (for natural persons).

100 Ibid.

101 Han, Schinkel and Tuinstra (n 98) 2.

102 Texas Industries v Radcliff Materials, Inc 451 US 630 (1981) 631; Joseph Angland, 'Joint and Several Liability, Contribution, and Claim Reduction' (2008) 3 Issues in Competition Law and Policy (ABA Section of Antitrust Law 2008) 2369, 2370 <https://dx.doi.org/10.2139/ssrn.1528007> accessed 4 February 2022. More details on the US antitrust law see Jones (n 88) 6–11; William H Page, 'Optimal Antitrust Remedies: A Synthesis' (17 May 2012) <http://dx.doi.org/10.2139/ssrn.2061791> accessed 4 February 2022.

103 Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 TFEU of the Treaty on the Functioning of the European Union (SWD(2013) 205), accompanying the

Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, {C(2013) 3440}, 11 June 2013, 10 (Practical Guide).

104 Ibid; Damien Geradin and Ianis Girgenson, 'The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach' (11 December 2011) 12, 17–23 <https://dx.doi.org/10.2139/ssrn.1970917> accessed 4 February 2022.

105 ADD, Art 17(1); OR, Arts 42(2) and 43(1).

106 More details see in Practical Guide, 15–24; Hovenkamp (n 97) 6.

107 More details see in Practical Guide 33–35.

108 Ibid 36.

109 Ibid 37.

110 Ibid 48.

111 Ibid 24–31.

112 1810 Code pénal, Art 313–6.

113 In order to prevent bidders from engaging into price-decreasing schemes, the UK enacted the Auctions (Bidding) Agreements Act 1927 (ABAA 1927) (17 and 18 Geo 5 c 12). Its procedural provisions were amended by the Auctions (Bidding Agreements) Act 1969 c 56 (ABAA 1969). However, unlike in France, where all collusive agreements between the bidders are prohibited by the criminal law, irrespective of their private or professional nature, the English statute proscribes only

agreements between the dealers, leaving the private agreements intact. The same Vigneron (n 1) 309.

114 Also Cassady (n 1) 216; Prott and O'Keefe (n 71) 364.

115 ABAA 1927, s 1(1); Code pénal, Art 313–6; Pestalozzi (n 9) 125; Vigneron (n 1) 304; Kresse (n 2) 294.

116 Blättler (n 5) 173; Becker (n 3) 242. This should not be confused with bid shielding, as explained in ch 3.

117 OR, Art 230(1); ABAA, s 1(1); Code pénal, Art 313–6. Pestalozzi (n 9) 125; Becker (n 3) 242; Kresse (n 2) 297, 302–03. On immorality of the cause as the reason for illegality of the contract in general also Vigneron (n 1) 102.

118 Pestalozzi (n 9) 118.

119 Vigneron (n 1) 307. Unenforceable contract lacks legal force and, thus, cannot be enforced by force. Ibid 96.

120 Ibid 99.

121 On this issue ibid 92–98.

122 ABAA 1927, s 1(1).

123 Vigneron (n 1) 102.

124 'Contracts. Legality of Agreements by Buyers Not to Bid against Each Other at a Public Auction' (1921) 30 (6) Yale Law Journal 630 <https://doi.org/789240> accessed 5 February 2022.

125 Ibid 631.

126 Kresse (n 2) 295; Vigneron (n 1) 307; Pestalozzi (n 9) 142; Blättler (n 5) 173; Becker (n 3) 242; Marc-André Renold,'Die Auktion' in Peter Mosimann, Marc-André Renold and Andrea FG Raschèr (eds), *Kultur, Kunst und Recht: Schweizerisches und Internationales Recht* (2 edn, Helbing Lichtenhahn Verlag 2020) 822.

127 Arg ex BGB, para 142(1) in conjunction with para 346(1); OR, Art 230(1) in conjunction with Art 31(1); Pestalozzi (n 9) 149; Becker (n 3) 244;

128 Pestalozzi (n 9) 149; Cassady (n 1) 191.

129 Arg ex OR, Art 41; BGB, para 144 in conjunction with para 249(1); also by analogy BGB, para 122(1); Code civil, Arts 1240, 1178(4). Vigneron (n 1) 307.

130 BGB, para 142(1); Pestalozzi (n 9) 106; Vigneron (n 1) 93; Becker (n 3) 243.

131 BGB, para 144(1); OR Art 23(1); also Becker (n 3) 243. On the option of convalidation in case of relative nullity (voidability) also Vigneron (n 1) 92.

132 OR, Arts 31(3), 41; BGB, para 144(1) in conjunction with para 249(1); Code civil, Art 1240.

133 OR, Art 31(3); BGB, para 144(1) in conjunction with para 249(1); Kresse (n 2) 299.

134 Kresse (n 2) 304.

135 This is not a loss of profit, since the sellers receive less value (less than or only the low estimate) in exchange for a higher value (high estimate) that left their property.

136 On third – party guarantees see ch 5.

137 Vigneron (n 1) 15.

138 Gregor Kirchhof and others, 'Grundlagen des Őffentlichen Wettbewerbsrechts' in Gregor Kirchhof, Stefan Korte and Stefan Magen (eds), *Öffentliches Wettbewerbsrecht: Neuvermessung eines Rechtsgebiets* (C.F. Műller 2014) 99.

139 Contr. Becker (n 3) 243, arguing that this right belongs only to the person not involved in the collusive agreement.

140 ABAA 1969, s 3(1); also Vigneron (n 1) 308.

141 ABAA 1969, s 3(2); for US law by analogy ex UCC, s 2–328(4).

142 UCC, s 2–721.

143 ABAA 1969, s 3(2).

144 Vigneron (n 1) 96.

145 ABAA 1969, s 3(1); for US law by analogy ex UCC, s 2–328(4).

146 Also, referring to some English cases where ABAA 1927, s 3(2), Harvey and Meisel (n 41) 273; for US law by analogy with taking the good at the good faith price ex UCC, s 2–328(4).

147 Vigneron (n 1) 307.
148 TFEU, Art 101(2); KG, Art 5(1) in conjunction OR, Art 20(1).
149 ADD, Art 2(14); KG, Art 12(1)(b).
150 ADD, Art 3(2). Already in Manfredi, para 95; Donau Chemie AG and Others, para 24; arg ex KG, Art 12(1)(b) in conjunction with OR, Art 41(1).
151 ADD, Recital 43; Lianos (n 95) 43.
152 Courage and Crehan, para 33.
153 John Asker, 'A Study of the Internal Organization of a Bidding Cartel' (2010) 100 (3) The American Economic Review 724, 726 <www.jstor.org/stable/27871229> accessed 5 February 2022.
154 ADD, Art 11(1); CLDCI 2017, s 47 f, sch 8 A, Pt 3, 12(3); OR, Art 50(1).
155 Geradin and Girgenson (n 104) 12; 15–16; Practical Guide, 43. Similar methods may be found in 15 USC s 15(d) (Measurement of damages).
156 CA 1998, s 2, subs 4 in conjunction with subs 1(b); 15 USC s 1.
157 CLDCI 2017, s 47 f, sch 8 A, Pt 1, 2(2)(a); 15 USC ss 15(a) and 15c(a)1.
158 CLDCI 2017, s 47 f, sch 8 A, Pt 1, 2(2)(a); 15 USC ss 15(a) and 15c(a)2.
159 CLDCI 2017, s 47 f, sch 8 A, Pt, s 8(b); Lianos (n 95) 43; Branta, LLC v. Newfield Production Company, D.Colo.2018, 310 F.Supp.3d 1166, para 1212.
160 For the UK see discussion on damages measurement developed under ADD; for US law 15 USC s 15d.
161 Han, Schinkel and Tuinstra (n 98) 2, 20.
162 15 USC ss 15(a) and 15c(a)2.
163 Ibid.
164 Eckart Bueren, 'Die Berücksichtigung der Anspruchsentwertung im Zeitablauf bei Schadensersatz wegen Verstößen gegen EU-Kartellrecht – Eine Rechtsvergleichende Studie' (2013) 77 (3) Rabels Zeitschrift für ausländisches und internationales Privatrecht 504, 546–47.
165 Ibid 548–49.
166 Ibid 552.
167 CLDCI 2017, s 47 f, sch 8 A, Pt 3, 12(3); OR, Art 50(1). For US law, by analogy with 15 USC s 7a – 2(3) (Rights, authorities, and liabilities not affected), however, without a right to contribution. Angland (n 102) 370; Texas Industries, para 631.
168 Kresse (n 2) 305; Pestalozzi (n 9) 127.
169 ATH Smith, 'Auction Rings' (1981) Criminal Law Review 86, 88; Harvey and Meisel (n 41) 269.
170 Angelo Artale, *Rings in Auctions: An Experimental Approach* (Springer 1997) 1; Aniol Llorente-Saguer and Ro'i Zultan, 'Auction Mechanisms and Bidder Collusion: Bribes, Signals and Selection' (2014) MPI Collective Goods Preprint, 18/2014, 2 <https://dx.doi.org/10.2139/ssrn.2545762> accessed 5 February 2022.
171 Code pénal, Art 313–6; Prott and O'Keefe (n 71) 363; Pestalozzi (n 9) 127; Harvey and Meisel (n 41) 265; Kresse (n 2) 305
172 Smith (n 169) 86; Cassady (n 1) 178; Prott and O'Keefe (n 71) 363; Harvey and Meisel (n 41) 265; Vigneron (n 1) 306.
173 Artale (n 170) 91–94; Harvey and Meisel (n 41) 265.
174 Artale (n 170) 91.
175 Cassady (n 1) 182.
176 See more in Harvey and Meisel (n 41) 266.
177 Artale (n 70) 27.
178 Cassady (n 1) 179; Smith (n 169) 89, 90.
179 Cassady (n 1) 177; Artale (n 70) 1; Harvey and Meisel (n 41) 265; Vigneron (n 1) 305; Kresse (n 2) 305.
180 OR, Art 230(1), ABAA 1969, s 1(1); Code pénal, Art 313–6; Kresse (n 2) 305.
181 ADD, Recital 13.

182 Smith (n 169) 86; Harvey and Meisel (n 41) 265; Vigneron (n 1) 307.
183 Cassady (n 1) 216; Harvey and Meisel (n 41) 266; Kresse (n 2) 305.
184 Harvey and Meisel (n 41) 273.
185 Fuchs (n 25) 510; Dennis Werner 'Űberblick; Anbieter und Arten von Internet-Auktionen' in Georg Borges (ed), *Rechtsfragen der Internet-Auktion*, vol 1 (2nd edn, Nomos 2014) 7.
186 In case of Internet auctions, known as Community-Shopping (Co-Shopping) or Power-Shopping. Werner (n 185) 7.
187 Fuchs (n 25) 510.
188 Likewise Kresse (n 2) 306.
189 Harvey and Meisel (n 41) 270.
190 Contracts. Legality of Agreements by Buyers Not to Bid against Each Other at a Public Auction (n 124) 631; Cassady (n 1) 190; Smith (n 169) 87; Pestalozzi (n 9) str. 127; Vigneron (n 1) 305; Kresse (n 2) 306; Fuchs (n 25) 510 (in the context of public procurement).
191 Kresse (n 2) 307; ABAA 1927, s 1(1).
192 ABAA 1969, s 3(1).

Conclusion

When a certain object is so specific that its value cannot be determined based on standardised parameters or when the object is highly desirable, auction seems to be the economically soundest method of price determination.

Auction is both an economic and legal institution. However, whereas economic theory of auction has been developing the economic concept of auction for several decades now, legal scholarship has been lagging behind due to its orientation towards national rules and institutions. This book has tried to identify this important gap in the academic literature and conceptualise the auction from a legal point of view.

In economic terms, an *auction* is every market institution that determines the allocation of resources and prices based on the bidders' offers. In this sense, auction covers one-sided and double-sided auctions, ascending and descending open-bid auctions and sealed-bid auctions. Therefore, auction, in an economic sense, covers methods like art auctions, stock exchanges and public procurement.

Defining *auction* in a legal sense has shown to be a challenging task given the under-regulation of auction, the lack of legislative definition of auctions and a variety of auction formats.

Auction in a legal sense is a much narrower notion than the notion of auction in an economic sense. Comparing normative solutions across the jurisdictions concerned in this book, it has been shown that a typical auction across all these jurisdictions has three essential elements. Firstly, auction is a successive competitive bidding. Instead of placing a single bid, each bidder has a chance to place consecutively higher bids in order to outbid the others. Secondly, auction is an overt bidding, enabling the bidders to familiarise themselves with the competing bids. Thirdly, an auction is an intermediated sale, requiring the intervention of an auctioneer acting for the account of the seller.

Normative solutions, however, do not provide a full image of the legal concept of auction. The normative model of ascending (English) auction is merely a default model in the auction rules concerned. Those rules do not preclude the auctioneer whatsoever from departing therefrom. Therefore, auctions can also be organised as descending (Dutch) auctions.

At this auction, the auctioneer offers the lot and the price is consecutively reduced until one bidder accepts the auctioneer's offer and wins the lot. Despite

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its descending character, the Dutch auction shares similarities with the English auction. It is a successive, competitive bidding with the bidders competing on who will buy the lot at the lowest possible price. The bidding is also overt, since every bidder knows the current price level and the competitors' reactions thereon. The price formed at the end of the bidding is, thus, a result of competitive pressure and the underlying interaction between the bidders rather than fixed or private-treaty pricing.

It follows that the legal concept of auction is broader than the normative concept of auction; however, it is narrower than the economic concept of auction. The legal concept of auction covers only those buyer-made methods of contract formation run by the auctioneer and based on a public, overt, competitive and successive bidding aiming at reaching the highest (or least reduced) price. The bidding is, in fact, a sort of sale negotiations run simultaneously with the two or more potential buyers.

Since they lack third-party intervention for the account of the seller and successive competitive bidding, public competitions like games of chance, public procurement, stock exchange and public offers of a reward are not auctions in a legal sense but rather separate contractual methods.

In 1925, an English lawyer G. D. Nokes said that the 'law relating to sales by auction is not a well-defined branch of law' but rather 'a collection of fragments of various branches of law which are applicable to the avocations of an auctioneer'. As the foregoing considerations have shown, this statement holds true even today. In the auction law, sales law is intertwined with the law of mandate, most notably brokerage and agency. Therefore, the full understanding of the legal concept of auction, the legal nature of the auctioneer, the structure and qualification of auction relationships has required an analysis of the two legal areas and their interaction.

Defining the structure and number of auction relationships has been a challenge due to the variety of capacities in which the auctioneer can intervene in the bidding process. Nevertheless, it has been shown that a typical auction consists of at least four essential categories of contractual relationships.

Firstly, there is a consignment agreement between the seller (consignor) and the auctioneer. Internally, the auctioneers act as active sale brokers for the account of the consignors. In return for their services, they receive a fee, coverage of expenses and possible damages related to the enforcement of the mandate. Externally, they act as agents for the consignor. Under German and Swiss laws, an auctioneer can be a direct legal representative (agent) or indirect legal representative (commission agent) of the consignor. Whereas both options are available, the commission agency prevails in particular in the art sales due to its confidentiality. Under French and Anglo-American law, the auctioneer acts as agent for the consignor.

Irrespective of its legal capacity, each auctioneer is the seller's fiduciary. Basic elements of this status include personal engagement in the consignor's affairs, avoidance of the conflict of interest, adherence to the consignor's instructions, proper attribution of the object and care about the received price.

Apart from the consignment agreement, there are auction contracts between the auctioneer and the bidders. The auctioneer promises the bidders to provide them with a chance to bid at auction, whereas they promise to pay the buyer's premium to the auctioneer if they win the lot. Since the auctioneer provides the bidders with exclusive access to the seller and the lot in exchange for a fee, the auction contract is a brokerage contract. If the auctioneer, however, provides the absentee bidders with an additional bidding service as their bidding agent, the auction contract is supplemented by absentee bidding agreement featuring elements of (commission) agency contract.

Thirdly, there is a so-called 'taking-part' agreement. Once the bidders decide to take part in the auction bidding, they accept to follow the 'rules of the game' – the conditions of sale for the bidders – alongside general principles of open competition. These rules and principles determine how each bidder should act in relation to all other bidders. As in any game, these rules are primarily negative principles, imposing a duty on the bidders to refrain from any behaviour that could distort open competition inherent in the auction. Most notably, it forbids them to engage into aggressive bidding tactics and artificial inflation of the prices aiming to exclude the others from bidding.

The purpose of an auction is the formation of the sales contract – the fourth essential contract in the structure of auction relationships. In continental jurisdictions, the formation of the sale contract is grounded on the theory of invitation. Irrespective of whether the sale is with or without reserve, unless agreed otherwise, the call for bids is a mere invitation to bid, whereas the bid is an offer to buy. The auctioneer is under no obligation whatsoever to knock down the lot to the highest bidder, while the best bidder has no enforceable claim against the auctioneer. The unjustified decline of the knock-down stands for an unfair breach of negotiations and results in precontractual damages (*culpa in contrahendo*).

On the other hand, the legal nature of the auctioneer's and the bidders' expressions of will under Anglo-American law is dependent upon whether the sale is declared to be with or without reserve. If the sale is declared to be with reserve, the meaning of the parties' wills will be judged according to the theory of invitation, as in the case of continental auction. If, however, the sale is declared to be without reserve, the parties' wills will be judged according to the theory of firm offer. The auctioneer's call for bids is also the general firm offer to sell and the accompanied collateral promise to sell to whoever leaves the best bid. By placing the last bid, the highest bidder simultaneously enters the sale contract and the collateral contract contingent, however, on the absence of a higher bid.

Therefore, whereas the formation of contract at continental auction and Anglo-American auction with reserve is alike, the formation of contract at continental auctions and the Anglo-American sale without reserve is quite different. However, this holds true insofar as an auction is organised as an English auction.

If an auction is organised as Dutch auction, the auctioneer's calls for bids and subsequent price reductions are proposals to sell at the offered (least reduced) price. Therefore, once some bidder shouts 'Mine', the contract is automatically

formed irrespective of whether there has been a minimum price or not. The knock-down has merely a symbolic, declaratory meaning.

The sale contract formed via auction has the same legal implications as any other sale contract. In terms of obligations law, the duty to transfer the object and the ownership, and to pay the price, respectively, arises as soon as the auctioneer knocks down the lot. In terms of property law, the ownership (as well as the risks for the accidental loss or damage to the lot) passes onto the buyer with the knock-down under all jurisdictions concerned save for German law, where this occurs at the moment of transfer of possession. However, under all jurisdictions concerned, the passage of title in the lot may be postponed until the buyer pays the price in full (retention of title clause).

The emergence of internet auctions – a time-bound, fully online competitive bidding – has opened a great deal of debate over the applicability of the existing auctions law on this novel sale method. This is because traditional auctions are run by an auctioneer who physically knocks down the object to the best bidder as the seller's active sales broker and agent.

In case of prominent auction platforms like eBay, the traditional auctioneer-agent and the conventional knock-down are missing. The platform operates as a mere neutral sales intermediary. It enables the parties to exchange information over the platform and provides the conditions for contract formation but does not take an active part in the negotiations itself. The entire sale process is left to the seller to design, while the conclusion of the contract is automatised. Hence, intermediary auction platforms (known as 'user-to-customer auctions') are ordinary distance sales. More precisely, they are distance private-treaty pricing supported by the mechanism of competitive bargaining. As such, they remain outside provisions of the auction law and are subject to e-commerce rules, the rules on consumer protection and the general sales law.

However, the fact that intermediary platforms dominate the online auction market does not mean that no internet auction can be considered a conventional, 'agency-like' auction.

Insofar as the platform operator acts as an agent for the seller (so-called 'auctioneer-to-customer platforms'), the traditional understanding of auction applies also to online competitive biddings, notwithstanding the fact that the virtual knock-down lacks material involvement of the auctioneer. It has been shown that what matters for a sale to be qualified as auction is the existence of the auctioneer and the competitive bidding rather than the form of a knock-down. Taking a dynamic approach in interpreting auction laws, virtual knock-down becomes just another customary way of knocking the objects. Therefore, auctioneer-to-customer auctions are genuine auctions in a legal sense and current auction laws should apply thereto as well.

The structure of auction relationships at internet auctions, in principle, follows the structure of the conventional auction. There is the user agreement between the seller and the platform, the user agreement between the platform and the bidders, the sale contract and the taking-part agreement between the bidders. Under the last agreement, the bidders shall refrain from deploying strategies such as shield

bidding, which may divert potential bidders from bidding or cause damage to the existing bidders.

However, the legal structure of legal relationships at typical intermediary auctions like eBay differs from the traditional auction in two ways.

Firstly, it includes two levels of user agreements.

On the one hand, the platform and the users enter into a user framework agreement. Under this agreement, the platform operator places its organisational and technical infrastructure at the users' disposal. This contract combines elements of contracts for provision of information society services and brokerage contracts.

On the other hand, individual user agreement between the platform operator and the user (seller and buyer, respectively) arises as soon as the user launches the platform for selling or buying, respectively. The individual contract also combines elements of the contract for the provision of information society services and the brokerage contract. Whereas the seller pays for the service with money, the bidders 'pay' for the use of the platform by sharing their personal data.

Secondly, the meaning of the parties' wills at internet intermediary auctions is grounded on the theory of firm offer. The seller's call for bids is an offer to sell, whereas the bidders' bids are acceptances to buy, contingent on the absence of a higher bid. Having in mind the openness of the auction rules to any customary way of bid acceptance, the automatic closure of the auction by passage of time is just another customary way of accepting the best bid, while a transfer of data via the internet is an effective form of a virtual knock-down (*Zuschlag mittels Zeitablauf*).

The foregoing structure of auction relationships is the basic structure of relationships that emerge always and at every successful auction. However, the basic structure is frequently supplemented by a myriad of specific contractual and extracontractual legal relationships, especially at high-end art auctions. These include resale royalty claims, auction guarantees and strategic sale-purchase alliances.

Resale royalty right is an inalienable, unwaivable and extracontractual right of the author of the original artwork and her or his heirs to continuously receive a percentage of the sale proceeds each time the artwork is resold on a secondary market.

This right is typical for continental legal systems, most notably France and Germany. On the one hand, it serves to recognise the personal link between the artists and their work. On the other hand, it aims to provide socioeconomic protection for visual artists that will bring them at an equal footing with the writers and composers. In the Anglo-American jurisdictions, however, imposing a mandatory resale right is generally considered at odds with the common-law theories of copyright, the free alienation of property and the freedom of contract.

The rules on the resale right have been harmonised in the EU. The EU Resale Right Directive wanted to broaden the territorial scope of resale right to nonresale right jurisdictions in order to prevent further disintegration of the internal market for art and to combat social inequalities between visual artists from different member states.

However, the compromises made during the harmonisation of the EU resale right have left several uncertainties regarding the interpretation and application of the directive to auctions.

Whereas EU resale right arises as soon as the artwork is created, the resale royalty claim arises with each resale. This should be understood as each valid sale contract for which the price has been paid. As any other pecuniary claim, resale royalty claim is waivable, assignable, subject to pledges and enforcement proceedings.

The directive covers all resales of artwork where at least one party is an art professional. Therefore, the resale right covers traditional auctions and internet auctions as far as the seller, the buyer or the operator of the auction platform are art market professionals. In case of auctioneer-to-customer auctions run by major art auction houses, the resale right will apply. However, since intermediary platforms like eBay are not professional art dealers, the resale right will apply to such sales only if the seller or the buyer are art professionals.

The auctioneer does the calculation of resale royalty based on total net sales price and the principle of tapering scale rather than on the capital gain scheme. Whereas taxes should be deducted from the calculation basis, the auctioneer's fees, which are due on the hammer price, remain part of the calculation basis.

The liability for the royalty payment, in principle, lies with the seller. However, member states may decide to make the auctioneer solely or jointly liable with the seller for the royalty payment. The auctioneer's joint liability should be understood to cover joint and several liability, joint but separate or merely supplementary liability to the seller's liability.

Introducing the joint and several liability should be given priority for at least three reasons. Firstly, it strengthens the legal position of the artist-creditor towards the seller. Secondly, it allows the seller to temporarily pass on the burden of payment of the fee to the auctioneer. Thirdly, it makes the jurisdictions providing for such a liability model more attractive for the art resellers.

Whatever liability model is applied, it is a mandatory regime. Whereas sellers and the auctioneer may pass the economic burden of the royalty payment onto the buyer, the legal liability stays with the original debtor. However, the sellers and the auctioneers may circumvent national solutions on the seller's sole liability for the royalty. This can be done via a commission agency. By giving the auctioneer the status of a commission agent, the consignor and the auctioneer could make the auctioneer – then formally the seller – solely liable for royalty payment although the EU member state concerned did not opt for the auctioneer's sole liability in its implementing measure.

With the intensification of the art trade in the second half of the twentieth century, the auctioneers started to introduce different financial guarantees to attract the best consignments and squeeze out the competition. Major auction houses have developed three types of auction guarantees: the auctioneer's own guarantee, the third-party guarantee and irrevocable bids. Under all three guarantees, the auctioneers or third-party guarantors promise to the consignor that they will pay the minimum price for the lot unless someone else does. If the sale fails, the

auctioneer or the third party will cover the guaranteed minimum. However, if the sale succeeds, the auctioneer or the third party will share the price surplus with the seller. Therefore, the auction guarantee is a combination of conditional private sale and specific financial insurance contract.

It has been shown that the auction guarantees have raised a great deal of debate over their influence on the auctioneer's fiduciary position towards the seller and the neutral position towards the bidders.

Despite providing the auctioneer with direct financial stake in the auction proceeds, the auction guarantee has not compromised the auctioneer's position as the seller's agent and fiduciary. It is merely an additional agreement providing the auctioneer with additional benefit for taking a personal del credere liability for the auction outcome. Hence, the auctioneer provides additional protection for the seller's interests, which transcends the auctioneer's usual position. Furthermore, the auction guarantee has not tarnished the competitive bidding either, since the very realisation of the auction guarantee depends on the outcome of the bidding. Moreover, the auction guarantee stimulates competitive bidding, as announcement of the guaranteed sale warms up the bidding atmosphere.

Whereas auction guarantees could result in financialisation of the art market and anticompetitive practices, their economic advantages make them a valuable legal instrument of the art market. They protect the consignors against risks of sale default, make the art a liquid asset, match the offer and demand for the most attractive pieces, fill the gap in the auction houses' incomes, encourage third-party investments and serve as an attractive marketing tool that fosters competition.

Therefore, instead of abandoning or prohibiting auction guarantees, they should be reformed via self-regulatory schemes and targeted state intervention, most notably, through anti-money laundering laws.

A good alternative self-regulatory scheme could be investment funds and crowdfunding. These collective funding schemes could disperse the financial risks inherent in auction guarantees. Furthermore, they could remove much of the criticism related to auction guarantees. The pluralism inherent in these schemes could stop financialisation of the art, bring more transparency and inclusiveness in the art financing, raise demand for art, foster competition and remove the current cut-throat competition among major auction houses.

Auction is an open, competitive bidding. Therefore, any interference in the free competition on the seller's or the bidders' side hurts the very purpose of the auction. To prevent this from happening, the legal systems concerned in this book require the seller and the auctioneer to refrain from placing secret, fictitious bids aiming at artificial inflation of the price. They also require the bidders to refrain from colluding with each other with the purpose to depress the prices. In both cases, the auction market is manipulated to defraud the other party, with several civil-law and antitrust implications.

In case of fictitious or sham bidding, the auction sale is voidable under all civil-law rules concerned in this book, leaving the best bidder to decide whether to seek annulment and damages or to convalidate the sale and ask for damages. Whereas in the former case the damage consists in actual damage (costs), eventual loss of

profit and statutory interests, in the latter case it consists in the recovery of the price difference between the higher price actually paid and the lower price the buyer would pay but for the sham bidding (overcharge), plus statutory interests.

In terms of competition law, sham bidding is an abuse of dominant position, leaving the buyer with the possibility of seeking antitrust damages. In the continental laws concerned in this book and in English law, the reparation of damages is based on the principle of full compensation for damage. This covers actual damages (recovery of overpaid sums), loss of profit and statutory interests, with the exclusion of monetary punishment. However, under US law, the damage reparation also covers punitive damages, aiming to punish the seller and the auctioneer for their abusive behaviour.

However, disclosed bidding by or on behalf of the seller is allowed if the sale is with reserve and the by-bidding does not exceed the reserve price. In this case, the bidders know for the auctioneer's intervention and can adapt their bidding strategies thereto. Furthermore, they are not harmed in any way, since the reserve price should be bid anyway.

The collusive agreements between the bidders – *pacta de non licitando* and auction rings – make the auction sale voidable as well, with identical legal implications as in the 'mirror' case of sham bidding. However, *bona fide* partnerships are lawful both in terms of civil and competition law. Pooling financial assets together results in the formation of a lawful horizontal agreement on joint purchases that strengthens the overall financial capacities of the bidders to the benefit of the seller and competitive bidding at auction.

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