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Brenna Adler

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The International Art Auction Industry: Has Competition Tarnished its Finish?

Brenna Adler^{*}

The modern auction industry is a lucrative business enterprise in both the United States¹ and in Europe.² The traditional function of the auction house as a “mere intermediary” between seller and buyer has eroded and been replaced by a more complex set of practices.³ Over the past thirty years, auction houses have changed from being wholesale suppliers for art dealers, to direct marketers of art to the general public.⁴ In the process, the large international auction houses, Sotheby’s, Christie’s and others, have competed fiercely to auction the most expensive and alluring art.⁵ These auction houses have created a modern “international art market,” wherein they, in effect, “[engage] in worldwide competition” to obtain and auction off the most desirable consignments.⁶ The consignments are works of art—including paintings, jewelry and furniture—that the auction houses receive from private collectors or art dealers.⁷ In order to compete with each other,

^{*} J.D. candidate, May 2003, Northwestern University School of Law; B.A. 1997, University of California at Berkeley. I would like to thank my family and friends for their comments, support, and encouragement.

¹ Stuart Bennett, *Fine Art Auctions and the Law: A Reassessment in the Aftermath of Cristallina*, 16 COLUM.-VLA J.L. & ARTS 257, 258 (1992).

² Van Kirk Reeves & Jan M. Boll, *General Report, Auction Sales and Conditions*, 3 INTERNATIONAL ART TRADE AND LAW 354 (Martine Briat & Judith A. Freedberg eds., 1991); see also Shelby White, *Putting Your Possessions on the Block*, N.Y. TIMES, June 14, 1987, § 3, at 11.

³ Reeves & Boll, *supra* note 2, at 355; see generally *id.* at 353-354; see also Jorge Contreras, *The Art Auctioneer: Duties and Assumptions*, 13 HASTINGS COMM. & ENT. L.J. 717, 720 (1991).

⁴ Contreras, *supra* note 3, at 719.

⁵ Douglas C. McGill, *Sweeping Reassessment in the Auction Trade*, N.Y. TIMES, July 31, 1985, at A1; Bennett, *supra* note 1, at 257-58.

⁶ Reeves & Boll, *supra* note 2, at 353-54.

⁷ Jennifer Dixon, *Prosecutors Say Chairs at Sotheby's, Christie's Devised Price-Fixing*

international auction houses are offering controversial financial services⁸ and conducting other practices,⁹ that may result in conflicts of interest between the auction house, the sellers, the buyers, and the public.¹⁰

The foundation of the auctioneer's duty is agency law.¹¹ However, it extends beyond that.¹² Duties of auctioneers have broadened to the buyer as well as the public.¹³ The laws that regulate auctioneers vary between countries.¹⁴ However, the controversial practices by the auction houses that will be discussed below seem to evade regulation, particularly in America and Britain.¹⁵ The "fierce competition" between the large international auction houses appears to drive them to commit illegal behavior, breaking both civil and criminal laws, while they violate their duties to sellers, buyers and the public.¹⁶ Indeed, the competition has ultimately culminated in one of the worst scandals the art auction world has seen: a collusive price-fixing scheme between the two largest auction houses in the United States and Britain, Sotheby's and Christie's.¹⁷

The question, then, is how and why do the international auction houses continue to thrive in the midst of unconscionable actions on their part? And ultimately, what can be done to curb the illegal behavior of the auction industry while emphasizing an appreciation for the uniqueness of the goods—art—they trade? The lack of cohesive international laws to regulate the auction industry is some evidence of the desire by the international community to leave auction houses to their own devices.¹⁸ I argue that a stronger,

Scheme, KRTBN KNIGHT-RIDDER TRIBUNE BUSINESS NEWS: DETROIT FREE PRESS—MICHIGAN, Nov. 10, 2001, available at 2001 WL 29846337.

⁸ Reeves & Boll, *supra* note 2, at 354; see also Contreras, *supra* note 3, at 741-42.

⁹ Contreras, *supra* note 3, at 719; see also Bennett, *supra* note 1, at 257-58.

¹⁰ Bennett, *supra* note 1, at 262; Reeves & Boll, *supra* note 2, at 355-56; Contreras, *supra* note 3, at 719.

¹¹ *Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc.*, 502 N.Y.S.2d 165, 171 (N.Y. App. Div. 1986); see Bennett, *supra* note 1, at 262-66; Martine Briat & Judith A. Freedberg, *Introduction to Auction Sales and Conditions*, 3 INTERNATIONAL ART TRADE AND LAW 349 (Martine Briat & Judith A. Freedberg eds., 1991) [hereinafter *Introduction*]; P.J. O'Keefe & Lyndel V. Prott, *LAW AND THE CULTURAL HERITAGE MOVEMENT* 315 (Butterworths, London and Edinburgh 1989).

¹² Contreras, *supra* note 3, at 719; see also Bennett, *supra* note 1, at 269.

¹³ Contreras, *supra* note 3, at 720, 730; Bennett, *supra* note 1, at 269.

¹⁴ See generally O'Keefe & Prott, *supra* note 11, at 335-360 (discussing auctioneering laws of different countries).

¹⁵ See Contreras, *supra* note 3, at 730, (asserting that agency law is not adequate for governing the practices of auctioneers in America); see generally Bennett, *supra* note 1, at 262-283 (discussing controversial practices by auction houses).

¹⁶ McGill, *supra* note 5, at C20; see Bennett, *supra* note 1, at 258.

¹⁷ Ralph Blumenthal & Carol Vogel, *Ex-Chief of Sotheby's Is Convicted of Price Fixing*, N.Y. TIMES, Dec. 6, 2001, at A1.

¹⁸ See John P. Shinn, *A New World Order for Cultural Property: Addressing the Failure of International and Domestic Regulation of the International Art Market*, 34 SANTA CLARA L. REV. 977, 993 (1994), (discussing how the international treaty, UNESCO, fails to regulate

more cohesive international regulation specially tailored to the auction industry is required in order to keep auction houses from committing unlawful behavior. Auction houses should not be considered *merely* businesses. Rather, special regulations are needed—regulations that take into account the unique goods that auction houses sell.

Part I of this comment will describe auctioneers' duties to sellers under the law. I will compare and contrast the laws of the United States, the Netherlands, and France and focus on an American case that discusses the breach of an auctioneer's duty to the seller. Part II will discuss the controversial practices performed and services provided, allegedly under the auctioneer's duty of agency to the seller, in the United States and abroad. I will discuss how competition between the major auction houses may drive these practices to extremes. Part III will discuss the auctioneer's duty to the buyer. Again, I will compare the laws of different countries, including the United States, France, and the Netherlands. Part IV will analyze the New York City regulations as an example of the difficult nature of reconciling the auctioneer's duty to the seller, the buyer and the public while attempting to address the current controversial practices of the auction industry. Part V will discuss the most recent illegal practices performed by the large international auction houses, Christie's and Sotheby's. Part VI will argue that the international community's failure to regulate the sale of stolen art by private institutions, including auction houses, is evidence of the community's lack of ability or desire to generally regulate the auction industry. Part VII will discuss the uniqueness of the art auction industry, from the extraordinary works of art it sells, to the glamour and prestige embedded in the industry. Finally, Part VIII will argue for special regulations that recognize and respect the uniqueness of the goods that the auction industry deals in, and attempt to curb the wrongful and illegal behavior of the auction houses.

I. AUCTIONEER'S DUTY TO THE SELLER: THE LAW OF AGENCY

A. Fiduciary Duty

The auctioneer's legal duty is based on the law of agency.¹⁹ An American court ruled that as the agent to the consignor, the auctioneer has a fiduciary duty "to act in the utmost good faith and in the interest of" the consignor.²⁰ An auctioneer is responsible for using reasonable efforts to disclose material facts to the consignor.²¹ The auctioneer's ultimate duty is

the sale of stolen art in private institutions).

¹⁹ Cristallina, 502 N.Y.S.2d at 171; see *Introduction*, *supra* note 11, at 350; see O'Keefe & Prott, *supra* note 11, at 315.

²⁰ *Id.* at 171; see Bennett, *supra* note 1 (discussing extensively *Cristallina* and the effect the decision has had on the auction world).

²¹ Cristallina, 502 N.Y.S.2d at 171; Contreras, *supra* note 3, at 726; Bennett, *supra* note

to obtain the best price for the consignor.²² When an auctioneer fails to perform these practices, the auctioneer has breached his fiduciary duty.²³

Auctioneering practices in the United States, however, can be contrasted with the practices of other countries.²⁴ In New York, the auctioneer is required to have a license, and is wholly responsible for maintaining proper conduct throughout the auction.²⁵ By contrast, in the Netherlands, the state provides a type of intermediary between the auctioneer and the seller and the public,²⁶ giving the state a tighter stronghold on the auctioneering practice. In order to have a legal auction, the auctioneer must be supervised by a state-appointed civil law notary or bailiff.²⁷ The bailiff or notary is responsible for ensuring that the "rules of conduct" of the auction are "properly followed."²⁸ In essence, the bailiff or notary is considered the "custodian of good conduct" and, as such, is responsible for monitoring whether the auctioneer is abiding by "general standards of honesty and decency."²⁹ This includes assuring that improper practices, such as "fake bidding" or the "sale of stolen goods," do not occur.³⁰ Notwithstanding the requirement of a state-appointed custodian, however, the Dutch auctioneer is still fully responsible for "proper compliance with the conditions of

1, at 265.

²² O'Keefe & Prott, *supra* note 11, at 315; Bennett, *supra* note 1, at 264-65.

²³ Cristallina, 502 N.Y.S.2d at 171.

²⁴ See *supra* note 14, and accompanying text; see Reeves & Boll, *supra* note 2, at 353-55.

²⁵ 6 Rules of the City of New York § 2-122 (2001).

²⁶ Jan M. Boll, *The Netherlands, Auction Sales and Conditions*, 3 INTERNATIONAL ART TRADE AND LAW 389, (Martine Briat & Judith A. Freedberg eds., 1991) (citing WET AMBTELIJK TOEZICHT BIJ OPENBARE VERKOPINGEN OF 15 DEC. 1971, § 748 [The Act on the Official Supervision at Public Auctions] and DUTCH CIVIL CODE art. 1255). Please note that the Dutch Civil Code has been undergoing extensive revision since 1992; some sections are not yet complete. The revisions may or may not have an effect on the notary/bailiff requirement.

²⁷ *Id.* (citing WET AMBTELIJK TOEZICHT BIJ OPENBARE VERKOPINGEN OF 15 DEC. 1971, § 748 [The Act on the Official Supervision at Public Auctions]). The Dutch law on public sales has been modified as of January 1, 2002. Wet Ambtelijk Toezicht Bij Openbare Verkoopingen (Versie Geldig Vanaf: 01-01-2002), at <http://wettenbank.sdu.nl/cgi-bin/showlawtext/vkey=W05801B1/pos=6/session=anonymous>. However, the law requiring a state-appointed notary or bailiff still applies to public auctions. Article 1 of the modified Act states, "Het is verboden openbare verkopeningen bij opbod, bij opbod en afslag of bij afslag van roerende zaken, met uitzondering van zaken, toebehorende aan of beheerd door de Staat, provincies, gemeenten . . . of andere lichamen aan wie krachtens de Grondwet verordenende bevoegdheid is verleend, te houden, anders dan ten overstaan van notarissen of van deurewaarders bij de rechterlijke colleges." *Id.* The translation states, "It is prohibited to hold public sales of movable property, except of property belonging to or administered by the nation, provinces, cities . . . or other administrative bodies empowered by the Constitution to rule, without the presence of a notary public or a bailiff." (Patrick Geeraert, LL.M., Northwestern University School of Law, trans.).

²⁸ Boll, *supra* note 26, at 390.

²⁹ *Id.*

³⁰ *Id.*

sale.”³¹ Similar to the fiduciary duty of the New York auctioneer to the consignor,³² in the Netherlands, under the conditions of sale, the auctioneer has a duty to act in good faith and fairness.³³

In France, the auctioneer has traditionally been a State official.³⁴ These State officials or agents are named “*commissaries priseurs*.”³⁵ For centuries, state-appointed auctioneers in France have held a monopoly over the auction industry in France.³⁶ Because the auctioneer in France has always been appointed by the state, the auctioneer has different duties than auctioneers in other countries.³⁷ The French auctioneer is a “member of an organized, regulated corporation,” and is under the supervision of the corporation as well as the French courts.³⁸

Thus, more similar to the Netherlands, and in contrast to the United States (the New York rule), the French auctioneering system has traditionally been tightly controlled by the state. However, in July 2001, a law was passed in France that broke up the monopoly of the *commissaries priseurs* over the auction industry.³⁹ This new development will eventually allow international auction houses such as Christie’s and Sotheby’s to do business in France because the state agents, or *commissaries priseurs*, though still prevalent in the French auction industry, will no longer be required to run a public art auction in France.⁴⁰

B. Breach of Fiduciary Duty?

Under the umbrella of maintaining a fiduciary duty to the consignor, auction houses in New York and abroad, including London and Geneva, have consistently maintained the practice of keeping reserve prices a secret.⁴¹ A reserve price is a price below which an auctioneer cannot sell the item at auction.⁴² A reserve price is one that must be agreed upon by the seller and auctioneer.⁴³ It has been asserted that keeping the reserve price a

³¹ *Id.* at 391.

³² *See* Cristallina, 502 N.Y.S.2d at 171.

³³ Boll, *supra* note 26, at 392. However, the Netherlands appears to construe the auctioneer’s duty a bit more broadly and in more vague language, by stating that the auctioneer has the same duty of “diligence . . . as is required in society in respect of the legitimate interests of other people.” *Id.*

³⁴ O’Keefe & Prott, *supra* note 11, at 341.

³⁵ *Prised Open*; *French Auctioneers*, THE ECONOMIST, Sept. 1, 2001, at 53.

³⁶ *Id.*; *see also* O’Keefe & Prott, *supra* note 11, at 341.

³⁷ *See* O’Keefe & Prott, *supra* note 11, at 341, 344.

³⁸ *Id.* at 341.

³⁹ *Prised Open*, *supra* note 35, at 53.

⁴⁰ *Id.*

⁴¹ *See* White, *supra* note 2; *see also* Bennett, *supra* note 1, at 283; *see also* Contreras, *supra* note 3, at 743-44.

⁴² Cristallina, 502 N.Y.S.2d at 168 n.2.

⁴³ *Id.*

secret creates an exciting atmosphere for both the seller and buyer; the buyer is unaware of the lowest price for which the seller is willing to settle, and the seller may be pleasantly surprised by bids that far exceed his reserve.⁴⁴ The auction industry asserts that secret reserve prices protect the seller by preserving that “little bit of mystery.”⁴⁵ In addition, the seller benefits because secret reserve prices guarantee a minimum price to the seller⁴⁶—without reserve prices, a seller would have no right to reclaim his work if it did not sell at a price that was acceptable to him.⁴⁷ Also, if a seller were not allowed to obtain a reserve price, he would most likely take his work to a private dealer where he could directly negotiate the price of his work.⁴⁸ Secret reserves serve to maintain competition between American and European auction houses.⁴⁹ New York auction houses assert that if secret reserve prices were abolished in New York, sellers would take their consignments to other major auction cities in Europe, such as London and Geneva.⁵⁰ When an auctioneer abuses the secret reserve system, however, an American court has ruled that a cause of action for breach of fiduciary duty exists.⁵¹

In a New York case, a court held that a consignor had a valid cause of action for breach of fiduciary duty against an auctioneer at Christie's when, *inter alia*, the auctioneer recommended a reserve price to the consignor that was *above* the value of the “high estimates” already quoted to the public.⁵² In *Cristallina v. Christie's*, the former president of Christie's auction house, David Bathurst, agreed to consign for sale eight Impressionist paintings owned by Cristallina, a Panamanian art investment company.⁵³ Cristallina representative, Dimitry Jodido, chose Christie's to auction his paintings because Bathurst suggested auction estimates totaling \$12.6 million for the eight paintings.⁵⁴ What Bathurst did not tell Jodido was that Christopher

⁴⁴ See Reeves & Boll, *supra* note 2, at 358.

⁴⁵ McGill, *supra* note 5, at C20; see also Bennett, *supra* note 1, at 283.

⁴⁶ McGill, *supra* note 5, at C20.

⁴⁷ Reeves & Boll, *supra* note 2, at 358; see also Contreras, *supra* note 3, at 743.

⁴⁸ Reeves & Boll, *supra* note 2, at 358.

⁴⁹ See McGill, *supra* note 5, at C20.

⁵⁰ White, *supra* note 2; see also Contreras, *supra* note 3, at 745; see also McGill, *supra* note 5, at C20.

⁵¹ See Cristallina, 502 N.Y.S.2d, at 171-72; see also Bennett, *supra* note 1, at 264.

⁵² Cristallina, 502 N.Y.S.2d, at 171 (the Appellate Court modified and denied the previous summary judgment ruling, allowing causes of action for, *inter alia*, breach of fiduciary duty and fraudulent misrepresentation); see also Bennett, *supra* note 1 (discussing at length *Cristallina* and its effect on the auction industry, particularly in New York).

⁵³ Cristallina, 502 N.Y.S.2d, at 167; see also Donald Wintersgill, *Christie's Settle Out of Court over Alleged New York Sale Fraud*, THE GUARDIAN (LONDON), Jan. 23, 1987.

⁵⁴ Cristallina, 502 N.Y.S.2d, at 167. The court asserts, that, according to Jodido, while Bathurst did suggest the paintings may sell at a lower amount, Bathurst “played down” the lower auction estimate amounts and “focus[ed]” on the \$12.6 million figure.

Burge, the head of Christie's Impressionist painting department, believed the paintings would not come close to obtaining the \$12.6 million Bathurst had quoted Jodido.⁵⁵ On May 4, 1981, weeks prior to the auction, Christie's published "pre-sale estimates" for seven of the eight paintings; the total of the "high estimates" for the seven paintings was \$8.55 million—over \$4 million lower than the figure quoted to Jodido.⁵⁶ Then, on May 12, 1981, Christie's public relations representative informed a major television station that Christie's expected to receive between \$5 million and \$9 million for the paintings.⁵⁷ However, the day before the auction, Bathurst recommended to Jodido a reserve price of \$9.25 million without informing Jodido that Christie's published "high estimate" (\$8.55 million) was *below* the recommended reserve, nor that Christie's had publicly announced (on May 12) that the paintings would sell for, at most, \$9 million.⁵⁸ By the time the auction was over, only one of Jodido's paintings had sold.⁵⁹ Because there were no bids that met the set reserve prices of the other seven paintings, Bathurst "bought in" the seven paintings; that is, at the auction, Bathurst slammed the hammer down at prices for the seven paintings that were under the reserve prices, and thus, were returned unsold to Jodido.⁶⁰ The "buy in" practice is in fact quite common among auction houses.⁶¹ However, what was unusual in the *Cristallina* case was that Bathurst then advised Christie's press department to put out a press release stating that *three*, instead of *one*, of the paintings had been sold at auction.⁶²

The *Cristallina* court, overturning summary judgment for Christie's and Bathurst, determined that *Cristallina* stated legitimate causes of action against Christie's for, *inter alia*, breaching its fiduciary duty and misrepresenting material facts to Jodido.⁶³ The court, clearly dismayed by Bathurst's behavior, asserted that, as *Cristallina*'s agent, Bathurst had a fiduciary duty to "act in the utmost good faith and in the interest of *Cristallina*."⁶⁴ According to the court, Bathurst appeared to have breached this

⁵⁵ *Id.* at 168.

⁵⁶ *Id.* at 168-69; see O'Keefe & Prott, *supra* note 11, at 343 (asserting that auction houses publish "pre-sale estimates" which are low and high prices of a work that are based on "historical records of sale prices similar or comparative works of art") (quoting J.A. Och, *Sotheby's Anatomy of an Auction House*, INTERNATIONAL SALES OF WORKS OF ART 251 (1988)).

⁵⁷ *Cristallina*, 502 N.Y.S.2d, at 169.

⁵⁸ *Id.* at 169-70.

⁵⁹ *Id.* at 170.

⁶⁰ Bennett, *supra* note 1, at 261; see also Contreras, *supra* note 3, at 743, for a description of "bought in."

⁶¹ Contreras, *supra* note 3, at 743; see O'Keefe & Prott, *supra* note 11, at 357-58 ("[The buy in process] give[s] the appearance of a sale when in truth none has been made.").

⁶² *Cristallina*, 502 N.Y.S.2d, at 170; see also Bennett, *supra* note 1, at 261.

⁶³ *Cristallina*, 502 N.Y.S.2d, at 171-72.

⁶⁴ *Id.* at 171.

duty in several ways.⁶⁵ First, the court asserted that agents have a duty to use reasonable efforts to convey material information to their principals.⁶⁶ The court asserted that Christie's may indeed have violated this duty by withholding material information when Bathurst failed to inform Jodido of Burge's disagreement over the paintings' value at auction and when Bathurst failed to inform Jodido of the price estimates released to the media and public in May 1981.⁶⁷ In addition, the court, seemingly amazed at Bathurst's behavior, lamented that Bathurst violated Christie's *own* policy of not allowing reserve prices to exceed the high estimates, and that he knew or should have known that it would be "virtually impossible" to sell the paintings as a result of the contradictory behavior of setting the reserve prices above the high estimates.⁶⁸

Next, the court determined that an agent has an "implied good faith obligation [to] use his best efforts to promote the principal's product"; that is, principals impliedly rely on their agent's "judgment and integrity" when the agent is carrying out the determined task.⁶⁹ In auction situations in particular, the court asserted that, while auctioneers are not expected to predict the price that a painting will bring, the auctioneer is still "held to a standard of care commensurate with the special skill which is the norm in the locality for that kind of work."⁷⁰ Here, the court determined that a question of fact did exist as to whether Christie's and Bathurst breached this duty by not acting "in a manner commensurate with their skill and expertise."⁷¹

Next, the court agreed that a question of fact existed as to whether Bathurst was guilty of fraudulently misrepresenting to Jodido the prices that the paintings could obtain at auction.⁷² The court determined that even if the estimated values asserted by Bathurst were considered mere "opinions," Bathurst still had an obligation to give a *truthful* opinion.⁷³

In the end, Christie's settled the case.⁷⁴ And, as a result of the press release that falsely announced the sale of three paintings, Christie's was fined \$80,000 and both Bathurst's and Burge's licenses were suspended.⁷⁵ Ultimately, Bathurst lost his job.⁷⁶

⁶⁵ *Id.*

⁶⁶ *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 381).

⁶⁷ *Id.* at 171-72.

⁶⁸ Cristallina, 502 N.Y.S.2d, at 172.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Cristallina, 502 N.Y.S.2d, at 172.

⁷⁴ Bennett, *supra* note 1, at 263.

⁷⁵ Bennett, *supra* note 1, at 264; *see also* McGill, *supra* note 5.

⁷⁶ Bennett, *supra* note 1, at 264.

II. CONTROVERSIAL PRACTICES IN THE AUCTION INDUSTRY: IN THE NAME OF THE AUCTIONEER'S DUTY TO THE SELLER

Author Stuart Bennett asserts that the Cristallina court implicitly assumed Bathurst was driven by the competition between Christie's and Sotheby's and therefore was determined to get the Cristallina consignment, regardless of whether he had to lie and manipulate to get it.⁷⁷ Issues that arose from the practices of Bathurst at Christie's, as well as other questionable practices (that did not arise in Cristallina) performed in the name of the auctioneer's duty of agency to the consignor, do indeed give rise to a question of unhealthy competition within the international auction industry.⁷⁸

A. Another Take on Secret Reserves

Controversy surrounds the secret reserve system practiced in America and other countries, even when auctioneers do not abuse the system by placing the reserve price above the high estimate.⁷⁹ As described above, the auction industry in New York, as well as other major auction centers, including London and Geneva, strongly supports a secret reserve system.⁸⁰ However, opponents argue that reserves should be made public.⁸¹ The controversial aspect of secret reserves occurs when the auctioneer "bids off the chandelier."⁸² This means that the auctioneer "rapidly announc[es] bids in the early bidding, even though no one in the audience is actually bidding on the object."⁸³ The auction houses assert that the secrecy of the process is necessary.⁸⁴ When a work has been placed up on the block, the auctioneer will begin "bidding off the chandelier" or "off the wall"⁸⁵ - that is, the auctioneer will pretend to take a party - in order to encourage the audience to start bidding and "push the price over the secret reserve price."⁸⁶ It is argued that this practice is deceptive to buyers because they believe they are competing with other potential buyers,⁸⁷ which can ultimately result in the

⁷⁷ *Id.* at 262.

⁷⁸ McGill, *supra* note 5, at C20; *see also* Bennett, *supra* note 1, at 262.

⁷⁹ *See* Contreras, *supra* note 3, at 743; *see also* O'Keefe & Prott, *supra* note 11, at 357; *see also* Bennett, *supra* note 1, at 283; *see also* McGill, *supra* note 5, at C20.

⁸⁰ *See* White, *supra* note 2; *see also supra* text at Part I.B.

⁸¹ Contreras, *supra* note 3, at 743; *see also* McGill, *supra* note 5, at C20; *see* Bennett, *supra* note 1, at 283.

⁸² McGill, *supra* note 5, at C20; Contreras, *supra* note 3, at 745; *see* Reeves & Boll, *supra* note 2, at 358.

⁸³ McGill, *supra* note 5, at C20.

⁸⁴ Contreras, *supra* note 3, at 744; McGill, *supra* note 5, at C20; *see supra* Part I.B.

⁸⁵ O'Keefe & Prott, *supra* note 11, at 357.

⁸⁶ McGill, *supra* note 5, at C20; *see also* O'Keefe & Prott, *supra* note 11, at 357.

⁸⁷ Contreras, *supra* note 3, at 745; McGill, *supra* note 5, at C20; *see also* Reeves & Boll, *supra* note 2, at 258.

creation of “false high prices.”⁸⁸

Another aspect of secret reserves that is considered controversial is the offshoot of secret reserves, “buying in.”⁸⁹ This is the process, described above, that occurs if the reserve price of a work has not been reached, but the auctioneer slams the gavel down anyway “to a sham bid.”⁹⁰ The auction audience is therefore left unaware of what was really sold.⁹¹

It has been asserted that there are valid reasons to perform the “buy in” process.⁹² When a work cannot sell—that is, nobody in the audience has bid at least as high as the reserve price—the reputation of the work can be tarnished.⁹³ More significant, however, is the fact that the auction houses are concerned for their own reputation when the work does not sell.⁹⁴ However, despite the argument for maintaining healthy competition between international auction houses and maintaining the “reputation” of the individual auction house, the secret reserve practice leaves open gaps in which auction houses can perpetrate deception upon the public.⁹⁵ This clearly occurred in the *Cristallina* case.⁹⁶ Because of the secret reserve and “buy in” system, Bathurst was ultimately able to deceive his consignor (Jodido) and the public, by placing the secret reserve above the high estimate as well as putting out a false press release.⁹⁷ Ironically, Bathurst’s explanation for putting out the false press release was that it was for “the benefit of [Cristallina] and the art market.”⁹⁸ It seems clear that what Bathurst was doing was going to an extreme to protect the reputation of both *Cristallina* and Christie’s. Ultimately, it appears that Christie’s competition with Sotheby’s drove Bathurst to manipulate the already controversial secret reserve and “buy in” systems, eventually breaching his duty to his consignor and perpetuating fraud on the public.⁹⁹

⁸⁸ McGill, *supra* note 5, at C20.

⁸⁹ See Bennett, *supra* note 1, at 282; *see also* O’Keefe & Prott, *supra* note 11, at 357-59.

⁹⁰ O’Keefe & Prott, *supra* note 11, at 358.

⁹¹ *Id.* at 358, 362.

⁹² *Id.* at 357.

⁹³ *Id.*; *see also* Bennett, *supra* note 1, at 259.

⁹⁴ O’Keefe & Prott, *supra* note 11, at 357-58.

⁹⁵ See Reeves & Boll, *supra* note 2, at 358; *see also* McGill, *supra* note 5, at C20; Contreras, *supra* note 3, at 745; and Bennett, *supra* note 1, at 264, 283.

⁹⁶ Bennett, *supra* note 1, at 264; O’Keefe & Prott, *supra* note 11, at 358.

⁹⁷ See Bennett, *supra* note 1, at 263-64; *see also* O’Keefe & Prott, *supra* note 11, at 358.

⁹⁸ *Cristallina*, 502 N.Y.S.2d at 170.

⁹⁹ See Bennett, *supra* note 1, at 262 (suggesting that Christie’s self-interest prevailed when dealing with *Cristallina* because Christie’s was absolutely determined to obtain the *Cristallina* consignment in order to “gain a competitive edge over Sotheby’s in the New York market.”).

B. "Guarantees"

Another practice that is considered controversial is the practice of auction houses "guaranteeing" minimum prices to consignors—regardless of whether or not the work sells.¹⁰⁰ Thus, even if no bidders bid up to the reserve price, the consignor is guaranteed a minimum price from the auction house itself.¹⁰¹ This practice was initially begun when Sotheby's and Christie's agreed to offer guaranteed minimum prices to "exceptional" consignments.¹⁰² However, other smaller auction houses have also begun to offer guarantees.¹⁰³ The controversy lies in the fact that, by providing a guarantee to a consignor, the auction house literally has an interest in the good.¹⁰⁴ "[The auction house] is, in effect, auctioning its own property."¹⁰⁵ The practice of guaranteeing presents a conflict of interest—with both the buyer and seller.¹⁰⁶ The provision of high guarantees may cause the auctioneer to over-publicize and overestimate the cost of the work, ultimately distorting prices.¹⁰⁷ Indeed, some auction houses have taken the guarantee practice to an extreme.¹⁰⁸ Phillips auction house in London, owned by French businessman Bernard Arnault, has been aggressive in its attempt to win business by offering extraordinarily high guarantees to coveted consignments.¹⁰⁹ Thus, guarantees are another avenue of competition for the auction houses that is susceptible to exploitation but is not (yet) considered illegal.¹¹⁰

III. THE AUCTIONEER'S DUTY TO THE BUYER

It has been established that the auctioneer is the agent of the seller/consignor. The next question, then, is what duties, if any, does the auctioneer owe to the buyer?¹¹¹ In the United States, a conflict of interest arises after the auctioneer's hammer falls, and he has a "double agency" duty to both seller and buyer.¹¹² While it is asserted that the auctioneer's

¹⁰⁰ Contreras, *supra* note 3, at 747; Reeves & Boll, *supra* note 2, at 359; *Affairs of the Art*, THE ECONOMIST, Sept. 1, 2001, at 53.

¹⁰¹ *Affairs of the Art*, *supra* note 100, at 53.

¹⁰² Reeves & Boll, *supra* note 2, at 359.

¹⁰³ See *Affairs of the Art*, *supra* note 100, at 53.

¹⁰⁴ *Id.*; see Reeves & Boll, *supra* note 2, at 359.

¹⁰⁵ *Affairs of the Art*, *supra* note 100, at 53.

¹⁰⁶ *Id.*; Reeves & Boll, *supra* note 2, at 359; Contreras, *supra* note 3, at 747-48.

¹⁰⁷ Contreras, *supra* note 3, at 748; *Affairs of the Art*, *supra* note 100, at 53.

¹⁰⁸ *Affairs of the Art*, *supra* note 100, at 53.

¹⁰⁹ Indeed, the practice seems to be working, as Phillip's landed the "most coveted [auction] consignments" in 2001. *Id.*

¹¹⁰ See *id.*; Contreras, *supra* note 3, at 747-48.

¹¹¹ Bennett, *supra* note 1, at 269; Contreras, *supra* note 3, at 731-32; Reeves & Boll, *supra* note 2, at 359-60.

¹¹² Contreras, *supra* note 3, at 732; see also Bennett, *supra* note 1, at 269.

duty to the buyer is subordinated to that of the seller,¹¹³ auction houses in the United States and abroad have dealt with the question of what exactly the auction house owes the buyer.¹¹⁴ Countries vary in their laws regarding auction house liability to buyers.¹¹⁵ In the 1978 New York case, *Dawson v. Malina*, the question of applying express warranties against fine art dealers by art buyers came to a head. In *Dawson*, the plaintiff, an art collector, bought several Chinese art pieces from defendant, a private art dealer, who claimed the pieces originated from a particular dynasty (i.e., from a particular period of Chinese antiquity).¹¹⁶ The plaintiff brought suit for breach of warranty when he came to believe the objects had been misattributed by the defendant—that in fact, the pieces were not from the specific periods of Chinese antiquity that the defendant had represented them to be—but instead were forgeries.¹¹⁷ Plaintiff brought suit under a New York express warranty of authenticity statute that read:

Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a written instrument which, in describing the work, identifies it with any author or authorship, such description (i) shall be presumed to be part of the basis of the bargain; and (ii) shall create an express warranty of the authenticity of such authorship as of the date of such sale or exchange.¹¹⁸

¹¹³ Contreras, *supra* note 3, at 731-32; Bennett, *supra* note 1, at 269.

¹¹⁴ See Bennett, *supra* note 1, at 269-70; Contreras, *supra* note 3, at 731-32; Reeves & Boll, *supra* note 2, at 350, 359-61.

¹¹⁵ See Reeves & Boll, *supra* note 2, at 350, 357.

¹¹⁶ *Dawson v. Malina*, 463 F. Supp. 461, 463 (S.D.N.Y. 1978).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 465-66 (citing N.Y. GEN. BUS. LAW § 219-c (repealed 1984)). This statute has been replaced by N.Y. ARTS & CULT. AFF. LAW § 13.01 (McKinney 1984 and Supp. 1992). However, I cite the old version of the statute because it is the one the Dawson court uses in its analysis. The old and new statutes are extremely similar in content—and thus, the replacement of the old statute with the new one appears to be a mere technicality. N.Y. ARTS & CULT. AFF. LAW § 13.01 reads in part:

1. Whenever an art merchant, in selling or exchanging a work of fine art, furnishes to a buyer of such work who is not an art merchant, a certificate of authenticity or any similar written instrument:

(a) Shall be presumed to be part of the basis of the bargain; and

(b) Shall create an express warranty for the material facts stated as of the date of such sale or exchange.

In addition, N.Y. ARTS & CULT. AFF. LAW § 11.01 supplies the definitions of the various terminology contained in § 13.01. See also Bennett, *supra* note 1, at 280 (discussing the in-statement of § 13.01).

The *Dawson* court analyzed the New York express warranty provision¹¹⁹ for the first time.¹²⁰ Because the descriptions of the art objects made by the defendant to the plaintiff specifically attributed the objects to a particular dynasty (i.e., authorship) the representations did constitute express warranties under the statute.¹²¹ Acknowledging that attributing any work of art to a particular dynasty is an “inexact science,” the standard the court applied in determining whether the defendant had breached the warranty was “whether the representations furnished [plaintiff] by [defendant] . . . had a *reasonable basis in fact, at the time that [the] representations were made . . .*”¹²² The court determined that a “reasonable basis in fact” should be measured by expert testimony provided at trial.¹²³ The court, in weighing the expert testimony at trial, determined that plaintiff was entitled to receive a refund on three of the five objects in dispute because, at the time the defendant made the representations about the three objects to the plaintiff, he lacked a reasonable basis in fact—that is, he lacked the sufficient knowledge and information to make such representations.¹²⁴

At the time, the *Dawson* reasoning could only implicitly be applied to auctioneers, as the case focuses explicitly on the duty of art dealers to their buyers. However, several years after *Dawson*, New York explicitly included “auctioneer” in the express warranty statute’s definition of “art merchant”;¹²⁵ thus, auctioneers are clearly bound by the express warranty statute the same way that private art dealers are. In a more recent American case, *Pritzker v. Krishna Gallery of Asian Arts*,¹²⁶ the court applied the New York express warranty statute,¹²⁷ and slightly modified the standard in *Dawson*. Including a Hawaiian court decision, *Balog v. Center Art Gallery-Hawaii, Inc.*, in its analysis, *Pritzker* reasoned that a court, in applying a “reasonable basis in fact,” should not solely rely on expert testimony because “[e]xpert testimony . . . does not necessarily address what *was known* or *should have been known to the defendant* at the time he made the sale.”¹²⁸ A court may determine what was known or should have been

¹¹⁹ At the time of the case, the express warranty provision referred to was §219-c of the N.Y. General Business Law. The statute has since been replaced by N.Y. ARTS AND CULT. AFF. LAW §13.01.

¹²⁰ *Dawson*, 463 F. Supp. at 467.

¹²¹ *Id.* at 466. Under N.Y. ARTS & CULT. AFF. LAW § 11.01(3), “authorship” includes the “period, culture, source or origin . . . with which the creation of such work is identified in the description of the work.”

¹²² *Dawson*, 463 F. Supp. at 467 (emphasis added).

¹²³ *Id.*

¹²⁴ *Id.* at 468-72.

¹²⁵ N.Y. ARTS & CULT. AFF. LAW § 11.01(2); see Bennett, *supra* note 1, at n. 105.

¹²⁶ *Pritzker v. Krishna Gallery of Asian Arts*, 1995 U.S. Dist. LEXIS 8778, at *52-53 (N.D. Ill. 1995).

¹²⁷ N.Y. ARTS & CULT. AFF. LAW § 13.01.

¹²⁸ *Pritzker*, 1995 U.S. Dist. LEXIS 8778, at *52-53 (emphasis added).

known to the defendant at the time of the sale by seeing whether defendant “undert[ook] a ‘sufficient investigation’ to substantiate the authenticity of the art objects in question.”¹²⁹ The *Pritzker* court, integrating the *Balog* court standard, seems to up the ante for the art merchant (which includes auctioneers) by holding, in part, the art merchant *personally* responsible for ensuring the authenticity of the art pieces he sells.

Similar to the New York statute and the *Dawson* and *Pritzker* courts’ reasoning, Sotheby’s and Christie’s (in Great Britain and the United States) also offer limited warranties to buyers, which are published in their catalogues.¹³⁰ Sotheby’s “guarantee of authenticity of Authorship” in part reads,

[I]f within . . . 5 years from the date of the sale of any lot, the original purchaser of record tenders to us a purchased lot . . . and it is established that the identification of Authorship . . . of such lot . . . is not substantially correct based on a fair reading of the catalogue including the terms of any Glossary contained herein, the sale of such lot will be rescinded and the original purchase price refunded.¹³¹

In France, however, the state-appointed auctioneer has very little liability to either the buyer or the seller.¹³² When a buyer in France attempts to show that an item he bought at auction is not what it was represented to be in the catalogue, the buyer must prove the misattribution by an “objective” standard.¹³³ This appears to be an extremely difficult task because French society pays extreme deference to the prestigious, specialized position of auctioneers.¹³⁴ In other words, in France, it is difficult for a buyer to prove an auctioneer has made a mistake.¹³⁵ In addition, when a buyer has a claim, in most instances, the buyer does not have a right against the auctioneer, but rather against the seller/consignor.¹³⁶ The auctioneer’s official status as a state agent deters the French courts from finding any liability on his part.¹³⁷

In the Netherlands, the Dutch Civil Code provides extensive consumer

¹²⁹ *Id.* at *53, *54 (quoting *Balog v. Center Art Gallery-Hawaii*, 745 F. Supp. 1556, 1556 (D. Haw. 1990)); see also Bennett, *supra* note 1, at 278-79 (giving a more detailed analysis of the *Balog* decision).

¹³⁰ Bennett, *supra* note 1, at 276-77, 281; O’Keefe & Prott, *supra* note 11, at 345; Contreras, *supra* note 3, at 735.

¹³¹ Bennett, *supra* note 1, at 276 (citing 19TH CENTURY EUROPEAN PAINTINGS, DRAWINGS AND SCULPTURE, Sotheby’s, New York, May 22, 1991 [sale catalogue]).

¹³² O’Keefe & Prott, *supra* note 11, at 344.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ O’Keefe & Prott, *supra* note 11, at 344.

protection.¹³⁸ The question that is asked is whether the Dutch buyer has a right against the auctioneer or against the seller/consignor.¹³⁹ Dutch law delineates two different types of agency.¹⁴⁰ The first one, "*middellijke vertegenwoordiging*," occurs when the auctioneer, as the intermediary, acts in his own name.¹⁴¹ The second one, "*onmiddellijke vertegenwoordiging*," occurs when the auctioneer acts as an intermediary in the name of the seller.¹⁴² Dutch auction houses usually operate under the latter form of agency, and thus, once the hammer falls, the buyer has a direct contractual relationship with the seller, and the auctioneer is not liable to the buyer in most instances.¹⁴³ If the auction house operates under "*onmiddellijke vertegenwoordiging*," and a buyer finds that an item bought does not conform to the description in the auction catalogue, the buyer can claim damages against the seller.¹⁴⁴ Similarly, if the auction house acts in the name of the seller, and the buyer finds that the item bought has "hidden defects," the buyer can take action against the seller, not the auctioneer.¹⁴⁵ However, if the auctioneer "knew or should have known" about the defect in the item while the seller did not know, then the auctioneer is liable to the buyer.¹⁴⁶ In a Dutch case, the Amsterdam District Court ruled that a seller who refused to allow an auctioneer to utilize the services of an outside expert to determine the authenticity of the seller's work, could not turn around and "attach" the assets of the auctioneer.¹⁴⁷

Thus, the duty and liability of the auctioneer to the buyer varies within the United States, Britain, France and the Netherlands.¹⁴⁸ The American court cases establish that art merchants—which include auctioneers—are liable for express warranties of authenticity for items sold to buyers. Interestingly, the recent case of *Pritzker* (which incorporates *Balog*) suggests a stringent standard be applied to individual art merchants ("sufficient investigation") in determining whether they personally breached an express warranty of authenticity. In addition, both Sotheby's and Christie's—which have operations in both New York and London—have implemented their own system of express warranty and limited liability.¹⁴⁹

¹³⁸ Reeves & Boll, *supra* note 2, at 354.

¹³⁹ Boll, *supra* note 26, at 393.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 394.

¹⁴⁴ *Id.* at 395.

¹⁴⁵ Boll, *supra* note 26, at 395-96.

¹⁴⁶ *Id.* at 396.

¹⁴⁷ *Id.* (citing an unpublished judgment from Amsterdam District Court, July 12, 1990, KG 90/1227 KK).

¹⁴⁸ Reeves & Boll, *supra* note 2, at 355-56.

¹⁴⁹ Bennett, *supra* note 1, at 276.

In contrast, France remains relatively rigid in not finding the state-appointed auctioneer liable for much of anything against the buyer.¹⁵⁰ Indeed, it will be interesting to see the developments in French auction law, now that there will no longer be a monopoly of state-appointed auctioneers.¹⁵¹

Finally, while the Netherlands has strong consumer protection, that protection is based mostly in the buyer's rights against the seller, not the auctioneer.¹⁵²

Thus, on the surface, it appears that American auctioneers, compared to those in the Netherlands and France, have a much greater chance of being found liable to the buyer for a breach of warranty of authenticity. Thus, it would be logical to assume that American auctioneers (and those associated with Sotheby's and Christies, in the United States and Britain) may be more apt to be diligent in their dealings with buyers. However, this is not necessarily the case, as the issue is complicated by the overlapping of duties to the seller, the buyer and the public. The following sections will explore the difficulty of reconciling an auctioneer's duty to the seller, buyer, and public and the way in which illegal practices by the auction industry have been able to escape, at least until recently, the radar of auction regulation.

IV. INADEQUATE REGULATION OF THE AUCTIONEER'S DUTY?

Traditionally, common law countries, such as the United States and Great Britain, have not heavily regulated their domestic auction industries because, in general, these countries do not strictly regulate private actions between parties.¹⁵³ In contrast, civil law countries, such as France, have traditionally strictly regulated their auction industry.¹⁵⁴ This is evidenced by the state's control over the auction industry, as described above, of making auctioneers state agents.¹⁵⁵ In fact, French auctioneering rules appear to be the most structured of all the major auction countries.¹⁵⁶ However, author Stuart Bennett asserts that as a result of the deceptive practices in *Cristallina*, New York City created new regulations for auctioneering practices.¹⁵⁷ To the curiosity of the auction world, New York has been the place where the most conflicts over the duties of auction houses have arisen.¹⁵⁸ Consequently, New York has proven to be "the principal litigation arena for

¹⁵⁰ See O'Keefe & Prott, *supra* note 11, at 344.

¹⁵¹ See *Prised Open*, *supra* note 35, at 53.

¹⁵² See generally Boll, *supra* note 26, at 393-96.

¹⁵³ See Reeves & Boll, *supra* note 2, at 354.

¹⁵⁴ *Id.* at 353.

¹⁵⁵ *Id.*; see also O'Keefe & Prott, *supra* note 11, at 341.

¹⁵⁶ Reeves & Boll, *supra* note 2, at 353.

¹⁵⁷ Bennett, *supra* note 1, at 258; see also O'Keefe & Prott, *supra* note 11, at 342, 358.

¹⁵⁸ Reeves & Boll, *supra* note 2, at 356.

defining the role of auction houses.”¹⁵⁹

This section will analyze the auctioneering regulations enacted in New York City. The New York City regulations serve as an example of the difficult nature of reconciling the auctioneer’s duty to the seller, the buyer and the public, while attempting to address the current controversial practices of the auction industry.

Bennett asserts that the regulations that were enacted by New York City post-*Cristallina* clarify the auctioneer’s duties in relation to the consignor.¹⁶⁰ Indeed, the newly instated New York City Department of Consumer Affairs regulations do control auctioneers practices more now because the auctioneers must disclose certain information that was previously only known by the auction house and the consignor.¹⁶¹ Interestingly, however, another author asserts that many of the current regulations of auctioneering practices in the United States actually “harm the consignor in order to benefit potential buyers and the public.”¹⁶² Indeed, many of the regulations enacted by the New York City Department of Consumer Affairs appear to be concerned more about the interest of the buyer and public as opposed to the relationship between the auctioneer and seller.¹⁶³

Under Section 2-122(l) of the Rules of the City of New York, Department of Consumer Affairs, the auction house must disclose to the public the fact that a work is being sold subject to a set reserve price.¹⁶⁴ And under Section 2-123(b), “bidding off the chandelier” (as described above) is not allowed to occur before bidding on a lot has reached its reserve price, unless the auction house publishes to the public that it plans to do so.¹⁶⁵ While the New York City regulations still do not require the auction house to reveal *what* the reserve price is,¹⁶⁶ there is clearly a concern that the pub-

¹⁵⁹ *Id.* at 356-57; see also Bennett, *supra* note 1 (discussing generally how the creation of more regulations in New York City was sparked by the extensive litigation involving auction houses).

¹⁶⁰ Bennett, *supra* note 1, at 284.

¹⁶¹ *Id.* at 282.

¹⁶² Contreras, *supra* note 3, at 730, 738 (at page 738, Contreras asserts, “Such concerns [for fairness in the auction process] can be seen in consumer protection legislation regulating auctioneers’ disclosures. Under the Consumer Affairs Code of New York City, for example, art auctioneers are held to fairly rigid standards of truthfulness in both pre- and post-auction reporting and advertising.”); see also McGill, *supra* note 5, at C20 (discussing how the case of *Cristallina* as well as other litigation auction houses have faced, brought about “consumer complaints about such auction practices” and thus New York City was looking to appease the consumer complaints when enacting new regulations); O’Keefe & Prott, *supra* note 11, at 342 (“Approximately 13 new regulations were added in an attempt to recognize and regulate the changing market place in New York City.”).

¹⁶³ See Contreras, *supra* note 3, at 737-38; see also McGill, *supra* note 5, at C20.

¹⁶⁴ 6 Rules of the City of New York § 2-122 (2001); see also Bennett, *supra* note 1, at 264, 266, 282.

¹⁶⁵ 6 Rules of the City of New York § 2-123 (b) (2001).

¹⁶⁶ See McGill, *supra* note 5, at C20 (“[T]he Art Dealers Assoc. of America campaigned

lic has knowledge that a reserve exists.¹⁶⁷

More telling, however, is Section 2-123 (a). It states: "If the reserve price is not bid, the auctioneer may withdraw a lot from sale. At the time of such withdrawal, and before bidding on another lot begins, the auctioneer *shall* announce that the withdrawn lot has been 'passed,' 'withdrawn,' 'returned to owner,' or 'bought-in.'¹⁶⁸ It is asserted that this regulation is in response to the *Cristallina* disaster wherein Bathurst deceived the public by stating that three paintings had been sold, but had instead secretly returned two of the paintings to Jodido at the auction through the "buy in" process, obviously without the audience's awareness.¹⁶⁹ Again, there is concern for educating the public about at least some of the behind-the-scenes maneuvers performed by auctioneers.

Finally, New York appears to protect the auction house-consumer relationship more rigidly when dealing with the issue of the auction house "guarantee."¹⁷⁰ New York addresses the issue of the "guarantee" by mandating that the auction house disclose to the public when it has an interest in a consignor's work.¹⁷¹ So, if an auction house guarantees a minimum price to a consignor for a work, the auction house must share that information with the public by disclosing it in the catalogue or other materials that are published in connection with the auction.¹⁷² This regulation helps the buyer by informing him that the auction house has a literal and figurative interest in a specific work.¹⁷³ However, even though New York mandates disclosure of guarantees, New York is still not eradicating the use of guarantees by auction houses.¹⁷⁴ It is the general use of guarantees that has created controversy in the auction world.¹⁷⁵

Thus, these regulations make it clear that it is difficult to reconcile the auctioneer's duty to the seller, buyer and public. New York has certainly attempted to emphasize the fiduciary role of the auctioneer—as seen by the *Cristallina* decision as well as the subsequent New York City Rules. However, as will be shown briefly, such attempts have failed miserably. Similarly, the American court cases dealing with the auctioneer's duty to the

against the secret reserve," but the auction houses ended up winning the battle. Thus, New York City does not compel auction houses to disclose the actual reserve price).

¹⁶⁷ See Contreras, *supra* note 3, at 743, 745; see also Bennett, *supra* note 1, at 283.

¹⁶⁸ 6 Rules of the City of New York § 2-123 (a) (2001) (emphasis added).

¹⁶⁹ Bennett, *supra* note 1, at 264; O'Keefe & Prott, *supra* note 11, at 358.

¹⁷⁰ See Contreras, *supra* note 3, at 730, 738, 747-48.

¹⁷¹ 6 Rules of the City of New York § 2-122 (d) (2001); see also Bennett, *supra* note 1, at 282.

¹⁷² 6 Rules of the City of New York § 2-122 (d) (2001); see also Bennett, *supra* note 1, at 282.

¹⁷³ See Contreras, *supra* note 3, at 747.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*; see also McGill, *supra* note 5, at C20.

buyer through express warranty have clearly not been sufficient to thoroughly regulate the auctioneering practices in the United States. While the *Dawson* and *Pritzker* decisions (as well as Sotheby's and Christie's express warranty liability clauses) map out the auctioneer's duty not to misrepresent to the buyer the authenticity of a given piece of art, there have yet to be cases that address other, more deceptive breaches of duty to the buyer. While New York attempts to regulate the auctioneer's fiduciary duty to the seller in a way that enhances the rights of the buyer and the public,¹⁷⁶ the problems discussed above, including the controversial practices of secret reserves and guarantees, seem to slip through the regulatory cracks. The ineffective regulations have been exacerbated by the severe competition within the auction industry, resulting in appalling breaches to the buyers and ultimately, criminal behavior within the auction industry.¹⁷⁷

V. ILLEGAL PRACTICES BY AUCTION HOUSES

This paper has thus far established that big international auction houses (including Sotheby's and Christie's) have both formal and informal duties to the seller, the buyer, and the public.¹⁷⁸ Even in other countries, such as France, where the auctioneer has essentially no duties to the buyer, the auctioneer is a state official, and his general duties as an auctioneer are taken quite seriously and given the utmost respect.¹⁷⁹ However, the regulations in the auction industry are hardly containing the practices of the auction houses, particularly in the United States (New York) and in the large international auction houses (Sotheby's and Christie's).¹⁸⁰ So why are these duties not working to curb the behavior of the large auction houses? There are several reasons. As discussed above, even the regulations that address the controversial practices in the auction industry - including secret reserves and guarantees - still do not solve the problem.¹⁸¹ It has been asserted that the auction industry has outgrown the use of the law of agency.¹⁸² The large auction houses, including Sotheby's and Christies are "multi-national corporation[s]," not individual agents.¹⁸³ In addition, even with the duties

¹⁷⁶ See generally Contreras, *supra* note 3, at 738; see also Contreras, *supra* note 162 and accompanying text.

¹⁷⁷ See Contreras, *supra* note 3, at 740.

¹⁷⁸ See Bennett, *supra* note 1, at 284 (discussing throughout the article the auctioneers' duties to seller, buyer and public); see also Contreras, *supra* note 3, at 719 (also discussing throughout the article the auctioneers' duties to seller, buyer and public).

¹⁷⁹ O'Keefe & Prott, *supra* note 11, at 344.

¹⁸⁰ See Contreras, *supra* note 3, at 729.

¹⁸¹ *Id.* at 730, 750-52 (discussing how the auction industry is improperly regulated and offers suggestions on how to properly regulate it at pages 750-52); see Reeves & Boll, *supra* note 2, at 353.

¹⁸² Contreras, *supra* note 3, at 730; see also Reeves & Boll, *supra* note 2, at 353.

¹⁸³ Contreras, *supra* note 3, at 730.

and regulations of the auctioneers, something else wins out—competition.¹⁸⁴ There is severe competition between the auction houses to get the sexiest, most coveted consignments.¹⁸⁵ And with all of the aggressive competition within the international auction industry, the auction houses are providing complex services, financial and otherwise, in an atmosphere of paltry and ineffective regulation.¹⁸⁶ This competition has clearly driven out respectable behavior by the auction houses and replaced it with embarrassing “cut-throat” competition.¹⁸⁷

This severe competition has culminated in the ultimate illegal business maneuver: price-fixing.¹⁸⁸ On December 5, 2001, the chairman of Sotheby's, A. Alfred Taubman, was convicted of violating federal anti-trust law for conspiring with the chairman of Christie's, Sir Anthony Tennant, to fix consignment commission prices between the two monster auction houses between 1993 and 1999.¹⁸⁹ During the sixteen-day trial in federal district court in New York City, prosecutors alleged that both Taubman and Tennant fixed seller's commissions.¹⁹⁰ That is, they agreed on a fixed rate to charge consignors - preventing consignors from bargaining over fees, and allowing the auction houses to create more profit for themselves and keep other competitors out of the market.¹⁹¹ Indeed, Sotheby's and Christie's control approximately 90% of the auction art market;¹⁹² thus, by fixing seller's commissions, they ensured that no other auction houses received the amount of business both Sotheby's and Christie's would receive.¹⁹³ It is estimated that in the six-year period in which the two auction houses schemed to fix consignor commissions, consignors were cheated out of approxi-

¹⁸⁴ Bennett, *supra* note 1, at 257-58 (Bennett also discusses competition between auction houses throughout his article); McGill, *supra* note 5, at C20.

¹⁸⁵ Bennett, *supra* note 1, at 259; *Affairs of the Art*, *supra* note 100, at 53; McGill, *supra* note 5, at C20.

¹⁸⁶ See Reeves & Boll, *supra* note 2, at 357. See also Contreras, *supra* note 3, at 730.

¹⁸⁷ See McGill, *supra* note 5, at C20 (“[T]he increasingly fierce competition among auction houses, especially between Sotheby's and Christie's, is often cited as a root cause for incidents such as the false reports from Christie's on its 1981 Impressionist auction....”); see also Bennett, *supra* note 1, at 257-59.

¹⁸⁸ See Dixon, *supra* note 7; see also Joshua Chaffin, *Christie's Settles Class Action Lawsuit*, FIN. TIMES (LONDON), Sept. 27, 2000, at 42; see also Shauna Snow, *Morning Report Arts and Entertainment Reports from the Times, News Services and the Nation's Press: Art*, LOS ANGELES TIMES, Sept. 27, 2000, at F2.

¹⁸⁹ Blumenthal & Vogel, *supra* note 17, at A1.

¹⁹⁰ *Id.*; Dixon, *supra* note 7.

¹⁹¹ Blumenthal & Vogel, *supra* note 17, at A1; John Goldman, *Sotheby's Former Chairman Jailed*, THE AGE Apr. 24, 2002, at <http://www.theage.com.au/articles/2002/04/23/1019441243127.html> (last visited 9/22/2002).

¹⁹² Joshua Chaffin, *Sotheby's Ex-Head Guilty of Price Fixing*, FIN. TIMES, Dec. 6, 2001, at 12.

¹⁹³ Dixon, *supra* note 7.

mately \$100 million.¹⁹⁴

Diana Brooks, Taubman's "protégé" and Sotheby's former CEO, cooperated with the prosecution by pleading guilty to one criminal count of antitrust violation.¹⁹⁵ Brooks acted as the main witness against Taubman in an attempt to avoid, or at least lessen, her own prison sentence.¹⁹⁶ Brooks testified that Sotheby's had been getting "killed on the bottom line" for making unprofitable concessions to clients in order to beat out Christie's for the consignments.¹⁹⁷ She stated that Taubman directed her to "suppress and eliminate competition,"¹⁹⁸ ordering her to meet several times secretly with Christie's (former) chief executive, Christopher Davidge, in order to make sure the two auction houses did not undercut each other by charging different sellers' commissions.¹⁹⁹ In the end, Brooks received three years of probation, including a six-month sentence of house arrest.²⁰⁰ Brooks was also fined \$350,000 and given 1,000 hours of community service.²⁰¹

Christopher Davidge, Christie's (former) CEO and key player in the price-fixing scheme, also cooperated with the U.S. Department of Justice, thus receiving conditional immunity for revealing evidence of Taubman's involvement.²⁰²

On April 22, 2002, Taubman was sentenced to one year and one day in prison, and fined \$7.5 million.²⁰³ While the Justice Department, which prosecuted Taubman, argued for a maximum three-year prison term, the Federal Probation Department surprisingly recommended no prison time for Taubman (citing, in part, debilitating health conditions).²⁰⁴ The sentencing judge, while not giving Taubman the maximum sentence, gave the appearance of exceeding disapproval of Taubman's actions, likening Taubman's

¹⁹⁴ Carol Vogel & Ralph Blumenthal, *Ex-Chairman of Sotheby's Gets Jail Time: His Role in Price Fixing Brings a Year and a Day*, N.Y. TIMES, Apr. 23, 2002, at B1.

¹⁹⁵ Paul Lieberman, *Trial Opens in Sotheby's Price-Fixing Case*, L.A. TIMES, Nov. 10, 2001, at A18.

¹⁹⁶ Blumenthal & Vogel, *supra* note 17, at A27.

¹⁹⁷ See Joshua Chaffin, *Sotheby's May Face its Own Sale of the Century: Following the Conviction of its Former Chairman, the Auction House is Expected to Go on the Block*, FIN. TIMES (LONDON), Jan. 8, 2002, at 26.

¹⁹⁸ Lieberman, *supra* note 195, at A18.

¹⁹⁹ *Id.*

²⁰⁰ Ralph Blumenthal & Carol Vogel, *Ex-Chief of Sotheby's Gets Probation and Fine*, N.Y. TIMES, Apr. 30, 2002, at B3.

²⁰¹ *Id.*

²⁰² Chaffin, *supra* note 192, at 12; Lieberman, *supra* note 195, at A18; Chaffin, *supra* note 188, at 42.

²⁰³ Vogel & Blumenthal, *supra* note 17, at B1. Taubman was denied an appeal by the United States Court of Appeals for the Second Circuit; see Hope Reeves, *Metro Briefing New York: Manhattan: No Retrial for Ex-Sotheby Head*, N.Y. TIMES, July 26, 2002, at B6.

²⁰⁴ Ralph Blumenthal & Carol Vogel, *No Prison Time Is Recommended in Sotheby's Price-Fixing Case*, N.Y. TIMES, Apr. 19, 2002, at B1; Blumenthal & Vogel, *supra* note 17, at B1.

crime to a “robbery.”²⁰⁵

Interestingly, Sir Anthony Tennant, the chairman of Christie’s and Taubman’s alleged co-conspirator, was not forced to stand trial in the United States, because under British law price-fixing is not a crime²⁰⁶ and, thus, Tennant could not be extradited.²⁰⁷ Prior to Taubman’s trial, however, both Sotheby’s and Christie’s settled a civil class action suit for \$512 million brought by former consignors of the auction houses who were cheated as a result of the price-fixing scheme. Taubman paid \$156 million of Sotheby’s share out of his own pocket.²⁰⁸ In April 2002, over a year after Taubman’s conviction, European antitrust officials formally charged both Sotheby’s and Christie’s with price-fixing.²⁰⁹ Yet, Sotheby’s will escape any further criminal prosecution (and Christie’s will escape all criminal prosecution), because the European Commission “has no authority to pursue a criminal investigation.”²¹⁰ Instead, if found guilty after adjudication of the charges by the European Commission, the two auction houses may face civil fines of up to 10% of their annual worldwide sales.²¹¹

When Christie’s (in New York in 1975) and Sotheby’s (in 1976) first introduced the “buyer’s premium”—a percentage of the final price of the good the buyer must pay the auction house - it created controversy in the auction world.²¹² The initial reason for introducing the “buyer’s premium” was because “the commission from the seller was not covering costs and did not seem susceptible to an increase if business was to be retained.”²¹³ Indeed, it was thought that Sotheby’s and Christie’s colluded to instate the buyer’s premium.²¹⁴ The Office of Fair Trading eventually dismissed the allegation, concluding that there was no proof of “actual collusion.”²¹⁵ Regardless of a finding of no “actual collusion,” it appears that possible illegal colluding—or at least strong suspicions of such—between the two auction

²⁰⁵ Blumenthal & Vogel, *supra* note 17, at B1.

²⁰⁶ Dixon, *supra* note 7; *Fixing for a Fight*, ECONOMIST.COM, Apr. 18, 2002, at http://www.economist.co.uk/PrinterFriendly.cfm?Story_ID=1087375&CFID=548952&CFTOKEN=40035349& (last visited 9/23/2003).

²⁰⁷ Paul Meller, *International Business; Europe Says Art Auction Houses Fixed Prices*, N.Y. TIMES, Apr. 20, 2002, at C3. It came out at trial that Taubman had at least 12 private meetings with Tennant in Taubman’s London and New York apartments, between the years 1993 and 1996, presumably to perpetuate the price-fixing scheme; Blumenthal & Vogel, *supra* note 17, at A27.

²⁰⁸ Blumenthal & Vogel, *supra* note 17, at A27.

²⁰⁹ Meller, *supra* note 207, at C3.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² O’Keefe & Prott, *supra* note 11, at 365-66.

²¹³ *Id.* at 365.

²¹⁴ O’Keefe & Prott, *supra* note 11, at 366 (citing BRIAN W. HARVEY & FRANKLIN MEISEL, AUCTIONS: LAW AND PRACTICE 126 (1st ed. Butterworths London 1985)).

²¹⁵ *Id.*

houses was fermenting early on, at least since the 1970s. Increasing profitability would, of course, be a main reason for the two auction houses to collude.²¹⁶ One art dealer suggested that without the collusive prices Christie's and Sotheby's maintained from 1993-1999, the two auction houses will go back to making "zero return[s] on [their] investment[s]."²¹⁷ This may be so, regardless of the fact that the two houses together actually control 90% of the auction art market.²¹⁸ Indeed, even in 1998, while Sotheby's was colluding with Christie's, it only brought in approximately \$54 million in profits.²¹⁹

However, the greedy, profit-driven behavior of Sotheby's and Christie's, while dampening the aura surrounding the high-brow auction industry,²²⁰ has far from destroyed the reputation of the art auction world. Immediately after Taubman's criminal conviction was announced in December 2001, Sotheby's stock, of which Taubman owned a controlling share (22.5%),²²¹ rose by 12 percent.²²² This seemingly odd occurrence was soon overshadowed by the share price of Sotheby's dropping to \$17 in January of 2002 - a rather stark contrast from its value of \$40 that was maintained two years earlier, before awareness of the price-fixing scandal permeated the public.²²³ However, the auction industry is still standing strong. Some speculate that the art world is far from permanently damaged—both Sotheby's and Christie's continued to attract sellers and buyers of exquisitely expensive artwork even after Taubman was convicted.²²⁴

What remains of the price-fixing scandal after the dust has settled is the troubling truth—a huge civil settlement and a criminal conviction in an industry that has traditionally been revered for its class and prestige.²²⁵ The United States legal system seems to be unable to thoroughly address the problems in the industry. A less-than-severe prison sentence for the collud-

²¹⁶ Chaffin, *supra* note 197, at 26.

²¹⁷ *Id.*

²¹⁸ Chaffin, *supra* note 192, at 1.

²¹⁹ *Id.* The reason for such low profits is explained by the unbearably expensive overhead endured by the auction industry—the profits from the rare, ultra high-priced items (Monets, Picassos, and others) are usually spent attempting to attract customers to the majority of the auction house's inventory—much less expensive items (including furniture, jewelry and baseball cards).

²²⁰ Chaffin, *supra* note 197, at 26 ("Mr. Taubman's trial offered a less than flattering advertisement for his business.").

²²¹ FT McCarthy, *Not Such a Pretty Picture*, THE ECONOMIST, Nov. 10, 2001, at 60.

²²² Chaffin, *supra* note 192, at 1.

²²³ Chaffin, *supra* note 197, at 26.

²²⁴ See Antony Thorncroft, *A Topsy Turvy Saleroom Drama: This Year Auctioneers Have Set Records and Suffered Legal Turmoil*, FIN. TIMES (LONDON), Dec. 22, 2001, at 7 ("The remarkable thing is that the dirty linen so publicly washed has hardly affected Sotheby's and Christie's ability to attract works of art to sell.").

²²⁵ See generally Chaffin, *supra* note 197, at 26.

ing activity of a high profile actor in the auction world is simply not enough to curb the slippery behavior of the auction industry, nor curb the interest and support of the public.

Likewise, a six-month term of house arrest for Taubman's side-kick, Diana Brooks, in which she has been "confined" to her upscale apartment in the Upper East Side of Manhattan, is hardly going to put fear into potential future illegal actors in the auction world.²²⁶ In addition, with the settling of cases like *Cristallina*, blatant displays of breaches of duties (to sellers, buyers, and the public) by auctioneers get swept under the rug and the courts, at least in America, are rarely given a chance to properly punish or make examples of such behavior.²²⁷

In addition to everything else, the lack of desire, ability, or both, of international regulation of the auction industry is also partly responsible for the unchecked behavior of the auction industry.²²⁸ The paltry international regulation is apparent in the way the international community has addressed the issue of the trade of stolen art by private institutions.

VI. LACK OF REGULATION OF THE AUCTION INDUSTRY BY THE INTERNATIONAL COMMUNITY

The competition in the international auction industry is causing the embarrassing behavior by the auction houses.²²⁹ By committing these civil wrongs and crimes, the auction houses are not only rebuffing their duty to seller, buyer, and public, but are blatantly putting their own interest above buyer, seller, and public.²³⁰ One of the problems lies in the fact that cohesive international regulation (of both the services offered and the liability assumed) of the international auction house industry does not appear to exist.²³¹

²²⁶ See Blumenthal & Vogel, *supra* note 200, at B3.

²²⁷ See Bennett, *supra* note 1, at 264 (asking the question, "Can the law provide measures to prevent . . . [the misconduct] in the fine art auction market?" and asserting that with the settlement of the *Cristallina* case it is difficult to know how the courts will treat other wrongful acts by auctioneers, or whether the law can contain such practices).

²²⁸ See generally O'Keefe & Prott, *supra* note 11, at 350 (discussing the lack of "harmonization" of international laws regulating the auction industry).

²²⁹ See Bennett, *supra* note 1, at 257-58, 262 (discussing the competition between Sotheby's and Christie's in the New York market); see also McGill, *supra* note 5, at A1.

²³⁰ See Bennett, *supra* note 1, at 262 ("Such competition does not directly oppose a consignor's interest; it can result in lower commission rates for example. It may however, also result in a conflict of interest, since an auction house may place its own interest before that of its client."). I argue that when the international auction houses commit such criminal activity as price-fixing, the houses are putting their interest above their client, the buyer, and the public. See also Contreras, *supra* note 3, at 730 (arguing that the auctioneer has duties to seller, buyer and public and that auction houses are poorly regulated because of the complexity of duties required of modern auction houses).

²³¹ See O'Keefe & Prott, *supra* note 11, at 349 (suggesting that an "international harmonization" of the auction industry is possible in the future).

The concern for proper regulations for the great auction houses has arisen from the development of the present international art market. These auction houses have played a significant role in developing this market where the leading auction houses in the major centers are engaged in worldwide competition to attract the most important objects and an international clientele.²³²

It has been suggested by some that “harmonizing... international auction sales conditions” is difficult because of the varying national regulations.²³³ Specifically, it would be difficult to “harmonize” countries that have stricter regulations, such as France, with other “looser” countries.²³⁴ However, as noted above, it was just recently reported that the French state agents—*commissaries priseurs*—no longer have a monopoly over art auctions.²³⁵ This is an interesting development that allows international auction houses, such as Christie’s and Sotheby’s, into the French market.²³⁶ This suggests that in the future, we may see more uniform activity by international auction houses.²³⁷ However, this by no means allays the competition between international auction houses.²³⁸ In fact, there has not been a serious enough effort by the international community, and particularly, America and Britain, to enforce international treaties that address the selling of stolen art.²³⁹ This is a reflection of America’s and Britain’s lack of desire and ability to generally address illegal activities (not just the selling of stolen art) committed by the large international auction houses such as Sotheby’s and Christie’s.²⁴⁰

A. UNESCO

The 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* was a “comprehensive international attempt” to curb the illicit trade of stolen art between countries.²⁴¹ In 1972, the United States ratified

monization” of the auction industry is possible in the future).

²³² Reeves & Boll, *supra* note 2, at 353-54.

²³³ O’Keefe & Prott, *supra* note 11, at 350.

²³⁴ *Id.*

²³⁵ *Prised Open*, *supra* note 35, at 53.

²³⁶ *Id.*

²³⁷ See *id.*; see generally O’Keefe & Prott, *supra* note 11, at 350.

²³⁸ *Prised Open*, *supra* note 35, at 53 (asserting that, in fact, the entrance of auction houses such as Sotheby’s and Christie’s into France may create even more intense competition).

²³⁹ See Shinn, *supra* note 18, at 978; see also Michelle Kunitz, *Switzerland & The International Trade in Art & Antiquities*, 21 NW. J. INT’L L. & BUS. 519, 525-36 (2001).

²⁴⁰ See McGill, *supra* note 5, at C20.

²⁴¹ Shinn, *supra* note 18, at 980; UNESCO Convention on the Illicit Movement of Art Treasures (reproduced from the text provided by the United Nations Educational, Scientific and Cultural Organization), 10 I.L.M. 289 (1971)[hereinafter UNESCO Convention]; see

the UNESCO treaty.²⁴² “The UNESCO Convention effectively makes it illegal to remove cultural property from a member country without its permission.”²⁴³ However, the United States “accepted” UNESCO with several caveats.²⁴⁴ Most interesting is the U.S. treatment of Article 7(a) of UNESCO.²⁴⁵ Article 7(a) of UNESCO imparts on the parties to the Convention:

to take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention²⁴⁶

At the request of the U.S. delegation to the Convention, Article 7(a) would only apply to *state-run* museums.²⁴⁷ Thus, the problem is that,

While control over state-run museums is a given, the real problems of illicit transfer and import of cultural property lie in the acquisition policies of private museums, institutions, and collectors, because they are much more difficult to monitor. Article [7a] fails to control the illegal art trade, especially as it concerns non-state-run museums and institutions.²⁴⁸

Auction houses would appear to fall under the category of “non-state-run . . . institutions” that deal in art. Thus, the UNESCO convention does not directly deal with the auction house industry.²⁴⁹ However, the UNESCO Convention does make some small attempt at addressing private institutions that deal in art trade.²⁵⁰ In Article 10, UNESCO states that the parties to the Convention shall attempt to

[R]estrict by education, information and vigilance, movement of cultural property illegally removed from any State Party to this Convention and, as appropriate for each country, oblige *antique dealers*, subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and

O’Keefe & Prott, *supra* note 11, at 726; see Kunitz, *supra* note 239, at 528.

²⁴² Shinn, *supra* note 18, at 981.

²⁴³ Kunitz, *supra* note 239, at 529.

²⁴⁴ O’Keefe & Prott, *supra* note 11, at 794; Shinn, *supra* note 18, at 981.

²⁴⁵ *Id.* at 794; Shinn, *supra* note 18, at 987.

²⁴⁶ UNESCO Convention, *supra* note 241, art. 7(a); see Shinn, *supra* note 18, at 987; see also O’Keefe & Prott, *supra* note 11, at 797 (asserting that the United States never even adopted Article 7(a) of UNESCO in its own domestic implementation of UNESCO, the 1983 Convention on Cultural Implementation Act).

²⁴⁷ O’Keefe & Prott, *supra* note 11, at 745; Shinn, *supra* note 18, at 987.

²⁴⁸ Shinn, *supra* note 18, at 993.

²⁴⁹ UNESCO Convention *supra* note 241; see also Shinn, *supra* note 18, at 987; see also Kunitz, *supra* note 239, at 520.

²⁵⁰ O’Keefe & Prott, *supra* note 11, at 760-61.

price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject . . .²⁵¹

The fact that only “antique dealers” are mentioned in Article 10 is a peculiarity noted by authors O’Keefe and Prott.²⁵² O’Keefe and Prott cite another commentator, Fraoua, who asserts that Article 10 “requires States to control dealers in antiquities and ‘*all other dealers in cultural goods*’ to keep a register.”²⁵³ If this were the case, then one could assume that auction houses fall within the category of “all other dealers in cultural goods” and that auction houses should diligently keep a register of all the goods they consign and sell.²⁵⁴ However, O’Keefe and Prott note that even if this were the intention of the drafters of UNESCO, it simply “does not appear in the text.”²⁵⁵ This point is moot in the United States, as the United States did not adopt Article 10 of UNESCO in its domestic legislation of the Convention.²⁵⁶

Until 2001, the United States had been the only “significant art-importing [nation]” to sign the agreement and implement the Convention domestically.²⁵⁷ In 2001, Britain also signed onto the Convention.²⁵⁸ In 1989, O’Keefe and Prott wrote that, “clearly the major contribution of the big auction houses to the British economy, and their influence in public life, have been most significant in that government’s lack of response to the Convention.”²⁵⁹

It is thought that Britain finally signed on to the Convention in order to gain “leverage for political bargaining.”²⁶⁰ O’Keefe and Prott also note that there had been strong opposition by “certain [private] dealers in [the United States]” to implementing the United States’ domestic version of UNESCO, *The 1983 Convention on Cultural Property Implementation Act* (C.C.P.I.A.).²⁶¹ The opposition by the auction houses in Britain and the

²⁵¹ UNESCO Convention, *supra* note 241, art. 10(a) (emphasis added); *see also* O’Keefe & Prott, *supra* note 11, at 760–61.

²⁵² O’Keefe & Prott, *supra* note 11, at 760.

²⁵³ *Id.* at 761 (citing R. Fraoua, *Convention Concernant les Mesures a Prendre Pour Interdire et Empecher L’Importation, L’Exportation et le Transfert de Propriete Illicites des Biens Culturels* 83 (UNESCO Doc. CC-86/WS/40) (1986)) (emphasis added).

²⁵⁴ *See* O’Keefe & Prott, *supra* note 11, at 761; *see also* Shinn, *supra* note 18, at 993 (asserting that UNESCO does not address private institutions).

²⁵⁵ O’Keefe & Prott, *supra* note 11, at 761.

²⁵⁶ *Id.* at 797; Shinn, *supra* note 18, at 989.

²⁵⁷ Shinn, *supra* note 18, at 982; *see also* Kunitz, *supra* note 239, at 529; *see also* O’Keefe & Prott, *supra* note 11, at 786.

²⁵⁸ Kunitz, *supra* note 239, at 529; Dalya Alberge, *Britain Acts to Prevent Illicit Trade in Art*, *THE TIMES* (LONDON), Mar. 15, 2001, available at LEXIS, News Library.

²⁵⁹ O’Keefe & Prott, *supra* note 11, at 786; *see also* Shinn, *supra* note 18, n. 27.

²⁶⁰ Kunitz, *supra* note 239, at 529.

²⁶¹ O’Keefe & Prott, *supra* note 11, at 786; *see also* Shinn, *supra* note 18, n. 27.

private dealers in the United States clearly shows that the private interest (which I argue includes auction houses) was consciously aware that illicit art was being traded and did not want to have to deal with the consequences of having stricter industry regulations by enacting a treaty such as UNESCO.²⁶²

B. UNIDROIT

An even clearer example of the way in which the interests of the auction houses win out over international attempts to regulate illegal activity in the international art market is the treatment of the UNIDROIT Convention by Western countries. The UNIDROIT Convention came about when, acknowledging UNESCO's feeble impact on international art regulation, UNESCO approached UNIDROIT (International Institute for the Unification of Private Law) to create a second international treaty that sought to, "reduce illicit traffic in cultural objects by expanding the rights upon which return of such objects [could] be sought..."²⁶³ The UNIDROIT Convention sought to establish "common, minimal legal rules" between states for the restitution of illegally traded art objects, as well as "*enhance international co-operation* and maintain a proper role for legal trading and inter-State agreements for cultural exchanges."²⁶⁴ Importantly, the UNIDROIT Convention, recognizing UNESCO's shortcomings, sought to include private collections of art into the definition of covered cultural property.²⁶⁵ This inclusion would undoubtedly have a serious effect on the auction houses, particularly Sotheby's and Christie's. Some argue that there is no question that international stolen artifacts create a lucrative business for international auction houses (including Sotheby's and Christie's).²⁶⁶ The following provides an example of the auction houses profiting off of stolen cultural property: in 1997 it was discovered that three of six notorious art objects stolen from museums or looted from archeological sites in Cambodia were later sold at Sotheby's.²⁶⁷

But alas, serious international cooperation regarding regulation of the illicit trade of art was not to be. Most Western countries have refused to

²⁶² See Kunitz, *supra* note 239, at 519-20 (asserting that art auction houses consistently deal in illicit art); see generally O'Keefe & Prott, *supra* note 11, at 786.

²⁶³ International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, 1322 [hereinafter UNIDROIT Convention], available at <http://www.unidroit.org/english/conventions/c-cult.htm> (last visited 9/23/2003).

²⁶⁴ *Id.* at 1330 (emphasis added).

²⁶⁵ Kunitz, *supra* note 239, at 530.

²⁶⁶ *Id.* at 519-20.

²⁶⁷ *Unplundering Art*, THE ECONOMIST, Dec. 20, 1997, available at 1997 WL 17832850.

sign the UNIDROIT Convention, much less enforce it, because they are afraid it will hurt their art markets.²⁶⁸ Importantly, it is acknowledged that Britain is “anxious to protect the interest of its two great auction houses” - Sotheby’s and Christies - and thus, refuses to sign the UNIDROIT Convention.²⁶⁹ Because Britain has one of the largest auction industries in the world, Britain’s protection of its auction industry effectively frustrates any international attempts to create common regulations across states in the international art auction industry.

UNESCO provides a weak (if not non-existent) attempt to regulate the selling of illicit art in the auction industry.²⁷⁰ While ratification of UNIDROIT by all nations with lucrative auction industries would have effectively regulated the auction industry’s participation in the selling of stolen art, the countries with the most at stake, including Britain, have refused to sign. Obviously, the selling of illicit art is only part of the problem of the auction industry. However, the weak, and ultimately, failed attempts by the international community to address the issue of the selling of illicit art in auction houses has left the auction industry virtually unregulated by the international community.²⁷¹

Another example of the international community’s lack of influence in the regulation of the auction industry is the way in which the European Commission will handle the recent Sotheby’s/Christie’s price-fixing scandal—the “punishment” will be a mere civil fine.²⁷² As hefty as the fine may be, the European Commission does not even have the authority to pursue a criminal investigation.²⁷³

VII. WHY THE AUCTION INDUSTRY CONTINUES TO THRIVE

Glamour, prestige and class are traditionally what comes to mind for most people when the names “Sotheby’s” or “Christie’s” are mentioned.²⁷⁴ And, I would argue, it is this very traditional view of auction houses that allows the auction industry to slip through cracks and remain under the radar of strict regulation—both domestically and internationally.²⁷⁵

Even traditionally strict regulating countries, such as France, have

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See Shinn, *supra* note 18, at 993; see also Kunitz, *supra* note 239, at 520.

²⁷¹ See generally Shinn, *supra* note 18, at 978.

²⁷² Meller, *supra* note 207, at C3.

²⁷³ *Id.*

²⁷⁴ See Reeves & Boll, *supra* note 2, at 360-61; see also Chaffin, *supra* note 197.

²⁷⁵ See *id.* (noting that the public is “entranced by the prestige, the glamour and the excitement of entering the art market,” in addition to “being possessors of some of the greatest examples of mankind’s achievement,” and for that, are willing to forego “strict regulations” on auction houses).

loosened their grip on the auction industry,²⁷⁶ seemingly as a result of the excitement and allure surrounding the big auction houses. Up until 2001, France had the strictest rules regulating their auction practices.²⁷⁷ However, the decision in December 2001 to liberalize the French auction market by allowing in the big competitors (Sotheby's/Christie's) is quite telling.²⁷⁸ It is clear that by eliminating the monopoly of state-agent (*commissaries priseurs*) control over public art auctions, France desires to bring in more competition and more profit from the glamorous and prestigious auction industry (particularly into Paris).²⁷⁹ For instance, prior to this new law, the *commissaries priseurs* charged fixed fees, set by the government of France, which were considered low by international standards.²⁸⁰ As a result of the new change in France, the *commissaries priseurs* will be able to set their own fees—developing a new “sense” of competition that never before existed.²⁸¹ Regardless of the scandals that surround the big auction house competitors, such as Sotheby's and Christie's, France is also drawn in by the allure of the exciting and, some would argue, unchecked competition of the auction industry.

While it is true that Sotheby's and Christie's were finally caught red-handed in the price-fixing scandal, there is something unique about the art auction world that continues to allow the industry to thrive.²⁸² Even with the numerous illegal activities committed by the auction houses (price-fixing, misrepresentation, selling stolen art), the business still holds a strong reputation and maintains prestige and glamour.²⁸³ It seems the glamour and prestige of the auction industry blind the public,²⁸⁴ and, one could argue, the legal system as well. Taubman's one-year prison sentence for a six-year scheme of collusion, bilking clients out of \$100 million, seems a bit lenient. Prior to sentencing, ninety luminaries, including former President Gerald Ford, Queen Noor al-Hussein of Jordan, and former Secretary of State Henry Kissinger, wrote testimonial letters to the court, lauding Taubman's good character and attempting to sway the court toward leniency, though the judge who sentenced Taubman would be hard-pressed to admit it.²⁸⁵ These letters may have had an effect on the court's decision in sentencing Taubman. It can certainly be argued that Taubman's role at Sotheby's

²⁷⁶ See *Prised Open*, *supra* note 35, at 53.

²⁷⁷ See Reeves & Boll, *supra* note 2, at 354.

²⁷⁸ See *Prised Open*, *supra* note 35, at 53.

²⁷⁹ See *id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See Reeves & Boll, *supra* note 2, at 360-61.

²⁸³ See generally *id.*

²⁸⁴ See *supra* note 275.

²⁸⁵ Blumenthal & Vogel, *supra* note 194, at B1.

helped him gain so many luminaries as “friends.” Without doubt, the auction industry is an exciting place—drawing in former presidents, queens, and sometimes, as in Taubman’s case, criminals.

A. Auction Houses are Not Just Businesses

Some argue that auction houses are important and viable sources of economic activity.²⁸⁶ The auction industry should not be weighed down by “undue administrative problems,” but rather, should be allowed to thrive as viable businesses.²⁸⁷ Too many regulations may constrict the activity of auction houses;²⁸⁸ however, too few regulations have led to criminal behavior by the two largest auction houses. What needs to be recognized is that the auction industry is not *merely* a business. The glamour and prestige of selling magnificent works of art *do* make auction houses unique and complex entities.²⁸⁹ It is essential that auction houses be specially regulated so as not to tarnish and cheapen the art they sell; it is important that auction houses are not considered *just* businesses. Indeed, auction houses dabble in extraordinary works of art—not the subject of most multi-billion dollar businesses.²⁹⁰

Ironically, even though auction houses should not be considered mere businesses, they have to be regulated in certain respects like any other business to prevent further illegal collusive behavior.²⁹¹ Clearly, the heads of the most glamorous and prestigious art auction houses are not beyond cheapening the extraordinary nature of the goods they sell in order to profit off a greedy business scheme. To those behind Sotheby’s and Christie’s price-fixing scheme, unique pieces of art became widgets to be exploited for the satisfaction of an auctioneering oligopoly. Taubman, Brooks, and Davidge effectively cheapened the auction industry’s wares. A newspaper reporter commenting on the recent criminal actions by Sotheby’s and Christie’s wrote, “[T]he investigation of the art industry and the subsequent trials are a reminder that despite their distinguished pedigrees and the huge sums they spend each year to promote themselves, they are *ultimately brokerages*.”²⁹² Similarly, the judge who sentenced Taubman commented, “Price fixing is a crime whether it’s committed in the grocery store or the

²⁸⁶ BRIAN W. HARVEY & FRANKLIN MEISEL, *AUCTIONS LAW AND PRACTICE* 9 (2nd ed. Oxford University Press 1995) (1985).

²⁸⁷ *Id.*

²⁸⁸ *See id.*

²⁸⁹ *See generally* Reeves & Boll, *supra* note 2, at 360-61.

²⁹⁰ *See id.*

²⁹¹ *See generally* HARVEY & MEISEL, *supra* note 286, at 9.

²⁹² Joshua Chaffin, *Court Case Likely to Hasten Changes in Auction Houses*, *FIN. TIMES* (London), Dec. 6, 2001, at 8 (emphasis added).

halls of a great auction house.”²⁹³

Auction houses *should not* be considered just “brokerages.” As such, special regulations must be enacted to ensure that the works of art are not exploited for greed’s sake. Clearly, the auction industry is in need of new regulations so that the trade, and ultimately the appreciation of art, is not cheapened by the illegal practices of auction houses.²⁹⁴ Indeed, as a result of the price-fixing scheme, it is thought that New York officials may consider implementing new regulations to replace the old auction regulations.²⁹⁵ In addition to price-fixing, the questionable behavior of the auction houses, including the use of extraordinarily high “guarantees,” has made it clear that the current regulations are feeble at best.²⁹⁶ Ultimately, it may be the price-fixing scheme that wakes up legislators.²⁹⁷ It is, however, a sad state of affairs when auction houses are looked upon with a distrustful eye by legislators.²⁹⁸ The selling of art warrants respect—the auction house must not only respect the seller, the buyer, and the public, but also the uniqueness and extraordinary nature of the goods (art) it sells.

VIII. SPECIAL REGULATION REQUIRED

The art auction industry requires stricter and greater regulation. The *Cristallina* decision and the subsequent regulations enacted in New York City over a decade ago, as well as the court holdings in *Dawson* and *Pritzker*, have been shown to be insufficient to handle the unique nature of the auction industry.²⁹⁹

While the auction houses are in the industry for profit, the goods sold by auction houses are by far the most unique of any business.³⁰⁰ It is essential that stricter domestic regulations be enacted—particularly in America and Britain—to prevent the exploitation of the art that is auctioned.³⁰¹

It would benefit the United States and Britain to follow a similar protocol as the Netherlands and France by having tighter state control over the auctioneers’ actions. Having an objective intermediary present during auction transactions, as in the Netherlands, or, having the auctioneer be responsible to the state, as in France, would necessarily impose stricter and more

²⁹³ Vogel & Blumenthal, *supra* note 191, at B8.

²⁹⁴ See Chaffin, *supra* note 292, at 8.

²⁹⁵ *Id.*

²⁹⁶ See generally *id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See Chaffin, *supra* note 292, at 8.

³⁰⁰ See Reeves & Boll, *supra* note 2, at 360-61.

³⁰¹ See McGill, *supra* note 5, at C20 (regulations in New York City in the late 1980s were enacted in response to illegal behavior by the auction houses); see Chaffin, *supra* note 292, at 8.

defined regulations over the auctioneers.³⁰² Because even though auctioneers, particularly under American law, are endowed with a stern fiduciary responsibility and express warranty liability, auction houses still manage to ignore their duties, as evidenced in the *Cristallina* case, as well as the price-fixing scandal, in order to compete ferociously in the marketplace. For this reason, not only are stricter domestic regulations required, but so too are stricter international regulations.³⁰³

The international community's lack of ability, as well as desire, to enforce international regulations of the auction industry³⁰⁴ must change. With the international price-fixing scandal, international buyers were bilked out of millions of dollars. The lack of international (and domestic) regulation gave room to the top executives of Sotheby's and Christie's to conspire for six years to the detriment of unassuming customers.

UNESCO *does* recognize the value and importance of "cultural property", the definition of which includes that which the state deems important for, *inter alia*, "art or science" and includes "property of artistic interest, such as: (i) pictures, paintings... (ii) original works of statutory art and sculpture..."³⁰⁵ Article 1 of UNESCO recognizes the importance and uniqueness of works of art, and importantly, the *delicacy* with which they should be dealt with within a business context. However, the lack of any direct regulation of the auction industry in UNESCO, in addition to America's, Britain's, and most of the international community's feeble attempt to even apply UNESCO in practice,³⁰⁶ leaves the door wide open for the auction industry to practice illegal business methods. Similarly, the Western countries outright refusal to sign UNIDROIT in attempts to "protect" their

³⁰² See O'Keefe & Prott, *supra* note 11, at 349 (stating that Reeves and Boll suggest that auctions throughout the international auction industry should be supervised, using the tradition of civil law countries' use of a state-appointed official/intermediary at auctions as examples of such supervision); see also Reeves & Boll, *supra* note 2, at 354 (asserting that America has yet to provide strong consumer protection within the art market and the auction industry, in comparison to certain European countries, including The Netherlands). Recall, also, that while the state-appointed official will still be prevalent in the French auction market, the actual requirement of having a state-appointed official at a French auction has been eliminated.

³⁰³ See *Introduction supra* note 11, at 349 (discussing the possibility of international regulation of the auction industry); see generally Reeves & Boll, *supra* note 2, at 353 (discussing the difficulty of differing domestic regulations within the larger international auction market).

³⁰⁴ See generally Shinn, *supra* note 18, at 993 (UNESCO does not appropriately address the selling of illicit art within private institutions and thus "fails to control the illegal art trade, especially as it concerns non-state-run...institutions").

³⁰⁵ UNESCO Convention, *supra* note 241, at art. 1.

³⁰⁶ See HARVEY & MEISEL, *supra* note 286, at 205 ("The policy behind... [UNESCO]...remains highly controversial and difficult to implement in practice."); see generally Kunitz, *supra* note 239, at 529 (stating that UNESCO's language is "vague and indeterminate").

art markets is a direct slap in the face to international regulation. Britain in particular wants to keep its auction industry under the radar of international regulation. It seems the Western countries recognize, shamelessly, that there is simply too much profit to be made off the selling of stolen art in the auction industry to sign on to a system of international regulation.³⁰⁷ And, as mentioned above, while the selling of stolen art is not the only wrongful activity practiced by auction houses, the lack of enthusiasm with which the international community attempts to regulate this behavior speaks volumes about its inability, or desire, to regulate other wrongful practices committed by the auction industry.

The international community must come together to recognize the uniqueness of the art traded in the auction industry and faithfully apply to the auction industry a treaty recognizing as such.

IX. CONCLUSION

This paper has explored international auction house activity and regulation. While the United States (New York) has attempted to emphasize the fiduciary duty of auctioneers (as evidenced in the *Cristallina* case as well as the City of New York Rules), the civil law countries of the Netherlands and France tend to have a tighter stronghold on their auctioneers due in large part to those states' interest and participation in the auction industry. The relatively ineffective domestic regulation, in conjunction with paltry international regulations, allows for controversial activities by the auction houses, including keeping secret reserves and giving guarantees. The two largest auction houses, Christie's and Sotheby's, which have houses in both Britain and the United States, have taken the controversial behavior to an extreme by colluding in a six-year price-fixing scheme. Ultimately, it is the lack of domestic and international regulation that creates an opening for the auction houses to commit illegal behavior. In addition, the glamour and prestige of the art world allow auctioneers to continue to attract customers.

The erratic and illegal behavior by the auction houses can be curbed by stronger and more specialized regulations. A treaty that specifically addresses private institutions including auction houses and that takes into account the unique nature of the goods sold by the auction industry should be enacted by the international community as well as applied domestically within each country. This new treaty should emphasize, instead of ignore, the necessity of controlling and effectively prohibiting illegal business practices by the auction industry. Without international cooperation, the international auction industry could eventually tarnish the reputation of the art world.

³⁰⁷ See generally *Unplundering Art*, *supra* note 267.