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Contract Certainty Under The Hammer

By Tony Baumgartner & Aysha Azam

Terms of sale can sometimes lead to unexpected and perhaps even unintended outcomes. Achieving contract certainty might not be at the forefront of bidders' minds when buying under the hammer at auction.



This seems to have been the case for Philippe Dupont, a Luxembourgish collector. He filed a law suit in a New York District Court on 18 April 2017, claiming that Christie's failed to deliver up a David Hammons body print sold to him at auction entitled "Coach" (1974). As reported by The Art Newspaper, Mr Dupont was successful in securing the art work during the auction on 3 March for \$475,500 (with premium). However, Mr Dupont's excitement in placing the winning bid was displaced when, after receiving emails from Christie's congratulating him on his purchase and wiring the purchase monies to them, Christie's telephoned Mr Dupont to purportedly cancel the sale. It transpired that they had failed to call another prospective bidder, and Christie's now wanted to re-auction the work to include this bidder.

While the Christie's terms of sale allows them to "...continue the bidding, determine the successful bidder, cancel the sale or re-offer and re-sell" where there is error or dispute during or after an auction, it is unclear whether their entitlement to cancel a sale inures beyond the transfer of ownership. Such terms appears to be commonplace auction houses' terms of sale, and they apparently confer on the auction house a very wide discretion to cancel a sale after payment has been made by the bidder – and possibly even after title in and possession of the lot has passed to the bidder – thus depriving the parties of the commercial certainty of a transaction.

While the outcome of Mr Dupont's New York lawsuit is eagerly awaited in the hope it might provide some guidance – at least under New York law – about the extent to which terms of sale can be relevant or binding once title has passed, his unfortunate experience raises broader issues regarding the importance of clarity and certainty of outcome in contractual terms. These considerations are not relevant merely to art and auction transaction in the United States, but to commercial transactions in every common law jurisdiction where the contractual position is not immediately clear. For example, while the rules on passing of title and risk under English law are clearly set out in the Sale of Goods Act 1979 and the Consumer Rights Act 2015, these have to be read in conjunction with the specific terms of a particular contract. The situation may be further complicated if the terms of sale do not provide for a governing law, or includes a transnational element.

Lack of contract certainty affects not only buyers, sellers and auction houses; it may also lead to problems with insurance in the unfortunate the subject matter of the sale is lost or damaged following the sale. If, for example, anything were to happen to the sold item, such uncertainty could lead to potentially lengthy and costly disputes about whose responsibility it was to insure the item, whether there was an insurable interest in the item, and the moment when an insurer has come on risk.

To avoid becoming stuck between a hammer and an anvil, and whether or not you are a buyer, seller or auction house, or an insurer or insured, it is vital to ensure that the terms of sale that bind your transaction give you the contract certainty you need such that you are sure about the end result.

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