



There be Dragons: Art Auctions at Sea Are Uncharted Legal Waters

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for **Fine Art Registry™**

AUCTION

For many of us, that word brings strong and highly varied images to mind: the somber, almost funereal pall hanging over a barn full of overall-clad men as a foreclosed farm is sold off, piece by tiny piece; the carnival chaos of a horse auction, or the fast-paced, high-pressured air of a used car auction for dealers; the charity, after-dinner auction, where you spend too much on things you don't need, for a good cause; the country estate sale, where locals who knew the family jostle for mementos against antiques dealers out from the city looking for inventory.

What all of these events, as well as art auctions from local artists collectives to high-priced famous auction houses, have in common, is that they are a means of conducting a specifically defined legal sales transaction, regulated, in the USA, by the terms of the Uniform Commercial Codes (UCC) sales chapter as well as each state's consumer protection, sales, and auctioneer licensing laws as well as many municipal regulations that shape the timing, location, and terms of the event. The legal environment surrounding auctions has evolved to protect consumers from scurrilous and unscrupulous auction practices – though admittedly, such practices do still exist to

varying degrees in ordinary auctions, but at least there are rules to be followed, and legal recourse for the purchaser when those rules are broken.

But what happens when the consumer leaves dry land and attends an art auction at sea? Cruise lines have increasingly been offering on-board “art auctions” as high seas entertainment, the majority of which are held by Park West at Sea, an affiliate of Park West Gallery. At these auctions, vacationers, far from the fiscal and social constraints of home, are often enticed to drop many tens of thousands of dollars on previously unplanned art purchases, and increasingly some of these customers are voicing complaints about the sales process and the nature or quality of the goods they purchased.

When an art buyer bids at a high seas art auction, he or she enters uncharted waters: courts have yet to catch up with the explosive new development of art auctions on the high seas, and it is unclear which of these legal protections, if any, will apply. What is clear is that the cruise ship auctions being held by Park West at Sea vary in several significant ways from an land-based auction, which is subject to the terms of the Uniform Commercial Code and other state and federal laws. Auction goers would be

wise to be knowledgeably acquainted with those differences before making a decision whether or not to participate in a high seas auction. Mapmakers of old put warning words on the empty spots of the map, the uncharted waters where mariners were at their own risk. High seas art auction buyers should take the same words to heart: "Here there be dragons."

AUCTION LAW: A SALE OF PRESENT, ACTUAL GOODS

An auction, according to *Black's Law Dictionary*, is "a public sale of property to the highest bidder by one licensed and authorized for that purpose." What constitutes a "sale of property" is clarified by the terms of the Uniform Commercial Code and other state laws pertaining to sales.

In its most basic form, a "sale" is the transfer of an ownership interest in something for consideration, meaning money. In the USA, the UCC is the most common legal code that governs the sale of "goods." The UCC uses the term "goods" instead of "property" to distinguish the sale of items, which are within the umbrella of the UCC, and the sale of real estate, which is not regulated under the UCC. Chapter 2 of the UCC pertains to sales, and Section 328 of Chapter 2 specifically pertains to the sale of goods by auction.

Within the meaning of the UCC, an auction is a legally authorized process for the sale of goods. Under the terms of the UCC, the "goods" sold at an auction are those items right there present to be transferred at the auction, and the "sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner." UCC Section 2-328(2).

This definition of goods and sale is so obvious to most auction goers that we don't tend to spend much time thinking about it. You go to an auction early to preview the actual items being sold, and when the hammer falls, you have purchased that particular item which is in front of you on the block. This is indeed the concept of

an auction as envisioned by the UCC and related sales laws.

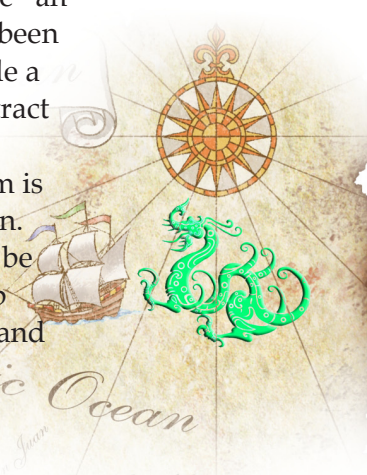
But the sale of art at the Park West at Sea art auctions does not appear to follow this prescribed course. Instead, in at least some, if not most, of the instances of purchase which occur at these auctions, the item on the auction block is not the goods being sold; it is, according to Park West's invoice and billing documentation, merely an "example" of the goods being sold. The actual item being sold appears in most cases not to be located on the ship, but rather back in some warehouse on land, where it is then shipped to the purchaser's home, sight unseen.

This flies in the face of the UCC auction procedure, which anticipates the sale of "goods" rather than "fungible goods," which would be "goods of which any unit, by nature or usage of trade, is the equivalent of any other unit, or... goods which by agreement are treated as equivalent." Art, especially art designated as fine art, original, or limited edition works, clearly cannot be considered "fungible goods." A legal, UCC sales-regulated auction is not a process of bidding on fungible goods but rather on a real item in front of the purchaser, with a sale that concludes on the spot.

The UCC definition section states that "Goods must be both existing and identified before any interest in them may pass. Goods that are not both existing and identified are 'future' goods. A purported present sale of future goods or of any interest therein operates as a contract to sell." The term "existing" is fairly obvious; in order to be presently sold, such as happens at the fall of a hammer at an auction, an item must really exist in the real world. If you "purchase" an item, such as, an art poster that hasn't been printed yet, you have not actually made a purchase, you have entered into a contract for a purchase of future goods; it only becomes a completed sale after the item is created and passes into your possession.

In addition to existing, an item must be "identified" before the legal ownership interest in it can pass to the purchaser and complete the sale. At a UCC-type legal

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Each state
has a
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auctioneer
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auction, the sale is complete when the hammer falls, and legal ownership of actual goods passes to the purchaser. But at a Park West at Sea auction, for many if not most of the transactions, although the hammer falls on a winning bid, the item being sold is not actually present, may or may not be in existence, and, by the terms of the Park West sales documents, has not yet been positively identified (see [A Legal Commentary on the Park West at Sea Art Auction Invoice](#) – the invoice specifies that substitution may be made, and the series numbers on items will not be the same as those in the “example” that the purchaser was bidding on). This means that although the hammer falls at these auctions, that hammer fall does not comprise a “sale.” Rather, when the customer signs the invoice document, he or she is entering into a contract for a future sale of future goods, and that contract sale will not be completed until the purchaser has received and accepted the goods under the terms agreed to on the invoice.

Part of the reason that auctions are relatively heavily regulated at law is precisely that finality: when the hammer falls, the sale is over and done with, without time to reconsider the purchase or return it as one might do with fungible goods you bring home from a store, like a toaster that you decide is not the right color for your kitchen. But if in fact what you’ve done is not finalized a sale, but rather entered into a contract for a future sale of goods yet to be identified, in theory the purchaser should still have all the protections at law regarding the execution and completion of a contract. On land, if it turned out the item you thought you bought at auction was not really the item offered to you for sale, you would have recourse at civil law for an unlawful auction process; and if you then did agree to enter into a contract for a future purchase, you would then have all the consumer protection and civil contract law rights secured in your state statutes. Not so if your purchase was made on the high seas – in fact, unless and until a court rules on that question, it’s unclear exactly what your legal rights and

recourse might be. You might just be the legal equivalent of shipwrecked: afloat on your questionable purchase, without a paddle.

AUCTIONEERS: LICENSED AND AUTHORIZED

According to *Black’s Law Dictionary*, an auctioneer is “a person authorized or licensed by law to sell lands or goods of other persons at public auction. One who sells goods at public auction for another on commission, or for a recompense.”

The reason that auctioneers are required to be licensed and regulated is that auctioneers play an unusual legal role. In most sales situations, the sales person is clearly the agent of the seller; in real estate purchases and some other large commercial transactions, there may well be a seller’s agent and a buyer’s agent. The near-universal rule of law is that a person cannot be an agent of both parties to a transaction. But auctioneers are the exception to this rule. Again, according to *Black’s Law Dictionary*, “The auctioneer is employed by the seller and is primarily his agent. However, when the property is struck off he is also the agent of the buyer to the extent of binding the parties by his memorandum of sale.”

Because of this unique legal position, and because state legislatures wish to protect consumers against unscrupulous auctioneering practices, states license auctioneers as they do other professionals from lawyers and architects to cosmetologists and dentists. Each state has a statute and regulations regarding auctioneer conduct, which auctioneers must learn and be tested on before receiving a license. And if an auctioneer – on land – engages in unlawful auction practices, then the consumer can file a complaint with the state licensing board, which may result in the auctioneer having his or her license removed, effectively putting them out of business.

Although auctioneers are engaged under contract by the seller of goods, the auctioneer is an independent professional business. Auction houses develop their own business reputation, and a reputable auction



house will work hard to maintain their good standing in the business community and resolve any disputes or allegations of misconduct swiftly and professionally in accordance with law. Auctioneers who specialize in particular areas, be it art, antiques, or the sale of business inventories, develop an expertise in the market which can be extremely helpful to both sellers, looking to maximize the return for their goods, as well as purchasers, seeking accurate information about the item being purchased. Of course, there are still slick-talking wily auctioneers as there are slick-talking wily used car salesmen, lawyers, and time-share brokers; but the licensing laws and professional regulations at least provide the consumer with reasonable recourse, and an auctioneer's reputation helps guide consumers in their decision as to whether or not to attend and bid at any given auction.

The Park West at Sea auctioneers are not direct employees of Park West, but rather independent contractors. [This according to the discussion of Park West at Sea business practices found in the decision of the Superior Court of New Jersey Appellate Division No. A-1428-06T2 June 22, 2007, Alan Beegal et. al v. Park West Gallery, Park West at Sea, and Carnival Cruise Lines.] However, these auctioneers are not licensed. Since these auctions occur on the high seas rather than in any given state, it may well be that there is not a state licensing law with which they need to comply. A court might one day examine the interesting question of, since the goods being sold are actually located in a warehouse on land in some state, should the at-sea auctioneers hold a license in the state where those goods are located? But unless and until a court considers that question, high seas art auction purchasers should be aware that the auctioneers are not licensed, which means there is no licensing-board recourse for their misconduct, and no way to determine if the auctioneer has been trained in legal auction proceedings, and most likely no business insurance for the actual auction conduct attributable to the auctioneer. It also means there is no way to investigate

this auctioneer's professional reputation, history of licensing complaints or misconduct investigations, and so forth. This diverges drastically from the law pertaining to the usual on-land auction.

SALES AT SEA: OFF THE EDGE OF THE MAP

Whether the high-seas art sale event is considered an "auction" or the entry into a contract for a future sale, high seas art auction purchasers have the same problem: courts have not yet had opportunity to decide what laws – if any – will apply to art sales by whatever process conducted on the high seas. To the extent that one court has considered the question of Park West at Sea auctions, they determined that the maritime law of each purchaser's home jurisdiction would apply. [This again according to the discussion of Park West at Sea business practices found in the decision of the Superior Court of New Jersey Appellate Division No. A-1428-06T2 June 22, 2007, Alan Beegal et. al v. Park West Gallery, Park West at Sea, and Carnival Cruise Lines.] Generally speaking, maritime law heavily favors the maritime-related businesses and limits liability regarding harms which occur at sea in ways that are clearly antithetical to most consumer protection statutes which govern sales on land; and there are no specific maritime law provisions covering auctions and sales at sea the way the UCC and state sales and auctioneering license laws apply to sales on land. Unless and until courts rule on the law applicable to consumer complaints voiced by high seas art auction purchasers, it's best to heed the warning on those old maps: You are sailing off the edge of the known world of auction law.

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