

Book Review

The Art of the Cartel

Christopher Mason

Art of the Steal: Inside the Sotheby's-Christie's Auction House Scandal

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Reviewed by Christopher R. Leslie

In *The Art of the Steal*, journalist Christopher Mason provides a well-researched, in-depth, and balanced look into the price-fixing agreements between the two largest auction houses in the world, Sotheby's and Christie's. This book joins such classic case studies in price fixing as *The Great Price Conspiracy* and *The Informant*, which explored the formation and collapse of the electrical equipment and lysine cartels, respectively.

The book begins with biographic backgrounds of the four pivotal players. Alfred Taubman rose from modest beginnings to become a multimillionaire who would serve as a white knight to buy the struggling Sotheby's and save it from a hostile takeover by two carpet manufacturers from New Jersey. After he became the chairman of Sotheby's, Taubman elevated Dede Brooks to the position of CEO of Sotheby's, the first woman to lead a major auction house. Born into a world of privilege, Brooks would nevertheless have to work her way to the top, leaving her position in the financial sector to begin life at Sotheby's, initially without any salary at all.

The two key players from Christie's also presented a tale of two different paths to power. While Anthony Tennant came from the privileged classes to head Christie's as its chairman, Christopher Davidge took a different route. After Christie's lost its chairman following a scandal (he lied to the press about the money fetched by two paintings at auction), Christie's did the unthinkable and hired Christopher Davidge, a man from England's lower-middle class who was raised in a government housing project in North London and had been running the catalog printing division at Christie's immediately prior to being tapped for the top position.

Early Competition

The book begins by demonstrating that the introduction of new blood can revitalize competition in a marketplace. Until the early 1980s, both Christie's and Sotheby's were relatively staid, conservative institutions run by establishment Englishmen bred from the upper classes who attended the proper schools. After Sotheby's hired Alfred Taubman, the American businessman introduced a new competitive spirit into the market that forced Christie's to respond. Davidge took over the day-to-day operations of Christie's at a time when Sotheby's new aggressive competitive approach was putting pressure on Christie's executives.

There was a time when Taubman was "obsessed with beating Christie's," according to Sotheby's CEO in 1984. When Sotheby's and Christie's operated as hated rivals, the seller's commission that could be as high as 10 percent would be bid down to as low as 2 percent or in some rare cases, even zero, as firms tried to convince sellers to consign with Sotheby's over Christie's. As *The Art of the Steal* shows, however, when firms begin to work together, have joint ventures, and form personal

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bonds, this hatred dissipates and with it the fierce competition that drives prices down.

The book does an excellent job of showing the competitive rivalry between Christie's and Sotheby's as they fought estate by estate, painting by painting for the right to auction off major works. The competition between Sotheby's and Christie's took many forms. For example, although Christie's had previously derided Sotheby's for giving guarantees to sellers—whereby the auction house would pay the seller a minimum amount even if the item did not sell at auction—Christie's eventually had to give in and began offering guarantees as well in 1990. In addition to guarantees, Sotheby's sought to attract business by providing cash advances to sellers. Finally, Sotheby's attempted to up the competitive stakes at one point by offering to make financial contributions to the charity of the seller's choice should the seller auction their goods through Sotheby's. The book shows how competition is a dynamic process that extends beyond price alone. Moreover, sophisticated sellers knew how to play the competitors off of each other in order to negotiate more concessions.

Earlier Collusion

Perhaps antitrust authorities should have been on the lookout for anticompetitive collusion between Sotheby's and Christie's because they were the two dominant firms in the market and because of their suspicious activities in the past. Long before the collusion on sellers' commissions that ultimately led to criminal convictions, the auction houses had been suspected of price fixing. In 1975, Christie's announced that it would begin imposing a 10 percent buyers' premium, a premium that had not existed in England. Three days later on Monday, June 2, Sotheby's announced it would follow suit. This buyer's premium would be on top of the 14 percent seller's premium that both firms were charging in 1975.

There was much talk and some evidence that the two auction houses had maintained a secret agreement to adopt buyers' premiums as a way to increase profits. Ultimately, art dealers filed a lawsuit in London, but the British anti-cartel law at the time was relatively anemic. The art dealers' competition suit against Sotheby's and Christie's was a losing proposition from the beginning because the maximum penalty under British law would have been a fine of £2,000, approximately \$3,913. By late 1981, the art dealers' legal expenses alone were £150,000, over \$290,000. Anxious to avoid the greater scandal and notoriety of a lawsuit, Christie's and Sotheby's reached a settlement with the art dealers by agreeing to pay £75,000, half of the dealers' legal costs to date.

Christopher Davidge witnessed this anticompetitive collusion between Sotheby's and Christie's. He observed that none of the individual actors were found to be personally liable or to have suffered any serious damage to their reputations. The fact that the litigation was resolved in a manner that allowed the firms to keep the hated buyer's commission in place may have given Davidge the impression that collusion was simply business as usual.

The Conspiracy

The book details how Tennant approached Taubman in the name of cooperation. At their high-level meetings, Tennant and Taubman agreed in principle to eliminate certain forms of guarantees and advances, to limit credit to buyers and introductory commissions to third parties, to stop offering charitable contributions as a way to entice sellers, and to cease "poaching" each others' employees.

Tennant and Taubman agreed to step back and let their CEOs hammer out the specifics of the collusion after Dede Brooks assumed her new position as CEO of Sotheby's. Mason notes that

only days after the official announcement in November of 1993 appointing her as the new CEO of Sotheby's, Brooks telephoned Davidge to set up their first in-person meeting to discuss cooperation between the auction house rivals. Brooks and Davidge met soon thereafter and began the process of fixing commissions. They agreed that Christie's would announce the increase first and Sotheby's would follow. The two also agreed to meet the following month to follow up on their discussions of greater cooperation between the rival auction houses. Davidge and Brooks reported back to Tennant and Taubman, respectively. Davidge and Brooks decided not to meet in public, suggesting the two knew what they were doing was wrong.

At their meeting in London in December of 1993, Brooks and Davidge continued their discussions on a wide range of agreements, including vendors' commissions, market share, guarantees, trade commissions, introductory commissions, poaching of staff, as well as other subjects. This shows that the range of agreements was much more complicated than just setting the commission rate for sellers' commissions. Davidge and Brooks agreed to stop giving interest-free advances. Although sellers' commissions generally ranged from 6 to 15 percent, many sellers were demanding zero-commission deals and some were getting them. Brooks and Davidge discussed ways to develop a sellers' commission that would be nonnegotiable.

After the successful announcement of their new non-negotiable sellers' commission rates in spring of 1995, Davidge proposed to Brooks that the two auction houses also refuse to grant concessions to major sellers, "such as waiving expenses for catalog illustrations, shipping and insurance charges." This is an example of how an initial level of collusion can expand into agreements to collude on a multitude of issues. It also shows how conspirators attempt to prevent cheating at the fringes. In the commodities cartels of the past, cartel members cheated by giving discounts on delivery. In the case of auctions houses, Davidge was concerned that the auction houses would chip away at the new commission rates by granting concessions in other areas. He sought to reduce the possibility of this by reaching collusive deals on these peripheral issues as well.

The conspiracy between the auction houses shows that price-fixing agreements are not implemented instantaneously. For example, it took more than a year from the first meeting between Tennant and Taubman in April 1993 until the agreements, fleshed out by Davidge and Brooks, were carried out in any meaningful way. And this only occurred after a dismal auction season in the spring of 1994.

The auction house conspiracy also illustrates the danger of trusting one's cartel partner, especially trusting them not to create and keep evidence of the conspiracy. Christopher Davidge, the CEO of Christie's, kept dozens of pages of notes from the illegal meetings that documented the illegal agreements he had entered into with Brooks, the CEO of Sotheby's. For example, after his December 1993 meeting with Brooks, Davidge wrote down the substance of their agreement on a legal pad in order to give a full report to Tennant about the topics discussed and the agreements reached between Brooks and Davidge. Davidge also kept documentation of his confidential communications with Sir Anthony Tennant, the then-worldwide chairman of Christie's. Finally, Davidge also had Tennant's handwritten notes that memorialized Tennant's agreements with Alfred Taubman, the chairman and controlling shareholder of Sotheby's. Because he possessed these handwritten notes, Davidge had significant leverage when the American antitrust authorities began investigating potential antitrust violations by the auction houses.

Leniency

Based on the parallel conduct between Sotheby's and Christie's, federal authorities initiated an investigation into possible antitrust violations by the auction houses. This investigation created ten-

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sion and distrust between conspirators both within and across firms, particularly between Christie's executives and Davidge, once Davidge resigned his position at Christie's. Both worried about being set up as the fall guy. Christie's felt that it needed to make a deal with the American government before Sotheby's did but also felt that it needed Davidge's documents, which it did not know for certain existed, in order to make such a deal. Davidge, in contrast, wanted to make a deal with antitrust authorities before Christie's did so that he could get individual leniency. Davidge's attorney worried that Christie's might attempt a carve-out whereby a corporation confessing to participating in an antitrust conspiracy attempts to exclude one of its executives from any leniency deal.

The auction house price-fixing case also shows how the antitrust leniency guidelines work to create a strong incentive to be the first to confess. After Christie's received Davidge's handwritten notes that laid out the antitrust conspiracy, Christie's had a strong incentive to make a deal with the American prosecutors before Davidge did. Furthermore, since Davidge had just left Christie's, the executives at Christie's were aware that Sotheby's executives might also worry that Davidge would expose the conspiracy. As a result, Christie's executives feared Sotheby's could attempt to secure amnesty from the antitrust prosecutors by turning in Christie's for its role in the price-fixing conspiracy.

Armed with Davidge's incriminating documents, Christie's outside counsel delivered all of these documents as well as other relevant documents—a 600-page package of materials—to antitrust prosecutors on December 29, 1999. Christie's was the first participant in the price-fixing cartel to come clean to the government. Christie's handed over all of these incriminating documents to the American prosecutors in hopes of getting amnesty, but without any guarantees.

The Art of the Steal provides a good inside look at the struggle over whether to seek leniency, both by the firms and the individual conspirators. Once presented with Davidge's documents, Christie's had to decide whether to turn over the documents and make a deal with antitrust authorities. Its caution was well-founded since the government investigation had already begun. When Christie's did approach the government with its proffer, the government made amnesty conditional on Christie's showing that it took "prompt and effective action" to withdraw from the conspiracy once it knew about it and that Christie's had not initiated the conspiracy.

The amnesty deal that Christie's worked out is interesting for a couple of reasons. First, Christie's, through its CEO at the beginning of the conspiracy, Anthony Tennant, was clearly the instigator of the cartel. Yet, Christie's received amnesty despite its ringleader status. Second, the explicit conditions of the amnesty were not fulfilled: Christie's had been the originator of the cartel agreement and several Christie's executives had suspected illegal collusion, but did not report their suspicions to the relevant authorities. Nevertheless, Christie's secured amnesty from criminal prosecution.

The Convictions

In light of the overwhelming evidence, Brooks pleaded guilty and agreed to cooperate with antitrust authorities. Taubman declined, however, forcing Brooks to testify against her former mentor. Without taking the stand, Taubman was convicted. Although Taubman and Tennant had twelve meetings, the defense proffered no real explanation for what was discussed at the meetings between the chairmen of Sotheby's and Christie's. This allowed the jury to speculate that if the two men were meeting in secret and no alternative explanation for the meetings was presented, then the men must have gotten together for the purpose of conspiring to fix prices.

The judge initially sentenced Taubman to one year in prison and a \$7.5 million fine. Taubman's

attorney asked for the sentence to be increased to a year and a day in order to make Taubman eligible for time off for good behavior, a request that the judge granted. The judge sentenced Brooks to three years probation, which included six months of home detention wearing an electronic monitoring device, and an additional 1,000 hours of community service and a criminal fine of \$350,000.

Lessons

The Art of the Steal exposes the culture of collusion that permeates much international business. When warned about the inappropriate nature of too much communication and cooperation between business rivals, Anthony Tennant was alleged to reply, "Nonsense. In my experience, a close relationship with one's competitor is to everyone's advantage. It takes out a level of competition which is unnecessary." At the beginning, at their second meeting, Taubman told Tennant in no uncertain terms that the men could not talk about price and that Taubman would not violate the Sherman Act. But Taubman was the exception, and his protestations were short-lived. The four principal players all knew that they were violating both English and American law and, according to Mason, ultimately, none had any moral qualms about breaking the law.

The auction house price-fixing case also shows how price fixers evade and deceive their own attorneys. For example, after Christie's announced its decision to impose non-negotiable commissions, Sotheby's chief in-house counsel brought in an antitrust lawyer to meet with Sotheby's executives before Sotheby's announced its response to Christie's move. Dede Brooks initially stayed clear of the outside antitrust attorney so as to avoid any direct questions about her relationship with Davidge. This could be a sign for antitrust attorneys everywhere when your own client attempts to avoid discussions with you that may be an indication of antitrust collusion. Davidge, in contrast, had no problem simply lying to Christie's in-house and outside counsel, a practice Brooks soon became more comfortable with. For example, Dede Brooks lied to her friend Donaldson Pillsbury when hiring him as Sotheby's new in-house general counsel. Pillsbury was concerned about the ongoing antitrust investigation and Brooks assured him that no violations had taken place. Even after the Department of Justice subpoenaed all their records, Brooks still told her attorneys that she had only met with Davidge to discuss "legitimate industry issues."

Another interesting fact: antitrust lawyers were only allowed to attend meetings where the firms had no intention of violating the antitrust laws. Thus, for example, when a firm called Centrox approached both Sotheby's and Christie's about pooling their auction sales information into a central database, both firms brought attorneys to the meetings to monitor the content in order to ensure compliance with antitrust laws. In contrast, no lawyers ever attended meetings with Davidge and Brooks because the sole purpose of those meetings was to violate the antitrust laws.

The book also illustrates the dubious value of antitrust compliance policies. After its board meeting in 1996, Christie's circulated its antitrust policy, which was signed by American employees who strongly believed that Davidge and Brooks were violating antitrust laws, as well as Davidge himself who was expressly violating American antitrust law.

In the ultimate irony, almost two weeks after the antitrust violations were announced to the world, Christie's disclosed that it was increasing its buyers' premium significantly and that same month Sotheby's announced it would increase its buyers' commissions even more. The new CEO of Christie's lamented that this showed how collusion was "completely unnecessary" because the firms could have raised prices in tandem without agreement and without violation of American antitrust laws.

Conclusion

It is important to understand how cartels actually work. Many theorists argue that cartels are inherently unstable and suggest that antitrust law is not terribly important because cartels will necessarily unravel on their own. Understanding how cartels actually operate can show that although cartels are inherently unstable in the abstract, some cartel participants have devised ways to successfully stabilize cartels. It is important for scholars to understand how cartels actually operate so that we can better study the phenomenon and advocate changes in antitrust law that will help detect, punish, and deter price fixing in the future. It is important for prosecutors to understand how cartels actually work so that they can better detect activities that may indicate the presence of price-fixing conspiracies and to get a better sense of how to get individuals in a cartel to confess and cooperate with prosecutors against their former co-conspirators. Finally, it is important for attorneys who counsel potential antitrust defendants to understand how price fixers actually operate so that they can give better guidance to their clients for what to look for within their own organizations.

Cartels are inherently difficult to study. In-depth case studies like *The Art of the Steal* help fill the void in the academic literature. They provide critical data so that we can better determine whether or not the theoretical models of cartel behavior proposed by economists and legal scholars actually reflect price-fixing behavior as it exists in the business world. As we gain a better understanding of how cartels operate, this facilitates enforcement actions against antitrust conspirators. ●