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# Between Consignors and Buyers: Conflicts of Interest of Auction Houses

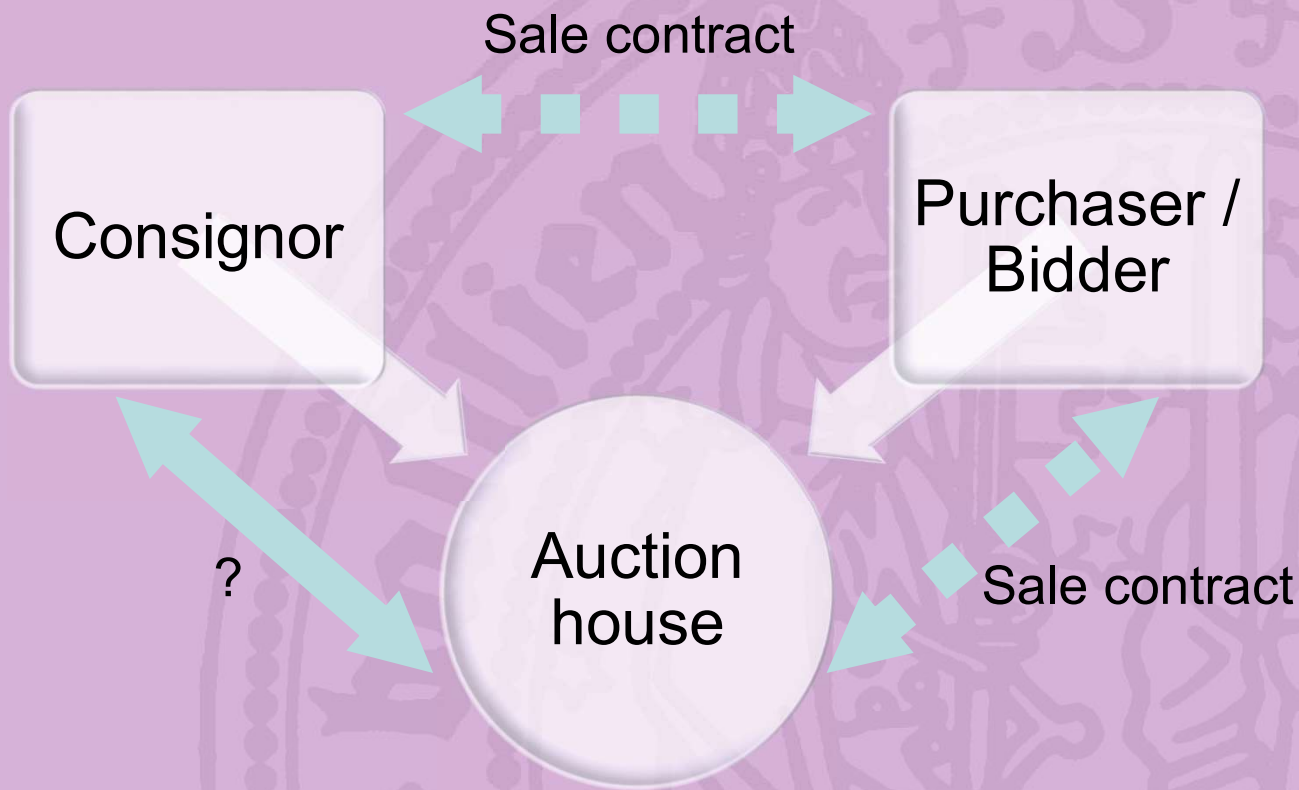
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### Position of auction houses



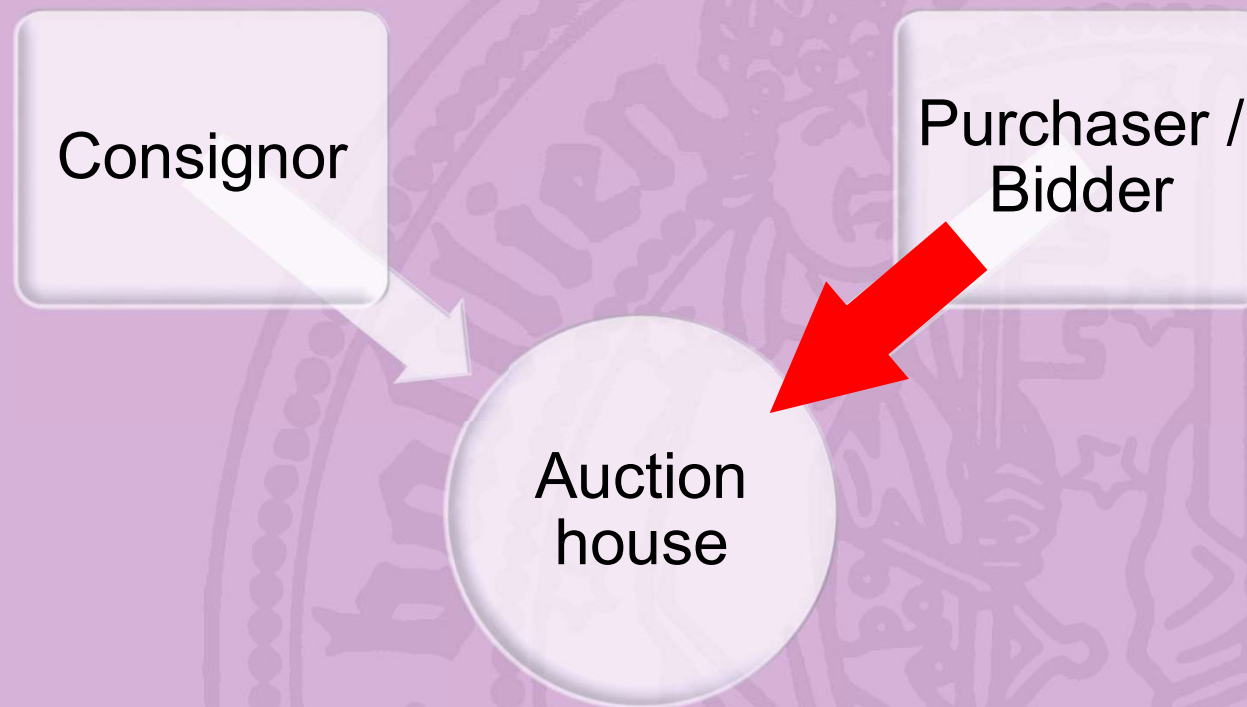
## Duties of auction houses

- Relationship with the consignor:
  - Depends on:
    - Representation of the consignor
    - Remuneration of the auction house
  - Commission agreement (Art. 425 *et seq.* CO) / Mandate (Art. 394 *et seq.* CO) / Brokerage (Art. 412 *et seq.* CO):
    - Decision of the FSC 4A\_412/2015 of February 9, 2016
    - ATF 112 II 337, JdT 1987 I 170
- Duties of the agent / commission agent (Art. 425(2) CO):
  - Duty of care and loyalty (Art. 398(2) CO)
  - Duty to report and to return to the principal anything that has been received as a result of the mandate (Art. 400 CO)

## Conflicts of interest under Swiss law

- Breach of duty of loyalty
- Examples of cases which may give rise to conflicts of interest:
  - Opposing interest of the agent or of its auxiliaries
  - Double representation (ATF 126 II 361, JdT 2001 I 131; ATF 111 II 366, JdT 1986 I 499)
  - *Selbsteintritt* in principle unlawful (Decision of the FSC 4A\_295/2012 of November 21, 2012), except if:
    - No risk of harm of the principal's interest
    - Authorized by the principal
    - Ratified by the principal (Art. 38 CO)

## Cases of possible conflicts of interest (1) Auction house acting as a broker for the purchaser

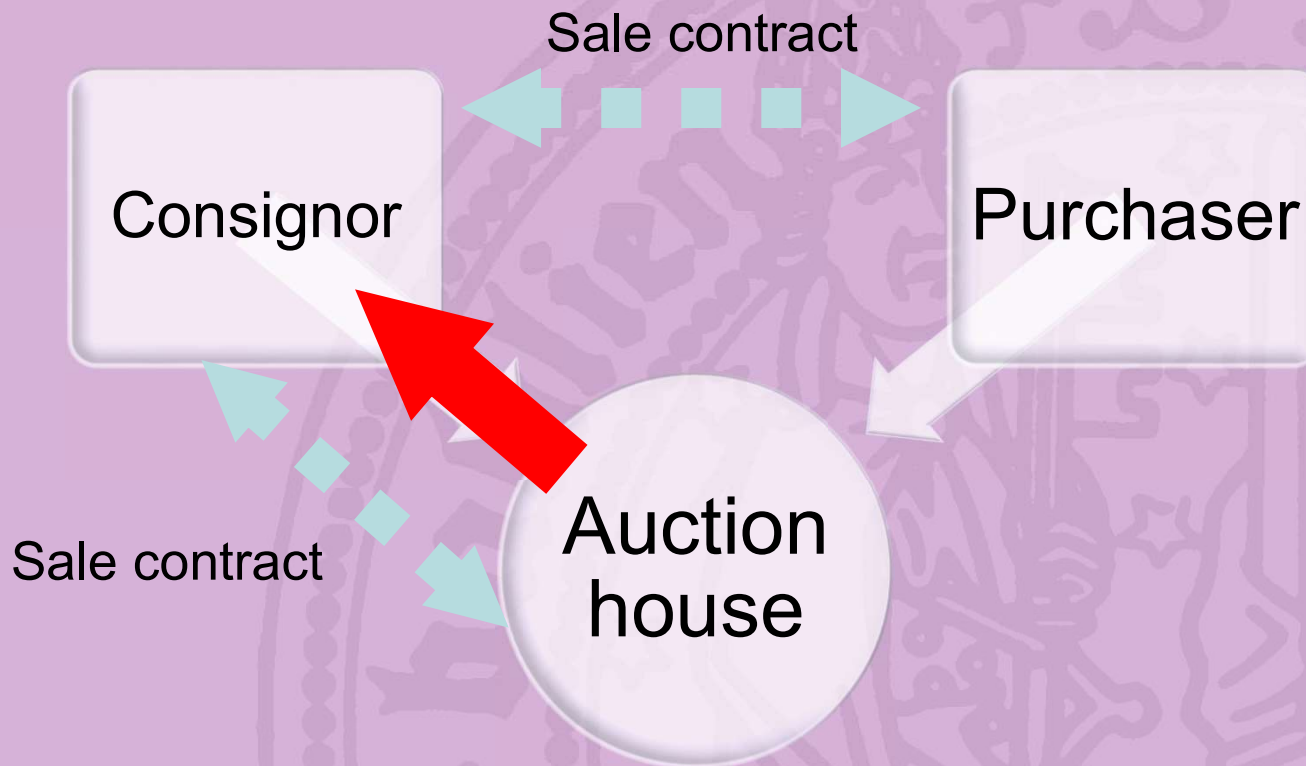




## Cases of possible conflicts of interest (1) Auction house acting as a broker for the purchaser

- Double brokerage:
  - Admissible if the broker only indicates a business opportunity, not if he / she represents the parties or negotiates the contract (Art. 415 CO)
  - Duties of care and loyalty to both the consignor and the purchaser (Art. 412(2) CO)
    - ⇒ Directly conflicting interests: possible to waive loyalty due to the purchaser / bidders?
    - ⇒ Issue of buyer's premium

## Cases of possible conflicts of interest (2) Minimum price guarantee





## Cases of possible conflicts of interest (2) Minimum price guarantee

- Sale to the commission agent in case of failure to meet the minimum price at auction
  - ⇒ issue of *Selbsteintritt*
- Solution: authorization / ratification by the consignor
  - Either expressly mention in the contract with the consignor that he / she is bound by a conditional sale agreement with the auction house, or
  - Allow the consignor to subsequently ratify the sale

⇒ Interpretation of the contract entered into between the auction house and the consignor (Art. 18 CO)

## Cases of possible conflicts of interest (3) Replacement of auction by a private treaty sale

Consignor	Auction house
Common interest: sale	
Certainty of sale	
Obtain the highest price	Obtain the highest commission
Dependence upon the auction house	Knowledge of the market
Publicity of the auction and competition	Increased confidentiality
Lack of visibility on the conditions negotiated between the auction house and the purchaser	Control over the conditions negotiated with the purchaser

⇒ Importance of transparency

## Cases of possible conflicts of interest (4)

Auction house acting as a purchaser and reselling the art work for a higher price

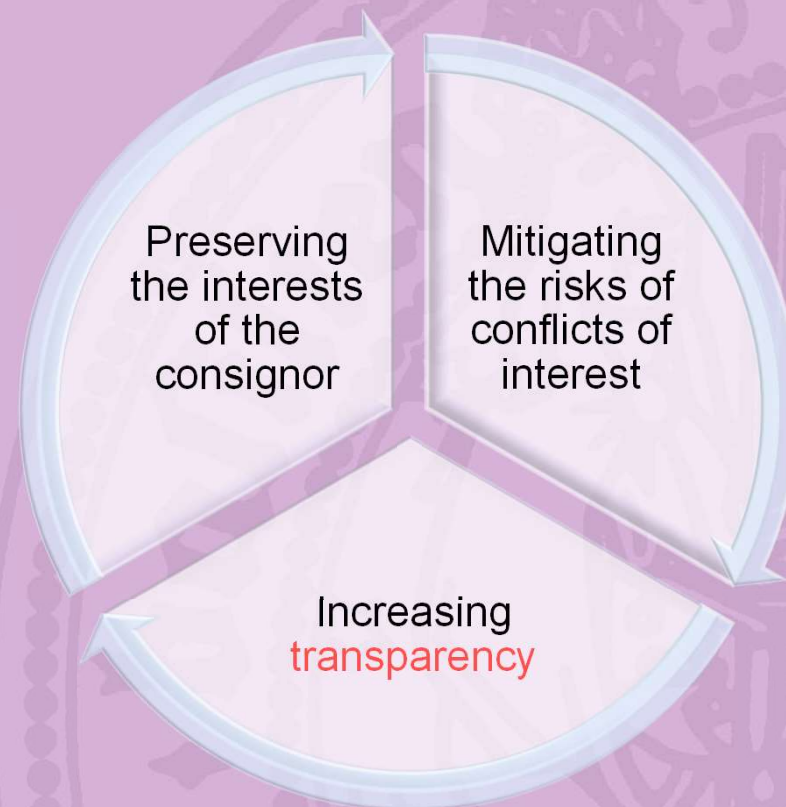
- Art. 433 CO



## Remedies in cases of occurrence of conflicts of interest

- Termination of mandate / commission agreement (Art. 404 CO)
  - Even if termination in an untimely manner (Art. 404(2) CO)
- Non payment of auction house's commission (Art. 433 CO)
- Issue of representation: no sale contract entered into
- Avoidance of the sale (Art. 230 CO)?
- Damages (Art. 97 CO)
  - Difficulty to demonstrate the damage. Had the auction house behaved in loyal manner, what would have been the sale price?

## Conclusion





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