

THE 14<sup>TH</sup> LAWASIA INTERNATIONAL MOOT COMPETITION 2019

**ASIAN INTERNATIONAL ARBITRATION CENTRE**

Between

**PRACHEEN KALAKAAR**

.... Claimant

And

**CHUP'S**

... Respondent

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**MEMORIAL FOR THE CLAIMANT**

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**D**

**E**

**A**      **II.      STATEMENT OF JURISDICTION**

1.      The parties have agreed to submit the present dispute to arbitration in accordance with the AIAC Fast Track Arbitration Rules 2018, pursuant to Clause 8 of the Auction  
**B**      Terms and Conditions.

2.      Pursuant to parties' agreement as per Article 7 of the Auction Terms and Conditions,  
**C**      the governing law will be that of the Hong Kong Special Administrative Region of the People's Republic of China. In addition, pursuant to Article 8.2 of the Auction Terms and Conditions, the arbitration is to be seated in Hong Kong.

**D**      **III.      QUESTIONS PRESENTED**

3.      Whether the Claimant is entitled to the possession of the Artwork;

**E**      4.      Whether the Respondent had granted a valid payment extension to the Claimant;

5.      Whether the Arbitral Tribunal has the jurisdiction to vacate the Award on Interim Measures made by the Emergency Arbitrator; and

6.      Whether the Arbitral Tribunal shall vacate the Award on Interim Measures made by the Emergency Arbitrator.

**A**      **IV.      STATEMENT OF FACTS**

**The Parties and Representatives**

**B**      7.      The Claimant, Pracheen Kalakaar, is a company which is incorporated under the laws of India. It is an art gallery from South India which focuses on Asian contemporary paintings, sculptures, artworks and photographs.

**C**      8.      The Respondent, Chui's, is a company which is headquartered in and registered under the laws of Hong Kong. It is one of the world's largest brokers of fine and decorative art, as well as jewellery, real estate and collectibles.

**D**

**The Respondent's Open House**

**E**      9.      On 12 November 2018, the Claimant was invited to attend an open house and auction that the Respondent was hosting on 12 December 2018. The Claimant authorised its curator, Mr. Hari Sadhu to attend. The Claimant also ensured that the necessary paperwork was completed such that Mr. Sadhu could exercise his proxy bid on its behalf at the auction. The Claimant approved a maximum bidding price of HKD 2,000,000.00.

10.      On 12 December 2018, Mr. Sadhu attended the open house and registered his interest in the auction as the authorised proxy holder for the Claimant. Mr. Sadhu was introduced by the Respondent's receptionist to Mr. Gregory Wong, who would be his

designated sales consultant for the purposes of the open house.

**A**

11. During the auction, Mr. Sadhu contacted the Claimant to confirm that Lot No. 58 was a rare artwork from the Shong Dynasty known as “*The Bamboo and the Panda*” (“**the Artwork**”). The Claimant agreed to increase its maximum bid amount to HKD 3,000,000.00 and instructed Mr. Sadhu to request for an extension of time for payment to made to the Respondent should its bid for the Artwork was successful.

**B**

**C**

12. Mr. Sadhu discussed this with Mr. Wong, who tentatively approved his request for an extension of time. Thus, payment would have to be made in ten working days, instead of five working days. This extension of time was conditional on the Claimant succeeding in its bid for the Artwork, as well as the Claimant paying a 20% cheque deposit against the Auction Price, instead of the standard 10% deposit. The Claimant was also required to agree to assume all the risk in the Artwork from the payment of the 20% deposit. The Claimant subsequently conveyed to Mr. Sadhu its agreement to the aforementioned terms and conditions.

**D**

**E**

13. The Claimant’s bid of HKD 2,650,000.00 succeeded at the auction (“**the Auction Price**”). Mr. Sadhu proceeded to clarify the variation of the payment terms and conditions with Mr. Wong and then handed over to the Respondent a cheque in the sum of HKD 530,000.00, which amounted to a 20% deposit against the Auction Price. Mr. Sadhu also executed the Auction Terms and Conditions. Later, Mr. Sadhu also informed the Sales Desk that he wished to raise the invoice for the outstanding balance of the Auction Price in Indian rupees, as opposed to Hong Kong dollars.

## **Events Following the Open House**

**A**

14. Pursuant to the agreed extension of time for payment, the Claimant transferred the outstanding balance on the Auction Price to the Respondent by way of electronic transfer on 20 December 2018. As of 24 December 2018, the transfer of the balance of the Auction Price to the Respondent is known to have been successful.

**B**

**C**

15. On 24 December 2018, the Claimant arrived on the Respondent's premises to view and arrange for the delivery of the Artwork. The Claimant provided the Respondent with the proof of its payment for the balance of the Auction Price and was escorted to view the Artwork which was stored in the Respondent's secured vault.

**D**

**E**

16. While viewing the Artwork, the Artwork unexpectedly tore approximately 80cm from the top-middle of the piece. The tearing of the Artwork occurred in the presence of at least 30 other individuals who were present in the Respondent's viewing room. Instead of allowing the Claimant to tend to the Artwork, the Respondent ushered the Claimant away from the Artwork and out of its premises.

17. On 26 December 2018, the Claimant made a second attempt to collect the Artwork from the Respondent's premises. The Claimant was informed by the Respondent's solicitor that it had not remitted the outstanding balance of the Auction Price of the Artwork within the contractual timeframe, and as such, the Claimant did not have good title to, nor any right to possession or risk in the Artwork. As such, the Claimant was disallowed from collecting the Artwork. The Claimant has since been unable to obtain

delivery of the Artwork from the Respondent.

**A**

**V. SUMMARY OF PLEADINGS**

**B**

18. The Claimant is entitled to possession of the Artwork as a matter of contract law. On 12 December 2018, parties entered into a valid and binding agreement to vary payment terms of the balance of the Auction Price. All requisite elements and formalities were satisfied, and the Claimant duly performed its obligations pursuant to the oral agreement. Accordingly, the Claimant is entitled to the transfer of title, risk and possession in the Artwork.

**C**

19. The Respondent's contention on the validity of the payment extension must fail. The Respondent's agent, Mr. Gregory Wong, had all requisite apparent authority to enter into the agreement with the Claimant. Nevertheless, the Respondent is still bound by the agreement as it subsequently ratified the contractual variation through its conduct.

**D**

**E**

20. Additionally, the Arbitral Tribunal has the power to terminate the interim award issued by the Emergency Arbitrator as he does not have the jurisdiction to decide on the interim measure application. Since the arbitration clause had provided for "*the expedited procedural framework available at the AIAC*", parties had intended to arbitrate under the Fast Track Rules and not apply for any interim award, including that issued by the Emergency Arbitrator, as provided for by Rule 19(7) of the Fast Track Rules. To this end, the power of the Arbitral Tribunal to terminate the interim award of the emergency arbitrator is implied.

21. In any case, the Award for Interim Measures should be vacated as the substantive

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B  
C  
prerequisites to issue an interim measure were not met under the *lex arbitri*. First, the Respondent's alleged damages were quantifiable since the Respondent had received offers from other prospective buyers. Secondly, the Respondent had failed to prove any likelihood of success on the merits given the valid extension of the time authorised by the Respondent's agent and the fact that the Claimant had performed its duty under the Contract. In the alternative, the Award for Interim Measures should be vacated as the Emergency Arbitrator should not have made conclusions on the merits of the parties' underlying dispute without providing reasons.

C  
D  
E  
VI. PLEADINGS

A. **The Claimant is entitled to possession of the Artwork as a matter of contract law.**

1. *Parties entered into a valid and binding oral variation to extend the payment terms of the balance of the Auction Price on 12 December 2018.*

22. It is trite that to be enforceable, a valid contractual variation must contain a valid offer and acceptance, be sufficiently certain, and also have all requisite formalities complied with. Certainty is found when all essential terms have been agreed on,<sup>1</sup> and an offer becomes binding once it is accepted by the offeree. Acceptance is to be objectively assessed with reference to parties' words and conduct.<sup>2</sup>

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<sup>1</sup> *The World Food Fair Limited and Another v Hong Kong Island Development Ltd* [2005] 1 HKC 594

<sup>2</sup> *Gibson v Manchester City Council* [1979] 1 WLR 294

- a) Valid offer and acceptance had been concluded immediately after the auction on 12 December 2018.

**A**

23. On 12 December 2018, parties agreed to vary the Auction Terms and Conditions dated 12 December 2018 (“**the Auction Terms**”) by extending the deadline for the payment of the balance of the Auction Price to ten working days in consideration for a greater deposit sum. This offer was first proposed by the Claimant through its agent, Mr. Hari Sadhu.

**B**

**C**

24. The Respondent, through its authorised agent Mr. Gregory Wong, accepted this offer after the Auction, finalising that the variation would be permitted in consideration for an additional deposit sum which amounted to 10% of the Auction Price, with the Claimant assuming all risk in the Artwork, and the Respondent forestalling sale of the Artwork to any third party until the Claimant failed to meet the extended deadline<sup>3</sup> (“**the Oral Agreement**”). With all essential terms including the payment deadline, consideration and transfer of risk having been finalised, the Oral Agreement was certain and became binding on the Respondent once Mr. Wong had expressed that parties were “*certainly*” to proceed with it.<sup>4</sup>

**D**

**E**

25. Notwithstanding the differing positions in Mr. Wong and Mr. Sadhu’s statements in that Mr. Wong disputes corresponding about the payment extension *after* the Auction, he does not go so far as to deny accepting the Claimant’s offer, thereby implicitly signifying the Respondent’s acceptance. While silence generally cannot constitute legal

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<sup>3</sup> Witness Statement of Mr. Hari Sadhu, ¶11

<sup>4</sup> *Ibid*

acceptance as it needs to be communicated to the offeror,<sup>5</sup> this general rule may be circumvented if acceptance is evinced by conduct.

**A**

26. Particularly, a party would be deemed to have accepted an offer if it continues contractual performance on terms of the offer and fails to object to it. This was the case in *Brogden v Metropolitan Railway* [1877] 2 App Cas 666 where the court deemed a contract though there was no communication of acceptance on the Claimant's part. This is because acceptance took place by conduct through performing the contract without any objections as to the terms. Analogous to the present, acceptance was evinced by the Respondent's performance of the contract (via accepting a varied deposit sum) and failing to expressly object (up to date) that a contractual variation was granted *immediately after* the auction. It must be noted that Mr. Wong only denies that a payment variation was concluded *during* the open house, but does not expressly contest the possibility that it was granted *immediately after* the Auction.

**B**

**C**

**D**

**E**

27. Inferably, it is significant that Mr. Wong's omission to explicitly *deny* the Claimant's offer stems from the admission that he "*too had forgotten about [the Claimant's] proposal for a payment extension*"<sup>6</sup> and possibly the correspondence about the Oral Agreement *during* the open house. Pertinently, consistent with the Claimant's position, Mr. Wong himself expressly recalls Mr. Sadhu discussing the payment extension issue with him before the auction.<sup>7</sup> Subsequently, a valid and binding oral variation came into effect when Mr. Wong agreed to "*certainly*" proceed as agreed.<sup>8</sup>

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<sup>5</sup> *Felthouse v Bindley* (1862) EWHC CP J 35

<sup>6</sup> Witness Statement of Mr. Gregory Wong, ¶17

<sup>7</sup> *Ibid*, ¶¶ 11, 12

<sup>8</sup> Witness Statement of Mr. Hari Sadhu, ¶14

a) Furthermore, all the requisite formalities had been complied with.

**A**

28. While a literal reading of Clause 10 of the Auction Terms states that the written contract represents the entire agreement, it must be read together with Clauses 1.2 and 1.3 which explicitly allow for payment terms to be varied.

**B**

29. As per the English Court of Appeal in *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387 which was cited with approval by the Hong Kong Court of First Instance in *Edwin John Phillips v SA SA International Holdings Ltd* [2002] HKCFI 21, whether an entire agreement clause is effective to exclude collateral agreements not included in the final written contract ultimately depends on the proper construction of the clause.

**C**

**D**

30. As Clauses 1.2 and 1.3 do not limit the mode of variation exclusively to writing, a purposive approach must be taken in the interpretation of clause 10. It is the Claimant's position that while clause 10 reflected the entire agreement as between the parties *at the time of the auction*, it did not preclude contractual variations from *subsequently* being entered into. In the alternative, Clause 10, read together with clauses 1.2 and 1.3, even expressly allows contractual variations to be made (without prescribing the mode), which is indeed part of the entire agreement between the parties.

**E**

31. Even if this Tribunal finds that Clauses 1.2 and 1.3 are inconsistent with clause 10, the *contra proferentem* rule should apply against the Respondents, given the ambiguous wording of the clauses. On application of this rule, Clause 10 cannot be said to

constitute an entire agreement such as to oust contractual variation.

**A**

32. In fact, the Respondent itself acknowledged that while it was not standard procedure to accommodate such requests for payment variations, such variations have indeed been granted, subject to the approval of 3 specific signatories.<sup>9</sup> In this light, the Respondent is precluded from submitting that the literal wording of Clause 10 will invalidate any contractual variation entered into between parties.

**B**

**C**

33. While the 3 specific signatures were not obtained in the present case, this internal administrative procedure was not included in the Auction Terms, nor communicated to the Claimant. The Claimant is entitled to rely on the common law indoor management rule to assume that the Respondent's internal procedures and requisite formalities had been complied with.

**D**

34. Accordingly, a valid and binding Oral Agreement, concluded with requisite formalities, came into force on 12 December 2018, thus allowing the Claimant to assert possession in the Artwork.

**E**

**2. Pursuant to the contractual variation, the Claimant duly performed its contractual obligations and is thus entitled to the transfer of title, risk and possession of the Artwork.**

35. In accordance with the Oral Agreement and the modified Auction Terms<sup>10</sup>:

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<sup>9</sup> Witness Statement of Mr. Gregory Wong, ¶12

<sup>10</sup> Auction Terms, Clauses 1.2 and 1.3

a. Risk had passed to the Claimant upon payment of 20% of the Auction Price.

**A**

The Claimant only deposited the extra 10% of the Auction Price as it believed that the Respondent would honour its end of the Oral Agreement. Upon such payment on 12 December 2018, risk in the Artwork passed to the Claimant.

**B**

b. Title had passed to the Claimant on 24 December 2018 upon providing proof of payment of the balance of the Auction Price to the Respondent's Mr. Quintin Cui. Payment of the balance sum was duly made on 20 December 2018 within the agreed ten-day period from the auction date.

**C**

c. Even if title had not passed at the time the Artwork tore, it nevertheless passed to the Claimant later that day on 24 December 2018, upon the Respondent's confirmation of the clearance of the Claimant's payment of the balance of the Auction Price.

**D**

**E**

36. Consequently, the Claimant obtained good title to the Artwork on 24 December 2018 by fulfilling all its contractual obligations and was thus entitled to possession of the Artwork on the same date. The Respondent, in failing to comply with its contractual obligation to transfer risk, title and possession of the Artwork, is in breach of the Auction Terms and Oral Agreement.

**3. *The Respondent's subsequent sale of the Artwork to a third party does not preclude the Claimant from claiming possession of it.***

37. Given that title had passed to the Claimant on 24 December 2018, granting it legal

A ownership over the Artwork, the Respondent's subsequent unauthorised sale of the Artwork to a third party without the Claimant's consent is invalid as the Respondent had no requisite title to engage in such transaction.

B 38. As per the common law rule *nemo dat quod non habet*, the subsequent sale has no bearing on the present claim as the third party has neither legal nor equitable title in the Artwork. It is critical to note that the third party in the present proceedings is *not* a bona fide third-party purchaser for value without notice and cannot claim protection as equity's darling. This is because the said third party is aware of the arbitration proceedings and is in any case hesitant to collect the Artwork due to ongoing arbitration proceedings.<sup>11</sup>

D **B. The Respondent granted a valid payment extension.**

E 1. *The Claimant's offer for an extension of the payment timeline was properly accepted by Mr. Wong as the duly authorised Agent of the Respondent.*

a) While Mr. Wong may not have had actual authority to unilaterally vary the Auction Terms, he did have actual authority to communicate that requisite approval had been obtained to vary the Auction Terms.

39. In *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194

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<sup>11</sup> Further Clarifications, ¶9

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 (“*First Energy*”), it was held that while a manager lacked actual authority to himself engage in a loan transaction on behalf of the bank, and that no other person had held him out as having such authority, it did not mean that the manager lacked authority to communicate the head office’s approval. The court held the manager’s position clothed him with ostensible authority to communicate decisions of senior bank members who had actual authority to make the transactions and that the plaintiff was entitled to rely on the manager’s statements because he was the very person who would ordinarily have such communication authority. Accordingly, the contract was valid and enforceable against the defendant bank.

D  
E  
 40. Analogous to the present, while the Respondent contests that Mr. Wong lacked any apparent authority to grant a payment extension, by virtue of Mr. Wong’s appointment as a Senior Accounts Executive and a Sales Consultant for the auction day,<sup>12</sup> Mr. Wong would nevertheless still have had usual authority to communicate the finance-related decisions of the Respondent’s senior management, which would have authority to grant a payment extension. Similar to the plaintiff in *First Energy*, the Claimant is thus entitled to rely on Mr. Wong’s communication authority and resultantly, the acceptance that was made.

41. Furthermore, given that the Claimant transacted with the Respondent in good faith, it is entitled to rely on the indoor management rule as codified under the Hong Kong Companies Ordinance (Cap. 622)<sup>13</sup> which allows the Claimant to assume that the Respondent’s internal management requirements and processes have been duly

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<sup>12</sup> Witness Statement of Mr. Gregory Wong, ¶5

<sup>13</sup> Sections 117

followed in accordance with the company's constitution.

**A**

42. As such, the Claimant was not under any duty to investigate as to whether Mr. Wong had obtained the requisite internal approval for the payment variation. When Mr. Wong communicated the Respondent's acceptance of its offer, the Claimant was entitled to assume that the Respondent's internal processes (i.e. obtaining approval from the management, or otherwise) had been duly complied with.

**B**

**C**

b) The Respondent is nevertheless bound by the payment variation as it conferred apparent authority upon Mr. Wong to vary the Auction Terms on its behalf.

**D**

43. Whilst the Respondent alleges that Mr. Wong did not have actual authority to enter into the Oral Agreement, Mr. Wong nevertheless possessed apparent authority to do so.

**E**

44. Per *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 as cited with approval by the Hong Kong Court of Final Appeal in *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 82, apparent authority will be established such as to bind the principal to the agent's act vis-a-vis a third party if:

a. The principal, through someone who had actual authority to manage its business, represented to third party that its agent had the authority to do the act in question;

b. The third party relied on the principal's representation to enter the said

transaction, as permitted by the company's constitution; and

**A**

- c. The third party must not have had actual knowledge of the agent's scope of authority.

**B**

45. On the present facts, all of the above elements were met.

(1) *The Respondent represented to the Claimant that Mr. Wong had authority to grant a payment extension through appointing him as a Senior Accounts Executive.*

**C**

46. While any representation by a principal as to authority of its agent must be “*clear and unequivocal*”, it need not be expressed in words but can be effected through conduct and by a course of dealing.<sup>14</sup> Ultimately, whether a representation is made must be adjudged in line with the practical realities of a particular case.<sup>15</sup>

**D**

**E**

(a) *As such, while no express representation was made, the Respondent impliedly represented that Mr. Wong had authority to grant a payment extension through his usual authority.*

47. Usual authority is a concept which overlaps as a subset of both actual and apparent authority. It refers to the authority of an agent to do acts which are reasonably incidental to and necessary for the effective performance of his duties. In the context of apparent authority, it can be said that where the principal, through its board, appoints an agent to particular position, it represents to outsiders that the agent has usual authority

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<sup>14</sup> *Woodhouse Ltd v Nigerian Produce Ltd* [1972] AC 741

<sup>15</sup> *Thanakarn*, 71

to engage in conduct reasonably incidental to the performance of his duties.

**A**

48. It has been held executive officers of a company may have usual authority to contract for the company within the scope of their area of responsibility as in the case of *Yee Fat Development Ltd v Winline Knitting Factory Ltd* [2011] 3 HKLRD 511 where the Hong Kong Court of Appeal held that the usual authority of a business manager could cover financial matters like giving of discounts and settling of accounts.

**B**

**C**

49. Analogous to the present, the Respondent, through its board, validly appointed Mr. Wong as a Senior Accounts Executive and, in doing so, represented to third parties that Mr. Wong had the usual authority to engage in finance-related matters such as the settling of accounts. This is especially since it was represented to the Claimant that Mr. Wong had authority and capacity to engage in “*any and all sales queries*”<sup>16</sup> which necessarily included discussions on the variation of auction terms. Accordingly, the Respondent did represent that Mr. Wong had the requisite capacity and authority to unilaterally contract on the Respondent’s behalf, from his appointment by the board.

**D**

**E**

*(b) A valid representation was nevertheless made by the Respondent, even if done negligently or unintentionally.*

50. The Respondent is precluded from denying Mr. Wong’s apparent authority on the basis that it unintentionally made a representation as to the latter’s scope of authority.

51. In *Tong Shun v Fung Ping Shan & Another* [1915] HKLR 84, the Privy Council held that an estoppel as to agency may be raised if the principal’s negligence was the real

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<sup>16</sup> Witness Statement of Mr. Hari Sadhu, ¶6

A and immediate cause of the damage done. On the present facts, even if the Respondent had not intended to represent that Mr. Wong had capacity to unilaterally vary the Auction Terms, it nevertheless did so negligently through its conduct.

B (2) *The Claimant relied on this representation in entering the Oral Agreement, which was not precluded by the Respondent's company constitution.*

C 52. The Claimant reasonably relied on the representation as to Mr. Wong's authority by entering into the Oral Agreement and paying a surplus deposit sum.

D 53. Further, the Respondent makes no claim that such delegation of authority to Mr. Wong or the agreement in itself is prohibited by the company constitution. It is clear that such agreement is valid, as it is in the nature of the Respondent's dealings as an auction house.

E 54. As such, Mr. Wong possessed apparent authority to grant a payment extension which is consequently valid and binding on the Respondent.

(3) *The Claimant is entitled to rely on the doctrine of apparent authority because it had no knowledge of Mr. Wong's actual scope of authority.*

55. While Mr. Wong claims that he lacked actual authority to extend payment terms as his role on the Auction day was allegedly limited to sales consultancy, this limitation of his job scope was not communicated to the Claimant. The Claimant is thus entitled to

presume that Mr. Wong was acting in his capacity as a Senior Accounts Executive who had the authority to vary payment terms.

**A**

56. In *The Cheong Fat Loong Kee v The Chip Cheong firm* [1931-2] HKLR 24, the principal withdrew from the agent his original authority to buy goods on credit from a third party, limiting it to obtainment on a cash basis only. Though parties contested on the validity of credit-based transactions entered into by the agent, it was ultimately held that the principal was bound to pay for the goods since it was reasonable for the third party to infer that credit transactions were valid, having been uninformed of the change.

**B**

**C**

57. Analogous to the present, while Mr. Wong's finance-related role as a Senior Accounts Executive was claimed to have been suspended on the Auction day having been allegedly instructed to act in the sole capacity of a sales consultant,<sup>17</sup> this was not communicated to the Claimant and thus has no bearing as to the validity of a claim in apparent authority. This is because the doctrine only concerns authority that appears to others and it is immaterial that the Respondent asserts that Mr. Wong's capacity on the auction day was solely limited to acting as a Sales Representative.

**D**

**E**

58. The Claimant did not know that Mr. Wong had no authority to act in his finance-related capacity on the auction day, and hence is entitled to bring a claim in apparent authority.

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<sup>17</sup> Witness Statement of Mr. Gregory Wong, ¶6

**A**

2. *In the event that this Tribunal finds that Mr. Wong had no authority to enter into the Oral Agreement, the Respondent nevertheless ratified his conduct.*

**B**

59. Even if this Tribunal deems that Mr. Wong lacked actual or apparent authority to enter into vary the payment terms, the Oral Agreement is still valid and binding because the Respondent had ratified Mr. Wong's conduct and consequently, the Oral Agreement.

**C**

60. A principal will be deemed to have ratified his agent's unauthorised act if he had had "*full knowledge of the facts*"<sup>18</sup> and material circumstances in which the act was done. Such ratification may be implied through acquiescence where the principal does nothing to disown the agent's authority.<sup>19</sup>

**D**

61. In *Gimex Development Ltd v Cua Wai Tai & Another* [2000] 1 HKLRD 14, the first defendant was found to have ratified a transaction which was executed by C as attorney for both the defendants. While the first defendant had not directly appointed C as her attorney, she was fully aware that her interest was being disposed of by C but took no steps to disown what C had done. Accordingly, the court held that there was clear ratification by acquiescence.

**E**

62. Analogous to the present case, the Respondent's knowledge that the Auction Terms were varied in the absence of proper management approval, having accepted the 20% deposit on the Auction Price on 12 December 2018 instead of the 10% sum as

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<sup>18</sup> *La Banque Jacques Cartier v Banque d'Épargne de Montreal* (1887) 13 App Cas 111, 118

<sup>19</sup> *Michael L Smith v Tanrich Investment Consultant Limited* [1995] 1 HKLR 111

stipulated in the Auction Terms. By its conduct in remaining silent and failing to raise any objections when Mr. Wong was issuing a new deposit invoice for the Claimant, the Respondent had effectively acquiesced to and ratified the Oral Agreement and consequently granted a valid payment extension.

**A**

**B**

63. The Respondent's following conduct was also consistent with having ratified the Oral Agreement entered into by Mr. Wong:

**C**

a. On 13 December 2018, the new balance invoice issued by the Respondent reflected 80% of the Auction Price instead of the 90% as stipulated in the Auction Terms.

**D**

b. On 24 December 2018, the Respondent welcomed the Claimant's agents to view and arrange for delivery of the Artwork at the auction house. If the payment extension was unauthorised, the Respondent should have informed the Claimant that its deposit was forfeited on the 20 December 2018, following the lapse of the five-working day timeline stipulated in the Auction Terms. The Respondent, however, by allowing the Claimant into its premises on 24 December to view the Artwork and confirm payment of the balance of the Auction Price, implied through its conduct, that the terms of the Oral Agreement were superseding and valid.

**E**

64. Taken together, the Respondent impliedly ratified the Oral Agreement as its conduct was consistent with a concluded contract and is thus precluded from denying the payment extension as embedded in the Oral Agreement.

**A** C. **The Arbitral Tribunal has the power to terminate the interim award issued by the Emergency Arbitrator as the emergency arbitrator did not have the jurisdiction to decide on the interim measure application.**

**B** 1. *Since the arbitration clause had provided for “the expedited procedural framework available at the AIAC”, parties had intended to arbitrate under the Fast Track Rules and not to apply for any interim award, as provided for by Rule 19(7) of the Fast Track Rules.*

**C**

65. Both parties had had a common intention to arbitrate under the Fast Track Rules, and thus should not be allowed to apply for any interim award. As stated in Article 1 of the Terms of Reference, on 19 February 2019, both parties had “*agreed that pursuant to Article 8 of the Auction Terms and Conditions, all disputes shall be resolved by a panel of three arbitrators pursuant to the AIAC Fast Track Arbitration Rules 2018*”. Under Rule 19 of the Fast Track Rules, parties who agree to arbitration under the AIAC Fast Track Arbitration Rules undertake not to apply for any interim award. Therefore, the emergency arbitrator did not have the requisite jurisdiction to issue the interim award, given that parties had undertaken not to apply for interim relief as per the Fast Track Rules.

**D**

**E**

66. It is clear that the 2018 AIAC Arbitration Rules as well as the Fast Track Rules were not intended by the drafters to operate in conjunction with each other. To this end, the primary objective of the Fast Track Rules is to allow parties to obtain their award through a procedure which is even more expeditious and cost-effective than that under

A generic institutional rules.<sup>20</sup> In contrast, the 2018 AIAC Arbitration Rules (“**the 2018 Arbitration Rules**”) provide for a different procedure altogether when compared against the Fast Track Rules. In particular, the discrepancies include: (i) the applicable rules of evidence<sup>21</sup>, (ii) the time frames<sup>22</sup>, (iii) the number of arbitrators<sup>23</sup>, (iv) the costs<sup>24</sup> and (v) the fact that claims which are less than or unlikely to exceed RM150,000 or USD 75,000 in a domestic and international arbitration, respectively, will automatically proceed as a documents-only arbitration, except where a substantive oral hearing has been deemed necessary by the arbitrator upon consultation with the parties<sup>25</sup>.<sup>26</sup> Clearly, given the fact that parties had agreed to resolve disputes under the Fast Track Rules, the emergency arbitrator did not have the jurisdiction to issue any interim award.

**2. *The power of the Arbitral Tribunal to terminate the interim award of the emergency arbitrator is implied.***

67. The arbitral tribunal has the power to terminate the interim award of the emergency arbitrator<sup>27</sup>. In the case of *Chinmax*, the court held that “*once the tribunal has been constituted, tribunal may reconsider, modify or vacate the interim award or order of*

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<sup>20</sup> LexisNexis, “The Kuala Lumpur Regional Centre for Arbitration Fast Track Arbitration Rules 2013” (2013), *LexisNexis* (blog), online: <<https://www.lexisnexis.com/ap/pg/malaysiadisputeresolution/document/428627/5MVX-MNM1-DXVF-T023-00000-00/The-Kuala-Lumpur-Regional-Centre-for-Arbitration-Fast-Track-Arbitration-Rules-2013-overview>>

<sup>21</sup> 2018 Arbitration Rules, Article 27

<sup>22</sup> *Ibid*, Article 25; Fast Track Rules, Rule 21

<sup>23</sup> *Supra* note 21, Article 7; Fast Track Rules, Rule 4

<sup>24</sup> *Supra* note 21, Articles 40, 42 and 43; Fast Track Rules, Rule 24

<sup>25</sup> Fast Track Rules, Rule 16

<sup>26</sup> AIAC, “Frequently Asked Questions” (2019), *Asian International Arbitration Centre* (blog), online: <<https://www.aiac.world/Frequently-Asked-Questions->>

<sup>27</sup> *Draeger Safety Diagnostics v New Horizon Interlock* No. 11-50160, 2011 US Dist. LEXIS 14414 (E.D. Mich. Feb. 14, 2011); *Chinmax Medical Systems v Alere San Diego* No. 10 cv 2467 WQH (NLS), 2011 WL 2135350 (S. D. Cal. May 27, 2011) (“*Chinmax*”); *Yahoo! Inc. v Microsoft Corporation* 873 F. Supp. 2d 310 (S.D.N.Y. 2013) (“*Yahoo*”)

**A** *emergency relief issued by the emergency arbitrator*<sup>28</sup>. Similarly, in the case of  
**B** *Yahoo*, the court found that the emergency arbitrator’s decision to award relief would  
be subject to review by the arbitral tribunal. However, the court in *Yahoo* ultimately  
held that the arbitral tribunal did not need to review the emergency arbitrator’s  
**C** decision as the emergency arbitrator did not exceed his power for two reasons: (i) the  
parties’ agreement had empowered the emergency arbitrator to grant non-monetary  
relief necessary to restore the status quo; and (ii) the emergency arbitrator had  
correctly found that there was irreparable harm.<sup>29</sup> In contrast, the present factual matrix  
**D** concerns parties that had not agreed to allow for disputes to be resolved by an  
emergency arbitrator, pursuant to the Fast Track Rules, and Respondent’s alleged  
damages were quantifiable, for reasons mentioned in the following arguments. Thus,  
the arbitral tribunal should have the power to review and terminate the interim award  
issued by the emergency arbitrator.

**E** 68. Moreover, emergency arbitrators’ decisions are interim by nature, and can thus be  
modified, terminated or annulled by regularly constituted tribunals.<sup>30</sup> To this end, the  
Hong Kong Arbitration Ordinance (Cap. 609) has stated that Article 17D of the 2006  
UNCITRAL Model Law, which provides that “*the arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted*” has  
effect. Given that Hong Kong law is the *lex arbitri* pursuant to Clause 7 of the Auction  
Terms and Conditions, the aforementioned provision is thus applicable.

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<sup>28</sup> *Chinmax*, 7

<sup>29</sup> *Yahoo*, 8-12

<sup>30</sup> *Grant Hanessian & Alexandra Dosman, “Songs of Innocence and Experience: Ten Years of Emergency Arbitration”* (2016) *The American Review of International Arbitration* 215-237

**D. In any case, the award should be vacated as the substantive prerequisites to issue an interim measure were not met under the *lex arbitri*.**

69. Section 36 of the Hong Kong Arbitration Ordinance<sup>31</sup>, which is adapted from Article 17A of the 2006 UNCITRAL Model Law, lists the substantive requirements for an interim order to have been granted. These include having to show a: (a) risk of serious or irreparable harm to the claimant, (b) urgency, and (c) likelihood of success on the merits or a prima facie case. There is also an additional requirement of there being no prejudgement of the merits of the case.<sup>32</sup>

70. On the facts, the substantive prerequisites to issue an interim measure were not met because the Respondent had not shown that he faced a serious or irreparable harm, the Respondent failed to prove a prima facie case, and the emergency arbitrator erred in prejudging the merits.

**1. *The Respondent's alleged damages were, in fact, quantifiable since the Respondent had been in receipt of offers from its prospective buyers.***

71. Arbitral tribunals require that the party seeking provisional measures demonstrate that it may suffer either “*irreparable*”, “*serious*” or “*substantial*” injury unless provisional relief is granted.<sup>33</sup> As the tribunal in a leading ICSID award observed that “*a*

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<sup>31</sup> *Ibid*

<sup>32</sup> Gary Born, *International Commercial Arbitration, 2<sup>nd</sup> ed* (Netherlands: Kluwer International, 2014), 2424 - 2563

<sup>33</sup> *Interim Award in ICC Case No. 8786*, 11(1) ICC Ct. Bull. 81, 83-84 (2000); *Interim Award in ICC Case No. 8894*, 11(1) ICC Ct. Bull. 94, 97 (2000); *Islamic Republic of Iran v USA*, Decision No. DEC116-A15(IV) & A24-FT of 18 May 1993, 29 Iran-US C.T.R. 214 (1993)

**A** *provisional measure is necessary where the actions of a party ‘are capable of causing*  
*or of threatening irreparable prejudice to the rights invoked.’*<sup>34</sup> To this end,  
*“irreparable harm”* has been defined as harm that cannot readily be compensated by an  
**B** award of damages.<sup>35</sup> The Working Group to the UNCITRAL Model Law has also  
agreed that the requisite standard should be that of *“harm not adequately reparable by*  
*an award of damages”*.<sup>36</sup>

**C** 72. On a similar note, the Emergency Arbitrator noted that one of the standards to be met  
for granting interim measure would be that *“harm not adequately reparable by an*  
*award of damages”* would likely result if the measure was not ordered, and such harm  
*“substantially outweighs the harm that is likely to result to the party against whom the*  
**D** *measure is directed if the measure is granted”*.<sup>37</sup>

**E** 73. The Respondent has failed to show that it would suffer irreparable and substantial harm  
if not for the interim award by the Emergency Arbitrator, thus the award should be  
vacated. First and foremost, the Respondent had managed to find a prospective buyer  
for the Artwork, and payment had been successful.<sup>38</sup> It follows that as the painting had  
been ascribed a quantitative value (in the form of a price that the prospective buyer had  
paid), damages would accordingly, be quantifiable as per said price.

74. Furthermore, a total of 23 prospective buyers expressed interest in one particular item,  
Lot 58.<sup>39</sup> The item on display was a rare artwork from the Shong Dynasty titled "*the*

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<sup>34</sup> *Tokios Tokelés v Ukraine, Procedural Order No. 3 in ICSID Case No. ARB/02/18 of 18 January 2005*, ¶8

<sup>35</sup> *Interim Award in ICC Case No. 8786*, 11(1) ICC Ct. Bull. 81, 83-84 (2000)

<sup>36</sup> A/CN/9/547 – Report of Working Group II (Arbitration) on the work of its fortieth session (New York, 23-27 February 2004), ¶88

<sup>37</sup> Award on Interim Measures, ¶6(a)

<sup>38</sup> Terms of Reference, ¶3.5

<sup>39</sup> *Ibid.*, ¶3.1.3

**A** *Bamboo and the Panda*". These prospective buyers had explicitly expressed their  
interest in the Artwork by approaching Mr. Gregory Wong, Senior Accounts Executive  
with the Respondent.<sup>40</sup> This is sufficient to show that apart from the Claimant's offer,  
**B** the Respondent had a sizeable sample of alternative offers that could have made for an  
approximate measure of the Respondent's anticipated damages. Therefore, the  
Respondent has failed to satisfy the threshold of "irreparable" and "substantial" harm  
that is required for an Emergency Arbitrator to issue an interim award.

**C** 2. *The Respondent had failed to prove any likelihood of success on the  
merits given the valid extension of time authorised by the  
Respondent's agent and the fact that the Claimant had performed its  
D duty under the Contract.*

**E** 75. Pursuant to Article 17A(b) of the 2006 UNCITRAL Model Law, which has been  
adopted in section 36 of the Hong Kong Arbitration Ordinance, one condition for  
granting interim measures is that there is a reasonable possibility that the requesting  
party will succeed on the merits of the claim. This is echoed in the Emergency  
Arbitrator's ruling, which states that for the Emergency Arbitrator to grant an interim  
measure, there must be a "reasonable possibility that the requesting party will succeed  
on the merits of the claim".<sup>41</sup> The requesting party need not prove that it will ultimately  
prevail on its claims in order to obtain interim measures, however, it must prove that  
there is a reasonable possibility it will prevail on its underlying claim.<sup>42</sup>

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<sup>40</sup> Witness Statement of Mr. Gregory Wong, ¶10

<sup>41</sup> Award on Interim Measures, ¶6(b)

<sup>42</sup> Markus Wirth, *Interim or Preventive Measures in Support of International Arbitration in Switzerland* (2000) 18 ASA Bull. 31, 37-38

76. To this end, the court in *Rex Med. L.P. v Angiotech Pharmaceuticals (US) Inc.*, 754 F. Supp. 2d 616, 623 (S.D.N.Y. 2010) stated that the legal threshold to find a “*likelihood of success on the merits*” would be the likelihood of prevailing in the arbitration proceedings. Notably, emergency arbitrators have required that the degree of success needed for a successful interim application should be “*more than likely*”.<sup>43</sup> Courts have also found that the Emergency Arbitrator has to find that the Claimant has a “*legally protectable interest*” before it is allowed to award an interim measure – if there is no reasonable prospect of success, there is no tangible right deserving of protection, and thus interim relief should not be granted<sup>44</sup>.

77. On the facts, the Respondent has failed to prove that it is “*more than likely*” to succeed on the merits of its claim, given the valid extension of time authorised by the Respondent’s agent, as (i) the Respondent had conferred authority upon the Respondent’s agent to enter into the Oral Agreement on his behalf, therein conferring him authority to grant a payment extension; and (ii) the Claimant had performed his end of the contract. Clearly, the Respondent has failed to satisfy the threshold of showing that it has a reasonable possibility of succeeding on the merits, given such glaring arguments pointing otherwise. Thus, the Emergency Arbitrator was wrong in concluding that the Respondent had proven a likelihood of success on the merits.<sup>45</sup>

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<sup>43</sup> *Kaj Hobér, Interim Measures by Arbitrators* (The Netherlands: Kluwer Law International, 2007), 735

<sup>44</sup> *ICSID Case No. ARB/12/1; ICSID Case No. ARB/06/11; Distributor A (nationality not indicated) v Manufacturer B (nationality not indicated)*, ICC Case No. 10596, Interlocutory Award, 30 Y.B. Comm. Arb. 66, 68

<sup>45</sup> Award on Interim Measures, ¶7

**A**

3. *In the alternative, the Award for Interim Measures should be vacated as the Emergency Arbitrator should not have made conclusions on the merits of the parties' underlying dispute without providing reasons.*

**B**

a) The Emergency Arbitrator should not have prejudged the merits of the parties' underlying dispute.

**C**

78. Provisional measures must not “*prejudge the merits*” of the parties' underlying dispute<sup>46</sup>. In other words, the emergency arbitrator should have refrained from prejudging the merits of the case.

**D**

79. As seen in Paragraph 7 of the Emergency Arbitrator's award dated 19 February 2019 (“**the Award on Interim Measures**”), the Emergency Arbitrator had made a precursory judgement on the merits of the case when he ruled in favour of the Respondent after prejudging the merits of the claim – that the Claimant had failed to pay on time and the extension of time had not been granted by an authorised agent.

**E**

80. As stated in a case before the International Court of Justice, it is at the merits that one sees “*whether there really has been a breach*”, and not at the stage of a request for provisional measures.<sup>47</sup> Therefore, in making the conclusion that the extension of time had not been granted and the Claimant had thus breached his contract by failing to pay

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<sup>46</sup> *Partial Award in ICC Case No. 8113*, 11(1) ICC Ct. Bull. 65 (2000) (“*granting of the measure requested by Claimant implies a pre-judgment of the dispute*”); *Maffezini v Kingdom of Spain, Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 October 1999*, 16 ICSID Rev.-For. Inv. L.J. 207, ¶21 (2001); *Christoph Schreuer et al, The ICSID Convention: A Commentary Art. 47, 2<sup>nd</sup> ed* (Cambridge, Cambridge University Press: 2009), ¶2 (tribunal must “*strike a careful balance between the urgency of a request for provisional measures and the need not to prejudge the merits of the case*”); *John Simpson & Hazel Fox, International Arbitration: Law and Practice* (New York, London, Stevens and Sons: 1959) (“*capable of prejudicing the execution of any decision, which may be given by the tribunal*”)

<sup>47</sup> *Oil Platforms (Iran v U.S.A.)*, Judgment of 12 December 1996, [1996] I.C.J. Rep. 803, 856-57

on time, the Emergency Arbitrator had been wrong to prejudge the merits. It follows that this Tribunal should vacate the Emergency Arbitrator's Award.

**A**

81. In any case, even if this Tribunal finds that the Emergency Arbitrator did not make a prejudgement on the merits when he issued the Award on Interim Measures in favour of the Respondent, it is a provisional decision that can be subject to alteration and revocation in the final award as the outcome of a provisional-measures application does not predetermine the final award. The “*no-prejudgement*” requirement stands for the basic proposition that a tribunal must take care to ensure that it does not, in considering and deciding an application for provisional measures, prejudge the outcome of the arbitration or even partially close its mind to one party’s submissions or deny one party an opportunity to be heard in subsequent proceedings.<sup>48</sup>

**B**

**C**

**D**

b) The Emergency Arbitrator should have provided reasons for, and not merely state his conclusion.

**E**

82. Where an arbitrator is obligated to provide reasons for his decision under Article 31(2) of the Model Law (which has been adapted into s 67 of the HKAO), arbitral awards have been set aside where the findings of a tribunal were not its reasons but its conclusions.<sup>49</sup> In the present case, the emergency arbitrator merely stated that the Respondent had shown a likelihood of success on the merits “in light of the Claimant’s failure to pay on time and the extension of time not being granted by an authorised agent”. While he is not required to give a detailed explanation for his decision given the fact that this present application was for the purpose of obtaining an interim order, it is submitted nevertheless that he merely provided his conclusions as opposed to his

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<sup>48</sup> *Supra* note 31, 2477

<sup>49</sup> *Gora Lal v Union of India* (2003) 12 SCC 459

reasoning for his decision. As such, the award is liable to be set aside.

**A**

**VII. PRAYER FOR RELIEF**

83. For the foregoing reasons, the Claimant respectfully requests the Tribunal's ruling that:

**B**

a. The Respondent granted a valid payment extension and the Claimant is thus entitled to risk, possession and title of the Artwork; and

**C**

b. The Award for Interim Measures be vacated.

Dated this 20<sup>th</sup> day of September 2019.

**D**

**COUNSEL FOR THE  
CLAIMANT**

**E**