

**The 14<sup>th</sup> LAWASIA INTERNATIONAL MOOT COMPETITION**

**ASIAN INTERNATIONAL ARBITRATION CENTRE**

**2019**

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**BETWEEN**

**PRACHEEN KALAKAAR**

**(CLAIMANT)**

**AND**

**CHUI'S**

**(RESPONDENT)**

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**MEMORIAL FOR THE RESPONDENT**

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## **STATEMENT OF JURISDICTION**

The parties, Pracheen Kalakaar (“**Claimant**”) and Chui’s (“**Respondent**”) have agreed to submit the present dispute to arbitration in Hong Kong before the Asian International Arbitration Centre (“**AIAC**”) Fast Track Tribunal in accordance with the AIAC Fast Track Arbitration Rules 2018 (“**Fast Track Rules**”).

### **QUESTIONS PRESENTED**

1. Whether Hong Kong law is the law governing all substantive disputes in the arbitration:
  - a. Whether Hong Kong law governs all substantive disputes in the arbitration pursuant to the parties' choice of law in the agreement between Pracheen Kalakaar and Chui's.
2. Whether the Respondent granted a valid payment extension:
  - a. Whether Mr. Gregory Wong has the ostensible authority to grant a valid payment extension.
  - b. Whether Mr. Gregory Wong's conduct has been ratified by the Respondent.
3. Whether the Claimant is entitled to the possession of the Artwork:
  - a. Whether Title, Risk and Possession has passed to the Claimant.
  - b. Whether a valid payment extension can still be made despite not obtaining the 3 signatures from the Head of Sales, Finance and Auctioneer.
  - c. Whether the entire agreement clause should be given effect.
4. Whether Hong Kong law is the law governing the arbitration agreement:
  - a. Whether the seat of arbitration or the law governing the substantive agreement will be the law governing the arbitration agreement.
5. Whether the current Arbitral Tribunal has the jurisdiction to vacate the Award on Interim Measures made by the Emergency Arbitrator:



- a. Whether the parties intended to apply the Fast Track Rules or the Emergency Arbitrator procedure from the outset;
  - b. Whether the current Arbitral Tribunal has an implied power to vacate the Award on Interim Measures; and
  - c. Whether the expiry of the Award on Interim Measures after 90 days meant it still needs to be vacated.
6. Whether the *lex arbitri* of this dispute is Hong Kong law:
- a. Whether the *lex arbitri* is determined by the seat of arbitration.
7. Whether the current Arbitral Tribunal should vacate the Award on Interim Measures made by the Emergency Arbitrator:
- a. Whether the prerequisites to grant the Award on Interim Measures were met by the Respondent:
    - i. Whether monetary relief can adequately remedy the harm suffered by the Respondent;
    - ii. Whether the harm suffered by the Respondent substantially outweighs the harm suffered by the Claimant; and
    - iii. Whether the Respondent has proven a reasonable possibility of success on the merits of their claim.

## STATEMENT OF FACTS

1. The Claimant, Pracheen Kalakaar, is an art gallery from South-India and is a company incorporated under the laws of India. Mr. Hari Sadhu is one of two of the Claimant's curator, authorized to attend open houses on behalf of the Claimant, and act as a proxy to bid on items.
2. The Respondent, Chui's, is a successful rare items auction house from Hong Kong and is registered under the laws of Hong Kong. Mr. Gregory Wong, a Senior Accounts Executive and a temporary sales consultant during the Open House on 12 December 2018, is the agent in question which corresponded with Mr. Hari Sadhu during the Open House.
3. On 12 December 2018, upon a successful auction bid, the Claimant and Respondent entered into an agreement, the Auction Terms and Conditions, for the sale and purchase of a rare artwork known as "The Bamboo and the Panda" ("**Artwork**").
4. The standard deadline for a buyer to complete payment under the Auction Terms and Conditions is 5 working days from the auction date. The Claimant, however, has orally requested for a time extension of 5 working days in order to complete the remaining purchase price. In return, the Claimant would pay an additional 10% deposit to the Respondent. These discussions were all made orally, prior to the signing of the contract.
5. On 24 December 2018, the Claimant returned to the Respondent's premises with the proof of payment for the balance of the purchase price, in order to view and arrange for

the delivery of the Artwork. However, whilst the Claimant was inspecting the Artwork, it unexpectedly tore. Upon this incident, the Claimant was immediately ushered away from the premises. The cheque for the balance of the Auction Price was also cleared on the same day.

6. On 26 December 2018, the Claimant tried to collect the Artwork, but was denied permission as the balance of the Auction Price was not paid within the contractual time frame of 5 days as stipulated in the Auction Terms and Conditions.
7. The Claimant claimed that a valid time extension of 5 days to 10 days was granted by Mr. Gregory Wong, an authorized agent of the Respondent. Hence, title passed upon clearance of the cheque on 24 December 2018 and the Claimant is entitled to the possession of the Artwork upon furnishing the proof of payment.
8. The Respondent however, disputes these claims, and argues that a valid time extension was not granted due to the lack of authority of Mr. Gregory Wong. Since no time extension was granted, the clearance of the cheque and proof of payment provided on 24 December 2018 has been made outside the standard deadline of 5 days, thereby denying the Claimant possession of the Artwork ever since.
9. On 2 January 2019, following this dispute between both parties, the Claimant commenced an arbitration proceeding at the AIAC, in accordance with the arbitration

agreement between both parties contained in clause 8.1 of the Auction Terms and Conditions.

10. Clause 8.1 in particular, requires any dispute between both parties to be settled using the “expedited procedures framework” available at the AIAC.
11. On 1 February 2019, pending the resolution of the dispute, the Respondent requested the AIAC for the appointment of an Emergency Arbitrator for an urgent interim award to sell the Artwork before the end of Chinese New Year, after which the value of the Artwork may depreciate.
12. On 2 February 2019, an Emergency Arbitrator was appointed. Following this, an interim award was delivered on 15 February 2019 in favour of the Respondent which allowed the sale of the Artwork *via* an auction. During the emergency arbitration proceedings, the Claimant objected to the jurisdiction of the Emergency Arbitrator.
13. The Claimant contends that “expedited procedures framework” under the arbitration agreement refers only to the Fast Track Rules, hence it is outside the jurisdictional purview of the Emergency Arbitrator.
14. The Respondent, on the other hand, argues that “expedited procedures framework” refers to all types of expedited procedures, including a framework where the appointment of an Emergency Arbitrator is permitted.

15. As a result, on 19 February 2019, both parties had subsequently agreed in the Terms of Reference to submit all disputes to be arbitrated in accordance with the AIAC Fast Track Arbitration Rules 2018.

16. On 22 May 2019, a three member tribunal under the AIAC Fast Track Arbitration Rules has been constituted, before which the parties agree to resolve this dispute.

## SUMMARY OF PLEADINGS

### **I. Hong Kong law is the law governing the substantive agreement.**

Since the parties have expressly agreed on the law governing the substance of their contract to be Hong Kong law, as a result Hong Kong law governs the substantive agreement of the parties.

### **II. The Respondent has not granted a valid payment extension.**

The Respondent's agent, Mr. Gregory Wong, does not have the valid authority to grant the time extension. This will then not bind the Respondent to the agreement between the parties that a time extension of an extra 5 days have been given. Mr. Gregory Wong's authority cannot be established by his ostensible authority nor alternatively, *via* ratification of his act by the Respondent.

### **III. The Claimant is not entitled to the possession of the Artwork.**

The Claimant cannot be entitled to the possession of the Artwork as the 3 signatures from the Head of Sales, Finance and Auctioneer have not been obtained and the Turquand rule is not applicable. The entire agreement clause should be given effect to prevent the pre-contractual negotiations of the time extension from 5 days to 10 days from taking effect. Since there is no valid payment extension, the Claimant has not paid within the time frame stipulated in the Agreement of 5 days. Furthermore, the contract has already been terminated. Looking at all these in totality, title, risk and possession will not pass to the Claimant.

**IV. Hong Kong law is the law governing the arbitration agreement.**

Where the parties did not indicate the law governing the arbitration agreement, there is a rebuttable presumption that it follows the law governing the underlying contract. Hence, the law governing the arbitration agreement is Hong Kong law.

**V. The current Arbitral Tribunal does not have the jurisdiction to vacate the Award on Interim Measures made by the Emergency Arbitrator**

Both parties intended their dispute to be arbitrated under all types of expedited procedures, which includes the Emergency Arbitrator procedure. Furthermore, this tribunal does not have an implied power to vacate the interim award. Alternatively, the Award on Interim Measure has since expired, hence, there is no need to vacate it.

**VI. The *lex arbitri* of this dispute is governed by Hong Kong law**

In the absence of an express choice of the law governing the arbitral proceedings or the *lex arbitri*, it is implied from the seat of arbitration.

**VII. The current Arbitral Tribunal should not vacate the Award on Interim Measures made by the Emergency Arbitrator**

The prerequisites to grant the Award on Interim Measures under the *lex arbitri* were met by the Respondent. Monetary relief is not an adequate remedy for the harm suffered by the Respondent. Furthermore, the harm suffered by the Respondent substantially outweighs the harm suffered by the Claimant. Moreover, the Respondent has proven a reasonable possibility of success on the merits of their claim.

## **PLEADINGS**

### **I. HONG KONG LAW IS THE LAW GOVERNING THE SUBSTANTIVE AGREEMENT.**

1. This is the particular system of law that governs the interpretation and validity of the contract, the rights and obligations of the parties, the mode of performance, and the consequences of breaches of the contract.
2. It is generally recognised that parties to an international commercial agreement are free to choose for themselves the law (or the legal rules) applicable to that agreement, by inserting a ‘choice of law’ clause into their contract<sup>1</sup>.
3. Here, since the parties have expressly agreed that all disputes arising out of the contract shall be governed by Hong Kong<sup>2</sup>, thus Hong Kong law governs the substantive agreement.

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<sup>1</sup> Redfern and Hunter on International Arbitration (Sixth Edition) (Nigel, Partasides, Redfern, et al. ; Sept 2015.) , page 185 – 187, para 3.91 – 3.99

<sup>2</sup> Moot Problem, Auction Terms and Conditions, page 19, clause 7



## II. THE RESPONDENT HAS NOT GRANTED A VALID PAYMENT EXTENSION.

4. Mr. Gregory Wong does not have the valid authority to bind the Respondent to the pre-contractual negotiations made between the Claimant and the Respondent. His authority cannot be established as he does not have the ostensible authority(**A**) nor was his conduct ratified by the Respondent(**B**).

*A. Mr. Gregory Wong does not have the ostensible authority to grant a valid payment extension.*

5. In determining whether the Respondent's agent, Mr. Gregory Wong has the ostensible authority, Lord Diplock in the case of **Freeman & Lockyer v Buckhurst Park Properties**<sup>3</sup>("Freeman") – as adopted by the Hong Kong jurisprudence in **Akai Holdings v Thanakharn Kasikorn**<sup>4</sup> – provided clear instructions on the principles of ostensible authority.
6. In **Freeman**, Lord Diplock had set out four conjunctive requirements<sup>5</sup> in order to determine whether the agent in question had the ostensible authority, and the Respondent contends that the **first and third**<sup>6</sup> elements have not been met.

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<sup>3</sup> *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd. and Another*. (1964) 2 Q.B. 480

<sup>4</sup> *Akai Holdings Ltd(In Liquidation) v. Thanakharn Kasikorn Thai Chamkat(Mahachon)*. (2010) HKCFA 63

<sup>5</sup> *Freeman*, *supra* note 3, page 506

<sup>6</sup> *Ibid*

- 6.1 **There must be a representation made to the contractor, that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced.**

6.1.1. Throughout the facts, the Respondent has not made any clear representation that Mr. Gregory Wong has the authority to grant a payment extension. This is supported by 2 pertinent facts and reasons:

6.1.1.1. First, it might be argued by the Claimant that since the Respondent's receptionist had represented to Mr. Hari Sadhu that he could direct any and all sales related queries<sup>7</sup>, this would be reasonable for the Claimant to believe that Mr. Gregory Wong had the requisite authority.

6.1.1.1.1. However, this is not a reasonable reason for the Claimant to believe that Mr. Gregory Wong had the valid authority since this involves only giving an answer to any questions<sup>8</sup> posed by Mr. Sadhu.

6.1.1.1.2. It certainly does not amount to any innuendo or implication which shows that Mr. Gregory Wong

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<sup>7</sup> Moot Problem, Witness Statement of Hari Sadhu, page 12, para 6

<sup>8</sup> Moot Problem, Witness Statement of Gregory Wong, page 42, para 6

has the valid authority. Mr. Gregory Wong's duty was only to deal with all queries, it does not mean he was vested with the power to grant a payment extension.

6.1.1.2. Second, in order to establish ostensible authority, there must a clear and unequivocal representation<sup>9</sup>.

6.1.1.2.1. On our facts, there has been no such clear representation. The closest to this is that of the announcement made by the Head Auctioneer, Mr. Bartholomew<sup>10</sup> on the substitution of the staff in general. However, this only points toward the fact that Mr. Gregory Wong would be a substitute sales consultant for the duration of the Open House.

6.1.1.2.2. In addition, granting a payment extension is not within the job scope of a sales consultant<sup>11</sup> – what more that of a *substitute* sales consultant.

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<sup>9</sup> *Akai Holdings*, *supra* note 4, para 120

<sup>10</sup> Clarifications to the Moot Problem, page 8, para 24

<sup>11</sup> *Ibid*, page 5, para 13

## 6.2 **There must be reliance on the representation**

6.2.1. It may appear that by the Claimant paying the 20% cheque deposit, they have thereby shown their reliance. However, this is certainly not the case as Mr. Hari Sadhu had admitted in his own witness statement<sup>12</sup> that he assumed that Mr. Gregory Wong's role at the Respondent's open house was of a similar nature to that of his previous employment in Scotties.

6.2.2. Thereby, this shows that Mr. Hari Sadhu did not actually rely on any representation made, but rather on his own assumptions. As a result, the 3<sup>rd</sup> element for ostensible authority has also not been satisfied.

### ***B. Mr. Gregory Wong's conduct has not been ratified by the Respondent.***

7. For there to be a valid ratification, the main requirement to be met is that there must be sufficient knowledge. It is trite law that there cannot be ratification without knowledge of what you are ratifying<sup>13</sup>.

8. If a principal knows the essentials of what happened between the agent and the 3<sup>rd</sup> party, it would be considered as sufficient knowledge<sup>14</sup>. This is evident from two pertinent facts:

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<sup>12</sup> Moot Problem, Witness Statement of Mr. Hari Sadhu, page 12, para 7

<sup>13</sup> *Morrison v. London County & Westminster Bank*. (1914) 3 KB 356

<sup>14</sup> *ING Re (UK) Limited v. R&V Versicherung AG* (2006) EWHC 1544

- 8.1 The Respondent did not know that Mr. Gregory Wong had conversed with Mr. Hari Sadhu regarding the payment extension as the Respondent were not even informed about it at all, the only thing the Respondent had knowledge of was that of the currency conversion<sup>15</sup>.
- 8.2 Furthermore, when the Respondent sent out a revised invoice, a due date was not specified for the payment. Oddly enough, the Claimant noticed it but did not say anything to the Respondent about it<sup>16</sup>. This just goes on to prove that the Respondent really did not know about the payment extension.
9. Therefore, these two facts go on to support that the Respondent did not have sufficient knowledge of the payment extension.
10. Furthermore there has not been any conduct by the Respondent which could amount to ratifying Mr. Gregory Wong's act. It is in fact, quite the opposite. In order for there to be a valid ratification, the Respondent must have intended to ratify Mr. Gregory Wong's act and do so with a positive act<sup>17</sup>.
11. There has been no such positive act on our facts as **Sino Channel Asia**<sup>18</sup> has already stipulated that such positive act must be an unequivocal act. The only act which may

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<sup>15</sup> Further Clarifications to the Moot Problem, page 2, para 2

<sup>16</sup> Moot Problem, Witness Statement of Mr. Hari Sadhu, page 14, para 16

<sup>17</sup> *Sino Channel Asia Ltd v Dana Shipping & Trading PTE Singapore & Another* (2017) EWCA Civ 1703

<sup>18</sup> *Ibid*, para 31

come close to this would be that of sending the revised invoice to the Claimant<sup>19</sup>, however this is certainly not an unequivocal act as the due date for payment was not stipulated on the invoice. Hence, the requirement for there to be an unequivocal act fails.

12. Therefore, since there was insufficient knowledge<sup>20</sup> and no conduct<sup>21</sup> by the Respondent approving the payment extension, the Respondent did not ratify Mr. Gregory Wong's act.

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<sup>19</sup> Moot Problem, Witness Statement of Mr. Hari Sadhu, page 14, para 16

<sup>20</sup> *ING Re*, *supra* note 14

<sup>21</sup> *Sino Channel Asia*, *supra* note 17

### III. THE CLAIMANT IS NOT ENTITLED TO THE POSSESSION OF THE ARTWORK.

13. In order for a payment extension to be granted, the 3 signatures from the Head of Sales, Finance and Auctioneer must have been obtained (A). Furthermore, the entire agreement clause should be given effect to prevent the pre-contractual negotiations regarding the time extension from being given effect.(B). Furthermore, since the contract has been terminated and there has not been a valid time extension, Title, Risk and Possession has not passed to the Claimant(C).

A. *A valid payment extension cannot be granted as the 3 signatures from the Head of Sales, Finance and Auctioneer has not been obtained.*

14. It may be argued by the Claimant that there is no need to adhere to the Respondent's standard procedure of obtaining the 3 signatures in order to obtain a payment extension<sup>22</sup> due to the Indoor Management rule as established from **Royal British Bank v Turquand**("Turquand")<sup>23</sup>.

15. However, there is an exception to the Turquand rule. The protection afforded to the Claimant by the Turquand rule will fail if the Claimant is put on inquiry<sup>24</sup>. The

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<sup>22</sup> Moot Problem, Witness Statement of Mr. Gregory Wong, page 43, para 12

<sup>23</sup> *Royal British Bank v Turquand* (1856) 6 E&B 327

<sup>24</sup> *Morris v Kanssen* (1946) AC 459, page 475

- Claimant has already been told by the Respondent that it is not a standard procedure to grant a payment extension<sup>25</sup>.
16. In addition, seeing as to how Mr. Hari Sadhu is one of two of the Claimant's curator<sup>26</sup>, it would be reasonable to infer that he knew of such a procedure. This is especially so as this is a standard procedure that is followed by many other Auction Houses in the Asia-Pacific region and so the Claimant would be well aware of such procedures<sup>27</sup>.
17. Therefore, since the Claimant has been put on inquiry, the Turquand rule is not applicable and since the 3 signatures have not been obtained, there can be no payment extension.
18. Furthermore, in order to apply the Turquand rule, the Claimant must first satisfy independently that Mr. Gregory Wong has the ostensible authority<sup>28</sup>. Since it has already been established earlier that Mr. Gregory Wong does not have the ostensible authority, the Turquand rule cannot survive – as the rule is dependent on whether Mr. Gregory Wong has the ostensible authority<sup>29</sup>.

***B. The entire agreement clause should be given effect to.***

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<sup>25</sup> Moot Problem, Witness Statement of Mr. Gregory Wong, page 43, para 13

<sup>26</sup> Moot Problem, Witness Statement of Mr. Hari Sadhu, page 11, para 1

<sup>27</sup> Clarifications to the Moot Problem, page 6, para 15

<sup>28</sup> *Northside Developments Pty Ltd v Registrar General* (1990) 170 CLR 146, page 198 ; *Akai Holdings*, *supra* note 4, para 59

<sup>29</sup> *Ibid*



19. In general, an entire agreement clause dictates that the written contract constitutes a binding agreement between the parties and that the full contractual terms are to be found in the same document. Hence, any assurances made in the course of the negotiations between the parties shall have no contractual force, unless they are reduced and reproduced in the said document<sup>30</sup>.
20. The reason why the entire agreement clause should be given effect to is due to the fact that the parties have signed the contract. To ignore or otherwise denude the entire agreement clause of any effect would be to obviate and override the parties' intention<sup>31</sup>. It certainly would also encourage uncertainty about the terms of the contract, as the whole purpose of the entire agreement clause is to promote certainty<sup>32</sup>.
21. It cannot be argued by the Claimant that it was the parties' intention to move away from the entire agreement clause as even *Longmore LJ* has observed in **North Eastern Properties**<sup>33</sup> that if the parties had agreed that the written contract is to be the entire contract, the court cannot tell them that they did not mean it.
22. Hence, the entire agreement clause should be given effect to uphold the parties' intentions and certainty in the contract, in order to prevent the pre-contractual negotiations regarding the payment extension from being given effect.

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<sup>30</sup> *Inntrepreneur Pub v East Crown Ltd.* (2000) 2 Lloyd's Rep 611, para 7

<sup>31</sup> *MWB Business Exchange Centres v Rock Advertising Ltd* (2018) UKSC 24, para 11

<sup>32</sup> *Ibid*, para 14

<sup>33</sup> *North Eastern Properties Ltd. v Coleman* (2010) 1 WLR 2715, para 82

***C. Title, Risk and Possession has not passed to the claimant.***

23. Since the requirement for 3 signatures needs to be obtained for a time extension and that the entire agreement clause has to be given effect to as argued above, this further add up to the fact that there was no valid payment extension. Furthermore, because it was also submitted that the Respondent has not granted a valid payment extension due to the invalid authority of the agent, it then means that the standard deadline of 5 days had remained.

24. Therefore, it must be shown that **Title**, **Risk** and **Possession** have not passed within the 5 days:

24.1 **Title**

24.1.1. According to the Hong Kong Sale of Goods Ordinance<sup>34</sup>, property passes only when intended to<sup>35</sup> and when certain conditions are fulfilled<sup>36</sup>.

24.1.2. Hence, it is the parties' intention when signing the Auction Terms and Conditions that title only passes once a certain condition is fulfilled – namely the clearance of the full Auction Price to be received<sup>37</sup>.

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<sup>34</sup> Hong Kong Sale of Goods Ordinance 1896 (Cap. 26)

<sup>35</sup> *Ibid*, s.19

<sup>36</sup> *Ibid*, s.21

<sup>37</sup> Moot Problem, Auction Terms & Conditions, page 17, clause 2.2

24.1.3. However, the full Auction price had only been cleared on 24 December 2018<sup>38</sup>, which is past the deadline of 5 days. Therefore, there has not been compliance with the contract of paying within 5 days and furthermore since the contract has already been terminated<sup>39</sup>, there is no longer any clause governing the transfer of title of the Artwork.

24.1.4. Therefore, title has not passed to the Claimant.

## 24.2 **Risk**

24.2.1. Risk in the goods passes usually at the same time property passes<sup>40</sup>. However, parties can decide within a contract when risk passes due to the wordings of “*unless otherwise agreed*” in s.22 of the Sale of Goods Ordinance.

24.2.2. Hence, since the pre-contractual negotiations regarding the time extension, which includes the transfer of risk to the Claimant was not effective due to the entire agreement clause and the lack of authority of Mr. Gregory Wong, risk has not passed to the Claimant on 12 December 2018.

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<sup>38</sup> Moot Problem, Witness Statement of Mr. Hari Sadhu, page 16, para 24. ; Clarifications to the Moot Problem, page 2, para 1.

<sup>39</sup> Clarifications to the Moot Problem, page 4, para 7

<sup>40</sup> Sale of Goods Ordinance, *supra* note 34, s.22

Risk has also not pass on 24 December 2018<sup>41</sup>, since the contract has been terminated, there is no longer any clause governing the transfer of risk.

### 24.3 **Possession**

24.3.1. Following the Auction Terms and Conditions<sup>42</sup>, possession passes when the proof of the full payment has been received by the Auction House.

24.3.2. Invariably, the Claimant had indeed presented the proof of the full payment to the Respondent<sup>43</sup>. However, since the contract has already been terminated, there is no longer any clause governing the transfer of possession.

24.3.3. It might be contended by the Claimant that if the contract had been terminated, why is it that the Respondent allowed the Claimant to enter the premises to view the Artwork. The reason is but a simple one.

24.3.4. Mr. Gregory Wong was not the one<sup>44</sup> who brought the Claimant to see the Artwork, but rather it was Mr. Quintin Cui<sup>45</sup>. Hence, since Mr Quintin Cui was unaware of the payment extension requests from the

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<sup>41</sup> Moot Problem, Auction Terms and Conditions, page 18, clause 2.3

<sup>42</sup> Moot Problem, Auction Terms and Conditions, page 18, clause 2.3

<sup>43</sup> Moot Problem, Terms of Reference, page 30, para 3.4.1.

<sup>44</sup> Moot Problem, Witness Statement of Mr. Gregory Wong, page 44, para 20

<sup>45</sup> Moot Problem, Witness Statement of Mr. Hari Sadhu, page 15, para 18

Claimant, that is the reason why he was able to bring the Claimant to view the Artwork.

25. Nevertheless, this does not shy away from the fact that the contract was terminated on 24 December 2018 and since the Claimant has not fulfilled its contractual obligations of paying within the 5 days<sup>46</sup>, the Seller has exercised its discretion<sup>47</sup> to terminate the contract and as a result, the Claimant is not entitled to the possession of the Artwork.

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<sup>46</sup> Moot Problem, Auction Terms and Conditions, page 17, clause 1.2 – 1.4

<sup>47</sup> *Ibid*, clause 1.4

#### IV. HONG KONG LAW IS THE LAW GOVERNING THE ARBITRATION AGREEMENT.

26. To determine the law governing the arbitration agreement, in the absence of any indication to the contrary, it is fair to start from the assumption that the parties intended the whole of their relationship to be governed by the same system of law as the proper law of the contract<sup>48</sup>.
27. Since the parties have expressly chosen the law governing the underlying contract to be Hong Kong law<sup>49</sup>, there is a very “strong presumption” in favour of the law governing the substantive agreement which contains the arbitration clause to also govern the arbitration agreement<sup>50</sup>.
28. Alternatively, since there is no conflict between the law of the seat and the law governing the substantive agreement, as both referred to Hong Kong law, equally there is a strong presumption that both parties intended the law governing the arbitration agreement to be Hong Kong law.

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<sup>48</sup> *Sulamérica Cia Nacional de Seguros SA and ors v Enesa Engenharia SA and ors* (2012) EWCA Civ 638, para 11

<sup>49</sup> Moot Problem, Auction Terms and Conditions, page 19, clause 7

<sup>50</sup> Redfern and Hunter, *supra* note 1, page 158, para 3.12

**V. THE CURRENT ARBITRAL TRIBUNAL DOES NOT HAVE THE JURISDICTION TO VACATE THE AWARD ON INTERIM MEASURES MADE BY THE EMERGENCY ARBITRATOR.**

29. Clause 8.1 of the Auction Terms and Conditions<sup>51</sup> refers to all types of expedited procedures, which includes the Emergency Arbitrator procedure (**A**). Furthermore, the current arbitral tribunal does not have the implied power to vacate the Award on Interim Measures made by the Emergency Arbitrator (**B**). Alternatively, the Award on Interim Measures has since expired, hence there is no need to vacate it(**C**).

***A. Both parties intended their dispute to be arbitrated under all types of expedited procedures, which includes the Emergency Arbitrator procedure from the outset.***

30. Following clause 8.1 of the arbitration agreement<sup>52</sup>, it is stated that “any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration using the expedited procedures framework available at the Asian International Arbitration Centre”.

31. The Claimant contends<sup>53</sup> that the phrase “expedited procedures” would mean Fast Track Rules<sup>54</sup>, however, the Respondent is of the position that the aforementioned

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<sup>51</sup> Moot Problem, Auction Terms and Conditions, page 19, clause 8.1

<sup>52</sup> *Ibid*

<sup>53</sup> Moot Problem, Terms of Reference, page 33, Article 4.3.1.1(a)

<sup>54</sup> AIAC Fast Track Arbitration Rules 2018

phrase means all types of expedited procedures, which consists of the Fast Track Rules and the Emergency Arbitrator procedure<sup>55</sup>.

32. Hence, it is vital to interpret the arbitration clause to determine what the parties have intended it to mean.
  
33. Under Hong Kong law, the method of construing an arbitration clause is the same as that of a commercial contract<sup>56</sup>. This is done by ascertaining the parties' objective intentions as reasonable commercial men, at the time the contract was concluded<sup>57</sup>. In doing so, the court laid down a few factors to be taken into consideration, namely (i) the natural and ordinary meaning, (ii) the commercial purpose of the agreement, (iii) the parties' relationship and (iv) the relevant facts surrounding the commercial transaction so far as known to the parties<sup>58</sup>.
  
34. Hence, by looking at the relevant facts and background knowledge of the parties at the time of the contract, both parties were inexperienced in arbitration<sup>59</sup> and there was no discussion on whether the AIAC Arbitration Rules 2018 or Fast Track Rules should be applied<sup>60</sup>. The only discussion that both parties had was to use any type of expedited procedures available at the AIAC<sup>61</sup>.

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<sup>55</sup> Moot Problem, Terms of Reference, page 34, Article 4.3.2.1(a)

<sup>56</sup> *Gossip Daily Ltd v Next Media Magazines Ltd and Others* (2018) HKCFI 1952; HCA 305/2018, para 16

<sup>57</sup> *Ibid*

<sup>58</sup> *Ibid*

<sup>59</sup> Further Clarifications to the Moot Problem, page 2, para 4

<sup>60</sup> Clarifications to the Moot Problem, page 3, para 3

<sup>61</sup> *Ibid*



35. As such, this connotes that both parties did not intend to rely solely on the Fast Track Rules or the Emergency Arbitrator procedure, instead, both parties intended to rely on any of the aforementioned expedited procedures to solve any dispute.

36. Hence, since the Claimant had commenced the arbitral proceeding under the AIAC Arbitration Rules 2018<sup>62</sup>, the only expedited procedure available under this particular rule is the Emergency Arbitrator procedure. As a result, the Emergency Arbitrator was allowed to be appointed and to grant an interim award.

***B. The current Arbitral Tribunal does not have an implied power to vacate the Award on Interim Measures.***

37. Implied power can only come into existence if there is no express prohibition by any rule or law<sup>63</sup>.

38. The Claimant contends that the Arbitral Tribunal has the power to vacate the interim award issued by the Emergency Arbitrator under the AIAC Arbitration Rules 2018<sup>64</sup> and has requested as such<sup>65</sup>.

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<sup>62</sup> Moot Problem, Claimant's Commencement Request, page 1

<sup>63</sup> Margaret L. Moses, Inherent and Implied Powers of Arbitrators, Public Law & Legal Theory Research Paper No. 2014-015

<sup>64</sup> AIAC Arbitration Rules 2018, Schedule 3, para 15(b)

<sup>65</sup> Moot Problem, Procedural Order No.1, page 50, para 21

39. However, following the commentary<sup>66</sup> on the aforementioned provision<sup>67</sup>, an arbitral tribunal can only terminate an interim award granted by itself and certainly not an interim award issued by other arbitral tribunals.

40. Since the interim award was issued by the Emergency Arbitrator under the AIAC Arbitration Rules 2018<sup>68</sup>, and not by the current arbitral tribunal constituted under the Fast Track Rules, it is therefore a strong indication that this arbitral tribunal does not have an implied power to vacate the Award on Interim Measures.

*C. Alternatively, the Award on Interim Measures has since expired, hence, there is no need to vacate it.*

41. Under the AIAC Arbitration Rules 2018<sup>69</sup>, any order or award issued by an Emergency Arbitrator shall cease to be binding if an arbitral tribunal is not constituted within 90 days of such order or award.

42. Since the Award on Interim Measures was rendered by the Emergency Arbitrator on 15 February 2019<sup>70</sup> and there was no subsequent arbitral tribunal constituted within 90 days under the AIAC Arbitration Rules 2018, the interim award is as a result, deemed to have expired. Therefore, there is no need for this arbitral tribunal to vacate the interim award.

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<sup>66</sup> A commentary on The UNCITRAL Arbitration Rules by David D. Caron and Lee M. Caplan (2nd edition), page 526

<sup>67</sup> Arbitration Rules, *supra* note 64, Schedule 3, para 15(b)

<sup>68</sup> Moot Problem, Award on Interim Measures, page 40, para 7

<sup>69</sup> Arbitration Rules, *supra* note 64, Schedule 3, para 16(a)

<sup>70</sup> Moot Problem, Award on Interim Measures, page 36

**VI. THE *LEX ARBITRI* OF THIS DISPUTE IS GOVERNED BY HONG KONG LAW.**

43. Where the parties do not indicate an express choice of the law governing the arbitral procedure, it is presumed it follows the law of the seat<sup>71</sup>, which would be deemed as the law of the place of the arbitration unless stipulated otherwise by the parties.
44. Additionally, the concept that an arbitration is governed by the law of the place in which it is held, which is the ‘seat’ (or ‘forum’, or *locus arbitri*) of the arbitration, is well established in both the theory and practice of international arbitration<sup>72</sup>.
45. In our present dispute, the parties chose Hong Kong as the place of arbitration<sup>73</sup>. Therefore, Hong Kong is determined to be the seat of arbitration, and thus the law governing the arbitral proceedings, or the *lex arbitri* would be the laws of Hong Kong.

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<sup>71</sup> *Sulamérica*, *supra* note 48, para 26 and 29

<sup>72</sup> Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International, 2014), pages 1530–1531 ; Redfern and Hunter, *supra* note 1, page 171-172, para 3.53

<sup>73</sup> Moot Problem, Auction Terms and Conditions, page 19, clause 8.2

**VII. THE CURRENT ARBITRAL TRIBUNAL SHOULD NOT VACATE THE  
AWARD ON INTERIM MEASURES MADE BY THE EMERGENCY  
ARBITRATOR.**

46. Where the prerequisites to grant an interim award have been met by the Respondent (A), this indicates that the Award on Interim Measures was validly issued, and hence it should not be vacated.

A. *The prerequisites to grant the Award on Interim Measures were met under the lex arbitri.*

47. In order for an interim award to be granted, the Respondent must satisfy three prerequisites<sup>74</sup> – Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered (*i*), and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted (*ii*), and there is a reasonable possibility that the requesting party will succeed on the merits of the claim (*iii*).

i. *Monetary relief cannot adequately remedy the harm suffered by the Respondent*

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<sup>74</sup> Hong Kong Arbitration Ordinance 2011(Cap. 609), s.36

48. Following **California Red Ltd v Neway Karaoke Box Ltd**<sup>75</sup>, monetary damages would not be an adequate remedy if the amount of damages suffered by the applicant is not quantifiable<sup>76</sup>.
49. Hence, the Respondent will only be contractually entitled to a 10% fixed commission on any successful auctionable item<sup>77</sup>, and in our present dispute, it would be the Artwork.
50. However, there were ancient myths about anyone who completely shreds the Artwork would obtain good luck and fortune for the day and if it is shredded during the Chinese New Year (“CNY”) of the year of the Panda, then that abundance of luck and immense fortune are to last for the entire year rather than just for a day<sup>78</sup>.
51. As a result, there was constant and continuous demand from the market as evidenced *via* logs, texts and emails<sup>79</sup>, thereby causing the value of the Artwork to skyrocket to an astronomical amount<sup>80</sup>.
52. Therefore, monetary damages would not be an adequate remedy for the Respondent since it is impossible to quantify how much the Artwork could have been sold for and

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<sup>75</sup> *California Red Ltd v Neway Karaoke Box Ltd and Others* (2008) HKFCI 608; HCA 748/2008 (2008) HKFCI 608; HCA 748/2008

<sup>76</sup> *Ibid*, para 34-35

<sup>77</sup> Moot Problem, Request To Appoint An Emergency Arbitrator, page 24, para 3(d)

<sup>78</sup> Moot Problem, Request To Appoint An Emergency Arbitrator, page 24, para 5(a)

<sup>79</sup> Moot Problem, Award On Interim Measures, page 37, para 4(a)

<sup>80</sup> Moot Problem, Request To Appoint An Emergency Arbitrator, page 24, para 5(b)

the profit the Respondent could have made without reselling the Artwork during the CNY<sup>81</sup>.

*ii. The harm suffered by the Respondent substantially outweighs the harm suffered by the Claimant*

53. Here, the test involves weighing the harm suffered by the Respondent against that suffered by the Claimant. In so doing, the courts in **Music Advance Limited v The Incorporated Owners of Argyle**<sup>82</sup> mentioned that the courts will take whichever course appears to carry the lower risk of injustice if it should turn out that their decision is wrong.

54. The only loss, suffered by the Claimant if the interim award is granted in favour of the Respondent, would be the loss of the Artwork<sup>83</sup>.

55. Taking into consideration the fact that the Claimant had attached a value to the Artwork by bidding for it at HKD 2,650,000.00<sup>84</sup>, this thereby shows that they could easily be compensated by refunding them what they have paid for.

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<sup>81</sup> Moot Problem, Request To Appoint An Emergency Arbitrator, page 25, para 6

<sup>82</sup> *Music Advance Limited v The Incorporated Owners of Argyle Centre Phase I* (2010) 2 HKLRD 1041, HCA 2574/2002

<sup>83</sup> Moot Problem, Witness Statement of Mr Hari Sadhu, page 11, para 3

<sup>84</sup> Moot Problem, Witness Statement of Mr Hari Sadhu, page 13, para 12

56. However, as for the Respondent, there is a sense of urgency to sell the Artwork before the end of CNY, given the fact that the shredding of the Artwork occurred just before the CNY and there was an indication that it will continue to rip<sup>85</sup>.
57. Therefore, if the Respondent is prohibited from carrying out the sale of the Artwork before the end of CNY, and if it completely rips, the Respondent will lose its chance to sell it at such an astronomical amount as the Artwork would never be as valuable as it is now<sup>86</sup>.
58. The reason why it will never be as valuable as it is now, is due to the fact that the prospective buyers were only interested in the Artwork, provided it tore before the end of CNY – as it would bring them enormous fortune<sup>87</sup> – and not because of the Artwork itself.
59. As a result, if the Respondent is not allowed to sell the Artwork before the end of CNY, the Artwork may never be sold. This is because after CNY ends, the ‘enormous fortune’ gained by the tearing of the Artwork during CNY will never come to be and hence rendering no reasons for prospective buyers to purchase the Artwork after CNY.
60. Since there will be no prospective purchasers for the Artwork after CNY, the Respondent will then never be contractually entitled to the 10% commission. Furthermore, as there is a strong indication that the price of the Artwork had

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<sup>85</sup> Moot Problem, Request To Appoint An Emergency Arbitrator, page 24, para 5(b)

<sup>86</sup> *Ibid*

<sup>87</sup> Moot Problem, Award on Interim Measures, page 38, para 4(a)

skyrocketed, it thereby increases the 10% commission at a high rate too. Hence, even if the true value of Artwork or the 10% commission that the Respondent is entitled to is not quantifiable, the loss of the 10% commission is likely to be invariably higher than the HKD2.65 million that the Claimant will lose.

61. Therefore, the harm suffered by the Respondent substantially outweighs the harm suffered by the Claimant.

*iii. The Respondent has proven a reasonable possibility of success on the merits of the claim*

62. In the case of **Safe Kids in Daily Supervision v McNeill**<sup>88</sup>, the court held that the “reasonable possibility” requirement to grant an interim award was to be seen as akin to the “serious question to be tried” requirement for an interim injunction. The requirement for a “serious question to be tried” is derived from the landmark case on the granting of interim injunctions, **American Cynamide v Ethicon**<sup>89</sup>.

63. At this stage of the request, it is not part of the arbitral tribunal’s function to try to resolve conflicts of evidence, since they are matters to be dealt with at the trial<sup>90</sup>.  
Therefore, in looking at whether an interim award or injunction should be granted, the

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<sup>88</sup> *Safe Kids in Daily Supervision Ltd v McNeill* (2010) NZHC 605 (14 April 2010), para 30

<sup>89</sup> *American Cynamide v Ethicon Limited* (1975) UKHL 1, page 5, per Lord Diplock

<sup>90</sup> Hong Kong Civil Procedure 2006, at para.29/1/19



court will assess whether the applicant has any real prospect of succeeding using the material available to the court at the hearing of the application only<sup>91</sup>.

64. This position is similarly adopted in Hong Kong, where the courts interpret ‘likelihood of success’ to mean if there is a “serious question to be tried”<sup>92</sup> based on the cause of action.

65. In the present dispute, the Respondent submits there is a reasonable possibility of success on the merits of the claims based on **two** grounds:

65.1 **The parties did not agree for a time extension to complete the payment**

65.1.1. Mr. Gregory Wong does not have the ostensible authority to grant a valid payment extension as there was no clear or unequivocal representation<sup>93</sup> made on his authority.

65.1.2. Furthermore, the presence of the entire agreement clause<sup>94</sup> prevents any pre-contractual negotiations, namely the payment extension, from being effective<sup>95</sup>.

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<sup>91</sup> *American Cynamide*, *supra* note 89, page 5, per Lord Diplock

<sup>92</sup> *Chor Ki Kwong David v Lorea Solabarrieta Cheung* (2013) HKCFI 209; HCA 1870/2012

<sup>93</sup> *Akai Holdings*, *supra* note 4, para 120

<sup>94</sup> Moot Problem, Auction Terms and Conditions, page 20, clause 10

<sup>95</sup> *Inntrepreneur*, *supra* note 30, para 7

65.2     **The Claimant failed to perform all its obligations within the stipulated time**

65.2.1.    Since there was no valid payment extension, the standard deadline of 5 days remains. Hence, since the payment was made on 24 December 2018, it is past the 5 days. As a result, the Claimant had failed to perform its obligations within the 5 days. Therefore, the Claimant is not entitled to the possession of the Artwork.

66.    Therefore, based on the evidence available, the Respondent has shown a reasonable possibility of succeeding on the merits of their claim.

67.    For the reasons stated, the Respondent has fulfilled the prerequisites to grant the interim award, and therefore, the current arbitral tribunal should not vacate the Award on Interim Measures made by the Emergency Arbitrator.

**PRAYER FOR RELIEF**

For the foregoing reasons, the Respondent respectfully requests the Tribunal to declare that:

1. Respondent did not grant a valid payment extension;
2. The Claimant is not entitled to the possession of the Artwork;
3. The arbitral tribunal has no jurisdiction to vacate the Award on Interim Measures granted by the Emergency Arbitrator; and
4. The arbitral tribunal should not vacate the Award on Interim Measures granted by the Emergency Arbitrator.