

**14th LAWASIA International Moot Competition (International Rounds) - Hong Kong**

**Name of Tribunal: Kuala Lumpur Regional Centre For Arbitration**

**Year of the Competition: 2019**

**Name of the Case: Pracheen Kalakaar And Chui's**

**Title: Memorial for Respondent**

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### **Statement of Jurisdiction**

The Arbitral Tribunal constituted under the AIAC Fast Track Arbitration Rules 2018 has subject matter jurisdiction over this case pursuant to Article 8 of the Auction Terms and Conditions and Rule 7 of the Fast Track Arbitration Rules 2018.

Chui's, the Respondent entered into a Terms of Reference dated 19<sup>th</sup> February 2019, agreeing on the applicability of the Fast Track Arbitration Rules 2018.

The Respondent nominated the Second Arbitrator in the Terms of Reference dated 19<sup>th</sup> February 2019 and the appointment was confirmed on 20<sup>th</sup> February 2019.

The Respondent reserved its rights to comment on the constitution of the arbitral tribunal.

[*signed*]

Yishu Chooi

Partner

[CHOOI & CO]

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Representative of the Respondent

## **Questions Presented**

- I. Whether the Claimant is entitled to the possession of the Artwork?
- II. Whether the Respondent granted a valid payment extension?
- III. Whether the Arbitral Tribunal has the jurisdiction to vacate the Award on Interim Measures made by the emergency arbitrator?
- IV. Whether the Arbitral Tribunal shall vacate the Award on Interim Measures made by the emergency arbitrator?

### Statement of Facts

1. On 12 November 2018, Pracheen Kalakaar (**the “Claimant”**) received an invitation to attend Chui’s (**the “Respondent”**)’s open house and auction on 12 December 2018.
2. Mr. Hari Sadhu (**“Mr. Sadhu”**), the Claimant’s curator, was authorised to attend the Respondent’s open house and to exercise his proxy bid on behalf of the Claimant at the Auction.
3. On 12 December 2018, Mr. Sadhu entered the Respondent’s open house and was informed to direct all enquires to his designated sales consultant for the day, Mr. Gregory Wong (**“Mr. Wong”**).
4. The Claimant received a call from Mr. Sadhu who was at the Respondent’s open house, advising that Lot No. 58 at the auction was a rare artwork from the Shong Dynasty titled *The Bamboo and the Panda* (**the “Artwork”**).
5. On the auction day, at no point in time did Mr. Wong raise the issue of a payment extension with the Respondent following the auction of the Artwork.
6. The Claimant’s bid on the Artwork was successful and the Artwork was auctioned at the remarkable price of \$HKD2,650,000 (**the “Auction Price”**). Mr. Sadhu thereafter completed the necessary paperwork to effect the sale to the Claimant, and he also presented a cheque for the deposit sum of \$HKD530,000 (20% of the total Auction Price).
7. On 13 December 2018, a revised invoice in Indian Rupees was sent to the Claimant by the Respondent for the outstanding balance. A deadline for payment was not stated on this invoice.
8. On 20 December 2018, the Claimant transferred the balance outstanding on the Auction Price to the Respondent by cheque deposit.

9. On 24 December 2018, the Claimant returned to the Respondent's premises to collect the Artwork bearing the proof of payment for the balance of the Auction Price of the Artwork.
10. The Artwork unexpectedly tore approximately 80cm from the top-middle of the piece. This event occurred in the presence of at least 30 of the Respondent's employees and representatives of media, and the Claimant. The Claimant was then escorted out of the premises.
11. On the same day, the Claimant received notification from its bank that the transfer was successful.
12. On 26 December 2018, the Claimant attempted to enter the Respondent's premises to collect the Artwork. However, the Respondent's solicitor informed the Claimant that it had not remitted the outstanding balance of the Auction Price within the contractual timeframe and refused to transfer the Artwork to the Claimant, who has been unable to obtain delivery of the Artwork since.
13. On 2 January 2019, the Claimant submitted its Notice of Arbitration regarding the dispute over the Artwork.
14. On 1 February 2019, the Respondent requested the Director of the Asian International Arbitration Centre (formerly known as KLRCA) (**the "AIAC"**) to appoint an emergency arbitrator, pursuant to Rule 8 of the AIAC Arbitration Rules 2018 (**the "Arbitration Rules"**), to rule on its application for interim measures.
15. On 2 February 2019, an emergency arbitrator was appointed.
16. In Procedural Order No.1 on 4 February 2019, the emergency arbitrator ordered that the Interim Measures application was to be heard only via oral submissions.

17. On 11 February 2019, the hearing for such relief occurred at the AIAC with both the Claimant's and Respondent's Representatives present.
18. On 15 February 2019, the emergency arbitrator found in favour of the Respondent and ordered the Interim Measures (**the "Interim Measures"**) accordingly. The Respondent then arranged for the sale. Although the payment was successful, as of 18 February 2019, the prospective buyer hesitated to collect the Artwork.
19. On 19 February 2019, the parties agreed that pursuant to Article 8 of the Auction Terms and Conditions (**the "Agreement"**), all disputes shall be resolved by a panel of three arbitrators pursuant to the AIAC Fast Track Arbitration Rules 2018 (**the "Fast Track Rules"**), hence agreed the Terms of Reference dated 19 February 2019.

## **Summary of Pleadings**

The Respondent hereby submits its pleadings to address the following issues:

1. Whether the Respondent granted a valid extension of time for payment
  - a. The agency of Mr. Wong.
  - b. Ratification of the oral agreement.
2. Whether the Claimant is entitled to the title, risk and possession of the Artwork
3. Whether the Arbitral Tribunal has the jurisdiction to vacate the Interim Measures
  - a. The jurisdiction of the emergency arbitrator.
  - b. The jurisdiction of the Arbitral Tribunal.
4. Whether the Arbitral Tribunal shall vacate the Interim Measures
  - a. Quantification of the Respondent's damages.
  - b. The Respondent's likelihood of success on the merits.

## Pleadings

1. The Respondent submits that (I) the Respondent did not grant a valid payment extension and that (II) since the payment was not duly made by the Claimant to the Respondent, the Claimant is not entitled to the title, risk and possession of the Artwork. Furthermore, it is submitted that (III) this Arbitral Tribunal did not have the jurisdiction to vacate the Interim Measures on the grounds that it was granted pursuant to the Agreement and the Arbitration Rules. Furthermore, (IV) it is submitted that the substantive prerequisites to issue the Interim Measures were satisfied according to the *lex arbitri*.

### **ISSUE I: Whether the Respondent granted a valid extension of time for payment**

2. The Respondent submits that a valid payment extension was not granted by him on the following grounds:
  - a. The Respondent never made any representation to the Claimant that Mr. Wong had the authority to extend the Claimant's request to extend the payment deadline. The Claimant was aware of Mr. Wong's capacity and was further notified by Mr. Wong that he lacked the authority. (**"Agency Issue"**)
  - b. With regard to the ratification, the Respondent did not have sufficient knowledge to ratify the oral agreement made between the Mr. Wong and Mr. Sadhu. (**"Ratification Issue"**)

#### *(a) Agency Issue*

3. The Respondent submits that Mr. Wong was not an agent who was ostensibly authorized to extend the payment deadline per Mr. Sadhu's request.

4. It is understood that a relationship of agency arises when a principal and an agent confer the authority by a principal on an agent that is implied or expressed either from conduct or situation of the parties.<sup>1</sup> The following categories should be applied in order for the third party to bind the principal on the basis of an agent's apparent or ostensible authority:<sup>2</sup>
- a. **The representation must be made by words or conduct.** Such representation can be express, or it may be implied from the surrounding circumstances<sup>3</sup>;
  - b. **The representation must be made to the third party<sup>4</sup>;**
  - c. **The third party must be induced by representation to enter into the contract<sup>5</sup>.** Reliance will normally be presumed where the principle has held up the alleged agent as having authority and the third party has entered into a contract through the alleged agent<sup>6</sup>. **The principal will not be liable if the third party chose not to investigate the agent's authority if the opportunity arose<sup>7</sup>, or was put on notice by the specifics of the transactions, or in fact knew that the agent was acting outside the boundaries of power;**
  - d. If the doctrine applies, **the principal would appear not to be able to sue on the contract formed by the act of the agent unless he ratifies it<sup>8</sup>.** (emphasis added)
5. In the present case, the Respondent never made any representation to the Claimant or Mr. Wong that Mr. Wong had the authority to extend the payment deadline. Hence, it is

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<sup>1</sup> Peter W. & Francis R., William B., *Bowstead and Reynolds on Agency*, (Sweet & Maxwell, Twenty First Edition, 2018) at para 2-001.

<sup>2</sup> Beale, H., *Chitty on Contracts*, (Sweet and Maxwell, Fourth Edition 2014) at para 1-052.

<sup>3</sup> *Wang Yip Hong (a firm) v King Wah Meat Co* [1963] H.K.D.C.L.R. 197.

<sup>4</sup> *Entores Co Ltd v Postwell Ltd* (unreported, HCA 8375/1994).

<sup>5</sup> *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480.

<sup>6</sup> *Thanakharn kasihorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] 13 HKCFAR 479 at 75.

<sup>7</sup> *Australian Bank of Commerce v Perel* [1926] A.C. 737.

<sup>8</sup> Beale, H., *Chitty on Contracts*, (Sweet and Maxwell, Fourth Edition 2014) at para 1-05.

submitted that Mr. Wong did not have ostensible authority to make an oral agreement with Mr. Sadhu according to the following facts:

- a. On 12 December 2018, most of the members of the Respondent's Sales Team were either on sick leave or annual leave. Accordingly, certain members of the Respondent's Finance Team, including Mr. Wong were appointed to work as sales consultant at the same time<sup>9</sup>.
- b. On 12 December 2018, prior to the commencement of the open house, the Head Auctioneer, Mr. Frederick Bartholomew ("**Mr. Frederick**") specifically instructed the members of the Finance Team that they were solely to act as sales consultants and field any and all queries relating to the auctionable items on display<sup>10</sup>.
- c. Subsequently, Mr. Frederick further instructed four members from the Finance Team including Mr. Wong to adhere to all current approval processes and were not permitted to bypass standard procedures<sup>11</sup>.
- d. On 12 December 2018, after completing the registration, the Respondent's receptionist introduced the Claimant to the sales consultant of the day, Mr. Wong whom he could direct any and all sales related queries<sup>12</sup>.
- e. Mr. Sadhu, after being convinced of the Artwork's authenticity, with the approval of the Claimant, decided to raise the new minimum bid from HKD2,000,000 to HKD3,000,000<sup>13</sup>. However, the Claimant needed additional

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<sup>9</sup> Witness Statement of Mr. Wong, para 5.

<sup>10</sup> Witness Statement of Mr. Wong, para 6.

<sup>11</sup> Witness Statement of Mr. Wong, para 6.

<sup>12</sup> Witness Statement of Mr. Sadhu, para 6.

<sup>13</sup> Witness Statement of Mr. Sadhu, para 9.

time to obtain relevant financing from the bank and initially tried to locate the Head Auctioneer Mr. Frederick to vary the standard procedures of payment<sup>14</sup>.

- f. Albeit, the Claimant could not locate Mr. Frederick but found Mr. Wong to negotiate the extension of the payment deadline<sup>15</sup>.
- g. During and after the above conversation, Mr. Wong was aware of the process for any request that bypassed the standard procedure. Approval for payment had to be recorded in the sale documents pertaining to the Artwork and signatures of the Head Auctioneer, Head of Sales, and the Head of Finance. In the absence of the prerequisites, an extension of time is never granted to any prospective buyer of an auctionable item<sup>16</sup>.
- h. On 12 December 2018, the Claimant was successful in his bidding and deposited 20% of the total amount. Additionally, the Claimant notified the Sales Desk about his preference of having the invoice to be converted into Indian Rupees and signed the necessary paperwork<sup>17</sup>.
- i. On 13 December 2018, the Claimant received the revised invoice for the balance of the Auction Price in Indian Rupees and noticed that for unknown reason, the revised invoice did not specify a due date for payment. However, the Claimant took no further action<sup>18</sup>.
- j. Generally, currency conversions are not granted by the Auction House. However, if it is granted, an amended invoice is issued to reflect the currency conversion.

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<sup>14</sup> Witness Statement of Mr. Sadhu, para 10.

<sup>15</sup> Witness Statement of Mr. Sadhu, para 11.

<sup>16</sup> Award on Interim Measures, para 12.

<sup>17</sup> Witness Statement of Mr. Sadhu, para 15.

<sup>18</sup> Witness Statement of Mr. Sadhu, para 16.

Unless otherwise specified, the payment deadline remains unchanged and the field is left blank<sup>19</sup>.

6. It is further submitted that Mr. Sadhu did not rely on the representation of Mr. Wong as he was notified of Mr. Wong's capacity as a sales consultant on a few occasions. Additionally, Mr. Sadhu did not try to investigate the authority of Mr. Wong even when the revised invoice for the Auction Price balance did not specify a due date, further suggesting that the Respondent should not be held liable.

*(b) Ratification Issue*

7. The Respondent submits that he has not sufficient knowledge to ratify the oral agreement made between Mr. Wong and Mr. Sadhu.
8. Generally, where an unauthorized act is done by an agent in the name of another person, that person may, by ratifying it through words or conduct, make it as valid and effectual as though it had been done with his authority. The scope of the ratification rule covers situations where the individual doing the act was an agent of a principal who has exceeded his authority, or where the individual concerned, simply had no authority to act<sup>20</sup>.
9. In principle, under *Suncorp Insurance and Finance v Milano Assicurazioni Spa*<sup>21</sup>, at the time of ratification, an individual should have the full knowledge of all the material circumstances in which the act was done. Unless he intended to ratify the act and take the risk of whatever the circumstances may have been<sup>22</sup>.

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<sup>19</sup> Clarifications to the Moot Problem, para 9.

<sup>20</sup> *Wilson v Tunman and Fretson* [1843] 6 M. & G. 236 at 242.

<sup>21</sup> [1983] 2, as per Lloyd's Rep.225.

<sup>22</sup> *Marsh v Joseph* [1897] 1 Ch. 213.

10. In the present case, the Respondent did not have the full knowledge of the Claimant's updated arrangement of payment as this was not the standard procedure at the Auction House and like the conversion of the currency from HKD to Indian Rupees, the request for extending the deadline for the payment of balance should have gone through the necessary paperwork. Under *Sea Emerald v Prominvestbank*<sup>23</sup>, it is imperative that there is a unilateral manifestation of will to adopt an unauthorized act.
11. Additionally, it has been as put forth by Lord Hobhouse in *Forman & Co Pty Ltd v The Liddesdale*<sup>24</sup> that if a principal is simply resuming possession of his own property, his action shall not amount to ratification. Therefore, if a respondent had no alternative but to receive the transaction, this act does not amount to ratification of an oral agreement as the supposed principal did not assent to the transaction<sup>25</sup>.
12. In the present case, the Respondent had no reason to refuse the transaction from the Claimant as he was not aware of the Claimant's and Mr. Wong's oral agreement. The Respondent's act of conduct by standing still at the time the invoices were raised does not amount to ratification of Mr. Wong's unauthorized action as the Respondent was simply running his business as usual.
13. The Respondent therefore submits that he did not ratify the unauthorized act of Mr. Wong as the elements to invoke ratification doctrine were not met.

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<sup>23</sup> [2008] EWHC 1979, per Andrew Smith J.

<sup>24</sup> [1900] A.C. 190.

<sup>25</sup> *Freeman v Rosher* (1849) 13 Q.B. 780.

## **ISSUE II: Whether the Claimant is entitled to the title, risk and possession of the Artwork**

14. The Respondent submits that the Claimant is not entitled to the title, risk, and possession of the Artwork as the payment was not duly made.
15. On 12 December 2018, the conversation between Mr. Wong and Mr. Sadhu <sup>26</sup> did not amount to an oral agreement on the basis that:
  - a. Article 10 of the Agreement<sup>27</sup> had clearly spelled out that the agreement supersedes all other agreements, both written or oral;
  - b. Extending the payment deadline for bidding was never a standard procedure for the Respondent's Auction House<sup>28</sup>;
  - c. Mr. Wong was aware of the fact that the procedure for any request that bypassed the standard procedure must have the approval recorded in the sale documents pertaining to the Artwork and signatures of the Head Auctioneer, Head of Sales, and the Head of Finance. In the absence of these prerequisites, an extension of time is never granted to any prospective buyer of an auctionable item<sup>29</sup>, thus affirming that Mr. Wong knew about his capacity as a sales consultant and as a member of the Financial Team.
  - d. Additionally, on 12 December 2018, the Claimant was notified by Mr. Wong and the Respondent's receptionist regarding Mr. Wong's role and capacity at the Open House<sup>30</sup>.
  - e. Both the Respondent and Mr. Wong did not authorize the Claimant for the payment deadline extension.

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<sup>26</sup> Witness Statement of Mr. Sadhu, paras 11 and 14.

<sup>27</sup> The Agreement, Article 10.

<sup>28</sup> Award on Interim Measures, para 13.

<sup>29</sup> Award on Interim Measures, para 12.

<sup>30</sup> Witness Statement of Mr. Sadhu, para 6; Award on Interim Measures, para 18.

16. Pursuant to the Agreement<sup>31</sup>, the Claimant should have paid the balance of the Artwork within 5 working days (i.e. 18 December 2018). However, it was paid outside the timeframe.
17. Accordingly, the Respondent submits that the title, risk and possession of the Artwork never passed to the Claimant.

**ISSUE III: Whether the Arbitral Tribunal has the jurisdiction to vacate the Interim Measures**

18. The Respondent submits that the Arbitral Tribunal does not have the jurisdiction to vacate the Interim Measures on the grounds that (a) the emergency arbitrator has the jurisdiction to order the Interim Measures, and (b) the Arbitral Tribunal does not have the jurisdiction to rule on the Interim Measures.

*(a) The Jurisdiction of the emergency arbitrator*

19. The arbitration was initiated according to the arbitration clause in Article 8 of the Agreement which states that<sup>32</sup>:

*“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.”*

20. In the present case, the Respondent submits that *“the expedited procedures framework”* refers to an arbitration conducted under the Arbitration Rules since that was the intention of

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<sup>31</sup> The Agreement, Article 1.2.

<sup>32</sup> The Agreement, Article 8.1.

the parties to arbitrate under the Arbitration Rules. The principle that a contextual approach must be taken to the interpretation of contracts was set out by Lord Hoffmann (who now serves as the non-permanent judge of the Hong Kong Court of Final Appeal) in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)*<sup>33</sup>, which is as follows:

*“interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract ... words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition.”*<sup>34</sup>

21. By applying such principle, it is concluded that *“the expedited procedures framework available at the Asian International Arbitration Centre”* would convey to a reasonable person that it refers to all available arbitration rules provided by the AIAC, including arbitration under the Arbitration Rules and the Fast Track Rules. If the Respondent specifically applied only one of the rules, the arbitration clause would have been drafted differently.
22. Further, on 2 January 2019, the arbitration was initially commenced under the Arbitration Rules.<sup>35</sup> This indicated that the parties had intention to arbitrate under the Arbitration Rules rather than the Fast Track Rules. It is also reasonably inferred that the parties refer *“the expedited procedures framework”* to an arbitration conducted according to the Arbitration Rules. The parties only intended to arbitrate under the Fast Track Rules not until they entered into the Terms of Reference dated 19 February 2019<sup>36</sup>.

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<sup>33</sup> [1998] 1 W.L.R. 896.

<sup>34</sup> [1998] 1 W.L.R. 896, at 912-913.

<sup>35</sup> Procedural Order No.1, para 4.

<sup>36</sup> Procedural Order No.1, para 4.

23. On 1 February 2019, the Respondent requested for the appointment of an emergency arbitrator to rule on the Interim Measures application.<sup>37</sup> On 2 February 2019, the Director of the AIAC appointed an emergency arbitrator.<sup>38</sup> On 11 February 2019, the hearing for such relief took place at the AIAC with both the Claimant’s and Respondent’s Representatives present.<sup>39</sup> Eventually, the Claimant had not filed any challenge application upon the appointment of emergency arbitrator.<sup>40</sup> Pursuant to Section 8 of Schedule 3 of the Arbitration Rules, it is clearly stated that<sup>41</sup>:

*“In the event there is any challenge to the appointment of the emergency arbitrator, such challenge application must be made within one day of the notification by the AIAC to the Parties of the appointment of the emergency arbitrator or the date on which the relevant circumstances were disclosed.”*

24. Accordingly, the Respondent submits that *“the expedited procedures framework”* refers to an arbitration conducted under the Arbitration Rules. Section 11 of Schedule 3 of the Arbitration Rules clearly states that<sup>42</sup>:

*“The emergency arbitrator shall have the power to order or award any interim measures that the emergency arbitrator deems necessary. The emergency arbitrator shall give reasons for the emergency arbitrator’s decision in writing.”*

25. Therefore, the Respondent submits that the parties are legally bound by the Interim Measures on the grounds that the parties intended to arbitrate under the Arbitration Rules.

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<sup>37</sup> Award on Interim Measures, para 1.

<sup>38</sup> Rule 4(6) and Section 5 of Schedule 2 of the Arbitration Rules.

<sup>39</sup> Award on Interim Measures, para 3.

<sup>40</sup> Clarification to the Moot Problem, para 27.

<sup>41</sup> Section 8 of Schedule 3 of the Arbitration Rules.

<sup>42</sup> Section 11 of Schedule 3 of the Arbitration Rules.

*(b) The Jurisdiction of the Arbitral Tribunal*

26. The Respondent submits that the Arbitral Tribunal does not have the jurisdiction on the grounds that the Arbitral Tribunal was constituted under the Fast Track Rules instead of being constituted under the Arbitration Rules.
27. In the present case, the Respondent submits that the Fast Track Rules do not provide the Arbitral Tribunal any power to rule on the Interim Measures made under the Arbitration Rules. Therefore, there is an absence of authority for the Arbitral Tribunal to vacate the Interim Measures under the circumstances.
28. Instead, the power to rule on the Interim Measures is given to an Arbitral Tribunal constituted under the Arbitration Rules. As provided in Section 15 of Schedule 3 of the Arbitration Rules, the Interim Measures will only cease to be binding under the following circumstances<sup>43</sup>:

*“(a) if the arbitral tribunal is not constituted within 90 days of such order or award;*

*(b) when the arbitral tribunal makes a final award; or*

*(c) if the claim is withdrawn.”*

29. Therefore, the Respondent submits that the Arbitral Tribunal does not have the jurisdiction to rule on the Interim Measures since they are created by different set of rules.
30. Since (a) the emergency arbitrator has the jurisdiction to order the Interim Measures, and (b) the Arbitral Tribunal does not have the power to rule on its jurisdiction, the Respondent submits that the Arbitral Tribunal does not have the jurisdiction to vacate the Interim Measures made by the emergency arbitrator.

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<sup>43</sup> Section 15 of Schedule 3 of the Arbitration Rules.

#### **ISSUE IV: Whether the Arbitral Tribunal shall vacate the Interim Measures**

31. The Claimant submits that the Arbitral Tribunal shall not vacate the Interim Measures, on the grounds that (a) the Respondent's damages can only be ascertained through an auction and (b) the Respondent is able to prove a likelihood of success on the merits.
32. The two conditions for granting interim measures are set out in Article 26(3) of the Arbitration Rules as follows<sup>44</sup>:

*“(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, 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; and*

*(b) There is a reasonable possibility that the requesting Party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.”*

33. The two conditions of granting interim measures in arbitration are the same as the court in common law jurisdictions granting an interlocutory injunction.<sup>45</sup>
34. The two conditions of granting an interlocutory injunction was set out in the case *American Cyanamid Co v Ethicom Ltd*<sup>46</sup>. The requirements are: (i) the loss can be adequately compensated by damages and (ii) that the balance of convenience lies in favour of granting an injunction.

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<sup>44</sup> Article 26(3) of the Arbitration Rules.

<sup>45</sup> Howard, M. H. & Joseph, E. N., *A Guide to The Uncitral Model Law on International Arbitration*, (Kluwer Law International, 1995) at p.169-170.

<sup>46</sup> [1975] AC 396.

*(a) The Respondent's Damages Can Only Be Ascertained through an Auction*

35. The Respondent submits that the Respondent's damages can only be ascertained through an auction since the sale by auction is the only way to determine the highest value of the Artwork.

36. The application of whether the damages are quantifiable is demonstrated in the of *MGA Entertainment Ltd v. Linwell Industries Ltd* by Judge Reyes follows<sup>47</sup>:

*"...on the basis of its income from such trade, why would the Defendant be unable to compensate the Plaintiff for any quantifiable damages... I conclude then that the Plaintiff has failed to establish the 1st limb of the American Cyanamid balance of convenience test and an injunction should be refused."*

37. Quantifiable damages refers to damages that compensate the party for quantifiable monetary losses such as the contract amount and the cost to repair the damaged property (direct losses) and loss of earnings (consequential damages).<sup>48</sup> It has to be distinguished from general damages, for which there is no exact dollar value to the respondent's losses.

38. In the present case, the Respondent's damages are not quantifiable without sale by auction as of the following circumstances:

- a. The Respondent is a successful rare items auction house based in Hong Kong. It is in the business of providing a marketplace for sellers of rare artefacts to exchange their valuables for a monetary sum.<sup>49</sup>

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<sup>47</sup> [2004] HKCFI 58 at 49.

<sup>48</sup> *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518.

<sup>49</sup> Request to Appoint an Emergency Arbitrator, para 3(a).

- b. The value of the Artwork increased significantly from the Auction Price at the time prior to the Chinese New Year.<sup>50</sup>
  - c. Per the Respondent's agreement with the Artwork's owner, it must be sold via auction, and it is the only way to determine the highest value of an item.<sup>51</sup>
  - d. The Respondent's oral argument showed that there was a clear necessity for it to sell the Artwork via auction before the end of Chinese New Year.<sup>52</sup>
39. It is the Respondent's business and duty to sell the items through an auction. Only receiving calls and offers from buyers is not enough to determine the highest possible value of an auction item, otherwise, there is no reason to hold an auction.
40. There was a constant and continuous demand for the Artwork to be relisted in the Auction which showed that there was a keen competition between the prospective buyers. The Respondent's auction system would be the only way to quantify the Artwork's true value in which the prospective buyers would be able to compete by placing the highest bid.
41. Therefore, since auction is the only way to determine the highest value of the Artwork, the Respondent's damages can only be ascertained through an auction.

*(b) The Likelihood of Success on the Merits*

42. The Respondent submits that the Respondent has a reasonable possibility of success on the merits of its claim on the ground that the Claimant failed to execute its obligations under the Agreement.

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<sup>50</sup> Request to Appoint an Emergency Arbitrator, para 5(b).

<sup>51</sup> Request to Appoint an Emergency Arbitrator, para 6.

<sup>52</sup> Witness Statement of Mr. Gregory Wong, para. 7.

43. In general, the standard was laid down in *American Cyanamid Co. v Ethicon Ltd*<sup>53</sup>, i.e. there must be a serious issue to be tried.
44. There is no difference between the “reasonable possibility to succeed”<sup>54</sup> and the usual interim injunction test of serious issues to be tried.<sup>55</sup>
45. Although the test of a serious issue to be tried is not a high evidential hurdle<sup>56</sup>, it is important for the Respondent to show evidence about every element of its cause of action. According to the serious issue to be tried test, the Respondent provided evidence that the Claimant breached the Agreement and argument to show a reasonable possibility to succeed in its case. Therefore, the Respondent can prove a likelihood of success on the merits.
46. In the present case, the Respondent submits that the Claimant had breached the Agreement out of the following circumstances:
- a. The Claimant paid a 20% deposit of the Auction Price right after being successful in his bid.<sup>57</sup>
  - b. The bank transfer of the balance of the Auction Price was successful on 24 December 2018, which is not within the contractual timeframe, i.e. five (5) working days.<sup>58</sup>
  - c. Title, risk and possession in the Artwork will not pass to the Claimant until clearance of the Auction Price is received by the Auction House.<sup>59</sup>
  - d. There is no extension of the payment granted by the Mr. Wong, if he did, which is denied, he had no such authority to alter the Agreement.<sup>60</sup>

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<sup>53</sup> [1975] AC 396.

<sup>54</sup> Article 26(3)(b) of the Arbitration Rules.

<sup>55</sup> *Safe Kids in Daily Supervision Limited v McNeil* [2010] NZHC 605.

<sup>56</sup> [1975] AC 396.

<sup>57</sup> Notice of Arbitration, para 14.

<sup>58</sup> Notice of Arbitration, para 19.

<sup>59</sup> The Agreement, paras 2.2 and 2.3.

<sup>60</sup> Witness Statement of Mr. Sadhu, para 11.

47. Accordingly, on the grounds that (a) the Respondent's damages can only be ascertained through an auction and (b) the Respondent has a reasonable possibility of success on the merits of its claim, the Arbitral Tribunal shall not vacate the Interim Measures made by the emergency arbitrator.

## Relief Sought

48. As a result, the Respondent respectfully requests the Arbitral Tribunal to issue an award:

- (a) declaring that the Claimant breached his contractual obligations not remitting the outstanding balance of the Auction Price of the Artwork according to the Agreement;
- (b) declaring that the Respondent is the rightful possessor of the Artwork;
- (c) declaring that the substantive prerequisites to issue the Interim Measures were satisfied according to the *lex arbitri* by the emergency arbitrator and that this Arbitral Tribunal should not vacate the Interim Award; and
- (d) ordering the Claimant to pay all arbitration costs, including Respondent's Representative's costs and expenses.

Respectfully submitted,

[*signed*]

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Partner

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