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# 14<sup>th</sup> **LAWASIA** International Moot

## CLARIFICATIONS TO THE MOOT PROBLEM

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Organiser of the LAWASIA International Moot Competition

## CLARIFICATIONS TO THE MOOT PROBLEM

- (a) Where questions have neither been answered nor recorded in these Clarifications, it should be assumed that they are immaterial, the omission is intentional or that the resolution of the issue is a matter for the Parties to determine by reference to the law and inferences to the facts.
- (b) The Parties are reminded to discuss only the procedural and substantive issues indicated under Paragraph 22 of Procedural Order No. 1 in their written and oral submissions. No further questions relating to the procedural and substantive should be addressed at this stage of proceedings.

### **Formatting Clarification and Amendments**

1. There is a typographical error in the Table of Contents where Claimant Exhibit 1 is for Witness Statement of Mr. Hari Sadhu and Claimant Exhibit 2 is for Respondent's Auction Terms and Condition.
2. There is a typographical error in Paragraph 11 of the Notice of Arbitration, where it should be "\$HKD3,000,000" instead of "\$HKD3,000,0000".
3. There is a correction in Paragraph 5 of the Witness Statement of Hari Sadhu where the date Mr. Sadhu left India to Hong Kong should be 12<sup>th</sup> December 2018 and not 10<sup>th</sup> November 2018.
4. There is a correction in Paragraph 3(d) of the Request To Appoint An Emergency Arbitrator where "the Auction House" should be replaced with "the Seller".

5. Paragraph 3.3.3. of the Terms of Reference is to be replaced with the following:-  
“3.3.3. Mr. Wong notified Mr. Sadhu that a payment extension was not a standard procedure but the issue could be further discussed if the Claimant’s bid at the auction is successful.”
6. In Paragraph 2 of the Award Of Interim Measures, “Prof. Theodore Gasly” should be replaced with “Mr. E”.
7. There is a typographical error in Procedural Order No. 1 at Paragraph 21 where the order made by the Emergency Arbitrator should be dated 15<sup>th</sup> February 2019.
8. The page numbers of the Moot Problem has been amended to make it easier for the preparation and the marking of the Memorials. An amended Moot Problem incorporating the changes mentioned above as well as the fresh pagination will be made available on the Moot website. Kindly note that the page numbers in the final version of the Moot Problem that will appear in the Moot Handbook for the Oral Rounds may be different.

#### **Clarifications to the questions asked**

1. **Was the Claimant’s cheque for 20% of the total Auction Price cleared on 24<sup>th</sup> December 2018? Is the statement “*the cheque for the balance of the Auction Price had successfully cleared*” in the Witness Statement of Mr. Hari Sadhu conclusive evidence that the payment was in fact made on such date?**

Yes, the cheque was cleared on 24<sup>th</sup> December 2018 and the statement “*the cheque for the balance of the Auction Price had successfully cleared*” is conclusive evidence that the payment was transferred into the Respondent’s account on that date.

**2. What was the date of Chinese New Year?**

The Chinese New Year of the Panda lasts from 5<sup>th</sup> to 20<sup>th</sup> February 2019.

**3. Did parties have any prior discussion or negotiation before the emergency award was issued on whether AIAC Arbitration Standard Rules or AIAC Arbitration Fast Track Rules will be applied in the arbitral proceeding?**

No, there was no discussion apart from the need to use a framework that will ensure the expedited resolution of disputes (if any).

**4. What is the current status of the Artwork? How much was the price of the Artwork sold in the second auction? What was the price range of the bids made during such auction?**

The Artwork was sold following the Emergency Arbitrator's Award. It was sold at an undisclosed amount in a private auction. However, the Claimant claims that an insider confirmed the Artwork sold for fifteen times the amount of the original Auction Price.

**5. Whether the Respondent sent a notification to the Claimant, or asked for the Claimant's consent in any form, prior to the application for the Interim Measures in the arbitral proceedings?**

There is no dispute as to the proper service of the Request to Appoint an Emergency Arbitrator on the AIAC and the Claimant (Paragraph 3 of Schedule 3 of the AIAC Arbitration Rules 2018). The Request to Appoint an Emergency Arbitrator contains the Respondent's application to rule on its interim measure request.

**6. What was the cause of the tear of the Artwork? Was a study carried out by any party to ascertain this fact?**

The tear of the Artwork was caused by unknown factors. The Seller of the Artwork sought the services of Mr. Guillaume Beauchamp, a conservator-restorer, who determined that no foul play caused the tear of the Artwork. The only possible explanation Mr. Beauchamp could provide was that the painting had succumbed to wear and tear, or alternatively, that the tear in the painting was an “act of God”.

**7. Pursuant to Paragraph 1.4 of the Auction Terms and Conditions, when and how did the Seller exercise its discretion to re-list the “*the Bamboo and the Panda*”?**

On 20<sup>th</sup> December 2018, the Respondent contacted the Seller and notified it that the balance auction price for Lot No. 58 was yet to be received. The Seller verbally advised the Claimant that written instructions regarding the re-listing of Lot No. 58 would be sent across shortly. The Seller’s written instructions to re-list “*the Bamboo and the Panda*” was received by the Respondent on 24<sup>th</sup> December 2018.

**8. Aside from “Lot Number(s)”, were the spaces in Annexure A to the Auction Terms and Conditions (Cl. Exhibit. 2) deliberately left blank?**

Yes, they were.

**9. Was the payment deadline in the invoice deliberately left blank? Is it a common practice of the Respondent to omit the payment deadline in previous transactions, and to enter a new deadline on the revised invoice in cases of payment extension?**

Currency conversions are not generally granted by the Auction House. In the event a currency conversion is granted, an amended invoice is issued to the Purchaser. However, where an invoice is amended to reflect the currency conversion, the system does not permit the revision of the payment deadline hence this field is left blank in revised invoices. If a currency conversion request is granted, unless otherwise specified, it means that the initial payment deadline remains unchanged.

**10. What is the relationship between Mr. Wong and the Claimant?**

Mr. Wong and Mr. Sadhu were a former acquaintance. Mr. Wong was the Claimant's designated sales consultant when Mr. Wong was still at Scotties' – another auction house located in Cape Town, South Africa. At that time, Mr. Wong handed over his business card to Mr. Sadhu since he was the point of contact to negotiate the payment and delivery terms of auction items.

**11. Paragraph 8 of the Notice of Arbitration provides contact information of Claimant, with an attention to Gopal Singh. Who is Gopal Singh to Claimant?**

Mr. Gopal Singh is the Chief Executive Officer of Pracheen Kalakaar.

**12. Page 4 provides the contact information of Respondent, with an attention to Mrs. Jason Chooi. Who is Mrs. Jason Chooi to Respondent?**

Mrs. Jason Chooi is the Head of Legal Department of Chui's.

**13. What is the job-scope of sales consultant on the auction day?**

Job description of a sales consultant varies from one auction house to another. In Chui's, however, sales consultants are the frontline of the company. Their task ranges from recording amounts of final bids for merchandise at auction sales, receiving money from final bidders at auctions, locating lot and item number of articles up for bidding on record sheets, and receiving deposit money or full payment from final bidders.

**14. What does the date of 22<sup>nd</sup> May 2019 indicate in Mr. Presiding Arbitrator's letter?**

22<sup>nd</sup> May 2019 is the date of constitution of the tribunal pursuant to the AIAC Fast Track Arbitration Rules 2018.

**15. Pursuant to Article 4.2.2.1 of the Terms of Reference, the Respondent said that the extension of time must be done in writing approved by three signatories, does the Claimant aware of this condition? Is it included under the terms and condition?**

No, this requirement is not included under the Auction Terms & Conditions. This is an internal practice of the Respondent and a practice that the Claimant would be well aware of as a similar procedure is followed in many other Auction Houses in the Asia-Pacific region.

**16. Pursuant to Paragraph 16 of the Notice of Arbitration, what does the presentation of the proof of payment for the balance of the Auction Price of the Artwork means? Is it after the notice from the bank stated that the payment was successful or only the proof that Claimant had paid?**

The term “proof of payment” refers to a party’s confirmation that it has undertaken the necessary steps to remit a requisite payment. The “proof” may be in the form of an online transaction confirmation, a photocopy of a cheque, a bank cheque deposit slip, or other suitable forms of evidence.

**17. Pursuant to Paragraph 17 of the Notice of Arbitration, was the Artwork protected in the air tight glass casing during that time?**

Yes, the Artwork was in the air-tight glass casing at the time the Artwork tore.

**18. Pursuant to Paragraph 8 of the Cl. Exhibit 1, Mr. Hari Sadhu’s Witness Statement, what kind of further inspection made by Mr. Sadhu towards the Artwork?**

Mr. Sadhu only undertook a visual inspection of the Artwork as patrons of the Auction House are not allowed to touch any rare items unless and until they become the rightful owner of same.

**19. Pursuant to Paragraph 18 of the Cl. Exhibit. 1, Mr. Hari Sadhu's Witness Statement, what was the response from the Respondent's Finance Team regarding the "clearance of the cheque"?**

Whilst Mr. Kalakaar, Mr. Sadhu, and Mr. Cui were observing and discussing Lot No. 58, Mr. Cui was notified by the Respondent's Finance Team via email, that the Claimant's cheque for the balance auction price of Lot No. 58 was awaiting clearance and that it should have cleared by the end of that day.

**20. Pursuant to the internal policy and regulations of the Respondent, does the term "business development activities" provided in Paragraph 1 of Mr. Gregory Wong's Witness Statement, include events such as the Respondent's open house and auction on 12<sup>th</sup> December 2018?**

With regard to the business development activity of the Open House, Mr. Gregory Wong is heavily involved in marketing side of the Open House. In fact, he is the person in charge to disseminate the invitation for the Open House, which the Claimant received on 12<sup>th</sup> November 2018, hence, his insightful knowledge on "*the Bamboo and the Panda*". His past working experience in the Scotties' left him with a great deal of contacts and enabling him to identify potential buyers.

**21. Referring to Paragraph 20 of the Notice of Arbitration, what are the other efforts made by the Claimant post 26<sup>th</sup> December 2018 to contact the Respondent regarding the collection of the Artwork?**

The Claimant did nothing further on 24<sup>th</sup> December 2018 to collect the Artwork as it was aghast by the state of affairs and considered it would be best to calm down before taking further action to collect the Artwork. The Claimant could not take any steps on 25<sup>th</sup> December 2018 as it was Christmas Day which is a public holiday in Hong Kong. Despite the following day, 26<sup>th</sup> December 2018, also being a public holiday in Hong Kong, "The First Weekday after Christmas Day" the Claimant thought that perhaps the Christmas spirit would be in its favour and it may have some luck at the Auction House that day. Although the Auction House was closed on



26<sup>th</sup> December 2018, due to media attention, the Respondent's key personnel and legal team were present on the Respondent's premises that day.

**22. On the 24<sup>th</sup> December 2018, why did the Respondent allow the Claimant to enter its premises "to view and arrange for the delivery of the Artwork" when the Respondent's position is that the "Claimant did not have good title to the Artwork, nor did it have any right to possession or risk in the Artwork"?**

The Respondent's representative who escorted the Claimant to view the Artwork, Mr. Cui, was unaware of the peculiar circumstances surrounding the Claimant's currency conversion and payment extension requests.

**23. Was Mr. Gregory Wong's job scope as provided for in Paragraph 1 of his Witness Statement, communicated to Mr. Sadhu, and if it was, when was it communicated to Mr. Sadhu?**

The instruction given by Mr. Frederick Bartholomew to Mr. Wong when he was asked to step in is clear – that Mr. Wong will assist any and all sales related queries of the Claimant. Thus, Mr. Wong found no necessity to emphasize the nature of his current occupation as the Senior Accounts Executive. Both Mr. Wong and Mr. Sadhu, however, are an active Premium user of LinkedIn and they are connected with each other.

**24. Referring to Paragraph 6 of Mr. Gregory Wong's Witness Statement, how did Mr. Frederick Bartholomew, the Head Auctioneer "instructed all four (4) members of the Finance Team present at the open house"?**

Prior to the commencement of the Open House, Mr. Bartholomew sent an email to the Finance Team, copying the receptionist, explaining the circumstances and asked them to step in as sales consultants. Mr. Bartholomew also made a quick announcement before the beginning of the auction, before the presence of all attendees, about the staff substitution and making sure that the attended guests are familiar with the faces of the newly-joined sales consultant from the Finance Team.

**25. Referring to Paragraph 12 of Mr. Gregory Wong’s Witness Statement, what is the standard operating procedure when one of the Head Auctioneer, Head of Sales or Head of Finance is unavailable to provide their signature? With regard to the same paragraph, what was recorded in the sales documents pertaining to “the Bamboo and the Panda”, i.e. Lot No. 58?**

When one or more of the Heads of Departments (Head of Auctioneer, Head of Sales or Head of Finance) are unavailable to sign off on the auction documents to approve an alternate mode of payment or a payment extension, an email is generally circulated to the unavailable persons to obtain their written consent to approve the requested process. This email correspondence is then saved in the Auction House’s database pertaining to the relevant Lot Number for record-keeping purposes. The relevant purchaser is then informed about the approval (or the rejection of same) in writing shortly thereafter (generally within 1-2 business days). In the auction documents pertaining to Lot No. 58, it appears that although the correspondence regarding the change in the currency for payment, no correspondence regarding the extension of the payment deadline was stored in the Auction House’s database.

**26. Did the “shred 80cm from the top middle” as provided in Paragraph 22 of Cl. Exhibit. 1, Mr. Hari Sadhu’s Witness Statement, render “the Bamboo and the Panda” unfit for transportation?**

No.

**27. Was there any challenge application filed by the Claimant upon the notification of the Emergency Arbitrator?**

No.

**28. Was the objection of the Tribunal’s jurisdiction or power to grant Interim Measure raised by the Claimant in the emergency arbitration?**

No.

**29. For the purpose of this proceeding, is reference to “place of arbitration” means reference to the seat?**

Yes.

Friday, 26 April 2019