

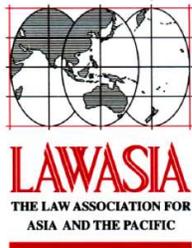


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# 14<sup>th</sup> LAWASIA International Moot

## MOOT PROBLEM 2019

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Organiser of the LAWASIA International Moot Competition

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2<sup>nd</sup> January 2019

**ASIAN INTERNATIONAL ARBITRATION CENTRE (AIAC)**

Bangunan Sulaiman  
Jalan Sultan Hishamuddin  
50000 Kuala Lumpur  
Malaysia

Attn: Director of the AIAC

Dear Sir,

**IN THE MATTER OF AN AIAC ARBITRATION BETWEEN PRACHEEN KALAKAAR (CLAIMANT)  
AND CHUI'S (RESPONDENT)**

We apply to commence the arbitral proceedings as provided by Article 8 of the Auction Terms and Conditions and kindly attach the following:

- (i) Notice of Arbitration along with the proof of service upon the Respondent on 4<sup>th</sup> January 2019;
- (ii) Copy of the Auction Terms and Conditions dated 12<sup>th</sup> December 2018;
- (iii) proof of payment of the non-refundable registration fee amounting to USD795.00.

Thank you in advance.

Should you have further questions, please do not hesitate to contact us.

*[signed]*

**RUPESH CHAWLA**

Chawla & Associates

Representative of the Claimant

**cc. YISHU & CO**

The Landmark, Edinburg Tower 17F  
15號 Queen's Road Central  
Central Hong Kong  
Attention: Mrs. Yishu Chooi ([yc@yishuhk.org](mailto:yc@yishuhk.org))

**IN THE MATTER OF AN AIAC ARBITRATION**

BETWEEN:

**PRACHEEN KALAKAAR**

(CLAIMANT)

-AND-

**CHUI'S**

(RESPONDENT)

**NOTICE OF ARBITRATION**

CHAWLA & ASSOCIATES

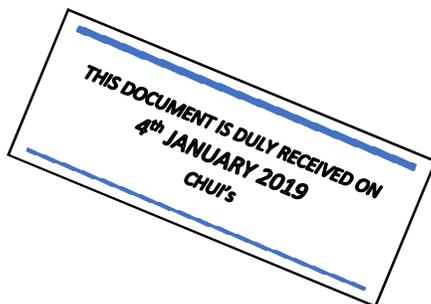
**CHAWLA & ASSOCIATES**

K-20, Malviya Nagar

New Delhi 110017 India

Representative of the Claimant

**2<sup>nd</sup> January 2019**



## I. INTRODUCTION

1. This Notice of Arbitration, together with its Exhibits numbered CI-1 to CI-2, is submitted on behalf of Pracheen Kalakaar (hereinafter referred as the “Claimant”) pursuant to Article 8 of the Auction Terms and Conditions against Chui’s (hereinafter “Respondent”). The Claimant and Respondent are collectively referred to as the “Parties”.
2. This Notice of Arbitration contains information concerning the following:
  - (a) The name, description and address of each of the Parties (II);
  - (b) The Parties’ contract and the nature of the Parties’ dispute (III);
  - (c) The arbitral proceedings (IV);
  - (d) Relief sought (V).
3. This dispute principally concerns, *inter alia*, transfer of the risk and possession of a rare scroll produced by Shong dynasty artist Su Zhi called *the Bamboo and the Panda* (the “Artwork”) to the Claimant. The Artwork is nearly 88 cm high and 168 cm wide and the first ever of its kind to be up for auction. The Artwork had been discreetly passed down from generation to generation and has never before been seen by the public’s eye.

## II. THE PARTIES

### A. Claimant

4. Claimant is Pracheen Kalakaar, art gallery from South-India focusing on the Asian contemporary painting, sculptures, artworks and photographs. Claimant is a company incorporated under the laws of India.
5. Claimant’s contact information is:

**PRACHEEN KALAKAAR**

#345 Sterling Road

Nungambakkam

Chennai – 600034 India

Attention: Gopal Singh [[gs@praachenk.org](mailto:gs@praachenk.org)]

6. Claimant’s representative, to whom all correspondence should be sent in this arbitration, is:

**CHAWLA & ASSOCIATES**

K-20, Malviya Nagar

New Delhi 110017 INDIA

Legal representative for Claimant

Phone: 91-11-46125000

Fax: 91-11-46115001

Attention: Rupesh Chawla [[rupesh@chawlaassociates.in](mailto:rupesh@chawlaassociates.in)]

- B. Respondent

7. Respondent is Chui’s, one of the world’s largest brokers of fine and decorative art, jewelry, real estate, and collectibles headquartered 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 with buyers who are endowed with the financial capacity to purchase and/or invest in such artefacts. Respondent is registered under the laws of Hong Kong.

8. Respondent’s contact information is as follows:

**CHUI’S**

G/F, 5A Wong Nai Chung Rd

Happy Valley, Hong Kong

Attention: Mrs. Jason Chooi [[jason@chui.org.hk](mailto:jason@chui.org.hk)]

### III. THE PARTIES' CONTRACT AND THE NATURE OF THE PARTIES' DISPUTE

#### A. Factual Background

9. On 12<sup>th</sup> November 2018, the Claimant received an invitation to attend the Respondent's open house and auction on 12<sup>th</sup> December 2018.
10. Mr. Sadhu was the Claimant's curator authorised to attend the open house on 12<sup>th</sup> December 2018. All necessary paperwork was completed for Mr. Sadhu to exercise his proxy bid on behalf of the Claimant at the Auction. A maximum bidding price of \$HKD2,000,000 was also approved.
11. On 12<sup>th</sup> December 2018, the Claimant received a call from Mr. Sadhu who was at the Respondent's open house. Mr. Sadhu advised the Claimant that Lot No. 58 at the auction was most certainly an artwork known as *the Bamboo and the Panda*. After clarifying the details of the Artwork, the Claimant agreed to increase Mr. Sadhu's maximum bid amount to \$HKD3,000,000. However, the Claimant instructed Mr. Sadhu to request for an extension of the time for payment from the Respondent in the event the Claimant's bid on the Artwork ended up being successful.
12. Approximately 30 minutes thereafter, Mr. Sadhu contacted the Claimant and notified the Claimant that he had spoken to Mr. Gregory Wong, a member of the Respondent's Finance Team who was also acting in the capacity of a sales consultant at the open house, who had tentatively approved the request for an extension of time for payment from five (5) working days to ten (10) working days. The extension of time was conditional on the Claimant being successful in the bid of the Artwork and also upon the Claimant's payment of a 20% cheque deposit against the auction price, as opposed to the standard 10% deposit. The Claimant was also required to agree assuming all the risk in the Artwork from the payment of the 20% deposit. The Claimant conveyed its agreement to the said terms and conditions to Mr. Sadhu [see **Cl. Exhibit 1** – Witness Statement of Mr. Hari Sadhu].

13. The Claimant was successful in its bid on the Artwork in Lot No. 58. The Artwork was auctioned at the remarkable price of \$HKD2,650,000 (the “Auction Price”).
14. Mr. Sadhu thereafter clarified the variation of the payment terms and conditions with Mr. Wong, handed over a cheque in the sum of \$HKD530,000.00 (representing a 20% deposit against the Auction Price) to the Respondent, and executed the Auction Terms and Conditions entered into between the Claimant, the Respondent and the Seller of Lot No. 58 dated 12<sup>th</sup> December 2018 [see Cl. **Exhibit 2** - Respondent’s Auction Terms & Conditions executed on 12<sup>th</sup> December 2018].
15. Pursuant to the approved request for an extension of time for payment, the Claimant transferred the balance outstanding on the Auction Price to the Respondent, by electronic transfer, on 20<sup>th</sup> December 2018.
16. On 24<sup>th</sup> December 2018, the Claimant attended the Respondent’s premises to view and arrange for the delivery of the Artwork. The Claimant provided the Respondent with the proof of payment for the balance of the Auction Price. It was then escorted to the viewing room to see the Artwork which was stored in the Respondent’s secured vault.
17. Whilst viewing the Artwork in the Respondent’s viewing room, the Artwork unexpectedly tore approximately 80cm from the top middle. This event occurred in the presence of at least 30 other persons who were present in the Respondent’s viewing room.
18. Rather than allowing the Claimant to tend to the Artwork, the Respondent ushered the Claimant away from the Artwork and its premises.
19. That same day, the Claimant received notification from its bank that the transfer of the balance of the Auction Price to the Respondent was successful.
20. On 26<sup>th</sup> December 2018, the Claimant once again attempted to enter the Respondent’s premises to collect the Artwork. The Claimant’s observed that the Respondent’s prem-

ises was surrounded by media persons. The Respondent's solicitor informed the Claimant that it had not remitted the outstanding balance of the Auction Price of the Artwork within the contractual timeframe. In the Respondent's view, this meant that the Claimant did not have good title to the Artwork, nor did it have any right to possession or risk in the Artwork.

21. The Claimant has been unable to obtain delivery of the Artwork since.

B. Legal Basis of Claim

22. The oral exchange between Mr. Sadhu and Mr. Wong is evidence that the Claimant and the Respondent had entered into an oral agreement to extend the time for the payment of the balance of the Auction Price.

23. In accordance with the oral agreement, the Claimant had paid a 20% deposit on the Auction Price of the Artwork within one (1) hour of the completion of the auction. This was despite the Auction Terms and Conditions stating that only a 10% deposit would be necessary.

24. The Claimant only had one reason to deposit an extra 10% of the Auction Price – it believed that the terms of its oral agreement with the Respondent would be honoured. At no point in time did the Respondent, or Mr. Wong on its behalf, indicate that the Auction Terms & Conditions could only be varied in writing.

25. Accordingly, pursuant to Clause 2 of the Auction Terms and Conditions, the title, risk and possession of the Artwork passed to the Claimant on 24<sup>th</sup> December 2018.

26. Possession and risk in the Artwork passed to the Claimant upon presentation of the proof of payment of the balance of the Auction Price of the Artwork.

27. Even if title in Artwork had not passed at the time the Artwork tore, title in the Artwork nevertheless passed to the Claimant later that day upon confirmation of the clearance of the Claimant's payment of the balance of the Auction Price.
28. Therefore, the Respondent has breached the Auction Terms & Conditions by:
- (a) denying the Claimant's right to the title, risk and possession of the Artwork; and
  - (b) disallowing the Claimant from collecting the Artwork from the Respondent's premises.

#### **IV. THE ARBITRAL PROCEEDINGS**

##### **A. The Arbitration Clause**

29. This arbitration is initiated pursuant to the arbitration agreement found at Article 8.1 of the Auction Terms and Conditions which provides as follows:

*"8.1. 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."*

##### **(a) The Place of Arbitration**

Pursuant to Article 8.2 of the Auction Terms and Conditions the place of the arbitration is Hong Kong.

##### **(b) Governing Law**

The Auction Terms and Conditions are governed by the substantive laws of the Hong Kong Special Administrative Region of the People's Republic of China pursuant to Article 7, which provides as follows:

*“The laws of the Hong Kong Special Administrative Region of the People’s Republic of China will govern all matters arising out of or relating to this agreement and the transactions it contemplates, including, without limitation, its interpretation, construction, validity, performance (including the details of performance), and enforcement.”*

(c) The Language of Arbitration

Pursuant to Article 8.3 of the Auction Terms and Conditions, the language of the arbitration shall be English.

(d) The Arbitral Tribunal

Article 8.3 of the Auction Terms and Conditions provides for a panel of three arbitrators.

(e) Registration Fee

The proof of remittance for the registration fee in the amount of USD795.00 is attached to the Notice of Arbitration.

**(V) RELIEF SOUGHT**

30. As a result, the Claimant respectfully requests the arbitral tribunal to issue an award:

(a) declaring that Respondent breached its contractual obligations by:

(i) denying the Claimant’s right to the title, risk and possession of the Artwork; and

(ii) disallowing the Claimant from collecting the Artwork from the Respondent’s premises;

(b) declaring that the Claimant is the rightful possessor of the Artwork;

(c) ordering Respondent to pay all arbitration costs, including Claimant's Representative's costs and expenses.

Respectfully submitted,

[signed]

**Rupesh Chawla**  
Partner  
[CHAWLA & ASSOCIATES]  
K-20, Malviya Nagar  
New Delhi 110017 India  
Representative of the Claimant

**Exhibits to the Notice of Arbitration**

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<i>No.</i>	<i>Exhibit</i>	<i>Exhibit number</i>
1.	Witness Statement of Mr. Sadhu	Cl. 1
2.	Copy of the Auction Terms and Conditions	Cl. 2

**CL. 1**

**IN THE MATTER OF AN ARBITRATION UNDER THE AIAC FAST TRACK ARBITRATION RULES 2018**

**PARTIES: PRACHEEN KALAKAAR (CLAIMANT) AND CHUI'S (RESPONDENT)**

**WITNESS STATEMENT OF MR. HARI SADHU**

I, Mr. Hari Sadhu, of Unit 3B, 215 Pokkisham Road, Alwarpet, Chennai 600018, India, affirm the following based on my personal knowledge:

1. I am one of two curators at Pracheen Kalakaar, a prestigious not-for-profit art gallery based in Chennai, India (the "Claimant").
2. On 12<sup>th</sup> November 2018, I was asked by the Claimant's Managing Director, Mr. Kalakaar, to attend an open house and action event hosted by Chui's (the "Respondent") at their Hong Kong premises. The open house was to be held on 12<sup>th</sup> December 2018.
3. As part of the invitation for the Respondent's open house, an inventory list of the auctionable items was enclosed. An item piqued my interest – Lot No. 58. The description of this item read as follows:

*"Ancient Chinese painting dating back to the Shong Dynasty. Cultural masterpiece. Comes in airtight glass casing. 35kg. Owned by one family for the past 150 years. Rare opportunity."*

4. At that point in time, the description of Lot No. 58 reminded me of a historical piece of art known as *the Bamboo and the Panda* from the Shong dynasty. As far as I was aware, this Artwork had never been listed at an auction before.
5. On 12<sup>th</sup> December 2018, I proceeded to leave India to attend the Respondent's open house in Hong Kong. Prior to leaving for the open house, I received the necessary paperwork authorising me to bid on the auction items as a proxy for the Claimant. A maximum bidding price of \$HKD2,000,000.00 was also approved.

## Open House on 12<sup>th</sup> December 2018

6. At the Respondent's open house on 12<sup>th</sup> December 2018, I completed the registration process and handed over the necessary proxy paperwork to the Respondent's receptionist. The Respondent's receptionist then introduced me to by sales consultant for the day to whom I could direct "*any and all sales related queries*" – Mr. Gregory Wong.
7. Mr. Wong and I were formerly acquainted whilst Mr. Wong was a Sales Representative at Scotties' – another auction house located in Cape Town, South Africa. Back when Mr. Wong was at Scotties', he was the Claimant's designated sales consultant and point of contact to negotiate the payment and delivery terms of auction items purchased by the Claimant through Scotties'. I assumed that Mr. Wong's role at the Respondent's open house was of a similar nature.
8. Thereafter, I walked through the viewing room and eventually arrived at Lot No. 58. At first, I was in disbelief that the item was actually the original. However, upon further inspection of the Artwork's one of a kind frame, I was convinced that I had chanced upon a historical masterpiece that would only bring prosperity to the Claimant's art gallery.
9. Excitedly, I immediately contacted Mr. Kalakaar who approved a new maximum bid price of \$HKD3,000,000 over the phone.
10. Upon receiving the Claimant's revised instructions, I sought to locate the head auctioneer to negotiate financing the purchase of the Artwork. Although I was unable to locate the head auctioneer, I did manage to find Mr. Gregory Wong.
11. I explained to Mr. Wong about the revised bidding instructions from the Claimant and notified him that some extra time may be required to procure financing to purchase the Artwork should the purchaser's bid be successful:

Mr. Wong: *“It’s wonderful you and the purchaser are so keen on owning this piece. But you do know that we are not authorised to make a private sale of any of the auction items, don’t you?”*

Me: *“Yes, I am well aware you cannot make a private sale. But I was just hoping that the terms of sale can be modified to reflect that it may take some time for the purchaser to obtain financing for the Artwork.”*

Mr. Wong: *“With all due respect, we do run a business here. We cannot vary the terms and conditions willy nilly to accomodate your employer’s needs.”*

Me: *“Oh, no. I don’t expect you to vary the terms without reason. All that I am asking is if it’s possible for you to hold onto the goods for 10 working days so that my client can obtain the relevant financing from the bank.”*

Mr. Wong: *“That’s 5 more working days than the standard terms and conditions. We can’t just vary the terms without getting anything in return.”*

Me: *“Well, what if we agree that upon payment of the 20% deposit for the Artwork, my employer will assume all the risk in the Artwork on the condition that you will not contract with another person to purchase the Artwork until 10 working days have passed from today’s auction?”*

Mr. Wong: *“I suppose that is reasonable. Let’s see how things fare at the auction and take things from there.”*

Me: *“Sure, it’s a deal.”*

12. It was a tight competition but fortunately I was successful in bidding for the Artwork for a steal at \$HKD2,650,000.00. Soon thereafter, I contacted Mr. Kalakaar to share the good news. Upon receipt of the Claimant’s instructions, I proceeded to the Sales Desk to complete the necessary paperwork for the sale. The main document I was required to execute was the Auction Terms and Conditions to be entered into between the Claimant, Respondent and the seller of the Artwork (the “Auction T&Cs”).

13. Perusing the Auction T&Cs, I noticed the following clause relating to title, risk and possession:

*“2. TITLE, RISK AND POSSESSION*

*2.1 Upon the fall of the hammer, the Auctionable Item(s) is considered to be sold to the Purchaser.*

- 2.2 *Title in the Auctionable Item(s) will not pass from the Seller to the Purchaser until clearance of the full Auction Price is received from the Auction House's bank.*
- 2.3 *Risk and possession in the Auctionable Item(s) will not pass to the Purchaser until proof of the full payment of the Auction Price is received by the Auction House. At that point in time, risk in the Auctionable Item(s) will remain with the Seller and possession of the Auctionable Item(s) will remain with the Auction House."*

14. Upon reading the above, I scanned the open house to find Mr. Wong. As I was about to walk over, Mr. Wong suddenly walked towards me.

*Mr. Wong: "Congratulations Mr. Sadhu, it is a remarkable piece to own. I hope you're happy."*

*Me: "I am indeed! We proceed as agreed?"*

*Mr. Wong (patting me on the back): "Certainly."*

*Me: "Also, is it possible to get the invoice for the outstanding balance changed from Hong Kong Dollars to Indian Rupees?"*

*Mr. Wong: "I'm not too sure. Just let the Sales Desk know you would like the invoice changed when you sign the Auction Terms & Conditions and I will liaise internally and find out for you."*

*Me: "Thank you Gregory! You're great help!"*

15. I handed over a cheque for the 20% deposit, notified the Sales Desk that I would like the invoice for the outstanding balance converted to Indian Rupees, and signed the necessary paperwork for the sale of the auctioned item.
16. On 13<sup>th</sup> December 2018, the Claimant was emailed a revised invoice for the balance of the Auction Price in Indian Rupees as opposed to Hong Kong Dollars. I did not realise it at the time, but the revised invoice for some strange reason did not specify a due date for payment.

### **Attendance at the Auction House on 24<sup>th</sup> December 2018**

17. On 24<sup>th</sup> December 2018, I returned to the auction house with Mr. Kalakaar and a cheque deposit slip for the balance of the Auction Price. The cheque deposit slip indicated that the payment was deposited the 2 working days earlier (i.e. on 20<sup>th</sup> December 2018). Prior to attending the Auction House, I had contacted the Claimant's bank and was notified that the cheque would clear by the end of that day.
18. A member from the Respondent's Sales Team, Mr. Quintin Cui, greeted Mr. Kalakaar and I and received a copy of the cheque deposit slip. Mr. Cui asked the receptionist to take the cheque deposit slip upstairs to the Finance Team to confirm the clearance of the cheque.
19. Mr. Kalakaar was interested in viewing the Artwork himself. Whilst awaiting the finance team's response, Mr. Cui escorted Mr. Kalakaar and I to the Respondent's main viewing room since we were not authorised to enter the vault where the Artwork was being stored.
20. Aside from the two of us, another 30 persons who appeared to be a mixture between the Respondent's employees and media persons were also present in the viewing room. Mr. Cui informed us that it would be a busy day for the Respondent due to the unveiling of a vintage Rolls Royce which was going to occur later that morning.
21. Mr. Cui, along with two other persons in the employ of the Respondent, brought out the Artwork, still in its glass casing to the main viewing room.
22. Mr. Kalakaar was mesmerised by the sight of the Artwork and the intricate detailing of the frame. He approached the Artwork to take a closer look at the detailing of the frame. Just as Mr. Kalakaar was about to touch the frame, the unthinkable happened - the Artwork shred 80cm from the top middle.

23. Mr. Cui immediately called security and escorted Mr. Kalakaar and I out of the Auction House premises. I thought that Mr. Cui's behaviour was incredibly odd since the Claimant was now the owner of the Artwork.
24. Later that day, I received an electronic notification that the cheque for the balance of the Auction Price had successfully cleared.
25. Since that day, the Claimant has not been able to obtain delivery of the Artwork from the Respondent.
26. The facts stated in this witness statement are true.

Dated: 31<sup>st</sup> December 2018

Witness Name: Hari Sadhu

Witness Signature: *[signed]*

**AUCTION TERMS AND CONDITIONS**



The following terms and conditions are applicable to the sale of all auctionable items by Chui's ("Auction House") and the owner of the auctionable item ("Seller") to the purchaser of the auctionable item ("Purchaser").

**1. SALE OF GOODS**

- 1.1. Upon a successful bid at the auction, the Seller shall sell to the Purchaser and the Purchaser shall buy from the Seller the items set forth in Annexure A ("Auctionable Item(s)") in the quantities and at the prices stated in Annexure A. The sale of the Auctionable Item(s) shall be intermediated by the Auction House.
- 1.2. Unless otherwise agreed, the Purchaser must deposit with the Auction House a deposit amounting to 10% of the Auction Price of the Auctionable Item(s) within one (1) hour from the completion of the auction. At the time of paying the 10% deposit, the Purchaser agrees to be bound by these terms and conditions.
- 1.3. Unless otherwise agreed, the remaining 90% of the Auction Price is payable by the Purchaser to the Auction House by cheque or online transfer within 5 working days from the auction date.
- 1.4. In the event the Purchaser fails to deposit the remaining 90% of the Auction Price to the Auction House within 5 working days from the auction date, the Seller may exercise its discretion to re-list the Auctionable Item(s) with the Auction House. If such discretion is exercised, this agreement between the Seller, Purchaser and the Auction House for the sale of the Auctionable Item(s) will immediately terminate.

**2. TITLE, RISK AND POSSESSION**

- 2.1. Upon the fall of the hammer, the Auctionable Item(s) is considered to be sold to the Purchaser.
- 2.2. Title in the Auctionable Item(s) will not pass from the Seller to the Purchaser until clearance of the full Auction Price is received from the Auction House's bank.

- 2.3. Risk and possession in the Auctionable Item(s) will not pass to the Purchaser until proof of the full payment of the Auction Price is received by the Auction House. At that point in time, risk in the Auctionable Item(s) will remain with the Seller and possession of the Auctionable Item(s) will remain with the Auction House.

### **3. COLLECTION OF AUCTIONABLE ITEM(S)**

- 3.1. Unless otherwise stated in Annexure A, the Purchaser shall collect the Auctionable Item(s) from the Auction House's storage facility.
- 3.2. The Auction House shall exercise reasonable skill and care in storing the Auctionable Item(s) in its storage facility until the Purchaser's collection of same within 5 working days from the auction date.
- 3.3. The Purchaser and the Seller may negotiate for the delivery of the Auctionable Item(s) from the Auction House to the Purchaser's address. The Auction House will not be liable for any loss, damages, penalties or expenses related to the delivery of the Auctionable Item(s).

### **4. DISCLAIMER OF WARRANTY**

- 4.1. The Auctionable Item(s) is being sold "as is," and the Seller and the Auction House disclaim all warranties of quality, whether express or implied, including the warranties of merchantability and fitness for particular purpose.
- 4.2. The Purchaser acknowledges that it has not been induced by any statements or representations of any person with respect to the quality or condition of the Auctionable Item(s) and that no such statements or representations have been made.
- 4.3. The Purchaser acknowledges that it has relied solely on the investigations, examinations, and inspections as the Purchaser has chosen to make and that the Seller and the Auction House have afforded the Purchaser the opportunity for full and complete investigations, examinations, and inspections.

## **5. LIMITATION OF LIABILITY**

- 5.1. The Seller will not be liable for any indirect, special, consequential, or punitive damages (including lost profits) arising out of or relating to this agreement or the transactions it contemplates (whether for breach of contract, tort, negligence, or other form of action) and irrespective of whether the Seller has been advised of the possibility of any such damage.
- 5.2. In no event will the Seller's liability exceed the price the Purchaser paid to the Seller for the Auctionable Item(s) provided by the Seller giving rise to the claim or cause of action.

## **6. LIMITATION OF ACTIONS**

No action arising out of or relating to this agreement or the transactions it contemplates may be commenced against the Seller or the Auction House more than 12 months after the basis for such claim could reasonably have been discovered.

## **7. GOVERNING LAW**

The laws of the Hong Kong Special Administrative Region of the People's Republic of China will govern all matters arising out of or relating to this agreement and the transactions it contemplates, including, without limitation, its interpretation, construction, validity, performance (including the details of performance), and enforcement.

## **8. ARBITRATION**

- 8.1. 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.
- 8.2. The place of arbitration shall be Hong Kong.
- 8.3. The language to be used in the arbitral proceedings shall be English.

## 9. FORCE MAJEURE

The Seller will not be liable for delays in performance or for non-performance due to unforeseen circumstances or causes beyond the Seller's reasonable control.

## 10. ENTIRE AGREEMENT

This agreement constitutes the entire agreement between the Parties with respect to the subject matter of this agreement and supersedes all other agreements, whether written or oral, between the Parties.

## 11. DATE OF EFFECT

This agreement will become effective when it is signed by the Purchaser and/or its authorised proxy holder in the presence of an authorised executive at the Auction House.

Date: 12<sup>th</sup> December 2018

[*signed*]

Signed by the Purchaser

**HARI SADHU**

on behalf of Pracheen

Kalakaar

[*signed*]

Signed by the Seller

**NIVVE CHOONG**

on behalf of the Choong

Family

[*signed*]

Signed by the Auction

House

**TITANIA CHUI**

on behalf of the Chui's

## **ANNEXURE A**

**AUCTIONABLE ITEM(S):**

**LOT NUMBER(S): 58**

**AUCTION LOCATION:**

**AUCTION DATE:**

**AUCTION PRICE:**

**ADDITIONAL NOTES:**

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**PRACHEEN KALAKAAR**

(CLAIMANT)

-AND-

**CHUI'S**

(RESPONDENT)

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**REQUEST TO APPOINT AN EMERGENCY ARBITRATOR**

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**YISHU & Co**

**YISHU & CO**

The Landmark, Edinburg Tower 17F

15號 Queen's Road Central, Central Hong

Kong

Representative of the Respondent

**1<sup>st</sup> February 2019**

1. Pursuant to Rule 8 of the AIAC Arbitration Rules, the Respondent hereby request the Director of the AIAC to appoint an emergency arbitrator for this matter.
  
2. Kindly find enclosed, along with this request:
  - (a) proof of payment of USD 2,120.00 for the non-refundable application fee to appoint an emergency arbitrator; and
  - (b) proof of payment of USD10,600.00 for the emergency arbitrator's fees.
  
3. The details of the Respondent as contained in the Claimant's Notice of Arbitration paragraphs 7-8 are admitted. In addition to these paragraphs, the Respondent would like to further explain the background of its business.
  - (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 with buyers who are endowed with the financial capacity to purchase and/or invest in such artefacts.
  
  - (b) All auctionable items are inventoried and stored by the Respondent in a fire and waterproof, air tight steel vault. Entry into the vault is only possible by the retina scan of an authorised staff member (of which there are 5). Where special conditions are required to be maintained for the preservation of an artefact (e.g. climate control, lighting, etc.), the seller is contractually obliged to fully appraise the Respondent of same and the Respondent is obliged to maintain the necessary conditions for the storage of that artefact.
  
  - (c) Thrice a year, the Respondent holds an invite-only three-hour open house followed by the auction of the artefacts on display at that particular open house. All items that are up for auction are assigned lot numbers. Exactly 30 days before the relevant open house, invitations to attend the upcoming open house are sent to 50 prospective buyers selected by a ballot system operated by the Respondent. A basic list of lot numbers and a description of the item(s) pertaining to a lot number is also provided to the invitees.

- (d) Prior to the open house, the Respondent and the Seller agree on the reserve price for the auctionable item. An item can only be successfully auctioned if, at the fall of the hammer at the auction, the final bid price is equal to or greater than the reserve price. Where an auctionable item has been successfully bid upon, the Respondent is contractually entitled to a 10% fixed commission on the successful bid value (inclusive of any applicable government levies).
4. The Respondent also makes reference to the copy of the Auction Terms and Conditions dated 12<sup>th</sup> December 2018 attached to the Claimant's Notice of Arbitration.
5. Due to the urgency of the interim relief, the Respondent provides all relevant facts for the consideration by the Director of the AIAC and subsequently by the Emergency Arbitrator (if appointed).
- (a) The public got word of the shredding of the painting after it had occurred. The Respondent had already re-listed the Artwork at this time and received repeated calls from buyers seeking to purchase the Artwork asking when the next auction for it would be. Unbeknownst to Respondent, there is an ancient myth about the one who completely shreds the Bamboo and the Panda obtains good luck and fortune for the day. Further, 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.
- (b) Given that the shredding occurred just before the CNY, there was an indication that it would continue to rip. Given that this upcoming CNY is the beginning of the year of the Panda, this may be the last opportunity for the myth to come true. Thus, the value of the Artwork skyrocketed to an astronomical amount. If the Respondent is required to wait until the end of these arbitral proceedings, it may lose its chance to sell such a Painting at this price. Further, if the Artwork completely rips, then the Artwork would

never be as valuable as it is now. Thus, the Respondent requests for the Director of the AIAC to appoint an emergency arbitrator to rule on its interim measure request.

6. As stated above it is imperative that the Respondent sell the item prior to the CNY. Per the Respondent's agreement with the Artwork's owner, it must be sold via auction, and additionally it is the only way to determine the highest value of an item. Thus, if the Respondent is not allowed to resell the Artwork during this CNY, it would never know how much it could have been sold for and the profit it could have made.
7. Consequentially, the amount would be unquantifiable since no other item has ever had such an urgency surrounding it and no other item of such nature has ever been auctioned in such a time frame. Therefore, there would be no way for the Respondent to determine how much it could sell the Artwork for. Therefore, this could not be rectified by monetary damages.
8. Notwithstanding this Request, the Respondent reserves its right to further develop its arguments and the relief it is seeking, especially in responding to the Claimant's Notice of Arbitration dated 2<sup>nd</sup> January 2019.

Respectfully submitted,

[signed]

**YISHU CHOOI**

Managing Partner

*YISHU & CO*

The Landmark, Edinburg Tower 17F

15號 Queen's Road Central, Central Hong Kong

Please quote our reference when replying.

Our Ref. : AIAC/INT/ADM-777-2019

2<sup>nd</sup> February 2019



**CHAWLA & ASSOCIATES**

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[Attn.: Rupesh Chawla]

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Dear Sirs/Madams,

**IN THE MATTER OF AN AIAC ARBITRATION BETWEEN PRACHEEN KALAKAAR (CLAIMANT) AND CHUI'S (RESPONDENT)**

We refer to the above matter.

Please be advised that this arbitration matter has been registered pursuant to **Rule 2** of the **AIAC Arbitration Rules 2018** (the "Rules"). According to **Rule 2(2)** of the **Rules**, the arbitration commenced on 2<sup>nd</sup> January 2019.

We wish to bring to your attention **Rule 14(1)** and **Rule 14(2)** of the **Rules** which states that the Director of the AIAC shall fix a provisional advance deposit which is intended to cover the costs of the arbitration. The amount of this deposit shall be paid in equal shares by both Parties within 21 days upon request from the AIAC.

Having regard to the above, please be informed that a provisional advance deposit of **USD100,000.00** is payable in equal shares by the Parties. The amount to be paid by the Parties is as follows:

Claimant : **USD50,000.00**

Respondent : **USD50,000.00**

Please be advised that pursuant to **Rule 14(3)** of the **Rules**, in the event that any of the Parties fails to pay its share of the deposit, the Director of the AIAC will give the other Party an opportunity to

make the required payment within a specified period of time. The arbitral proceedings shall not proceed until the provisional advance deposit is paid in full.

We wish to highlight that pursuant to **Rule 14(4)** and **Rule 14(5)** of the **Rules**, further deposits may be requested following a calculation of the estimated fees and expenses of the Arbitral Tribunal and AIAC administrative fee. Any unexpended balance shall be returned to the Parties upon rendering of the final account.

Finally, please be advised that according to the Service Tax Act 2018 effective as of 1 September 2018, a service tax (the “SST”) is applicable to taxable services specified in the First Schedule of the Service Tax Regulations 2018. In compliance with the legislative requirements, the AIAC includes (where applicable), as part of its calculation of deposits, a 6% SST rate on: (i) the arbitrator’s fees; and (ii) the AIAC administrative fees. The AIAC will issue tax invoices accordingly when the arbitration proceedings conclude. Please see the AIAC’s [Circular on the Application of Service Tax Act 2018](#) for further details.

Please find enclosed our Invoices no. 10000393 and 10000394 for your reference.

Kindly remit the above stated amount within 21 days by 23<sup>rd</sup> February 2019 and submit to us the proof of the remittance.

Thank you.

Yours faithfully,

[*signed*]

**ALBERTA PRIMADONA**  
International Case Counsel  
Email: [alberta@aiac.world](mailto:alberta@aiac.world)

## TERMS OF REFERENCE

**DATE:** 19<sup>th</sup> February 2019

**PARTIES:** PRACHEEN KALAKAAR (CLAIMANT) AND CHUI'S (RESPONDENT)

The Terms of Reference are prepared by the Claimant and the Respondent (hereinafter jointly referred to as the "Parties") on the basis of the discussion.

### **Article 1. Reference to Arbitration**

On 19<sup>th</sup> February 2019, the Parties agreed that pursuant to Article 8 of the Auction Terms and Conditions, all disputes shall be resolved by a panel of three arbitrators pursuant to the AIAC Fast Track Arbitration Rules 2018 (the "Rules").

### **Article 2. Appointment of Arbitrators and Arbitral Proceedings**

- 2.1. The Claimant nominates Mr. Virdas Gupta as the First Arbitrator, and Respondent nominates Ms. Zhong Hui Hua as the Second Arbitrator. Both Parties agree with the other party's nomination.
- 2.2. For the purposes of satisfying Rule 2, 10 and 11 of the Rules, the arbitral proceedings are deemed to have commenced on the day the Parties enter into this Agreement. The requirements for a Notice of Arbitration and Response to the Notice of Arbitration are dispensed with, as this Agreement is exhaustive in respect of the matters in dispute.
- 2.3. In respect of the fees for the arbitrators and the costs and expenses for the arbitration, Rule 24 of the Rules shall apply.
- 2.4. Parties agree that this arbitration shall proceed by way of substantive oral hearing which requires physical presence by the Parties and/or their Representatives.
- 2.5. The arbitral tribunal will have 60 days to publish its award from the date of closure of the hearings.
- 2.6. Parties agree that the timeline as provided by Rule 21 and 22 of the Rules is dispensed with, and Parties shall adhere to the timeline as provided in this Terms of Reference strictly, and

Parties further agree to limit the tribunal's powers to extend the periods of time unless written consent has been given by both Parties to the tribunal.

### **Article 3. Description of the Dispute**

In order to have time and cost-efficient arbitral proceedings, Parties hereby agreed on the following description of the dispute:

#### **3.1. Item in Dispute (Lot No. 58)**

- 3.1.1. On 12<sup>th</sup> December 2018, the Respondent held its third and final open house for 2018. Seventy-two (72) auctionable items were displayed and available for purchase at this open house. The head auctioneer at this open house was Mr. Frederick Bartholomew. The Respondent's other staff who was also present at this open house included six (6) members of the Respondent's Sales Team, four (4) members of the Respondent's Finance Team, and an administrative assistant.
- 3.1.2. Given that a number of members from the Respondent's Sales Team were either on sick leave or annual leave on the auction date, the members of the Respondent's Finance Team who were present also doubled-up as sales consultants for the open house. Mr. Gregory Wong, a senior member of the Respondent's Finance Team, was one of the members of the Finance Team who acted as a sales consultant at the open house.
- 3.1.3. At this particular open house, a total of 23 prospective buyers expressed interest in one particular item – Lot 58. The item on display was a rare artwork from the Shong Dynasty titled *the Bamboo and the Panda*.

#### **3.2. Invitation to the Respondent's Open House**

- 3.2.1. On 12<sup>th</sup> November 2018, the Claimant received an invitation to attend the Respondent's open house and auction on 12<sup>th</sup> December 2018.
- 3.2.2. Annexed to the Respondent's invitation was an inventory list of the items to be auctioned. The list simply stated each lot number with a brief description of the item relating to that lot.
- 3.2.3. Mr. Hari Sadhu was the Claimant's curator authorised to attend the open house on 12<sup>th</sup> December 2018. Prior to leaving for the open house in Hong Kong, Mr. Sadhu received the

necessary paperwork authorising him to bid on the auction items as a proxy for the Claimant. A maximum bidding price of \$HKD2,000,000.00 was also approved.

### 3.3. The Open House on 12<sup>th</sup> December 2018

- 3.3.1. On 12<sup>th</sup> December 2018, Mr. Sadhu entered the Respondent's premises presenting an invitation letter for that day's open house addressed to the Claimant, and registered his interest in the auction as the authorised proxy holder for the Claimant (alongside providing all the necessary verification paperwork). Mr. Sadhu was directed by the Respondent's receptionist to direct all enquires to his designated sales consultant for the day, Mr. Gregory Wong.
- 3.3.2. Approximately 25 minutes prior to the auction, Mr. Sadhu approached Mr. Wong and expressed an interest in Lot No. 58. Mr. Sadhu also notified Mr. Wong that he had received revised bidding instructions from the Claimant but that some extra time may be required to procure financing to purchase the Artwork should the Claimant's bid be successful.
- 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.
- 3.3.4. In the auction for Lot No. 58, Mr. Sadhu's bid of \$HKD2,650,000.00 was successful against the reserve price of \$HKD2,550,000.000.
- 3.3.5. Mr. Sadhu completed the necessary paperwork to effect the sale of Lot No. 58 to the Claimant, and he also presented a cheque for the deposit sum of \$HKD530,000.00 (20% of the total Auction Price). Following a discussion with Mr. Wong, Mr. Sadhu also informed the Sales Desk that he would like the invoice for the outstanding balance of the Auction Price to be raised in Indian Rupees as opposed to Hong Kong Dollars.
- 3.3.6. On 13<sup>th</sup> December 2018, a revised invoice in Indian Rupees was sent to the Claimant by the Respondent for its action. A deadline for payment was not stated on this invoice.

### 3.4. Claimant's Collection of Lot No. 58

- 3.4.1. On 24<sup>th</sup> 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. The Claimant wished to inspect the Artwork whilst the Respondent was verifying the clearance of the Claimant's payment of the balance of the Auction Price.
- 3.4.2. Whilst the Claimant was inspecting the Artwork, it 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.

3.4.3. The Respondent escorted the Claimant out of its Premises.

3.4.4. On 26<sup>th</sup> December 2018, the Claimant returned to the Respondent's premises to collect the Artwork. The Respondent refused to permit the Claimant to collect the Artwork on the basis that the Claimant did not pay the balance of the Auction Price within the contractual time frame.

3.4.5. Since that day, the Claimant has not been able to obtain delivery of the Artwork from the Respondent.

3.5. Award on Interim Measure dated 15<sup>th</sup> February 2019

Following the issuance of the Interim Measure dated 15<sup>th</sup> February 2019, the Respondent then arranged for the sale and managed to find a prospective buyer for the Artwork. Although the payment was successful, as of 18<sup>th</sup> February 2019, the prospective buyer has not collected the Artwork from the Respondent's premises. The Respondent has reached out to them and is currently waiting for their clarification.

#### **Article 4. Summary of Arguments**

4.1. Extension of the Payment Granted by the Respondent

4.1.1. Claimant's Position

4.1.1.1. Claimant's request for extending the payment timeline has been granted by Mr. Wong as the duly authorised Agent of the Respondent. The authority of Mr. Wong stems from the ostensibly authority given by the Respondent. This is because the Respondent made a reliable representation which led Claimant to reasonably believe that Mr. Wong has the authority to extend the deadline of the payment.

4.1.1.2. However, even if Mr. Wong acted outside his authorisation, the Claimant has ratified such conduct by not raising any objection when the Respondent is aware that Mr. Wong is raising a new invoice for the Claimant. Thus, the timeline extension is valid.

4.1.2. Respondent's Position

- 4.1.2.1. Contrary to the Claimant's argument, the Respondent never made any representation to the Claimant that Mr. Wong has the authority to extend Claimant's request to extend the payment timeline. The Claimant is aware of the capacity of Mr. Wong at the time the Respondent introduced him to the Claimant. Claimant is also made known by Mr. Wong that he is lacking such authority [see **Annexure 2** – Witness Statement of Mr. Wong].
- 4.1.2.2. With regard to the ratification, the Respondent submits that elements to invoke the ratification doctrine are not met, *inter alia*, sufficient knowledge of the Principal at the time of the purported ratification. Thus, the Respondent's conduct by standing still at the time the invoices were raised shall not amount as an acceptance of Mr. Wong's unauthorised action.

## 4.2. Entitlement of the Claimant to the Possession of the Artwork

### 4.2.1. Claimant's Position

- 4.2.1.1. Claimant argued that on 12<sup>th</sup> December 2018, it entered into a binding oral agreement with the Respondent (through Mr. Wong acting as the duly authorised Respondent's agent) to vary the payment terms of the balance of the Auction Price.
- 4.2.1.2. Pursuant to the oral agreement with the Respondent and in accordance with the Auction Terms and Conditions dated 12<sup>th</sup> December 2018, the Claimant contended it is entitled to the transfer of the title, risk and possession of the Artwork as of 24<sup>th</sup> December 2018. Risk passed upon the payment of the deposit for the Artwork and possession and title passed upon the presentation of the payment proof and clearance of the balance of the Auction Price, respectively.

### 4.2.2. Respondent's Position

- 4.2.2.1. Respondent argued that there was no oral agreement with the Claimant to vary the payment terms stated in the Auction Terms and Conditions dated 12<sup>th</sup> December 2018. There was no holding-out by the Respondent that Mr. Wong was authorised to approve payment extensions unilaterally. Such a

payment extension could only be approved in writing by the relevant signatories, of which there were three. There was no written approval annexed to the Claimant's executed Auction Terms and Conditions to indicate the Respondent's consent to varying the payment terms.

4.2.2.2. Although the Claimant paid the balance of the Auction Price for the product, it was paid outside the timeframe stipulated in the Auction Terms and Conditions dated 12<sup>th</sup> December 2018. In accordance with the Auction Terms and Conditions, the Seller authorised the Respondent to re-list the Artwork for auction. Thus, title, risk and possession of the Artwork never passed to the Claimant.

#### 4.3. Power of Arbitral Tribunal to Terminate an Interim Award Issued by the Emergency Arbitrator

##### 4.3.1. Claimant's Position

4.3.1.1. The emergency arbitrator did not have the jurisdiction to decide on the interim measure application [*see Annexure 1 – Award on Interim Measure*] and, hence, the arbitral tribunal shall terminate the interim award:

- (a) since the arbitration clause provides for the expedited procedural framework available at the AIAC, the Claimant argues that the Parties' intent was to arbitrate under the AIAC Fast Track Arbitration Rules 2018 and, hence, not to apply for any interim award as provided by Rule 19(7) of the AIAC Fast Track Arbitration Rules 2018;
- (b) Article 8 of the Auction Terms and Conditions does not explicitly refer to the AIAC Arbitration Rules 2018 and, hence, the appointment of the emergency arbitrator is not valid;
- (c) the power of arbitral tribunal to terminate the interim award of the emergency arbitrator is implied.

4.3.1.2. Even if the arbitral tribunal decides that an emergency arbitrator had jurisdiction to decide on the Respondent's application for interim measures, the Claimant reserves its right to comment on paragraph 16(a) of Schedule 3 of the AIAC Arbitration Rules 2018.

##### 4.3.2. Respondent's Position

4.3.2.1. The emergency arbitrator had the jurisdiction to decide on the Respondent's application for interim measures:

- (a) the Parties' intent was to use all types of expedited procedures available at the AIAC pursuant to Article 8 of the Auction Terms and Conditions, including a possibility to appoint an emergency arbitrator. However, the Respondent's application for the appointment of an emergency arbitrator does not amount to its agreement to arbitrate under the AIAC Arbitration Rules 2018;
- (b) despite the fact that the AIAC has confirmed commencement of arbitral proceedings pursuant to the AIAC Arbitration Rules 2018, the Respondent reserved its right to comment on the procedural and substantive issues later on.

4.3.2.2. Even if the arbitral tribunal decides that an emergency arbitrator did not have jurisdiction to decide on the Respondent's application for interim measures, the Respondent reserves its right to comment on paragraph 16(a) of Schedule 3 of the AIAC Arbitration Rules 2018.

#### 4.4. Grounds to Vacate the Interim Award Issued by the Emergency Arbitrator

##### 4.4.1. Claimant's Position

4.4.1.1. In the event that the emergency arbitrator has jurisdiction to award such interim measure, the substantive prerequisites to issue an interim measure were not met under the *lex arbitri*.

4.4.1.2. The Claimant argues that in order for an interim measure to be granted, monetary relief may not remedy the damages adequately. However, the Respondent's alleged damages were quantifiable since the Respondent is in receipt of offers from their prospective buyers. Thus, it would be possible for the damages to be ascertained.

4.4.1.3. The Respondent also failed to prove any likelihood of success on the merits since the Respondent's agent had duly authorised an extension of time and thus due to the Claimant's performance of its duty under the Contract, the Artwork belonged to it.

#### 4.4.2. Respondent's Position

4.4.2.1. The Respondent submits that the substantive requirements to grant the interim order were met under *lex arbitri*. This is because the Respondent would likely suffer harm not adequately reparable by an award of damages.

4.4.2.2. The Respondent contends that the only way to quantify the Artwork's true value would be through an auction sale of the Artwork due to voluminous demands from the market and its sterling reputation. This speaks volume to the urgency of the sale of the Artwork.

4.4.2.3. The Respondent further emphasises that there is a reasonable possibility of success on the merits of its claim. Contrary to what the Claimant alleges in their Notice of Arbitration, the Claimant failed to execute its obligations under the Contract by failing to make payment in time. Further, the Respondent argued that no extension of time was granted by the Respondent. Consequentially, the Artwork is the rightful property of Respondent.

#### Article 5. Miscellaneous

5.1. All definitions used in the Terms of Reference in relation to the arbitration proceedings shall have the same meaning as defined in the Rules.

5.2. Both Parties have entered into the Terms of Reference in good faith and must do all things and execute all further documents necessary to give full effect to these Terms of Reference.

5.3. No amendment to the Terms of Reference shall be effective unless it is in writing and signed by both Parties.

5.4. All costs for preparation of the Terms of Reference shall be borne equally by the Parties.

[signed]

[signed]

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**RUPESH CHAWLA**  
Partner  
*Chawla & Associates*  
Representative of the Claimant

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**YISHU CHOOI**  
Managing Partner  
*YISHU & CO*  
Representative of the Respondent

**ANNEX 1 TO THE TERMS OF REFERENCE DATED 19<sup>th</sup> FEBRUARY 2019**

IN THE MATTER OF AN ARBITRATION UNDER  
THE ASIAN INTERNATIONAL ARBITRATION CENTRE ARBITRATION RULES 2018

BETWEEN:

**PRACHAAN KALAKAAR**

(CLAIMANT)

-AND-

**CHUI'S**

(RESPONDENT)

**[CASE REFERENCE NO.: AIAC/INT/ADM-777-2019]**

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**AWARD ON INTERIM MEASURES**

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Emergency Arbitrator: Mr. E

Place of Arbitration: Hong Kong

Date of the Award: 15 February 2019

## I. PROCEDURAL HISTORY

1. On the 2<sup>nd</sup> January 2019, the Claimant submitted its Notice of Arbitration (“NoA”) regarding the dispute over the Artwork. On 1<sup>st</sup> February 2019, the Respondent requested for the appointment of an emergency arbitrator to rule on its application for interim measures.
2. Following such application, on 2<sup>nd</sup> February 2019, the Director of the AIAC appointed me, Mr. E, as an emergency arbitrator pursuant to Rule 4(6) and Section 5 of Schedule 2 of the AIAC Arbitration Rules 2018.
3. In Procedural Order No. 1 dated 4<sup>th</sup> February 2019, I ordered that the interim measures application was to be heard via only oral submissions. On 11<sup>th</sup> February 2019, the hearing for such relief took place at the AIAC with both the Claimant’s and Respondent’s Representatives present.

## II. INTERIM RELIEF SOUGHT BY THE RESPONDENT

4. Below are excerpts of the arguments submitted by the Respondent during the oral hearing on 11<sup>th</sup> February 2019:

(a) Excerpt 1:

*“The Respondent requests for the Emergency Arbitrator to allow the sale of the Artwork before the end of Chinese New Year (“CNY”). The Respondent argues that the value of the Artwork has skyrocketed and the Respondent would most likely suffer harm not adequately reparable by an award of damages without the sale of the order of the Artwork.”*

(a) Excerpt 2:

*“There has been a constant and continuous demand for the Artwork to be re-listed in the Auction. Upon request from the Emergency Arbitrator, the Respondent is able to furnish supporting evidence through call logs, texts, and emails to il-*

*illustrate such demand from the market. From such correspondences, the Respondent learned that the exponential increase of such price is contributed to by two recent events: (i) the infamous news which provoked international attention that the Artwork has been split almost in half due to an unknown event; and (ii) widespread rumours that that an individual who is able to completely tear the Artwork in half before the end of CNY in the year of the Panda would receive an enormous fortune.”*

(c) Excerpt 3:

*“The Respondent contends that the only way to quantify the Artwork’s true value would be through an auction system sale of the Artwork due to voluminous demands from the market and its sterling reputation. This speaks volume to the urgency of the Artwork’s sale.”*

(d) Excerpt 4:

*“The Respondent further emphasises that there is a reasonable possibility of success on the merits of its claim. Contrary to what the Claimant alleges in their Notice of Arbitration, the Claimant failed to execute its obligations under the Contract by failing to make payment in time. Further, the Respondent argued that no extension of time was granted by the Respondent. Thus, the Artwork is the rightful property of the Respondent.”*

### **III. CLAIMANT’S ARGUMENTS**

5. The following is the excerpts of the arguments submitted by the Claimant during the Oral Hearing:

(a) Excerpt 1:

*“Claimant argues that the Emergency Arbitrator did not have the jurisdiction to award interim measures under the AIAC Fast-Track Arbitration Rules 2018, which govern this dispute. The purpose of the Fast-Track Arbitration Rules is to allow for expeditious resolution of disputes.”*

(b) Excerpt 2:

*“The Claimant contends that assuming arguendo that the Emergency Arbitrator has jurisdiction to award interim measures, the Respondent lacked the requisite necessity for such an award. The Claimant argues that in order for interim measures to be granted, monetary relief may not remedy the damages adequately.”*

(c) Excerpt 3:

*“However, here the alleged damage by Respondent was quantifiable according to the Claimant since the Respondent had already received offers from many prospective buyers by just re-listing the Artwork. Thus, it would be possible for the damages to be ascertained.”*

(d) Excerpt 4:

*“The Claimant asserts that the Respondent’s agent had authorised an extension of time, and thus by performing its duty under the contract the Artwork was belonged to Claimant. The Claimant explained that the Respondent had failed to prove that it had a reasonable possibility of success on the merits.”*

#### **IV. STANDARDS TO BE MET FOR GRANTING INTERIM MEASURE**

6. Under the *lex arbitri* of this case, an arbitral tribunal may grant interim measures to take action that would prevent current or imminent harm. The Party requesting such relief, must satisfy that:

*(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.*

**V. DECISION**

7. Based on the Parties' submissions, I find in favour of the Respondent. The Respondent in its oral argument showed that there was a clear necessity for it to sell the Artwork via auction before the end of CNY. There is clearly no other way for the Respondent to determine the value without holding such auction. Further, in light of the Claimant's failure to pay on time and the extension of time not being granted by an authorised agent, the Respondent has shown a likelihood of success on the merits.

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[signed]

Emergency Arbitrator, *Mr. E*

**ANNEX 2 TO THE TERMS OF REFERENCE DATED 19<sup>th</sup> FEBRUARY 2019**

**[ADM/INT/FTR-777-2019]: IN THE MATTER OF AN AIAC FAST TRACK ARBITRATION BETWEEN  
PRACHEEN KALAKAAR (CLAIMANT) AND CHUI'S (RESPONDENT)**

**WITNESS STATEMENT OF MR. GREGORY WONG**

I, Gregory Wong, of Unit 32F, Castley Tower, Abercrombie Road, Hong Kong 518088, affirm as follows based on my personal knowledge:

1. I am a Senior Accounts Executive at Chui's – a successful rare items auction house based in Hong Kong ("Respondent"). My role involves supervising the Respondent's accounts receivables and engaging in business development activities to expand the Respondent's clientele.
2. On 10<sup>th</sup> November 2018, the Respondent received the delivery of an artwork known as *the Bamboo and the Panda*. Given the age and historical significance of this artwork, the Choong Family ("Seller") had been maintaining the artwork inside an air-tight glass casing for the past 150 years. Upon the Respondent's possession of the artwork, it remained in the same glass casing and it was stored in the Respondent's vault along with all the other auctionable items for the open house on 12<sup>th</sup> December 2018.
3. On 12<sup>th</sup> November 2018, the Respondent issued fifty 50 invitations to various art collectors, art galleries and other members of the Respondent's client database, to attend the Respondent's next open house and rare items auction scheduled for 12<sup>th</sup> December 2018. I am aware that an invitation letter was sent to Pracheen Kalakaar ("Claimant").
4. On 12<sup>th</sup> December 2018, the Respondent held its third and final open house for 2018. Seventy-two (72) auctionable items were displayed and available for purchase at this open house. The head auctioneer at this open house was Mr. Frederick Bartholomew. The Respondent's other staff who was also present at this open house included six (6) members

of the Respondent's Sales Team, four (4) members of the Respondent's Finance Team, and an administrative assistant.

5. Given that a number of members of the Respondent's Sales Team was either on sick leave or annual leave on the auction date, certain members of the Respondent's Finance Team who were present also doubled-up as sales consultants for the open house. I was one of the members of the Finance Team who acted as a sales consultant at the open house. I assumed this was because of my prior experience in sales.
6. Prior to the open house commencing, Mr. Bartholomew instructed all four (4) members of the Finance Team present at the open house that we were solely to act as sales consultants and field any and all queries relating to the auctionable items on display. Although all four (4) of us were members of the Finance Team, we were instructed to adhere to all current approval process and were not permitted to bypass standard procedures.
7. On the day of any open house, all prospective buyers are required to complete a registration form prior to entering the viewing room to inspect the auctionable items. As part of the registration process, all proxy holders are also required to hand over their proxy forms whereby the proxy holder is authorised to place bids on behalf of the actual purchaser.
8. It was due to the registration process that I was aware Mr. Hari Sadhu was at the open house acting as the proxy for the Claimant. Mr. Sadhu and I were previously acquainted through my former employment at Scotties' – an auction house similar to the Respondent's based in Cape Town, South Africa.
9. Approximately half an hour into the open house, Mr. Sadhu approached me and expressed an interest in Lot No. 58 – *The Bamboo and the Panda*.
10. Mr. Sadhu told me that the Claimant was interested in bidding for Lot No. 58 and that he had also received revised bidding instructions from the Claimant in this regard. I informed Mr. Sadhu that competition for Lot No. 58 would likely be stiff as approximately 23 prospective buyers had already approached me that evening with respect to that Lot Number.

11. Mr. Sadhu informed me that the Claimant may need extra time to procure financing to purchase Lot No. 58 should the Claimant's bid be successful.
12. It was not the Respondent's standard procedure to accommodate such requests for payment extensions. In the select instances where such requests had been approved by the Respondent, the approval has always been recorded in the sale documents pertaining to that auctionable item and the 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.
13. I informed Mr. Sadhu that it was not a standard procedure to accommodate such requests for a payment extension.
14. Mr. Sadhu proposed that if the Claimant was successful in the bid for Lot No. 58, the Claimant would make a 20% deposit against the Auction Price and it would also assume all risk in the auctioned item from that point in time.
15. I advised Mr. Sadhu that his proposal could be considered by the Respondent if the Claimant ended up being the successful bidder for Lot No. 58.
16. Mr. Sadhu did end up being the successful bidder for Lot No. 58. Given our acquaintance, I proceeded to walk over to Mr. Sadhu to congratulate him on his success whilst he was standing at the Sales Desk to complete the necessary paperwork for effect the auction of Lot No. 58:

*Me: "Congratulations Mr. Sadhu, it is a remarkable piece to own. I hope you're happy."*

*Mr. Sadhu: "I am indeed! It most certainly will fit right into the existing collection in our art gallery. By the way, if I pay the deposit in Hong Kong Dollars, would it be possible for me to pay the balance in Indian Rupees?"*

Me: *"It may be possible but I will need to seek internal approval. When you execute the auction documents, just let the Sales Desk know you would like to pay in a foreign currency and I will follow up on the invoice for you."*

Mr. Sadhu: *"Thank you Gregory, much appreciated."*

17. At no point in time did Mr. Sadhu raise the issue of a payment extension during my interaction with him following the auction of Lot No. 58. Given that I had interacted with many prospective buyers during the evening's open house, I too had forgotten about Mr. Sadhu's proposal for a payment extension.
18. Having said that, at no point in time did I represent to Mr. Sadhu that I had the authority to unilaterally approve his request for a payment extension. It is true that I had such a power during my tenure at Scotties as a Sales Representative but the same authority did not translate to my position as a Senior Accounts Executive with the Respondent.
19. After the conclusion of the open house, I sent an email to the Head of Finance querying whether we could approve Mr. Sadhu request for the invoice for the balance of the Auction Price to be converted from Hong Kong Dollars to Indian Rupees. After a few layers of approval, I understood that the request had been actioned and that a revised invoice in Indian Rupees was sent to the Claimant on 13<sup>th</sup> December 2018.
20. Aside from the above, I had no further involvement in the events surrounding the auction of Lot No. 58.
21. The facts stated in this witness statement are true.

Dated: 15<sup>th</sup> January 2019

Witness Name: Gregory Wong

Witness Signature: *[signed]*

**MR. PRESIDING ARBITRATOR**  
GOUGH MONET PAINTERS  
Jodenbreestraat 263-267, 1016 GV Amsterdam, Netherlands

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*Our Reference:* RB/01/2019/PKC

22<sup>nd</sup> May 2019

**CHAWLA & ASSOCIATES**

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Dear Sirs,

**IN THE MATTER OF AN AIAC FAST TRACK ARBITRATION BETWEEN PRACHEEN KALAKAAR (CLAIMANT) AND CHUI'S SDN BHD (RESPONDENT)**

With reference to the arbitration above and the confirmation by the Director of the AIAC, a three-member Arbitral Tribunal has been constituted as follows:

- (i) Mr. First Arbitrator;
- (ii) Mr. Second Arbitrator;
- (iii) Mr. Presiding Arbitrator.

In order to progress the arbitration, the Arbitral Tribunal intends to fix a tele-conference. The Tribunal invites the Claimant and the Respondent to confirm their availability on Thursday, 28<sup>th</sup> February 2019 from 10:00 AM to 6:00 PM.

Kindly provide your confirmation by no later than **25<sup>th</sup> February 2019.**

Should the Parties be agreeable, the tribunal would like to invite the Claimant to liaise with Mr. Charlie Pillard from the AIAC to arrange the necessary.

Thank you.

[signed]

Yours faithfully,

MR. PRESIDING ARBITRATOR

**cc. MR. FIRST ARBITRATOR**

4 Jingshan Front St  
Dongcheng Qu  
100006 Beijing  
China

**By Fax, Email & Hand**  
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**MR. SECOND ARBITRATOR**

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**IN THE MATTER OF AN ARBITRATION UNDER  
THE ASIAN INTERNATIONAL ARBITRATION CENTRE  
FAST TRACK ARBITRATION RULES 2018**

BETWEEN:

**PRAACHEN KALAKAAR**

(CLAIMANT)

-AND-

**CHUI'S**

(RESPONDENT)

**[CASE NO.: AIAC/INT/FTR-777-2019]**

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**PROCEDURAL ORDER NO.1**

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**Arbitral Tribunal:**

Mr. Presiding Arbitrator

Mr. First Arbitrator

Mr. Second Arbitrator

**Tribunal Secretary:**

Mr. Charlie Pillard

**Date:** 1<sup>st</sup> June, 2019

## I. Introduction

1. The first session of the Arbitral Tribunal was held on May 29, 2019 at 10:00 AM MYT by telephone conference. The session was adjourned at 5:20 PM MYT.
2. The telephone conference was attended by:
  - (a) Members of the Tribunal:
    - Mr. Presiding Arbitrator
    - Mr. First Arbitrator
    - Mr. Second Arbitrator
  - (b) Secretary of the Tribunal: Mr. Charlie Pillard, International Case Counsel, AIAC
  - (c) Representatives of the Parties:
    - Mr. Rupesh Chawla, Partner, Chawla & Associates (participating on behalf of the Claimant)
    - Mr. Yishu Chooi, Partner, Chooi & Co (participating on behalf of the Respondent)
3. This Procedural Order sets out the procedural rules that govern this arbitration.

## II. Applicable Arbitration Rules

4. Pursuant to letter from the AIAC dated 2<sup>nd</sup> February 2019, this arbitration was initially commenced under AIAC Arbitration Rules on the 2<sup>nd</sup> January pursuant to Rule 2(2) of the AIAC Arbitration Rules.
5. The Parties entered into a Terms of Reference dated 19<sup>th</sup> February 2019, agreeing on the applicability of the Fast Track Arbitration Rules 2018.
6. In light of the above, these proceedings are conducted in accordance with the Fast Track AIAC Arbitration Rules 2018 and the arbitration agreement contained in the Article 8 of the Auction Terms and Conditions.

### III. Constitution of the Tribunal

7. The Claimant nominated the First Arbitrator and the Respondent nominated the Second Arbitrator in the Terms of Reference dated 19<sup>th</sup> February 2019.
8. The AIAC has confirmed the appointment of the First Arbitrator and the Second Arbitrator on 20<sup>th</sup> February 2019.
9. On 21<sup>st</sup> March 2019, the First Arbitrator and the Second Arbitrator jointly nominated a person to be appointed as the Presiding Arbitrator. However, due to conflict of interest, such appointment was not finalised.
10. Subsequent extension of time was granted by the Director of the AIAC until 21<sup>st</sup> April 2019.
11. On 20<sup>th</sup> April 2019, the First Arbitrator and the Second Arbitrator requested another extension of time until 21<sup>st</sup> May 2019. The Director of the AIAC granted such request.
12. On 20<sup>th</sup> May 2019, the First Arbitrator and the Second Arbitrator informed the AIAC on the selection of the Presiding Arbitrator and, hence, formation of the tribunal.
13. On 21<sup>st</sup> May 2019, the Director of the AIAC confirmed the appointment of the Presiding Arbitrator and payment of the preliminary advance deposit requested on 2<sup>nd</sup> February 2019.
14. Both Parties reserved their rights to comment on the constitution of the arbitral tribunal.

### IV. Secretary of the Tribunal

15. Mr. Charlie Pillard, International Case Counsel at the AIAC, was appointed as a Tribunal Secretary.

16. Mr. Charlie Pillard shall be copied in all communications using the following contact details:

**ATTN: Mr. Charlie Pillard**

International Case Counsel

Asian International Arbitration Centre

Bangunan Sulaiman, Jalan Sultan Hishamuddin, Kampung Attap, 50000

Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur

Malaysia

[Email: [charlie@aiac.world](mailto:charlie@aiac.world)]

#### V. Place of Arbitration

17. Hong Kong shall be the place of the arbitration.
18. The Tribunal may hold hearings at any place that it considers appropriate following consultation with the parties.
19. The Tribunal may deliberate at any place it considers convenient.

#### VI. Language of arbitration

20. English shall be the procedural languages of the arbitration.

#### VII. Issues to be Addressed in the Parties' Written Submissions and Oral Hearing

21. The Arbitral Tribunal take note that the Claimant has reserved its right, and is now exercising its right, to request the Arbitral Tribunal to vacate the order made by the Emergency Arbitrator dated 15<sup>th</sup> February 2019 based on Paragraph 15(b) of Schedule 3 of the AIAC Arbitration Rules 2018. During the telephone conference, the Arbitral Tribunal and the Parties have deliberated various viable structures of the presented issue to be dealt with.

22. In light of the aforementioned and Article 4 of the Terms of Reference dated 19<sup>th</sup> February 2019, the Arbitral Tribunal decides that the Parties are required to address the following issues in their written submission and at the oral hearing in Hong Kong:

- (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.

23. Notwithstanding to paragraph 22 above, the Parties have the liberty to structure the presented issues in their written and oral submission in any order that they deem fit.

24. The deadline for the written submissions is on the 20<sup>th</sup> September 2019 while the hearing dates have been fixed on the 4<sup>th</sup> – 7<sup>th</sup> November 2019.

This procedural order is issued in Hong Kong, this 1<sup>st</sup> June 2019 by the following members of the Tribunal:

[signed]

[signed]

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Mr. First Arbitrator

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Mr. Second Arbitrator

[signed]

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Mr. Presiding Arbitrator