5. BANKING LAW

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Bank and customer

The bank's mandate

5.1 The bank's mandate is usually established at the start of the banker-customer relationship, when the customer signs one or more detailed account opening forms. The bank can only act in accordance with the customer's instructions, and a breach will amount to a breach of contract by the bank. A vital aspect of account opening is the determination of the person or persons with the authority to give instructions for the operation of the account, who will be the account signatory or signatories. This is usually a straightforward matter, but the High Court case of *Telemedia Pacific Group Ltd v Crédit Agricole (Suisse) SA* [2015] 1 SLR 338 ("*Telemedia Pacific Group*") illustrates some of the issues that may arise. The plaintiff, Telemedia Pacific Group Ltd ("Telemedia"), opened an account with Crédit Agricole (Suisse) SA ("Crédit Agricole") pursuant to a joint venture agreement it had with Yuanta Asset Management International Ltd ("Yuanta"). Telemedia's sole director and majority shareholder was Hardy Hartono ("Hartono"), and Yuanta was owned by the third party in the action, Jack Yeh ("Yeh"). The transaction in question arose because, pursuant to Yeh's instructions, Crédit Agricole transferred shares that were being held in Telemedia's account into an account maintained by a subsidiary of Yuanta. Telemedia alleged that Crédit Agricole acted in breach of mandate or negligently by doing this, as Hartanto was the only authorised signatory of Telemedia's account, and Yeh was not an authorised signatory. In defence, Crédit Agricole relied on the account-opening forms for Telemedia's account, which showed that both Hartanto and Yeh were singly authorised signatories of Telemedias account. However, Telemedia argued that when the account opening forms were first submitted to Crédit Agricole, they only bore the name of Hartanto as a signatory, and that Yeh's name was later inserted without Telemedia's knowledge or consent after the forms had been handed over to the bank's representative. Crédit Agricole denied this and asserted that the account-opening forms bore the names of both Hartanto and Yeh when they were submitted as was consistent with the understanding all along that both Hartanto and Yeh would be singly authorised to operate

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Telemedia's account. The case turned largely on its highly contentious facts. These were examined in detail by George Wei JC, who explained his findings clearly and comprehensively. Wei JC preferred Crédit Agricole's version of the facts. He found that Yeh was an authorised signatory of Telemedia's account and that his name was inserted on the account-opening forms with the knowledge and consent of Hartanto. The claim against the bank for breach of mandate, therefore, failed.

5.2 Whilst the question of which signatures appear on the account opening forms as authorised signatures is a fact that is easily ascertainable by referring to the forms, *Telemedia Pacific Group* shows the issues that might arise when the signed forms are allegedly altered after they have been handed over to the bank's representative. The decision of Wei JC in *Telemedia Pacific Group* did not find this to be so on the facts of that case. However, if there had been evidence of the forms having been tampered with, difficult questions could arise. Clearly, the customer cannot be bound by the alterations unless it authorised or knew about these. On the other hand, if the alterations had been made with the knowledge of, or due to the negligence of the bank's representative, the bank cannot be protected by relying on the altered forms. The most uphill task for both the customer and the bank would be to convince the court that their version of the facts is the correct one. One of the ways of doing this could be for the customer to sign in front of an independent witness or perhaps in keeping with the current culture of "selfies" and instant photographs taken on mobile devices, this could be done by taking a photograph of the customer with the signed document. Both of these suggestions are likely to be too cumbersome to incorporate into the standard operating procedures of banks. In *Telemedia Pacific Group*, Wei JC observed (at [266]) that a greater degree of care would have been advisable:

> On the version of the facts that I have preferred, the account-opening forms were signed at different times, and never in front of Mr Goh, Ms Teo, or another Crédit Agricole bank officer. This, in my view, was unfortunate.

Wei JC added (at [268]):

> I am of the view that if either Mr Goh or Ms Teo had witnessed the actual signing of the account-opening forms, the room for dispute as to whether Mr Yeh was a singly authorised signatory would have been reduced.

5.3 An alternative scenario in which disputes may arise as to whether the bank has breached its mandate is the one where a customer instruction is given to the bank over telephone. In this situation, a customer might deny that the instructions were given by him, and sue the bank for acting upon the unauthorised instruction. With the

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customer's word against that of the bank officer, the contest becomes one that is based primarily on facts, and the winner would be the one who convinces the court of its version of the events. This was precisely the situation in *Lo Man Heng v UBS AG* [2014] SGHC 134 ("*Lo Man Heng*"). There, the account holder, Lo Man Heng ("Lo"), claimed that UBS AG ("UBS") had acted improperly upon unauthorised telephone instructions received by Chua Hock Beng Dennis ("Chua"), the bank's relationship manager, to close Lo's accounts and transfer the moneys into the account of Yap Loo Mien ("Yap"), who was the wife of Lo's business partner, Michael Chia Tien Foh ("Chia"). Lo claimed that Chia made the phone calls giving the instructions, whilst the bank claimed that it was Lo who made those calls. The case turned on who had made the phone calls – if it had been Chia, the bank could have breached its mandate in acting upon the instructions of an unauthorised person, whereas if it had been Lo, the bank would have been acting within its mandate. This factual determination would normally have been helped by the bank's standard practice to record all calls regarding payment instructions. However, the bank kept the recordings of the phone conversations only for two years, and more than two years had elapsed by the time Lo commenced the action. In this situation, the court could only rely on conflicting witness testimony and ambiguous documentary evidence to make its factual finding that it was Lo who had made the phone calls. This was a happy result for the bank, but it could have gone the other way. A general lesson to be learnt might be that if payment instructions are to be accepted by telephone, it would be prudent for the bank to keep the records of the telephone conversations for the full length of the limitation period during which the customer could bring an action.

Revocation of authority

5.4 A customer may wish to change its instructions to its bank at various points in the banker-customer relationship, including revoking the authority of one of the authorised signatories. Naturally, a bank should only act in accordance with such instructions when the person instructing the change has the authority to do so, and the proper procedure has been followed. In *Telemedia Pacific Group*, one of the arguments put forward by Telemedia was that even if Yeh had been an authorised signatory at the beginning, his authority had been revoked by a series of e-mails written by Hartanto to the bank before the instruction to transfer the shares had been given. Wei JC found on the facts that the e-mails did not amount to such revocation. He found further that even if the e-mails had purported to revoke Yeh's authority, they would not have been effective. One of the account-opening forms which constituted the mandate to Crédit Agricole was the "Certified

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Extract of Board Resolution". Clause 2 named Hartono and Yeh as authorised signatories. Clause 12 stated:

> [T]hese resolutions [shall] be communicated to the Bank and shall constitute the Company's mandate to the Bank and remain in force and effect until an amending resolution shall have been passed by the Directors, and a copy thereof certified by a Director or the Company Secretary, shall have been actually received by the Bank.

As no board resolution to remove Yeh had been passed, Wei JC found that the original mandate remained and Yeh's authority would had not have been successfully revoked at the time the shares were transferred.

Conclusive evidence clauses and estoppel

5.5 It has become standard for bank documentation in Singapore to include conclusive evidence clauses, also known as verification clauses. The leading case in this area is the Court of Appeal's decision of *Pertamina Energy Trading Ltd v Credit Suisse* [2006] 4 SLR(R) 273 ("*Pertamina Energy*"), where such clauses were held to be valid. V K Rajah J (as he then was) described these clauses (at [55]) to be those that:

> … place the onus on the bank's customers to verify their bank statements and to notify the bank if there is any discrepancy within a certain period of time. If the customer fails to do so, he is precluded from asserting that the statements do not represent the true state of his accounts with the bank. In other words, he may not make a claim against the bank for his loss.

5.6 The Court of Appeal's decision in *Pertamina Energy* confirmed the position taken by the High Court in three earlier cases, *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 ("*Consmat*"), *Stephan Machinery Singapore Pte Ltd v Oversea-Chinese Banking Corp Ltd* [1999] 2 SLR(R) 518, and *Tjoa Elis v United Overseas Bank* [2003] 1 SLR(R) 747 ("*Tjoa Elis*"). The Court of Appeal highlighted (at [63]) that:

> … the relationship between a bank and its customer is governed by contract; and the parties are at liberty to expressly agree on any peculiar arrangement to define and determine their relationship, including the imposition of obligations and responsibilities not usually recognised at common law. The freedom of the parties to contract is however circumscribed by legislation (such as the UCTA) and public policy considerations. For example, if a bank attempted to exclude liability for the fraud of its own employees, we would have no hesitation in declaring such a clause unreasonable and invalid.

As conclusive evidence clauses seek to exclude liability for one's own contractual obligations under s 3 of the Unfair Contract Terms Act

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(Cap 386, 1994 Rev Ed) ("UCTA"), they must meet the requirements of reasonableness prescribed by that section. The conclusive evidence clauses in the cases just mentioned in the preceding text passed UCTA's reasonableness test. The Court of Appeal in *Pertamina Energy* endorsed (at [60]) the views of L P Thean J (as he then was) (*Consmat* at [26]) that:

> … in principle conclusive evidence clauses employed in a banker and corporate customer relationship afford a practical and reasonable device for pragmatic management of risk allocation. There is nothing intrinsically objectionable about such clauses provided they are properly and reasonably defined.

5.7 It was not contested in *Telemedia Pacific Group* that Crédit Agricole's general conditions contained a conclusive evidence clause which formed part of the contract between the bank and Telemedia. Crédit Agricole claimed that it sent advices to Telemedia notifying it of the share transfers and Telemedia had not complained as it was required to do under the exclusive evidence clause if it had any objections. Crédit Agricole argued that even if Yeh had not been an authorised signatory, according to the terms of the conclusive evidence clause, Telemedia was estopped from claiming against the bank. In response, Telemedia submitted that the operation of the conclusive evidence clause was predicated on the receipt of a valid instruction from the customer. The question for the court was whether the bank was precluded from relying on the conclusive evidence clause in a situation where the transaction in question was unauthorised. This turned out to be a non-issue, given Wei JC's decision that Yeh was indeed an authorised signatory. Wei JC, nevertheless, gave his opinion that the bank could still rely on the conclusive evidence clause even if the transaction was unauthorised. Wei JC referred to the cases of *Pertamina Energy* and *Tjoa Elis* where the operation of conclusive evidence clauses exonerated the banks from liability even though the transactions were unauthorised because the instructions were forged. In contrast, the conclusive evidence clause in *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 did not protect the bank because the fraud was perpetrated by the bank's own employee, and nothing short of an express reference to this in the clause would be sufficient to bring such a risk within the conclusive evidence clause. Wei JC highlighted that the effect of a conclusive evidence clause was not to create authorisation where none existed, but to place the duty on the customer to check the statements and advices: *Telemedia Pacific Group* at [236].

5.8 Although conclusive evidence clauses have been held to be valid in Singapore, the banking community would do well to remember that the reasonableness of such clauses would depend to a large extent on the facts of the case and the precise terms of the clause. In the words of Rajah J in *Pertamina Energy*: "Each case will entail a careful examination

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of its own peculiar factual matrix starting with a careful scrutiny of the conclusive evidence clause that is being questioned": *Pertamina Energy* at [61].

5.9 When a bank is sued for breach of mandate and is unable to rely on a conclusive evidence clause for whatever reason, the bank might still be able to defend itself by raising normal estoppel. In *Lo Man Heng* (above, para 5.3), if the High Court had found instead that Chia (the account holder's business partner) had made the phone calls, this would have resulted in the transaction being unauthorised. In such a situation, the bank would have been unable to rely on the conclusive evidence clause in its account-opening document because the clause provided (at [65]) that it did not apply to "unauthorised transactions which have resulted from the forgery, fraud or negligence of the Bank or any of its employees". If there had been a breach of mandate by UBS AG, this would have been caused by the negligence of the relationship manager, who upon receiving the phone call from Chia should have checked against the account-opening forms and discovered that Chia was not authorised to give instructions.

5.10 Although the bank in *Lo Man Heng* could not rely directly on the conclusive evidence clause, the High Court found that it could maintain a defence of estoppel in respect of the plaintiff's claim. The requirements of an operative estoppel were set out by the Court of Appeal in *Pertamina Energy*. There must be (*Pertamina Energy* at [72]):

> (a) a representation or conduct amounting to representation intending to induce a course of action on the part of the person to whom the representation was made; (b) an act or omission resulting from the representation by the person to whom it was made; and (c) detriment to such person as a consequence of the act or omission.

Judith Prakash J applied these requirements to the facts of the case and found that all three requirements were satisfied: *Lo Man Heng* at [70]–[73]. By failing to tell the bank about the unauthorised transaction when he had a duty to do so under the conclusive evidence clause, Lo was representing that all was in order. As a result, the bank took no action to recover the moneys that had been paid without authority. For several years after the transfer, Yap (the recipient of the funds from Lo's account) had maintained accounts with the bank which contained more than the amount of money mistakenly paid to her. If the bank had known of the unauthorised transactions on time, it could have declined to allow Yap to withdraw those funds when she eventually closed her accounts. Lo's delay in informing the bank of the unauthorised payments was detrimental to the bank and seriously affected its prospects of recovery against Yap.

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The bank's duty of care

5.11 In the absence of an express contractual term, a duty of care might be owed by a bank to its customer as a result of an implied term in their contract, or it might arise under the common law of torts. In *Telemedia Pacific Group* (above, para 5.1), Telemedia's assertions that Crédit Agricole had breached its duty of care fell away when Wei JC decided that Yeh had authority to transfer the shares out of Telemedia's account. Nevertheless, the learned Judicial Commissioner proceeded to consider Telemedia's breach of duty claims on the assumption that these had been made in the alternative, that is, that Crédit Agricole may be liable for breach of duty of care even if Yeh had been authorised to operate the Telemedia account. A few points may be highlighted from Wei JC's analysis.

5.12 First, where a bank's duty of care arises under an implied term of the contract, this could be a term that is implied in law, or one that is implied in fact. Wei JC referred to the remarks of the Court of Appeal in *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 at [69] to the effect that the implication of terms in law should be done with "considerable restraint" as such a term "would apply to all future like cases, rather than to the particular contract at hand, as is the case for terms implied in fact": *Telemedia Pacific Group* at [203]. Wei JC found that Telemedia's case for certain terms to be implied in law by virtue of the banker-customer relationship had not been made out because this lacked detailed submissions as to the terms to be implied and evidence was not provided on the banker-customer relationship. In contrast to terms implied by law, terms implied by fact depended on business efficacy or the unexpressed intentions of the parties in a particular transaction. This had not been specifically pleaded by Telemedia, but Crédit Agricole was at least willing to acknowledge that it owed the duty of a reasonable banker.

5.13 Second, some degree of caution must be exercised in finding a common law duty of care in tort in a situation where the parties' duties are already defined by contract. This would depend on the scope of the duty of care that allegedly arises under common law. Wei JC referred to the Court of Appeal case of *Deutsche Bank v Chang Tse Wen* [2013] 4 SLR 886 and stated that the thrust of that decision was that (*Telemedia Pacific Group* at [209]):

> … great care was needed before finding that wide obligations were imposed or assumed in tort, over and above those provided for in the contract. While the circumstances will have to be very clear and cogent before any common law duty of care will include a duty to advise or protect a client's wealth and assets, the same is not true with a duty to take care in carrying out instructions. In principle, in appropriate cases, applying the test in *Spandeck Engineering (S) Pte*

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> *Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100, a common law duty of care could arise out of a banker-customer relationship.

The courts in Singapore have found that a bank is under an implied duty as well as a common law duty to take care in carrying out the customer's instructions, for example, in *Bank of America National Trust and Savings Association v Herman Iskandar* [1998] 1 SLR(R) 848 and *Go Dante Yap v Bank of Austria Creditanstalt AG* [2011] 4 SLR 559.

5.14 Third, the bank's duty to follow its customer's instructions is not absolute, and is subject to its duty to take reasonable care in all the circumstances. Whilst a bank was entitled, without more, to honour a genuine mandate presented by an agent acting within his authority, the bank's mandate is subject to circumstances that put it on inquiry. The question whether a prudent bank would be put on notice is a question of fact. Where the bank was aware of circumstances putting it on inquiry, the bank's actions would be subject to the test of whether the reasonably prudent banker faced with the same circumstances would regard the course of action taken on the facts justifiable: *Yogambikai Nagarajah v Indian Overseas Bank* [1996] 2 SLR(R) 774 at [59]; *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178 at [24]–[25]. On the facts in *Telemedia Pacific Group*, Wei JC found that Crédit Agricole had not become aware of any facts that would have put a reasonably prudent banker on inquiry such that they should have sought express confirmation from Hartanto regarding Yeh's authority to sign before transferring the shares on Yeh's instructions.

Letters of credit

Doctrine of autonomy, compliance of documents and standard of examination

5.15 The contract between the applicant and the issuing bank in a letter of credit ("LC") transaction was the focus of the High Court decision by George Wei JC in *Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909 ("*Abani Trading*"). This case was an appeal from the District Court, and was the first reported LC case in Singapore decided under the *Uniform Customs and Practice for Documentary Credits (2007 Revision)* (International Chamber of Commerce Publication No 600) ("UCP 600"). The plaintiff, Abani Trading Pte Ltd ("Abani"), applied to the defendant, BNP Paribas ("BNP"), for the issuance of an LC in respect of a purchase of a consignment of metal bars from Metal Market Dis Ticaret Ltd Sti ("Metal Market"). The LC was governed by the UCP 600 and the latest date of shipment was stated to be 30 December 2008. This shipment date was probably chosen to ensure that Abani, who had

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sub-sold the consignment to another party named Codiscomad, could meet its obligation under the sub-sale, which required the goods to be shipped between November and December 2008. The documents required under the credit included an original full set of clean on board bill of lading issued by carrier or agent, and the LC stipulated that a forwarder bill of lading was not acceptable.

5.16 On 12 January 2009, BNP received a bill of lading dated 30 December 2008 issued by Karetta Uluslararasi Tasimacilik Ve Dis Tic Ltd Sti ("Caretta") together with other relevant documents from the negotiating bank, Fortis Bank, which sought reimbursement from BNP. BNP subsequently debited Abani's account on 16 January 2009. However, it appeared that another bill of lading was issued later, which indicated that the shipping date was 2 January 2009. As a result, Abani was in breach of contract to Codiscomad and had to settle Codiscomad's claim by deducting a sum of US$64,431.53 from the original sale price. Abani then brought the action in the District Court against BNP to recover the sum of US$64,431.53, or alternatively, damages, on the basis that BNP had breached its duty or the terms of the LC and had failed to exercise due care in examining the relevant documentation before making payment. Abani based its claim against the bank for breach of duty on two grounds: First, the bill of lading was a freight forwarder's bill of lading and should have been rejected as this was prohibited by the terms of the LC. Second, the bill of lading that was presented for negotiation was not a "true" bill of lading. The "true" bill of lading only came to light later, revealing that the goods were shipped on 2 January 2009, which was after the latest date of shipment specified in the LC, that is, 30 December 2008. The District Judge found BNP not liable and Wei JC agreed.

5.17 To establish BNP's breach, Abani argued that the bill of lading was a freight forwarder's bill of lading and should have been rejected as this was prohibited by the terms of the LC. However, this argument must be assessed in light of the fact that the bill of lading that was presented to BNP had been signed by Caretta as agent for the carrier, Delmas, and on the face of it, this would have satisfied the requirements of the credit. Abani's argument would only succeed if the court imposed a duty on BNP to have regard to information that was contained in the bill of lading. To support the argument that the bill of lading was a freight forwarder's bill of lading, Abani argued that it was common knowledge that Caretta was a freight forwarding company. Although not explicitly asserted, the implication of this must have been that BNP should have known that Caretta had issued the bill of lading in its capacity as freight forwarder. Abani also suggested that BNP should have known from past experience that Caretta was not the agent of Delmas, the carrier. BNP had been involved in previous transactions with Abani where the same carrier, Delmas, had been used and in those

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cases, the bills of lading had signed by CMA CGM Shipping Agency JSC ("CMA CGM") as agent of the carrier. The upshot of this was that BNP should have known that CMA CGM, and not Delmas, was the agent of the carrier.

5.18 Wei JC found that just because Caretta was a freight forwarder did not mean that it had signed the bills of lading in that capacity. It was possible for a freight forwarder to sign a bill of lading in its own capacity as a freight forwarder or in its capacity as an agent for the carrier. This was a matter of arrangement between the relevant parties to the transaction, and would be unknown to the bank. The bank was not required to investigate the status of the signing party beyond what was shown on the bill of lading. As to BNP's knowledge of previous transactions, Wei JC was of the view that this did not mean that BNP was obliged to reject any bill of lading where CMA CGM was not reflected as agent. It was possible that Delmas might use more than one agent. In any case, even if it were true that the agent of Delmas was CMA CGM and not Caretta, Wei JC was of the view that this did not mean that BNP had failed in its duty to properly examine the relevant documents. On the face of the bill of lading, Caretta signed off as agent for the carrier and this was not an underlying fact which the bank had to investigate. Wei JC also dismissed Abani's argument that the date of shipment reflected on the "true" bill of lading was after the latest date of shipment allowed under the credit. By the time that Abani had received the "true" bill of lading, BNP had already paid on the LC showing a valid shipment date and had deducted Abani's accout. The emergence of the "true" bill of lading was not relevant to whether the bank had properly examined the bill of lading that had been presented. Wei JC found that BNP had not breached its duty to exercise due care in examining the documents that were presented to it.

Doctrine of autonomy

5.19 An important principle relied on by the court in *Abani Trading* to support its findings was the doctrine of autonomy. The principle of autonomy is set out in Art 4(a) of the UCP 600 which provides that a credit by its nature is a separate transaction from the sale or other contract on which it may be based. This principle was explained by the House of Lords in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 ("*United City Merchants*") and has been applied in Singapore in cases such as the Court of Appeal decision of *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146. Essentially, the principle from these cases is that banks have an obligation to honour the LC if the documents presented conform, on their face, to the requirements of the credit. This obligation would stand even if there were any irregularities in the underlying contract, and notwithstanding that the bank had knowledge that the

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beneficiary had already committed a breach of the underlying contract. Any breach of the underlying contract was a matter to be sorted out between the applicant and the beneficiary and was not a reason for the bank to withhold payment on the LC, which had traditionally been treated in mercantile practice as being the equivalent of cash in hand. The only exception to this was if the seller, for the purpose of drawing on the credit, presented documents which contained material representations which to its knowledge were false. As there was no suggestion of fraud on the facts of *Abani Trading*, the autonomy principle applied in full force.

5.20 Abani sought to distinguish the autonomy principle in the House of Lords decision in *United City Merchants* on the basis that the present case did not involve a dispute as to the underlying transaction. Wei JC did not address this point specifically, but it would follow from his application of the principle of autonomy to the facts of the case, that he disagreed with this submission. In so far as this point was made by Abani in relation to its claim that BNP should have known that the bill of lading, although seemingly compliant on its face, was actually non-compliant because it was a freight forwarder's bill, this author is of the view that it may have some merit. This particular assertion would seem to be better analysed using the rules relating to the standard of examination and compliance of documents as discussed below. However, the proper principle to use for analysing this claim is not clear cut and there may be an overlap, especially if the underlying sale contract between Abani and its seller required a bill that was not a freight forwarder's bill, so that a breach of this requirement would fall under the autonomy principle in *United City Merchants*. A clearer example of the operation of the classic autonomy principle to the facts of *Abani Trading* would be in relation to the shipment of the goods on 2 January 2009, after the deadline for shipment stated in the contract between Abani and its seller. This would clearly be a breach of the underlying contract, and the application of the autonomy principle would mean that even if BNP had known at the time of presentation of documents that the goods were shipped late, it would still, in the absence of fraud by the seller, have had to honour the LC, and would be entitled to reimbursement from Abani.

5.21 This author would venture to suggest that the doctrine of autonomy as stated in Art 4(a) of the UCP 600 and *United City Merchants* applies largely when the bank is deciding whether or not to honour an LC in a situation where the documents presented conform to the credit but there is some issue with the underlying contract. In contrast, when the bank is determining whether the documents presented conform to the credit in a situation where there may be some extraneous information that could throw light on the information that appears on the face of the documents, it would appear that the rules

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relating to the examination of documents are more appropriate. In other words, the principle of autonomy operates in different circumstances from the principles relating to the examination and compliance of documents, although their main thrust, that the bank should not and need not look beyond the documents that are presented, is the same. This is entirely appropriate, given the overriding documentary nature of letters of credit.

Compliance of documents and standard of examination

5.22 Article 14(a) of the UCP 600 deals directly with the standard of examination that banks have to satisfy. It states:

> A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

This article makes it clear that the determination of whether a presentation is a complying presentation must be done "on the basis of documents alone", and this depends on whether the documents "on their face" "appear" to comply with the credit. In *Abani Trading*, Wei JC explained (at [23]) that one of the reasons for such a strict rule is that "the bank examining the documents often does not possess the requisite expertise or tools to investigate, inspect or inquire into the truth of the representations which appear on the face of the documents". Wei JC pointed out that Art 14(a) was consistent with Art 34 of the UCP 600, which states that a "bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document".

5.23 Abani had asserted that in examining the documents, BNP should have relied on its banking experience and exercised its judgment and general knowledge, which would have enabled it to realise that Caretta was not the carrier's agent, that Caretta was a freight forwarder and that the bill of lading was a freight forwarder's bill of lading. Wei JC accepted (at [29]) that there were some facts which a bank was expected to know, for example, that Singapore was not in Europe. Apart from a clear case like this which was at one end of the spectrum, Wei JC agreed with the observations made by the authors in Ali Malek & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed, 2009) at para 8.21 that:

> … there will be cases which are less clear cut so that there would be some doubt where the dividing line lies between what the bank can be expected to know, and what it is not required to investigate.

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Wei JC was of the opinion that the fact that Caretta was not an agent of the carrier Delmas was not a fact which a bank can be expected to know.

5.24 Abani argued that the bill of lading did not comply with the conditions set out in the credit, and relied on certain technical arguments based on the provisions of Art 20(a) of the UCP 600 and on the interpretation of the phrase "freight forwarder's bill of lading". These will not be explored here, save to observe that in the course of this discussion, Wei JC referred to the position papers issued by the International Chamber of Commerce ("ICC"), and to the opinions of the ICC Banking Commission, and stated (at [41]) that whilst not legally binding, these should be given persuasive weight in so far as they reflect international practice in this area of the law. Wei JC also referred to the decision released under the framework of the ICC's Documentary Credit Dispute Resolution Expertise ("DOCDEX") in the present case – that the bill of lading was complying and that BNP did not have the obligation to investigate the background of the signature by Caretta – which was consistent with the decision that he himself had reached, and explained that DOCDEX decisions were also of persuasive value as being evidence of international practice. Such reference to ICC papers, opinions and rulings is to be welcomed as the UCP 600 is an international set of rules, and it is desirable to achieve some degree of uniformity in its application across the world.

Duties of issuing bank, confirming bank, nominated bank and negotiating bank

5.25 A bank that issues an LC may involve its correspondent banks to perform various roles in relation to the credit, for example, to be the advising bank, confirming bank, or nominated bank. The different rights and duties of banks having such designated roles are contained in the UCP 600. A correspondent bank may assume more than one role, in which case, it would have more than one set of rights and duties, some of which may be overlapping. The main issues in the High Court case of *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2015] 1 SLR 1213 ("*Grains and Industrial Products*") concerned the duties of an issuing bank, a confirming bank, a negotiating bank and a nominated bank. The plaintiff, Grains and Industrial Products Trading Pte Ltd, was the beneficiary of an LC issued by Indian Bank, which was the second defendant in the action. The first defendant, the Bank of India, was named as the nominated bank under the LC, which was stated as being available by acceptance with the Bank of India. The LC was subject to the UCP 600 and had an expiry date of 25 March 2012. On 15 March 2012, the plaintiff sent the required documents under the LC to the Bank of India, which were received by the latter on 16 March 2012. The Bank of India transmitted the documents to the issuer, Indian

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Bank, on 18 April 2012, which was after the expiry date of the credit. On 19 April 2012, Indian Bank informed the Bank of India that it was rejecting the documents and was not honouring the LC because of late negotiation and expiry of the LC. The plaintiffs then started the action against the two banks.

5.26 The plaintiff's case against the Bank of India rested on its obligations as the "Confirming Bank" and/or "Negotiating Bank" under the LC. However, the facts were in dispute and a substantial part of the court's judgment was devoted to factual determination. The plaintiff asserted that the Bank of India had orally agreed in a telephone conversation between the plaintiff's representative and the bank's representative to confirm and/or honour and/or negotiate the LC. The Bank of India denied this. Lee Kim Shin JC found that the plaintiff failed to prove that such agreement had been reached.

Confirming bank

5.27 The obligation of a confirming bank to honour or negotiate a credit upon receipt of conforming documents was not in question in *Grains and Industrial Products*. The important preliminary question was whether the Bank of India could indeed be shown to have assumed the role of a confirming bank. With the rejection by the court of the evidence of an oral agreement to confirm, the only argument remaining was the plaintiff's assertion that the Bank of India was the confirming bank on the basis that the issuing bank, Indian Bank, had requested the Bank of India to confirm the LC and the Bank of India had not notified Indian Bank that it did not agree to do so. This argument was also rejected by the court. To advance its argument, the plaintiff relied on Art 8(d) of the UCP 600 on the confirming bank's undertaking which states:

> If a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank without delay and may advise the credit without confirmation.

Lee JC found this argument untenable for two reasons. First, he was of the view (at [73]) that the SWIFT message only requested the Bank of India to confirm the LC but that this was not, without more, "capable of giving rise to a contractual relationship as between *the plaintiff and the first defendant*" [emphasis in original]. Lee JC further found (at [74]) that the plaintiff's interpretation of Art 8(d) of the UCP 600 was inconsistent with Art 12(a) which states that a nominated bank is not obliged to honour or act on its nomination "except when *expressly agreed to* by that nominated bank *and so communicated to the beneficiary*" [emphasis in original], and also with Art 2 where confirmation is defined as a "*definite undertaking* of the confirming

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bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation" [emphasis in original]. Lee JC concluded (at [75]) that:

> … it was clear that a Nominated Bank did not become a Confirming Bank only by virtue of the fact that it had not informed the Issuing Bank of its unwillingness to confirm the letter of credit. Instead, the Nominated Bank's express agreement to confirm the letter of credit was required and this had to be communicated to the beneficiary.

5.28 The position may not be as straightforward as the extract from Art 12(a) of the UCP 600 set out in the judgment and reproduced in the preceding paragraph may suggest. The full text of Art 12(a) states:

> *Unless a nominated bank is the confirming bank*, an authorization to honour or negotiate does not impose any obligation to that nominated bank to honour or to negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary [emphasis added].

To what extent do the words in italics affect the meaning of this article? Taking the provision as a whole, it would seem that the rule that "an authorization to honour or negotiate does not impose any obligation to that nominated bank to honour or to negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary" does not apply to the confirming bank. This means that the requirement for express agreement of the confirming bank and for this to be communicated to the beneficiary is not found in this article.

5.29 What is the legal effect when a bank that is nominated to confirm an LC refuses to do so but fails to inform the issuing bank of such refusal? This is clearly a breach of the terms of Art 8(d), but for which no specific sanction has been provided in the UCP 600. If the UCP 600 is incorporated by reference into the contract between a nominated bank and an issuing bank, there will be a contractual duty on the nominated bank to inform the issuing bank of its refusal to confirm. However, it does not follow, even in such a case, that the nominated bank's failure to inform the issuing bank of its refusal to confirm renders it a confirming bank by default, making it liable to the beneficiary under the UCP 600. The crucial question in *Grains and Industrial Products* was whether the Bank of India assumed any obligation to be the nominated bank under the credit. It would seem that the Bank of India's omission to inform Indian Bank of its refusal to confirm could not have constituted such assumption of responsibility unless the Bank of India had some obligation to confirm in the first place, or unless by this omission, Bank of India had led the plaintiff to believe that it had agreed to confirm the credit. Neither scenario was argued to be the case by the plaintiff. The circumstances relating to how the LC was advised could be relevant to this question. Article 8(d) which sets out the obligation of

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the nominated bank to inform of its refusal to confirm adds that such bank "may advise the credit without confirmation". The facts as set out in the judgment do not cover this point, but if the Bank of India had been the advising bank for the LC and had advised the plaintiff of the opening of the LC without adding its confirmation, this would show clearly that it was not assuming the role of confirming bank.

Negotiating bank

5.30 One of the arguments put forward by the plaintiff in *Grains and Industrial Products* was that the Bank of India was the negotiating bank under the LC as it had agreed to advance funds to the plaintiff. Lee JC found that this assertion was not made out on the facts. The LC was expressed to be available with the Bank of India by acceptance and not by negotiation. Further, prior to Indian Bank's refusal to honour the LC in April 2012, the plaintiff's representatives did not use the word "negotiate" or "negotiating" in their correspondence with the Bank of India, but only the words "discount" or "discounting". Lee JC highlighted (at [66]) the distinction between "discounting" and "negotiation", as explained by Chan Seng Onn JC (as he then was) in *Kredietbank NV v Sinotani Pacific Pte Ltd* [1999] 1 SLR(R) 274 at [48]–[49] in the following terms:

> … 'discounting' means the discounting bank advancing or lending money after the bill has been accepted, which becomes the security for the advancement or loan, and upon failure of that security, there is recourse to the borrower for reimbursement of the moneys advanced or lent. *A discounting transaction is in fact a separate 'side' transaction outside the credit to which the issuing bank is not privy to.*
>
> … 'negotiation' under a credit in its technical and legal sense, within the meaning of the UCP 500, generally means giving value to or purchasing the bill usually prior to acceptance and making payment to the beneficiary without recourse, after the negotiating bank is satisfied that the documents tendered for negotiation are in compliance with the credit. … *A negotiation is a transaction under the credit, to which the issuing bank is privy to*, because the negotiation by that bank will have to be first authorised or allowed under the credit. …
>
> [emphasis added by the High Court]

Issuing bank

5.31 Where conforming documents have been presented to a nominated bank within the validity period of the LC, does the issuing bank have to honour the LC if the nominated bank declines to act upon its nomination, or if the documents are received by the issuing bank after the expiry of the credit? In *Grains and Industrial Products*, Lee JC answered both questions in the affirmative.

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5.32 The LC in this case was an acceptance credit, and the nominated bank had not acted on its nomination, so the governing provision regarding the issuing bank's undertaking was Art 7(a)(iv) of the UCP 600 which states as follows:

> Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by … acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity.

Lee JC was of the view that it was clear from Art 7(a)(iv) that as long as a complying presentation was made to the nominated bank *or* the issuing bank within the period of validity of the credit, the issuing bank had to honour the LC. This position is well supported by commentaries on the UCP 600 and, with respect, is clearly right. If a complying presentation has been made to the nominated bank within the period of validity of the LC, it is not necessary that the documents should also be received by the issuing bank before the expiry of the LC. The nominated bank is the agent of the issuing bank for the receipt of documents and a receipt by the nominated bank is akin to a receipt by the issuing bank. Further, the UCP 600 does not prescribe any time within which the documents which have been presented to the nominated bank must reach the issuing bank. Transmission of documents to the issuing bank would be done by the nominated bank and it would not be fair to make the beneficiary's rights against the issuing bank dependent upon an act over which the beneficiary has no control. If an issuing bank wishes to impose a time limit within which documents received by the nominated bank should be transmitted, it must do this by a separate agreement with the nominated bank.

5.33 On whether the Bank of India had to agree to act on its nomination before it could be regarded as a nominated bank, Lee JC found that this was not required under the definition in Art 2 of the UCP 600 which stated simply that a nominated bank meant "the bank with which the credit is available or any bank in the case of a credit available with any bank".

Nominated bank

5.34 One of the assertions made in the counterclaim by Indian Bank against the Bank of India in *Grains and Industrial Products* was that the Bank of India should have examined the documents to determine whether the documents were complying. However, it is clear that a bank that is a nominated bank under an LC is not subject to the obligations prescribed for nominated banks under the UCP 600 unless it has decided to act upon its nomination. Lee JC found that the duty of the

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nominated bank under Arts 14(a) and 14(b) to examine the documents and determine within a maximum of five banking days whether the presentation was complying would only apply to the Bank of India if it had acted upon its nomination, and it did not do so.

Performance bonds

Unconscionability

5.35 In Singapore, there are two grounds for restraining a beneficiary from making a call on a performance bond, namely, fraud and unconscionability. As unconscionability is easier to prove than fraud, such cases predominate, and it is one of the most common issues relating to performance bonds arising in the courts for the past 20 years. The principles applied by the Singapore courts in granting an injunction to restrain a beneficiary from claiming on a performance bond are well established and have been discussed in previous editions of the Ann Rev. A substantial number of cases turn primarily on a factual inquiry as to whether the claim of unconscionability had been made out. An example in the year under review is the case of *CCM Industrial Pte Ltd v 70 Shenton Pte Ltd* [2014] SGHC 75 where the High Court refused an injunction because no strong *prima facie* case of unconscionability had been shown. Another case where an injunction was applied for on the grounds of unconscionability, and refused, was *Tech-System Design & Contract (S) Pte Ltd v WYWY Investments Pte Ltd* [2014] 2 SLR 1309 ("*Tech-System System Design*"). Here, Edmund Leow JC took guidance from the Court of Appeal decision in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 to reiterate several points:

(a) In deciding whether a strong *prima facie* case of unconscionability had been made out, the court had to consider the entire context of the case, and only if the entire context was particularly malodorous would an injunction be granted: *Tech-System System Design* at [18].

(b) The court's role in deciding whether to grant an injunction was just to make a *prima facie* evaluation of all the evidence to see if the plaintiff's claim was so obviously abusive or dishonest as to be unconscionable. It was not to consider the merits or make any substantive determination of the issues between the parties, as that was better left to the pending arbitration or a full trial: *Tech-System System Design* at [23] and [26].

(c) Even if the beneficiary was wrong in taking the position that it was entitled to a certain sum and was justified in calling on the bond, the call would still be legitimate as long as the

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beneficiary honestly believed that the obligor was in breach of his obligations: *Tech-System System Design* at [37].

Leow JC also expressed the view that even if allowing a call on the performance bond would cause the obligor liquidity and financial problems, such financial hardship to the obligor was not relevant and should not prevent the beneficiary from calling on the bond: *Tech-System System Design* at [39].

Contractual limits on the right to restrain a call on a performance bond

5.36 In the High Court case of *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 1 SLR 987 ("*CKR v Asplenium (HC)*"), the question arose as to whether the right of the beneficiary to call on a performance bond could be restrained by contract. The plaintiff, CKR Contract Services Pte Ltd ("CKR"), was the main contractor for residential flats being developed by the first defendant, Asplenium Land Pte Ltd ("Asplenium"). As required by the main contract, CKR provided a performance bond issued by the second defendant, DBS Bank. Asplenium was unhappy with CKR's performance and called on the performance bond. CKR applied for an injunction to restrain Asplenium from doing so, on the ground that the call on the bond was unconscionable. However, cl 3.5.8 of the main contract provided that, except on the ground of fraud, CKR was not entitled to restrain the calling of the performance bond on any ground, including the ground of unconscionability. Despite the presence of this clause, Asplenium justified its call by arguing that the clause was unenforceable as it was an attempt to oust the jurisdiction of the court. In the High Court, Asplenium's call on the bond was allowed based on court's finding that the call was not unconscionable. It was also found in the High Court that cl 3.5.8 was void and unenforceable, meaning that CKR was entitled to apply for an injunction on the ground of unconscionability. CKR appealed against the High Court's finding that the call was not unconscionable and Asplenium cross-appealed against the finding that cl 3.5.8 was unenforceable. When the case went up on appeal in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] SGCA 24 ("*CKR v Asplenium (CA)*"), the Court of Appeal disagreed with the judge's finding on cl 3.5.8 and found that the clause was valid. This meant that CKR could only restrain a call on the performance bond in the event of fraud and was not entitled to do so on the ground of unconscionability. As there was no suggestion that any fraud was involved, the Court of Appeal allowed Asplenium to call on the bond.

5.37 The Court of Appeal's decision in *CKR v Asplenium (CA)* is an important one. It decides that parties can agree to exclude the

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unconscionability exception as a ground for restraining a call on a performance bond. It takes on even greater significance in light of the fact that cl 3.5.8 is one that is commonly used in the building industry, being based on the amended Singapore Institute of Architects Articles and Conditions of Building Contract (9th Ed, August 2011).

5.38 The crucial issue was stated by the Court of Appeal to be whether or not cl 3.5.8 was one that ousted the jurisdiction of the court and, hence, one that was void and unenforceable as being contrary to public policy. The Court of Appeal's conclusion was that it did not do so. A starting point in the Court of Appeal's analysis was to observe that the courts would override the parties' freedom of contract only where this would give effect to the greater public good, and state that such occasions would be "the (rare) exception": *CKR v Asplenium (CA)* at [17]. The Court of Appeal observed that contracts that oust the jurisdiction of the courts fall into this rare category of illegality and public policy; however, limitations placed on the rights and remedies available to the parties have not been treated as an ouster of the court's jurisdiction. For example, exclusion and limitation clauses seek to restrict or exclude a party's right to damages (a common law remedy) but are not seen to oust the jurisdiction of the court. The Court of Appeal highlighted that in such cases, neither party has been denied access to the courts. Similarly, the Court of Appeal felt that cl 3.5.8, which restricted a party's right to an injunction in equity, could be seen, not as a clause seeking to oust the jurisdiction of the court, but as being more in the nature of an exclusion clause. It could potentially be subject to common law principles such as incorporation, although this was clearly not an issue in the present case. It could also potentially be subject to statutory controls, such as the UCTA, under which the clause might be found to be unenforceable, but this had not been argued by the parties. The Court of Appeal's conclusion was that a clause that seeks to limit the right to an equitable remedy is not one that seeks to exclude the jurisdiction of the court. The Court of Appeal felt that support for their analysis could be found in the fact that Asplenium could have asked for a cash deposit instead of a performance bond. In the court's view, this meant that there was no pressing reason either in principle or policy why cl 3.5.8 should be considered as being contrary to public policy in the sense of purporting to oust the jurisdiction of the court.

5.39 The High Court in *CKR v Asplenium (HC)* had found cl 3.5.8 to be unenforceable for three reasons: *CKR v Asplenium (HC)* at [19]–[24]. First, the clause was an attempt to oust the jurisdiction of the court as it amounted to a "severe incursion" on the court's freedom to grant injunctive relief on the "significant ground of unconscionability" and would be contrary to public policy. Second, the power to grant injunctions flowed from the court's equitable jurisdiction, which could not be circumscribed or curtailed by contract. Third, the unconscionability

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exception was based on important policy considerations which could not be brushed aside by agreement. The acceptance by the Singapore courts of the unconscionability exception was a "considered and deliberate decision" to strike a balance between party autonomy and the regulation of dishonest and unconscionable behaviour.

5.40 The Court of Appeal disagreed with the three reasons put forward by the High Court judge in the previous paragraph. In relation to the first reason, the Court of Appeal stated (*CKR v Asplenium (CA)* at [36]) that:

> … the court's jurisdiction to hear the matter is not impacted, although the *remedy* it could grant has been sought to be limited or even excluded. Even then, this would be something the parties voluntarily agreed to and could, in any event, be (in appropriate circumstances) overseen by the court pursuant to, for example, the relevant provision(s) in the UCTA. [emphasis in original]

These same considerations led the Court of Appeal to find the second reason, that the court's power to grant injunctions flows from its equitable jurisdiction which cannot be circumscribed or curtailed by clauses in a contract, unpersuasive. As regards the third reason, the Court of Appeal highlighted that the policy reasons for developing the unconscionability exception in the context of abusive calls on performance bonds were quite different from the conceptions of public policy that led to contracts that sought to *oust the jurisdiction of the court* being found to be void and unenforceable.

5.41 The Court of Appeal's decision that cl 3.5.8 was valid meant that CKR would not have been entitled to restrain a call on the bond even if there had been unconscionability. There was, thus, no need for the Court of Appeal to consider the issue of whether the call was unconscionable, and the High Court's finding on this point still stands. Two of the assertions that were raised by CKR to support their claim of unconscionability in the call of the bond, and that were found by the High Court to be unmeritorious, are of general interest. One was the assertion that the beneficiary should not call on the bond if he had no genuine lack of funds. The High Court rejected this argument, stating that the nature of an on-demand performance bond was such that there was no need for the beneficiary to show some degree of impecuniosity as a precondition for calling on the bond: *CKR v Asplenium (HC)* at [29]. The second was the assertion that Asplenium was aware that a call on the bond would cause CKR irreparable harm and have severe impact on its cash flow and asset management. This argument was also rejected. The judge relied for support on *Tech-System Design* at [39] where it was held that "[a] beneficiary should not be prevented from calling on a bond simply because this resulted in hardship to the obligor": *CKR v Asplenium (HC)* at [32]. The High Court judge pointed

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out that the focus of the enquiry was on the beneficiary's alleged unconscionable conduct and not the purported effect of financial hardship that it may have on the obligor, which did not, without more, establish a strong *prima facie* case of unconscionability: *CKR v Asplenium (HC)* at [32].

5.42 The issue that arose to be decided in *CKR v Asplenium* – whether parties can agree to exclude the unconscionability exception as a ground for restraining a call on a performance bond – involved a range of conflicting considerations, as evidenced from the contrasting decisions reached by the High Court and the Court of Appeal. The Court of Appeal's approach of distinguishing a clause that restricts a remedy from one that ousts the jurisdiction of the court is one that was well explained and well supported. However, one might feel slightly uncomfortable that the "bad guys", that is, beneficiaries who call on performances bonds in unconscionable circumstances, should be allowed to have their way. To allay such discomfort, it is important to remember that the performance bond is ultimately a creature of contract. Those coming across the law of performance bonds for the first time might equally be discomfited to learn that the beneficiary in an on-demand bond can claim on the bond just by calling on it, without having to show any default on the part of the obligor. The Singapore courts have developed the unconscionability exception to protect obligors from unscrupulous beneficiaries. However, it is up to the obligor to decide if it is willing to forgo such protection for commercial expediency. The general rule in contract law is that parties have freedom of contract subject to the limited controls that exist, such as the UCTA. It is worth noting that a clause such as the one in *CKR v Asplenium* may be requested by a beneficiary of a performance bond for good reason. For instance, the beneficiary may just want to avoid the uncertainty and delay that comes with the obligor's application for an injunction to restrain a call on the bond on the ground of unconscionability. This would be consistent with the main motive for obtaining the performance bond, which is to ensure payment without delay.

5.43 At least two interesting questions fall to be further considered after the Court of Appeal decision in *CKR v Asplenium (CA)*. First, are there any limits on the Court of Appeal's reasoning? For example, would a clause which excludes not just the unconscionability exception but also the fraud exception as grounds for calling on a performance bond be valid and enforceable? Such a clause would have the effect of preventing the obligor from applying for an injunction to restrain a call on the bond altogether. By the Court of Appeal's reasoning, they are unlikely to be seen as clauses which oust the jurisdiction of the court. The other question relates to the potential application of the UCTA to control such clauses. Two aspects are relevant: whether such clauses fall within s 3 of UCTA so as to be subject to the reasonableness test; and

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whether, if so subject, the clause would satisfy the test of reasonableness. The Court of Appeal in *CKR v Asplenium (CA)* tentatively suggested that the UCTA may potentially apply to the clause in question, and that the clause might potentially pass the reasonableness test. This was couched by the court to be in the nature of an idea for further discussion rather than any attempt to rule, however tentatively, on the matter. When a full discussion on UCTA takes place in the courts, it might be a challenge to fit the beneficiary of the performance bond into the UCTA s 3 role of someone who "when himself in breach of contract", is attempting to exclude or restrict any liability in respect of the breach.

Guarantees

5.44 A lender's right to claim against the guarantor of a loan when the borrower defaults may be affected by practical or legal obstacles. Although a judgment in default may be obtained against the guarantor under O 13 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) if it does not enter an appearance, this default judgment might be ineffective when the plaintiff seeks enforcement in a foreign country. This was the situation in *Indian Overseas Bank v Svil Agro Pte Ltd* [2014] 3 SLR 892, where the bank sought to enforce guarantees against three Indian guarantors in India, and found that only a judgment on the merits could be enforced in that country. The bank, therefore, applied for the default judgments to be set aside, and commenced an action to have the case tried on its merits. The question then arose whether the court had the power to try a case on its merits when the defendants did not enter an appearance. Judith Prakash J decided that the court did have such power. Order 13 r 1 read with O 92 r 4 shows that the court's inherent discretion to exercise its power in order to ensure that the ends of justice are served is not circumscribed by the availability of the default judgment mechanism. Prakash J was of the view that the appropriate path to take in such a case was for the plaintiff to set down the proceedings for a full trial and adduce its evidence in the normal way. When the trial of the action comes on and the defendant does not appear, O 35 r 1(2) gives the court the power to proceed to a full trial on the merits even if the defendant is absent. Prakash J felt that it would be unjust to the plaintiff for her to refuse to exercise her inherent discretion in the circumstances. The defendant had submitted to the jurisdiction of the Singapore courts, and refusing to exercise her discretion would have made it necessary for the plaintiff to bring an action in the Indian courts, leading to further delay. From the documents and the testimony of the plaintiff's witnesses, Prakash J found the guarantors to be liable under the guarantees.

5.45 A guarantee is a contract between the guarantor and the bank, and is subject to the general rules of contract law. Accordingly,

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a guarantor may be able to escape liability under the guarantee if the agreement can be avoided because of the presence of a vitiating factor. For example, in the case of *Bank of China Ltd (Singapore Branch) v Huang Ziqiang* [2014] SGHC 245, the guarantor sought to resist the enforcement of the guarantee against him by arguing that he had entered into the contract of guarantee as a result of fraudulent misrepresentations that had been made to him by the bank. However, he failed to prove his case in court and was found to be liable to the bank under the guarantee.

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