5. BANKING LAW

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Bank and customer

Repayment of bank deposit

5.1 Where a debtor fails to repay a debt that is due, the creditor can sue the debtor for payment. In order to succeed in the action, the creditor must prove that the money was lent. The debtor has a defence to the creditor's claim if he can show that the debt has been repaid. In the context of banking, when a customer deposits money in a bank, the bank becomes the customer's debtor (*Foley v Hill* (1848) 2 HLC 28) and has to return the money according to the terms of the deposit. The customer will fail in a claim against the bank for the return of the money in the bank account if he has already withdrawn the money, as this would mean that the debt had been repaid. In *Chua Kok Tee David v DBS Bank Ltd* [2015] 5 SLR 231 ("*Chua v DBS*"), the plaintiff (Chua) produced a fixed deposit receipt showing that he had deposited a sum of $135,954.43 with the defendant bank (DBS) in March 1983 (the "9246 Account"). This receipt, bearing the notation "automatic renewal", was kept in Chua's safe deposit box from 1983 until 2012. The terms "automatic renewal" meant that the bank was authorised, until further notice, to place the principal and all accrued interest in the 9246 Account on a new one-month fixed deposit on the 13th of every month at the bank's prevailing interest rate. In 2012, Chua asked DBS to confirm the balance due to him under the fixed deposit. DBS was unable to find any trace of the 9246 Account in its records. When sued by Chua for repayment of the money, DBS claimed that the account had been closed in or before 1985. The judge, Vinodh Coomaraswamy J, was of the view that the bank bore the burden of proving that the account had been closed, so that the bank no longer owed Chua a debt arising from the account. As there was no direct evidence of the closure of the account, the case turned on circumstantial evidence. The first matter raised by DBS in its defence was that there was no trace of the 9246 Account in its records from February 1984 to the present day. DBS was able to convince the judge, on a balance of probabilities, that its systems and procedures for keeping records of accounts were sufficiently rigorous and robust such that the only explanation for the absence of any trace of the 9246 Account was that the account had been closed. The second matter relied upon by DBS in its defence was Chua's own conduct over the years, which did not appear to indicate any belief on his part that the bank was indebted to him on the 9246 Account. For instance, Chua stated that he had not received any fixed deposit receipts for the 9246 Account apart from the one issued when the account was opened in 1983. Yet, he never queried why this was so, despite the fact that he had been receiving account statements for his other accounts with the bank, in particular another fixed deposit that he opened with the bank about two months after the one in question (the "9756 Account") at the same branch and subject to the same terms and conditions. Although Chua's behaviour may have been curious, the judge did not think that this, of itself, established that Chua had closed the 9246 Account in or before 1985. The judge also rejected the bank's argument that a presumption of payment arises when a customer of a bank fails to make a claim for repayment of a debt owed by the bank after a long lapse of time, and found that no such presumption existed (*Chua v DBS* at [102] and [107]).

5.2 The main principles of substantive banking law that were applicable in *Chua v DBS* were clear, and the case turned mainly on issues of evidence. That a bank may be able to get out of repaying a customer's deposit by claiming that the account had been closed although it was unable to show evidence of such closure on its records will be discomfiting for bank customers. This puts the bank in a superior position, as such an assertion can be made in relation to any customer account, and the customer can do nothing about it. However, too much should not be made of this danger, as any bank making this assertion will have to prove its case. In *Chua v DBS*, the judge went through a detailed examination of the bank's systems and record keeping procedures before reaching the conclusion that the only possible explanation for there not being any record of the 9246 Account was because it had been closed. With respect, this author, a sceptic about the bank's seemingly audacious assertion at the start of reading the case, finally came to the same conclusion as the judge, so extenuating was the bank's evidence of painstaking procedures and counterchecks. As the judge stated (at [35]), "Circumstantial evidence is not inevitably inferior to direct evidence. It can be every bit as probative as direct evidence if the circumstances or the inferential chain are obvious and compelling."

5.3 DBS raised two legal defences which were dealt with only briefly by the court, given the finding already made in favour of the bank. The first defence was that Chua was estopped from bringing the present claim as his failure to inform the bank that he had stopped receiving any correspondence in relation to the 9246 Account had led the bank to destroy the records it would otherwise have to bolster its case. This was rejected by the judge as he was of the view that the records relating to the 9246 Account were destroyed by DBS in accordance with its own document retention policy and not in reliance on the plaintiff's silence (*Chua v DBS* at [110]–[111]). DBS also raised a second defence of limitation and laches, and argued that the six-year limitation period prescribed under s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed) for a claim in debt or a claim for an account runs from the date that the account was closed, rather than from the date on which Chua demanded payment of the debt. This argument was also rejected by the judge.

Liquidation of customer's securities

5.4 In *ABN AMRO Clearing Bank NV v 1050 Capital Pte Ltd* [2016] 1 SLR 186 ("*ABN AMRO v 1050 Capital*"), the plaintiff agreed to provide financial services to the defendant, including direct market access ("DMA") to various stock exchanges and a credit facility for funding the defendant's trades through its client account. The defendant's portfolio with the plaintiff comprised of trades in futures and options in the Nikkei 225 Index. Due to movements in the Nikkei 225 Index, the net liquidation value of the plaintiff's account had fallen below the risk amount and the defendant was requested to top up its client account to meet the risk amount. The defendant was unable to do so, and the plaintiff sent a notification to inform the defendant that it was exercising its right to liquidate the defendant's portfolio. The plaintiff proceeded to liquidate the defendant's entire portfolio by way of auction and sold it to the highest of three bidders for a price that fell within the indicative price range provided by an independent valuation. The plaintiff later sued the defendant for the net liabilities that were owing under its client account as well as several months of outstanding DMA charges, and applied for summary judgment under O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The assistant registrar entered final judgment for the amounts owing in respect of the DMA charges but granted unconditional leave to defend the claim for the amount owed under the client account. On appeal, the High Court (George Wei J) affirmed the assistant registrar's decision on the DMA charges (which was not substantively addressed by the defendant in the appeal), and reversed the assistant registrar's decision regarding the defendant's liability under the client account. The plaintiff was therefore granted final judgement in respect of the entire amount of its claim.

5.5 Two questions raised in the case warrant further analysis. The first concerns the standard which has to be met by a bank in exercising its discretion to liquidate its client's portfolio, a matter that will be of great interest to banks. Where there is contractual provision on this matter, the requisite standard will depend on a construction of the contract. Clause 15 of the Standard Client Agreement ("Agreement") in *ABN AMRO v 1050 Capital* provided that in the event of the defendant's default, the plaintiff was entitled "at its reasonable discretion without prior consultation" to take such actions that the plaintiff considered reasonable to realise any asset or to discharge any liability in the client portfolio. Wei J held that the word "reasonable" in a clause conferring a contractual discretion did not necessarily mean that an objective standard of reasonableness was to be applied. This would depend on the clause as a whole, interpreted in relation to the contract as a whole: at [80]. He construed cl 15 to focus on the plaintiff's subjective state of mind, *ie*, whether it considered the actions reasonable, and the court would not intervene in the plaintiff's actions "in the absence of arbitrariness, capriciousness, perversity and irrationality": at [85]. Based on the facts, the court found that the plaintiff's liquidation actions did not fall into this high threshold of bad behaviour. Whilst the judge's specific finding in *ABN AMRO v 1050 Capital* is based on a construction of cl 15, the principles that he applied can be applied widely to other cases giving one person a reasonable discretion to take reasonable steps: a person needs only to do what he or she thinks is reasonable. It is likely even if a clause does not provide expressly for an action to be taken reasonably, that such a standard would in any case be implied.

5.6 Another important question is whether a conclusive evidence clause can excuse a bank from liability for its own misconduct by estopping its client from challenging the bank's actions? The answer based on the clauses in *ABN AMRO v 1050 Capital* was "no", but it can arguably be extrapolated from the court's decision, explained below, that the answer might be "yes", if there is an appropriately drafted clause in clear and unambiguous language. Two clauses in *ABN AMRO v 1050 Capital* were especially relevant. Clause 2.3 of Schedule 5 of the Agreement provided:

> If the Client does not notify ABN of any error within one Business Day, ABN [is] entitled to treat the report or file as having been approved by the Client.

Clause 21.4 of the Credit Facility Agreement (the "Facility Agreement") provided:

> Each confirmation or determination made or certificate issued by ABN under this Agreement of a rate or amount under any Finance Document shall, in the absence of manifest error, be conclusive and binding on the Client and shall be promptly notified to the Client provided that any failure or delay in such notification shall not in any way relieve the Client of its obligation to pay any amounts in accordance with the terms of this Agreement.

5.7 Wei J considered the question whether these clauses applied so that the defendant was contractually estopped from challenging the propriety of the plaintiff's action in liquidating its portfolio, and agreed with the assistant registrar that they did not. Despite the willingness of the Singapore courts to give effect to conclusive evidence clauses, Wei J highlighted that the precise effect of such clauses may vary depending on how broadly or narrowly the clause is drafted and ultimately it is a matter of construction (*ABN AMRO v 1050 Capital* at [33] and [58]). Wei J took guidance from the approach of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 (adopted by L P Thean J in *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association* [1992] 2 SLR(R) 195 at [20]) that clear and unambiguous language must be used in conclusive evidence clauses. He also noted the Court of Appeal decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131] that where a provision was one-sided or onerous, it was to be construed strictly against the party seeking to rely on it. Applying these principles to the case at hand, Wei J was of the view that the plain words of the clause, which required the customer to notify the bank of any "error", did not envisage a situation where the propriety of the bank's conduct was disputed. The bank had not made a mistake – it had intended to sell the defendant's portfolio for the given price range. The question was whether it had acted "reasonably or irrationally, perversely or capriciously" in selling the portfolio in the way it did. Therefore, the clauses relied on by the plaintiff did not apply and the defendant was not obliged to inform the plaintiff of its objections regarding the way that its portfolio was sold (*ABN AMRO v 1050 Capital* at [60]). Further, the clauses did not make clear whether the defendant was deemed to have assented to the quantum as well as the liability (in the sense of the propriety of the liquidation actions) set out in the report, file, confirmation or certificate, and the clauses were not sufficient to highlight the significance of the duty to check and verify. As the learned judge reached his conclusion by a construction of the relevant clause, a different result may be reached with a differently drafted clause. If a conclusive evidence clause applies to the facts of a particular case, its validity will still have to be tested under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA").

5.8 Ultimately, the court's finding against the plaintiff on the conclusive evidence clause in *ABN AMRO v 1050 Capital* did not affect the plaintiff's success in their claim. The court highlighted (at [101]) that the summary judgment procedure existed for situations where the strength of the plaintiff's case is such that it would be unfair to compel the plaintiff or defendant to wait until the trial before his unchallengeable rights are recognised and enforced. Although the defendant was not estopped from objecting to the plaintiff's actions in liquidating its portfolio, it failed to satisfy the court that there was a question in dispute "which ought to be tried, or that there ought for some other reason to be a trial of the claim or part of the claim": at [101]. The court therefore awarded the plaintiff summary judgment. It may be observed that where a customer's case is weak, it does not matter to the bank even if the court finds that the conclusive evidence clause is not applicable to curtail the evidence that the customer can raise. At the same time, a bank does not need to rely on a conclusive evidence clause if it can show that the customer had in fact known about the facts in question and had acquiesced in them, in which case the customer may be argued to have waived his right to complain about these matters.

Bills of exchange

Whether a promissory note falls within the scope of an arbitration agreement

5.9 Where promissory notes are issued as payment under a supply contract that contains an arbitration clause, and the seller negotiates the notes to its bank without recourse, does the bank's claim on the promissory note fall within the scope of the arbitration clause such that the bank's action can be stayed under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA")? In the High Court case of *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 ("*Cariparma v Rals*"), Vinodh Coomaraswamy J answered this question in the negative. Although the judgment does not state the above question or the judicial answer in such categorical terms, shorn of various justifications and exceptions, this appears to be the crucial point of the case.

5.10 *Cariparma v Rals* involved an agreement ("Supply Agreement") for cashew nut processing equipment between the buyer/defendant (Rals) and the seller (Oltremare) which contained an arbitration clause in Art 9. Part of the price was to be paid by way of eight promissory notes made payable to the seller. The seller later discounted these notes to the plaintiff (Cariparma). The seller also assigned to the plaintiff the amount which the buyer owed to them under the Supply Agreement. The plaintiff's claim in the case was based solely on the promissory notes, without any reference to the assignment, a strategy that was ruled to be proper by the court. It sought to recover €902,000 on four of the promissory notes which were dishonoured, and it sought a declaration that it was a holder in due course of the remaining four notes and that the defendant was liable to pay on those notes. The defendant applied to stay the action under s 6 of the IAA. A stay was allowed by the assistant registrar, and the plaintiff appealed.

5.11 Under s 6(1) of the IAA, where any party to an arbitration agreement institutes any proceedings in court against any other party to the agreement "in respect of any matter which is the subject of the agreement", any party to the agreement may apply to that court to stay the proceedings. Section 6(2) provides that the court shall make an order staying the proceedings "so far as the proceedings relate to the matter" and s 6(5) states that a reference to a party shall include a reference "to any person claiming through or under such party". Applying the IAA, the plaintiff's action was only liable to be stayed if first, the plaintiff was a party to the arbitration agreement, and second, the matter was one which was subject to the agreement. In examining these questions, the court analysed in detail the issues such as the approach to interpreting an arbitration clause and the obligation of an assignee of a contract containing an arbitration clause to arbitrate rather than litigate its claim, which are beyond the scope of this banking chapter. (See Nelson Goh, "An Assignee's Obligation to Arbitrate and the Principle of Conditional Benefit: '*Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd*' [2016] 1 SLR 79" (2016) 28 SAcLJ 262 for a case note on aspects of the case pertaining to an assignee's obligations.) The court found that the plaintiff was a party claiming "through or under" the buyer under s 6(5)(*a*) of the IAA. The court then went on to construe the arbitration agreement to assess if the plaintiff's claim was one that fell within the agreement. Coomaraswamy J was of the view that it would defeat the objectively ascertained intent of the buyer and seller if Art 9 of the Supply Agreement were construed to encompass the plaintiff's claim as an indorsee of the eight promissory notes. Two reasons were given for this. First, he found it hard to believe that any right-thinking merchant would agree to give up his rights on a dishonoured bill of exchange, and added (*Cariparma v Rals* at [194]):

> The right I have in mind here is not the right to receive cash on the bill through summary adjudication. That right is available both in litigation and in arbitration. The right which is given up in this situation is the right to keep open until the last possible moment all of the merchant's options as to how to enforce his right to receive cash on the bill – whether by action or by arbitration – and to exercise that option to his best advantage in light of the actual circumstances prevailing at the time he chooses to mount the claim. I find it even harder to believe that a right thinking merchant would intend to restrict his indorsee's mode of dispute resolution. If nothing else, that restriction has the potential to affect the depth of the discount he will have to suffer if he negotiates the bill.

Second, he felt the parties' choice of payment by promissory notes was a considered decision. This arrangement gave the buyer four years' credit to pay the purchase price without having to provide security. The length of the period of credit made it more likely that the plaintiff would negotiate the promissory notes to monetise the buyer's deferred payment obligation, and less likely that the plaintiff would agree to anything in the arbitration agreement which would make this prospect more difficult or less valuable (*Cariparma v Rals* at [195]).

5.12 Two competing fundamental principles of commercial law had to be assessed in *Cariparma v Rals*. The first principle was that arbitration is a form of consensual dispute resolution. Coomaraswamy J highlighted that this meant that no person ought to be compelled to arbitrate a dispute unless he had agreed to do so, and at the same time, that a person who had agreed to do so should not be permitted to resile from his agreement. The second principle was that a promissory note, being a species of bills of exchange, is to be treated as the equivalent of cash. The payment obligation represented by a bill must therefore at all times be convertible into cash quickly, simply and effectively. *Cariparma v Rals* gave primacy to the second principle. In coming to his decision, Coomaraswamy J distinguished the earlier High Court case of *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 ("*Piallo*"), which preferred the first principle. In *Piallo*, Belinda Ang Saw Ean J decided that a manufacturer who was the payee of dishonoured cheques was bound by the arbitration clause in its distributorship agreement to arbitrate its claim on the cheques and not resort to litigation. (For a case note on the *Piallo* case, see Lau Kwan Ho, "Should Claims on a Bill of Exchange be Stayed in Favour of Arbitration" [2014] LMCLQ 146.) An important point of distinction identified by Coomaraswamy J was that *Cariparma v Rals* involved the stay of an action by an indorsee of a bill of exchange (promissory notes and cheques are both species of bills of exchange), whilst the action sought to be stayed in *Piallo* was being brought by a payee of a bill. Further, Coomaraswamy J found that neither the plaintiff's claim nor the defendant's defence in *Cariparma v Rals* arose in connection with the Supply Agreement. This was in contrast to the situation in *Piallo*, where Ang J found that the manufacturer's claim on the dishonoured cheque was so closely connected to the distributor's cross claims under the distributorship agreement that both fell within the scope of the arbitration agreement.

5.13 With respect, the decision in *Cariparma v Rals* is a strong one which gives proper consideration to the special features of bills of exchange law. The importance of the principles of negotiability, cash equivalence and the special position of a holder in due course are persuasively articulated. It seems clear that it would defeat the intention of the parties to interpret the indorsee's claim in the present case as falling within the arbitration clause. One might ask whether the position of an indorsee of a bill of exchange is so different from that of the payee so as to justify the different decisions reached in *Cariparma v Rals* and *Piallo*. Although Coomaraswamy J distinguished the two cases in coming to his decision, the learned judge acknowledged that the distinction might not be entirely satisfactory (*Cariparma v Rals* at [238]). A powerful argument that supports the view that a typical merchant would not have intended his indorsee's claim under a bill of exchange to come under the arbitration clause is that the merchant would not want to tie his indorsee's hands. This argument could equally well be applied to the merchant's own claim as payee of a bill of exchange, to justify a finding that the arbitration agreement was not intended to be binding on the payee under a bill of exchange either. If the parties to an arbitration agreement really want a claim on a bill of exchange to come under the arbitration clause, they can specify that this is the case. Even if they do, there may still be a question whether this clause will be construed as being intended to cover a claim brought by an indorsee of a bill, unless that is expressly stated. Even so, it is not clear that the payee of a bill of exchange should have the power to bind an indorsee and force him to arbitrate his claim.

Guarantees

Whether a guarantor is bound by variations to the principal contract

5.14 Under the law of guarantees, the rule established in *Holme v Brunskill* [1878] 3 QBD 495 is that a material variation of the principal contract made without the guarantor's consent would discharge the guarantor. However, as decided in *British Motor Trust Co Ltd v Hyams* (1934) 50 TLR 230, the parties can contract out of this rule, and this can be done by including a variation clause in the guarantee. The law in this area is well established and has been applied in many Singapore cases: see, *eg*, *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 for the rule and *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR(R) 345 for the exception.

5.15 *ECICS Ltd v Capstone Construction Pte Ltd* [2015] SGHC 214 ("*ECICS v Capstone*") concerned the continued liability of the fourth defendant, who was one of the guarantors of a credit facility given by the plaintiff bank to the first defendant (Capstone), where the main contract had been varied. As is typical in such cases, the outcome depended on whether the variations in question were covered by a term of the guarantee, or alternatively, whether the guarantor had separately given her consent to the variations, and the enquiry primarily involved the court in construing the guarantee and making factual findings in relation to consent. In *ECICS v Capstone* (at [19]), cl 7 of the guarantee provided:

> THE undersigned shall not be exonerated nor shall this Guarantee be in any way discharged or diminished by [the plaintiff] from time to

> time without the assent or knowledge of the undersigned granting to [Capstone] or to any other person any time indulgence or concession; … renewing[,] determining[,] varying or increasing any facilities to or the terms or conditions in respect of any transaction with [Capstone] in any manner whatsoever whether under or in connection with the Agreement or otherwise[.]

Clauses such as this are aimed to ensure that the obligations of the guarantor would remain, regardless of the variations in the main contract, and have been upheld in a number of Singapore cases. In *ECICS v Capstone*, Aedit Abdullah JC decided that cl 7 was broad and covered any changes to any term in the main contract. He found that the variations that had taken place (by way of a supplemental agreement and by the removal of a proviso that had been found in the main contract) fell within the variation clause. This was sufficient to establish the fourth defendant's liability under the guarantee. Abdullah JC nevertheless went on to examine the factual question of consent, and was satisfied, on a balance of probabilities, that the fourth defendant had signed a separate consent letter giving her consent to the variations.

5.16 The law in this area is clear, and with respect, the court's decision on the proper construction of cl 7 and on the fourth defendant's consent is uncontroversial, so no further elaboration on findings that are specific to the facts of the case is required here. As a general matter, it must be pointed out that a guarantor should be aware, in signing a guarantee containing a broad variation clause, that his potential liability under the guarantee could be enlarged way beyond what had been contemplated, without further reference to him, and without his knowledge. For instance, the guarantors in *ECICS v Capstone* were potentially liable for an additional amount of more than $1m under the supplemental agreement, which had the effect of increasing the amount of the credit facility from $3,511,261.50 under the original contract to a new amount of $4.6m. Another example is seen in *Development Bank of Singapore v Yeap Teik Leong* [1988] 2 SLR(R) 201, where a variation that allowed the use of guaranteed funds for a purpose that was originally prohibited was found to fall within the variation clause which was interpreted broadly, which meant that the money could be used for a different purpose from that originally contemplated by the parties. Abdullah JC pointed out (at [19]), in relation to *ECICS v Capstone*, that "there was nothing wrong with breadth if that was indeed the bargain struck between the guarantors, including the 4th Defendant, and the plaintiff". But it would be a matter of concern for the party subject to the variation clause if the other party's power to vary the clause is untrammelled. One control that may be available can be extrapolated from Abdullah JC's statement in *ECICS v Capstone* (at [29] and [31]) that the change was not of such a nature as to take the new obligation out of the initial contemplation of the original agreement.

Although this factor was not specifically highlighted by Abdullah JC as a requirement, in an appropriate case, it could be useful as a control mechanism to limit a guarantor's exposure under a variation clause for changes that render the guarantee obligation significantly different from what had been originally agreed.

Performance bonds and indemnities

Restraining a call on a bond

5.17 It is a well-established principle of Singapore law that the beneficiary of an on-demand performance bond may be restrained from calling on the bond on two potential grounds, fraud and unconscionability. The basic principles relating to such injunctions and the development of the law in this area have been discussed at length in previous editions of the Ann Rev. In the year under review, the case of *JK Integrated (Pte Ltd) v 50 Robinson Road* [2015] SGHC 57 ("*JK Integrated*"), like many earlier cases, raised the factual question whether a claim of unconscionability had been made out. In this case, the plaintiff was a construction company that had been engaged by the first defendant as the main contractor for the construction of a 42-storey residential-cum-commercial building, and had provided the defendant with a performance bond to secure performance of its obligations. After proceeding smoothly for a few months, the work began to be delayed, finally prompting the architect to issue a written notice to the plaintiff under cl 32(3)(d) of the Singapore Institute of Architects, *Articles and Conditions of Building Contract* (Lump Sum Contract, 8th Edition) which were adopted under the contract, requiring the plaintiff to take effective steps to proceed with the project expeditiously. Thereafter, a supplemental agreement was entered into to extend the completion date for the works and to provide the plaintiff with additional sums to complete the project. Further delays and disagreements took place and the architect issued a termination certificate to the plaintiff, in reliance upon which the first defendant terminated the contract with the plaintiff and demanded payment under the performance bond. The plaintiff succeeded in applying for an *ex parte* injunction to restrain the first defendant from receiving payment under the performance bond. The present case concerned the first defendant's application to the High Court to discharge the injunction. Hoo Sheau Peng JC allowed the first defendant's application, having found that the matters raised by the plaintiff (such as its allegations that the first defendant had under-certified claims, caused delays in the works and used threats of non-payment to put pressure on the plaintiff) did not show a strong *prima facie* case of unconscionable conduct on the part of the first defendant such that it should continue to be restrained from calling on the performance bond. Hoo JC highlighted (*JK Integrated* at [24], citing

Raymond Construction Pte Ltd v Low Yang Tong [1996] SGHC 136 at [5]) that unconscionability "involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party", but it did not mean that every case of unfairness would amount to unconscionability as the courts should not unnecessarily interfere with contractual agreements entered into between the parties (see Court of Appeal in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [30]).

5.18 The decision of the court in *JK Integrated* to discharge the injunction because there was no *prima facie* case of unconscionability worked to the beneficiary's benefit. In deciding whether to grant an injunction to restrain payment on a bond, it is important for the court to balance the interests both of the beneficiary as well as the obligor. These interests are necessarily conflicting. A decision whether or not to grant an injunction restraining payment would negatively affect one or the other of them. Hoo JC stated (*JK Integrated* at [27]):

> [A]lthough a call on a performance bond may cause an obligor to suffer financial hardship, the deprivation of the beneficiary's right to call on the bond may equally be detrimental to its prospects and liquidity. Therefore, mere breaches of contract by the beneficiary, or genuine disputes between the parties, are insufficient to constitute unconscionability. The beneficiary is entitled to protect its commercial interests, and parties are expected to abide by the bargain they struck.

5.19 Further, where there is a dispute between the parties, it is natural that one party's point of view will differ from the other party's. Otherwise there would be no dispute. Each party thinks that its position is the correct one. In considering whether to grant an injunction, a court should not substitute its view on the contentious, substantive issues for those of the parties. The legal principle is that as long as one party called on the bond because it had the honest belief that the plaintiff had breached the contract, its call on the performance bond would have been legitimate even if this belief was mistaken. Hoo JC referred (*JK Integrated* at [71]) to the comments of the Court of Appeal in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 (at [52]) where this point was made, and where the Court of Appeal highlighted that it was not the court's role to appraise the merits of each parties' decision as to whether the other was in breach, "but to be alive to the lack of *bona fides* in those decisions" [emphasis in original omitted]. This is an important reminder.

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

5.20 An application for an injunction to restrain the beneficiary of a performance bond from calling on a bond on the ground of unconscionability is probably the most common type of claim relating to performance bonds in the Singapore courts. Although unconscionability is less difficult to show than fraud, it is nevertheless not easy to succeed in obtaining an injunction based on this ground as the standard required to show a *prima facie* case of unconscionability is high. However, the applicant's prospects of success in obtaining an injunction based on the beneficiary's unconscionability could drop to zero as a result of the Court of Appeal decision in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 ("*CKR v Asplenium (CA)*"). Here, the Court of Appeal took a different position from the High Court below, and decided that where an applicant provides a beneficiary with a performance bond under a contract, the parties can agree to exclude the unconscionability exception as a ground for restraining a call on the performance bond. The Court of Appeal thereby upheld cl 3.5.8 of the agreement between the parties which was to this effect. It is noteworthy that the result of this decision is that where such a clause exists, the applicant will not be able to restrain the beneficiary's call on the bond even if it is unconscionable, and the only remaining ground of restraint would be a fraudulent call on the part of the beneficiary. In upholding the clause, the Court of Appeal made a distinction between a contract that ousted the jurisdiction of the courts, which was unenforceable as being contrary to public policy, and one that placed limitations on the rights and remedies of the parties, which was permissible as neither parties were denied access to the courts. Although *CKR v Asplenium (CA)* was decided by the Court of Appeal in 2015, the facts of the case and the legal analysis adopted were discussed in detail in (2014) 15 SAL Ann Rev 73 at 91–95, paras 5.36–5.43 to complement the discussion of the High Court decision in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 1 SLR 987, and will not be repeated in this chapter, which will just point out the implications of the decision and issues for the future.

5.21 The Court of Appeal decision is especially significant in light of the fact that the clause in question, 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), and further, that such a clause is likely to be copied in other types of contracts. This decision could mean that the unconscionability exception – which was a deliberate departure from English law by the Singapore courts in order to protect obligors from a potentially oppressive instrument that might be used by unscrupulous beneficiaries and had the potential to cause undue hardship or unwarranted economic harm, and also a unique feature of Singapore law as compared to the law of England – may lose its relevance. The most likely reason for the use of exclusionary clauses such as cl 3.5.8 is to avoid the uncertainty involved when an injunction to restrain a call of a performance bond is sought on the ground of unconscionability. Indeed, the validity of such a clause brings the performance bond back to its original purpose to ensure payment without delay despite any dispute on the principal contract, a feature which was compromised by the rise of the unconscionability exception in Singapore. The operation of such clauses would achieve an effect that is similar to that applying under the law of England, that fraud is the only basis for obtaining an injunction to restrain a beneficiary from obtaining payment. The inclusion of such a clause favours the beneficiary rather than the obligor, but an obligor may have no choice but to agree if the beneficiary has superior bargaining power, or may agree out of the pragmatic consideration that uncertainty might increase the cost of doing business if the beneficiary prices the increased risk of being restrained from calling on the performance bond into the contract, resulting in higher prices.

5.22 The 2014 Ann Rev contribution highlighted two issues for further consideration. First, what are the limits of a contractual clause restricting the right of the parties to apply for an injunction? In particular, would a clause that restricts the obligor from restraining a call on a performance bond based on the fraud exception (as opposed to the unconscionability exception) similarly be upheld by the Singapore courts? The possibility of a clause to this effect was neither mentioned nor analysed in *CKR v Asplenium (CA)*. It may be argued, by analogy with the Court of Appeal's reasoning that cl 3.5.8 was valid as it merely restricted a right or a remedy did not offend public policy since it did not oust the jurisdiction of the court, that a clause restricting the application for an injunction based on fraud would similarly be valid for this reason. However, a clause relating to fraud is likely to offend public policy for a different reason: the simple principle may be that the egregious nature of fraud itself would render a clause invalid. It has been suggested that indirect support for the position that a clause restricting the call on a bond on the basis of fraud may be found in the principle that exclusion clauses would not naturally be construed to exclude liability for fraud (see *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, discussed by Lau Kwan Ho, "Injunctive Relief: But Let's Agree Not to Have it?" (2016) 79(3) *Modern Law Review* 468 at 475). However, this analogy based on the proper construction of clauses will not apply where there is an express intention for the clause to apply precisely to a fraudulent call on the bond.

5.23 The second question was one that was raised and left open by the Court of Appeal in *CKR v Asplenium (CA)*. This was whether cl 3.5.8

fell under s 3 of UCTA so as to be subject to the reasonableness test. Under s 3 of UCTA, a party to a contract cannot by reference to any contract term, when he himself is in breach of contract, exclude or restrict any liability of his in respect of the breach. To fit the situation that arose in the case under the provisions of s 3, one would have to argue that the beneficiary's act of making a claim on the performance bond when it was unconscionable for him to do so constituted a breach of contract; that this breach would render the beneficiary liable to be restrained by an injunction applied for by the obligor; and that the beneficiary restricted his liability to be restrained by using the clause to prevent the obligor from applying for an injunction. Even if this rather cumbersome and unnatural analysis suggests a potential, albeit weak, possibility that the clause falls under s 3 of UCTA, the clause will nevertheless be upheld if it satisfies the reasonableness test in s 11 of UCTA. A rough indication of the potential judicial receptiveness to such a clause can be extrapolated from the reaction of the Court of Appeal in *CKR v Asplenium (CA)* where no negative comments were made about the relevant clause. Further, the operation of the clause is in line with the original rationale for using a performance bond and the law of England (above, para 5.21).

Claim under an indemnity agreement

5.24 It is common in international transactions to have a chain of several contracts involving intermediary banks, leading to the issuance of a performance bond in favour of the beneficiary. This arrangement is illustrated by the facts of the High Court case of *Boustead Singapore Ltd v Arab Banking Corporation (BSC)* [2015] 3 SLR 38 ("*Boustead v ABC (HC)*") where Boustead (a Singapore company), acting through a joint venture, was employed by the Organisation for Development of Administrative Centres ("ODAC"), a Libyan entity, to construct a development in Libya. The construction contract provided for a performance bond ("PB") and an advance-payment guarantee ("APG") to be issued in favour of ODAC. Boustead instructed its Bahrain Bank, Arab Banking Corporation ("ABC"), to furnish two counter-guarantees ("CGs") in favour of a Libyan Bank, the Bank of Commerce and Development ("BCD"). Against these counter-guarantees, BCD in turn furnished the PB and APG in favour of ODAC. The PB, APG and CGs were all on-demand guarantees, which required payment on demand as opposed to payment on proof of breach or loss. Boustead's relationship with ABC was governed by a facility agreement ("FA") under which Boustead was obliged to reimburse or indemnify ABC for any amounts demanded or paid under the CGs. Under the FA, any demand from ABC was to be conclusive evidence of the amount owing from Boustead to ABC under the FA. When civil war broke out in Libya in 2011, staff had to be evacuated from the construction site and Boustead took the position that the civil war was a *force majeure* event which discharged the construction contract. Subsequently, BCD made demands on ABC for payments under the CGs, purportedly because BCD had received notices of demand from ODAC under the PB and APG. When Boustead heard about these demands, it successfully applied for and obtained an injunction restraining ABC from making payment to BCD under the CGs. ABC later made a demand to Boustead under the FA for a sum equal to the total of the sums demanded by BCD under the CGs. Boustead refused to pay ABC. This case was complex as it involved several contracts in different countries. It raised two main questions, the first being whether Boustead was liable to pay ABC under the FA, and the second whether the injunction restraining ABC from paying BCD under the CGs should be discharged. The High Court answered the first question in the negative and granted a permanent injunction preventing ABC from receiving payment from Boustead. The High Court also granted a fresh injunction replacing the earlier one, restraining ABC from paying BCD.

5.25 ABC appealed against the High Court's decision. The Court of Appeal dismissed ABC's appeal in *Arab Banking Corp (BSC) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*ABC v Boustead (CA)*"). The Court of Appeal's decision, handed down in 2016, is more appropriately discussed in the 2016 Ann Rev and will not be examined in this chapter, which will focus on key aspects of the High Court decision.

5.26 In assessing BCD's claim on the CGs, the High Court looked to English law, which was the governing law of the CGs. Woo J outlined the three main principles applying to performance bonds in England which were also found in the International Chamber of Commerce Uniform Rules for Demand Guarantees (ICC Publication No 458) that was incorporated into the CGs. These were first, the principle of autonomy, *ie*, that the performance bond was independent from the underlying contract; second, the principle that the issuer is concerned with documents and not external facts, meaning that the beneficiary would be entitled to payment upon making a valid demand by presentment of specified documents; and finally, the principle of apparent conformity, in the sense that the guarantor or counter-guarantor are only concerned with whether the documents on their face conform to the terms of the guarantee or counter-guarantee. These three principles are important for the commercial role that performance bonds play, as such bonds are treated as the equivalent of cash (*Boustead v ABC (HC)* at [56]). The only exception to these principles under English law is where there is fraud. Woo J stated that a bank may (or must) refuse to pay on a demand where the beneficiary to the guarantee (or counter-guarantee) is a party to the fraud; the bank has knowledge of the fraud by a particular time; and the beneficiary has been given an opportunity to answer the allegation of fraud (at [57]).

Woo J also summarised the English law authorities relating to the high standard required to prove the fraud exception, for instance that fraud had to be "clearly established", that there had to be "particularly cogent evidence" of fraud, or that "the only realistic inference" was fraud (at [58]).

5.27 BCD made demands on the CGs stating that it had received demands from ODAC that were in accordance with the terms of the contract. However, the court found that ODAC's notices claiming payment clearly did not conform to the requirements of a valid demand under the terms of the PB and APG. BCD had therefore made an inaccurate statement in its demand. BCD's behaviour would be fraudulent if it had made the statement knowing that it was false, or recklessly without caring as to its truth or falsity (*Derry v Peek* (1889) 14 App Cas 337). Woo J concluded that the only realistic inference from the facts was that BCD's demands on the CGs were made fraudulently in the reckless sense (*Boustead v ABC (HC)* at [91]). This finding on the fraudulent nature of BCD's demand justified the grant of an injunction restraining ABC from paying BCD. It was also one of the foundations for ABC's claim against Boustead under the FA, discussed below.

5.28 Boustead asserted that ABC's demand on the FA was fraudulent. Woo J stated that ABC would be acting fraudulently if it was shown that: (a) it brought its claim against Boustead knowing that it had no basis in fact or law; or (b) that it acted recklessly (*Boustead v ABC (HC)* at [169]). ABC's demand on the FA was premised on the apparent validity of the demand on the CGs. But the court found, as discussed in the previous paragraph, that BCD's demand on the CGs was fraudulent. The court further found that ABC knew or ought to have known about this fraud. In the light of these findings, the court was satisfied that ABC was acting fraudulently in the reckless sense when it made the demand on the FA, or alternatively that it acted fraudulently in the reckless sense in maintaining its claim after it found out about BCD's fraudulent demand.

5.29 Woo J found that Singapore law would apply to the restraint of payment on demands under the FA, and went on to explore the question whether it would be unconscionable, under Singapore law, for ABC to obtain payment from Boustead under the FA. As a preliminary step, Woo J had to decide the novel question whether the unconscionability exception, developed in the context of performance bonds, would apply also to a claim by a bank for an indemnity under a facility agreement. He was of the view that it should, as the obligation owed by Boustead under the FA, to indemnify ABC on its first demand, was similar to that found in a performance bond. This approach of treating a cross-indemnity on the same footing as a performance bond was supported by the English High Court decision in *Technical & General*

Guarantee Company Ltd v Mark Patterson (2003) WL 18223105. Further, Woo J felt that the rationale and practical considerations underlying the unconscionability exception were equally applicable to a facility letter as they were to a performance bond. These were first, that the demand guarantee was different from a letter of credit as it was not a method of payment but merely security for a secondary obligation to pay damages in the event of a breach; and second, that the demand guarantee, being one sided may result in excessive or abusive calls which might have a negative impact on the party required to make payment. Indeed, the conventional thinking is that the first principle makes any delay resulting from an injunction more acceptable for the beneficiary, whilst the second makes it more vital for the account party to be protected. On the facts of the case, Woo J found that it would be unconscionable for ABC to obtain payment from Boustead under the FA.

5.30 In *ABC v Boustead (CA)*, the Court of Appeal upheld the High Court decision, and the aspects of the High Court's findings discussed above remain largely intact, although the reasoning in the Court of Appeal judgment was sharper and more focused. It is a pity that the Court of Appeal did not rule on the most interesting aspect of the High Court decision, whether the scope of the unconscionability exception could be extended beyond the context of a performance bond to cover also a demand under a facility letter. The Court of Appeal felt that there was no need to decide definitively on this issue, as it had already found against ABC on the issue of fraud. It did, however, raise some doubt whether the unconscionability exception was an appropriate basis for an order restraining ABC from receiving payment where there has been "a full trial [that had determined Boustead's liability to ABC] under the FA Demand" (*ABC v Boustead (CA)* at [100]).

5.31 To assess the applicability of the unconscionability exception in facility letters, it is useful to examine the context in which the exception was developed in relation to performance bonds. The main aim of a performance bond is to enable the beneficiary to obtain payment quickly in the event of a breach of contract by the other party. Take, for example, a situation where a contractor provides a performance bond in favour of his employer. If the contractor fails to perform his obligations, the employer can claim under the performance bond without having to prove the contractor's breach or his own loss. The performance bond provides the employer with instant liquidity. But this is temporary. The dispute between the parties must still be resolved, upon which the contractor must return any excess amount that he claimed under the performance bond over and above the amount of his loss as a result of the contractor's breach, if any (see *Pun Serge v Joy Head Investments Ltd* [2010] 4 SLR 478 applying *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 WLR 461). Where the employer makes a fraudulent or unconscionable demand, the contractor can apply for an injunction under Singapore law to prevent the employer from being paid under the bond. The effect of this injunction is to take away the employer's advantage under the performance bond, but it does not determine the liability of the parties under the contract. If the dispute on the underlying contract ultimately comes before a court, the court will have to decide on the usual civil law standard of proof whether the employer has made out his case against the contractor. The High Court's judgment in *Boustead v ABC (HC)* that the unconscionability exception can be extended to cover also a demand under a facility letter must be considered with these principles in mind. Such extension may be justifiable where the issue before the court is whether to grant an interim injunction to prevent the bank who is party to a facility agreement from claiming payment from its client under the agreement. The grant of an interim injunction is the context in which the unconscionability exception was recognised in Singapore law, and the same considerations could be said to apply in relation to facility agreements as to performance bonds. This was cogently explained by the High Court, as discussed at para 5.29 above. However, a principle that may be appropriate in the context of a temporary restraint may not be as suitable where a permanent adjudication of a claim is involved. In *Boustead v ABC (HC)*, the High Court granted an injunction (the Court of Appeal highlighted that this was a permanent injunction) to restrain ABC from receiving payment from Boustead. From the judgment, it would appear that this was not what was originally sought by the parties. Boustead sought a declaration (Suit No 730 of 2012) that it was not liable to ABC for the sum demanded under the FA (at [16]), and ABC sought payment from Boustead under the FA, or alternatively, a declaration (Suit No 784 of 2012) that Boustead is liable to pay ABC on the sums demanded in the FA (at [21]). It would appear that the same basic question is raised by both claims: whether Boustead is liable to pay ABC under the FA. If the answer is no, there would technically be no need for an injunction to restrain ABC from receiving payment. It would have no right to payment in any case. Even if it might be justifiable to curtail a bank's right to payment under a FA if it has behaved fraudulently in relation to the claim (because the courts will not allow its processes to be used to help perpetrate a fraud), should this right also be affected if it has merely acted unconscionably? The use of the unconscionability exception in this situation does not appear to have taken place in the Singapore courts, even for performance bonds.