5. BANKING LAW

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Banking

Banker and customer

5.1 In carrying out a customer's instructions, a banker acts under the customer's mandate. Inherent in the mandate is a banker's duty to exercise care in carrying out a customer's instructions. A banker who fails to exercise care in carrying out a customer's mandate is liable to the customer for breach of contract. In recent years, banks in Singapore have taken on the role of marketing investments and insurance products in addition to the normal customer banking services. Arising from the new business undertaken by the banks, the need to regulate the activities has become imperative. This has led to the enactment of the Financial Advisers Act (Cap 110, 2007 Rev Ed). Apart from the Financial Advisers Act, there is little doubt that a financial adviser also owes a duty of care at common law in rendering advice to a client. An adviser could become liable to a client if the advice is given negligently. Banks which act as financial advisers and have been granted exemption by the Monetary Authority of Singapore ("MAS") in their dealings with high net worth individuals very often incorporate a disclaimer of liability in their agreements with these customers. In practice, in spite of the Financial Advisers Act, financial advisers dealing with high net worth individuals might seek to disclaim their common law liability by expressly throwing the responsibility for due diligence on to their customers through the incorporation of a non-reliance clause in their contracts with their customers. However, arising out of the banker and customer relationship, does the banker owe a duty to the customer to exercise reasonable care and skill when he carries out the customer's instructions or when he advises the customer? In *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante*"), the respondent bank, incorporated in Austria, operated branches in Hong Kong and Singapore. In 1997, the appellant, a businessman from the Philippines, met up in Hong Kong with one Winnifred Natasha Tong Ching Laude ("Ms Ching"), a vice-president of the bank's Hong Kong branch to open an account with the bank. The appellant subsequently opened two accounts with the bank through Ms Ching, a savings account with the Hong Kong branch ("Hong Kong account") and an investment account with the Singapore branch ("Singapore account"). The appellant executed three sets of account-opening documents ("Account-opening

Documents") with the bank. The agreements included the account opening and custodian agreement for the Singapore account; the Discretionary Investment Management Agreement ("DIMA") for the Singapore account and the Investment Authority Instructions ("IAI") for the Singapore account. The DIMA granted the bank the power and discretion to trade in securities on behalf of the appellant using his account, without the need for his specific authorisation. The appellant, however, sought to limit the bank's authority by executing the IAI, whereby the bank was not authorised to make any investment or sell any securities for the Singapore account or Hong Kong account without the appellant's instructions. The bank also extended a loan of US$5m to the appellant under a loan facility letter and the proceeds of the loan were remitted to the Singapore account. The appellant's dispute with the bank involved losses arising from 16 investments, comprising, mainly, emerging market debt instruments, entered into by Ms Ching under the appellant's Singapore account. In the course of making these 16 investments, the appellant and Ms Ching would hold monthly meetings, where Ms Ching would show the appellant the portfolio, currency and money market analyses from the previous month's transactions. During the meetings, the appellant would go through and discuss these documents with Ms Ching, in order to review the performance of the appellant's investments, which included examining the projected returns from these investments. The appellant raised two main contentions in his claim against the bank. First, the investments were not authorised by him (authorisation claim) and secondly, that the bank owed him a contractual and tortious duty to advise him over the investments (advisory claim). The Court of Appeal agreed with the High Court that the contractual terms between the parties did not expressly provide for an advisory relationship between the parties. The Court of Appeal, however, went on to decide that, even though a bank's written agreement might not have expressly or impliedly imposed a contractual duty on the bank to advise a customer, there was still room for the bank's common law duty that it should exercise reasonable care and skill in advising the customer to operate when it advised the customer. Andrew Phang Boon Leong JA said (*Go Dante* at [24] and [25]):

> The absence of an express or implied contractual duty to advise the Appellant did not mean, however, that the Respondent did not owe a contractual duty of skill and care to the Appellant under the Account-opening Documents. In contracts under which a skilled or professional person agrees to render certain services to his client in return for a specified or reasonable fee, there is at common law an implied term in law that he will exercise reasonable skill and care in rendering those services … Consequently, we considered that there was ample authority from which to conclude that the Respondent owed the Appellant an implied contractual duty of care in carrying out his instructions under the Account opening.

5.2 The parties to a contract are normally bound by the terms of the contract and the principle is equally applicable to a contract entered into between a bank and its customer in the sale of investment products to the customer. In *Soon Kok Tiang v DBS Bank Ltd* [2012] 1 SLR 397 ("*Soon Kok Tiang*"), the appellants ("Appellants") were a group of 21 investors who had invested in derivative credit-linked notes called "DBS High Notes 5" ("HN5") issued by the respondent, DBS Bank Ltd ("Respondent"). The Appellants brought proceedings through an originating summons against the Respondent, on behalf of themselves as well as 192 other plaintiffs for the refund of the entire capital sum which they had lost in investing in the HN5 consequent upon the bankruptcy on 15 September 2008 of Lehman Brothers Holdings Inc ("Lehman"), one of the reference entities to which the HN5 were linked. The Respondent's offer of the HN5 was expressed to be made on the basis of the information contained in a 93-page pricing statement dated 29 March 2007 and a 168-page base prospectus dated 22 December 2005 as amended by a supplementary base prospectus dated 5 April 2006. The Appellants' claims were dismissed by the Court of Appeal on the grounds that the Appellants were bound by the terms of their agreements with the Respondent and the agreements were not void of uncertainty as contended by the Appellants. Bank customers who had invested in the bank's derivative credit-linked notes were bound by the terms of the investment agreements. Chan Sek Keong CJ said (*Soon Kok Tiang* at [19]):

> In the light of the terms and conditions of the contract governing the HN5 ('the HN5 contract'), the Appellants had little or no legal basis to argue that they were entitled to receive anything other than (as will be seen) a zero payment from the Respondent when the Credit Event triggered by Lehman's bankruptcy occurred. They could not claim that they were not bound by the terms and conditions of the HN5 contract since (as mentioned at [3] above) they had expressly agreed to those terms and conditions in the Application Forms which they submitted to the Respondent. They also could not rely on the usual vitiating factors in contract law, such as fraud, mistake, misrepresentation, *non est factum*, *etc*. In particular, the Appellants could not claim that they did not understand the true risks of investing in the HN5 as they had acknowledged in their Application Forms that they 'ha[d] assessed [the] suitability of the product against [their] risk attitude[s], financial means, and investment objectives'.

5.3 The court added a reminder to members of the public that they were generally bound by the terms of a contract they had signed. Chan CJ said (*Soon Kok Tiang* at [63]):

> In view of our decision in this appeal, we think it apposite and timely to remind the general public that under the law of contract, a person who signs a contract which is set out in a language he is not familiar with or whose terms he may not understand is nonetheless bound by the terms of that contract. Illiteracy, whether linguistic, financial or

> general, does not enable a contracting party to avoid a contract whose terms he has expressly agreed to be bound by. The principle of caveat emptor applies equally to literates and illiterates in such circumstances.

Verification agreement

5.4 The Court of Appeal in *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273 left open the application of the provisions of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") to a verification agreement or conclusive evidence clause when it involves an individual account. The Singapore courts have now, for the very first time, applied the provisions of UCTA directly to a conclusive evidence clause or verification agreement involving an individual account. In *Jiang Ou v EFG Bank AG* [2011] 4 SLR 246 ("*Jiang Ou*"), the plaintiff, Jiang Ou, a businesswoman, and her husband, citizens of the People's Republic of China, applied for permanent residence in Singapore under the Monetary Authority of Singapore ("MAS") Financial Investor Scheme ("FIS"). Under the scheme, an individual could apply for permanent residence in Singapore by depositing a sum of at least S$5m with an approved bank regulated by the MAS, for a continuous period of five years. The appellant opened an account with the respondent, EFG Bank AG, a bank incorporated in Switzerland and licensed to operate as a bank in Singapore. Between July 2008 and August 2008, the appellant deposited a total of US$4,999,957.50 into her FIS Account. The bank noted in its customer information profile that the appellant had "little level of understanding of financial products" and had little understanding of English. Mr Ng Ton Yee ("Ng"), an employee of EFG Bank, advised the appellant to convert the FIS monies into Australian dollars so as to benefit from the higher interest rates, to which the appellant agreed. She also agreed that Ng could engage in "minor" transactions involving currency conversion of the FIS monies to benefit from the higher interest rates. Between August 2008 and April 2009, EFG Bank through Ng executed a series of 160 high-volume and/or high risk leveraged foreign exchange and securities transactions resulting in substantial losses to her FIS account. The respondent relied on clause 3.1 of its agreement with the appellant stipulating that:

> The Client undertakes to carefully examine and verify the correctness of each confirmation, advice and statement of account and agrees that reliance may only be placed upon original confirmations, advices, and/or statements of account issued by the Bank. The Client further undertakes to inform the Bank promptly in writing and in any event within fourteen (14) days from the date of any such confirmation or advice, and within thirty (30) days from the date of such statements of account, of any discrepancies, omissions, incorrect or inaccurate entries in the Account or the contents of any confirmation, advice or statement of account or the execution or non-execution of any order,

> failing which the Bank may deem the Client to have approved the original confirmations, advices or statements of account as sent by the Bank to the Client, in which case they shall be conclusive and binding upon the Client without any further proof that the Account is and all entries therein and the execution of all Transactions are correct, and the Client shall be deemed to have waived all Claims against the Bank in respect of the Account and all such Transactions, even if the Bank had not exercised the usual diligence in relation thereto.

Steven Chong J decided that a conclusive evidence clause which sought to exclude a bank's liability for the fraudulent conduct of its employee would be contrary to public policy and ran foul of the reasonableness test under UCTA. Such a clause would be both unreasonable under UCTA as well as void as a matter of public policy. Using conclusive evidence clauses to allocate the risk of fraud of a bank employee to the customer was not only devoid of pragmatism, but entirely inconsistent with the core rationale underpinning the court's willingness to uphold these clauses in the first place, since the allocation of the risk of fraud of the bank's employees, by reason of the relative ease of detection and control, should rightfully and reasonably be borne by the bank: *Jiang Ou* at [120]. Shifting the attendant risk and liability for the fraud or wilful misconduct of the bank's employees by way of conclusive evidence clauses, struck at the very heart of the presumed integrity of the banking system. The negative impact on public confidence and trust in the modern banking system would render such clauses unreasonable under UCTA as well as void as a matter of public policy. Chong J said (*Jiang Ou* at [122]):

> [I]ndividuals and corporations entrust banks and employees of banks with their savings and investments. Public confidence in the banking system is therefore fundamental to the integrity of the system and is no doubt founded upon mutual trust and a reasonable expectation of honest dealings by employees of banks. Shifting the attendant risk and liability for the fraud or wilful misconduct of employees of banks by way of conclusive evidence clauses, strikes at the very heart of the presumed integrity of the system.

Negotiable instruments

Summary judgment

5.5 When a cheque is given as payment under a contract of sale, the cheque constitutes a distinct and separate transaction from the underlying contract of sale. The cheque is treated as a payment in cash. When an immediate party is suing on a negotiable instrument, the plaintiff is entitled to summary judgment unless the instrument is affected with fraud, illegality or there is a failure of consideration. In *Thomson Rubbers (India) Pte Ltd v Tan Ai Hock* [2011] SGHC 256

("*Thomson Rubbers*"), the defendant and his wife were the only shareholders of Third Wind Rubber Pte Ltd ("Third Wind"). The company entered into three contracts to supply a total of 504 metric tonnes ("MT") of natural rubber to the plaintiff, Thomson Rubbers (India) Pte Ltd, between September 2010 and October 2010. An advanced payment of US$559,641.60 was made by the plaintiff. The plaintiff intended to use the 504 MT of natural rubber, supplied by Third Wind, to fulfil obligations to its own customers. Third Wind had contracted with Indonesian suppliers for the rubber, but the suppliers failed to deliver. The plaintiff and defendant entered into negotiations in Ho Chi Minh City, Vietnam, and these resulted in the defendant giving a written undertaking to pay the plaintiff two sums of US$559,641.60 (equivalent to S$709,065) and US$483,305.74 (equivalent to S$616,698) to cover the advanced payment and the damages suffered by the plaintiff respectively. Upon his return to Singapore on the same day, the defendant issued to the plaintiff two post-dated cheques drawn on his Singapore bank account for S$709,065 and S$616,698. The two cheques were dishonoured when they were presented for payment on their due dates. The defendant raised three main defences to the claim on the cheques. First, he had signed the cheques under duress, secondly, the cheques were issued without consideration and finally, that the cheques were issued with an express condition. The plaintiff's application for summary judgment on the two cheques was rejected by the assistant registrar who granted the defendant unconditional leave to defend. The assistant registrar's decision was reversed by the High Court. In allowing the plaintiff's appeal, Lai Siu Chiu J decided that the defendant had failed to demonstrate that he had a real or *bona fide* defence to the plaintiff's claim on two dishonoured cheques. Referring to the defence of duress raised by the defendant, Lai J said (*Thomson Rubbers* at [19]):

> Third, the defendant's allegation of having been coerced into signing the letter of undertaking and settlement agreement did not impact upon the voluntary issuance of the two cheques. This was because the defendant issued the two cheques only upon his return to Singapore when there was no longer any operative duress if indeed it existed in the first place.

5.6 Dismissing the defences based on the lack of consideration and that the cheques were issued with an express condition, Lai J said (*Thomson Rubbers* at [21] and [23]):

> The letter of undertaking clearly stated that the defendant acknowledged receipt of the advance payment as well as Third Wind's failure to perform its obligations under the Thomson Rubber Contracts … The defendant's final argument was that the cheques were issued to the plaintiff with the express condition that the latter was to give notice to the defendant prior to presenting the two cheques for payment. This allegation was denied by the plaintiff. The defendant's argument failed *in limine* in the light of s 3 of the Act

> which expressly defines a bill of exchange as an 'unconditional order in writing'. [emphasis added]

Consideration

5.7 It is a fundamental principle of the common law that for a contract to be binding, consideration must move from the promisee to the promisor. The common law notion of consideration has been modified by s 27(2) of the Bills of Exchange Act (Cap 23, 2004 Rev Ed), in respect of a subsequent holder of a negotiable instrument. However, as between the immediate parties to the instrument, the common law requirement that consideration must move from a promisee to a promisor continues to apply. Would a cheque issued by a third party to satisfy the indebtedness of another be binding on the drawer? Such a cheque is enforceable against the drawer if consideration is provided by the payee for the cheque. Since the debt is not owed by the drawer, payment of the debt would not constitute consideration for the cheque unless there is an express or implied request by the drawer to the payee not to sue on the debt. This basic principle is well-established in law. In *Oliver v Davis* [1949] 2 KB 727, the English Court of Appeal decided that, when an antecedent debt was relied upon as providing the consideration for a cheque, the debt must be that of the drawer and not some third party. In addition, consideration must move from the payee to the drawer and not from a third party. Similarly, in *Hasan v Willson* [1977] 1 Lloyd's Rep 431, Goff J decided that it was a fundamental principle of contract law that the consideration to support a contract must move from a promisee to a promisor and that consideration coming from a stranger to the contract would not constitute good consideration. In *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 ("*NEC Asia*"), NEC Asia Pte Ltd ("NEC") sold to the first defendant, Picket & Rail Asia Pacific Pte Ltd ("D1") 2,390 units of Mitsubishi High End Projectors for US$1,402,380.30. Payment for the goods came in the form of a cheque issued by Digital Network Pte Ltd ("D2"). The cheque was dishonoured. D1 in the meantime was in liquidation and the action against D1 was stayed as a consequence. Belinda Ang Saw Ean J decided that D2 was liable on the cheque because NEC was holder for value of the cheque. Ang J said (*NEC Asia* at [70]):

> In this case, I find that D2 had issued the cheque to NEC in order to discharge D1's obligation to make payment to NEC under the supply contract. Accordingly, NEC had given good consideration to D2 (*ie*, releasing D1 from its payment obligations) in exchange for its issuance of the cheque. NEC is a holder for value in respect of the cheque under s 27 of the Bills of Exchange Act (Cap 23, 2004 Rev Ed).

5.8 The issue as to whether the cheque was supported by consideration moving from the payee to the drawer was a potential issue, but since the issue was not canvassed before the court, the court was justified in concluding that the payee was entitled to enforce the cheque since there is a presumption under s 30 of the Bills of Exchange Act that every holder of a cheque is *prima facie* deemed to have become a party to the cheque for value.

Credit and security

Pledge of shares

5.9 When share certificates are deposited with a creditor as security, an equitable mortgage of the shares is created by the deposit of the share certificates. A person who takes an equitable mortgage of shares takes the security subject to prior equities. A holder of the shares is entitled to have the certificates registered in his name if there are no prior equities and the deposit of the certificates is accompanied by blank transfer forms signed by the owner of the certificates. When share certificates accompanied by signed blank transfer forms are deposited with a creditor, the authority of the creditor to sell the mortgaged shares may be readily implied from the conduct of the share owner. In the absence of blank transfer forms signed by the owner of the shares, an equitable mortgagee in exercising his rights to realise the security would have to apply to court to sanction the sale of the shares. In *Kong Swee Eng v Rolles Rudolf Jurgen August* [2011] 1 SLR 873 ("*Kong Swee*"), the defendant, together with three other investors, entered into an agreement to buy 3,218,458 ordinary shares ("S&P Agreement") in Golden Oriental Pte Ltd ("Company"). Under the agreement, a Mr Guo Ze Ming ("Guo"), the former founder, director and majority shareholder of the Company granted a charge ("Charge") over 6% of the Company's ordinary shares in return for an investment of S$2m. Under clause 3.3 of the Charge, Guo was required to deposit the share certificates of all his shares in the Company, together with duly executed share transfer forms in blank, with The Bank of East Asia, who were appointed as the escrow agent. However, due to an oversight by the investors, this was in fact not done by Guo. On 5 November 2008, after they had found out about this lapse, the defendant's solicitors wrote to Guo, giving him until 11 November 2008 to remedy the situation and to deposit the share certificates and the share transfer forms with the escrow agent, but Guo did not respond or comply with their request. The shares under the Charge were sold by the defendant to the plaintiff. The plaintiff sought to be released from her obligation to complete the sale and purchase and also for the refund of her deposit of S$500,000, on the principal ground that the shares that were sold to her were still encumbered by a subsequent charge in favour of United Overseas Bank Limited ("UOB charge") and the sale was therefore in breach of a condition precedent of the sales agreement which required the shares to be free from all encumbrances. Steven Chong J decided that a deposit of share certificates accompanied by signed blank transfer forms gave rise to an equitable mortgage over the relevant shares. The pledge of the shares constituted an equitable mortgage even though neither the share certificates nor the blank share transfer forms were in fact deposited. An equitable mortgagee, who had no power to convey the legal title out of court, would have to apply to court to sell or convey the legal title. The fact that the Company was no longer a viable investment did not provide a legitimate excuse for the plaintiff not to perform her clear and binding obligation to complete the sale and purchase of the shares under the S&P Agreement. A mortgagee who exercised his power of sale was obliged to hold the surplus proceeds on trust for subsequent mortgagees according to their priorities, and ultimately for the mortgagor. Chong J said (*Kong Swee* at [50] and [73]):

> However, what these two passages really meant, in my judgment, was that, in a situation where the mortgage was not made by deed, an equitable mortgagee who has no other power or mechanism to convey the legal title out of court would simply have no choice but to apply to court to sell or convey the legal title … It bears mentioning that it was the plaintiff who had approached the defendant to purchase the Shares mortgaged by Guo. The plaintiff clearly wanted to take over control of the Company. This was consistent with both her own investments in the Company and the loans which she had extended to the Company. However, shortly after the S&P Agreement was entered into, she realised that the Company was not such an attractive investment opportunity after all. Thereafter, she became determined to find all possible avenues to extricate herself from the S&P Agreement. Unfortunately for the plaintiff, the fact that the Company was no longer a viable investment does not provide a legitimate excuse not to perform her clear and binding obligation to complete the sale and purchase of the Shares under the S&P Agreement.

5.10 When share certificates together with a signed blank share transfer form are deposited with a creditor, the deposit of the certificates creates an equitable mortgage over the shares. In *State Bank of India Singapore v Rainforest Trading Ltd* [2011] 4 SLR 699 ("*Rainforest Trading*"), the plaintiff, State Bank of India, Singapore ("SBI SG"), entered into a facility agreement ("Facility Agreement"), in February 2007, with Baytech Inc ("Baytech"), a company incorporated in the British Virgin Islands, to provide a US dollar term loan facility of US$80m to Baytech. The final maturity date was defined as 36 months from the date of drawdown and the entire loan facility was drawn down by Baytech in one tranche on 23 February 2007. As security for the Facility Agreement, the defendants deposited with SBI SG five share certificates representing 51% of the share capital of eSys Technologies Pte Ltd ("eSys") ("Pledged Shares"), together with a signed blank share transfer form. The first defendant, Rainforest Trading Limited ("Rainforest"), was a company incorporated in the British Virgin Islands while the second defendant, eSys (now known as Haruki Solutions Pte

Ltd), was a private company incorporated in Singapore. eSys was a wholly owned subsidiary of Rainforest. Baytech was a wholly owned subsidiary of Teledata Informatics Limited ("Teledata") and the loan from the bank was intended to finance Teledata's acquisition of a majority control of eSys. Following a default under the Facility Agreement, SBI SG sought to perfect its security in the Pledged Shares. SBI SG submitted that the deposit of the share certificates accompanied by a signed blank share transfer form gave rise to an equitable mortgage with an implied power of sale upon the borrower's default. SBI SG bank initially sought an order for the enforcement of the "pledge" without further notice to the defendants and without reference to the articles of association of the company. The defendants contended that the Pledged Shares were procured and/or obtained through an elaborate fraud perpetrated by Teledata, Baytech and SBI SG. Steven Chong J decided that the deposit of the share certificates together with a signed blank share transfer form created an equitable mortgage over the shares. The allegations of fraud raised in the affidavits by the defendants did not constitute sufficient evidence to warrant the conversion of the originating summons application to a writ action. The court found that none of the fraud allegations levelled by the defendants against SBI SG were of substance. An event of default had occurred under the Facility Agreement entitling SBI SG to enforce its security by selling the Pledged Shares subject to the provisions of the eSys articles of association. Chong J said (*Rainforest Trading* at [119]):

> In addition, I direct a valuation of the Pledged Shares be conducted and for this purpose, the parties are to agree on the joint appointment of an independent auditor within three weeks from the date hereof, failing agreement, the parties are at liberty to seek the court's assistance to appoint an auditor on behalf of the parties.

Performance guarantees

5.11 A performance bond may be issued with or without conditions attached. When a performance bond is made payable without any conditions attached, a simple demand by a beneficiary is sufficient to bring on an issuing bank's obligation to make payment under the bond. A performance bond may also be issued with conditions attached. When conditions are attached to the payment of a performance bond, a demand for payment has to comply strictly with the terms and conditions set out in the bond. The courts have to determine whether as a matter of construction, the demand for payment comes strictly within the terms of the bond. In *Labroy Offshore Ltd v Master Marine AS* [2011] SGHC 234 ("*Master Marine*"), the plaintiff, Labroy Offshore Ltd ("Labroy") entered into a construction contract ("Construction Contract") with the first defendant, Master Marine AS ("MM") to construct a self-elevating offshore unit for MM. Under the Construction

Contract, MM was to make payment of the contract price in six instalments. The first five instalments were deemed to be "advances" to Labroy, with the sixth and final instalment due upon delivery. Labroy was required to provide refund guarantees ("Refund Guarantees") for repayment of each of the first five instalments, and it provided banker's guarantees from the second, third and fourth defendants, the Overseas-Chinese Banking Corporation Ltd, United Overseas Bank Ltd and DBS Bank Pte Ltd respectively (collectively, the "Banks"). MM later purported to rescind the Construction Contract under various articles thereof and issued demands for payment under the Refund Guarantees to the Banks. Labroy applied for an injunction to restrain the Banks from paying MM and to enjoin MM from receiving payment thereby. Andrew Ang J decided that the beneficiary of a performance guarantee was not entitled to payment when the demand for payment did not comply with the terms of the performance guarantee. Ang J said (*Master Marine* at [39] and [41]):

> As explained above, I accepted that MM was not entitled to make the New Demands when its rescission of the Construction Contract was the subject of arbitration proceedings because it would undermine the overall scheme of the Refund Guarantees. However, in holding this, I essentially held that MM had no legal right under the Refund Guarantees to make the New Demands. In conclusion, I found that the plain language of limb (i) as well as the overall scheme of the Refund Guarantees supported Labroy's and the Banks' reading that limbs (i) and (ii) applied to mutually exclusive circumstances: limb (ii) applied where the Construction Contract had been rescinded and an Initial Demand had been made, whereas limb (i) applied only where the Construction Contract was still in force and the delivery of the Rig was still envisioned by the parties. MM could not invoke limb (i) if it had purported to rescind the Construction Contract.