TWO DECADES OF RESTRAINING UNCONSCIONABLE CALLS ON PERFORMANCE GUARANTEES

From *Royal Design* to *JBE Properties*

Singapore courts have expressly departed from the English position by recognising unconscionability as a separate ground for restraining a beneficiary from demanding payment under a performance guarantee. The power to issue interlocutory injunctions upon a strong *prima facie* case of unconscionability is a valuable tool for mitigating the injustice occasioned by abusive calls; but it must be wielded with care so as not to nullify the commercial utility of performance guarantees. The key objections raised against the recognition of unconscionability are addressed herein; yet pragmatic clarification of the *core content* of unconscionability by the *judiciary* is necessary.

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I. Trite propositions

1 It is hornbook law that documentary letters of credit and performance guarantees (or performance bonds) share three related features under English and Singapore law, all of which are based on the policy of preserving the established commercial utility of such instruments. Citation of authorities for such trite propositions serves no purpose save to accentuate the symptoms of endemic *cititis* plaguing lawyers; and the interested reader should instead refer to the many staple discussions in the modern literature.[1] First, the payment obligation of issuers of both instruments is typically predicated upon

* The author thanks Dr Wee Meng Seng (NUS), Dr Tang Hang Wu (NUS) and an anonymous referee for their helpful comments on an earlier draft. The usual caveats apply.

1 On letters of credit and performance guarantees, see generally: Prof Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) (especially chs 6 and 13); Ali Malek & David Quest, *Jack: Documentary Credits – The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees* (Tottel Publishing, 4th Ed, 2009) (especially ch 12); and Deborah Horowitz, *Letters of Credit and Demand Guarantees: Defences to Payment* (Oxford University Press, 2010).

purely documentary demands, rather than the objective ascertainment of external facts. Second, the issuer pays against presentment of strictly conformant documents. Third, the issuer's payment obligation is independent of the commercial transaction underlying the credit or guarantee; thus, issuers pay upon an apparently conformant demand without being concerned with disputes between the beneficiary and the account party (on whose account the guarantee or credit has been issued) over the underlying transaction. This third feature is referred to as the "autonomy" or "independence" principle; it emphasises the autonomy of the issuer's payment obligation towards the beneficiary under the guarantee or credit, which is separate from the underlying commercial transaction between the account party and beneficiary.

II. Autonomy: Letters of credit and performance guarantees

2 That the autonomy principle is fundamental to letters of credit is a point repeatedly emphasised in courts and treatises, and is reflected by the rule that the courts will not interfere with the beneficiary's right to demand payment except in cases of clear fraud. *English* law applies the same idea to performance guarantees, so that fraud remains the sole basis upon which the autonomous payment obligations under *both* letters of credit and performance guarantees could be interfered with.[2] On the other hand, fraud provides the sole basis for judicial intervention in Singapore only in relation to letters of credit. In this respect, the Singapore courts have adopted a more nuanced approach which distinguishes between letters of credit and performance guarantees.[3]

3 The chief reason why Singapore courts distinguish performance guarantees from letters of credit is that they have different commercial

2 *Edward Owen Engineering v Barclays Bank International* [1978] QB 159.

3 On performance guarantees, see: Prof H N Bennett, "Autonomous Guarantees" in *Benjamin's Sale of Goods* (Michael Bridge ed) (Sweet & Maxwell, 8th Ed, 2010) ch 24; Ewan McKendrick, *Goode on Commercial Law* (Penguin, 4th ed, 2010) at p 1124 *et seq*; Poh Chu Chai, *Guarantees and Performance Bonds* (LexisNexis, 2008) (ch 13); Nelson Enonchong, "The Problem of Abusive Calls on Demand Guarantees" [2007] LMCLQ 83; Roeland F Bertrams, *Bank Guarantees in International Trade* (Kluwer Law International, 3rd Ed, 2004); Quentin Loh & Tang Hang Wu, "Injunctions Restraining Calls on Performance Bonds – Is Fraud the Only Ground in Singapore?" [2000] LMCLQ 348; the Hon L P Thean JA, "The Enforcement of a Performance Bond: The Perspective of the Underlying Contract" (1998) 19 Singapore Law Review 389; Arvin Lee, "Injuncting Calls on Performance Bonds: Reconstructing Unconscionability" (2003) 15 SAcLJ 30; Low Kee Yang, Eugene Ooi & Elizabeth Wong, "Unconscionable Calls on Performance Bonds: A Bold New Exception" in *Singapore Academy of Law Conference 2006: Developments in Singapore Law between 2001 and 2005*) (Teo Keang Sood gen ed) (Singapore Academy of Law, 2006) ch 21.

characters.[4] A letter of credit serves as an accepted mode of payment of price in international trade; it is thus the lifeblood of international commerce with which courts should not interfere save in clear cases of fraud. On the other hand, performance guarantees serve the different function of securing the account party's obligation to pay damages upon commission of a breach. Since letters of credit and performance guarantees can *both* be used in: (a) the domestic or international contexts; and (b) transactions where either the account party or beneficiary may be more vulnerable, over-generalisations for either instrument would obviously be unhelpful. Much therefore turns on the circumstances, particularly the commercial purpose served by the credit or guarantee, in each case.[5] Suffice to say that much[6] of the relevant Singapore case law on unconscionable calls on performance guarantees, including *JBE Properties Pte Ltd v Gammon Pte Ltd*[7] ("*JBE Properties*"), concerns domestic construction disputes far removed from the international sale transactions which give rise to letters of credit. Short of commencing expensive litigation in an overseas forum, an international seller (beneficiary) has no choice but to look almost *exclusively* to a letter of credit for payment once he has shipped goods to a foreign buyer (account party) and surrendered his bill of lading.[8] On the other hand, a local employer is not so vulnerable for he merely makes interim stage payments to his construction contractor as and when certified milestones have been reached. The contractor (account party) often has no choice but to get his bank to provide the employer (beneficiary) with a performance guarantee as security for damages occasioned by possible construction defects. It is in fact the contractor who relies almost exclusively for his cash flow on the employer's interim payments. An employer who makes a call on the contractor's performance guarantee exerts enormous financial pressure on the contractor; calls, if abused, may be extremely oppressive.[9]

4 *Cf* the Hon L P Thean JA, "The Enforcement of a Performance Bond: The Perspective of the Underlying Contract" (1998) 19 *Singapore Law Review* 389 at 403; and Quentin Loh & Tang Hang Wu, "Injunctions Restraining Calls on Performance Bonds – Is Fraud the Only Ground in Singapore?" [2000] LMCLQ 348 at 352–353.

5 The Hon L P Thean JA, "The Enforcement of a Performance Bond: The Perspective of the Underlying Contract" (1998) 19 Singapore Law Review 389 at 415.

6 Obviously not *all*: for example, *Min Thai Holdings v Sunlabel* [1998] 3 SLR(R) 961 (Lai Kew Chai J) concerned an international sale of rice.

7 [2011] 2 SLR 47 (CA) (Chan Sek Keong CJ).

8 The Hon L P Thean JA, "The Enforcement of a Performance Bond: The Perspective of the Underlying Contract" (1998) 19 Singapore Law Review 389 at 403.

9 *Chartered Electronics Industries v Development Bank of Singapore* [1992] 2 SLR(R) 20 (Chan Sek Keong J); and Quentin Loh & Tang Hang Wu, "Injunctions Restraining Calls on Performance Bonds – Is Fraud the Only Ground in Singapore?" [2000] LMCLQ 348 at 353.

4 Limited interference with payment under performance guarantees under such circumstances will not affect international trade. Thus, as Chan Sek Keong CJ points out in *JBE Properties*, a less stringent standard (as compared to the standard applicable *vis-à-vis* letters of credit) can justifiably be adopted for determining whether a demand for payment under a performance guarantee should be restrained.[10] The differences between performance guarantees and letters of credit have been analysed in detail by Prof Debattista, who also argued that the autonomy principle which applies to letters of credit need not apply to the same extent to performance guarantees.[11]

III. Unconscionability

5 Delivering the Singapore Court of Appeal's judgment in December 2010 in *JBE Properties*, Chan CJ confirmed that Singapore law differed from English law in that apart from fraud, unconscionability provides an additional and separate basis under Singapore law for granting an interlocutory injunction restraining a beneficiary from making a call on a performance guarantee. In addition, it was also suggested in *JBE Properties* that where a performance guarantee is worded ambiguously, the court could interpret it as being predicated upon facts rather than documents.[12]

6 Chan CJ's judgment in *JBE Properties*, which is characteristically crisp, is the latest contribution to the Singapore case law spanning two decades including, *inter alia*, *Royal Design Studio Pte Ltd v Chang Development Pte Ltd*[13] (in 1990); *Chartered Electronics Industries v Development Bank of Singapore*[14] (in 1992); *Kvaerner Singapore Ltd v UDL (Shipbuilding) Singapore Ltd*[15] (in 1993); *Bocotra Construction Pte Ltd v AG*[16] (in 1995); *Raymond Construction Pte Ltd v Low Yang Tong & AGF Insurance*[17] ("*Raymond Construction*") (in 1996); *Min Thai Holdings v Sunlabel*[18] (in 1998); *GHL Pte Ltd v Unitrack Building Construction Pte Ltd*[19] (in 1999); *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan*[20]

10 *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10].
11 Charles Debasttista, "Performance Bonds and Letters of Credit: A Cracked Mirror Image" [1997] JBL 289.
12 *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10].
13 [1990] 2 SLR(R) 520 (L P Thean J).
14 [1992] 2 SLR(R) 20 (Chan Sek Keong J).
15 [1993] 2 SLR(R) 341 (G P Selvam JC).
16 [1995] 2 SLR(R) 262 (M Karthigesu JA).
17 [1996] SGHC 136 (Lai Kew Chai J).
18 [1998] 3 SLR(R) 961 (Lai Kew Chai J).
19 [1999] 3 SLR(R) 44 (L P Thean JA).
20 [2000] 1 SLR(R) 117 (Chao Hick Tin JA).

("*Dauphin*") (in 2000); *Eltraco International v CGH Development*[21] (in 2000); *Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd*[22] (in 2001); *McConnell Dowell Constructors v Sembcorp Engineers & Constructors*[23] (in 2002); *Newtech Engineering Construction v BKB Engineering Constructions*[24] (in 2003) and *Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp*[25] (in 2009). Although *Bocotra* is sometimes regarded as the fountainhead, the Singapore Court of Appeal in *GHL*[26] has attributed the origins of restraining unconscionable calls to earlier cases including *Royal Design*, *Chartered Electronics* and *Kvaerner*.

7 Case law development has been substantial and the preceding list does not purport to be comprehensive. Neither is it proposed to enter into a detailed analysis of *JBE Properties* for that would be superfluous. The reader should simply refer to Chan CJ's succinct exposition. Rather it would be more useful to examine some arguments which have been raised elsewhere against recognising unconscionability as a separate ground for injunctive relief. Prof Enonchong has identified three main objections.[27]

IV. Three objections

8 First, Prof Enonchong says that easy availability of injunctive relief would destroy confidence in performance guarantees as the equivalent of cash in hand[28] and undermine their commercial utility.[29] One could conceivably suppose that Chan CJ's response might have been that a performance guarantee (unlike a letter of credit which comprises the mode of payment of *price* for goods or services) is *not* the lifeblood of commerce as it is merely security against damages for defective performance.[30] In any case, although the recognition of unconscionability as an *additional* ground of relief (apart from fraud)

21 [2000] 3 SLR(R) 198 (Chao Hick Tin JA).
22 [2001] 3 SLR(R) 716 (L P Thean JA).
23 [2002] 1 SLR(R) 60 (Woo Bih Li JC).
24 [2003] 4 SLR(R) 73 (Tay Yong Kwang J).
25 [2009] SGHC 7 (Choo Han Teck J).
26 *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [14], [20], [21] and [22] *per* L P Thean JA.
27 Nelson Enonchong, "The Problem of Abusive Calls on Demand Guarantees" [2007] LMCLQ 83 at 104.
28 *Cf Chartered Electronics Industries v Development Bank of Singapore* [1992] 2 SLR(R) 20 at [38] *per* Chan Sek Keong J: "A performance bond is as good as cash between buyer and seller only because that is the effect of the English decisions and not because it is the cause of such decisions."
29 Nelson Enonchong, "The Problem of Abusive Calls on Demand Guarantees" [2007] LMCLQ 83 at 104.
30 *Cf JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10].

means relief would be more readily available, that is not to say that injunctive relief would be *easily or readily* available – not unless unconscionable behaviour were rampant amongst beneficiaries of performance guarantees and provable on *strong* evidence. Furthermore, confidence in, and utility of, commercial instruments such as performance guarantees cannot possibly be promoted by habitual judicial enforcement of unconscionable payment demands made under oppressive circumstances. In any event, Singapore's departure from the English position has not gone unnoticed in England or Malaysia. Despite earlier signs of flirtation with the idea,[31] English commentators[32] and Malaysian courts[33] have not enthusiastically embraced unconscionability as a separate ground for injunctive relief. Although the Australian courts have accepted unconscionability as a separate ground for injunctive relief, that is based not on the common law (as in Singapore) but on s 51AA of Australia's Trade Practices Act 1974 which prohibits corporations from engaging in unconscionable conduct in trade and commerce.[34] The difference in juridical bases for injunctive intervention does not, however, detract from the fact that unconscionability is not an idiosyncratic ground of relief unique to Singapore: It exists also in Australia, a major common law jurisdiction.

9 Reference should also be made to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit ("Convention").[35] On the other hand, the International Chamber of

31 See, *eg*, *Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1996] 1 MLJ 425; *TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd* [2003] EWHC 762 (TCC), [2003] 1 All ER (Comm) 914 (Judge Thornton QC); Prof Peter Ellinger, "Documentary Credits and Finance by Mercantile Houses" in *Benjamin's Sale of Goods* (A G Guest (ed), (Sweet & Maxwell, 7th Ed, 2006) ch 23 at p 2075:

> A number of recent cases, decided in Singapore, postulate an unconscionability exception. … The principle is applicable only in respect of a party that exercises its rights under the on-demand guarantee in an unfair and commercially objectionable manner. An injunction based on unconscionability would, accordingly, not be granted against a bank that seeks to carry out its undertaking. But injunctions have been granted against a commercial party that demands payment without a sound commercial basis. It is hoped that this well-defined doctrine will be adopted in other jurisdictions.

32 Charles Procter ed, *Goode on Payment Obligations in Commercial and Financial Transactions* (Sweet & Maxwell, 2nd Ed, 2009) at p 59; and Nelson Enonchong, "The Problem of Abusive Calls on Demand Guarantees" [2007] LMCLQ 83 at 104–106.

33 *Transfeld Projects v Malaysian Airline System* [1999] 1 MLJ 428; *LEC Contractors v Castle Inn* [2000] 3 MLJ 339 at 359–361.

34 *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380 (Batt J); Nelson Enonchong, "The Problem of Abusive Calls on Demand Guarantees" [2007] LMCLQ 83 at 100.

35 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL, 1995). Although, to-date, neither the UK nor Singapore is a party to the Convention and only eight nations have acceded to or ratified the

(*cont'd on the next page*)

Commerce's Uniform Rules for Demand Guarantees ("URDG")[36] will not be discussed in this article because, even if parties voluntarily subject their performance guarantee thereto, the URDG unsurprisingly does *not* purport to say anything about the courts' power to restrain fraudulent (or unconscionable) calls by interlocutory injunction. Under Arts 19 and 20 of the Convention, interlocutory injunctive relief would be justified apart from fraud or forgery, if there is strong evidence that no payment is due on the basis asserted in the demand[37] or the demand has "no conceivable basis" judging by the type and purpose of the payment obligation.[38] Under Art 19(2) of the Convention, a demand would have "no conceivable basis" if, *inter alia*, the contingency or risk which the payment obligation was designed to secure does not materialise;[39] the underlying obligation of the account party has been fulfilled to the beneficiary's satisfaction;[40] or fulfilment of the underlying obligation has been prevented by the beneficiary's wilful misconduct.[41] These Convention grounds for injunctive relief, which clearly extend beyond fraud,[42] together with the Australian recognition of unconscionability, illustrate without a doubt that the perceived dangers of recognising any ground of relief apart from fraud has been overstated.

10 Prof Enonchong's second objection is that recognising the unconscionability ground for injunctive relief may lead to courts getting involved in disputes arising from the underlying commercial transaction when such disputes should be resolved in separate proceedings.[43] The argument here is that the parties intended that the beneficiary be *paid first* and any dispute should be resolved later in separate proceedings: "pay first, dispute later" is one of the objectives underlying the autonomy principle. However formidable this objection might originally

Convention, a significant ninth nation (the US) became a signatory in December 1997.

36 ICC Uniform Rules for Demand Guarantees including Model Forms (URDG 758) (International Chamber of Commerce, 2010 Revision).

37 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL, 1995) Art 19(1)(b).

38 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL, 1995) Art 19(1)(c).

39 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL, 1995) Art 19(2)(a).

40 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL, 1995) Art 19(2)(c).

41 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL, 1995) Art 19(2)(d).

42 They also depart from the autonomy principle by piercing through the guarantee and making direct reference to the underlying transaction: *cf* Deborah Horowitz, *Letters of Credit and Demand Guarantees: Defences to Payment* (Oxford University Press, 2010) at p 139.

43 Nelson Enonchong, "The Problem of Abusive Calls on Demand Guarantees" [2007] LMCLQ 83 at 105.

have been, it must have lost all traction when Anglo-American law took that first step upon the slippery slope, many decades ago, when recognising fraud as an exception to the autonomy principle.[44] Whatever commercial value might be attached to the autonomy principle, just as the courts will not countenance the law and the court's own offices being perverted into instruments of fraud,[45] the courts will likewise not allow the law or its offices to become instruments of unconscionable conduct. Any suggestion that a court should withhold injunctive relief despite having evidence of fraudulent – or, for that matter, unconscionable – conduct placed before it simply flies in the face of the court's duty to ensure that justice is done and is seen manifestly to have been done. Just as technical appeals to the autonomy principle will not exclude the courts' power to intervene in cases of fraud, autonomy will not shield truly unconscionable conduct. Prof Enonchong's second objection must also have lost some force in light of Prof Bennett's reminder that the "refusal of injunctive relief preventing payment does not prejudice the availability of a freezing order with respect to the proceeds of payment".[46] No doubt, the prerequisites and purposes of a *Mareva* injunction are quite different from those for an injunction restraining a beneficiary from making a demand; yet both result in restrictions imposed on the beneficiary's freedom to access and deal with funds.[47] Accepting that the beneficiary may be subject to a *Mareva* injunction freezing *proceeds* which have been *paid* to him makes it patently clear that the beneficiary's expectation of "pay first, dispute later" is not sacrosanct. Surely, the real difficulty does not lie in recognising that injunctive relief could be grounded in unconscionability, but rather in *formulating what "unconscionability" means* in this context and *how* a case of unconscionability is to be sufficiently proved in evidential terms to trigger interlocutory judicial intervention.

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44 *Societe Metallurgique d'Aubrives & Villerupt v British Bank for Foreign Trade* (1922) 11 Ll L Rep 168; *Sztejin v J Henry Schroeder Banking Corp* 31 NYS 2d 631 (1941); *Harbottle v National Westminster Bank* [1978] 1 QB 146; *Edward Owen v Barclays Bank* [1978] 1 QB 159.

45 Prof H N Bennett, "Autonomous Guarantees" in *Benjamin's Sale of Goods* (Michael Bridge ed) (Sweet & Maxwell, 8th Ed, 2010) ch 24 at p 2154.

46 Prof H N Bennett, "Autonomous Guarantees" in *Benjamin's Sale of Goods* (Michael Bridge ed) (Sweet & Maxwell, 8th Ed, 2010) ch 24 at pp 2160 and 2163; *Czarnikow-Rionda Sugar v Standard Bank London* [1999] 2 Lloyd's Rep 187 at 204; *Themehelp v West* [1996] QB 84 at 103.

47 Ian Goldrein QC ed, *Commercial Litigation: Pre-Emptive Remedies – International Edition* (Sweet & Maxwell, 2005) at p 231, citing *The Bhoja Trader* [1981] 1 Lloyd's Rep 256 at 258 (Donaldson LJ):

> The learned Judge went on to say that this did not prevent the court, in an appropriate case, from imposing a *Mareva* injunction upon the fruits of the letter of credit or guarantee. Again we agree. It is the natural corollary of the proposition that a letter of credit or bank guarantee is to be treated as cash that when the bank pays and cash is received by the beneficiary, it should be subject to the same restraints as any other of his cash assets.

11 This brings us to Prof Enonchong's third objection, namely, that unconscionability is too vague and uncertain a concept, and that recognising it would inject too much uncertainty into commerce.[48] This assertion by Prof Enonchong is no doubt true. However, few legal concepts – even "fraud" – are clear enough for mechanical application. Surely, even legal concepts which might *now* appear to be sufficiently clear and certain must have started out less so, and have come to be stabilised over time as a result of judicial and academic refinement. Much ink has been spilt over what amounts to fraud in the context of letters of credit, which learning has been applied to performance guarantees in English law.[49] The core ideas of what constitutes relevant "fraud" in that context had to be developed and refined by courts and academics over many years; and the same must, unfortunately, *also* apply to "unconscionability".

12 A perusal of some of the decided cases suggests that perhaps injunctive relief might be available involving the following circumstances:[50] where the beneficiary's call was based on a breach induced by his own fault;[51] where the beneficiary's call was based on the account party's delay in construction works, but the delay had been caused by the beneficiary not having made timely interim payments;[52] and where the account party's failure to deliver rice was due to severe floods which raised the question whether the contractual *force majeure* clause excused the account party.[53] Furthermore, where the beneficiary held substantial retention money and other moneys due to the account party, the beneficiary may be *partially* restrained so he may only call on the amount of the guarantee *less those sums*.[54] The beneficiary will also be restrained from calling on the full sum of the bond where the beneficiary owed the account party substantial sums and the account party's construction work was marred by merely "minor defects" (which cost far less to rectify than the "grossly inflated" sums demanded by the beneficiary).[55] Where a beneficiary's call is motivated by some ulterior

48 Nelson Enonchong, "The Problem of Abusive Calls on Demand Guarantees" [2007] LMCLQ 83 at 105.

49 See, *eg*, Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010); and Ali Malek & David Quest, *Jack: Documentary Credits – The Law and Practice of Documentary Credits Including Standby Credits and Demand Guarantees* (Tottel Publishing, 4th Ed, 2009).

50 See generally *Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp* [2009] SGHC 7 at [3]–[4] *per* Choo Han Teck J; citing *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 at [46] *per* Chao Hick Tin JA.

51 *Kvaerner Singapore v UDL Shipbuilding* [193] 2 SLR(R) 341 (G P Selvam J).

52 *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] 2 SLR(R) 520 (L P Thean J).

53 *Min Thai Holdings v Sunlabel Pte Ltd* [1998] 3 SLR(R) 961 (Lai Kew Chai J).

54 *Eltraco International v CGH Development* [2000] 3 SLR(R) 198 (Chao Hick Tin JA).

55 *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 (Chan Sek Keong CJ).

motive and not based on a *bona fide* claim against the account party, he will not be allowed to call on a performance guarantee as a bargaining chip to coerce the account party to submit to the beneficiary's terms in negotiations[56] or to improve the beneficiary's own cash flow.[57] However these are merely individual *instances* of unconscionable calls on performance guarantees. No discernible guideline of a *practical and principled* nature has been propounded. This means that, firstly, whether the decided cases will ultimately be reaffirmed on their facts remains open to question; and secondly, in every case whether an injunction will issue cannot be predicted with any certainty.

13 Nonetheless, the rule of law necessarily demands minimal standards of objective ascertainability of the rules by which citizens must order their affairs. It is therefore essential that commercial parties (and their advisers) should know where they (and their clients) stand. The general pronouncements in *Dauphin*[58] and *Raymond Construction*[59] usefully underline the inherently *flexible* judicial parameters of "unconscionability". Nonetheless, businessmen and their advisers need guidance of greater specificity. Whilst acknowledging that certainty approximating mathematical precision is obviously beyond reach (at least in peripheral cases), it is hoped that some clarity on the *core* substantive content of "unconscionability" can be established by the emerging Singapore case law. Although the *periphery* of "unconscionability" will necessarily remain indistinct, that should not be too much cause for concern. Those whose consciously dubious conduct brings them treading along the unchartered boundaries of legality are deliberately engaging in legal brinksmanship. If they choose to *test* the limits of legality, no one else is to be blamed when their wish is granted. On the other hand, the vast majority of businessmen acting within generally acceptable commercial norms will of course not be caught by "unconscionability". No doubt, the Singapore courts will be

56 *Samwoh Asphalt v Sum Cheong Piling* [2001] 3 SLR(R) 716 (L P Thean JA).

57 *Newtech Engineering Construction v BKB Engineering Constructions* [2003] 4 SLR(R) 73 (Tay Yong Kwang J).

58 *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 at 42 *per* Chao JA: "We do not think it is possible to define 'unconscionability' other than to give some broad indications such as lack of *bona fides*. What kind of situation would constitute unconscionability would have to depend on the facts of each case."

59 *Raymond Construction Pte Ltd v Low Yang Tong & AGF Insurance* [1996] SGHC 136 at [5] *per* Lai J:

> The concept of 'unconscionability' to me 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. Mere breaches of contract by the party in question … would not by themselves be unconscionable.

mindful not to intervene save in cases of conduct which is clearly unacceptable according to commercial norms.[60]

V. Exporting a strong *prima facie* case

14 Finally, apart from Prof Enonchong's three aforementioned objections, one further difficulty must be addressed which relates to the "exportability" of the Singapore doctrine. It arises from Prof Bennett's exposition on *interlocutory* injunctive relief in performance guarantee cases.[61] The standard of proof required under Singapore case law for interlocutory injunctive relief grounded upon unconscionability and fraud is that of a "strong *prima facie* case";[62] whereas the English approach requires "clear evidence" of fraud.[63] Furthermore, Prof Bennett notes that whereas the English approach requires a second stage where the court assesses the adequacy of damages and the balance of convenience,[64] the Singapore approach treats evidence of unconscionability and fraud as conclusive.[65] Given the Singapore court's opprobrium towards *both* types of conduct, it simply "does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy".[66]

15 Prof Bennett therefore concludes that although it is still possible for English courts to now follow the lead of Eveleigh LJ in *Potton Homes v Coleman Contractors*[67] and the Singapore approach by recognising unconscionability as a separate ground for injunctive relief against a beneficiary of a performance guarantee, it would be illogical to follow the Singapore approach in full: "However, it would be illogical for the availability of an injunction on the basis of fraud to be subject to considerations of damages as an adequate alternative remedy and the balance of convenience while an injunction on the morally less culpable ground of unconscionability was not so subject, so that an injunction

60 *Cf Eltraco International v CGH Development* [2000] 3 SLR(R) 198 at [30] *per* Chao JA.

61 Prof H N Bennett, "Autonomous Guarantees" in *Benjamin's Sale of Goods* (Michael Bridge ed) (Sweet & Maxwell, 8th Ed, 2010) ch 24 at pp 2159 and 2165.

62 *Chartered Electronics Industries v Development Bank of Singapore* [1992] 2 SLR(R) 20; *GHL Pte Ltd v Unitrack Building Construction* [1999] 3 SLR(R) 44; *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 at [57]; and see also *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [8]–[10].

63 *Bolivinter Oil v Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251.

64 *State Trading Corp of India v ED & F Man (Sugar)* [1981] Com LR 235.

65 *Bocotra Construction v AG* [1995] 2 SLR(R) 262 at [46] *per* Karthigesu JA; Prof H N Bennett, "Autonomous Guarantees" in *Benjamin's Sale of Goods* (Michael Bridge ed) (Sweet & Maxwell, 8th Ed, 2010) ch 24 at p 2165.

66 *Bocotra Construction v AG* [1995] 2 SLR(R) 262 at [46] *per* Karthigesu JA.

67 (1984) 28 BLR 19.

was more readily granted for the lesser sin."[68] It follows that if unconscionability were recognised as a novel ground of relief in English law, adjustments would have to be made in relation to whether adequacy of damages and balance of convenience must also be assessed, as well as standard of proof, for both fraud and unconscionability. The key is to ensure that the standard required of unconscionability should not be less exacting than of fraud. One way to do this would be to apply the same standard, of strong *prima facie* case, to both fraud and unconscionability (which is the Singapore approach).

VI. Conclusion

16 In the ultimate analysis, the Singapore Court of Appeal's decision in *JBE Properties* is to be welcomed in its affirmation of unconscionability as an independent ground, separate from fraud, for restraining a beneficiary from demanding payment under performance guarantees. Separate and independent it might be, but also wider; and thus there is no doubt that unconscionability completely eclipses fraud as a ground of relief.

17 It cannot be right to stultify justice by inflexibly defining "unconscionability" in exhaustive terms; yet legitimate commercial expectations must not be thwarted. Businessmen (and their advisers) must be provided with some practical working definition so they know, at least in a rough and ready way, where they (or their clients) stand. Whilst acknowledging that absolute certainty is beyond reach (at least in peripheral cases), the hope is that some clarity on the *core* substantive content of "unconscionability" can be established in the emerging Singapore case law. Injunctive restraint of unconscionable calls on performance guarantees can no longer be dismissed as just an awkward pubescent notion. Born in the Singapore courts two decades ago, it is now at the very threshold of majority; yet, it is of very young vintage compared to the established fraud doctrine. To truly mature into doctrine, more must be done to develop its core character. Some academic effort at distilling the essence of unconscionability from local case law is already underway;[69] but clearly, it must be for practical,

68 Prof H N Bennett, "Autonomous Guarantees" in *Benjamin's Sale of Goods* (Michael Bridge ed) (Sweet & Maxwell, 8th Ed, 2010) ch 24 at p 2165.

69 See, *eg*, Quentin Loh & Tang Hang Wu, "Injunctions Restraining Calls on Performance Bonds – Is Fraud the Only Ground in Singapore?" [2000] LMCLQ 348 at 359; Low Kee Yang, Eugene Ooi & Elizabeth Wong, "Unconscionable Calls on Performance Bonds: A Bold New Exception" in *Singapore Academy of Law Conference 2006: Developments in Singapore Law between 2001 and 2005* (Teo Keang Sood gen ed) (Singapore Academy of Law, 2006) ch 21 at p 848 ff; Poh Chu Chai, *Guarantees and Performance Bonds* (LexisNexis, 2008) ch 13 at p 334; and Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ch 13 at p 322.

succinct, judicial pronouncements to lead the way. Properly nurtured, it may in time mature into the Singapore courts' most exportable doctrine.