

Case Note

INTERLOCUTORY INJUNCTIONS AFFECTING DEMAND GUARANTEES IN INTERNATIONAL COMMERCE

Conflicts and Confusion

Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia
[2010] 2 SLR 329

This note considers the implications of the Singapore High Court's decision in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 for Singapore's jurisprudence on the two areas of choice of law and demand guarantees.

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I. Introduction

1 The decision of the Singapore High Court in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia*¹ (“*Shanghai Electric*”) is the first decision in Singapore and, it appears, the Commonwealth,² to determine the issue of whether restraining a call on and payment under a demand guarantee is a procedural matter for the *lex fori*, or a substantive matter, such that a law other than that of the *lex fori* may

1 [2010] 2 SLR 329.

2 In *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380, an application was brought for a bond injunction. Batt J of the Supreme Court of Victoria held that the demand guarantee in question was governed by Czech law, and observed that logically, the proper law of the guarantee must be first determined because that was what determined the rights and liabilities of the parties to the guarantee. However, Batt J went on to consider the possibility that the issue of whether to grant the injunction was a procedural one and governed by the *lex fori*. In the event, the question of whether Czech law ought to have applied was left open. In *Marinteknik Shipbuilders (S) Pte Ltd v SNC Passion* [2001] SGHC 140, an injunction was sought to restrain a beneficiary from making a demand on an on-demand guarantee. Both the guarantee and the underlying contract were governed by English law. Lee Seiu Kin JC (as he then was) noted the possibility that English law governed the issue. However, as no submissions were made on the applicability of English law, Lee JC left the question open.

apply. This decision has significant implications for local doctrine pertaining to the two areas of choice of law and demand guarantees.

2 The plaintiff in *Shanghai Electric*,³ a Chinese company, entered into a contract with the first defendant, an Indonesian company, to construct a power plant in Indonesia. Pursuant to the contract, the first defendant paid the plaintiff an advance of 10% of the contract price. The plaintiff procured an advance payment guarantee in the first defendant's favour from the second defendant, the Singapore branch of the Bank of China, to secure the return of the advance payment. The guarantee was a demand guarantee. Both the construction contract and the guarantee provided for English law to be their governing law. Disputes arose in connection with the construction contract. On the basis that the plaintiff had breached the contract, the first defendant terminated the contract and called on the guarantee. The plaintiff applied *ex parte* to the Singapore High Court to restrain the second defendant from making payment and the first defendant from making further demands on and receiving payment under the guarantee. (In this note, such injunctions in relation to demand guarantees will for convenience be referred to as "bond injunctions".)

3 The *ex parte* application was granted. The first defendant applied to have the bond injunction set aside. The first defendant's setting aside application was granted by the court in *Shanghai Electric*.⁴ In doing so, the court determined that the grant of the injunction was a substantive matter, and that the applicable law was that agreed by the parties to govern the guarantee and the underlying contract.⁵

4 In order to fully explain the significance and implications of this aspect of the court's decision, it is useful to set out certain background matters. This is done in paras 7–20 of this note. First, the nature of demand guarantees and the purpose of bond injunctions will be explained, to show the practical relevance of the decision in *Shanghai Electric*⁶ to parties to an international transaction involving demand guarantees. Local jurisprudence on substance and procedure and bond injunctions is then briefly canvassed.

3 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

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5 The plaintiff's appeal in Civil Appeal No 3 of 2010 was dismissed. The court's reasons, as stated in its brief oral grounds delivered at the end of the hearing of the appeal, were that the monies secured by the advance payment guarantee were the defendant's own monies. This meant that the plaintiff could not succeed even if the ground of unconscionability were to apply. No ruling was made on the choice of law issue, and indeed such ruling would not be necessary to the court's decision. No written grounds have been issued as the time of the writing of this note.

6 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

5 Paragraphs 21–55 of this note address the implications of the decision for local approaches to defining substance and procedure. Certain general categorisations traditionally used to distinguish between substance and procedure can no longer hold, if this decision is followed. The reasons for the court’s characterisation of the application as substantive also cast light on the nature and effect of bond injunctions and demand guarantees.

6 Where the issue is identified as a substantive matter, the next step is to categorise the issue in order to identify the connecting factor that will point to the applicable legal system.⁷ In *Shanghai Electric*,⁸ the contractual categorisation of the issue was assumed. In paras 56–61 of this note, some of the unique problems with regard to categorisation in choice of law that are posed by international demand guarantees will be considered.

II. Background

7 Demand guarantees⁹ are commonly used as performance guarantees to secure the performance of contracts; they may also be advance payment guarantees, which secure the return of monies paid out in advance by one party in consideration of the other’s performance of certain contractual obligations.¹⁰ The hallmark of a demand guarantee is the contractual entitlement it gives to a beneficiary to receive the monies secured upon a mere demand, without the need for the disputes arising from the underlying contract to be first resolved.¹¹

7 This follows the first three steps of the general methodology for choice of law, namely, (a) characterisation of the issue in dispute; (b) identification of the connecting factor(s) associated with the category in question; (c) the identification of the applicable law in that legal system; (d) the application, if necessary, of rules of the forum which are mandatory in the international sense that they override the choice of law process; and (e) the rejection, if necessary, of foreign law if the consequence of its application is contrary to fundamental public policies of the forum: see *Halsbury’s Laws of Singapore* vol 6(2) (Singapore: LexisNexis, 2009) at para 75.241.

8 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

9 In this note, the terms “guarantee” or “bond” are used to refer to demand guarantees, unless otherwise stated. While this note focuses on demand guarantees, much of what is discussed would probably also apply to letters of credit. See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1977] WLR 764 at 772–773 (“these [demand] performance guarantees are virtually promissory notes payable on demand ... All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit”).

10 See Professor Roy Goode, *Guide to the ICC Uniform Rules for Demand Guarantees* (International Chamber of Commerce Publication No 510) at p 14.

11 See *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1977] WLR 764 at 772–773. (“[t]he bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions”); and *IE Contractors Ltd v Lloyds Bank plc* [1989] 2 Lloyd’s Rep 205 at 207 (“[t]he main feature of a performance bond is that
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The demand guarantee represents an agreed allocation of risk; it renders the principal, and not the beneficiary, out of pocket pending resolution of their underlying contractual disputes.¹²

8 Under the terms of demand guarantees, all that is usually required for a beneficiary to receive payment is for the beneficiary to make a written demand to the issuing bank in the requisite form.¹³ The beneficiary does not have to prove that it has suffered any loss resulting from a breach by the principal. Giving unqualified effect to the strict terms of demand guarantees can hence have harsh consequences for the principal. There appears to be uniform agreement among most, if not all, jurisdictions, that even though a valid demand has been made, the beneficiary's entitlement to payment is subject to exception.

9 Principals to demand guarantees frequently apply to the courts to enjoin the beneficiary from making a demand or further demands on the guarantee, and/or the issuing bank from paying out under any demand. Applications for bond injunctions will be granted where (a) the demand is found to be not in compliance with the formal requirements of the demand guarantee, and/or (b) where the circumstances of the case are such that the courts find that restraint should be ordered notwithstanding a valid demand. For ease of reference, the circumstances in which a court in any country will order such restraint notwithstanding a valid demand are referred to as "the Exception".

10 There appears to be a general consensus that fraudulent demands would fall within the Exception.¹⁴ Still, different jurisdictions have divergent definitions of fraud, and more broadly, the nature and scope of the Exception.¹⁵ The law in Singapore is a striking example of

it enables the party for whose benefit a commercial contract is performed to recover without proof compensation for breach of it up to the amount of the indemnity afforded by the bond").

12 See *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 WLR 461 at 470. ("[A bond injunction] achieves the effect of an early payment against loss or possibility of loss without the need to resort to litigation, and if it is sufficient (or more than sufficient) to compensate the buyer, it places the onus of challenge and recovery upon the seller.").

13 See *IE Contractors Ltd v Lloyds Bank plc* [1989] 2 Lloyd's Rep 205 at 207. ("Under what are sometimes called first demand bonds the obligation to pay arises without any evidence of the validity of the claim on a simple demand, or on a demand either in a specified form or accompanied by a specified document.")

14 See Art 19 of the United Nations ("UN") Convention on International Guarantees and Standby Letters of Credit.

15 A main purpose of the UN Convention on International Guarantees and Standby Letters of Credit is to "establish greater uniformity internationally in the manner in which guarantor/issuers and courts respond to allegations of fraud or abuse in demands for payment under independent guarantees ...": see Explanatory note by the United Nations Commission on International Trade Law ("UNCITRAL") Secretariat on the UN Convention on Independent Guarantees and Stand-by
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such divergence. While most jurisdictions limit the Exception to fraud, the Singapore courts have added a concept of “unconscionability”.¹⁶

11 Demand guarantees are used heavily in international transactions. The place of performance of the underlying contract, the place the guarantee was issued, the place where payment under the guarantee will be made, the country of the parties and/or the governing laws of the guarantee and the underlying contract may well be different. The existence of foreign elements and the varying definitions of the scope of the Exception across different jurisdictions afford parties to a bond injunction application opportunities to argue for the application of the system of law that most favours their case.

12 Hence, it was not surprising that the beneficiary in *Shanghai Electric*¹⁷ argued for English law to apply. The Exception in English law is significantly narrower than the Exception as defined in Singapore. English law was a candidate as it was the law expressly agreed by the parties to govern the guarantee and the underlying contract. On the other hand, the principal asserted that the *lex fori* ought to apply.

13 It is trite that procedural matters are governed by the *lex fori* while substantive matters are governed by the law to which the court is directed by its choice of law rule.¹⁸ Defining the line between substance

Letters of Credit (“Explanatory Note”). According to the Explanatory Note, this “has been a particularly troublesome and disruptive area in practice ... because of [among other things] the divergent notions and ways with which such allegations have been treated both by guarantor/issuers and by courts approached for provisional measures to block payment”. In England, the Exception has been expressed as fraud in the contents of the demand or the documents presented to claim payment under the on-demand instrument: see *United City Merchant (Investments) Ltd v Royal Bank of Canada* [1982] 2 WLR 1039 at 1045E, per Lord Diplock. In the US, the Uniform Commercial Code expressly covers forged or fraudulent documents, and situations where “honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or the applicant”, hence endorsing a conception of fraud encompassing fraud in the underlying transaction and not only the demand or documents presented. It was noted in *United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd’s Rep 554 that the conception of fraud in the US was “far wider than [in England] and would appear to include ordinary breach of contract”. In Canada, the wider scope of the Exception has been endorsed: see *Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59 at 83. In general, see Ali Malek QC & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed) at pp 254–262, paras 9.15–9.30.

16 In *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [16], the Singapore Court of Appeal accepted that its decision in *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 262 was “a conscious departure, from the English position”.

17 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

18 *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) at paras 7-002–7-003, cited in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [17].

and procedure, in the sense used in private international law, was thus a central issue in *Shanghai Electric*.¹⁹

A. The law in Singapore on substance and procedure before Shanghai Electric

14 The division between substance and procedure for choice of law purposes has not been an easy one to draw; it is also drawn differently in different jurisdictions.²⁰ The traditional common law drew a distinction between the existence of a right and its enforcement; matters relating to the former are substantive, while matters relating to the latter are procedural. Case law in major Commonwealth jurisdictions, for example, the High Court of Australia's decision in *John Pfeiffer Pty Ltd v Rogerson*²¹ ("*John Pfeiffer*"), have moved away from the traditional approach, adopting instead a functional approach of asking whether the application of foreign law in the particular instance would so seriously inconvenience the administration of justice that it would justify the exclusion of foreign law.²²

15 Before *Shanghai Electric*, the local position was represented by the decision of the Singapore Court of Appeal in *Star City Pty Ltd v Tan Hong Woon*, which endorsed the traditional common law approach.²³ Local jurisprudence took a step towards the modern approach with the Singapore Court of Appeal's decision in *Goh Suan Hee v Teo Cher Teck*²⁴ ("*Goh Suan Hee*"). That case concerned a car collision in Malaysia involving a Malaysian and a Singaporean. The Singaporean brought a personal injury claim in Singapore against the Malaysian, who then applied to stay the action on the ground of *forum non conveniens*. The defendant argued that the plaintiff had obtained a juridical advantage by instituting proceedings in Singapore, as the Singapore courts were likely to award greater damages than the Malaysian courts.

16 What was significant about the court's judgment was that it questioned the assumption that the Singapore courts would apply Singapore law in assessing damages for a tort that took place in a foreign jurisdiction. The court acknowledged that the traditional common law position was that the quantification of damages was a procedural matter

19 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

20 *Halsbury's Laws of Singapore* vol 6(2) (Singapore: LexisNexis, 2009) at para 75.255.

21 [2000] HCA 36.

22 See *Tolofson v Jensen* [1994] 3 SCR 1022, in particular, at [86] (Canada); *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, in particular, at [97]–[99] (Australia).

23 [2002] 1 SLR(R) 306 at [12].

24 [2010] 1 SLR 367.

governed by the *lex fori*.²⁵ Nevertheless, the court stated that whether the *lex loci delicti* may instead apply was very much an open question. *John Pfeiffer*²⁶ was cited as an alternative reasonable way of approaching the choice of law analysis in quantifying damages.

17 The prevailing Australian approach to the substance and procedure distinction hence appears to have been given implicit endorsement. Indeed, the court was of the view that procedure, for choice of law purposes, was “directed to matters governing or regulating the mode or conduct of court proceedings”.²⁷ Particularly significant is the court’s statement that it is “untenable in principle to separate remedy from rights”,²⁸ thereby disapproving of the right-remedy categorisation traditionally used to distinguish between substance and procedure.

B. The law in Singapore on the Exception

18 The Exception in Singapore, comprising both fraud and unconscionability, is an equitable principle.²⁹ The exception based on fraud³⁰ generally follows that in English law,³¹ and has been said to arise from the application of the maxim *ex turpi causa non oritur actio*, or “fraud unravels all”.³² The additional exception of unconscionability is founded on the basis that equity will step in to prevent the enforcement of any legal right if such enforcement would be unjust.³³ The court, in granting a bond injunction on the ground of unconscionability, is exercising an equitable jurisdiction; the object of this jurisdiction is to achieve equity and justice.³⁴

25 See *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [16]–[18], citing *JD’Almeida Araujo LDA v Sir Frederick Becker & Co Ltd* [1953] 2 QB 329; *Chaplin v Boys* [1971] AC 356; and *Harding v Wealands* [2005] 1 WLR 1539.

26 [2000] HCA 36.

27 *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [21].

28 *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [21].

29 See *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 262 at [45].

30 In this note, references to “fraud” and the “fraud exception” do not refer to a uniform notion of fraud; they instead refer to the notion of fraud prevailing in the relevant jurisdiction.

31 See *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20, where the court relied on the substantive definition of fraud in English law (see [28]), but adopted a different standard of proof.

32 See *United City Merchant (Investments) Ltd v Royal Bank of Canada* [1982] 2 WLR 1039 at 1045G. See also Ali Malek QC & David Quest, *Jack: Documentary Credits* (Tottel Publishing: 4th Ed) at p 253. (“A more accurate translation, and one which better reflects the rationale of the fraud exception in English law, is ‘an action does not arise from a base cause’.”)

33 *Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [6].

34 *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [36] (SGCA).

19 Bond injunctions based on the Exception require the courts to interfere in the parties' commercial bargain. Compared with other jurisdictions, the Singapore courts have been liberal in exercising their equitable jurisdiction to intervene. The principle that the guarantee represents an agreed allocation of risk as to who will be out of pocket pending resolution of the dispute has been played down in local jurisprudence, despite this being an important distinctive feature of a demand guarantee. Instead, the Singapore courts have justified their intervention on the basis that the demand guarantee "is basically security", and a bond injunction is a "temporary restraining order [that] does not prejudice or adversely affect the security", but "merely postpones the realisation of the security" until determination of the underlying disputes.³⁵ As will be seen, these observations provide fodder for the argument for a procedural characterisation of the bond injunction.

20 The circumstances in which a Singapore court will intervene are wide. In *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd*, the Singapore High Court found that the defendant beneficiary was "perfectly entitled to make a call on the guarantee" as it was going to expire, but should have instead offered to place the proceeds of the guarantee in a joint escrow account.³⁶ The call was accordingly found to be unconscionable. In *Eltraco International Pte Ltd v CGH Development Pte Ltd*, the court found that the call was *not* unconscionable, but that equity and justice required that the amount paid out under the guarantee be partially reduced.³⁷ These cases evince a tendency of the Singapore courts to rewrite the parties' bargain. Significantly, the decision in *Shanghai Electric*³⁸ throws doubt on the merits of this approach. The merits of the prevailing approach are debatable, but this debate is not within the scope of this note.³⁹

35 *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [24], citing with approval *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 at [37]; *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 [47]; *Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp* [2009] SGHC 7 at [2].

36 [1999] 3 SLR(R) 961 at [35].

37 [2000] 3 SLR(R) 198 at [33] and [41].

38 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

39 Interestingly, during the hearing of the appeal from *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 before the Court of Appeal, the court appeared interested to hear submissions on whether the "unconscionability" ground of the Exception ought to be discarded to align the position in Singapore with that in other jurisdictions. This perhaps foreshadows changes to the definition of the Exception in Singapore.

III. A new and nuanced approach to defining substance and procedure in the conflict of laws

21 The decision in *Shanghai Electric*⁴⁰ represents an unambiguous step towards narrowing the scope of what constitutes procedure for choice of law purposes. The holding that an interlocutory bond injunction is substantive means that the following general categorisations traditionally used in defining substance and procedure no longer hold good: (a) matters affecting the enforceability of rights are procedural, while matters affecting the existence of a right are substantive; and (b) interim measures are always matters for the *lex fori*.

22 A nuanced, functional approach was evidently preferred over the use of general categorisations. The court expressly approved⁴¹ of the Australian approach enunciated in *John Pfeiffer*, that matters of procedure were directed to governing or regulating the mode or conduct of court proceedings, and “matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure”.⁴² The function of distinguishing substance and procedure was noted in a passage cited from *Chaplin v Boys*:⁴³ “The *lex fori* must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures.” After acknowledging the function of the procedure-substance distinction, the court then considered the purpose of the demand guarantee and the nature of the right to the remedy of a bond injunction.

23 This functional approach has much merit. Every issue that arises for consideration ought to be tested against the rationale for the substance-procedure distinction.⁴⁴ Defining “procedure” widely is a historical tendency that has fallen into disfavour in other Commonwealth jurisdictions.⁴⁵ It “leads to greater international disharmony of results as courts of different countries apply their own laws to give different answers to the same issues”.⁴⁶ As will be shown further below, this

40 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

41 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [19].

42 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36 at [99].

43 [1971] AC 356 at 394C, cited in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [20].

44 T M Yeo, *Choice of Law For Equitable Doctrines* (Oxford University Press, 2004) at para 4.08.

45 See paras 14–17 of this note.

46 T M Yeo, *Choice of Law For Equitable Doctrines* (Oxford University Press, 2004) at para 4.09.

disharmony may give rise to particular concerns in the context of demand guarantees used in international transactions.⁴⁷

A. *The inaptness of the right-remedy categorisation*

24 In *Shanghai Electric*, the plaintiff argued for a procedural characterisation of the bond injunction on the basis that it was a judicial remedy of an equitable nature.⁴⁸ In support of this, the plaintiff incorrectly relied on the proposition in *Halsbury's Laws of England* that "all matters relating to the nature of the claimant's remedy, such as whether the claimant is entitled to an injunction ... are for the *lex fori*".⁴⁹ The court pointed out that this proposition concerned the *availability* of remedies and was not in controversy.

25 The plaintiff's argument attempted to rely on the traditional right-remedy distinction, and the general proposition that matters affecting the existence of a right are substantive, while those that affect its enforceability are procedural. However, whatever the independent merits of these categorisations, they were clearly inapt in the context of the application. The case did not involve a situation where the categorisations usually feature, for example, where the court has to choose among remedies or determine the extent of a remedy.⁵⁰ The plaintiff's argument above relied only on the fact that the injunction was a remedy. But a remedy is sought in every application. The argument illustrates the semantic confusion that can be caused by the absence of nuance in these traditional general categorisations.

26 Significantly, the court gave clear endorsement of the principle formulated by the High Court of Australia in *John Pfeiffer*,⁵¹ which stated that substantive matters included matters affecting the enforceability of rights.⁵² This, and the implicit approval of *John Pfeiffer* given by the Court of Appeal in *Goh Suan Hee*,⁵³ mark a discernible shift in local jurisprudence away from the historical common law approach.

47 See paras 32–55 of this note.

48 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [20].

49 *Halsbury's Laws of England* vol 8(3) (LexisNexis, 4th Ed Reissue, 2003) at para 21.

50 See, eg, *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105; *Harding v Wealands* [2005] 1 WLR 1539.

51 *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36.

52 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [19].

53 *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367.

B. Interim measures are not always procedural

27 *Shanghai Electric*⁵⁴ stands as an exception to the general principle that the issue of interlocutory orders is a procedural matter. In the English case of *Librarie du Liban Inc v Pardoe Blacker Ltd*,⁵⁵ which involved an injunction to restrain the publication of books in a copyright dispute, the court reasoned that: “If the issue is to be finally determined by this Court then clearly it is for this Court to decide whether interlocutory relief should be granted pending the determination of the dispute. In doing so the Court must apply the principles of English law and the practice in these courts relating to the grant or refusal of interlocutory relief as the *lex fori*.”

28 The likely rationale for this procedural characterisation is that in ordering interlocutory relief, the court is ensuring the effective exercise of its jurisdiction and preventing the frustration of the court’s process.⁵⁶ Generally, an interlocutory or interim injunction does so by holding the position pending the trial of the dispute.⁵⁷

29 Still, that interim or interlocutory measures are procedural should be regarded only as a general principle to which exceptions may apply. For example, it has been noted that where an interlocutory injunction is sought to support foreign processes, the case for a procedural characterisation is weaker. In these circumstances, English law appears to provide for a discretion to take into account the laws of the country where the trial is pending.⁵⁸

30 It is also worth noting that the grant of interim injunctions may involve foreign law notwithstanding a procedural characterisation. In England and Singapore, interlocutory injunctions are generally granted on the principles set out in *American Cyanamid Co v Ethicon Ltd*⁵⁹ (“*American Cyanamid*”), which require a preliminary assessment of the merits of the case.⁶⁰ Hence, if the substantive merits of the main dispute

54 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

55 21 December 1983 (LexisNexis transcript: CH-1983-L-No-3462) at 6.

56 See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [41]. (“The Mareva injunction is the paradigm example of an order to prevent the frustration of a court’s process ... The general principle which informs the exercise of the power to grant interlocutory relief is that the court may make such orders, at least against the parties to the proceeding against whom final relief might be granted, as are needed to ensure the effective exercise of the jurisdiction invoked.”)

57 Gee, *Commercial Injunctions* (London: Sweet & Maxwell, 2004 Ed) at p 46.

58 See T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) at para 4.45.

59 [1975] AC 396.

60 For the position in Singapore in relation to interim prohibitory injunctions, see the Court of Appeal decision in *Da Vinci Collection Pte Ltd v Richemont International SA* [2006] 3 SLR(R) 560 at [10]. (The test is “(a) whether there was a serious question
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are governed by foreign law, foreign law would feature in the grant of the interlocutory injunction on *American Cyanamid* principles.⁶¹

31 General statements have proven most unhelpful in drawing the substance-procedure distinction. The proposition that interlocutory injunctions are procedural should not be uncritically adhered to. Moreover, the types and nature of interim injunctions are varied. Whether they may properly be characterised as procedural must still ultimately depend on their specific function and purpose. What, then, led the court in *Shanghai Electric*⁶² to find that a bond injunction should be an exception to the general rule?

C. *Reasons for the court's substantive characterisation of interlocutory bond injunctions and its implications for domestic law on demand guarantees*

32 The salient findings that led the court to adopt a substantive characterisation of an interlocutory bond injunction may be summarised as follows:⁶³

(a) although a bond injunction is often characterised as an interim measure to preserve the *status quo* pending final resolution of the dispute, the true position must be that a fraudulent call would not be valid under the contract between issuer and beneficiary on account of the presumption of good faith; as for the restraint of a call on an on-demand bond on the ground of unconscionability, the court is exercising its equitable jurisdiction based on some notion of fairness;

(b) a bond injunction is final on the issue of whether the beneficiary is entitled to receive the proceeds that the issuing bank would otherwise be obliged to pay pursuant to the call;

(c) a bond injunction determines the rights of the beneficiary under the bond as to his entitlement to the monies thereunder and the amount payable (citing the Singapore High

to be tried; (b) if there was, whether damages would not be an adequate remedy; and (c) where the balance of convenience lay".)

61 In *Swiss Singapore Overseas Enterprises Pte Ltd v Navalmar UK Ltd* [2003] 1 SLR(R) 587, an interim mandatory injunction was sought to compel the defendant to release certain bills of lading said to be due under a fixture note governed by English law. The plaintiff was a third party to the fixture note, and invoked the UK Contracts (Rights of Third Parties) Act 1999 pursuant to the fixture note. English law was hence considered in the grant of the interim injunction.

62 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

63 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [22], [27] and [28]–[30].

Court's decision in *Econ Corp International Ltd v Ballast-Nedam International BV*);⁶⁴ and

(d) a restraint on the right of the beneficiary to receive immediate payment upon demand would effectively deprive him of his substantive right to immediate payment; accordingly, the application concerned a substantive right of the beneficiary under both the guarantee and the underlying contract.

33 The above reasoning applies the principle that “matters that affect the existence, extent or enforceability of ... rights” would generally be substantive.⁶⁵ The principle is desirable to the extent that it cautions against an overly-intrusive application of the *lex fori*. However, it is only a guiding principle, and its general application is, expectedly, not without difficulties.

34 Interim injunctions would not uncommonly affect the enforceability of the rights that are to be determined in the dispute.⁶⁶ But such an injunction is often stated to be granted for the purpose of preserving the effectiveness of the exercise of the court's jurisdiction. In other words, the fact that an interim injunction affects the existence, extent or enforceability of rights would not in itself be conclusive of whether it is substantive or procedural for choice of law purposes. It is submitted that the more precise and focused inquiry should be whether or not the interlocutory injunction is to be used for the purpose of regulating the conduct of the action.

35 The court in *Shanghai Electric*⁶⁷ made no express pronouncement on the purpose of a bond injunction, focusing instead on its consequences and effect. Nevertheless, the observations of the court summarised above are significant to this issue because of the inferences that may reasonably be drawn from them. *First*, the court did not appear persuaded by the view that the bond injunction serves the purpose of preserving the status quo. Rather, the observations referred to in (d) suggest that a bond injunction is not intended to preserve the *status quo*, and in fact does not do so. *Second*, the court appears to have viewed the grant of a bond injunction as a measure designed to prevent the beneficiary from exercising its substantive rights in a manner that lacks good faith or is unfair. *Third*, a bond injunction granted on the

64 [2003] 2 SLR(R) 15 at [16].

65 See *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36 at [99].

66 See, eg, *Chiarapurk Jack v Haw Par Brothers International Ltd* [1993] 2 SLR(R) 620 (interim injunction restraining a defendant from selling his products in an action for passing off); *Swiss Singapore Overseas Enterprises Pte Ltd v Navalmar UK Ltd* [2003] 1 SLR(R) 587 (interim injunction compelling the release of bills of lading pursuant to a fixture note in an action for precisely that relief).

67 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

basis of the fraud exception gives effect to an obligation of good faith on the part of the beneficiary arising from its relationship with the issuing bank.

36 While the preceding discussion has addressed the implications of *Shanghai Electric*⁶⁸ for Singapore's private international law jurisprudence, the discussion here on the features of a bond injunction (based on the forum's conception of the injunction) inevitably draws out the case's implications for the domestic law on demand guarantees.

(1) *The true purpose of a bond injunction*

37 The court's view that the true purpose of a bond injunction is not to preserve the *status quo* greatly diminishes the case for a procedural characterisation. However, and as acknowledged by the court, certain observations in local cases appear to support the view that the purpose of interlocutory bond injunctions is to preserve the *status quo* pending determination of the underlying dispute between principal and beneficiary.⁶⁹ The following passage from *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* ("*GHL v Unitrack*") may be seen as supporting this contrary view:⁷⁰

We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realization of the security until the party concerned is given an opportunity to prove his case.

38 But this passage addresses the effect and not the purpose of a bond injunction. As explained, it is the purpose of the interlocutory injunction, as opposed to its effect, that more precisely answers the issue of substance and procedure. Importantly, the purpose of a bond injunction is instead addressed in the observations of the court immediately preceding the above passage:⁷¹

We are concerned with abusive calls on the bonds. It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is prima facie evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated.

68 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

69 See paras 18–20 of this note.

70 [1999] 3 SLR(R) 44 at [24].

71 *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [24].

39 In other words, and in accord with the view of the court in *Shanghai Electric*,⁷² a purpose of a bond injunction is to prevent the fraudulent or unconscionable exercise of the beneficiary's rights. This view of the purpose of a bond injunction supports a substantive characterisation.

40 The Singapore Court of Appeal's decision in *Bocotra Construction Pte Ltd v AG*⁷³ ("*Bocotra (CA 132)*") would also appear to pose difficulties. In *Bocotra (CA 132)*, the appellant contractors were engaged by the respondent, the Director-General of Public Works, to carry out construction works. Pursuant to the contract, the appellant had procured the issuance of a demand guarantee in favour of the respondent. The appellant subsequently brought a claim against the respondent in arbitration proceedings. Upon being notified by the respondent that it would be calling on the bank guarantee, the appellant applied to the arbitrator for an injunction restraining the respondent from calling on the guarantee. However, the Government Proceedings Act⁷⁴ precluded any injunction from being issued against the respondent. The arbitrator then made an interim declaratory order that the respondent was not entitled to make any demand on the bank guarantee until its entitlement to do so had been determined in the arbitration.

41 One of the issues before the Court of Appeal was whether an "interim declaration" was a relief known in law. The rule was that declarations must be of final legal rights. The learned judge below held that the order was made to preserve the *status quo* pending the arbitrator's eventual determination of the respondent's entitlement to call on the guarantee. The court agreed, finding that the arbitrator's order was really an interim injunction couched in declaratory terms, and was "fashioned to preserve the status quo".⁷⁵ It was not a pronouncement of the legal rights of the parties *inter se*.

42 One difficulty posed by *Bocotra (CA 132)*⁷⁶ is its characterisation of an interlocutory injunction (albeit one framed in declaratory terms) as one intended to preserve the *status quo*. This would favour a procedural characterisation of a bond injunction. In this respect, *Bocotra (CA 132)* may be distinguished on the basis that the court's observations on the purpose of the order were strictly *obiter*. The conclusion that the order was designed to preserve the *status quo* appears to have been because the order was framed as one restraining

72 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

73 [1995] 2 SLR(R) 282.

74 Cap 121, 1985 Rev Ed.

75 *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282 at [30].

76 *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282.

the beneficiary only until the beneficiary's entitlement to make a demand on the guarantee was determined in the arbitration.⁷⁷ But the fact that the grant of an interlocutory order does not finally decide on the rights of the parties does not mean that its purpose is to preserve the *status quo*. Notably, the law on demand guarantees and bond injunctions did not feature at all in the discussion of this issue in the decisions of the learned judge below and the Court of Appeal.⁷⁸ It was after all not at all necessary for the court to define the purpose of a bond injunction in that case.

43 That a bond injunction is not to be granted for the purpose of preserving the *status quo* is also supported by the distinction drawn between a bond injunction and *Mareva* relief. In the case of a *Mareva*, the court does not alter the substantive rights of the parties, but preserves the *status quo* until it has determined the action. A bond injunction, however, has been held to be altogether different from a *Mareva*.⁷⁹ Where a principal's application for a bond injunction is refused, the principal may still thereafter apply for a *Mareva* injunction.⁸⁰ The two injunctions hence serve different purposes. Indeed, different legal tests apply in respect of each.

44 The other implications of *Shanghai Electric*⁸¹ addressed below do not appear relevant to the choice of law issue, although they were raised by the court in that context. Instead, they carry significance for the domestic law on demand guarantees.

(2) *A bond injunction alters the status quo*

45 The decisions in *Shanghai Electric*⁸² and *GHL v Unitrack*⁸³ distinctly differ with regard to the effect of a bond injunction. In

77 *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282 at [29], [30].

78 *Bocotra Construction Pte Ltd v A-G* [1994] 3 SLR(R) 723 at [57]–[59]; *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282 at [25]–[38].

79 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1977] WLR 764 at 774A. (“This case [involving a bond injunction] is altogether different from *Mareva Compania Naviera SA v International Bulkcarriers Ltd* [1975] 2 Lloyd's Rep 509 ... This is a new case on a performance bond or guarantee which must be decided on the principle applicable to it.”) See also *Permasteelisa Japan KK v Bouyguesstroi* [2007] EWHC 3508 at [46] (holding that in an application for a holding injunction in relation to an on-demand performance bond, the court should apply the principles developed in respect of calls on performance guarantees, rather than a different test seeking to preserve the position pending the determination of the dispute).

80 See *Themehelp Ltd v West* [1996] QB 841; *Potton Homes Ltd v Coleman Contractors Ltd* 28 Build LR 19.

81 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

82 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

83 *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44.

Shanghai Electric, significant emphasis was placed on the injunction's effect of depriving the beneficiary of his right to *immediate* payment. In *GHL v Unitrack* on the other hand, the emphasis was on the fact that the monies secured by the guarantee remained secured despite the injunction; the timing of payment under the guarantee, although a distinctive term of the parties' agreement, was downplayed.

46 The difference in emphasis indicates divergent judicial attitudes towards the extent to which a court should allow itself to interfere in commercial bargains. The approach in *GHL v Unitrack*⁸⁴ has erstwhile been the one prevailing locally.⁸⁵ Unsurprisingly, the approach in *Shanghai Electric*⁸⁶ is supported by authorities from other Commonwealth jurisdictions where the Exception is limited to fraud. On this view, a bond injunction alters the parties' bargain,⁸⁷ and hence the *status quo*.⁸⁸ Whether this approach will gain traction locally remains to be seen. If it does, the circumstances in which commercial parties can expect the Singapore courts to grant bond injunctions, even on the ground of unconscionability, are likely to be considerably more limited.

(3) *The domestic doctrinal bases for the Exception*

47 Authorities from other jurisdictions have put forward different doctrinal bases for the fraud exception. It has been argued that a bond injunction is an exception to the well-known rule enunciated in *The Siskina (Owners of cargo lately laden on board) v Distos Compania Naviera SA* that injunctions must be supported by an underlying substantive cause of action.⁸⁹ On this view, the fraud exception is based entirely on the court's willingness to interfere in order to prevent the furtherance of fraud. The argument was rejected in favour of the theory

84 *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [25].

85 See *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 (SGCA) at [36], *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 at [24], citing with approval *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 at [37]; *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 [47]; *Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp* [2009] SGHC 7 at [2].

86 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

87 See *Potton Homes Ltd v Coleman Contractors Ltd* 28 Build LR 19, per Eveleigh J. (A bond injunction "would in effect be a variation of the terms of the parties' agreement in relation to the bond".)

88 See the decision of the Supreme Court of New South Wales in *Australian Gasfields Ltd v Kvaerner Process Systems Pty Ltd* [2001] WASCA 320 at [44] pertaining to an on-demand banker's undertaking. ("In my view, the status quo is that the [beneficiary] has the benefit of a security which has been put in place as a risk-allocation device. The [beneficiary] has a bona fide claim to moneys so secured and should not be denied of the benefit of the security. To do so would be to alter the status quo: not to preserve it.")

89 [1979] AC 210.

that the fraud exception arises as an implied limitation on the bank's mandate from the principal.⁹⁰ The fraud exception has also been described as an implied term in the contract between principal and issuing bank.⁹¹ According to another theory, the principal's cause of action against the beneficiary or the bank is founded on a tortious action in deceit or injurious falsehood.⁹²

48 Local jurisprudence on the doctrinal bases for the Exception appears scant, which adds to the significance of the decision in *Shanghai Electric*. In *Shanghai Electric*, the court observed that the fraud exception is based on the presumption of good faith under the contractual relationship between issuing bank and the beneficiary.⁹³ This observation lends support to the doctrinal theory that the fraud exception is founded on a contractual cause of action.

49 With regard to the unconscionability exception, the court found that this was based on the exercise of the court's equitable jurisdiction. No other basis was mentioned.⁹⁴ It appears that on this analysis, the unconscionability exception is solely dependent on the court's discretion, and not founded on any underlying substantive cause of action.

50 Again, *Bocotra (CA 132)*⁹⁵ poses difficulties to the above analysis. The Court of Appeal in that case observed that the arbitrator's interim declaratory order restraining the beneficiary from making any demand on the bank guarantee was problematic as "[i]t is difficult to see what 'interim legal rights' which could be ascribed to the [principal] were being declared. Moreover, the source of these amorphous 'interim rights' was ambiguous. They could not have derived from the contract, much

90 *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1991] 1 All ER (Comm) 890 at 914 ("The fact that the rationale of the fraud exception is the law's prohibition on the use of its process to carry out fraud ... may appropriately be viewed as an authoritative expression of the source in law of the implied limitation on a bank's mandate."). See also *Tukan Timber Ltd v Barclays Bank plc* [1987] 1 Lloyd's Rep 171 at 177, where the court stated that should a bank pay out despite having notice that the situation was one that fell within the fraud exception, the applicant would have a "cast-iron claim against the bank for damages".

91 Ali Malek QC & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed) at p 253, para 9.14 ("an alternative or supplementary basis for the exception might be that there is an implied term of the contract between paying bank and beneficiary").

92 Gee, *Commercial Injunctions* (London: Sweet & Maxwell, 2004 Ed) at p 441. See also *United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, where the court accepted that it was arguable that a bank owes a duty of care to the applicant ultimately liable at the end of the chain of contractual arrangements in a letter of credit transaction to not pay out if it had notice of the beneficiary's fraud.

93 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [22].

94 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [27].

95 *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282.

less the guarantee, since the [principal was] not privy to the latter agreement”.⁹⁶ *Bocotra (CA 132)* appears to support the doctrinal theory that bond injunctions are based wholly on the court’s willingness to intervene, and not on a substantive cause of action.

51 It is submitted, with respect, that the observations in *Bocotra (CA 132)* should be confined as *obiter*, for the reasons explained above.⁹⁷ Further, a finding that there were no rights to be determined at all in an interim injunction application was not necessary to the *ratio decidendi* in *Bocotra (CA 132)*, which was that the order did not determine the parties’ rights once and for all.⁹⁸ It is also worth noting that in a subsequent High Court decision, the learned judge stated the view that “interim rights” of the parties are determined in a bond injunction application.⁹⁹

52 Defining the doctrinal basis of the Exception is arguably of practical relevance where a party seeks to raise the Exception as a substantive defence or cause of action. A finding that the Exception is based on a substantive cause of action (whether in tort or contract) would not only provide a principal with a remedy in damages against a bank who wrongly makes payment under a guarantee,¹⁰⁰ it would also afford a bank or principal resisting payment a substantive defence.¹⁰¹ The position in Singapore, however, is that an issuing bank is not entitled to raise fraud or unconscionability as a defence against a beneficiary’s claim.¹⁰² This may fall to be reconsidered in light of *Shanghai Electric*.¹⁰³

(4) *A bond injunction is “final on the matter”*

53 The following statement by the court in *Shanghai Electric* clearly describes what in fact happens when a bond injunction is granted:¹⁰⁴

96 *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282 at [30].

97 See paras 37–44 of this note.

98 *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282 at [31].

99 *New Civilbuild Pte Ltd v Guobena Sdn Bhd* [2000] 1 SLR(R) 368 at [87].

100 See *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd* [1991] 1 All ER (Comm) 890.

101 See *United City Merchant (Investments) Ltd v Royal Bank of Canada* [1982] 2 WLR 1039 (where the House of Lords recognised that the fraud exception would afford a confirming bank a substantive defence to the beneficiary’s claim); *Turkiye Is Bankasi AS v Bank of China* [1996] 2 Lloyd’s Rep 611 (where the court recognised that the fraud exception could be raised as a substantive defence by an applicant seeking to resist reimbursing the paying bank).

102 *Chew Pin Pin v AGF Insurance (Singapore) Pte Ltd* [2001] 1 SLR(R) 358.

103 On the analysis in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329, fraud would appear to afford the bank a substantive defence, but not unconscionability.

104 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [22].

[T]he beneficiary would not be entitled to receive the proceeds that the issuer would otherwise be obliged to pay pursuant to the call and so *the injunction is final on the matter*. If the parties then proceed to final resolution of the dispute between them and the party that procured the bond is found to be liable to the beneficiary for a certain sum, the beneficiary can then make another call on the on-demand bond for that sum and the procuring party would not be able to prevent the payment as he would not be able to make out a case of fraud. [Emphasis added]

54 The *ratio decidendi* in *Bocotra (CA 132)* was that an interim bond injunction, whether or not framed in declaratory terms, does not determine the parties' rights in the dispute once and for all, and hence cannot be a "final" order. The Court of Appeal stated:¹⁰⁵

The order had purported to determine the interim rights of the parties, but the crucial test is whether the order as made had finally disposed of the substantive rights in dispute in the action. The order as made was never a conclusive determination of the parties' substantive rights in dispute in the action. These rights would still be considered and determined at a later point in time. Contrary to the appellants' submissions, we are impelled to conclude that the order was in reality an interim order which was interlocutory in nature.

55 Any perceived conflict between the two authorities is more apparent than real. It is correct to say that an interim bond injunction does not conclusively determine the beneficiary's right to make calls on the guarantee. As noted by the court in *Shanghai Electric*,¹⁰⁶ the beneficiary may still make a call on the guarantee in the future when the underlying dispute is finally resolved. This, however, does not detract from the fact that the beneficiary's right to receive payment upon demand at the specific time of the bond injunction application has been finally determined. The controversy arises from the fact that the timing of payment, which is to be immediately upon the making of a demand, is an important term of demand guarantees.

IV. Identifying the connecting factor – Particular problems in international demand guarantee transactions

56 Earlier wisdom in private international law held that the principles of equity of the *lex fori* applied whenever the court assumed equitable jurisdiction.¹⁰⁷ As final and interlocutory injunctions are

105 *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282 at [31].

106 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

107 See *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 at 11,982. See also T M Yeo, *Choice of Law For Equitable Doctrines* (Oxford University Press, 2004) at para 1.09.

equitable remedies, there would, on this theory, be no room for choice of law in injunction applications.

57 This notion has been unequivocally discarded in Singapore. In *Rickshaw Investments Ltd v Nicolai Baron von Uexkall*¹⁰⁸ (“*Rickshaw*”), the Singapore Court of Appeal expressly rejected the adoption of the *lex fori* as the *lex causae* for all issues arising in equity. *Shanghai Electric*¹⁰⁹ represents an application of this holding in *Rickshaw*.

58 As far as issues involving the court’s exercise of its equitable jurisdiction are concerned, the accepted approach to identifying the connecting factor is to discern from the particular factual matrix the legal foundation giving rise to the equitable rights and remedies in question; where the legal foundation is premised on an independent established category such as contract or tort, the applicable principle ought to be centred on the established category concerned.¹¹⁰

59 In *Shanghai Electric*,¹¹¹ the court assumed that a contractual characterisation of the issue applied. The analysis proposed in *Rickshaw*¹¹² was bypassed.¹¹³ Nevertheless, the contractual characterisation in the factual matrix of *Shanghai Electric* is difficult to fault, simply because the foundation of the relationships between issuer, beneficiary and principal clearly lies in contract.

60 However, it may not be the case that a contractual characterisation will always apply where a bond injunction is in issue. International transactions involving demand guarantees pose particular conflict of law problems. The most basic form of such transactions involves three parties, namely, the principal, issuer and beneficiary, as was the case in *Shanghai Electric*.¹¹⁴ In this scenario, all parties have a direct contractual relationship with each other. However, more complex international demand guarantee transactions can involve as many as six

108 [2007] 1 SLR(R) 377. See also *Murakami Takako v Wiryadi Louise Maria* [2009] 1 SLR(R) 508, where the Court of Appeal re-affirmed the principle that jurisdiction and choice of law are two separate questions.

109 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

110 *Rickshaw Investments Ltd v Nicolai Baron von Uexkall* [2007] 1 SLR(R) 377 at [76] and [80].

111 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

112 *Rickshaw Investments Ltd v Nicolai Baron von Uexkall* [2007] 1 SLR(R) 377.

113 See Dr Yeo Tiong Min, “Private International Law from the Equitable Jurisdiction: Imperialism, Universalism and Pluralism” Yong Pung How Professorship of Law Lecture, Singapore Management University, 13 May 2010. It was also suggested that there was no practical difference between direct and indirect characterisation. Examples of other cases of indirect characterisation cited were *Murakami Takako v Wiryadi Louise Maria* [2009] 1 SLR(R) 508; and *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR(R) 1086.

114 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

parties, for example, the principal, the issuing bank, correspondent bank, confirming and advising banks, and the beneficiary.¹¹⁵ In a case where a principal seeks an injunction restraining a bank further down the chain, no direct contractual relationship may exist between the principal and that bank. Here, the case for a contractual characterisation is less evident.¹¹⁶

61 Even if a contractual characterisation were uniformly employed throughout the whole transaction, the existence of multiple contractual relationships gives rise to the potential problem of choosing which contractual relationship should be used to identify the applicable law. In *Shanghai Electric*,¹¹⁷ the parties had agreed on the same law, *ie*, English law, to govern both the underlying contract between the plaintiff and first defendant and the demand guarantee between the first and second defendants. What about scenarios where the two contracts are governed by *different* laws?¹¹⁸ The more complex the transaction, the more involved the choice of law analysis is likely to be. Employing flexible exceptions to general choice of law rules may be the solution to these conflict of law problems.¹¹⁹

V. Conclusion

62 The decision in *Shanghai Electric*¹²⁰ has added needed definition to the difficult task of distinguishing between substance and procedure for choice of law purposes. In moving towards the modern approach

115 See Ali Malek QC & David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed) at p 8, para 1.15 for a general overview of the various relationships in a letter of credit transaction.

116 See *United Trading Corporation SA and Murray Clayton Ltd v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554.

117 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

118 In *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380, the law of the underlying contract was Swiss law. The demand guarantees in question were found by the court to be the law of the Republic of Czechoslovakia, by applying the choice of law principle that a demand guarantee is governed by the law of the place where payment is to be made. The court considered that if the grant of the bond injunction sought was a substantive matter, then the law of the demand guarantees would apply.

119 For the situation under the 1980 Rome Convention on the Law Applicable to Contractual Obligations generally, *Trafigura Beheer v Kookmin Bank Co* [2005] EWHC 2350 (Comm) (conflict of law problems arising from the existence of both contractual and tortious claims in an international letter of credit transaction; *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87 (conflict of law problems arising from multiple relationships governed by different laws on the application of general choice of law rules). For the common law approaches, see Yeo Tiong Min, "The Effective Reach of Choice of Law Agreements" (2008) 20 SAclJ 723; Ellinger & Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ch 14.

120 *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329.

availing in other Commonwealth jurisdictions, the decision is a welcome development. In relation to the law on demand guarantees, it has given clarity to the purpose of a bond injunction and its doctrinal bases. The decision also represents a divergence from prevailing judicial attitudes towards intervening in the commercial bargain of the parties concerned.

63 Where private international law and the law on demand guarantees intersect, the substantive characterisation of bond injunctions is of significant practical relevance – it affords greater opportunity for the application of choice of law rules that can ameliorate the conflict problems in international demand guarantee transactions.
