

## THE NEW ‘ASPENIUM CLAUSE’—UNCONSCIONABILITY UNWOUND?

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Just at the point where the unconscionability exception to the autonomy principle pertaining to letters of credit and demand guarantees appears to have finally emerged fully developed, the Singapore Court of Appeal has recognised the right of parties to contractually limit the range of causes of action available where the parties enter into a dispute. Finding such contractual terms enforceable has now taken the unconscionability exception almost entirely out of play and simultaneously shifted the power balance to the beneficiary while making the letter of credit product more attractive to rational buyers. The effect of the new ‘Asplenium Clause’ is yet to be fully seen but this paper concludes that in the immediate term, boilerplate clauses will be entered into every contract of sale that requires a guarantee to be provided, thereby virtually eliminating unconscionability as a grounds for enjoining against abusive calls on independent guarantees.

### I. UNCONSCIONABILITY REVISITED

The doctrine of autonomy operates to separate the rights and obligations inherent in two separate agreements—a documentary credit instrument and the underlying commercial contract between the parties that requires the provision of the credit instrument. The purpose of this doctrine is to ensure that a dispute in the underlying contract, one that is best dealt with under contract law, does not contaminate the integrity of the documentary credit instrument and thereby undermine confidence in the product itself; such confidence being fundamental to the very usefulness of the instrument. Given this, exceptions to autonomy are limited and attempts to expand their number continue to be resisted by courts in many jurisdictions.<sup>1</sup> Thus, the rise in Singapore and Malaysia of the unconscionability exception to the doctrine raised the ire of a number of commentators.<sup>2</sup> Of these, most (if not all) have now been rendered moot given the finding by the Singapore Court of Appeal that despite the equitable nature of the unconscionability exception, parties to a contract can agree to exclude unconscionable conduct as a grounds to refuse payment.

The development of the unconscionability exception to the doctrine of autonomy in Singapore over the course of the last quarter of a century has been the delight

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<sup>1</sup> See *eg*, *TTI Team Telecom v Hutchison 3G UK Ltd* [2003] 1 All ER (Comm) 914 (TCC) [*TTI*].

<sup>2</sup> See *inter alia*, James E Byrne, “Why Judges Should Keep Their Consciences Out of LC Fraud Issues” (2009) *Documentary Credit World* 20 [Byrne, “LC Fraud Issues”].

of legal scholars all over the world. Ever since early cases such as *Royal Design Studio Pte Ltd v Chang Development Pte Ltd*<sup>3</sup> and *Kvaerner Singapore Pte Ltd v UDL Shipping Pte Ltd*<sup>4</sup> first inclined the court toward this separate ground for restraining a demand on a letter of credit or bank guarantee,<sup>5</sup> the academic and legal communities have watched the development with abiding interest. It has not always been a smooth journey but it has been inexorable.<sup>6</sup>

Ever since the earliest Singaporean cases mentioned, a continuous stream of work debating the jurisprudence of the exception has been published: whole book sections have been dedicated to it,<sup>7</sup> innumerable articles have discussed the entire gamut of matters examined by the court,<sup>8</sup> and parts of at least three doctoral dissertations that have been submitted are anchored in the exception.<sup>9</sup>

Without detailing the development of the unconscionability exception, which has been well canvassed elsewhere, a brief summary of the main points will provide context for what follows. The Doctrine of Autonomy<sup>10</sup> is one of the primary pillars that keep aloft the edifice of the letter of credit instrument, in all its guises. This doctrine is itself underpinned by both international rules<sup>11</sup> established *inter alia* under the auspices of the International Chamber of Commerce and UNCITRAL, and is further supported by a vast body of case law found in virtually every major jurisdiction. Until 1990, or arguably until 1999,<sup>12</sup> the only means by which to cross

<sup>3</sup> [1991] 2 MLJ 229 (HC) [*Royal Design*].

<sup>4</sup> [1993] 2 SLR (R) 341 (HC) [*Kvaerner*].

<sup>5</sup> For the purposes of this article, the terms “bank bond”, “standby letters of credit”, “demand guarantee” and the plethora of other names given to these instruments will be referred to collectively as “bank guarantee”.

<sup>6</sup> See *eg*, *New Civilbuild Pte Ltd v Guobena Sdn Bhd & Anor* [1998] 2 SLR (R) 732 (HC) at para 44 in which, relying on *Bocotra Construction Pte Ltd v AG (No 2)* [1995] 2 SLR (R) 262 (CA) [*Bocotra*] and disregarding *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 2 SLR (R) 341 (HC), Lee Seiu Kin JC stated that “[t]o admit a distinct concept of ‘unconscionability’, it would be necessary to identify features that distinguish the case from those of the authorities cited.” This view was later modified by the Court of Appeal.

<sup>7</sup> *Eg*, see Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit*, 1st ed (Oxford: Hart Publishing, 2010) at 321–326.

<sup>8</sup> *Eg*, see Roger J Johns and Mark S Blodgett, “Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality as Exceptions to the Independence Principle of Letters of Credit and Bank Guarantees” (2011) 31 N Ill U L Rev 297, or Alexei Fedotov, “Abuse, Unconscionability and Demand Guarantees” (2008) 11 Int’l Trade & Bus L Rev 49, among many.

<sup>9</sup> See *eg*, the PhD dissertations of Chumah Amaefule (*Birmingham*), Thanuja Rodrigo (*Griffith*) who was quoted in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at para 19 (CA) [*BS Mount Sophia*], and Hang Yen Low (*Birmingham*) who was quoted in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2012] 4 MLJ 1 at para 25 [*Sumatec*].

<sup>10</sup> Also known as the “Independence Principle”, “Principle of Abstraction” or “Doctrine of Separation”.

<sup>11</sup> *ICC Uniform Customs and Practice for Documentary Credits* (UCP 600), art 4a:

A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit.

See also *Uniform Rules for Demand Guarantees (URDG)*, art 5; ISP98 1.06(a) and (c); *UNCITRAL Convention on Independent Guarantees and Standby Letters of Credit*, art 3.

<sup>12</sup> It depends on whether we consider the exception to have existed since *Royal Design*, *supra* note 3, or since it was affirmed in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another* [1999] 3 SLR (R) 44 (CA) [*GHL*].

the legal ravine of autonomy and restrain a demand on a credit instrument was to build a bridge of material fraud on the part of the beneficiary.<sup>13</sup>

However, almost simultaneously in both Australia and Singapore, courts began considering arguments on a lesser standard which would serve to mitigate abusive calls on letters of credit and bank guarantees. While Australian courts tinkered with how to apply section 51AA(1) of the *Trade Practices Act 1974* (Cth)<sup>14</sup> in a manner that reflected the will of the parliament,<sup>15</sup> the Singaporean courts turned to its equitable jurisdiction for guidance and found it in the form of equitable fraud.

Equitable fraud is a much broader legal concept than fraud under common law; it was originally defined in *Kitchen v Royal Air Force Association* as “conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other...”<sup>16</sup> *Ergo*, there lies a direct connection between equitable fraud and unconscionable conduct *per se*.

Equitable fraud need not involve any “moral turpitude” nor necessarily any positive act of concealment.<sup>17</sup> A failure by one contracting party to inform the other party of a cause of action (such as his own breach of contract) may constitute equitable fraud. It is possibly the robust nature of this cause of action that makes it so useful when dealing with abusive calls on bank guarantees.

The doctrine of equitable fraud, being broader in scope and less objective, allows for a wider net to be cast than does common law fraud, the elements of which make it difficult to put to proof. If proving common law fraud requires evidence of engagement in a deliberate deception or dishonest action, a belief that is honestly held by a person with regard to the integrity of that behaviour or action should relieve them of allegations of fraud. Certainly in the context of demand guarantees at least, the court has not displayed any inclination to support allegations of fraud where a beneficiary has been shown to hold an honest belief in their right to make a demand against a guarantee.

The question before the court therefore has been whether the honestly held belief was also a *reasonably* held belief.<sup>18</sup> To this end it has therefore been tasked to the

<sup>13</sup> *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia & Anor* [2010] 2 SLR 329 at para 37 (HC) [*Shanghai Electric Group*]: “The evidence of fraud must be clear, both as to the fact of fraud and as to the bank’s knowledge. The mere assertion or allegation of fraud would not be sufficient...”

<sup>14</sup> “A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories” and s 51AC which applies to unconscionable conduct in business transactions. The ‘Unconscionability’ provisions of the *Trade Practices Act 1974* (Cth) have since been moved with minor changes into the *Competition and Consumer Act* (Cth) Sch 2 *Australian Consumer Law*, Part 2-2. Section 20 provides: “A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.”

<sup>15</sup> See eg, *Olex Focas Pty Ltd & Anor v Skodaexport Company Ltd & Anor* [1997] HCATrans 74 (HCA) [*Olex Focas*]; *Boral Formwork and Scaffolding Pty Ltd v Action Makers Ltd* [2003] NSWSC 713 (NSWSC) [*Boral Formwork*]; *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd & Anor* [2008] FCAFC 136 (FCA) [*Clough Engineering*].

<sup>16</sup> [1958] 1 WLR 563 at 573 [*Kitchen*].

<sup>17</sup> *Archer v Moss* [1971] 2 WLR 541 (EWCA) (Lord Denning MR).

<sup>18</sup> While the case law does not provide any specific discussion on a claimant’s reasonably held belief, this view can be implied from the court’s reasoning in a number of cases. Eg, in *Newtech Engineering Construction Pte Ltd v BKB Engineering Constructions Pte Ltd* [2003] 4 SLR (R) 73 at para 27 (HC), the court in *obiter* made it very clear to the respondent beneficiary that the claim against the guarantee was spurious at best and could not be objectively considered as being based on a reasonably held belief:

court to look beneath the demand (and by association the beneficiary's belief in the integrity of the demand) to the behaviours of the parties leading up to it with respect to the underlying contract, and to determine whether a reasonable person would believe that those behaviours lacked any *male fides*.<sup>19</sup>

Lifting of the veil of autonomy has allowed the court to review whether the beneficiary has met their obligations under the contract and to establish whether a reasonable person would consider themselves justified in exercising their right to make a demand against a guarantee. The net effect from those cases where it was found that no such justification could possibly be made out, and the demand was found to be unconscionable, has not in fact been to give rise to concerns with regard to the integrity of letters of credit but instead to reinforce the essential confidence in the product—a confidence which the courts have consistently sought to protect.

Close scrutiny of the entire line of Singaporean authority however does not reveal much of the court's specific thinking with regard to the jurisprudential foundations of the unconscionability exception and the proposition that it was originally based in equitable fraud is a reasoned speculation at best. Only relatively recently did the court in *BS Mount Sophia* propound that “[t]he juridical basis for adopting unconscionability as a relevant ground (separate from and independent of fraud) lies in the equitable nature of the injunction.”<sup>20</sup>

The speculative reasoning alluded to can therefore be made out as follows. It is well established that the restraint of the exercise of a right in any manner that is unconscionable is a “fundamental principle” of equity.<sup>21</sup> Also given that, per *Kitchen*, unconscionable conduct is the behavioural foundation of equitable fraud and that, per *BS Mount Sophia*, the juridical basis for adopting unconscionability also lies in equity, it reasonably follows then that equitable fraud is the juridical basis for the unconscionability exception. Again however, the court has not made this out with such exactitude.

Former Chief Justice Chan Sek Keong has stated without elaboration that the doctrine was introduced into Singapore from Australia,<sup>22</sup> but it is difficult to see how this view can be sustained given that *Bocotra*, the case widely held as seeding the exception,<sup>23</sup> predates any significant Australian case pleading this cause of action.

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“The entire circumstances of the case suggested strongly that the first defendants [BKB] had an ulterior motive in calling on the bonds. It did not appear to be based on any *bona fide* claim they had against the plaintiffs [Newtech].”

<sup>19</sup> In *Shanghai Electric Group*, *supra* note 13 at para 47, Lee Seiu Kin J stated that:

[I]t would seem wrong to me if the court was not entitled to have regard to the terms of the underlying contract and could be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit.

<sup>20</sup> *BS Mount Sophia*, *supra* note 9 at para 18.

<sup>21</sup> *Legione v Hately* (1983) 152 CLR 406 (HCA) (Mason and Deane JJ).

<sup>22</sup> Chan Sek Keong CJ (as he then was) (Opening Address delivered at the Singapore Academy of Law Conference 2011: Developments in Singapore Law 2006–2010, 24 February 2011) [unpublished].

<sup>23</sup> *Bocotra*, *supra* note 6, does not discuss unconscionability, but refers obliquely to “fraud and unconscionability”. *Bocotra*'s role in the line of authority has been argued as overrated but the Court of Appeal in *GHL* deliberately affirmed the view that *Bocotra* was the genesis of unconscionability:

[In discussing *Bocotra*] We should add that the concept of ‘unconscionability’ was adopted after deliberation, and was not inadvertently inserted as a result of a slip; nor was it intended to be used synonymously or interchangeably with ‘fraud’. There is nothing in that judgment which can be said

In any case, the Singapore Court of Appeal in *GHL* finally settled the question as to the existence of another exception to the autonomy principle. In the direct line of authority leading to *GHL*, it is generally accepted that seven significant cases developed the exception but it is in the subsequent procession of 15 cases that it is defined and clarified, so that both the burden and standard of proof are well established along with a clear line of principles by which to judge. In addition, a sufficiently diverse range of behaviours have been examined and either adopted or discarded as being unconscionable so that by the time the Court of Appeal heard *BS Mount Sophia*, there was full judicial readiness to provide a comprehensive dissertation on the scope of the exception and the court did so with relish.

If it can be said that a line of authority has a denouement, a single seminal case that puts to rest any notion of doubt as to the existence and scope of a doctrine, then *BS Mount Sophia* is such a case. The full bench of the Court of Appeal addressed virtually every aspect of the unconscionability exception, quoted from a wide variety of domestic and non-Singaporean case law, statute and juridical commentary, and produced the *magnum opus* on the Singaporean Unconscionability Exception to the Autonomy Principle in Demand Guarantees and Letters of Credit. Anything that was to come after *BS Mount Sophia* (and there have been at least three cases) would have resulted in a re-statement that, at best, would tweak and explore boundaries based on factual anomalies. One of those three cases, however, was *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter*,<sup>24</sup> which delivered a finding that has altered matters considerably.

In *BS Mount Sophia*, the Court of Appeal took the opportunity to lay out its view on the development and scope of the unconscionability exception to credit independence. In a wide-ranging and in-depth dictum, the court provided scholars with the complete doctrine on the unconscionability exception. In part, it affirmed an earlier case in the line of authority, namely, *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd and Anor.*<sup>25</sup>

It is in *Astrata* that the High Court provided a compilation of the “applicable principles” which the court has found relating to the unconscionability exception that frame the very nature of unconscionable behaviour. Justice Pillai’s original seven principles for the exception were summarised as follows:<sup>26</sup>

- (a) Whether there is unconscionability depends on the facts of each case. There is no pre-determined categorisation.
- (b) In determining whether a call on a bond is unconscionable, the entire picture must be viewed, taking into account all the relevant factors.<sup>27</sup>

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to indicate or suggest that the court did not decide that ‘unconscionability’ alone is not a separate ground as distinct from fraud.

Furthermore, no case in the Singapore line of authority makes more than passing reference to an Australian case dealing with unconscionable demands.

<sup>24</sup> [2015] 3 SLR 1041 (CA) [*CKR Contract Services (CA)*]. The finding is discussed extensively below.

<sup>25</sup> [2011] 1 SLR 449 (HC).

<sup>26</sup> *Ibid* at para 73.

<sup>27</sup> The first two of these principles appear strikingly similar but, unfortunately, neither the Court in *Astrata* nor in *BS Mount Sophia* provides further explanation on the distillation process that gave rise to each nor do they appear to have conducted a comparative analysis of the two. The first principle is an almost direct quote from *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh*

- (c) The concept of unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.
- (d) While in every instance of unconscionability there would be an element of unfairness, the reverse is not necessarily true. Unfairness *per se* does not constitute unconscionability.
- (e) In intervening in a call on an on-demand bond/guarantee, the court is concerned with abusive calls on the bonds.
- (f) Mere breaches of contract by the party in question would not by themselves be unconscionable.
- (g) It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.

In addition to these principles, it is also well-settled that in order to satisfy the burden of proof, the plaintiff must provide the court with a “strong *prima facie* case” of unconscionable behaviour in relation to the demand on a bank guarantee or letter of credit.<sup>28</sup> The court acknowledges the threshold as being high<sup>29</sup> on the basis that to have a lower one would undermine the strength of the credit product.<sup>30</sup>

To contextualise the principles of the unconscionability exception, it is essential to note that the specific behaviour that must be deemed “unconscionable” occurs at the *end* of the relationship between the parties and *not* when the contract is formed.<sup>31</sup> Unconscionable behaviour in the general law of contract—in consumer law for example—demands consideration of “special disadvantage” and inequality

*Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR (R) 117 at para 42 (CA) wherein the court held that:

We do not think it possible to define ‘unconscionability’ other than to give some very 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... There is no pre-determined categorisation.

The second is an exact quote from *Eltraco International Pte Ltd v CGH Developments Pte Ltd* [2000] 3 SLR (R) 198 at para 31 wherein the court discusses its decision in relation to the facts of that particular case. The court in *Eltraco* also quotes and affirms the court’s aforementioned position in *Dauphin*.

<sup>28</sup> In the entire line of authority, 29 matters in all, only one case is centred on a commercial letter of credit. See *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd* [1998] 3 SLR (R) 961 (HC) [*Min Thai Holdings*] wherein it was found to be unconscionable to make a demand when the underlying contract is suffering under the operation of a *force majeure* clause.

<sup>29</sup> *BS Mount Sophia*, *supra* note 9 at para 22:

The reason for setting the barrier at such a high level is that the equitable remedy of the interim prohibitive injunction is a very harsh one. It restricts the person in whose favour the performance bond was issued (“the beneficiary”) from doing that which he was entitled by agreement of the parties to do, and which he in all probability had bargained for during the negotiations leading up to the contract concerned.

<sup>30</sup> *Ibid* at para 33, citing Kelry CF Loi, “Two Decades of Restraining Unconscionable Calls On Performance Guarantees—From Royal Design to JBE Properties” (2011) 23 Sing Ac LJ 504 at 508, 509: “. . . 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.”

<sup>31</sup> *Ibid* at para 41 [emphasis in original]:

[The unconscionability exception] must be distinguished from the *general contract law doctrine* of unconscionability, which is concerned with conduct at the time of the formation of the contract, and

between the parties *when contracts are entered into*.<sup>32</sup> The unconscionability exception to the autonomy principle deals with the factual matrix of statements and actions leading up to the making of a claim against a guarantee and consequently whether the claim is “utterly lacking in *bona fides*”.<sup>33</sup>

So, demands on a bank guarantee instrument usually signal the conclusion of the contractual relationship. As these are indemnifying instruments and not entered into with an expectation that they will be called upon, it is often the case that before a claim is made there will have been some form of repudiation of the underlying contract by at least one party to it. There will almost certainly be evidence of contractual dispute.

The unconscionability exception however only operates where there is an abusive demand being made and the court has to exercise its equitable jurisdiction in order to satisfy an injustice in the common law such as that which occurs, for example, where the strict enforcement of a right is harsh and oppressive.<sup>34</sup> It is noteworthy also that the court, when being asked to restrain a beneficiary, is actually being asked to restrain a person “from enforcing a substantive right which he had contracted for”,<sup>35</sup> and this fact is a responsibility of which the court is acutely aware.

To establish whether the behaviour of the claimant has been such that to allow the claim would be unfair to a plaintiff, the court is obliged to look at the terms of the underlying contract and the beneficiary’s behaviour in relation to those terms. *Ergo*, the process required to establish whether there has been unconscionable conduct in the making of a demand on a guarantee will conflict with the edicts of the principle of autonomy, thus giving rise to the exception.

While not an exhaustive list of the types of behaviours that the courts have so far found to be unconscionable, some of the behaviours proscribed by the court include where the beneficiary makes a demand:

- for an amount greater than that which is owed: *GHL*;<sup>36</sup>
- to acquire some form of advantage by devious means: *Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd*;<sup>37</sup>
- where a contractual dispute settled within the terms of the underlying contract estopped the beneficiary from making the claim: *Boral Formwork*;<sup>38</sup>
- despite being unable to meet their own fiscal responsibilities under the contract: *Raymond Construction Pte Ltd v Low Yang Tong and AGF Insurance (Singapore) Pte Ltd*;<sup>39</sup>

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which can vitiate consent to a contract on the grounds that the terms of the contract are unfair and the contract was entered into in an unfair manner.

<sup>32</sup> *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 (HCA).

<sup>33</sup> *Kvaerner*, *supra* note 4 at para 10.

<sup>34</sup> *Olex Focus Pty Ltd & Anor v Skodaexport Company Ltd* (1996) 3 VR 380 at 402: “. . . the notion of unconscionability is given specific content by a number of doctrines. The third . . . is stated as, ‘insistence upon rights in circumstances which make that harsh or oppressive’”. See also *GHL*, *supra* note 12 at para 24: “We are concerned with abusive calls on the bonds. It should not be forgotten that a performance bond can be used as an oppressive instrument . . .”

<sup>35</sup> *BS Mount Sophia*, *supra* note 9 at para 22.

<sup>36</sup> *Supra* note 12.

<sup>37</sup> [1996] 1 MLJ 425.

<sup>38</sup> *Supra* note 15.

<sup>39</sup> (11 July 1996), High Court Suit No 1715 of 1995.

- despite acting to obstruct the performance of the underlying contract so as to enable a claim against the credit: *Royal Design*;<sup>40</sup>
- despite there being an outstanding dispute as to whether the contract is still on foot, e.g. whether a force majeure provision might be held to operate: *Min Thai Holdings*;<sup>41</sup> and
- despite failing to meet a major obligation under the contract terms, thereby causing the performing party to default and triggering a capacity to make the claim—usually a failure to make or guarantee interim payments: *Kvaerner*.<sup>42</sup>

It has been ably demonstrated that the unconscionability exception has come of age, as it were, and given the court's comprehensive re-statement of the unconscionability exception in *BS Mount Sophia*, it appeared that any further matters that might yet come before the court would constitute little more than an examination of the facts and an application of the principles laid out so carefully beforehand, much as has already occurred with *Tech-System Design & Contract (S) Pte Ltd v WYWY Investments Pte Ltd*<sup>43</sup> and *CCM Industrial Pte Ltd v 70 Shenton Pte Ltd and Anor*.<sup>44</sup>

It is forgivable then to be surprised by the turn of events resulting from a case in the Singapore Court of Appeal: *CKR Contract Services (CA)*, wherein the court has suddenly and unexpectedly taken the unconscionability exception largely out of play.

## II. *CKR CONTRACT SERVICES V ASPLENIUM LAND*—ANALYSIS

Centred on a construction industry dispute, as the majority of cases in this line of authority do, the primary contract was an SGD\$88 million, two-year condominium development for which the plaintiff, CKR Contract Services, provided a performance bond for 10% of the contract price, as per standard industry practice. When the contract was terminated, allegedly for poor performance, the defendant made a call on the guarantee which the plaintiff believed to be an unconscionable demand.

The plaintiff was however restrained from alleging this cause of action because of Clause 3.5.8 of the primary contract which provided that:

In keeping with the intent that the performance bond is provided by the [plaintiff] in lieu of a cash deposit, the Contractor agrees that except in the case of fraud, *the Contractor shall not for any reason whatsoever be entitled to enjoin or restrain:-*

- the [first defendant] from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond; or
- the [second defendant] under the performance bond from paying any cash proceeds under the performance bond

on any ground including the ground of unconscionability.<sup>45</sup>

<sup>40</sup> *Supra* note 3.

<sup>41</sup> *Supra* note 28.

<sup>42</sup> *Supra* note 4.

<sup>43</sup> [2014] 2 SLR 1309 (HC) [*Tech-system*].

<sup>44</sup> [2014] SGHC 75 [*CCM Industrial*]. *Tech-system*, *ibid* and *CCM Industrial* were two somewhat pedestrian cases heard subsequent to *BS Mount Sophia*, *supra* note 9, wherein the court dealt very brusquely with the plaintiffs' claims of unconscionable conduct.

<sup>45</sup> Quoted in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 1 SLR 987 at para 15 (HC) [*CKR Contract Services (HC)*] [emphasis added].



So, for the first time the question before the court became whether, as the plaintiff claimed, it was not possible for parties to contract out of causes of action other than fraud and therefore whether Clause 3.5.8 was enforceable or not.<sup>46</sup> In finer detail, the question becomes one of whether the clause of the type under review constituted an ouster clause that excluded the right of a party to access the court for adjudication or whether it was more in the line of an exclusion clause that did not fetter the court's power but merely restricted the grounds upon which relief could be sought, for which there is much precedent.

In the initial High Court hearing before Edmund Leow JC, the plaintiff had mixed results, with the court first finding the exemption clause to be unenforceable but also holding that there was no strong *prima facie* case of unconscionability to answer. Looking first at whether Clause 3.5.8 was enforceable, the court determined three proofs:

- (1) That the clause was an attempt to oust the jurisdiction of the court with respect to its power to grant injunctive relief and was therefore an affront to public policy;
- (2) That the power to grant injunctive relief flowed from its equitable jurisdiction which cannot be "circumscribed or curtailed by clauses in a contract";<sup>47</sup> and
- (3) That the rise of the unconscionability exception was consequent to a "considered and deliberate" policy decision on the part of the court to temper the effect of abusive demands and as such could not be simply "brushed aside by agreement".<sup>48</sup>

Given this, Leow JC held Clause 3.5.8 to be unenforceable and therefore was required to determine whether the demand was unconscionable (holding it not to be so). Both parties were unsatisfied with the outcome and cross-appeals were lodged. The plaintiff appealed to have the demand deemed unconscionable and the defendant appealed to have Clause 3.5.8 deemed enforceable.<sup>49</sup> Unfortunately for the plaintiff, the Court of Appeal took the complete opposite view of Clause 3.5.8 while agreeing with the lower court on the matter of whether Asplenium had made an unconscionable demand.

In doing so, the court has virtually neutered the unconscionability exception as a cause of action. In its reasoning, the Court of Appeal addressed each of Leow JC's reasons and found each to be unsatisfactory.

First, the Court of Appeal decided that the issue was "whether parties can agree to exclude the unconscionability exception as a ground for restraining a call on a performance bond"<sup>50</sup> but held that this turned on whether Clause 3.5.8 was enforceable. The enforceability of the clause turns on whether it: (a) seeks to oust the jurisdiction of the court; or (b) merely seeks to limit the right to an equitable remedy.

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<sup>46</sup> If the Clause was found unenforceable, then the court would be called upon to determine if the demand was unconscionable, but this was an entirely different matter.

<sup>47</sup> *CKR Contract Services (HC)*, *supra* note 45 at para 21 (Leow JC).

<sup>48</sup> *CKR Contract Services (CA)*, *supra* note 24 at para 13 (Andrew Phang JA).

<sup>49</sup> Given that the court had already found for the defendant with costs, one suspects that this was a purely strategic defence on their part in case the plaintiff's appeal on the character of the demand happened to be successful.

<sup>50</sup> *CKR Contract Services (CA)*, *supra* note 24 at para 16.

With regard to the first possibility, the court was offered two examples by the defendant, Asplenium, where contractual clauses excluded the right to an equitable remedy—the “right to an equitable set-off and specific performance”. Unfortunately, the court did not see fit to address either of these examples and it is unknown whether they were viewed analogously or not. Instead, the court looked at a comparative doctrine in common law and drew an analogy from that.

The court held that under private law, parties were free to accept contractual conditions that excluded a common law remedy, such as damages to an innocent party for breach of contract. Such conditions, it is made very clear, have “never” been seen as ousting the court’s jurisdiction but instead have been considered “more in the nature of an exclusion clause or an exception clause”.<sup>51</sup> So, from this contractual exclusion from the common law remedy of damages, the court made a comparison with the provision in Clause 3.5.8, which excludes grounds for an *injunction in equity*.

While it is possible to argue the merits of the analogy, it is expressly stated in *dictum* that simply because Clause 3.5.8 attempts to limit the grounds under which one party can seek to enjoin the other party from making a demand, it does not necessarily follow that it therefore seeks to oust the jurisdiction of the court.<sup>52</sup> Clause 3.5.8 is therefore enforceable. Given that the clause is enforceable, the general principle must surely follow that any party to a supply agreement can agree to exclude the unconscionability exception as a ground for restraining a call on a performance bond.

The court also distinguished a case from the Supreme Court of Western Australia<sup>53</sup> relied on by the plaintiff in which Owen J accepted that a clause limiting a party’s capacity to “restrain or injunct” a principal from converting a security into money was an attempt to oust the court’s jurisdiction. However, the Singapore Court of Appeal felt that the facts were sufficiently different in a material way: the guarantee in the Australian case was not independent and the right to call on it was a condition subsequent to “certain [unstated] preconditions”.<sup>54</sup>

Finally, to ensure there is no doubt as to its intention, the Court of Appeal addressed each of the three reasons outlined above which the lower court provided for its decision that the clause was an ouster, and systematically countered each.

The first was the argument for enforcing the public policy related to the court’s jurisdiction. This was quickly despatched by the higher court given its aforementioned arguments: the court’s jurisdiction to hear a matter is not impacted by such a term; only the remedy it is able to grant is limited or excluded by that term and such a limitation has never been held void for policy reasons.

The second reason given by the lower court posited that the flow of the court’s power from its equitable jurisdiction cannot be circumscribed or curtailed by contract clauses between private individuals. With little further discussion, the Court of Appeal dismissed this reasoning as identical in substance to the first reason using policy considerations as the basis for finding the clause invalid, and was therefore unpersuasive for the same reasons.

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<sup>51</sup> *Ibid* at para 22.

<sup>52</sup> *Ibid* at para 24.

<sup>53</sup> *Bateman Project Engineering Pty Ltd and others v Resolute Ltd and others* [2000] WASC 284.

<sup>54</sup> *CKR Contract Services (CA)*, *supra* note 24 at paras 32-34.

The final reason given by the lower court proposed that the policy considerations that led to the development of the unconscionability exception originally “cannot be lightly brushed aside by an agreement made by the parties”.<sup>55</sup> The policy referred to might be summarised as follows: (a) there is a public concern regarding how to deal with abusive calls on guarantees; (b) the unconscionability exception was developed deliberately to provide the court with a robust approach to intervention at the interlocutory stage; and therefore (c) the parties to a contract should not be empowered with the capacity to overrule that policy framework. While not expressly stated, nor perhaps even consciously considered, there may be little doubt that the court would have weighed also the inherently unequal bargaining positions of the players at the time underlying supply contracts are formed and the incapacity of obligors to negotiate fairer terms with regard to the provision of security instruments to anchor the deal.<sup>56</sup>

The Court of Appeal in *CKR Contract Services (CA)* however found that an “ambiguity” had arisen as to which policy was offended by Asplenium Land’s exclusion clause because the *general* policy considerations upon which the unconscionability exception was founded and the *public* policy considerations which are used to determine the categories of contract that seek to oust the court’s jurisdiction are quite different.

What follows from this is that where the wrong policy objective is offended, the logic of that limb of the lower court decision is negated. In other words, the lower court held that the exclusion clause offended policy considerations upon which the unconscionability exception was founded, not the policy used to determine the categories of contract that seek to oust the court’s jurisdiction, which would make it an ouster and therefore untenable. The appellate court found this reasoning to be false and that the exclusion clause is not concerned with abusive calls but with limiting the available remedies, and is thus not offensive. Therefore, the third limb of the lower court’s reasoning was also found wanting.

As a result of these considerations, the enforceable Asplenium Clause emerges in common law to defeat the unconscionability exception that was born in equity, sired from the general principles of equitable fraud, and midwived by injunction law. In the shadow of that clause now rests twenty five years of precedent possibly rendered moot by the power of private law and the freedom to contract.

### III. THE ‘ASPENIUM CLAUSE’—CAUSE AND EFFECT

Almost without doubt the immediate effect of this decision will be that every contract for the supply of goods or services wherein a guarantee is required to be furnished by the supplier to indemnify the purchaser for their performance or for damages will have a boilerplate ‘Asplenium Clause’ embedded in it. Meanwhile the court’s refusal to proscribe the use of Asplenium’s limitation clause provides a sufficiently concise example of the language required to restrain the account party from seeking redress for an unconscionable demand on a guarantee.

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<sup>55</sup> *CKR Contract Services (HC)*, *supra* note 45 at para 22.

<sup>56</sup> It should be noted that the court alludes to this when it discusses the parties’ capacity to have the inclusion of a disputed limitation clause into the contract addressed through the application of the relevant provisions of the *Unfair Contract Terms Act* (Cap 396, 1994 Rev Ed Sing) [UCTA].

However, this is not the end of the matter. What this decision has done is to further skew the balance of power unalterably toward the party with the most power from the outset—the beneficiary. It is broadly accepted that in pre-contractual negotiations, and consequent to the very nature of independent guarantees, the bargaining power of the parties is largely unequal.<sup>57</sup> This was demonstrated when the High Court in *York International Pte Ltd v Voltas Ltd*<sup>58</sup> sought to determine how to construe an ambiguity of terms that lay between the underlying contract and the bond. Referring to the benefits of performance bonds as being “mostly one-sided in favour of the beneficiary”,<sup>59</sup> the court found that in an interesting variation on the *contra proferentem* rule, construing ambiguity against the beneficiary goes some way toward redressing the imbalance of power between the parties. The unconscionability exception has like effect—it goes some way toward redressing the inherent imbalance of power that is inherent in the relationship between parties to a bank guarantee; the leverage which is generated by the independent nature of the guarantee.

Unfortunately, no such redress is likely to become available to a supplier who, having been obliged to agree to the inclusion of an ‘Asplenium Clause’ in order to secure the business it needed, finds that the beneficiary is intent on making an abusive call on the guarantee. It is even possible to imagine a case arising where it can be shown that the beneficiary entered into an agreement bearing an ‘Asplenium Clause’ with the express intent of making an abusive claim, but putting such a claim to proof might prove somewhat problematic.<sup>60</sup>

In *CKR Contract Services (CA)*, the Court of Appeal pointed out that it forever retained the capacity to determine under the general law if an ‘Asplenium Clause’ has been properly incorporated into the contract and where determined that it has not been, then the unconscionability exception might again be summoned to provide equitable relief. It would seem reasonable to suggest that this is likely to be a rare event from the outset and to become even more so as the legal industry adapts to this new reality and refines the contractual terms used in the limitation clause so as to be increasingly watertight. Baseline drafting requirements though have already been provided by Clause 3.5.8.

Ironically, and in the same vein, in the lower court, Leow JC provided his view in *obiter* that “[i]t is apparent from the authorities that the ground of unconscionability is the primary port of call used by parties seeking an injunction to restrain the calling of a performance bond”.<sup>61</sup> It is reasonable to suggest that, as a result of the Court of Appeal’s finding, this is unlikely to remain the case and it is probable that unconscionability will rarely ever again be called upon to ground an injunction restraining payment on a bond.

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<sup>57</sup> *Sumatec*, *supra* note 9 at para 20:

In English Law the now well accepted single exception of fraud was recognised by the courts to counter any injustice that may arise from a call or payment on the bank guarantee. And the reason is this; the certainty of payment to the beneficiary under the autonomy principle has tipped the balance of risk heavily in favour of the beneficiary, sometimes resulting in inequitable result to the account party...

<sup>58</sup> [2013] 3 SLR 1142 (HC).

<sup>59</sup> *Ibid* at para 21.

<sup>60</sup> Of course, if such an allegation could be successfully put to proof, it would probably constitute fraud and thereby sidestep the Asplenium Clause by triggering the fraud exception.

<sup>61</sup> *CKR Contract Services (HC)*, *supra* note 45 at para 20.

It is also somewhat ironic that the case that appears to sound the death knell for the unconscionability exception is also a case where the plaintiff failed to present the court with a strong *prima facie* case of unconscionability. The defendant, Asplenium Land Pte Ltd had succeeded in the lower court. It is suggested here that in all likelihood it was only as a result of the (strictly speaking) unnecessary legal strategy on the part of the defendant to cross-sue so as to have the clause found enforceable that the Court of Appeal had the opportunity to consider the ouster clause and to find it valid and enforceable.

Finally, one consequence is almost certain. The sum effect of the introduction of the 'Asplenium Clause' will be to strengthen the credit instrument generally in the Singaporean jurisdiction given that economically rational stakeholders will choose lower risk instruments over those bearing higher risk, and the removal of access to the legal effect of the unconscionability exception will certainly lower transaction risk.

#### IV. CONCLUSION—IT'S NOT THE END OF THE WORLD AS WE KNOW IT

To be clear, the unconscionability exception has not been set aside by the court—just the practical access to its effect. It is difficult to see any way forward for the unconscionability exception given the advent of the 'Asplenium Clause'. Having reached its zenith in *BS Mount Sophia*, the exception was poised to spread across jurisdictions as it has already spread to Malaysia.<sup>62</sup> Australia, on the back of its statute-based decisions in *Olex Focus*,<sup>63</sup> *Boral*,<sup>64</sup> *Clough*,<sup>65</sup> and others might perhaps have been most ready for an unconscionability exception from the court of equity. South Africa has looked at the exception and the United Kingdom has also nibbled around its edges.<sup>66</sup> It is probably fair to suggest that further spread will never occur now.

Jurisprudentially and academically, the unconscionability exception has suddenly entered new territory and what results from this directional shift is yet to be seen. Perhaps over time it will become apparent how this inherent contradiction between the private law of contract and the equitable principles of fairness and injunction came to be resolved construed against fairness. The recognition of the 'Asplenium Clause' by the court has almost assuredly increased the certainty of abusive calls and it would be imaginative to believe otherwise. Given the inequality of power in the contract formation, to remove one of the few avenues available to find remedy from abuse is to shift the power relationship between the parties significantly toward the beneficiary.

However, there are also good arguments for why, in commercial circumstances, the freedom to contract has to trump the general principles of equity. For example, where the parties are relatively equal corporations, the players generally accept that business is a much higher-risk proposition. The letter of credit product is designed to allocate this risk and this allocation generally occurs broadly in line with the relative power of the players. As one party's power increases in relation to other parties, they

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<sup>62</sup> *Sumatec*, *supra* note 9.

<sup>63</sup> *Supra* note 15.

<sup>64</sup> *Supra* note 15.

<sup>65</sup> *Supra* note 15.

<sup>66</sup> See *TTI*, *supra* note 1.

are often in the position of being able to dictate the amount of risk they are willing to accept. With the unconscionability exception neutralised by contract law, and given the consequent removal of such a significant risk element in the transaction, the beneficiary's relative position is thereby strengthened. Consequentially, the credit product must inevitably become more attractive to rational buyers.

During negotiations for the contract of sale, where the power often lies predominantly with the buyer, the unconscionability exception introduces the notion that contractual terms freely entered into (*ie* the right to make a demand without having to explain why the right is being exercised) also bear implied elements of fair play (*ie* the demand must be conscionable). This implied equity benefits the obligor/seller and acts to offset at least some of the benefits that accrue to the beneficiary as a result of the nature of the credit instrument. It would appear that the capacity now provided by *CKR Contract Services (CA)* to contractually avoid this means of relief has put the ledger further out of balance.

It was also said by the court that where the clause is unfair, it would be caught by the relevant legislation.<sup>67</sup> It is suggested here that this would no doubt apply in other jurisdictions where such legislation exists, but it is difficult to imagine a factual scenario where a limitation clause of this nature would be found unfair and thereby get caught by the statute. Of course, this type of legislation differs quite significantly between jurisdictions<sup>68</sup> and quite different results would be had depending on the particular statutory regime.

Perhaps, the Court of Appeal just found the use of the unconscionability exception to be fatally flawed and ultimately could not be sustained. It could be asked: when tested, was there an inherent contradiction in the exception that caused it to become completely abrogated? Did the conflict between equity and common law contract force the court to choose sides?

In any case, it is hard to imagine another legal doctrine that has developed under such judicial scrutiny over such a relatively short time, that has attracted the attention of so many academics and other observers, that has been carried on such a narrow line of authority and that has also been brought to such an ignominious end. Such an end will no doubt find favour among some<sup>69</sup> who saw the rise of the unconscionability exception as a legal travesty, whether it be founded in statute or equity.

In the final analysis, if the original public policy as outlined by both courts in *CKR Contract Services (HC)* and *CKR Contract Services (CA)* was indeed to address the issue of using guarantees as oppressive instruments through the making of abusive calls, then the court's recognition of the 'Asplenium Clause' is clearly a complete abrogation of that public policy.

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<sup>67</sup> *UCTA*, *supra* note 56.

<sup>68</sup> The Australian Government has announced that it hopes to extend the unfair contract terms provisions contained in the *Competition and Consumer Act (Cth) Sch 2 Australian Consumer Law*, *supra* note 14, to small business which may capture such transactions. The Act holds an unfair contract term to be a term that: (a) causes a significant imbalance in the parties' rights and obligations under the contract; (b) would cause detriment (financial or otherwise) to a party if it were to be relied on; and (c) is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. Also see the *Contracts Review Act 1980* (NSW), s 9, which provides that the court "shall have regard to the public interest and to all the circumstances of the case..."

<sup>69</sup> See Ross Buckley, "Unconscionability Amok, or Two Readily Distinguishable Cases?" (1998) 26 *ABLR* 323; Byrne, "LC Fraud Issues", *supra* note 2.