LEGAL HERALD

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LH AG ADVOCATES AND SOLICITORS

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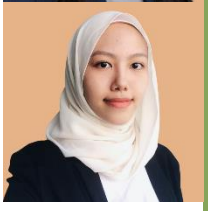
Land Reference: To Intervene Or To File Form N Objection?



by Ho Ai Ting and Sahira Sha'ari

A few years back, the Federal Court in **Unggul Tangkas**[1] handed down a landmark decision stating that with exception to the land administrator, only a person who has properly objected to an award under s. 37,[2] Land Acquisition Act 1960 (**LAA**) is entitled to be a party to the land reference proceedings with the rights that entail.[3] The Federal Court held that the application by the paymaster to intervene under O. 15 r. 6(2)(b), Rules of Court 2012 (**RC 2012**) to be made a party in the land reference proceedings initiated by the landowner was inappropriate.

Recently, the Federal Court in ***Spicon Products***[4] revisited the ratio decidendi in ***Unggul Tangkas*** and related judicial precedents in deciding the issue of whether a landowner who has, without any objection, accepted an award of compensation made by the land administrator, is nevertheless entitled to intervene and participate in land reference proceedings initiated by another interested party, namely the 'paymaster' who had objected to the land administrator's award. A summary of the key takeaways from ***Spicon Products*** will be discussed in this article.

Spicon Products

Salient Facts

The Appellant's land was compulsorily acquired for the 1st Respondent (**TNB**) to construct its main substation. After due enquiry, the land administrator (**LA**) made an award consisting of land compensation, incidental costs, and valuer's fees (**Award**) to the Appellant, which was payable by TNB.

The Appellant accepted the Award without any objection. TNB however filed an objection by way of Form N, challenging part of the Award concerning the incidental costs which they claimed to be excessive and outside the ambit of the First Schedule, LAA. TNB's objection was subsequently referred to the High Court, registered as a land reference.

1 *Tenaga Nasional Bhd v Unggul Tangkas Sdn Bhd & Anor And Other Appeals* [2018] 4 CLJ 285

2 Section 37 LAA allows a person interested to raise objections in relation to the measurement of land, amount of compensation payable, persons to whom it is payable, and apportionment of the compensation by lodging a Form N to the land administrator.

3 Para [43], *Unggul Tangkas*

4 *Spicon Products Sdn Bhd v Tenaga Nasional Berhad & Anor* [2022] 4 CLJ 195

The Appellant, albeit having accepted the Award unreservedly, filed an application under O.15 r.6(2)(b), RC 2012 to intervene and be made a party to TNB's land reference. The Appellant claimed it should be allowed to partake in the land reference proceedings as it would be prejudiced by any reduction of compensation.

TNB objected to the Appellant's application, citing abuse of process vis-à-vis the Appellant's failure to file Form N was fatal, thereby precluding them from participating in the land reference proceedings.

The High Court allowed the Appellant's intervention application. Subsequently, TNB appealed to the Court of Appeal.

The Court of Appeal agreed with TNB and set aside the High Court's decision. The Appellant then obtained leave to appeal to the Federal Court.

Key findings by Federal Court

In allowing the appeal, the Federal Court held that a landowner, despite having accepted the Award of compensation by the land administrator without any objection, may still be entitled to intervene and participate in the land reference proceedings, initiated by the paymaster who had filed a Form N objection against the Award.

The key findings made by the Federal Court are -

a) Unless and until there are clear express provisions restricting a right of participation in any exercise to deprive property, any relevant law must be read to allow if not encourage such participation; [5]

b) The Appellant, as a *'person interested'* under the provisions of LAA, is entitled to safeguard his or her rights and interests as the outcome of the land reference proceedings will eventually have a bearing on the Award;

c) The Appellant, who unreservedly accepted the Award, obviously did not qualify nor was entitled to lodge an objection under s. 37(1) LAA.[6]

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5 Para [40]

6 Section 37(1) LAA provides the requirements for a person who wishes to object to the award must either; not have accepted the award, or has accepted the amount of such award under protest as to its sufficiency.

Consequently, the decision of the Court of Appeal that the Appellant was obliged to lodge Form N in order to participate in the reference proceedings at the High Court was plainly in error; [7]

d) The land reference was on an objection which relates ultimately to the matter of determining the question of adequacy of compensation under Art. 13 of the Federal Constitution. The landowner therefore obviously and rightly has an interest to be added as a party and to appear in the reference proceedings; [8]

e) The landowner's appearance and participation in the reference proceedings are consistent with his or her rights and interests under Art. 13 of the Federal Constitution, and the construction and interpretation of the LAA should always have that as a forefront consideration; [9]

f) The Federal Court disagreed with TNB's contention that ss. 37(1), 38, 43(c), 44(2) and 55 LAA expressly exclude the Appellant who has accepted the Award from participation in the reference proceedings. All these provisions, at best, may infer that the Appellant has no right to object or insist to be notified of the reference proceedings. It would be wrong to state that the scheme and provisions of the LAA exclude the application of RC 2012 such as to prevent a legitimate landowner as the Appellant from intervening and protecting his or her interests; [10]

g) The Third Schedule LAA which governs evidence and procedure in land reference cases neither provides for intervention nor exclude the application of RC 2012. By virtue of s.45(2) LAA, the RC 2012 shall apply to all proceedings before the land reference court, provided the provisions of RC 2012 are not inconsistent with the LAA; and

h) None of the provisions of the LAA excludes a landowner who had accepted an Award without objection to participate in land reference proceedings. The Appellant is therefore entitled to apply to intervene in the TNB's land reference under RC 2012.[11]

Unggul Tangkas distinguished

The Federal Court also took the trouble to examine the earlier decision of ***Ungkul Tangkas***.

Unggul Tangkas and ***Spicon Products*** involve a similar issue concerning an intervention application. Factually, the stark difference between these 2 cases lies in the identity of the proposed intervener. In ***Unggul Tangkas***, the paymaster i.e. TNB applied to intervene in the landowner's land reference.

In ***Unggul Tangkas***, the Federal Court, in arriving at its decision, adopted the Court of Appeal's observation in ***Inch Kenneth Kajang*** [12]–

'[16] In the overall scheme and context of the Land Acquisition Act, any application by the appellant under O. 15 r. 6(2)(b) of the RHC 1980 to be a party, is inappropriate. It would amount to an abuse of the process of the court and an attempt to circumvent the clear and unambiguous provisions of the LAA 1960 as regards to the manner and circumstances in which 'persons interested' under the LAA 1960 are to

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7 Para [69]
8 Para [83]
9 Para [84]
10 Para [82] to [85]
11 Para [91]
12 *Sistem Lingkaran Lebuhraya Kajang Sdn Bhd v. Inch Kenneth Kajang Rubber Ltd & Anor And Other Appeals* [2011] 1 CLJ 95

participate in proceedings either before the land administrator at an enquiry or, in the court, upon a reference by the land administrator upon any objection to an award. Filing of Form N is the most appropriate and the only mode available under the LAA 1960 to any person interested under the LAA 1960 to become a party in a land reference at the High Court relating to an objection to the amount of compensation.'

In ***Spicon Products***, the Federal Court is of the view that such observation failed to comprehensively address a few aspects, *inter alia* –

i. While a person may qualify as a '*person interested*' under s.2 LAA, such person may nevertheless not qualify to file an objection due to the condition precedent under s.37 LAA. This does not however dispel the fact that such person is a '*person interested*'; [13]

ii. The land reference court is obliged under s.44 LAA to consider the interests of all persons interested regardless whether those persons have filed an objection or have been notified by the court to attend the land reference proceedings. The presence or interests of the Appellant as landowner was amply indicated in Form O; [14] and

iii. Since the interests of all persons interested must be considered by the land reference court when determining the objection or adequacy of compensation, s.45(2) LAA must be seen as an enabling provision to ensure that the attendance and participation of all persons interested may be facilitated, and in this case, through O.15 r. 6 RC 2012.[15]

Our view

Spicon Products is yet another welcoming decision that upheld landowners' constitutional right to property guaranteed under Art. 13 of the Federal Constitution. The Federal Court had properly and comprehensively explained the scheme and operation of the LAA, providing clarity to the application and operation of certain important provisions in the LAA which appear to have been frequently overlooked. The Federal Court also remarked that *"[t]here should be no injustice caused to any person interested in the name of speedy disposal"*.[16]

It is a principle of great antiquity that the decision in each case must be confined to its own peculiar facts and circumstances.[17] It remains to be seen how the courts will apply the *ratio decidendi* of ***Spicon Products*** when dealing with intervention applications in land reference cases – whether it also applies when the intervention application is made by other persons interested[18] defined under the LAA such as chargee bank, tenants or lessees. Further, it should be noted that while the landowner in ***Spicon Products*** was allowed to intervene, matters such as the landowner's ability to adduce evidence, or the extent of the evidence that could be led to partake in the land reference proceedings in order to protect its rights and interests, remain unaddressed.

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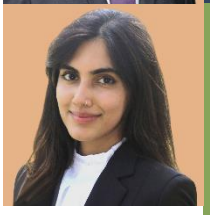
13 Para [104]
14 Para [105]
15 Para [111]
16 Para [117]
17 *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579
18 Section 2 LAA defines "*person interested*" to include every person claiming an interest in compensation to be made on account of the acquisition of land under this Act, but does not include a tenant at will.

Exclusivity In Non-Exclusive Jurisdiction Clause



By Andrew Chiew Ean Vooi and Ashreyna Kaur Bhatia

In **Ng Kam Seng & Anor v Heng Peng Kai @ Jeff Heng Peng Kai and United Overseas Bank Limited,** the Court of Appeal in an unreported decision recently held that the bank's customers are bound to bring their claims in Singapore under a non-exclusive foreign jurisdiction clause, although their claims concern the purported breach of Malaysian laws.[1]

The Suit

The plaintiffs, who were customers of the Singaporean bank, brought an action against the Singaporean bank and its officer in Ipoh High Court for a declaration that the contract relating to the purchase of bonds was void because it contravened ss 58(1) and 258(1) of the Capital Markets and Services Act 2007 (**CMSA 2007**). The contract, subject to the laws of Singapore, contained an agreement by the customers to irrevocably submit their claims to the non-exclusive jurisdiction of the courts of Singapore. The defendant, relying on the non-exclusive jurisdiction clause applied to set aside the writ on grounds of *forum non conveniens*.

The customers opposed the application on amongst others, that the Malaysian courts were best suited to hear the matter as the claim concerns the breach of Malaysian laws. It was further argued *forum conveniens* weighs in favour of Malaysia because the customers and the cause of action occurred in Malaysia and the choice of law clause was non-determinant.

The High Court set aside the writ.[2] Abdul Wahab Mohamed, J., in coming to his decision, noted that whilst the Court seizes jurisdiction over an action properly brought in Malaysia, there is a rebuttable presumption that the domestic court is *forum conveniens.*[3] The High Court also noted the factors which determine *"what would constitute the element of the most real and substantial connection is not exhaustive".*[4]

His Lordship also found Singapore as the proper forum on the facts. The factors, which the High Court found, were that the bonds were purchased in Singapore for the customers' account in Singapore. Moreover, the customers' accounts were in Singapore and were therefore subject to the laws of Singapore. Likewise, the witnesses involved in the transaction are in Singapore and the customers had previously sought recourse through

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1 Civil Appeal No.: A-02(IM)(NCC)-1693-09/2021, unreported decision on 24.6.2022

2 *Ng Kam Seng & Anor v Heng Peng Kai @ Jeff Heng Peng Kai & Anor* [2021] MLJU 2252

3 *BSNC Leasing Sdn Bhd v Sabah Shipyward Sdn Bhd & Ors* [2000] 2 CLJ. 197, COA at para [35]

4 *Yee Chee Ming v Teo Ah Khing @ Teo Cho Teck & Anor* [2005] 5 MLJ 354. *See Harrah' s Operating Co Inc (trading as Harrah' s Casino Hotel Lake Tahoe & Bill' s Lake Tahoe Casion) v Wu Yun Shya Josephine and another appeal* [2008] 4 MLJ 63

adjudication in Singapore. His Lordship also noted there was nothing to suggest that the Singapore Courts will ignore the customers' claim of illegality.

The customers appealed.

Non-exclusive Jurisdiction

The key issue on appeal was whether the Malaysian Court is the proper forum to hear the matter since it concerns the breach of Malaysian laws, notwithstanding the non-exclusive jurisdiction clause.

The arguments in the Court of Appeal centered on the effect on non-exclusive jurisdiction clause.

On this issue, the Court of Appeal in **United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors**[5] found no difference between a non-exclusive jurisdiction clause and an exclusive jurisdiction clause. In the former, the party who had agreed to submit to the foreign jurisdiction is bound by it, unless strong reasons can be shown as to why he should not be bound by his bargain. In the latter, both parties are bound by the foreign jurisdiction clause. The usual principles in ***The Spliliada*** on *forum non conveniens* do not apply.

See Mee Chun, JCA said –

"[20] …We were in agreement with the rationale behind a non-exclusive jurisdiction clause as explained by Richard Fentiman in When Non-Exclusive Means Exclusive, The Cambridge Law Journal, Jul, 1992, Vol 51, No 2 at pp 234–235 as follows:

In loan agreements, to take one example, jurisdiction clauses are drafted, from the lender's viewpoint, with two main aims in mind: first, to ensure that the borrower cannot challenge the jurisdiction of the lender's preferred forum; and secondly, to give the lender the maximum freedom to sue elsewhere as well, normally in pursuit of the borrower's assets … An express submission to the non-exclusive jurisdiction of the English courts was usually adequate … to secure English jurisdiction.

…

Secondly, as long as the parties agree to English jurisdiction the language in which they express themselves is irrelevant. A non-exclusive jurisdiction agreement is still a jurisdiction agreement.

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5 *United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors* [2021] SGCA 78

…

If an agreement to English jurisdiction exists, it should not matter whether it is exclusive or non-exclusive in form, or simply undesignated.

[21] Case law too supports such an understanding. In JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd [2001] 2 Lloyd's Rep 41 it was held at p 45 as follows:

43. For the present purposes I see no difference between an exclusive and a non-exclusive jurisdiction clause. The difference between the two in principle is that, in the former case both parties are contractually bound to the chosen forum whereas in the latter case it is only the defendant who is so bound."

The effect of a non-exclusive jurisdiction clause was considered in ***Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd.***[6] Mah Weng Kwai, JC (as he then was) said –

"

o) *The principal purpose of the non-exclusive jurisdiction clause is to determine the primary place of jurisdiction. By cl. 13, the parties had selected England to be the primary place of jurisdiction. The plaintiff by filing the suit in Malaysia had wantonly disregarded the non-exclusive jurisdiction clause. The burden is on the plaintiff to show why the suit should proceed in Malaysia since the parties had agreed to submit to the jurisdiction of the English courts. The agreement creates a strong prima facie case that the English jurisdiction is the appropriate forum.*

p) *In the House of Lords case of Spiliada Maritime Corporation v. Cansulex Ltd [1987] 1 AC 460 Lord Goff held that "the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.*

q) *In the case of S & W Berisford Plc v. New Hampshire Insurance Co [1990] 1 Lloyd's Rep 454 Hobhouse J held –*

… The fact that the parties have agreed in their contract that the English Court shall have jurisdiction (albeit non-exclusive jurisdiction) creates a strong prima facie case that the jurisdiction is an appropriate one; it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate; they have both implicitly agreed that it is appropriate."

The rationale in S&W Berisford was considered In ***Antec International Ltd v Biosafety USA.***[7] Gloster J held at para [7] –

"

i. *The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the Claimant has founded jurisdiction here as of right, even though the clause is non-exclusive; see eg per Hobhouse J in S & W Berisford plc v New Hampshire Insurance Co [1990] 1 Lloyd's Rep. 454, at 463; per Waller J in British Aerospace Plc v Dee Howard Co [1993] 1 Lloyd's Rep. 368; per Moore-Bick J in Mercury Communications Ltd v Communication Telesystems International [1999] 2 All ER 33.*

ii. *Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties*

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6 *United Southern Acids (M) Bhd v Standard Chartered Bank Malaysia Bhd* [2012] 2 CLJ 361

7 *Antec International Ltd v Biosafety USA* [2006] EWHC 47 (Comm)

will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule…"

iii. *Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard Spiliada balancing exercise. The Defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain; see cases cited supra. In particular, the fact that the Defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction."*

Lee Swee Seng, JCA., in delivering the oral grounds for the Court of Appeal in ***Ng Kam Seng***, found the customers have submitted to the non-exclusive jurisdiction of the Singapore Courts and the Court *"must give due credit to the terms agreed between the parties".*

Strong reasons

In ***United Overseas Bank Ltd & Ors v United Securities Sdn Bhd (in liquidation) & Ors***, the Court of Appeal held the burden was on the party bound by the non-exclusive jurisdiction clause "*to show strong reasons why it ought to be allowed to continue with the USSB suit. There is no necessity to go the route of Spiliada on forum conveniens*."

On this issue, the Court of Appeal in ***Ng Kam Seng*** did not think the nature of the customers' claim, which concerns a breach of Malaysian law, was a special reason. In the High Court, Abdul Wahab Mohamed, J. did not think so.

The learned Judge said –
"[29] It is in this court's further observation that the Plaintiffs would suffer no prejudice in having their claim prosecuted in Singapore. There is nothing to suggest that the Singapore Courts will ignore the issue of misrepresentation and illegality as claimed by the Plaintiffs in the present case."

Specifically, in the Court of Appeal, it was held the customers were "*not barred from raising and/or pursuing the defence of illegality by Malaysian law, in Singapore courts*." This follows the Singapore Court of Appeal's decision in ***Peh Teck Quee v Bayerische Landesbank Girozentrale***, where Yong Pung How, CJ. Said:

"an agreement whose object to be attained is a breach of international comity will be regarded by the courts as being against public policy and void".[8]

Conclusion

The Court of Appeal's recent decision clarifies a number of things –

1. There is no difference between a non-exclusive jurisdiction clause and an exclusive jurisdiction clause.

2. The party bound by the non-exclusive jurisdiction has the burden of establishing strong reasons to be released from his contractual bargain.

8 *Peh Teck Quee v Bayerische Landesbank Gironzentrale* [2000] 1 SLR 148 at para [45]

3. Unless it can be shown that the party would be barred from raising and/or pursuing the defence of illegality, it is not a special reason to be released from the non-exclusive jurisdiction clause.

Andrew Chiew Ean Vooi acted for the Bank.

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Anti-Sexual Harassment Bill: An Employment Perspective

By Shariffullah Majeed and Arissa Ahrom

According to a report published by SUHAKAM,[1] cases of sexual harassment at the workplace have been reported as far back as 1939, since before the formation of Malaysia. At the time, the Klang Indian Association organised a series of strikes condemning the molestation of female workers. Subsequently, rubber tappers from the Panavan Karupiah Estate in Perak also went on a similar strike against sexual molestation in 1950.

Whilst the nation has seen much activism behind the issue of sexual harassment since then, the regulation of the conduct of employers and employees at the workplace was only codified in 1999, when the Human Resources Ministry introduced the Code of Practice on the Prevention and Eradication of Sexual Harassment ("**Code of Practice**").[2] However, the said Code of Practice merely serves as a practical guidance and does not have any force in law. Although trade unions and women's groups have called for laws specifically to combat sexual harassment since the 1980s,[3] it was only in 2011 that the Anti Sexual Harassment Bill ("**the Bill**") was proposed.

After more than a decade since it was first mooted in 2011, the Bill was finally passed in the Dewan Rakyat on 20 July 2022 but not without any controversy. Unfortunately, even during the passing of the Bill, the Dewan Rakyat saw an outburst of profanity by a Member of Parliament ("**MP**") against other female MPs.

Thus, the passing of the Bill is not only timely, but it marks an important recognition that Malaysia is progressing to end the normalisation of sexual harassment. It is also believed that just like the 200% increase in police reports after the Domestic Violence Act 1994 came into force on 1 June 1996, more victims will be forthcoming now that there is a specific legislation in place to protect both women and men from sexual harassment.[4]

The Bill defines sexual harassment as:

"any unwanted conduct of a sexual nature, in any form, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is reasonably offensive or humiliating or is a threat to his well-being."

1 SUHAKAM's Report on the Status of Women's Rights in Malaysia, Human Rights Commission of Malaysia (SUHAKAM), 2010

2 MOHR Malaysia (1999). Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (PDF) (Report). Ministry of Human Resources (Malaysia). Retrieved 4 November 2020

3 https://wao.org.my/jag-memorandum-of-proposed-sexual-harassment-bill/ accessed on 23 August 2022

4 https://www.thestar.com.my/news/nation/2022/07/26/womens-groups-tribunal-must-be-diverse accessed on 26 July 2022

It must be noted that this definition is similar to the definition of sexual harassment in the Employment Act 1995, save for the addition of the phrase "*reasonably*" and removal of the phrase "*arising out of and in the course of his employment*". On the other hand, sexual harassment under the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace ("**Code of Practice**") means:

"Any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:

- *that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment;*

or

- *that might on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being but has no direct link to her/his employment."*

Interestingly, whilst the Code of Practice emphasises that what amounts to sexual harassment is based on the perception of the victim, the Bill appears to leave what amounts to "*reasonably offensive or humiliating or is a threat to his well-being*" to be determined by a tribunal.

Overview of the Bill

It is important to note that the Bill seeks to provide a right of redress for any person who has been sexually harassed, regardless of their gender, the establishment of the Tribunal for Anti-Sexual Harassment ("**Tribunal**") and the promotion of awareness of sexual harassment.

Establishment of Tribunal

The Tribunal established by the Bill shall consist of not less than 12 members who will be appointed by the Minister of Women, Family and Community Development and comprise of:[5]

a) a President and a Deputy President to be appointed from amongst the members of the Judicial and Legal Service;
b) not less than 5 other members who are either members of or who have held office in the Judicial and Legal Service or advocates and solicitors of not less than 7 years' standing; and

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5 Anti-Sexual Harassment Bill 2021, s 4(1)

c) not less than 5 other members who have knowledge or practice experience in matters relating to sexual harassment.

It is suggested by the Ministry's Deputy Secretary General, Chua Choon Hwa, that the tribunal system is meant to be victim-centric as it provides an easier and safer avenue for victims to hear cases of sexual harassment compared to the more complex and costly court system.[6]

Jurisdiction of Tribunal and Exclusion of Jurisdiction of Court

The Tribunal shall have jurisdiction to hear and determine any complaint of sexual harassment made by any person .[7] However, where a complaint of sexual harassment is lodged by any person to the Tribunal, the issues in such a complaint shall not be the subject of proceedings between the same parties in any court except where:[8]

a) the proceedings in Court commenced before the complaint of sexual harassment was lodged with the Tribunal;

b) the complaint of sexual harassment involves any conduct which constitutes a crime; or

c) the complaint of sexual harassment before the Tribunal is withdrawn or struck out.

Does this mean that an employee who has lodged a sexual harassment complaint to the Tribunal may not claim for constructive dismissal in the Industrial Court on the grounds, for example, that her / his employer had failed to provide a safe working environment by failing to inquire into the same sexual harassment complaint?

Arguably, the employee may still proceed with her / his case in the Industrial Court despite the same sexual harassment complaint being lodged to the Tribunal. This is because the Industrial Court case would be between the employee and employer, whereas, proceedings before the Tribunal will be between the employee and the perpetrator.

Conduct of Proceedings

A complaint lodged to the Tribunal is subject to a prescribed fee.[9] Upon a complaint being lodged, the Secretary to the Tribunal shall give a written notice to the complainant and alleged perpetrator of the details of the day, time and place of the hearing.[10]

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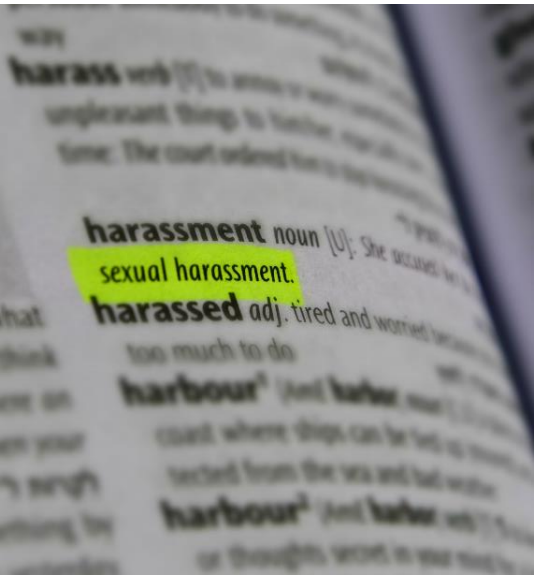
6 https://www.thestar.com.my/news/nation/2022/07/26/tribunal-is-meant-to-be-more-victim-centric accessed on 26 July 2022
7 Anti-Sexual Harassment Bill 2021, s 7
8 Anti-Sexual Harassment Bill 2021, s 8 (1)
9 Anti-Sexual Harassment Bill 2021, s 10
10 Anti-Sexual Harassment Bill 2021, s 11



The hearing shall be before a panel of 3 members[11] and will be closed to the public.[12] The Bill further provides that no party shall have any legal representation at the hearing.[13] Although this saves costs and may simplify the proceedings, it may be a cause for concern, especially noting that upon conviction, the perpetrator may be liable to a fine or imprisonment.

The Tribunal may also mediate every complaint of sexual harassment within its jurisdiction and with agreement of the parties.[14] Where an agreed settlement is achieved between parties, the said settlement shall be recorded and take effect as if it is an award of the Tribunal.[15] Before an Award is made by the Tribunal, it has a discretion to refer to a Judge of the High Court a question of law:[16]

a) which arose in the course of the proceedings;

b) which in the opinion of the Tribunal, is of sufficient importance to merit such reference; and

c) which in the opinion of the Tribunal, raises sufficient doubt to merit such reference.

Award and Order of Tribunal

The Bill provides that the Tribunal shall make its award without delay and where practicable, within 60 days from the first day of the hearing.[17] This is to encourage victims to come forward with their complaints as they are assured that they will not be forced to go through a lengthy process. In fact, a survey conducted by the Ministry of Women, Family and Community Development ("**the Ministry**") showed that over 80% of the respondents felt confident about reporting cases.[18]

An award of the Tribunal is final and binding on parties and deemed to be a court order,[19] wherein its non-compliance results in a criminal penalty. Similar to an Industrial Court award, the award of the Tribunal shall contain the reasoning for its decision and the finding of facts.[20] In making the award, the Tribunal may also make any one or more of the following orders:[21]

a) an order for the perpetrator to issue a statement of apology to the complainant;

b) an order for the perpetrator to publish a statement of apology in any manner where the act of sexual harassment was carried out in public;

c) an order for the perpetrator to pay any compensation or damages not exceeding RM250,000.00 for any loss or damage suffered by the complainant; or

d) an order for the parties to attend any programme as the Tribunal thinks necessary.

Any person who fails to comply with an award of the Tribunal within 30 days from the date the award was made commits an offence and shall on conviction, be liable to either:[22]

a) a fine amounting to 2 times the total amount of compensation or damages or to imprisonment for a term not exceeding 2 years, or to both, in a case where compensation or damages is ordered by the Tribunal; or
b) a fine not exceeding RM10,000.00 or to imprisonment for a term not exceeding 2 years, or to both, where no compensation is ordered by the Tribunal.

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11 Anti-Sexual Harassment Bill 2021, s 12
12 Anti-Sexual Harassment Bill 2021, s 14
13 Anti-Sexual Harassment Bill 2021, s 13 (2)
14 Anti-Sexual Harassment Bill 2021, s 16
15 Anti-Sexual Harassment Bill 2021, s 16 (3)
16 Anti-Sexual Harassment Bill 2021, s 17
17 Anti-Sexual Harassment Bill 2021, s 19 (1)
18 https://www.thestar.com.my/news/nation/2022/07/26/swift-justice-on-the-cards accessed on 26 July 2022
19 Anti-Sexual Harassment Bill 2021, s 22 (1) (b)
20 Anti-Sexual Harassment Bill 2021, s 19 (2)
21 Anti-Sexual Harassment Bill 2021, s 20
22 Anti-Sexual Harassment Bill 2021, s 21 (1)

Challenging the Award

The Bill provides that any party to the proceedings of the Tribunal may, upon notice to the other party, apply to the High Court to challenge an award of the Tribunal on the ground of serious irregularity of the following kinds:[23]

a) failure of the Tribunal to deal with all the relevant issues that were put to it; or

b) uncertainty or ambiguity as to the effect of the award.

This suggests that the mode of challenging an award of the Tribunal is by way of an application for judicial review to the High Court.

Special Provision for Police Report

Importantly, a complaint of sexual harassment made under the Bill does not preclude the complainant or any other person from lodging a police report for any offence relating to sexual harassment under any written laws.

Employment (Amendment) Act 2022

Apart from an additional requirement for employers to exhibit conspicuously at the place of employment, a notice on sexual harassment at all times,[24] no other significant amendments were made to an employers' duty to prevent and address sexual harassment in the workplace in the Employment Act 1995.

Nonetheless, the passing of the Bill may potentially affect how sexual harassment complaints are managed by employers as victims no longer need to wait for employers to take action against their perpetrators. Instead, they may take matters into their own hands and lodge their complaints directly to the Tribunal.

Thus, it is of utmost importance that employers take heed of the Bill and reinforce its internal sexual harassment management procedures as well as raise awareness of the seriousness of such a misconduct which will have penal consequences. **LH-AG**

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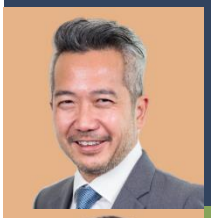
23 Anti-Sexual Harassment Bill 2021, s 23
24 Employment (Amendment) Act 2002, s 81H

Performance Bonds Still As Good As Cash?



By Steven S Y Tee and Joyce Ong Kar Yee

English common law is one of the most prevalent and influential legal traditions of the world. Many jurisdictions that were once British colonies have adopted the common law system. Notwithstanding the proliferation of enacted legislation and administrative rules and regulations, case law remains a bedrock of fundamental legal principles within common law systems. English case law, not unexpectedly, is highly persuasive in the development of such case law in many jurisdictions and is often the root for establishing general legal principles across jurisdictions.

However, it is not safe to assume that all common law jurisdictions apply the same legal principles in the same way. Courts have often exercised flexibility and boldness in developing different ways of applying such principles in their respective jurisdictions. One such example can be observed in the treatment of on-demand performance bonds in relation to the use of the defence of '*unconscionability*' to restrain payment on such bonds.

Use of Performance Bonds

Performance bonds are a common prerequisite requested by employers to most construction projects as security for a contractor's performance during the construction and/or maintenance periods. Performance bonds largely exist in two classifications, namely, *'on-demand'* bonds where the beneficiary can demand for payment without being required to prove that the contractor is in breach of his or her obligations and '*conditional*' bonds where some pre-determined event must have occurred prior to the beneficiary being entitled to payment. Employers will usually seek, and contractors will almost inevitably agree to provide, the former, which are typically issued by a bank. Contractors have often approached the courts to seek injunctive relief to restrain employers from unfairly exercising their right to receive payment under these on-demand bonds.

English Position

For many years, the English courts had maintained a high burden for any claimant seeking an injunction in relation to an on-demand bond. It was recognised in *Edward Owen*[1] that performance bonds stand on a similar footing to a letter of credit and the bank must pay according to its guarantee, on demand, if so specified, without proof or conditions. On-demand bonds have been acknowledged by the judiciary as the "life-blood of international commerce".[2] As such, historically, the English courts have not impeded a

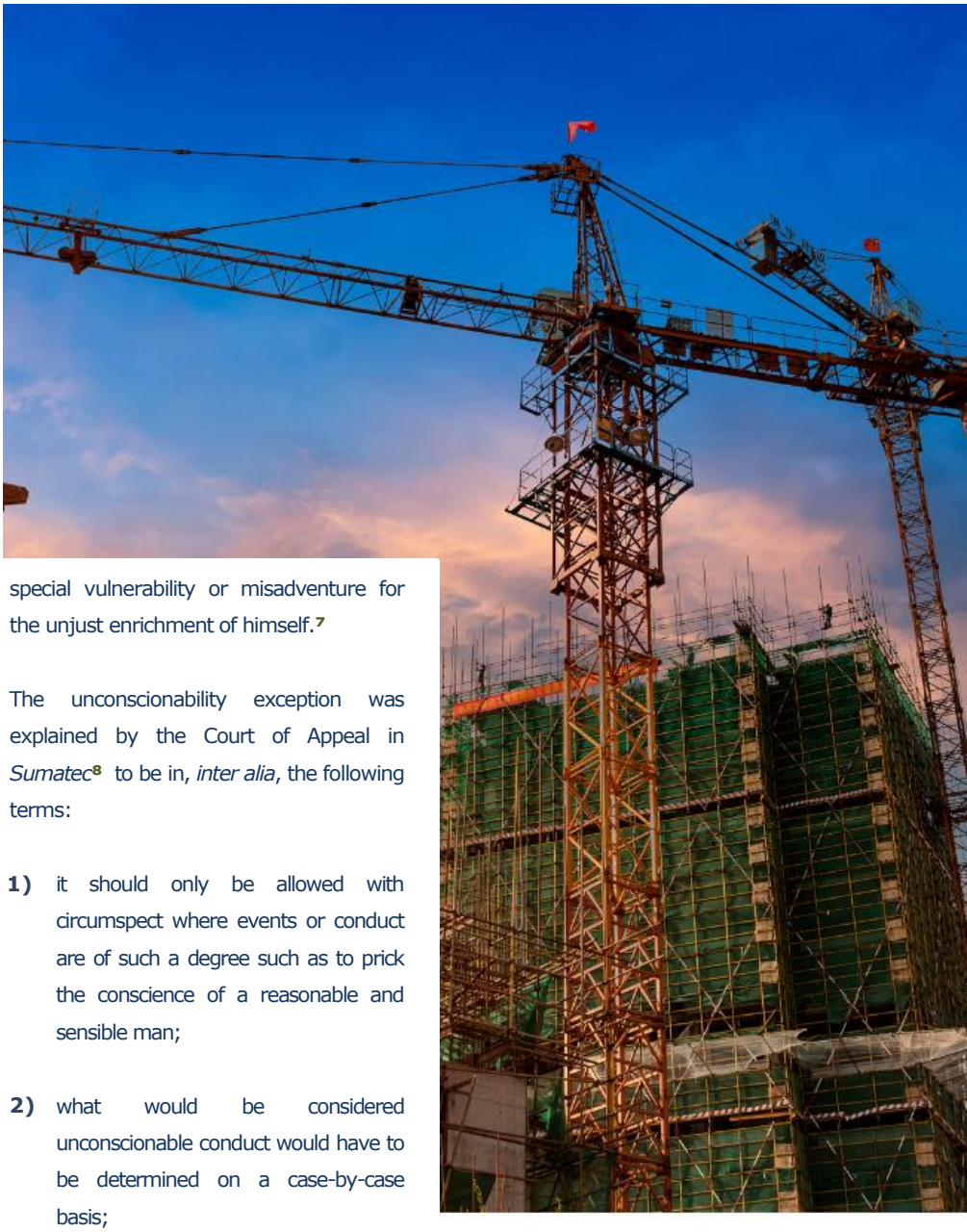
1 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976
2 *Kerr J in RD Harbottle (Mercantile) Ltd v National Westminster Bank* [1978] QB 146 at p 155

bank's obligation to make payment on grounds that do not concern the credit. The wholly exceptional case where an injunction may be granted is where the bank is proven to know that any demand for payment already made, or which may thereafter be made, will clearly be fraudulent. This is known as the 'fraud exception'.

Pivoting slightly from the bright-line rule that only the fraud exception applies, the English courts have subsequently, over the years, recognised that payment under a demand on a bond may be restrained if the underlying contract expressly prohibits the making of the demand. This was articulated in *Sirius*[3] and elaborated further in *Simon Carves*[4] where the court adopted standards that were more familiar to other interim injunction applications and did not hesitate to make an assessment of the underlying merits of the application.

Home ground

In Malaysia, the Federal Court's decision in *Esso Petroleum*[5] adopted the English law position in *Edward Owen* that an injunction to restrain a call on an on-demand bond would only be granted where fraud is established. However, in *Sumatec Engineering*,[6] the Federal Court then recognised 'unconscionability' as a "separate and independent ground" to allow a restraining order on the beneficiary on the basis that this exception stems from the general concept of equity that a person should not be allowed to use his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself.[7]



The unconscionability exception was explained by the Court of Appeal in *Sumatec*[8] to be in, *inter alia*, the following terms:

1) it should only be allowed with circumspect where events or conduct are of such a degree such as to prick the conscience of a reasonable and sensible man;

2) what would be considered unconscionable conduct would have to be determined on a case-by-case basis;

3) unconscionable conduct would always involve an element of unfairness or some form of conduct which appears to be performed in bad faith; and

4) a clear case of unconscionability must be established, and mere allegations are insufficient.

The principles laid down in *Sumatec* were subsequently applied in a long line of cases[9] within the country. Rather than an exclusive emphasis on the value of certainty, Malaysian courts have appeared to adopt a more fact-sensitive approach to safeguard the obligor of a performance bond from abusive calls on the bond.

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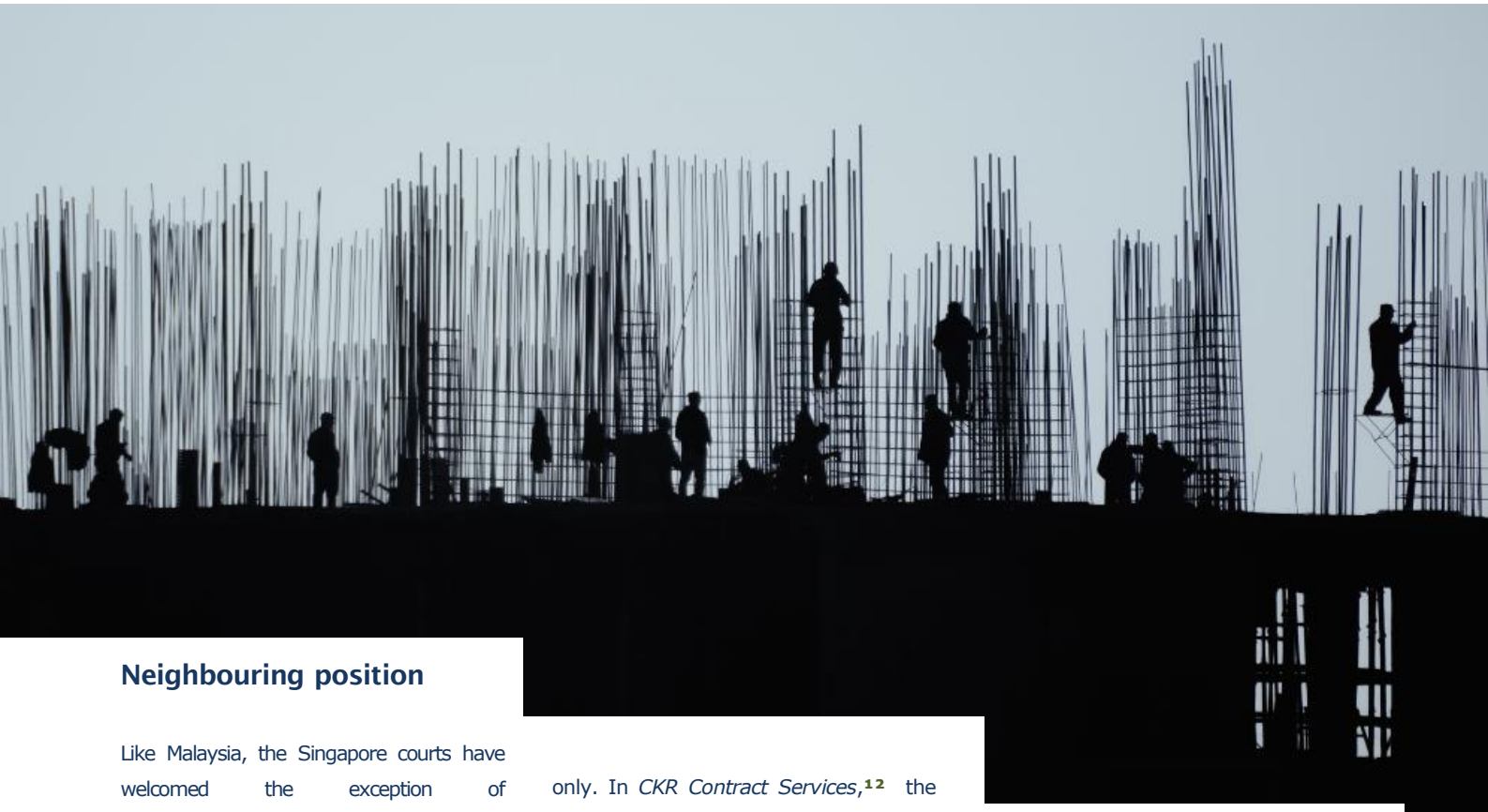
3 *Sirius International Insurance Co v FAI General Insurance Limited* [2003] 1 WLR 2214
4 *Simon Carves Ltd v Ensus UK Ltd* [2011] BLR 340
5 *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283
6 *Sumatec Engineering & Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401
7 *See Stern v McArthur* (1988) 165 CLR 489
8 *Malaysian Refining Company Sdn Bhd v Sumatec Engineering & Construction Sdn Bhd* [2011] 7 CLJ 21
9 This includes *Maxwell Accent JV Sdn Bhd v Kuala Lumpur Aviation Fuelling System* [2017] 1 LNS 990; *Dunggun Jaya Sdn Bhd v Aeropod Sdn Bhd & Anor* [2017] MLJU 1225; *KNM Process Systems Sdn Bhd v Lukoil Uzbekistan Operating Company LLC* [2020] MLJU 85



Neighbouring position

Like Malaysia, the Singapore courts have welcomed the exception of unconscionability. In *Bocotra*,[10] the Singapore Court of Appeal opened the door to unconscionability by alluding to *'fraud or unconscionability'* as a ground for injuncting calls on performance bonds. It was later affirmed in *GHL Pte Ltd*,[11] that unconscionability involves unfairness, a separate notion from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would not proceed to assist the party.

Although the Singapore courts have accepted the unconscionability exception, it is interesting to note that they have also provided an avenue to sidestep the exception by holding that parties to an agreement may agree to limit the circumstances in which a contractor is entitled to seek an injunction restraining a call on a performance bond, i.e. to fraud only. In *CKR Contract Services*,[12] the construction contract between the developer of a residential project and its main contractor contained a clause that the contractor was not entitled to restrain the developer's call on the performance bond on any ground except in the case of fraud. The Singapore Court of Appeal held that the clause was akin to an exemption clause and found no reason to find the clause unenforceable.

The decision in *CKR Contract Services* is not unexpected given that it came at the heels of an earlier decision of the Singapore High Court in *Shanghai Electric*[13] which in effect allowed the parties to try and contract out of the unconscionability exception by providing for the performance bond to be governed by English law, under which unconscionability is not a bar to calls on the bond.

The URDG 758

Separately from the choice of governing law, the use and incorporation of the Uniform Rules for Demand Guarantees (URDG) 758 ("**URDG 758**") into the terms of the bond could add a further complication. In *Leonardo*,[14] the Qatar Financial Centre court considered both the impact of incorporating the URDG 758 into on-demand bonds, especially for international projects, and the defence of unconscionability.[15] Even though the court recognised the adoption of the doctrine in some jurisdictions, it held that the whole commercial purpose of on-demand bonds is for the beneficiary to obtain immediate relief and to avert the need to enter into disputes arising from the underlying contract.

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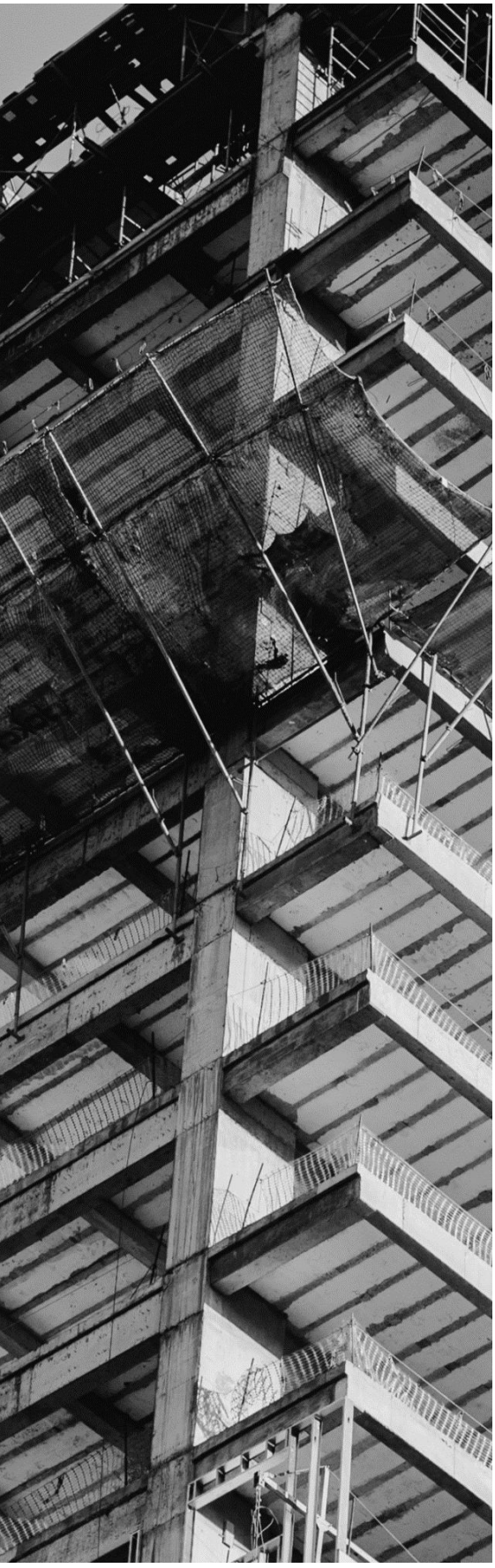
10 *Bocotra Construction Pte Ltd & Ors v Attorney General (No. 2)* [1995] 2 SLR 733
11 *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR (R) 44
12 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] SGCA 24
13 *Shanghai Electric Group Co Ltd v PT Merak Energy Indonesia & Anor* [2010] 2 SLR 329
14 *Leonardo S.p.A v Doha Bank Assurance Company LLC* [2020] QIC (A) 1 (on appeal from [2019] QIC (F) 6)
15 The URDG 758 are only applicable if the parties to an on-demand bond incorporate the URDG 758 into the bond.



The court opined that while fraud may operate as an exception to the general rule, wider exceptions should not be encouraged.

The core principle of the URDG 758 is that the bond should be autonomous from the terms in the underlying contact which means that the circumstances giving rise to the obligation to pay should be found exclusively in the bond. Under the URDG 758, the guarantor should only be concerned with the issue of whether the documents presented comply with the terms and conditions of the guarantee and not whether the goods and services conform with the underlying contract. It appears that the application of the URDG 758 would make it less likely that the unconscionability exception will apply. The further question then is whether this will remain the position where the URDG 758 is incorporated into an on-demand bond and at the same time the underlying contract expressly prohibits the making of the demand, as described earlier in *Simon Carves*.[16]

Takeaway

Whilst the courts in common law jurisdictions are inclined to accept the notion that an on-demand bond should be "*as good as cash*", there have been circumstances where a more liberal approach has been adopted. Parties are encouraged to be alive to the distinctions between jurisdictions, both when negotiating the governing law and terms of a performance bond, and when evaluating whether to apply for, or to resist, an injunction against a call on such bond.

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16 *Simon Carves Ltd v Ensus UK Ltd* [2011] BLR 340

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