IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 301

Originating Application No 530 of 2022

Between

DJY

… *Claimant*

And

(1) DJZ
(2) DKA

… *Defendants*

JUDGMENT

[Credit and Security — Bonds — Construction]
[Credit and Security — Performance bond — Strict compliance with terms when making call on performance bond — Whether valid demand was made]
[Credit and Security — Performance bond — Unconscionability exception — Whether call on performance bond unconscionable and ought to be restrained]
[Civil Procedure — Injunctions]

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26 November 2024 Judgment reserved.

Wong Li Kok, Alex JC:

Introduction

1 This is the claimant's ("DJY") application to obtain an injunction to restrain the first defendant ("DJZ") from demanding payment and/or receiving any sum of money under an irrevocable standby letter of credit dated 28 March 2022 (the "SBLC"). DJY also seeks to restrain the bank which issued the SBLC ("the Bank"), *ie*, the second defendant, from effecting payment of any sum of money to DJZ under the SBLC.[1] In response, DJZ objects to DJY's application and prays for it to be dismissed with costs.[2]

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1 Claimant's Written Submissions (dated 1 October 2024) ("CWS"), at paras 1(a) and 1(b); Originating Application for HC/OA 530/20 (dated 9 September 2022), at Prayers 1 and 2.

2 1st Defendant's Written Submissions (dated 1 October 2024) ("DWS") at para 171.

2 Relatedly, DJY also seeks to amend its prayers for OA 530, via HC/SUM 2733/2024 ("SUM 2733"), to read as follows: "An injunction to restrain [DJZ], whether acting by itself, its officers, servants or agents or howsoever otherwise, from demanding payment under and/or receiving any sum of money by any means under the [SBLC] issued by [the Bank] pending a final decision of the [FAC] determining that the payments made under the contract dated 19 December 2003 ("Contract") (including under Amendment No. 3 of the Contract) are null, void and not valid" [emphasis in original].[3] In particular, DJY sought to replace the original text, *ie*, "in the ongoing audit proceedings before it" with the underlined text above.[4] At the hearing, DJZ's counsel confirmed that it would not object to SUM 2733, save for as it relates to costs.

Facts

3 On 19 December 2003, DJY entered into a contract with DJZ for the former to construct and assemble an offshore semi-submersible production platform (the "Platform") to produce oil and gas off the coast of Country [X] (the "Contract").[5] Subsequently, the parties amended the Contract several times to, *inter alia*, increase the contract value "to allow the proper compensation for the cost associated to the [Country [X]'s currency] Appreciation against the American Dollars".[6] The Contract's contract price was increased to

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3 Claimant's Written Submissions for HC/SUM 2733/2024 (dated 1 October 2024) at paras 1(a) and 1(b).

4 Summons for Amendment HC/SUM 2733/2024 (filed 23 September 2024) at Annex A.

5 Joint Bundle of Documents ("JBOD") Vol 1 at pp 418–419; cited by CWS at para 4 and DWS at para 5.

6 JBOD Vol 9 at pp 36–40.

US$ 882,877,414.79 (the "Contract Price"), pursuant to cl 5.1 of the amendment.[7]

Creation of the SBLC

4 In 2007, the Federal Audit Court of Country [X] (the "FAC") initiated an audit process to inquire into the Contract, and the amendments thereto. A separate contract between another Company [A] and DJZ for the construction of another offshore semi-submersible production platform and other related amendments (the "Contract-A") was also audited.[8] On 17 October 2007, the FAC made an order to "suspend the execution of payment acts resulting from the economic-financial rebalancing motivated by exchange rate variations and changes in the domestic market … [for] the amount of US$ 92,293,967.56".[9] Pending its final decision on the matter, the FAC determined, on 21 November 2007, that DJZ could continue to make payments to DJY. However, this concession was granted on the condition that one of the guarantees, listed under Country [X]'s laws, was provided by DJY as security for DJZ's continued payments to DJY for the aforementioned sums (the "FAC Interim Decision").[10] The final order from the FAC, as it relates to the execution of payments between DJY and DJZ, thus reads as follows:[11]

> … suspend the execution of the payments resulting from the economic rebalancing motivated by the heating of the domestic market, retaining, on the remaining balance of the [Contract] — EPC of [the Platform], entered into between [DJZ] and [DJY] —,

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7 JBOD Vol 9 at p 37.

8 JBOD Vol 1 at p 421; JBOD Vol 3 at p 8.

9 JBOD Vol 8 at p 133.

10 JBOD Vol 1 at pp 504–506.

11 JBOD Vol 2 at pp 61−63.

> as well as in the new amendments to the [Contract], the portion of the total amount of US$ 92,293,967.56 (calculated up to February 2007) equivalent to the variation of the sectorial price indexes, **until a final decision of this Court, without prejudice of allowing [DJZ] and the interested company, by negotiation between the parties, to substitute the retention of the mentioned amount by the provision of one of the guarantees listed in [Country [X]'s law]**;…
>
> [text in bold represents the supplemental text included pursuant to the FAC Interim Decision]

Parties thus agreed that "an irrevocable standby letter of credit issued in favour of DJZ would be the appropriate type of bank guarantee".[12]

5 Consequently, an irrevocable standby letter of credit was issued, at DJY's request, in favour of DJZ on 20 February 2008.[13] This standby letter of credit was revised on 28 March 2022, and the issuing bank was changed to the Bank, with the SBLC issued for the amount of US$126.569,231.12 and DJZ as the named beneficiary. Importantly, the SBLC stipulated two conditions for payment. For the purposes of the present application, only condition (A) is relevant, and I reproduce it as follows:[14]

> WITHOUT PREJUDICE TO THE FULFILLMENT OF ADDITIONAL CONDITIONS STATED HEREIN, PAYMENTS UNDER THIS STANDBY LETTER OF CREDIT ARE AVAILABLE AGAINST PRESENTATION OF:
>
> A-(I) COPY OF THE NOTIFICATION RECEIPT BY [DJZ] FROM [FAC] WITH THE FINAL DECISION ISSUED BY [FAC] DECLARING THE PAYMENT IS NULL AND VOID; (II)

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12 JBOD Vol 2 at p 63.

13 JBOD Vol 2 at pp 121–128.

14 JBOD Vol 9 at pp 61–63.

> BENEFICIARY'S DULY SIGNED STATEMENT READING AS FOLLOWS:
>
> QUOTE
>
> I (INSERT NAME AND TITLE OF SIGNER) A DULY AUTHORIZED OFFICER OF [DJZ] DO HEREBY CERTIFY THAT [THE FAC] HAS DETERMINED THAT PAYMENT OBLIGATION AS SET OUT IN [THE CONTRACT], SIGNED ON DECEMBER 19, 2003 CORRESPONDING WITH THE PAYMENTS DUE UNDER THE CONTRACT MADE BY [DJZ] OF USD126,569,231.12 (UNITED STATES DOLLARS ONE HUNDRED TWENTY-SIX MILLION FIVE HUNDRED SIXTY-NINE THOUSAND TWO HUNDRED THIRTY-ONE AND 12/100) ON (INSERT DATE OF PAYMENT) IS NULL, VOID AND NOT VALID, BEING SUCH DETERMINATION FINAL AND NOT SUBJECT TO ANY FURTHER APPEAL, SUCH PAYMENTS SHALL BE REFUNDED BY (THE BANK) IN THE AMOUNT OF USD (INSERT AMOUNT IN WORDS AND FIGURES). DRAWN UNDER (THE BANK) STANDBY LETTER OF CREDIT NO. [XXX].
>
> UNQUOTE

The SBLC was subsequently extended up to 16 April 2025.[15]

Parties' prior proceedings

6 On 7 December 2011, the FAC issued its decision (the "FAC First Decision"). DJZ was directed, *inter alia*, to: (a) retain the existing balances under the Contract from "the amounts paid as economic-financial rebalancing due to exchange variation and heating of the domestic market"; (b) liquidate the bank letters of guarantee; and (c) if there are no contractual balance or guarantees, to "take the necessary administrative and/or judicial steps to recover from the contractors the remaining amounts". Similar directions were made with respect to Contract-A.[16] All of the parties (*ie*, DJY, DJZ and Company [A])

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15 JBOD Vol 9 at p 65.

16 JBOD Vol 9 at p 102 paras 9.1.1.–9.1.6..

appealed against this decision by the FAC. The appeal was dismissed on 27 July 2022 (the "FAC Appeal Decision").[17] DJY and Company [A] then filed Motions for Clarification ("MFC") against the FAC Appeal Decision. Both of their MFCs were dismissed on 10 August 2022 and 5 October 2022, respectively.[18]

7 After DJY's MFC was dismissed, but before the dismissal of Company [A]'s MFC, DJZ called on the SBLC. On 22 August 2022, DJZ wrote to its advising bank, seeking "the execution of the [SBLC]". In its email, DJZ attached a "copy of the notification receipt by DJZ from [the FAC] with the final decision issued by [the FAC] declaring the payment is null and void" and the "beneficiary's duly signed statement", amongst other things.[19]

8 Following DJZ's decision to call on the SBLC, DJY undertook several proceedings, both in Singapore's and Country [X]'s courts as well as in arbitration. I briefly set them out as follows:

(a) In Country [X]: On 8 September 2022, DJY commenced a lawsuit (the "2022 Lawsuit") to seek a final injunction ordering DJZ to withdraw its call on the SBLC and a preliminary injunction to restrain DJZ from taking any steps to call on the SBLC, pending the FAC's decision on Company [A]'s MFC.[20] The preliminary injunction was granted on 15 September 2022,[21] but the final injunction was dismissed

17 JBOD Vol 9 at pp 150–152.

18 JBOD Vol 1 at pp 231–233 and 509–515.

19 JBOD Vol 9 at pp 71–72.

20 JBOD Vol 9 at pp 209–217.

21 JBOD Vol 3 at p 16.

on 14 December 2023.[22] DJY filed an appeal, on 7 February 2024, against this dismissal and that appeal is presently pending.[23] In tandem with the 2022 Lawsuit, DJY filed a Writ of Mandamus against the FAC in the supreme court of Country [X] (the "Supreme Court") to nullify the FAC First Decision, FAC Appeal Decision and the decision on DJY's MFC.[24] The Supreme Court dismissed DJY's Writ of Mandamus on 7 February 2023.[25] DJY filed an interlocutory appeal against this dismissal, but eventually withdrew the Writ of Mandamus altogether on 5 May 2023.[26] DJY also filed a second MFC against the FAC Appeal Decision on 24 October 2022,[27] however this second MFC was dismissed by the FAC on 22 November 2023.[28]

On 14 December 2023, DJY commenced a suit against DJZ and the Federal Government of Country [X] (representing the FAC) at the Federal Court, to seek an annulment of the various decisions by the FAC, and an injunction on a provisional basis to "halt the effects" of the aforementioned FAC decisions (the "New Lawsuit").[29] The Federal Court declined to grant the injunction on 16 December 2023. DJY filed an interlocutory appeal against this decision, including a preliminary

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22 JBOD Vol 9 at p 223.

23 JBOD Vol 8 at pp 341–347.

24 JBOD Vol 9 at pp 225–227.

25 JBOD Vol 9 at pp 301–314.

26 JBOD Vol 3 at pp 17 and 425–426.

27 JBOD Vol 8 at pp 261–266.

28 JBOD Vol 8 at pp 307–317.

29 JBOD Vol 9 at p 365.

injunction request, but it was denied on 17 January 2024.[30] Finally, on 8 July 2024, the third Federal Court dismissed the New Lawsuit,[31] and DJY's MFC against this dismissal was similarly dismissed on 13 August 2024.[32] DJY appealed against the dismissal of the New Lawsuit on 13 September 2024, and its appeal remains pending.[33]

(b) In Singapore: On 9 September 2022, DJY commenced the present proceeding, *ie*, HC/OA 530/2022 ("OA 530"), on an *ex parte* basis to seek an injunction against DJZ and the Bank pending the final decision from the FAC,[34] alongside HC/SUM 3699/2022 ("SUM 3699") for an interim injunction, for the same, pending the final decision of OA 530.[35] SUM 3699 was granted by See Kee Oon J on 14 September 2022.[36] The case before me concerns whether the injunction under OA 530 should be granted.

(c) In arbitration: Pursuant to cl 31 of the Contract, DJY commenced arbitration against DJZ on 21 December 2023.[37] Subsequently, on 18 January 2024, DJY commenced HC/OA 60/2024 ("OA 60") to seek, against DJZ and the Bank, injunctions in aid of the

30 JBOD Vol 9 at pp 361–377.

31 JBOD Vol 9 at pp 396-408.

32 JBOD Vol 8 at pp 498–500.

33 JBOD Vol 9 at pp 421–444.

34 Originating Application for HC/OA 530/20 (dated 9 September 2022), at Prayers 1 and 2.

35 JBOD Vol 1 at p 11.

36 JBOD Vol 1 at p 14.

37 JBOD Vol 9 at pp 449–458.

arbitration.[38] DJZ mounted an application to challenge the jurisdiction of the tribunal, and by an award dated 31 July 2024, the arbitral tribunal found that while it did not "have jurisdiction to order injunctive relief to prevent a demand from being made on the SBLC", it did have "jurisdiction to determine any claim for declaratory relief or damages brought by [DJY] under the Contract, and any amendments thereto, including where such claims arise from the consequences or anticipated consequences of the operation of the SBLC".[39] DJY has since withdrawn its application for the reliefs outlined in OA 60.[40]

The parties' cases

9 DJY argues that the SBLC should be more properly categorised as a performance bond rather than a letter of credit. As such, the applicable test is whether there is fraud and/or unconscionability. Here, an injunction *ought* to be granted as DJZ's call on the SBLC did not fall within the terms and conditions of the SBLC, and it would be unconscionable to allow DJZ to call on the SBLC. At the hearing before me, DJY's counsel further stressed DJZ's purported failure to strictly adhere to and comply with the terms of the SBLC, before calling on it.

10 In contrast, DJZ argues that the SBLC is in fact a letter of credit and *not* a performance bond. As such, proof of fraud by DJZ would be the only ground on which DJY can obtain an injunction to restrain DJZ's call on the SBLC.

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38 JBOD Vol 1 at pp 23–24.

39 JBOD Vol 9 at p 581.

40 CWS at para 33.

Here, the injunction should be denied as DJZ's call on the SBLC was not made fraudulently, or even unconscionably.

Issues to be determined

11 The parties' contentions can be summarised as giving rise to two issues:

(a) Whether the SBLC should be regarded as a performance bond or a letter of credit. This will determine what is the appropriate legal test for an injunction to be granted.

(b) Whether the requirements to warrant granting an injunction restraining payment under the SBLC are made out on the facts of the present case. In particular:

(i) whether there has been strict compliance with the terms of the SBLC when DJZ called on it; and

(ii) depending on the appropriate legal test, whether unconscionability and/or fraud has been made out on the facts.

The characterisation of the SBLC

The SBLC was a performance bond

12 DJY argues that standby letters of credit have been considered within the same category as performance bonds in case law, and thus ought to be regarded as such in the present case.[41] DJY's case is that a standby letter of credit "is a special form of letter of credit which essentially fulfils the same function

41 CWS at para 34.

as a performance guarantee". It is a "safeguard against non-performance by the seller rather than non-payment by the buyer" (citing Geraldine Mary Andrews & Richard Millett KC, *The Law of Guarantees* (Sweet & Maxwell, 7th Ed, 2015)[42] at para 16-039). Performance bonds used to be "associated with letters of credit and such bonds were sometimes also known as standby letters of credit". However, unlike ordinary letters of credit, a performance bond "may be given in a wide variety of situations and is no longer confined to an importer and exporter" (citing Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit* (LexisNexis, 5th Ed, 2016)[43] at p 829). DJY further relies on the cases of *Energy Shipping Co Ltd v UDL Shipbuilding (Singapore)* [1994] SGHC 225 (at pp 8–9) and *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE Properties*") in support of its argument. In particular, DJY relies on *JBE Properties* (at [10]) for the proposition that since a "performance bond is not the lifeblood of commerce … a less stringent standard (as compared to the standard applicable *vis-à-vis* letters of credit) can justifiably be adopted for determining whether a call on a performance bond should be restrained".[44] At the hearing, DJY's counsel further contended that although the SBLC was issued in 2008, it was not called on for years as it was a standby in the event refunds had to be made to DJZ. That being the case, it can hardly be described as the lifeblood of commerce. Thus, the SBLC should be characterised as a performance bond.

13 In contrast, DJZ argues that the SBLC ought *not* to be treated as a performance bond, but instead, a letter of credit. In support of this, DJZ similarly relies on *JBE Properties* (at [10]), however it cites instead the Court of Appeal's

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42 Claimant's Bundle of Authorities (dated 1 October 2024) ("CBOA") at Tab 18.

43 CBOA at Tab 22.

44 CWS at p 15 fn 46.

finding that a letter of credit "performs the role of payment by the obligor […and interfering] with payment under a letter of credit is tantamount to interfering with the *primary* obligation of the obligor to make payment under its contract with the beneficiary". In contrast, "a performance bond is merely security for the *secondary* obligation of the obligor to pay damages *if* it breaches its primary contractual obligations to the beneficiary" [emphasis in original].[45] DJZ further relies on the case of *Indian Overseas Bank v United Coconut Oil Mills Inc* [1992] 3 SLR(R) 12 ("*Indian Overseas Bank*") to analogise the SBLC to the letters of credit in that case (citing *Indian Overseas Bank* at [6]–[7]), while seeking to distinguish the SBLC from the performance bond in *JBE Properties*.[46] This is because the SBLC "performs the role of payment by [DJY] when the relevant payment conditions are met", and *not* "security for an secondary obligation of [DJY] to pay damages if it breaches a primary contractual obligation to [DJZ]".[47]

14 I agree with DJY that the SBLC is not a letter of credit and, for the purposes of this case, it should be treated as a performance bond.

15 The fact that the SBLC has been labelled a "standby letter of credit" is not dispositive. Instead, the court must look to the terms of the SBLC and its underlying purpose in order to determine whether it should be properly regarded as a performance bond or a letter of credit. In *Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another v Arab Bank plc (Low Hua Kin, third party)* [1997] 1 SLR(R) 277 ("*Kumagai-Zenecon (HC)*"), Judith Prakash J (as she then

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45 DWS at paras 86–87.

46 DWS at paras 89–90.

47 DWS at para 91.

was), held that "the label "letter of credit" by itself cannot in any specific case lead to an absolutely pre-ordained result … [and] the terms of the credit have in each case to be examined and construed so that one can determine what it is that is required by that particular credit" (at [13]).

16 When inspecting the terms and conditions as well as the purpose of the payment instrument, the key question for determining whether a credit document is a performance bond or a letter of credit is whether that document "is merely a security", as a performance bond would be, or a "mode of payment in exchange for goods" (*Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 ("*Chartered Electronics Industries*") at [36]).

17 In L P Thean, "The Enforcement of a Performance Bond: The Perspective of the Underlying Contract" (1998) 19 Sing LR 389 ("Enforcement of a Performance Bond"), L P Thean JA made several observations regarding the distinction between a performance bond and a letter of credit. A letter of credit "is normally used in international trade where the seller who has sold and shipped his goods is looking to the bank to honour the letter of credit and pay for his goods which are by then beyond his reach" (at 402). In contrast, performance bonds are usually "given as security for the performance of a contract and it would not disrupt any trade if, as between the beneficiary and the account party, the enforcement of this security is held back pending the resolution of their dispute" [emphasis in original omitted] (at 403). Put another way, while "the transaction under the letter of credit exists independently and is autonomous from the underlying contract", a "performance bond is given as security for the performance of the underlying contract and it is inevitably linked to that contract" [emphasis in original omitted] (at 404).

18 In my judgment, the SBLC is linked to the Contract and acts as a security as opposed to a mode of payment by DJY to DJZ. This decision is based on three factors. These are: (a) the purpose of the SBLC; (b) the terms of the SBLC; and (c) the International Standby Practices ("ISP98"), which has been expressly incorporated into the SBLC by its terms (see [22] below).

19 First, I address the purpose of the SBLC. In the FAC Interim Decision, the court ordered DJZ to "suspend the execution of the payments … on the remaining balance of the [Contract] … as well as in the new amendments to the [Contract]", however this is "without prejudice of allowing [DJZ] and [DJY], by negotiation between the parties, to substitute the retention of the mentioned amount by the provision of [the SBLC]".[48] In other words, DJZ is only permitted to continue to make payments to DJY – and thereby *not* retain the sums amounting to the "remaining balance of the contract" – *if* DJY first obtains the SBLC in DJZ's favour. This ties and connects the SBLC to the Contract in a manner distinguishable from how a letter of credit exists independently and autonomously from an underlying contract. This also makes clear that the purpose of the SBLC was to secure the refund of the payments made by DJZ, after the FAC Interim Decision, in the event the Contract between DJZ and DJY cannot be performed pursuant to a determination by the FAC.

20 Second, and more pertinently, the SBLC's character as security (rather than a mode of payment) is made even clearer by the terms of the SBLC itself. For ease of reference, I reproduce some of the key terms within the SBLC issued by the Bank:[49]

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48 JBOD Vol 1 at p 504.

49 JBOD Vol 9 at p 61.

> WHEREAS FOR [DJY] IT IS **NOT FEASIBLE TO PERFORM THE WORK OF THE CONTRACT WITHOUT RECEIVING THE PAYMENTS DUE** UNDER THE SAID CONTRACT AND THEREFORE AGREED TO PROVIDE THE **STANDBY LETTER OF CREDIT** MENTIONED ABOVE THROUGH THE PRESENT INSTRUMENT, **IN ORDER TO ALLOW THE PAYMENTS UNDER THE CONTRACT**, WITHOUT PREJUDICE TO [DJY'S] RIGHT UNDER THE CONTRACT;
>
> …
>
> THIS **STANDBY LETTER OF CREDIT IS ISSUED TO SECURE THE REFUND OF THE PAYMENTS DUE UNDER THE CONTRACT** TO BE MADE BY BENEFICIARY IN FAVOR OF APPLICANT …
>
> ONCE ANY OF THE **PAYMENTS DUE UNDER THE CONTRACT WHICH REFUND IS TO BE GUARANTEED** HEREUNDER HAS BEEN MADE BY BENEFICIARY TO APPLICANT …
>
> [emphasis in bold added]

21 These terms provide that the SBLC was issued by DJY to DJZ so that DJZ can continue to make payments to DJY in order to facilitate DJY's completion of the Contract by constructing and assembling the Platform. Indeed, such an arrangement was necessitated by the FAC Interim Decision which suspended and prevented DJZ from making any further payments to DJY in the absence of a guarantee like the SBLC. Hence, it was not feasible for DJY to resume work under the Contract without such payments. However, in the event that the FAC ultimately declares that the payments made by DJZ to DJY were null, void and not valid, DJZ would be guaranteed the return of its payments to DJY via the SBLC. As suggested by the term "this [SBLC] is issued to *secure the refund* of the payments due under the Contract" (see above at [20]), as opposed to being a form of payment from DJY to DJZ, the SBLC should be seen as a security for the return of DJZ's payments to DJY pursuant to the FAC Interim Decision.

22 Third, the ISP98 also supports a finding that the SBLC would be more properly regarded as a performance bond as opposed to a letter of credit. The ISP98 is applicable as the terms of the SBLC refer to it.[50] According to the ISP98, a common classification of a type of standby is an "Advance Payment Standby" which "supports an obligation to account for an advance payment made by the beneficiary to the applicant".[51] Here, it would appear that the SBLC is analogous to an "Advance Payment Standby". It supports DJY's obligation (as the applicant) to account for payments made by DJZ (the beneficiary), unlike typical performance bonds which are used to support an obligation to perform a contractual obligation. This suggests that *in addition* to bearing the title of a "standby letter of credit", the SBLC shares similarities with a common category of such credit documents.

23 At this juncture, it would be apposite to note that several of the authorities I canvassed above have generally referred to standby letters of credit (like the SBLC) as performance bonds. I outline a few key examples:

(a) in *Kumagai-Zenecon (HC)*, Prakash J also observed that performance bonds "are contractual instruments *much akin to standby letters of credit* in that they are generally construed as unconditional payment instruments" [emphasis added] (at [13]); and

(b) in *Chartered Electronics Industries*, Chan Sek Keong J (as he then was) observed that a "performance guarantee is a variant of the standby letter of credit (which was originally the instrument used by

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50 JBOD Vol 9 at p 63.

51 JBOD Vol 2 at p 135.

> American banks because they were prohibited by law from issuing guarantees)" (at [38]).

While the naming of the SBLC as a 'standby letter of credit' is by no means dispositive (see above at [15]), the fact that many authorities have categorised credit documents of such a nature and form as a type of performance bond, lends greater support and credence to DJY's position that the SBLC is indeed a performance bond.

24 DJZ attempts to rely on the ISP98 to argue that it supports a finding that the SBLC is "separate from any underlying contractual obligations between [DJY] and [DJZ] under the Contract", and thus suggests that the SBLC would be more properly regarded as a letter of credit. In particular, DJZ seeks to rely on the ISP98's elaboration on the nature of standbys as being an "independent … undertaking when issued" and that because it is independent, "the enforceability of an issuer's [*ie*, the Bank's] obligations under a standby does not depend on … a reference in the standby to any … underlying transaction … [or] the issuer's knowledge of performance or breach of any … underlying transaction".[52] These characteristics of standbys, as outlined in the ISP98, appear to indicate a significant degree of independence and separation from the underlying transaction that is atypical of performance bonds. That said, this alone is insufficient to suggest that such standby letters of credit (like the SBLC) are more appropriately categorised as letters of credit.

25 First, the ISP98's reference to the nature of standby letters of credit as being independent from any "reference to any reimbursement agreement or

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[52] DWS at para 92; citing JBOD Vol 2 at p 145.

underlying agreement or … the [issuing bank's] knowledge of the performance or breach of any reimbursement agreement or underlying breach", is merely a reflection of the doctrine of strict compliance. Indeed, as will be elaborated on subsequently (at [33]–[34] below), the doctrine of strict compliance requires that the issuing party (typically a bank) and the court, must be able to determine if the terms and conditions of the credit document have been strictly complied with, *purely* with reference to the bond instrument only.

26 Second, as canvassed above (at [17]–[19]), while the independence of the credit document from the underlying transaction is *one* component which the court can take into consideration, it is neither the sole nor determinative factor. Rather the key feature of a letter of credit is its characterisation as imposing a *primary* obligation of payment on the obligor, as opposed to a *secondary* obligation which only arises in the event the obligor breaches its primary obligations, like a performance bond (see, *JBE Properties* at [10]). It is this feature of a letter of credit, *ie*, serving as a mode of payment in exchange for goods that makes it the "life blood of commerce", which justifies the higher threshold to be satisfied when restraining any payment under it (*Chartered Electronics Industries* at [36]). This similar feature does not exist for performance bonds, or adjacent credit instruments, and hence permits the imposition of a lower threshold.

27 While it is true that a standby credit "is an autonomous contract in that its performance is separate from and unaffected by the contract between the applicant or account party and the beneficiary which has given rise to it", such credit documents "most commonly fulfil the function of providing security against the non-performance of a party to a contract" (see Ali Malek, David Quest & Raymond Jack, *Documentary Credits : The Law and Practice of*

Documentary Credits Including Standby Credits and Demand Guarantees (4th ed., Tottel Publishing, 2009) at paras 2.36 and 12.16). Here, even accepting DJZ's claim that the SBLC exists independent of the Contract, in so far as payment under the SBLC is contingent on an adverse ruling by the FAC and not the completion of the Contract, it clearly operates as a *secondary*, and not a primary, obligation. The Bank's obligation to pay DJZ, pursuant to the SBLC, only arises in the event that the FAC rules that payments made by DJZ were null, void and not valid.

28 For these reasons, the SBLC should be treated as a performance bond for the purpose of determining the applicable test on whether the call on the SBLC should be restrained.

The applicable test for whether DJZ's call on the SBLC should be restrained

29 In *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262, the Court of Appeal affirmed that "whether there is *fraud or unconscionability* is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted" [emphasis added] (at [46]). Importantly, it is only open to the party seeking the injunction to plead either fraud or unconscionability when the credit document/transaction in question is a performance bond. This is so, as in the context of letters of credit, the fraud exception is the *only* exception to the autonomy principle, and thus the only ground on which a party can seek an injunction to restrain calls on a letter of credit (see *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another appeal* [2024] 1 SLR 1054 ("*Winson Oil Trading*") at [30]–[32]).

30 Turning back to the factor of unconscionability, in *CEX v CEY and another* [2021] 3 SLR 571 ("*CEX*"), Lee Seiu Kin J outlined a framework for

"evaluating whether an injunction restraining a performance bond should be granted on the ground of unconscionability" (at [11]).[53] The framework is as follows:

(a) Identify the nature of the performance bond (*CEX* at [11(a)]);

(b) Ascertain whether the call falls within the terms of the bond (*CEX* at [11(b)]); and

(c) Evaluate whether the "overall tenor and entire context of the conduct of the parties support a strong *prima facie* case of unconscionability", unconscionability having been broadly (but not exhaustively) described to involve elements of unfairness and conduct lacking in good faith (*CEX* at [11(c)]).

31 For the reasons I have outlined (at [14]–[28] above), I agree with DJY that the SBLC is more analogous to a performance bond and thus, unconscionable conduct on DJZ's part would be sufficient grounds to restrain DJZ from calling on the SBLC.

DJZ satisfied the requirements to call on the SBLC

32 As outlined by Lee J in *CEX*, there are three considerations that the court must take into account when deciding whether to grant an injunction to restrain a call on a performance bond. Transposing that to the present context, this raises two key issues. First, whether DJZ's call fell within the terms of the SBLC, *ie*, whether there has been strict compliance with the terms and conditions of the SBLC. Second, assuming that strict compliance has been addressed, whether

[53] See also, CWS at para 39.

the overall tenor and entire context of the conduct of the parties supports a strong *prima facie* case of unconscionability on the part of DJZ in calling the SBLC. I address each of these issues in turn.

There was strict compliance with the conditions of the SBLC

33 In *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 ("*Master Marine*") the Court of Appeal affirmed that where condition precedents are set for the beneficiary to a performance bond to satisfy before making a demand, the doctrine of strict compliance applies. Strict compliance is necessary as it "ensure[s] certainty for both the account party and the beneficiary". Hence, when the court is required to make an assessment on whether to grant an injunction to restrict payment under such a bond, it "should be able to reach its decision quickly by *referring only* to the *bond instrument*" [emphasis added] (at [31]–[32]). However, as to the question of *what is* the condition precedent which must be strictly complied with, "this is a matter of construing the instrument" (at [33]).

34 This necessity for strict compliance with the terms and conditions of a standby letter of credit was similarly affirmed in *Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another v Arab Bank plc (Low Hua Kin, third party)* [1997] 2 SLR(R) 1020 ("*Kumagai-Zenecon (CA)*"). In that case, the Court of Appeal affirmatively cited the case of *Equitable Trust Company of New York v Dawson Partners, Ltd* (1926) 27 LI L Rep 49 for the proposition that when it comes to strict compliance "[t]here is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines". That said, while "the standard of conformity required … is one of strict conformity to its terms but not one of

literal conformity", "[v]ery minor and inconsequential discrepancies … may be disregarded, but any discrepancy which calls for an inquiry or investigation or 'such as to invite litigation' would render the tender of the documents bad or defective" (*Kumagai-Zenecon (CA)* at [16]; citing *Indian Overseas Bank* at [27]).

The parties' arguments

35 DJY argues that a plain reading of condition (A) of the SBLC conditions (produced in full at [5] above), imposes two requirements.[54] The first relates to the phrase "the final decision issued by [FAC]", and the second relates to the phrase "declaring the payment is null and void" (the "First Condition" and "Second Condition", respectively). Applying a plain reading of the SBLC, the two conditions to be met are as follows:[55]

(a) the First Condition requires an "express declaration/decision by the [FAC] that [DJZ's] payment obligations under the Contract (pursuant to which it made payments to [DJY]) are legally invalid"; and

(b) the Second Condition requires that such a declaration/decision must "be a final one that can no longer be modified on appeal".

DJY argues that neither the First nor Second Condition have been satisfied in the present case as the FAC had not made an express declaration/decision on whether DJZ's payment obligations under the Contract are legally invalid, and

54 CWS at para 41.

55 CWS at para 43.

that even if it had, that such a declaration/decision was neither final nor no longer subject to any further appeal.[56]

36 With regard to the First Condition, DJY argues that the FAC and Country [X]'s courts have stated several times (see, for instance, the Supreme Court's decision on the Writ of Mandamus filed by DJY) that the FAC "did not declare the … [C]ontract or its amendments to be invalid" and thus had not pronounced on whether DJZ's payment obligations were null and void.[57] DJY raises the further point that the FAC itself admitted that it has no power to make any such declarations/determinations to invalidate DJZ's payments, and this is something *both* DJY and DJZ's experts are in agreement with.[58] At the hearing before me, DJY's counsel further argued that DJZ had failed to comply with the First Condition as the notification receipt from the FAC only states that it "accept[s] the Requests for Review to, on merit, dismiss them"[59] – which is *not* a declaration that the payment made by DJY is "null, void and not valid". DJY's counsel also reiterated the argument that, in any regard, the FAC had repeatedly affirmed, in various subsequent proceedings before it, that it had not in fact made any findings or declarations on the validity of the Contract or DJZ's payment obligations under it.[60]

37 On the Second Condition, DJY argues that there has not been a final determination by the FAC, that is not the subject of any further appeal, since judicial review has been invoked in relation to the various FAC Decisions via

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56 CWS at para 47.

57 CWS at para 48.

58 CWS at para 51; citing JBOD Vol 6 at p 134 and JBOD Vol 4 at pp 518–519.

59 JBOD Vol 9 at p 80.

60 See, JBOD Vol 9 at pp 283 and 310−311.

the New Lawsuit before the Federal Court (see above at [8(a)]).[61] Finally, and in the alternative, even if the court found the SBLC conditions to be patently ambiguous and found it apposite to engage in a contextual and purposive reading, this would still mean DJZ must show that there was a "clear and final determination that the payments were invalid" in order to call on the SBLC. Such a determination could not be made out on the present facts as such a "final decision can only be made upon the conclusion of the [a]rbitration, which is parties' agreed dispute resolution forum", and no such conclusion of the arbitration commenced against DJZ has been reached.[62]

38 Conversely, DJZ submits that there *had* been a final determination by the FAC at the point when DJZ called for the SBLC and thus, the Second Condition was satisfied.[63] To this end, DJZ argues that the mere existence of, and filing for, MFCs do not affect the finality of a decision and do not constitute appeals on the merits. Hence the various MFCs filed by Company [A] and DJY would not affect the court's determination of whether the FAC's decision had been final.[64]

39 As to the First Condition, in oral submissions, counsel for DJZ argued that DJZ *had* strictly complied with the First Condition of the SBLC. In the FAC Appeal Decision, the court had made a finding that "[t]here is *no legal substantiation* for the payment of restoration of the economic-financial balance of [the Contract]" [emphasis added] ("the Finding").[65] Since the SBLC does not

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61 CWS at para 55; citing JBOD Vol 4 at pp 505–508.

62 CWS at paras 58–61.

63 DWS at para 112.

64 DWS at paras 114–122.

65 JBOD Vol 9 at p 146.

require the specific terms of "null and void" to appear, such a determination by the FAC, which has the *effect* of rendering the payments null and void, would satisfy the First Condition. DJZ's counsel further contended that it would be inconsistent for DJY to now assert that strict compliance with the terms and conditions of the SBLC has not been complied with. DJY's own director had admitted that "after assessing the merits of the case, the [FAC] concluded in a first instance decision that all payments made pursuant to [the Contract and its amendments] are null and void".[66] This position was echoed by DJY's own experts. The experts took the position that the FAC had upheld its previous ruling "that payments made to [DJY] under the [Contract's amendments] were null and void", but that DJZ's call on the SBLC was not in comport with the SBLC's terms and conditions as there had still not been a final decision from the FAC since both DJY and Company [A] had pending MFCs. The MFCs "have the effect of staying the previous [FAC's] decisions".[67] As such, DJY's key objection had always been confined to the Second Condition, *ie,* that the FAC's decision was not final given pending MFCs, and *not* that there has not been a declaration of the validity of DJZ's payments.

40 DJY's counsel responded at the hearing, arguing that the Finding relied upon by DJZ, was insufficient for two key reasons. First, the FAC Appeal Decision, in which the Finding was made, had not been tendered to the Bank and only a notification receipt containing a link to the full judgment was tendered. This is insufficient to adhere to strict compliance, as it is too onerous to expect the Bank to access the judgment via the link. Second, the Finding by the FAC, *ie*, that the payments have "no legal substantiation", is insufficient.

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66 JBOD Vol 1 at p 41.

67 JBOD Vol 1 at p 239.

The Bank would still be placed on inquiry as to whether such a finding means that the payments were "null and void". Thus, the lack of a clear statement from the FAC on the validity of the payment obligations meant that strict compliance with the First Condition remains unsatisfied.

Proper interpretation of the SBLC

41 I agree with DJZ that there has been strict compliance with the SBLC's conditions. I say this based on the proper interpretation of the conditions of the SBLC. I agree with DJY's interpretation of the Second Condition, *ie*, that in order for a declaration/decision by the FAC to be "final and not subject to any further appeal" it must be one that can no longer be modified on appeal. However, I disagree with the DJY's interpretation of the First Condition of the SBLC (outlined at [35(a)] above). Specifically, I disagree with DJY's claim that there must be an express declaration and/or decision by the FAC that DJZ's payment obligations under the Contract are "null and void" in order for the First Condition to be satisfied.

42 DJY's proffered interpretation does not cohere with business common sense and leads to an absurd result. In *Master Marine*, the Court of Appeal affirmed its position in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") that "ambiguity is no longer a prerequisite for the admissibility of extrinsic evidence in aid of contractual interpretation" and the "external context of the contract … will, more often than not, help to define the contours and limits of the penumbra" (*Master Marine* at [34]; citing *Zurich* at [114] and [122]). That said, the Court of Appeal acknowledged that the "court should be restrained in its examination of the external context and extrinsic evidence" when interpreting a

performance bond, since "both the beneficiary and bank need to be able to determine quickly if the demand is valid simply by looking at the bond instrument itself. There should not be a need for cross-references to be made to the underlying contract to determine the ambit of the condition precedents" [emphasis in original omitted] (*Master Marine* at [35]).

43 Notwithstanding the need for such restraint, the Court of Appeal in *Master Marine* also affirmed that "in situations where the wording of the bond instrument is patently ambiguous, and it cannot be readily determined from the internal context of the document how to read the disputed provision, the court's only recourse is to refer to extrinsic evidence for a better understanding of the parties' objective intentions and/or commercial purpose". Thus, the most common extrinsic evidence the court will readily have recourse to is the underlying agreement which necessitated the procurement of the performance bond (at [36]). The Court of Appeal (at [39]) also cited and affirmed the proposition in the English case of *Kookmin Bank v Rainy Sky SA and others* [2010] EWCA Civ 582 that where "there are two possible constructions, the Court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business commonsense" (at [19]). This cited proposition was upheld by the UK Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (at [21]).

44 In this case, if DJY's arguments are to be taken to their logical conclusion, it appears that DJY is essentially asking the court to make a finding that DJZ can *never* be entitled to call on the SBLC as the conditions within the SBLC are impossible to fulfil. DJY argues that the requirement that a "final decision issued by the FAC declaring the payment is null and void" means that there must be an express declaration and/or determination by the FAC that

DJZ's payment to DJY under the Contract are legally invalid. However, in the same breath, DJY contends that the FAC has "**no power** in the first place to make declarations/determinations to invalidate [DJZ's] payments" [emphasis in original].[68] If this is accepted, then there can *never* be a situation where the First Condition can be met as it effectively stipulates a requirement for the FAC to act outside the scope of its powers. In other words, the FAC can *never* make the sort of declaration and/or determination necessary to satisfy the purported First Condition of the SBLC as alleged by DJY (*ie,* that there must a declaration that DJZ's payment obligations under the Contract are legally invalid). Indeed, "an interpretation that leads to very unreasonable results will be avoided unless it is required by clear words and there is no other tenable construction" (*Master Marine* at [41(h)]). Here, I do not find that such clear words exist, nor is there no possible alternative construction that is more tenable or reasonable.

45 Furthermore, to the extent that DJY's counsel had tried to argue, particularly at the hearing before me, that anything short of the exact phrase "null and void" appearing within the FAC Appeal Decision would be insufficient to satisfy the requirement of strict compliance – I disagree. Indeed, such a reading would not be an accurate interpretation of the First Condition and I say this for two reasons: (a) the ISP98 does not support a requirement for the exact phrase of "null and void" to appear in the final decision from the FAC; and (b) parties could *not* have intended to impose a requirement for that precise phrase to appear when deciding on the conditions of the SBLC, given the surrounding context. I deal with each reason in turn.

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68 CWS at para 51.

46 First, the ISP98 does not support DJY's claim that the exact phrase of "null and void" must appear. Paragraph 4.09(a) of the ISP98 stipulates that "[i]f a standby requires a statement without specifying precise wording, then the wording in the document presented must appear to convey the same meaning as that required by the standby". If specified wording is required, "quotation marks, blocked wording, or an attached exhibit of form" should be used (see paras 4.09(b)–4.09(c)).[69] Here, the First Condition simply requires a "copy of the notification receipt by [DJZ] from [the FAC] with the final decision issued by [the FAC] declaring the payment is null and void". Given that the phrase "null and void" is not enclosed in quotation marks nor is it in blocked wording, I conclude that precise wording is not required. It would suffice if the FAC decision presented conveys the *same meaning* as a declaration that the payment is null and void. This is especially so, since, where an exact replica of the words is required elsewhere under the SBLC, quotation marks and blocked quoting have been used (*eg*, condition (A)-II of the SBLC at [5] above).

47 Second, parties sensibly know that it is *neither* reasonable *nor* coherent with business commonsense to impose a requirement for the exact phrase "payment is null and void", or even "null and void", to appear in the FAC Appeal Decision. Parties cannot possibly dictate or control how the FAC wishes to phrase its judgment so as to reasonably justify requiring the inclusion of *specific* phrases. More significantly, the FAC Appeal Decision would likely have to be subject to translation as well, given that the official language of Country [X] is not English, rendering the requirement of the appearance of a precise phrase even less feasible. In sum, this lends further support to an

[69] JBOD Vol 2 at p 165.

inference that parties could *not* have intended for the phrase "null and void" to appear verbatim within the FAC Appeal Decision.

48 In light of the foregoing, the more reasonable interpretation of the SBLC's terms, *ie*, that there must be a "final decision issued by [the FAC] declaring [that] the payment is null and void",[70] is that it requires a declaration from the FAC with the effect that DJZ is to be paid back the sums it paid to DJY after the FAC Interim Decision. Such an interpretation is also in accordance with the plain meaning of the text of the SBLC.

49 Before I leave this point, I pause to briefly address DJY's further claim that there has not been strict compliance with the SBLC's terms and conditions as there are no findings or declarations on the validity of the *Contract* or DJZ's general payment obligations under the Contract. Here, looking solely at the SBLC's terms, the phrase "the payment" (used in the SBLC) would appear to refer only to the payment of the sum secured under the SBLC (*ie*, US$126,569,231.12)[71] and not the payment of *all* the moneys conveyed under the Contract (*ie*, the estimated Contract Price of US$774,917,602.70[72]). Hence the SBLC's terms only stipulate that there be a declaration by the FAC that "*the payment* is null and void" [emphasis added].[73] A finding on the validity of the Contract as a whole, and correspondingly DJZ's payment obligations under it, is unnecessary and irrelevant for purposes of satisfying the requirements to call on the SBLC.

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70 JBOD Vol 9 at p 67.

71 JBOD Vol 9 at p 67.

72 JBOD Vol 9 at p 15.

73 JBOD Vol 9 at p 67.

Strict compliance with conditions of the SBLC

50 As a preliminary point, I disagree with DJY that it would be overly onerous to expect the Bank to access the full FAC Appeal Decision via the link provided in the notification receipt. Rather, I find that the court *is* entitled to take the FAC Appeal Decision into account when determining whether strict compliance with the First Condition has been satisfied. In *Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295, in the context of incorporation by reference for contracts, the Court of Appeal affirmed that parties to a signed contract could be bound by the additional terms of a separate document if the signed contract "incorporated some or all the terms of a separate document by making reference to those terms" (at [59]). Although the present case is not one which concerns contractual interpretation, an analogous principle can be applied to the present case. Given that the notification receipt makes a clear and explicit reference to the FAC Appeal Decision (*ie*, by providing a link to access the said decision on the FAC Portal[74]), I find that this is sufficient to incorporate the FAC Appeal Decision into the notification receipt. Consequently, reference to the FAC Appeal Decision can be made when determining whether there has been adherence to the requirement of strict compliance.

51 Having reviewed the FAC Appeal Decision, I am in agreement with DJZ. The FAC's determination that there is "no legal substantiation" for the payment made by DJZ conveys the same meaning as that stipulated by the First Condition of the SBLC, and required by the ISP98 (see above at [46]), *ie*, a

[74] JBOD Vol 9 at p 77.

declaration that the payments were null and void and thus legally invalid. Hence, there has been strict compliance with the First Condition of the SBLC.

52 I also disagree with DJY's claim that the Second Condition has not been satisfied. The FAC Appeal Decision *was* a final determination and is *not* the subject of any further appeal, even despite the pending judicial review in the New Lawsuit. Both DJY and DJZ adduced expert evidence on Country [X]'s Law on this issue. DJY's experts maintained that as the FAC "is a control and audit agency and not a judicial court", it "does not have judicial authority [and] its decisions are not final and do not produce substantive *res judicata*".[75] This is because "it is always possible to challenge administrative decisions in court, such as those issued by control bodies like the [FAC], provided that it is alleged that they violate or threaten rights". Accordingly, FAC's "determinations which do not produce *res judicata* effects (such as the [FAC's] decisions in this case) can never be final".[76] In contrast, DJZ's expert differed from DJY's experts' opinion and concluded that the FAC Appeal Decision *was* a final decision. The decision "may not be reopened, varied or set aside on the merits by the [FAC]" and its enforceability "is not affected by pending judicial review of the decision".[77] In response to DJY's experts' views, DJZ's expert contended that as "whether a decision is final turns on whether the decision may be reopened, varied or set aside on the merits by the same adjudicating body or Court that delivered it … [thus] whether a decision of the [*FAC*] is final is not affected by whether a *different* adjudicating body or Court may be asked to evaluate the

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75 JBOD Vol 4 at p 504.

76 JBOD Vol 4 at pp 506–508.

77 JBOD Vol 6 at p 115.

merits of such decision, by way of a judicial challenge or otherwise" [emphasis in original].[78]

53 After reviewing both parties' experts' reports, I find DJZ's expert evidence to be more persuasive on this issue. Preliminarily, I pause to observe that *if* DJY's experts' evidence is to be preferred, this gives rise to the same issue raised above (at [44]), of the SBLC containing a condition that is impossible to satisfy. Indeed if, as DJY's experts claim, the FAC Appeal Decision is not final as the FAC is "not part of the Judiciary Branch and does not have judicial authority" to render decisions which are final and produces substantive *res judicata*[79] – this would mean that the FAC can *never* produce a final determination that is not the subject of any further appeal. In other words, the Second Condition can never be satisfied. Such an interpretation is one which is untenable and unreasonable. To this end, I find that DJZ's expert opinion (*ie*, that a judicial review challenge of the FAC Appeal Decision does not affect its finality nor render it the subject of any further appeals) is aligned with the position in Singapore law that, "a person seeking judicial review of a decision by a public body must *exhaust all alternative remedies* before invoking the jurisdiction of the court for judicial review" [emphasis added] (see *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [25]). An appeal would, in fact, be one form of alternative remedy. I further note that DJY has not tendered any evidence on the nature of the remedy of judicial review in Country [X] and whether it, like in Singapore, serves as a distinct form of remedy. It is well established that in the absence of such proof of the content of foreign law, a court may regard foreign law as the same as local law (*Ollech*

78 JBOD Vol 6 at p 126.

79 JBOD Vol 4 at pp 505–506.

David v Horizon Capital Fund [2024] 1 SLR 287 at [54]). Thus, the fact that DJY has sought judicial review of the various FAC decisions would suggest that after failing at the FAC Appeal Decision, DJY *had* exhausted *all* alternative remedies (including appeals). From the above, since a judicial review of a decision is separate and distinct from an appeal, the existence of such a process being underway cannot serve as evidence that the FAC Appeal Decision is still the subject of any further appeals under the FAC.

54 For all of the above reasons, I find that based on the nature of the SBLC, DJZ's call did fall within the terms of the SBLC and thus DJZ had strictly complied with the conditions for calling on the SBLC.

DJZ had not behaved unconscionably in calling on the SBLC

55 In *CEX*, Lee J outlined several examples of how unconscionability may manifest: "(i) calls for excessive sums; (ii) calls based on contractual breaches that the beneficiary of the call itself is responsible for; (iii) calls tainted by unclean hands, *eg*, supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures; (iv) calls made for ulterior motives; and (v) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond" (at [11]). That said, he highlighted that these factual matrices are not meant to be "an exhaustive list of circumstances where unconscionability arises" and that "no single factor is dispositive. The weight attached to each factor will vary from case to case depending on the strength of the evidence. Every case must be examined with careful regard to the entire context, rather than devolve into a pedantic inquiry into each and every factor" (at [12]).

56 DJY contends that DJZ's call on the SBLC was unconscionable for at least two key reasons. The first is that DJZ's call was baseless and cannot be justified with clear evidence. DJY predicates its argument in this regard on the basis that DJZ had called on the SBLC despite being aware that it failed to meet the conditions set out in the SBLC. In particular, the First Condition requiring a determination by the FAC that the payments due under the Contract were null, void and not valid.[80] The second reason is that DJZ's entitlement to the sum under the SBLC is currently the subject of dispute in ongoing proceedings, namely the appeal against the dismissal of the New Lawsuit (see above at [8(a)]) as well as the arbitration against DJZ commenced on 21 December 2023 (see above at [8(c)]).[81] Hence, as the substantive dispute underlying the Contract has not been resolved, the question of whether it would be fair to allow DJZ to receive payment remains at issue. Thus, it would be unconscionable to allow DJZ to effectively circumvent ongoing proceedings and realise the sum under the SBLC, before the substantive dispute on DJZ's entitlement on the sum is resolved.[82]

57 At the hearing, DJY's counsel relied on *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter* [2019] 4 SLR 1324 ("*Ryobi*") for the proposition that although genuine disputes as to whether the underlying subcontracts were breached would not render a call unconscionable, genuine disputes as to whether the beneficiary was legally entitled to call on the bond would (at [38]). Here, since DJZ lacked the legal entitlement to call on the

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80 CWS at para 66.

81 CWS at para 67.

82 CWS at para 68.

SBLC, it is irrelevant whether DJZ genuinely believed that it was entitled to call on it – the call would remain unconscionable.

58 In response DJZ argues that when it called on the SBLC on 22 August 2022, there had been a final decision from the FAC that was not subject to any appeal at the time (*ie*, the FAC Appeal Decision) and thus its notification receipt and duly signed statement (as required by the terms of the SBLC) were true and accurate statements. Moreover, these documents accurately affirmed the fact that DJZ *had* satisfied the requirements stipulated under the terms of the SBLC.[83]

59 Even assuming that its notification receipt and duly signed statement were not true and accurate statements, DJY had failed to adduce any evidence proving that DJZ had made those statements with the knowledge that they were false.[84] Thus, it cannot be said that DJZ acted so unfairly, reprehensibly or lacking in good faith that a court of conscience ought to restrain DJZ from calling on the SBLC.[85] At the hearing, DJZ's counsel (citing *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*") at [24]–[25] and [45]) stressed that there is a *high* threshold for proving unconscionability. In that regard, an injunction on that basis is only warranted if the court finds the beneficiary's actions "to be so lacking in *bona fides* such that an injunction restraining the beneficiary's substantive rights is warranted". To this end, "[s]ufficient reasons must be given to the court to enable it to come to such a conclusion".

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83 DWS at paras 112–122.

84 DWS at paras 123–125.

85 DWS at paras 126–127.

60 I agree with DJZ that, in looking at the overall tenor and context of the parties' conduct, DJY has not made out a strong *prima facie* case of unconscionability on the part of DJZ.

61 I do not propose to deal with DJY's first contention – *ie*, that DJZ's call was baseless and cannot be justified with clear evidence as it had clearly failed to meet the SBLC's conditions – in much depth. As I have determined above, under my interpretation of the SBLC, DJZ had strictly complied with the relevant conditions of the SBLC when it made the call (see above generally, at [41]–[54]).

62 I turn to DJY's second argument, being that it would be unconscionable to allow DJZ to call on the SBLC as DJZ's entitlement to the sum under the SBLC remains indeterminate. In *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*Arab Banking*"), the Court of Appeal opined (albeit in obiter) that "it would nevertheless be unfair for the beneficiary to realise his security *pending resolution of the substantive dispute*" [emphasis in original]. It elaborated that the "unconscionability exception serves to protect the account party from unfair demands by the beneficiary to have the secured sum in hand in circumstances where there has not yet been a final determination as to whether he is actually entitled to that sum" (at [104]). In *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44, the Court of Appeal similarly stressed that since "a performance bond is basically a security for the performance of the *main contract* … a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is *given an opportunity to prove his case*" [emphasis added] (at [24]). Put another way, the court found that it would be unconscionable to allow a beneficiary to call on a performance bond *prior to*

a final determination of its entitlement to the sum that is secured by the performance bond, as it could transpire that the beneficiary was actually *not* entitled to that sum.

63 Here, there *was* a final determination on DJZ's entitlement to the sum secured by the SBLC. Even if I accept DJY's claim that the validity of the Contract, and thus DJZ's payment obligations under it, remains indeterminate pending the New Lawsuit and the arbitration commenced against DJZ, it does not follow that DJZ's entitlement to the sum secured by the SBLC remains indeterminate as well. Once there was a final decision by the FAC that the payments made by DJZ to DJY, pursuant to the FAC Interim Decision, ought to be returned to DJZ, this would have served as a final determination and resolution of the dispute concerning DJZ's entitlement to repayment. Regardless of any ruling from the New Lawsuit or arbitration on the validity of the Contract, DJY would still be required to return the sums it paid to DJZ pursuant to the FAC Interim Decision. Therefore, DJZ's entitlement to the sum secured by the SBLC had been conclusively and finally determined by the FAC when it ordered for the SBLC to be liquidated (in the FAC First Decision that was upheld subsequently by the FAC Appeal Decision). Put another way, the disputes under the New Lawsuit and the arbitration are disputes under the Contract that relate to the increase in the Contract Price, and not disputes relating to the administrative requirement of requiring a guarantee, imposed by the FAC, which manifested in the SBLC.

64 Indeed, DJZ's entitlement to call on the SBLC, even pending a determination of the validity of the Contract, is made even clearer by the case of *Ryobi*. In that case, Kannan Ramesh J (as he then was) determined that the defendant was not entitled to call on two of three performance bonds, as he had

lacked an honest belief that there was any non-performance in respect of the underlying subcontract for those two bonds (at [37]). In quoting the Court of Appeal in *Mount Sophia* (at [52]), Ramesh J affirmed that even if a beneficiary "was mistaken in [calling on a performance bond], the *call* could still be *legitimate* if this position was *genuinely adopted* and the [beneficiary] honestly believed that the [account party] was in breach" [emphasis in original omitted, emphasis in italics added] (*Ryobi* at [38]). Furthermore, Ramesh J drew a clear distinction between genuine disputes "as to whether the underlying subcontracts were breached" as opposed to genuine disputes over "a legal entitlement to call" [emphasis in original omitted], only the former of which would not render a call unconscionable (*Ryobi* at [38]). In sum, a call on a performance bond would not be unconscionable if, despite the existence of a dispute as to whether the underlying contract relating to a performance bond was breached, the beneficiary *genuinely* believed that there was no such dispute to the underlying contract and that it was thus entitled to call on that bond.

65 As I have determined above (at [63]), DJZ's entitlement to the sums secured by the SBLC is separate and independent from the underlying validity of the Contract, and there has been a final determination on it. Hence, the only dispute which remains indeterminate, if any exists at all, pertains to the substantive dispute of the validity of the Contract and DJZ's general payment obligations under it. To that end, as affirmed by Ramesh J in *Ryobi*, such disputes, if genuine, would not render a call unconscionable.

66 In the case of *Ryobi*, the defendant lacked the honest belief that there was any non-performance in respect of the underlying subcontract. This is in contrast to the present case where I agree with DJZ that DJY has not satisfactorily adduced any evidence that DJZ had called on the SBLC with the

knowledge that it was not entitled to do so due to a pending dispute on the Contract. DJY's counsel had conceded, at the hearing, that the legal burden is on it to prove unconscionability, and thus to show such knowledge by DJZ. It did not meet that burden. Although DJY makes references to the New Lawsuit as well as the arbitration against DJZ, it is important to bear in mind that when DJZ made the call on the SBLC on 22 August 2022, neither of the aforementioned actions had been commenced. Rather, the only pending action was Company [A]'s MFC which, as DJZ pointed out via its expert, cannot affect the finality of the FAC's determination.[86] On this basis, I accept that when DJZ called on the SBLC, it genuinely believed that there was no dispute as to the validity of the underlying Contract. Indeed, such a finding is bolstered by the fact that, as DJZ's counsel pointed out at the hearing before me, DJZ had waited for over ten years after the FAC First Decision before calling on the SBLC (see above at [6]–[7]). This points to a finding that DJZ had acted with restraint and was careful in arriving at its decision to call on the SBLC. In light of the above, I am thus unable to agree with DJY that DJZ had acted unconscionably such that an injunction preventing it from calling on the SBLC would be warranted.

67 Since I have found that DJY has not been able to show that unconscionability is made out on the facts of the present case, this similarly suggests *a fortiori* that fraud (which imposes a much higher evidential burden of proof on DJY) has not been made out either. Consequently, there is *no* basis for me to grant an injunction restraining DJZ from calling on the SBLC.

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86 DWS at paras 117 and 121–122; citing JBOD Vol 3 at p 16.

Conclusion

68 In sum, although I agree with DJY that the SBLC in the present case is more analogous to a performance bond, I do not find that it has satisfied the requisite test for the grant of an injunction to restrain DJZ from calling on the SBLC. Therefore, I dismiss its application for an injunction against DJZ and the Bank, sought pursuant to OA 530.

69 If parties are unable to agree on costs, they are to file written submissions on costs, of not more than three pages, within a week of this Judgment.

Wong Li Kok, Alex
Judicial Commissioner

Lin Weiqi Wendy, Jill Ann Koh Ying (Xu Ying), Leau Jun Li (Phoebe), Wee Jong Xuan and Foo Hsien Weng (WongPartnership LLP) for the claimant;
Hing Shan Shan Blossom, Lim Mingguan, Lu En Hui Sarah and Desiree Chong Ci En (Drew & Napier LLC) for the first defendant;
The second defendant absent and unrepresented.