Comparative Study of Unconscionability Exception to the Principle of Autonomy in Law of Letter of Credits

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Abstract: This paper touches upon the legal nature and scope of unconscionability as an exception to autonomy principle of documentary letters of credit (LC) and bank guarantees. Complicated process of international trade is known as the main reason behind development of new exceptions to globally appreciated principle of autonomy in process of LC transaction. Apart from fraud which has been recognized in international business society and various jurisdictions, other exceptions including unconscionability, nullity, illegality and recklessness have received different treatments in different national laws. Unconscionability is applied to situations where beneficiary's demand to draw under the LC is not fraudulent but affected with bad faith in a way that court prevents bank from honouring the credit. While UCP leaves the problem of fraud and other exceptions to autonomy principle to be solved by national laws, among common law countries, unconscionability defence has been recognized in Australia and Singapore but others do not show welcoming attitude towards it. Current paper tries to find reasons behind different attitudes of common law jurisdictions to unconscionability defence in letter of credit process by answering following questions: What is the nature of unconscionability? How different common law jurisdictions have received it as an exception to principle of autonomy in documentary letters of credit and bank guarantees? And last but not the least, what are arguments in favour and against its universal recognition as a defence for payment under letter of credit and bank guarantee system?

Keywords: Documentary Letters of Credit; International Trade; Exceptions to Principle of Autonomy; Unconscionability; Common Law System

1. Introduction

In the process of international business, documentary letters of credit are used historically for the purpose of shifting risk of payment from applicant as a natural person to the bank as a more reputable entity with legal personality. By using

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documentary credits, seller would be sure that his payment is ready upon presentation of complying documents to bank and regardless to any dispute on the underlying contract.On the other hand, buyer is sure that in case of noncompliance of documents with terms and conditions of credit or committing fraud and forgery by seller bank would not make payment and his interests are protected. (Alavi, 2016, pp. 106-121) Mechanism of international LC transaction just like bank guarantee is subjected to two main principles of autonomy and strict compliance[1]. Accordingly, principle of autonomy separates the credit from its underlying contract while principle of strict compliance imposes condition of strict compliance of presentation with terms and conditions of credit for letting bank to effectuate the payment. Before case of *Sztejn v Henry Schroder banking Corporation*[2]absolute application of the principle of autonomy deemed uncontested. However, recognition of fraud as the first exception to the principle of autonomy in documentary letters of credit raised fear of moving "down the slippery slope toward a more pervasive impairment of the utility of letters of credit" (Johns & Blodgett, 2010, p. 297) among commentators. Such concerns seem to be true as trade practices started to develop further disruptions including unconscionability, illegality, recklessness and nullity as new exceptions to the principle of autonomy in international LC transaction (Alavi, 2016, p. 70).

Unconscionability, as the focus point of current research, refers to condition in which claim of beneficiary to draw under the credit or bank guarantee is so affected with bad faith that court decides to prevent bank from payment in absence of fraud or forgery. (Ellinger & Neo, 2010, p. 169) The unclear nature of unconscionability has resulted in divergent approaches to above mentioned circumstances in different jurisdictions. Many legal practitioners and academicians endeavoured to articulate it and occasions under which unconscionability can be used as a defence.[3] However, majority of efforts have been failed due to difficulties in providing a precise definition and circumstances for application of unconscionability as an exception to autonomy principle of documentary letters of credit (Amaefule, 2012). At the same time, its supporters claim that unconscionability will provide court with more flexibility[4] and possibility to "police agreement directly"[5] and reject contractual

[1] UCP 600, Article 4, 5 and 6.
[2] Sztejn v Henry Schroder banking Corporation 31 NYS 2d 631 (1941).
[3] (Rickett, 2006). In John Lowry Commercial Law: Perspective and Practice, Lexis Nexis, p. 175.
[4] Epstein. R, (1975). Unconscionability: A Critical Reappraisal. 18 J LEcon. 293, 304.
[5] Hilman. R, (1981). Debunking some Myth about Unconscionability: A New Framework for UCC Section 2-302. 67 Cornell L Rev 1, 15.

rights in absence of the free choice.[1] In contract, its ardent critics argue that unconscionability is "an emotionally satisfying incantation acting as a refuge for the desperate and analytically lazy". (Rickett, 2006, p. 179) which means "nothing" in practice.

With reference to documentary letters of credit, unconscionability has received different treatment in different common law jurisdictions. While it is recognized under Singaporean and Australian Law, it has not experienced such welcoming approach towards in English and American law. Therefore, it is possible to conclude (due to its recognition in two common law countries) that unconscionably represents a sort of merit as an exception to the principle of autonomy. (Amaefule, 2012, p. 165)

While discussing such contradictory opinions on developing concept like unconscionably, it worth to keep in mind that exceptions to the autonomy principle in documentary letters of credit and bank guarantees is a changing area of law and it gradually develops towards further wisdom[2].

Therefore, current paper endeavours providing an answer to questions of what is the nature of unconscionability. How different jurisdictions have received it as an exception to principle of autonomy in documentary letters of credit and bank guarantees? And last but not the least, what are arguments in favour and against its universal recognition as a defence for payment under letter of credit and bank guarantee system? Following the objective of answering above mentioned research questions, paper is divided into seven parts. After an introduction, second part will tap on the autonomy principle in LC law. Third part will discuss the nature of unconscionably, and fourth will review approaches of different common law jurisdictions to it as an exception to principle of autonomy. While part five and six discuss the standard of proof and arguments for and against recognition of unconscionability in documentary letters of credit under English law, final part will make overall conclusion on discussion over the subject matter.

[1] Hawkland UCC SERIES, S.2-302 (Art. 2) (1997-1999) 1.
[2] Mugasha, A. (2004). Enjoining the Beneficiary's Claim on a Letter of Credit or Bank Guarantee. JBL 515 at 538.

2. Autonomy as a Fundamental Principle in Letter of Credit's Law

The process of documentary letters of credit is subjected to two main principles of autonomy and strict compliance. (Alavi, 2016). Simultaneous application of both principles facilities the smoothness of international trade, autonomy principle prevents effects of dispute on underlying contract to affect payment under abstract obligation of issuer and assures beneficiary about receiving payment upon presentation of complying documents with terms and conditions of the credit. In the same vein, principle of strict compliance safeguards interests of applicant by providing the beneficiary would not be paid before presenting documents which prove compliance of shipped goods with terms of the credit. (Alavi, 2015) According to article 4 of the UCP 600:

Article 4 Credits v. Contracts a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.

A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank. b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like."

Although, geographical distance of parties in regular practice of international trade provides beneficiary with asymmetrical access to information which provides him with possibility to commit fraud, but application of autonomy principle would reduce risk of trade down to acceptable point for both parties[1]. However, it is more than seventy years that absolute application of independence principle has been eroded by global recognition of fraud rule as a basis for interference of courts in regular process of LC operation.[2] Despite age long recognition of fraud rule in in international LC operation on the basis of mercantile usage[3], it was first time applied

[1] Wiener Katz. A. (1999). *An Economic Analysis of the Guaranty Contract*. 66 U. CHI. L. REv. 47, 105.
[2] Symons, Jr. (1980). Letters of Credit: Fraud, Good Faith and the Basis for Injunctive Relief 54 TUL. L. REv. 338, 341-42
[3] Blodgett. M. & Mayer, D. (1998). *International Letters of Credit: Arbitral Alternatives to Litigating Fraud*. 35 AM. Bus. L.J. 443, 12.

to the case of in 1941.[1] Since the application of fraud rule in international LC operation, there were always concerns among legal scholars that availability of injection relief in the framework of disputes in underlying contract would affect the utility of documentary letters of credit as a popular means of finance among international trades (Johns & Blodgett, 2010, p. 297).

"It is axiomatic that courts and legislatures must tether the fraud inquiry in independent obligations law, for untethered, the inquiry destroys these independent commercial devices, which are crucial to international trade and domestic commerce." (Dolan, 2006, p. 480)

As a result, most of courts in different jurisdictions show hesitance in issuing injections on the basis of fraud in documentary letters of credit and demand guarantees.

It has been argued *Sztejn* case had a significant effect on introduction of more erosions in universal application of independence principle as it took the first step down the slop towards introduction of further expectations[2]. Such concerns seems to be valid as at the same time that policy exigencies try to keep the predictability of law of the letter of credits viable, new exceptions like unconscionability, nullity and illegality started to raise on the basis of commercial practices.[3]

It seems necessary that before going more in-depth into the legal issues relevant to unconscionability exception to principle of autonomy in documentary letters of credit to pay attention to different nature of primary and secondary payment obligations in banking industry. It is common for courts to use interchangeably the law of injunction for primary obligation bank guarantees and commercial letters of credit as they have been developed alongside each other.[4] However, bank guarantees (standby letters of credit) are primary obligations where performance bonds are secondary obligations (Leigh, 1984, p. 226). While primary obligations are completely independent from underlying contract, secondary obligations do not show such independent nature.

[1] Sztejn v. J. Henry Schroder Banking Corp 31 N.Y.S.2d 631 (1941).
[2] Kalson, D.J. (1983). *Note, The International Monetary Fund Agreement and Letters of Credit: A Balancing of Purposes*. 44 U. PIrr. L. REV. 1061, 1065
[3] Leigh, M. (1984). *Decision: Iranian Assets Control Regulations Stand by Letters of Credit-Blocking of Foreign Assets.* 78 AM. J. INT'L L. 224.
[4] Group Josi Re v. Walbrook Ins. Co. (1996). 1 W.L.R. 1152.

3. Nature of Unconscionability

Efforts for defining the unconscionability would result in further ambiguity due to amorphousness of its nature[1]. However, there are several available definitions of unconscionability including: Unified Commercial Code in the United States which comments on unconscionability as a principle following the goal of "prevention of oppression and unfair surprise and not of disturbance for the allocation of risks because of superior bargaining power"[2]. In the same vein, in Australia, during the hearing of *Optus Networks Pty Limited v Telstra Corporation Limited*[3], Edmond's J with reference to Australian Trade Practices Act of 1974 [4]mentioned that unconscionability: "includes conduct in respect of which a judge in equity would have been prepared to grant relief".

Therefore, it is necessary to review unconscionability from two different perspectives of procedure and substance. This can be considered the main difference between illegality, fraud, duress, mistake and impossibility with unconscionability.[5] According to Leff, while all above mentioned defences can be viewed either from the perspective of the process of contracting or outcome of the contract, unconscionability can exist both in process and outcome.[6] According to him, procedural unconscionability is in fact "bargaining naughtiness"[7] which displays elements of defect in negotiation process by one party with result in oppression of the other party[8]. On the other hand, substantive unconscionability refers to the ill faith resulted from contact. (Leff, 1967, p. 492)

Many jurisdictions have pointed at unconscionability as a legal tool. For example, section 36 of the Nordic Contracts Act mentions: "If a contract or a term thereof is unfair, or its application would be unfair, it may be adjusted or left unapplied. When considering the unfairness the whole content of the contract, the position of the parties, the circumstances when the contract was made and thereafter and other circumstances shall be taken into account". Article 2-302 of the UCC in the United

[1] Editors Note on "Unconscionability: an attempt at definition" (1969-1970). 31 U Pitt L Rev 333.
[2] UCC Article 2-302.
[3] Optus Networks Pty Limited v Telstra Corporation Limited [2009] WL 1998981 (FCA), (2009) FCA 728.
[4] Australian Trade Practices Act. (1974). Section 51, AA.
[5] Leff, A.A, (1967). Unconscionability and the Code-The Emperors New Clause. 115 U PA L Rev 485.
[6] Ibid.
[7] Ibid.
[8] Horowitz, C. (1986). Comment "Reviving the Law of Substantive Unconscionability: Applying the implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts". 33 UNCLA L Rev 940.

States of America clearly established that: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result". At the same time, Section 51. AA of Australian Trade Practices 1974 provides that: "A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories". As a result, it is possible to conclude that using unconscionability as a legal tool follows the goal of overcoming the problem in common law to set aside contracts which are "clearly oppressive and unfair"[1] but "at the same time not fraudulent"[2].

In the context of documentary letters of credit, judgements of learned judges show that unconscionability is only possible to be defined in a broad sense under terms like absence of good faith.[3] In other case, it was defined as: "Unconscionability to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question... would not by themselves be unconscionable"[4]. Although, experience shows that efforts in clarifying legal position of unconscionability will lead to further ambiguity, but such problems should be expected due to the nature of the term. "The point needs to be made that unconscionability is an equitable creation and some of the primary considerations in its determination is what is commercially reasonable, devoid of mala fides and meets the commercial and contractual expectation of the parties." (Amaefule, 2012, pp. 169-170)

[1] Price, D. (1981). *The conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Fact and Law.* 54 Temp L Q 743, 746.
[2] Ibid.
[3] Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan (2000). 1 SLR 657.
[4] GHL Pte Ltd v Unitrack Building Construction Pte Ltd (1999). 4 SLR 604.

4. Unconscionability in Different Jurisdictions

4.1. Status of Unconscionability under English Law

The English law has history of dealing with unconscionable contracts since 1697. [1]In the case of *Earl of Chesterfield v Janssen*[2], Lord Hardwicke pronounced the term "unconscientious" while ruling on unenforceability of a contract based on presumptive fraud

"It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under a delusion would make on the one hand, and as no honest man and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice."[3]

According to early English cases on the subject matter of unconscionability, it appears that unconscionability were applied to circumstances where fraud, duress, or illegality could not be established. (Enonchong, 2006)

In the framework of documentary letters of credit and bank guarantees, first indication of unconscionability in English law goes back to 1966 in the case of *Elian and Rabbath v Matsas and Matsas*[4], The Court of Appeal held that in system of performance guarantees, there might be circumstances where the bad faith of a party entitles court to erode principle of independence by granting injunction in order to prevent an "irrevocable injustice."[5] However, Lord Denning tried to elaborate the difference between commercial letters of credit and performance bonds but it was not precise and issue was left unclear:

"Now I quite agree that a bank guarantee is very much like a letter of credit. The Courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its due implementation. But that is not an absolute rule. Circumstances may arise such as to warrant interference by injunction. Although the shippers were not parties to the bank guarantee, nevertheless they have a most important interest in it. If the bank pays under this guarantee, they will claim against the Lebanese bank who in turn will claim against the shippers. The shippers will certainly be debited with the account.

[1] Vener, L.J (1984). Unconscionable Terms and Penalty Clauses: A Review of Cases under Article 2 of the Uniform Commercial Code. 89 Com. LJ 403,404.
[2] Earl of Chesterfield v Janssen 2 Ves Sr 125 at 128 Eng. Reprint 821 Atk 30126 Eng Rep 191.
[3] Ibid 155.
[4] Elian and Rabbath v Matsas and Matsas (1966). 2 Lloyds Rep 495.
[5] Ibid 172.

On being so debited, they will have to sue the ship-owners for breach of their promise, express or implied, to release the goods. Are the shippers to be forced to take that course? Or can they short-circuit the dispute by suing the ship-owners at once for an injunction?"[1]

In the Court of Appeal of *Potton Homes Ltd v Coleman Contractors (Oversea) Ltd*[2], Eveleigh LJ in an *obiter dictum* mentioned:

"In principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud will the court restrain the buyer. The facts of each case must be considered. If the contract is avoided or if there is a failure of consideration between the buyer and the seller for which the seller undertook to procure the issue of a performance bond, I do not see why, as between seller and buyer, the seller should not be unable to prevent a call on the bond by the mere assertion that the bond is to be treated as cash in hand."[3]

In support of the opinion that principle of autonomy can be displaced on the basis of other reasons rather than fraud exception, he continued: " [the seller lawfully] avoided the contract prima facie it seems …[the seller] should be entitled to restrain the buyer from making use of the performance bond"[4]. In *TTI Telecom International Ltd v Hutchison 3G UK limited* [5]by referring to recognition of unconscionability as a defence for payment in Singapore, the court held that it can be a reason for displacing the principle of autonomy in performance bonds under English law[6].

However, despite existence of above mentioned *obiter dicta*, unconscionability has no equal position of fraud as recognized exception to the principle of autonomy in documentary letters of credit and it seems that English courts have taken a silent position in terms of its recognition as a defence for payment in international LC transactions as well as bank guarantees and performance bonds.

[1] Ibid.
[2] Potton Homes Ltd v Coleman Contractors (Oversea) Ltd (1984) 28 Build LR 19.
[3] Ibid 20-21.
[4] Ibid.
[5] TTI Telecom International Ltd v Hutchison 3G UK limited (2003). 1 All ER 914.
[6] Ibid.

4.2. Singapore Law

Due to its colonial ties with England, common law system of England has been adopted in Singapore. Accordingly, for a long time, fraud was the only recognized exception to autonomy principle on documentary credits and bank guarantees under Singaporean law. (Johns & Blodgett, 2010, p. 297) However, later court is Singapore got separated from the English law and developed its own unique approach to the subject matter. Following the case of *Patton Homes*[1], two judgements in Singapore found its *dictum* favourable. In *Royal Design Studio Pte Ltd v Chang Development Pte Ltd*[2], court granted an injunction to prevent beneficiary of a performance bond form benefiting from his own wrong[3]. The court's decision was followed rational of granting injunction on the basis of performance in underlying contract and it did not interfere with system of performance bond at all.[4] However, in the case *Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Pte Ltd*[5] court took a different approach and granted injunction against issuer of the performance bond.[6] Above mentioned decisions of Singaporean courts clearly show intention of legal system in this country towards development of new exception to autonomy principle in documentary letters of credit and performance bonds based on unconscionability and bad faith of beneficiary. Those decisions are famous as "implicit unconscionability"[7]. Taking the direction of moving towards "explicit unconscionability" (Johns & Blodgett, 2010, p. 297), the court of *Bocotra Construction Pte Ltd. v. Attorney General (No. 2)*[8] held that sole considerations which amount for granting interlocutory injunction are either fraud or unconscionability[9]. Although, decision of *Bocotra* was contested with later decision of *Civilbuild Pte Ltd. v. Guobena Sdn Bhd*[10] on the basis that unconscionability might affect the moral rights but it does not affect the legal right of beneficiary for receiving payment under LC or performance bond[11], subsequent cases established it as an

[1] Potton Homes Ltd v Coleman Contractors (Oversea) Ltd (1984) 28 Build LR 19.
[2] Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1990] 1 SLR 1116.
[3] Ibid 314.
[4] Ibid.
[5] Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Pte Ltd [1993], 3 SLR 350.
[6] Ibid.
[7] (1990). 1 SLR 1116, 314.
[8] Bocotra Construction Pte Ltd. v. Attorney General (No. 2) [1995) 2 S.L.R. 733.
[9] Ibid 747.
[10] Civilbuild Pte Ltd. v. Guobena Sdn Bhd [1999]1 SLR 374.
[11] Ibid 375.

exception to autonomy principle in documentary letters of credit under Singaporean law.

In *Dauphin Offshore Engineering & Trading Pte Ltd. v. Private Office of HRH Sheikh Sultan bin Kalifa bin Azyed al Nahyan,*[1] the court ruled that unconscionable conduct of party in the framework of underlying contract would be enough reason for granting interlocutory relief on the basis of *providing prima* facie evidence of unconscionability.[2] In an endeavour to clarify the notion of unconscionability, court of *McConnell Dowell Constructors (Aust) Pty Ltd v Sembcorp Engineers and Constructors Pte Ltd*[3]held that case of unconscionability should deal with an element of unfairness.[4] Also, confirming the decision of *Dauphine*, in terms of the need to approach the unconscionability on the case by case basis rather than providing an overall definition for it, the court of *Hiap Tian Soon Construction Pte Ltd v Hola Development Pte Ltd*[5] held: "…what kind of situation would constitute unconscionability would have to depend on the facts of each case. There is no pre-determined categorization[6].

It is possible to conclude that following points apply to position of Singapore towards unconscionability defence: in Singapore, unconscionability is recognized as an independent defence to autonomy principle in addition to fraud. Despite existence of problems in clarifying the notion of unconscionability, it is fully recognized. Due to application of exception to performance bonds, it is possible to mention that it is also recognized under LC law of Singapore. Last but not the least, recognition of unconscionability defence in Singapore has not provoked any criticism about negative effect of its subjective nature on process of international trade. Finally, the Singapore Court of Appeal confirmed in the recent case of *JBE Properties Pte Ltd v Gammon Pte Ltd*[7] "juridical basis for adopting unconscionability as a relevant ground (separate from and independent of fraud) lies in the equitable nature of the injunction. Considerations of unconscionability are applicable in relation to the use of the injunction in other areas of the law, and there is no reason why these

[1] Dauphin Offshore Engineering & Trading Pte Ltd. v. Private Office of HRH Sheikh Sultan bin Kalifa bin Azyed al Nahyan (2000). 1 S.L.R. 657.
[2] Ibid 672.
[3] McConnell Dowell Constructors (Aust) Pty Ltd v Sembcorp Engineers and ConstructorsPte Ltd (2002). 1 SLR 199.
[4] Ibid.
[5] Hiap Tian Soon Construction Pte Ltd v Hola Development Pte Ltd (2003). 1 SLR 667.
[6] Ibid.
[7] JBE Properties Pte Ltd v Gammon Pte Ltd (2010). SGCA 46.

considerations should not be applied for the purposes of determining whether a call on the performance bond should be restrained so as to achieve a fair balance between the interests of the beneficiary and those of obligor."[1]

4.3. Australian Law

In Australian law, unconscionability has different position as it is subjected to legislative effect of Australian Customer Law Act. Currently, it is governed by Section 20 (1) of the Australian Consumer Law Act of 2010 as the reproduction of Section 51 AA of Trade Practices Act 1974. Interestingly, the Section 51 AA did not provide any definition for unconscionability, mandated the court to use the "unwritten law, from time to time, of the States and Territories"[2]which is equal to the common law of the Australia[3]. The first record of dealing with unconscionability under letter of credit and performance guarantee law in Australia goes back to 1985 and case of *Hortico (Australia) Pty. Ltd. v. Energy Equipment Co. (Australia) Pty. Ltd*[4]. Where in an *obiter dicta*, State Court of New South Wales stated that: "it does not seem to me that anything short of actual fraud would warrant this Court in intervening, though it may be that in some cases (not this one), the unconscionable conduct may be so gross as to lead to [the] exercise of the discretionary power."[5] And, recognized the possibility for unconscionability as a ground for granting injunctions under common law of Australia. Eleven years later, Victoria State Supreme Court accepted the unconscionability as a defence for payment in *Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd*[6] under letter of credit and performance bonds but, on the basis of different reasoning than *Hortico*. In this case, plaintiff Olex Focas the provider of communication, power cables and telecommunication equipment, entered a contract with defendant Skodaexport, the contractor for construction of oil pipeline in India.[7] In order to start the work, Olex Focas received two payments from defendant in return for two bank guarantees protecting it from loss of advanced payments. Upon delay of Olex Focas in starting the work, dispute started between parties and defendant made request for payment under bank guarantees. Olex Focas sought injunction against bank from paying under guarantees and Skodaexport from

[1] Ibid.
[2] Trade Practices Act 1974, Section 51 AA (1), available at, http://www.chartermerc.com.au/pdfTradePractices%20act/201974.pdf. Accessed 10 July 201.
[3] Lange v Australisan Competition and Consumer Commission v Samton Holdings Pty Ltd & Ors (2002). 117 (FCR) 301.
[4] Hortico (Australia) Pty. Ltd. v. Energy Equipment Co. (Australia) Pty. Ltd [1985] 1 NSWLR 545.
[5] Ibid 554.
[6] Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd No. 6282, 1996 VIC LEXIS 1245.
[7] Ibid.

receiving payment. In the process of hearing, court rejected granting injunction based on common law despite existence of *Hortico* dictum and held: "[if unconscionability] were a ground, even allowing for the considerable growth in importance of unconscionability as a sword and a shield in Australian jurisprudence of late one would expect it to have been mentioned in the cases much earlier."[1] However, final judgement of the court of Olex Focas was in favour of issuing injunction based on the statutory law of Australia[2]. Later, the court of *Boral Formwork v Action Makers*[3]difficulties with clarification of definition for unconscionability under the law of documentary letters of credit became more evident where the court decided to grant a temporary injunction on the basis of Section 51 AA and in accordance with the decision of Olex Focas. The decision of Barol shifted the inquiry on position of unconscionability in Australian law from rule-based criteria which aimed at protecting the application of the principle of autonomy to the fact based criteria which determines level of judge's tolerance towards degree of unconscionability in beneficiary's conduct. (Johns & Blodgett, 2010, p. 324)

In the case of *Clough Engineering Ltd v Oil and Natural Gas Corporation Limited (No 2)*[4], it was held that injunction under Section 51 AA is available for unconscionability in addition to common law defence for fraud. [5] In case of *Clough Engineering Ltd*, action was taken by plaintiff to prevent a customer from drawing bank guarantees provide by plaintiff against risk of his failure under a construction contract between parities.[6] *Oil and Natural Gas Corporation Limited (*customer) applied for drawing under guarantees based on claim that *Clough Engineering Ltd* breached the underlying contract.[7] Plaintiff in return claimed that drawing under guarantees is unconscionable as breach of contract was the result of earlier breaches by the customer.[8] Further, court provided following definition unconscionability: "under the unwritten law, which is the common law of Australia, unconscionable conduct will be such conduct as would support the grant of relief on principles set

[1] Ibid 60-61.
[2] Section 51 AA of Australia Trade Practices Act 1974.
[3] Boral Formwork v Action Makers (2003) ATPR 41-953[14].
[4] Clough Engineering Ltd v Oil and Natural Gas Corporation Limited (No 2) (2008) FCAFC 136.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid.

out in specific equitable doctrines. Equity does not provide a remedy in respect of conduct in trade or commerce which is, in the opinion of a judge, unfair".[1]

Following the line of the development of unconscionability exception in Australian law, it is possible to conclude that it has been recognized as a defence for payment against autonomy principle of documentary letters of credit despite existing confusions around it statutory development parallel to common law.

4.4. American Law

Uniform Commercial Code of the United States of America does not recognize unconscionability or bad faith in addition to fraud and forgery as provide by article 5-109. Therefore, it would not be possible for claimant in the United States to seek for interlocutory relief when the conduct of beneficiary is tainted with bad faith but does not amount for fraud or forgery[2]. In American case of *Mid-America Tire v PTZ Trading Ltd Import and Export Agents*[3]Valen J. In a dissenting view with other judges mentioned that beneficiary is guilty of fraud as a result of violating his obligations of good faith, diligence, reasonableness and care. However, it is submitted that violation of none of the above mentioned obligations would not amount for fraud[4]

4.5. Malaysia Law

In Malaysia, like England, fraud is the only recognized exception to the principle of autonomy in documentary letters of credit. In the case of LEC *Contractors Sdn Bhd v. Castle Inn Sdn Bhd*[5], with reference to English courts, the Court of Appeal of Malaysia held: "… authorities we have referred to clearly indicate that in order to justify any injunction to stop payment there must be clear evidence of fraud on the part of the first defendant which comes to the knowledge of the second defendant. Bad faith or unconscionable conduct by itself is not fraud"[6]. This position was reflected in the High Court case of *Mitsubishi Corp & Ors v Sepangar Bay Power Corp Sdn Bhd*[7]where claimant was asking to restrain beneficiary from drawing under the performance bond based on unconscionability. Kang Gee J with reliance on

[1] Ibid.
[2] Enonchong, N. (2011), p. 181.
[3] Mid-America Tire v PTZ Trading Ltd Import and Export Agents 2000 Ohio App, LEXIS 5402, 43 UCC Rep. Serv 2ed 964 (2000).
[4] Enonchong, N. (2011), p. 181.
[5] LEC Contractors Sdn Bhd v. Castle Inn Sdn Bhd (2000). 3 MLJ 339.
[6] Ibid 361.
[7] Mitsubishi Corp & Ors v Sepangar Bay Power Corp Sdn Bhd (2009). 9 MLJ 121.

decision of LEC *Contractors* rejected the argument that unconscionability could be an exception to autonomy principle of documentary letters of credit and performance bonds.[1]

However, Hishamodin J in the case of *Pasukhas Construction Sdn Bhd v MTM Millennium Holdings Sdn Bhd*[2]despite being bond with principle of *LEC Contractors* which recognized fraud as the only exception to autonomy principle, showed his regret for being bound to follow such decision under the principle of binding precedent. Further, he commented on unconscionability recognized as defence for payment in the Court of Appeal decision of *Bocotra Construction*[3] as a sound principle.[4]

Further, in two Malaysian cases, *Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor*[5] and *Perkasa Duta Sdn. Bhd. v Perbadanan Kemajuan Negeri Selangor*[6] unconscionability conduct considered to be a ground for restraining payment to beneficiary. In *Nafas Abadi*, Suriyadi J was of the opinion that commercial documentary letters of credit and performance bonds are at the same legal ground and fraud is a recognized exception to principle of autonomy in both instruments. He held that: "I do not think it is possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. In our opinion, fraud and unconscionability are considerations in application for injunction restraining payment or calls on bonds"[7]. Similar decision was taken in latter case that the court has authority to interfere in process of documentary letters of credit ad enjoin beneficiary on the basis of unconscionably.

It is possible to conclude that under Malaysian law, position of the Court of Appeal is in favour of fraud as the only exception to the principle of autonomy in documentary letters of credit. However, sympathy of lower courts towards unconscionability as separate defence to payment which was even resulted in its adoption in some cases creates doubt about rational of higher court.[8] On the other hand, despite existence of support in Malaysian courts towards recognition of unconscionability, it would not be recognized as a separate exception to autonomy

[1] Ibid.
[2] Pasukhas Construction Sdn Bhd v MTM Millennium Holdings Sdn Bhd (2009). 8 MLJU 0025.
[3] (1995). 2 SLR 733.
[4] (2009). 8 MLJU 0025.21.
[5] Nafas Abadi Holdings Sdn Bhd v Putrajaya Holdings Sdn Bhd & Anor (2004). MLJU 148.
[6] Perkasa Duta Sdn. Bhd. v Perbadanan Kemajuan Negeri Selangor (2002) 2 CLJ 307.
[7] (2004). MLJU 148, pp. 3-6.
[8] Bains Harding (Malaysia) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd (1996). 1 MLJ 425.

principle in documentary letters of credit and performance bonds unless appellate court decides otherwise. (Amaefule, 2012, p. 182)

4.6. UN Convention

The United Nations Convention on Independence Guarantees and Standby Letters of Credit recognizes bad faith as reason for issuer to spot payment. According to article 15(3) of the Convention, in occasion of demanding the payment, beneficiary "is deemed to certify that the demand is not in bad faith and that none of the elements referred to in sub paragraph (a), (b) and (c) of paragraph 1 of the article 19 are present"[1]. Accordingly, article 19-1 (a) is concerned with falsified and non-genuine documents. Subparagraph (b) is concerned with points "where no payment is due on the basis asserted in the demand and the supporting documents" which seems more relevant to fraud exception. Subparagraph (c) is about circumstances where "judging by the type and purpose of the undertaking, the demand has no conceivable basis". Further, article 19- 2 provides:

"(2) For the purposes of subparagraph (c) of paragraph (1) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;

(e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates"[2]

[1] The UN Convenion article 15-1Radio & General Trading Co Sdn v Wayss & Freytag (Malaysia) Sdn Bhd (1997) MLJU 462; Pasukhas Construction Sdn Bhd & Anor v MTM Millennium Holdings Sdn Bhd & Anor (2009). 8 MLJ (210).
[2] Ibid, Article 19-2.

It is submitted that situation in which demand does not have a conceivable basis are similar to the effect of unconscionability under jurisdictions which recognize it.[1] However, application of the UN convention would provide less flexibility in application of the exception as number of circumstances which amount for unconscionability under article 19-1 (c) and 19-2 are limited. For example, in application of above mentioned articles, court might not be able to grant injunction when bad faith demand is for excessive demand. Since excessive demand is not recognised by the convention among demands with no conceivable basis.

4.7. Uniform Customs and Practices for Documentary Letters of Credit

The UCP is set of rules prepared by International Chamber of Commerce regulating the application, issuance, advise, confirming, negotiation, reimbursement and requirements for documentary compliance under the LC operation in addition to rules relevant to fundamental principles of documentary letters of credit.

Current version of UCP (600) takes an absolute silent position towards exceptions to principle of autonomy in documentary letters of credit and leaves it open for national laws.

5. Standard of Proof

The standard of proof for claim on the basis of unconscionable conduct of beneficiary against autonomy principle of documentary letters of credit has two different aspects. First is the claim of applicant to enjoin beneficiary from drawing under the credit on the basis of unconscionability. Second is the claim of applicant to enjoin bank from payment against unconscionable demand of beneficiary to draw under the credit. Therefore, dealing with standard of proof, two main questions should seek for answer: what is the standard of proof at pre trail stage for applicant to prevent beneficiary from claiming unconscionable demand under the credit and second question is what is the standard of proof at full trail?

5.1. Singapore

In Singapore, case law is not very clear on answering the question of what is the standard of proof to issue interlocutory injunction at pre trail stage. Some authorities held that depending on the circumstances of each case, the court has discretion to grant interlocutory injunction when applicant establishes the case of

[1] Enonchong (2011), 183.

unconscionability.[1] Since there is no clarity in above mentioned decision whether to apply a high or law standard, it is submitted that it does not help in defining the required standard of proof. However, two major trends can be followed in Singaporean authorities regarding the standard of proof for unconscionability. Namely high standard in early cases and more flexible standard in recent cases. The High Court in *Raymond Construction Pte Ltd v Low Yang Tong*[2] held if a contractor is applying to enjoin employer from drawing under performance bonds, it is not sufficient to bring allegations of unconscionability. In order to grant an interlocutory injunction, court requires strong prima facie evidence of established unconscionability[3]. In the case of *Bocotra*[4], the court was of the opinion that "a higher degree of strictness applies'. It was his contention that to establish unconscionability, the principal must 'establish a clear case in interlocutory proceedings. It is clear that mere allegation is not enough."[5] However, since end 1990s, it seems that Singapore courts have adopted a lower standard of proof. In *GHL v Unitrack*[6], the court held that: "where there is a prima facie evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated"[7].

5.2. Australia

In Australia, due to statutory recognition of unconscionability a different standard of proof is required than the one asked by Singaporean courts. In the case of *Western Australia v Vetter Trittler*[8], court was of the opinion that: "that a prima facie case is made out, if, on the material before the Court, inferences are open which if translated into findings of fact would support the relief claimed"[9]. This is the sign of traditional approach of Australian courts to requirement for claimant to establish the existence of prima facie cases as standard of proof for grating interlocutory injunction. In the case of *Australian Broadcasting Corporation Ltd v O'Neil*[10], by reliance on decision of *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[11],definition of prima facie was

[1] Samwoh Asphalt Premix v Sum Cheong Piling Pte Ltd (2002) SLR 459 (CA).
[2] (1993). 3 SLR 350.
[3] Ibid.
[4] 565 (1995). 2 SLR 733, 744.
[5] Ibid.
[6] GHL v Unitrack 568 (1999) 4 SLR 604.
[7] Ibid 614-16.
[8] Western Australia v Vetter Trittler (1991) 30 FCR 102, 110.
[9] Ibid.
[10] Australian Broadcasting Corporation Ltd v O'Neil (2006). 80 ALJR 1672.
[11] Beecham Group Ltd v Bristol Laboratories Pty Ltd (1968). 118 CLR 618.

provided as: "By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. This was the sense in which the Court was referring to the notion of a prima facie case."[1]

Within the context of documentary letters of credit, in the case of *Clough Engineering Ltd v Oil and Natural Gas Corporation Limited*[2]with reliance on the same approach, it was held that in order to grant an interlocutory injunction in favour of plaintiff (Clough) in order to prevent defendant from drawing under performance bonds a prima facie case of unconscionably under the terms of Trade Practices Act (1974) should be established.

Also it is necessary to point at approach of Australian courts to the standard of proof at full trail. It is submitted that standard of proof for unconscionability at full trail is the same as standard of proof for establishing fraud in civil proceedings. Being a civil law notion (in opposite to criminal law), the standard of proof for unconscionability is the same at full trial in all civil proceedings. As a result, case law in common law jurisdictions point at balance of probabilities as requirement for establishing unconscionability at full trail[3]. In contract with Singapore and Malesia which do not consider the necessity to exercise the balance of convenience, another enquiry in Australian law in addition to the standard of proof is where the balance of convenience lies. After the providing prima facie evidence of unconscionability, claimant should stratify where the balance of convenience lies in order to get interlocutory injunction granted in his favour. (Amaefule, 2012, p. 326)

6. Recognition of Unconscionability in English Law

There are reasons in public policy for advocating recognition of the unconscionability exception to the autonomy principle in LC transaction under English law. However, there are strong reasons against its recognition as well. As to settling the controversy between recognition or rejection of the exception in respect to policy, some scholars are of the opinion that rationales against recognition of the

[1] (2006). 80 ALJR 1672 (65).
[2] Clough Engineering Ltd v Oil and Natural Gas Corporation Limited (2007). FCA 927.
[3] The same standard of proof is required in England, Australia, Malesia and Singapore.

exception in English law outweigh the supportive ones. (Enonchong, 2011, p. 169) Current section of will tap the issue of policy reasons for and against recognition of unconscionability exception to autonomy principle of documentary letters of credit in English law.

6.1. Rationales for Recognition of Unconscionability Exception.

6.1.1. Long History for Recognition of Unconscionability in English Law

The history for application of unconscionability as a vitiating factor of contact in English common law goes back to 1697 and the case of *Earl of Chesterfield v Janssen*[1] where Lord Hardwicke held: "where no man in his right senses and not under a delusion nor an honest and fair man would accept on the other hand that which is inequitable and unconscientious…"[2]. Unlike the *Earl of Chesterfield v Janssen,* which was only limited to application of unconscionability in case of vulnerable group, decisions of *Multiservice Bookbinding v Marden*[3], *Alec Lobb v Total Oil*[4]*and Ruddick v Ormston*[5]provided a wider application of unconscionability defence in English law almost applicable to any type of contract. It is submitted that above mentioned cases suggest "a general principle entitling a court to intervene on the grounds of unconscionability"[6].As a result, historical recognition of the exception in English common law is a strong reason for its application in the framework of documentary letters of credit in order to displace autonomy principle. In fact, there are Obiter Dicta's in case law which support the idea of application of unconscionability exception in documentary letters of credit.[7] Despite the fact that some of them are on performance bonds, it was held in *TTI Team Telecom International v Hutchinson 3G UK Ltd* that "Although this case is concerned with a contract describing itself as a performance bond, the principles governing the court's supervisory jurisdiction in relation to a beneficiary's threatened call are not limited to bonds... These credits are used to finance, secure or assist an underlying commercial transaction whether of sale, services or the provision of work and

[1] 28 Eng. Rep. 82 (Ch. 1751).
[2] Ibid.
[3] Bookbinding v Marden (1979) Ch 84.
[4]Alec Lobb v Total Oil (1983) 1WLR 87.
[5] Ruddick v Ormston (2005) EWHC 2547.
[6] Siopis. A, (1984) 'Unconscionable Bargains and General Principle' 100 LQR 523, 525.
[7] Elian and Rabbath v Matsas (1966) 2 Lloyds Rep 495; TTI Team Telecom International v Hutchinson 3G UK Ltd (2003) 1 All ER 914; Samwoh Asphalt Premix v Sum Cheong Pilling Pte Ltd. (2002) BLR 450; Mc Connell Dowell Constructors (Aus) Pty Ltd v Sembcorp Engineering and Constructors Pte. Ltd. (2002) BLR 450.

materials and to give comfort to one party to that transaction that the other party will honour or discharge a payment obligation to which that underlying transaction subjects it to"[1].

6.1.2. Complementary to fraud exception

The principle rational in supporting the recognition of unconscionability exception is complementary role which it plays to cover existing gap from non-effective application of fraud rule.[2] In fact, unconscionability defence can be an effective way to prevent abusive call when fraud rule and even breach of underlying contract are not available[3] It worth to mention that apart from recognition of only fraud exception to autonomy principle of letters of credits in England, application of fraud rule is extremely difficult due to problems in proving elements of common law fraud like knowledge, intention, and dishonesty. For example in the case of *Discount Records Ltd v Barclays Bank Ltd*[4] the court ordered for fraud not to be established despite existence of substantial evidence on inferiority of number and quality of goods delivered in comparison with what was promised in underlying contract. Therefore, in circumstances where reliance on fraud rule is not rendered in abusive and *mala fide* calls under primary payment obligations, unconscionability exception can provide court with a complementary mechanism to prevent beneficiary in benefiting from his wrong. According to Enonchong, courts may try to extend boundaries of fraud while protecting good faith claimant and granting injunction against abusive demand of *mala fide* defendant[5]. However, such extensions might create criticisms as of not being justifiable under fraud rule.[6] Recognition of unconscionability exception provides possibility to displace autonomy principle in circumstances where request for drawing under credit is missing the proof of fraud but it is at the same time abusive and unconscionable.

6.1.3. Flexibility

Flexible nature of unconscionability exception refers to possibility to make it suitable for different facts and circumstances in absence of strict preconditions for its application. Experience of courts in Singapore, to use flexible nature of

[1] (2003) 1 All ER 914.
[2] Enonchong, N. (2011), 169.
[3] Ibid.
[4] Discount Records Ltd v Barclays Bank Ltd (1975) 1 WLR 315.
[5] Enonchong N. (2007). The Problem of Abusive Calls on Demand Guarantees LMCLQ 97, 104.
[6] Bolivinter Oil SA v Chase Manhattan Bank NA (1984) 1Lloyd's Rep. 251.

unconscionability in preventing abusive calls under demand guarantees which fall short of being actual fraud is a very good explanation for this rational.

6.1.4. Recognition of Unconscionability in other Jurisdictions

Some other common law jurisdictions have already recognized unconscionability in addition to fraud as a defence to autonomy principle of documentary letters of credit and performance bonds. In Singapore, (at least in term of performance bonds) unconscionability is an established exception to principle of autonomy. In Australia, it has statutory nature under Australian Consumer Law Act with application to common law of Australia including international sales of goods which clearly prevents payment under unconscionable demands.

6.2. Rationales against Recognition of Unconscionability Exception

6.2.1. Vague Nature of Unconscionability

The very first rational against recognition of unconscionability in English law is going back to its uncertain nature. (Enonchong, 2011, p. 170) There is no doubt that its recognition as a defence against autonomy principle in letter of credit process will create lots of impression in the area of law which requires utmost level of clarity. As experienced in Singapore, recognition of unconscionability may lead to high number of legal cases and increase number of claims against beneficiary's right to draw under the performance bond or commercial letter of credit[1]. Such increase in number of litigations will definitely reduce the attractiveness of documentary letters of credit and performance bonds as a financial tool in business society.

However, it should be noted that uncertainty (particularly in international trade) is an inherent part of the business life which also applicable to the operation of documentary letters of credit and performance bonds.[2]The argument of uncertainty also can be refuted with reference to argument of Toohey J on conscionability in

[1] Anvar v Teo Hee Lai Building Constructing Pte Ltd (2003) 1 SLR 394; Samwuth Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd (2002) 1 SLR; Mc Conell Dowell Constructors (Aust) Pty Ltd v Sembcorp Engeneers and Constructors Pte Ltd (2002) 1SLR 199; Dauphin Offshore Engineering & Trading Pte Ltd. v. Private Office of HRH Sheikh Sultan bin Kalifa bin Azyed al Nahyan (2000) 1 SLR 627; Electro International Pte Ltd v CGH Development Pte Ltd (2000) 4 SLR 290.

[2] (Cardozo, 1921, p. 166; Klau, 1990, p. 511): "I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile.... As the years have gone by, and as I have reflected more and more on the nature of judicial process, I have become reconciled to uncertainty, because I have grown to see it as inevitable. I have grown to see the process in its highest reaches, is not discovery but creation: and that the doubts and misgiving, the hopes and fears, are part of the mind, the pangs of death and the pangs of birth, in which principle that have served their day expire, and new principles are born."

Louth v Diporose[1]: "although the concept of unconscionability has been expressed in fairly wide terms, the courts are exercising an equitable jurisdiction according to recognized principles. They are not armed with a general power to set aside contractual bargains simply because in the eyes of the judges, they appear to be unfair, harsh or unconscionable"[2]. Application of Toohey J's opinion on LC operation leads us to the point that courts do not decide with full discretion while invoking the unconscionability but acting on the basis of recognized principle, they exercise an equitable jurisdiction[3]

6.2.2. Eroding the Effectiveness of Autonomy Principle by Granting Higher Number of Injunctions

It is submitted since it is easier to establish unconscionably than fraud, recognition of unconscionability as an exception to autonomy principle will increase the number of injunctions against beneficiary which will consecutively reduce reliance of businessmen on documentary letters of credit[4]. However, point should not be missed that standard of proof required for claimant is to provide evidences which show unconscionability is "significant and clearly established"[5]. Also, in the case of *Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd*.[6] It was held that for injunction to be granted in favour of claimant in the process of LC transaction, he should establish that in addition to cause of action against defendant, balance of convenience also lies in his favour. Such prerequisite for granting injunction is a matter of great difficulty for claimant and can be used as a complementary argument to refute doubts about increasing number of pre-trial relief issue by court after recognition of unconscionability exception.

6.2.3. Involving Banks in Disputes over the Underlying Contract

There is likelihood that recognition of unconscionability exception would lead banks to get involved in disputes related to underlying contract, whereas such disputes should be resolved under different claims. This will lead to court's involvement in determining what are losses incurred by beneficiary and in cases the beneficiary in holding some security whether or not the remedies for breach would be more than

[1] Louth v Diporose (1992). 175 CLR 621.
[2] Ibid.
[3] Ibid 654.
[4] Enonchong, N. (2007). The Problem of Abusive Calls on Demand Guarantees, LMCLQ 97, p. 104.
[5] TTI Team Telecom International V Hutchinson 3G (2003) 1 All ER 914 (37).
[6] Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd (1999). 2 Lloyd's Rep 187.

securities held by beneficiary[1]. However, the main objective of letter of credit system is to provide beneficiary with guarantee of bank that he would be paid before raising any disputes in underlying contract rather than pending his payment up to resolution of such disputes. As a result, recognition of unconscionability exception would be against the purpose of the letter of credit system up to the extent which it depends the payment to beneficiary on resolution of disputes relevant to underlying contract.

However, it has been argued that the same point applies to fraud exception as it also will let court to prevent payment to beneficiary until disputes on performance in underlying contract is settled.

7. Conclusion

Current paper tried to review nature and legal arguments relevant to unconscionability as an exception to principle of autonomy in documentary letters of credit. For this purpose, approach of different jurisdictions to unconscionability was examined, standard of proof and case law in countries which accepted the exception was analysed and reason for and against adoption of exception in English law were scrutinized. While application of unconscionability would amount for injunction against beneficiary or bank in the same manner as fraud and other exceptions to the principle of autonomy, the difference lays in the fact that injunction would be granted to stop unconscionable (or extra) demand. Beneficiary is however, entitled to receive in the balance.

While principle of autonomy has created stability and certainty to the system of documentary letters of credit, there are lots of arguments that recognition of an additional exception to fraud against the principle of autonomy will affect the certainty in process LC transaction negatively. Therefore, it would not be easy to say whether or not English law will recognize it. However, despite need for acknowledgement of all criticisms against unconscionability, there are sufficient arguments like historical recognition of unconscionable conduct in English law, filling the gap resulted in application of fraud rule, flexibility provided by it to the court to define the degree of unconscionability of beneficiary based on the facts in each case as well as its recognition in other common law jurisdictions which support its recognition.

[1] Anvar v Teo Hee Lai Building Constructing Pte Ltd (2003). 1 SLR 394.

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