Astrata (Singapore) Pte Ltd *v* Tridex Technologies Pte Ltd and another and other matters [2010] SGHC 250

Case Number : Originating Summons No 168 of 2010, Originating Summons No 171 of 2010 and Originating Summons No 690 of 2010

Decision Date : 26 August 2010

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Gerald Kuppusamy, Fong Lee Cheng & Shawn Lee (Wong & Leow LLC) for the plaintiff Davinder Singh SC and Jaikanth Shankar (Drew & Napier LLC) for the first defendant Ronald Choo and Ang Siok Hoon (Rajah & Tann LLP) for the second defendant.

Parties : Astrata (Singapore) Pte Ltd — Tridex Technologies Pte Ltd and another

Civil Procedure – Injunctions

Civil Procedure – Interpleader

Banking – Performance bond

[LawNet Editorial Note: The plaintiff's (a) application for leave to appeal in Originating Summons No 1082 of 2010 was granted; and (b) appeals in Civil Appeals Nos 158 and 159 of 2010 were dismissed, by the Court of Appeal on 29 April 2011. See [2011] SGCA 20.]

26 August 2010 Judgment reserved.

Philip Pillai J:

1 The plaintiff is Astrata (Singapore) Pte Ltd ("Astrata"), a company incorporated in Singapore. It is part of the Astrata group of companies, of which the ultimate holding company is Astrata Group Incorporated ("AGI"), a company incorporated in Nevada, USA.

2 The first defendant is Tridex Technologies Pte Ltd ("Tridex"), a company incorporated in Singapore. The second defendant, Portcullis Escrow Pte Ltd ("the Escrow Agent" or "PEPL"), is the escrow agent pursuant to an Escrow Agreement dated 23 October 2007 ("the Escrow Agreement").

3 Astrata is in the business of designing and developing advanced location based information technology services and solutions (telematics) that combine global positioning systems, wireless communication (satellite or terrestrial) and geographical information technology. These solutions enable businesses, institutions and governments to monitor, trace and control the movement and status of machinery vehicles, personnel or other assets. Tridex is a Singapore incorporated company which is the interposed contracting entity under the Supply Agreement but the system is to be installed, tested and delivered to the end user, which is a state.

4 Astrata and Tridex entered into a Supply Agreement dated 10 April 2007 under which Astrata undertook to further develop and adapt its existing designs and software for installation behind vehicle licence plates on a nationwide application and supply the same ultimately to the state. The contract sum which is approximately US$ 95.6m provides for ongoing supply, testing and installation

over a period of time against phases of milestone completion and whilst the Supply Agreement sets out the principal obligations of the parties, it expressly provides that it is to be supplemented and modified from time to time by points of agreement ("POA") of which there are twelve. The Supply Agreement is by its terms governed by English law and the parties have agreed that disputes thereunder be resolved by ICC arbitration.

5 The deliverables under this Supply Agreement are a system ("the System") which comprises the E-Plate and Command and Control Backend and includes components, installation guides, operators and user manuals. The E-Plate is a bespoke licence plate enclosure to be installed on vehicles which contains a Logic Centre. The Logic Centre comprises an electronic package containing GPS location, computer and cellular communication devices which is embedded in the E-Plate. The Command and Control Backend ("CCB") is the hardware and software to the backend operations of the System. The functional requirements of the System are set out in the System Function Requirements in Appendix 2 of the Supply Agreement.

6 The Supply Agreement required Astrata to provide a performance bond which is to be released only upon the successful completion of the Command and Control Backend Acceptance Test Procedure within the time frame prescribed. The performance bond has been issued by OCBC Bank and Tridex has called on this bond. The Supply Agreement prescribes testing and installation milestones which have a bearing on the Call Injunction Application.

7 The Supply Agreement POA#7 provides for Astrata to regularly deliver updated comprehensive source codes and comprehensive engineering diagrams from time to time to an escrow agent to be appointed. Astrata, Tridex and PEPL thereafter entered an Escrow Agreement dated 23 October 2007 under which PEPL was appointed Escrow Agent and Astrata was from time to time to deposit the comprehensive source codes ("Source Codes") and comprehensive engineering diagrams ("Diagrams") with the Escrow Agent. The Escrow Agreement by its terms is governed by Singapore law and the parties have agreed to submit disputes to the non-exclusive jurisdiction of the Singapore courts.

8 Briefly, all of the several applications before me, apart from the Call Injunction Application, have been brought into play by reason of AGI, a Nevada corporation, entering a United States Chapter 11 process. As a result, Tridex is saying that its rights under clause 7(i)(c) of the Escrow Agreement to the delivery of the Source Codes and Diagrams deposited with the Escrow Agent have been triggered. Astrata is disputing this, and the Escrow Agent has also interpleaded and sought a declaration on the construction of clause 7(i) (c) of the Escrow Agreement under Singapore law.

9 There are three originating summonses ("OS") before me as follows:

(a) Originating Summons No 171 of 2010 ("OS 171 of 2010") ("the Interlocutory Injunction Application") by Astrata seeks an interlocutory injunction ("the Interlocutory Injunction") to restrain:

(i) Tridex from demanding/calling for the release of the Documents (defined below) held under escrow by the Escrow Agent; and

(ii) the Escrow Agent from breaking escrow and/or releasing the Documents it holds under escrow,

until the dispute between them is heard and determined by an arbitral tribunal, and until this application and any appeal arising therefrom is heard and finally determined.

(b) Originating Summons No 690 of 2010 ("OS 690 of 2010") ("the Declaration Application") by the Escrow Agent seeks, *inter alia*:

(i) a declaration ("the Declaration") on whether, as at the date of the Order to be made hereon, the conditions set out in the Escrow Agreement (in particular, clauses 7(i)(c) and 7(ii)(b) thereof), have been satisfied such that Tridex is entitled to demand the release of the Comprehensive Source Code and the Comprehensive Engineering Diagrams (as defined in the Escrow Agreement);

(ii) pending a decision on (i) above, the Escrow Agent be granted interpleader relief ("the Interim Interpleader Relief") and excused from making a decision as to whether the clauses 7(i)(c) and 7(ii)(b) of the Escrow Agreement have been satisfied such that Tridex is entitled to demand the release of the Source Codes and the Diagrams;

(iii) the Escrow Agent be allowed to follow and rely entirely on the Order(s) of the Court in connection with the safe keeping, inspection and release of the Source Code and Diagrams held in escrow pursuant to the Escrow Agreement; and

(iv) costs of this application be provided for on a full indemnity basis.

Within the Declaration Application, there is an application ("the Stay Application") via Summons No 3264 of 2010/E in OS No 690 of 2010 by Astrata praying, *inter alia*, for a stay ("the Stay") of all further proceedings in the action pursuant to section 11A of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), Astrata and Tridex having by an agreement in writing dated 10 April 2007 agreed to refer to arbitration the matters in respect of which the Escrow Agent's action is brought.

(c) Originating Summons No 168 of 2010 ("OS 168 of 2010") ("the Call Injunction Application") by Astrata is seeking an injunction ("the Call Injunction") to restrain Tridex from making a call on, and OCBC Bank from releasing monies held pursuant to a performance bond issued by OCBC Bank ("the Performance Bond").

The Interlocutory Injunction Application

10 It is common ground that the Interlocutory Injunction Application, the Declaration Application and the Stay Application all turn upon the construction of clause 7 of the Escrow Agreement between Astrata, Tridex and the Escrow Agent. Accordingly I would deal with the three OSes in the order I have introduced them above.

Background to the dispute

11 Clause 13 of the Supply Agreement between Astrata and Tridex originally provided for the

delivery by Astrata to Tridex of the intellectual property rights in various documents, which including the Source Codes and the Diagrams for the Project "on the Final Phase 1B E-Plate Payment date".

12 Subsequently, the parties entered into POA#7. In POA#7 the Parties' agreed to put the Source Codes and the Diagrams into escrow, and to enter into a three-party escrow agreement with David Chong & Company. David Chong & Company is an entity related to the Escrow Agent. In para 1(v)(d) of POA#7 the parties agreed that clause 7(i)(c) of the Escrow Agreement would contain conditions for the release of the escrow documents in essentially the same terms as those in paragraph 1(v)(a) to paragraph 1(v)(c) of POA#7.

13 On 6 August 2009, AGI filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code Chapter 11 and its final Plan of Reorganization ("AGI's Chapter 11") was confirmed by the competent United States court on 15 December 2009 and became effective as of 4 January 2010. Tridex sent a letter dated 5 February 2010 to the Escrow Agent and copied to Astrata. In this letter, Tridex, having produced AGI's Amended Disclosure Statement and Plan of Reorganization, as modified and filed by AGI on 22 October 2009 and the Confirmation Order, went on to assert that the changes to AGI's relations with its creditors as a result of the Plan of Reorganization constituted an "arrangement for the benefit of [AGI's] creditors" (being one of the specified entities) as that term is used in clause 7(i)(c) of the Escrow Agreement. Further, Tridex alleged that:

> 7. In the circumstances, pursuant to clause 7(c) [*sic*] of the Escrow Agreement, PEPL is obliged, without consultation or approval from Astrata, to release to Tridex all envelopes marked "Comprehensive Source Code" ("CSC") together with the index which relates to the CSC.
>
> 8. By this letter, Tridex seeks to:
>
> (a) Put PEPL on notice of the matters referred to in paragraphs 4 and 6 above and of Tridex's rights and entitlement and PEPL's obligations referred to in paragraphs 3 and 7 above;
>
> (b) inform PEPL that it shall not under any circumstances release the CSC and/or the said index which relates to the CSC to Astrata or any other person or entity; and
>
> (c) inform PEPL that it shall not under any circumstances permit Astrata or any other person or entity to conduct an audit of, or have any access to, the Documents (as defined in the Escrow Agreement) without first obtaining the prior written consent of Tridex.
>
> 9. Tridex will, if necessary, and at the appropriate time, seek the release of the CSC and the index which relates to the CSC form PEPL to Tridex. If and when we do so, and to give you sufficient time to take independent legal advice on your position, we will when we make our request for the release give you ten (10) days to let us have your position. We will also copy the aforesaid request to Astrata.
>
> 10. All our rights are expressly reserved.

14 Clause 7(i)(c) of the Escrow Agreement sets out one of the conditions for releasing the Source Codes and Diagrams to Tridex. It states:

> **7) Release of Documents to Tridex**
>
> (i) PEPL shall, without consultation or approval from Astrata, release to Tridex all envelopes

marked "Comprehensive Source Code" together with the index which relates to the CSC when either one of the following three conditions is satisfied:

…

c) on Tridex's production of conclusive proof (including but not limited to the production of authenticated copies of publicly filed documents confirming the appointment of the receiver, administrator or similar officer as referred to in this paragraph), that Astrata Singapore Pte Ltd and/or Astrata Group Incorporated (but not any of its subsidiaries or associates other than Astrata (Asia Pacific) Pte Ltd or Astrata Singapore Pte Ltd) has ceased or threatened to cease to carry on its business or has had a receiver, administrator or similar officer appointed over all or any part of its assets or undertaking or has made any arrangement for the benefit of its creditors *or gone into liquidation save for the purpose of a genuine amalgamation or reconstruction*.

[emphasis added]

Clause 7(ii)(b) of the Escrow Agreement is expressed in similar terms in relation to the Diagrams.

15 On 9 February 2010, both Astrata and its then-solicitors, Messrs Lee & Lee, wrote to the Escrow Agent objecting to Tridex's position that clause 7(i)(c) had been satisfied and instructing the Escrow Agent not to release the Source Codes or any of the Diagrams to Tridex. In particular, in their letter of 9 February 2010, Messrs Lee & Lee informed the Escrow Agent that the proviso at the end of clause 7(i)(c), namely the words "save for the purpose of a genuine amalgamation or reconstruction", were applicable to AGI's Chapter 11, thus bringing it out of the ambit of clause 7(i)(c).

16 For its part, Astrata avers that it had asked the Escrow Agent to confirm that it had not broken escrow. When it failed to receive such confirmation, Astrata applied to court for the Interlocutory Injunction. Astrata's basis for seeking the Interlocutory Injunction is that Tridex wrongly relied on the purported satisfaction of clause 7(i)(c) of the Escrow Agreement. It argues that an injunction ought to be granted to preserve the *status quo* so that the dispute between Astrata and Tridex can be decided by the arbitration under the Supply Agreement between them, which led to the Escrow Agreement between Astrata, Tridex and the Escrow Agent being entered.

17 The test to be applied in determining whether an interlocutory injunction should be granted under O 69A, r 3 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) is the same as that under O 29. That test is set out in *American Cyanamid Co v Ethicon* [1975] AC 396. The House of Lords held there that the requirements were first, "that there is a serious question to be tried" and second, "that the balance of convenience lies in favour of granting an injunction".

18 My starting point is the Escrow Agreement. The material clauses of the Escrow Agreement are as follows:

WHEREAS:

A) Tridex and Astrata had earlier this year, entered into an agreement ("Supply Agreement") where Astrata had agreed to supply Tridex with certain goods and services.

B) In the course of supplying these goods and services, Astrata shall develop proprietary information ("Documents"), the ownership of which shall only transfer over to Tridex upon the satisfaction of certain terms and conditions listed hereunder in this Escrow Agreement.

C) Astrata would like another party to act as an escrow agent, whereby it shall safe-keep the aforesaid Documents, and release them to Tridex only when the stated terms and conditions have been fulfilled.

D) PEPL has agreed to act as the escrow agent on the terms and conditions listed in this Escrow Agreement.

…

4) Possession and ownership of the Documents

a) Possession and ownership of the Documents together with those Intellectual Property Rights specified in the Supply Agreement and any of the Points of Agreement ("POA's") (but only those Intellectual Property Rights) shall be transferred to Tridex notwithstanding any provisions otherwise in the earlier agreement(s) entered into between Tridex and Astrata as soon as the envelopes and their respective contents are delivered to PEPL but strictly subject to the provisions of this Escrow Agreement.

…

7) Release of Documents to Tridex

i) PEPL shall, without consultation or approval from Astrata, release to Tridex all envelopes marked "Comprehensive Source Code" together with the index which relates to the CSC when either one of the following three conditions is satisfied:

...

c) on Tridex's production of conclusive proof (including but not limited to the production of authenticated copies of publicly filed documents confirming the appointment of the receiver, administrator or similar officer as referred to in this paragraph), that Astrata Singapore Pte Ltd and/or Astrata Group Incorporated (but not any of its subsidiaries or associates other than Astrata (Asia Pacific) Pte Ltd or Astrata Singapore Pte Ltd) has ceased or threatened to cease to carry on its business or has had a receiver, administrator or similar officer appointed over all or any part of its assets or undertaking or has made any arrangement for the benefit of its creditors *or gone into liquidation save for the purpose of a genuine amalgamation or reconstruction*.

…

11) Entire Agreement

This Escrow Agreement constitutes the entire agreement between all three Parties (but not Tridex and Astrata alone) in relation to the subject matter herein, and supersedes all prior representations, agreements, statements and understandings, whether verbal or in writing.

…

17) Governing Law

This Escrow Agreement will be governed by and construed in accordance with Singapore Law.

18) Dispute Resolution

a) if there is a dispute relating to any claim or controversy arising out of , or in connection with this Escrow Agreement, including any question regarding its formation, existence, validity, enforceability, performance, interpretation, breach, or termination (the "Dispute"), the PEPL shall have the right to terminate this Escrow Agreement forthwith by giving 30 days' notice and require Tridex and Astrata to appoint another Escrow Agent to replace PEPL, failing which PEPL shall also have the right to issue an interpleader summons to place the CSC and CED with the Singapore Court pending the outcome of the dispute between Tridex and Astrata. Both Tridex and Astrata agree to be jointly and severally liable to indemnity PEPL for all costs and expenses arising therefrom.

b) The parties hereby submit to the non-exclusive jurisdiction of the court of Singapore.

c) Notwithstanding anything to the contrary, in the event of a Dispute, Tridex and Astrata shall continue to fulfil their respective obligations under this Escrow Agreement until a settlement of the Dispute has been reached.

…

20) General

c . **Jurisdiction**: The parties hereby submit to the non-exclusive jurisdiction of the court of Singapore.

19 It was common ground to all parties before me that the crucial question for determination was, whether or not by reason of AGI's Chapter 11, it had:

> ceased or threatened to cease to carry on its business or has had a receiver, administrator or similar officer appointed over all or any part of its assets or undertaking or has made any arrangement for the benefit of its creditors or gone into liquidation save for the purpose of a genuine amalgamation or reconstruction

within the meaning of clause 7(i)(c) of the Escrow Agreement. No challenge was made by any of the parties before me that the documents produced by Tridex in its letter of 5 February 2010 did not constitute conclusive proof of AGI's Chapter 11.

20 As the governing law of the Escrow Agreement is expressly stated to be Singapore law, the construction as to the scope and meaning of clause 7(i)(c) of the Escrow Agreement is to be determined by Singapore law. As all parties to the Escrow Agreement have expressly submitted to the non-exclusive jurisdiction of the courts of Singapore, this court has jurisdiction to determine the present applications. All parties agreed that the construction of clause 7(i)(c) would be determinative of the legal rights and obligations between them arising out of the Escrow Agreement and accordingly that all these applications would be heard together.

Is there a serious question to be tried?

21 Astrata argues that there is a serious question to be tried arising out of the construction of clause 7(i)(c)of the Escrow Agreement, *to wit*, that AGI's Chapter 11 is an arrangement for the benefit of creditors and is a "genuine amalgamation or reconstruction" within the meaning of clause 7(i)(c). Astrata proposes that the clause should be read as "has made any arrangement for

the benefit of its creditors or gone into liquidation save for the purpose of a genuine amalgamation or reconstruction". With this proposed construction it then concedes that this AGI's Chapter 11 is an arrangement for the benefit of its creditors, thus falling within the *prima facie* scope of the clause, but then goes on to argue that it is a genuine amalgamation or reconstruction, thus falling within the exception which takes it out of the scope of the clause.

22 The heart of Astrata's case turns on its proposed construction under Singapore law of clause 7(i)(c) of the Escrow Agreement. I will first set out the trigger events which appear *ex facie* to be as follows:

(i) has ceased or threatened to cease to carry on its business; or

(ii) has had a receiver, administrator or similar officer appointed over all or any part of its assets or undertaking; or

(iii) has made any arrangement for the benefit of its creditors; or

(iv) has gone into liquidation save for the purpose of a genuine amalgamation or reconstruction.

23 Astrata's proposed construction of the same clause is that the trigger events should be construed as follows:

(i) has ceased or threatened to cease to carry on its business, or

(ii) has had a receiver, administrator or similar officer appointed over all or any part of its assets or undertaking, or

(iii) has made any arrangement for the benefit of its creditors, or has gone into liquidation save for the purpose of a genuine amalgamation or reconstruction.

In my view, Astrata's proposed construction conflates the two distinct situations which I have enumerated as (iii) and (iv) in [22] above into one trigger event. Moving from here Astrata then concedes that whilst there has been an arrangement for the benefit of creditors, AGI's Chapter 11 being a genuine reconstruction is now beyond the scope of the clause.

24 In support of its proposed construction, Astrata first draws on the quite separate Supply Agreement in which semicolons have been inserted which do not exist in the parallel clause in the Escrow Agreement. It submits that the Supply Agreement discloses Astrata's and Tridex's agreement as to the trigger events which must dictate the construction of a parallel but not identically worded clause in the Escrow Agreement between different parties. However, I am only concerned to construe clause 7(i)(c) of the Escrow Agreement and I find no merit in this submission that the construction of a clause in one agreement between different parties is to be determined by a similar but not identical

clause entered earlier between some but not all the parties. In any event, it is not my task to construe the Supply Agreement and POA#7.

25 I turn now to the construction of clause 7(i)(c) of the Escrow Agreement upon its express terms alone. Astrata's proposed construction is entirely untenable for the following reasons. First and critically, the repeated use of the word "or" in the clause 7(i)(c) of the Escrow Agreement plainly delineated four categories:

> that Astrata Singapore Pte Ltd and/or Astrata Group Incorporated (but not any of its subsidiaries or associates other than Astrata (Asia Pacific) Pte Ltd or Astrata Singapore Pte Ltd) **(i)** has ceased or threatened to cease to carry on its business **or (ii)** has had a receiver, administrator or similar officer appointed over all or any part of its assets or undertaking **or (iii)** has made any arrangement for the benefit of its creditors **or (iv)** gone into liquidation save for the purpose of a genuine amalgamation or reconstruction.
>
> [Emphasis and added numbering in bold]

26 In the second place, Astrata's proposed construction ignores the business objective of this commonly used standard form precedent. In *Boilerplate: Practical Clauses* (Richard Christou gen ed) (Sweet & Maxwell, 5th Ed, 2009), the editors provide an example of a precedent clause which deals with the disappearance of a party through dissolution, death or insolvency. The precedent clause reads as follows:

> The Contract may be terminated with immediate effect by either party giving notice of termination to the other party (the "Defaulting Party"):
>
> > (i) if the Defaulting Party (being a company) shall pass a resolution for winding-up (otherwise than for the purposes of a solvent amalgamation or reconstruction where the resulting entity is at least as credit-worthy as the Defaulting Party and assumes all of the obligations of the Defaulting Party under the Contract) or a court shall make an order to that effect …

27 Indeed, the editors explain the nature and effect of this precedent clause as follows:

> The following clause deals with the disappearance of a party through dissolution, death or insolvency. The exception relating to a solvent amalgamation or reconstruction should be noted since its absence would forbid perfectly harmless reorganizations, for instance, of the structure of a group of companies.

The phrase "amalgamation or reconstruction" is commonly used as a carve-out to liquidations for this purpose.

28 The business purpose of provisions such as clause 7(i)(c) of the Escrow Agreement is to secure the Escrow items for the purchaser, upon the occurrence to the supplier and specified entities, of clearly defined and understood commercial triggering events. It is in these clearly defined trigger events that the purchaser seeks to preserve its contractual and proprietary interests in the Escrow property against cessation of business, asset or undertaking seizures, creditor arrangements, or liquidation of the specified entities. Astrata's proposed construction, in short, flies in the face of business commonsense.

29 As this construction is completely untenable it cannot constitute a serious question to be tried

within the threshold requirement of *American Cynamid*.

30 Even if I were to accept its untenable proposed construction that the exception of "a genuine amalgamation or reconstruction" applied to an "arrangement for the benefit of its creditors", Astrata still has to establish that there is a serious question to be tried that AGI's Chapter 11 is "a genuine amalgamation or reconstruction".

31 Astrata concedes that AGI's Chapter 11 was not an amalgamation but submits that it is a "reconstruction" within the meaning of the Escrow Agreement. It should be stated at the outset that the issue before me is not whether AGI's Chapter 11 constitutes a "reconstruction" under United States law (federal or state). The meaning of "reconstruction" in a contract expressed to be governed by Singapore law falls to be construed by Singapore law. In this Escrow Agreement, clause 7(i)(c) refers to reconstruction to apply to specified entities, several of which are Singapore incorporated companies and one is AGI incorporated in the state of Nevada. To construe this clause to mean different things under the law of each entity's law of the place of incorporation and not the governing law of the Escrow Agreement would not be warranted under the terms of the Escrow Agreement itself. As escrow agreements deal with contingencies and precise events, business efficacy, as to the meaning of reconstruction in this Escrow Agreement, requires that this term be construed in the same way under the expressly chosen governing law, with respect to all the parties to this agreement regardless of their place of incorporation.

32 What then is the meaning to be accorded to reconstruction in clause 7(i)(c) of the Escrow Agreement under Singapore law? Whatever else the term may mean in the United States, the meaning of "reconstruction" in a Singapore law governed document making provision for financial distress is shaped by our English common law foundations. This backdrop is well described by Roy Goode in *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd Ed, 2005) at pp 25–27 on *The Various Insolvency Regimes* as follows:

> A company unable to pay its debts as they are due may be able to reach an agreement with its creditors for the satisfaction of their claims otherwise than by payment in full. Such an agreement may be made either within or outside of a statutory framework. There are many different forms of agreement and these possess a bewildering variety of names: composition, compounding, compromise, arrangement, scheme of arrangement, voluntary arrangement, moratorium, reorganization, reconstruction, workout. ...
>
> A composition is an agreement by which creditors accept, in a single sum or by instalments, an amount less than that which is due to them. It involves no transfer of assets or change of any kind in the structure of the company or the rights of its members *inter se* or *vis-a-vis* creditors. Debts which become the subject of a composition are said to be compounded, so that composition and compounding are synonymous. An arrangement cannot be a composition if no payment will be received by preferential and unsecured creditor, but this does not prevent it from being a voluntary arrangement so long as such creditors retain rights after the end of any moratorium and accordingly do not suffer a confiscation or appropriation. A *compromise* is an agreement in settlement of a claim which is in doubt, dispute or difficulty of enforcement. The term would seem to cover agreements between a company and its creditors which cannot be enforced in full because the company's insolvency. *Arrangement* (which is synonymous with "scheme of arrangement") has a very wide meaning, embracing such diverse schemes as conversion of debt into equity, subordination of secured or unsecured debt, conversion of secured into unsecured claims and *vice versa*, increase or reduction of share capital and other forms of reconstruction and amalgamation. …

A *moratorium* is a freeze on the exercise of creditors' rights agreed among the creditors (in which case it may also constitute a voluntary arrangement) or imposed by the Insolvency Act as the result of proceedings for administration. A moratorium arranged by agreement differs from other forms of agreement with creditors in that it does not by itself operate to reduce the debts, merely to defer payment or postpone collection. *Reorganisation* is not a term of art but generally denotes any method by which the capital of a company is restructured and typically involves the formation of one or more new companies and, in the case of an insolvent company, a moratorium and various other elements. A *reconstruction* is a form of reorganisation by which the business of a company is transferred to a new company in consideration of the issue of shares in the new company to the members of the old company in exchange for their shares in the latter. A scheme is not a reconstruction unless the business carried on by the new company is substantially the same as that carried on by the old company and the corporators of the old and new are substantially the same. A restructuring, or workout, is a reorganisation which is effected by agreement among creditors rather than as an arrangement under the Insolvency Act or the Companies Act, though the terms of the workout may provide for an insolvency proceeding such as winding up or for the distribution of assets to follow the rules of distribution in winding-up.

33 The meaning of "a genuine amalgamation or reconstruction" was analysed in *South African Supply and Cold Storage Company In re Wild v Same Company* [1904] Ch D 268 where the relevant contractual phrase was "winding-up for the purposes of reconstruction or amalgamation". Buckley J held (at 286 and 287):

> What does "reconstruction" mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to [reserve it in some form, and to do so, not by selling it to an outsider who shall carry it on-that would be a mere sale- but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves I think, that substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same. Does it make any difference that the new company or resuscitated company does or does not take over the liabilities? I think not. I think it is none the less a reconstruction because from the assets taken over some part is excepted provided that substantially the business is taken, and it is immaterial whether the liabilities are taken over by the new or resuscitated company or are provided for by excepting from the scheme of reconstruction a sufficient amount to answer them It is not, therefore, vital that either the whole assets should be taken over or that the liabilities should be taken over. You have to see whether substantially the same persons carry on the same business; and if they do, that, I conceive, is a reconstruction. …
>
> Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have a rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam — a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass-substantially they must pass — nor need all the corporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern. An amalgamation may take place, it seems to me, either by the transfer of undertakings A. and B. to a new corporation, C., or by the continuance of A. and B. by B. upon terms that the shareholders of A. shall become shareholders in B. It is not necessary that you should have a new company. You may have a continuance of one of the two companies upon the terms that the undertakings of

both corporations shall substantially be merged in one corporation only.

34 The common law approach has been extensively applied in Singapore (see *eg Clifford Development Pte Ltd v Commissioner of Stamp Duties* [2009] 2 SLR(R) 363) to mean that, under Singapore law, a reconstruction essentially involves a new company substantially carrying on the same business as the old, with substantially the same corporators as before. See also *In re Mytravel Group plc* [2005] 1 WLR 2365, where it was held that "a state of affairs in which 4% by value of the shareholding in the new company was held by 100% of the shareholders in the old was not one in which there was a substantial identity between the two bodies of shareholders" and that therefore, the transaction in issue in that case was not a reconstruction.

35 There is no question that AGI's Chapter 11 was anything other than a genuine process. But that does not mean that it is a reconstruction within the meaning of Singapore law, which must be shown by Astrata to the requisite standard to support its Interlocutory Injunction Application.

36 Astrata submits that AGI's Chapter 11 is a reorganization within the meaning of this Escrow Agreement which is governed by Singapore law for the following reasons:

(i) AGI was reorganized pursuant to AGI's Chapter 11. AGI still carries on substantially the same business and its management remains unchanged.

(ii) The substance of AGI's Chapter 11 was that AGI's operations were to continue, aided by capitalization from a new majority stockholder. In addition, its general unsecured creditors would receive 3.5% of the outstanding common stock, receive payment in respect of debts over time and are the beneficiaries of a litigation trust. The following statements in the Plan of Reorganization exemplify the above:

(a) Chapter 11 allows the debtor, its creditors and other parties in interest to propose a plan of reorganization. A plan of reorganisation may provide for a debtor to reorganize by continuing to operate, to liquidate by selling assets of the estate, or a combination of both. This Amended Plan of Reorganization (the "Plan"), which is proposed by AGI, is a reorganization plan. After Confirmation of the Plan, AGI shall be referred to as the "Reorganized Debtor";

(b) This Plan provides for the continuation of the Debtor's operations through the Reorganized Debtor with a capitalization of not less than $8.5million from Fame Trading Limited ("Fame");

(c) The capitalization was "designed to provide management more time to refinance AGI and its subsidiaries, and/or, fund AGI's capital shortage, and/or restructure AGI";

(d) On August 8, 2009, and with Fame's consent, AGI announced the appointment of (A). John A. Bryan Jr., a seasoned restructuring and finance professional, as chief restructuring officer of AGI (the "CRO") to assist in restructuring the Debtor's balance sheet and implementing a revised business strategy for the Debtor, with the goal of proposing, executing and implementing a plan of reorganization for the Debtor"; and

(e) AGI, "as the 100% owner of [Astrata (Asia Pacific) Pte Ltd], has a substantial interest in ensuring that [Astrata (Asia Pacific) Pte Ltd's] business is not disrupted by

[AGI's] bankruptcy"; and

(f) The Plan also discloses that, on or after the Effective Date, the Reorganized Debtor's management will remain the same … The Reorganized Debtor will be a privately held company. The foregoing management will be in the best interests of creditors and will not be inconsistent with public policy.

37 Decisively, as a result of AGI's Chapter 11, all of the new equity of AGI will be held by new entities or investors: 94.5% is to be transferred to a new entity, Fame Trading Ltd ("Fame"), or its designee; and the remaining 5.5% is to be issued to a litigation trust ("the Litigation Trust") set up pursuant to the Plan. [note: 1]

38 In addition, Astrata's and AGI's American attorneys opine that the Plan of Reorganisation is a genuine reconstruction which fits within the ambit of the phrase "genuine amalgamation or reconstruction". In a letter dated 20 August 2009 from AGI's attorneys to Mr Anthony J Harrison, Astrata's Chief Executive Officer, AGI's attorneys opined that:

(a) Chapter 11 in the United States is a reorganization and restructuring proceeding, while Chapter 7 is a liquidation proceedings and more like the British concept of "administration". The United States is somewhat unique because Chapter 11 is more like a financing transaction, rather than a bankruptcy, and this concept does not really exist elsewhere in the world;

(b) prior to the recapitalization of Astrata (Asia Pacific) Pte Ltd ("AAP"), its parent company, AGI, "needed to be restructured, specifically to clean up the balance sheet as well as the structure of the common and preferred stock". However, a hostile takeover attempt of AGI resulted in the initiation of the Chapter 11 Proceedings "so that AGI can be restructured and the loans from Fame/Harmon can be converted into a majority of the shares of stock as originally agreed";

(c) the new majority stockholders have assured AGI that "they are fully behind management in this dispute" and "has agreed to increase the loan facility amount"; and

(d) AAP is not affected and AGI's subsidiaries are funded and operating normally.

39 Based on the above substantive features of this Chapter 11, there has been a reconstruction of AGI's balance sheet with the continuation of management. There has however been substantial dilution or elimination of the interests of original shareholders accompanied by the emergence of new majority shareholders. In light of this, AGI's Chapter 11 does not satisfy the substantive criteria of a reconstruction under Singapore law for the purposes of the Escrow Agreement. It falls short because there no longer remain substantially the same persons carrying on substantially the same business. So Astrata would here also fail in establishing this essential aspect of its case for granting the Interlocutory Injunction. For the avoidance of doubt, I should add that whilst this particular Chapter 11 does not constitute a reorganization within the meaning of the Escrow Agreement governed by Singapore law, there may well be other Chapter 11 processes which could fulfil the substantive qualifying criteria of a reconstruction under Singapore law.

Where does the balance of convenience lie?

40 The second limb in the test for granting an interlocutory injunction is for the applicant to persuade the court that the balance of convenience lies in favour of granting an injunction. It is for this court to weigh the competing interests of the applicant against injury by violation of his rights

which could not be adequately compensated for in damages if the dispute were resolved in arbitration to be in his favour and that of the other party's interest in being prevented from exercising its legal rights which could not be adequately compensated under the applicant's undertaking in damages. Tridex by its letter dated 5 February 2010 to the Escrow Agent copied to Astrata puts them on notice of the events and expressly undertook as follows:

> Tridex will, if necessary, and at the appropriate time, seek the release of the CSC and the index which relates to the CSC form PEPL to Tridex. If and when we do so, and to give you sufficient time to take independent legal advice on your position, we will when we make our request for the release give you ten (10) days to let us have your position. We will also copy the aforesaid request to Astrata.

41 In accordance with this undertaking Tridex has not demanded the release of the Source Codes or Diagrams by the Escrow Agent. It has put all parties on notice that the conditions of clause 7(i)(c) have occurred but will give the Escrow Agent time to take legal advice in the event that delivery is called for. In the circumstances, quite apart from my conclusion that there is no serious question of law to be tried with respect to the Escrow Agreement, the balance of convenience does not, in my view, lie in favour of granting the Interlocutory Injunction.

Introduction of further affidavit evidence after close of hearing

42 I had early on in the hearing indicated that I would hear the Interlocutory Injunction Application, the Stay Application and the Declaration Application in that order and the hearing of those Applications took place as indicated and were completed. I heard the Call Injunction Application on another adjourned hearing date.

43 At this adjourned hearing of the Call Injunction Application, Astrata applied for leave to file a fresh affidavit in support of the Interlocutory Injunction Application, the hearing of which had by then been completed. The fresh affidavit was sought to be filed for the purpose of a new argument of waiver in support of the Interlocutory Injunction Application, *ie*, that Tridex had waived its rights to invoke clause 7(i)(c) and 7(ii)(b) of the Escrow Agreement. No reason was advanced as to why this affidavit could not have been put in earlier. In making the application, Astrata's counsel disclosed that he was taken by surprise that the Escrow Agent had filed a fresh Declaration Application to substitute its earlier application for interpleader relief, which was withdrawn. But the fresh affidavit sought to be filed does not relate to the Declaration Application. Also, the issue of waiver was being raised for the first time in these proceedings. It seems clear to me that waiver was being raised on an afterthought following the conclusion of the hearing on the Injunction.

44 Whilst I would ordinarily not be minded to grant leave in such circumstances, in order to efficiently expedite the many applications before me, I nevertheless granted leave to admit this new affidavit and to hear both counsel on this new waiver argument for the purposes of whether Astrata has now raised a fresh serious question of law which the balance of convenience warrants the grant of the Interlocutory Injunction.

45 The requirements of waiver/estoppel are firstly, representation and secondly, reliance. In the case of *In Tacplas Property Services Pte Ltd v Lee Peter Michael* [2000] 1 SLR(R) 159 ("*Tacplas Property*"), Chao Hick Tin JA, who delivered the judgment of the Court of Appeal, stated at 177:

> Although a representation giving rise to such an estoppel need not be express and may be implied, it must, nonetheless, be clear and unequivocal. Mere silence and inactivity will not normally suffice and in the words of Robert Goff LJ in *The Leonidas D; Allied Marine Transport Ltd*

v Vale do Rio Doce Navegacao SA [1985] 1 WLR 925 at 937 "it is difficult to imagine how silence and inaction can be anything but equivocal" (endorsed by this court in *Fook Gee Finance Co Ltd v Liu Cho Chit* [1998] 1 SLR (R) 385).

And see *Re Tararone Investments Ptd Ltd* [2001] SGCA 57, which held that, to constitute reliance, there must be substantive evidence of reliance.

46 If there really was a waiver which Astrata relied on, this would be apparent to Astrata and would have been asserted at the outset of the Interlocutory Injunction Application. But prior to Astrata's belated application for leave, no such assertion had been made. This suggests that Astrata did not conduct itself on the basis or in reliance of any waiver, but was instead attempting to raise, belatedly, any remotely plausible argument which would support its Interlocutory Injunction Application. And, rather significantly, Astrata's counsel submitted at the outset that the waiver argument was not relevant to any argument of the balance of convenience.

47 Having heard the new arguments relating to waiver, for the above reasons, I find that there is no serious question to be tried on waiver nor does the balance of convenience warrant any injunction.

48 I therefore decline to grant the Interlocutory Injunction.

49 Tridex and the Escrow Agent are entitled to recover their costs of the Interlocutory Injunction Application from Astrata, to be agreed or taxed.

The Stay Application

50 In this application, the Escrow Agent seeks, *inter alia*, the Declaration and the Interim Interpleader Relief as defined in [9] above. At the end of the hearing I granted the Interim Interpleader Relief in the terms sought and in addition gave liberty to apply.

51 Astrata has concurrently made the Stay Application. I shall deal first with the Stay Application.

52 The crux of the Stay Application is that, even though the Escrow Agreement provides that the parties submit to the non-exclusive jurisdiction of the Singapore courts, that this court should, taking into account the Supply Agreement between Astrata and Tridex, to which the Escrow Agent is not a party, nevertheless stay the Declaration Application which relates to the Escrow Agreement.

53 In support of the Stay Application, Astrata invoked s 11A of the IAA, which provides as follows:

> 11A. Where in proceedings before any court relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief *may* direct the issue between the claimants to be determined in accordance with the agreement.
>
> [emphasis added]

54 Astrata submits that notwithstanding the choice of jurisdiction clause in the Escrow Agreement, the court clearly has the power to decide the issue of whether Tridex is entitled to call upon the Escrow to be determined in the arbitration agreed between Astrata and Tridex under their bilateral Supply Agreement. Read together with the court's mandatory obligation to grant a stay in favour of arbitration proceedings under s 6(2) of the IAA unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, Astrata submits that this court ought to

stay the Declaration Application. Astrata submits that the word "may" in s 11A should be construed to mean that the court should ordinarily direct the issue between the claimants to be determined in accordance with the agreement. Once the issue has been determined by the arbitral tribunal, the successful party may then apply to court for the necessary orders. At the same time, it submits that the Escrow Agent can be granted relief from any possible obligation to release the Escrow by a court order that the Escrow will only be released upon an order of court. In other words, the Escrow Agent's involvement ends (with only the residual duty to comply with any future order of court), while the principal parties continue their dispute in arbitration. This arrangement, Astrata submits, also takes care of Escrow Agent's concerns that it will not be bound by any arbitral award, as there will be a later order of court which will bind it.

55 In support of this approach, Astrata refers to the UK equivalent of s 11A of the IAA, *ie*, s 10(1) of the UK Arbitration Act 1996 (c 23) ("the UK Act"), which provides that:

> Where in legal proceedings relief by way of interpleader is granted and any issue between the claimants is one in respect of which there is an arbitration agreement between them, the court granting the relief *shall* direct that the issue be determined in accordance with the agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed.
>
> [emphasis added]

Section 10(1) of the UK Act was in fact amended in 1996 to make it mandatory for the court to direct that the issue be determined in accordance with the arbitration agreement unless the circumstances are such that proceedings brought by a claimant in respect of the matter would not be stayed. This aim was to bring the UK position in line with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (entered into force 7 June 1959) 330 UNTS 38, which requires a mandatory stay of judicial proceedings where there is a valid and applicable arbitration agreement: see Robert Merkin, *Arbitration Law* (Informa, Looseleaf Ed, 2009) at para 8.9).

56 Astrata submits that s 11A of the IAA must be interpreted in a pro-arbitration light, consistent with the decision of the Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [28] and [29] that:

> [28] More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules as to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.
>
> [29] Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. It must be remembered that the whole thrust of the IAA is geared towards minimizing court involvement in matters which the parties have agreed to submit to arbitration. Concurrent arbitration and court proceedings are to be avoided unless it is for the purpose of lending curial assistance to the arbitral process.

57 In my judgment *Tjong Very Sumito* does not assist Astrata. Astrata is essentially asserting that because Astrata and Tridex have a dispute under the bilateral Supply Agreement between them, which provides for arbitration, the court must therefore stay curial proceedings in respect of a dispute between Astrata, Tridex and the Escrow Agent under the separate trilateral Escrow Agreement

between them, which provided for dispute resolution before Singapore courts.

58 This is clearly not a case of a stay in favour of, or to assist, arbitration agreed to by the parties. This is an invitation to this court to derogate from the express agreement of the parties to the Escrow Agreement submitting to the non-exclusive jurisdiction of Singapore courts in respect of disputes arising from the same agreement. It is in substance an invitation to the court to abdicate from its responsibility to determine a question under Singapore law which the parties have expressly agreed is to be determined by the Singapore courts.

59 In any event, Astrata's reliance on s 11A of the IAA, is misplaced for three reasons. First, s 11A of the IAA requires that where interpleader relief is granted by the court and there is an issue between the claimants, in which there is an arbitration agreement between them, *ie*, the claimants, this should be stayed in favour of arbitration. The Declaration Application is an application by the Escrow Agent pursuant to an agreement with Astrata and Tridex in which there exists no arbitration agreement between the three relevant claimants. The existence of an agreement to arbitrate disputes between Astrata and Tridex under their quite separate Supply Agreement which is not before me is not relevant to the Declaration Application. There is no dispute between the parties to the Escrow Agreement as claimants to which they have all agreed to submit to resolution by arbitration. On the contrary they have all expressly submitted to resolution by the Singapore courts.

60 Astrata next submits that given that the Escrow Agreement is not the entire agreement between Astrata and Tridex bilaterally, this Court should be slow to find reasons to assume jurisdiction over a matter that they have agreed to submit to arbitration. Astrata was at pains to suggest that as the Escrow Agreement was contemplated and arose out of the Supply Agreement and POA#7, it must necessarily operate so as to apply to the Escrow Agreement, to displace the express submission to the Singapore court in the Escrow Agreement. This, I find to be a remarkable submission, given that these complex agreements have been painstakingly drafted, advised and negotiated with the assistance of lawyers. Whatever disputes may arise between Astrata and Tridex out of their Supply Agreement and POAs are entirely a matter for resolution by arbitration to which they have agreed as between themselves and not before this court. In any event, it is clear that, unlike the UK Act, which provides that the court shall stay the interpleader application, s 11A of the IAA by its express terms confers a discretion on this Court whether or not to stay such interpleader applications. On the facts I see no grounds for me to exercise this discretion.

61 Further the Declaration Application is not identical or confined to an interpleader. Apart from the Interim Interpleader Relief, the relief sought in the Declaration Application is the determination on the meaning and scope of a clause in the Escrow Agreement. This is a question of Singapore law which upon determination by the Singapore court as agreed by all parties will have definitive outcomes for all parties for purposes of the Escrow Agreement and determine the obligations of the Escrow Agent in Singapore. If as a result of such judicial determination, Astrata or Tridex continue to have disputes under their bilateral Supply Agreement and POAs, it remains open to them to have such disputes determined by arbitration with theoretically possible different outcomes or conclusions as may be determined by the arbitrators under English law as they have chosen under their bilateral agreement.

62 For the reasons above, s 11A of the IAA has no operation to the Declaration Application before me and even if it did, I am not persuaded that I should exercise the discretion conferred on this court to grant the Stay.

63 The Stay Application is therefore denied.

64 Tridex and the Escrow Agent are entitled to recover their costs of the Stay Application from Astrata, to be agreed or taxed.

65 In the light of the above, I now proceed to consider the Declaration Application.

The Declaration Application

66 The question in the Declaration Application is:

> whether, as at the date of the Order to be made hereon, the conditions set out in the Escrow Agreement dated 25 October 2007 (in particular, clauses 7(i)(c) and 7(ii)(b) thereof), have been satisfied such that Tridex is entitled to demand the release of the Comprehensive Source Code and the Comprehensive Engineering Diagrams as defined in the Escrow Agreement).

67 Clause 7(i)(c) of the Escrow Agreement prescribes that Tridex is to produce conclusive proof (including but not limited to the production of authenticated copies of publicly filed documents confirming the appointment of the receiver, administrator or similar officer as referred to in this paragraph). No challenge has been made before me that the documents produced by Tridex have not satisfied this requirement.

68 I have set out the construction of clause 7(i)(c) of the Escrow Agreement under Singapore law in [18] to [40] above.

69 I would grant the Declaration sought in the following terms:

> As at the date of this judgment, the conditions set out in the Escrow Agreement (in particular, clauses 7(i)(c) and 7(ii)(b) thereof) have been satisfied such that Tridex is entitled to demand the release of the Comprehensive Source Code and the Comprehensive Engineering Diagrams as defined in the Escrow Agreement.

70 The Escrow Agent is entitled to recover its costs of the Declaration Application from Astrata and Tridex, to be agreed or taxed.

The Call Injunction Application

71 In this application, Astrata is seeking the Call Injunction as defined in [3] above on the ground *inter alia*, that Tridex's call on the Performance Bond is unconscionable.

72 In support of its case of unconscionability, Astrata points to the following:

(a) Tridex unilaterally declared that Astrata had failed the CAT 1B Static Test and withheld all the means by which Astrata could verify Tridex's declaration that it had failed this test.

(b) Tridex led Astrata to believe that it would be allowed to remedy the issues before the next technical test stage known as CATP 2 whilst its true concern was that Astrata's ultimate parent was undergoing Chapter 11.

(c) Tridex engineered a breach of the Supply Agreement by declaring that Astrata had not met

the time requirements to remedy the issues encountered in the CATP 1B Static Test when it was Tridex who refused to cooperate and allow Astrata to remedy those issues.

(d) When the Chapter 11 proceedings were concluded, Tridex took an extreme position in demanding that Astrata admit its breach in writing knowing that Astrata would never do so, in order to declare an impasse and exit the Supply Agreement, obtain the escrow items and call on the Performance Bond.

(e) The nature of the Performance Bond originally issued on 17 May 2007 had been altered when the parties agreed that it was part of the Retention Monies under paragraph 6 of POA#10 dated 3 September 2008 and can only be paid out in accordance with this agreement.

73 The law on applications to restrain calls on performance bonds is well settled. See *Bocotra Construction Pte Ltd & Others v Attorney General* [1995] 2 SLR(R) 262 at [278] ("*Bocotra*"); *GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Another* [1999] 3 SLR(R) 44 at [51] ("*GHL*"); *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa* in *Zayed Al Nahyan* [2000] 1 SLR(R) 117 ("*Dauphin*") and *Eltraco International Pte Ltrd v CGH Development Pte Ltd* [2000] 2 SLR(R) 180 ("*Eltraco*"). The applicable principles distilled from these cases are:

(a) Whether there is unconscionability depends on the facts of each case. There is no pre-determined categorisation.

(b) In determining whether a call on a bond is unconscionable, the entire picture must be viewed, taking into account all the relevant factors.

(c) The concept of unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.

(d) While in every instance of unconscionability there would be an element of unfairness, the reverse is not necessarily true. Unfairness *per se* does not constitute unconscionability.

(e) In intervening in a call on an on-demand bond/guarantee, the court is concerned with abusive calls on the bonds.

(f) Mere breaches of contract by the party in question would not by themselves be unconscionable.

(g) It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.

74 The burden on the party seeking to restrain a call on a performance bond is high. The Court of Appeal in *Dauphin* defined the burden in the following terms:

> In coming to this view we have borne in mind the standard of proof required of the alleged unconscionability. In *Bocotra*, this court stated that 'a high degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient. In *GHL v Unitrack*, this court implicitly endorsed the strong prima facie standard propounded by the High Court in *Chartered Electronics Industries v Development Bank of Singapore Ltd* [1999] 4 SLR 655. In our opinion, what must be shown is a strong *prima facie* case of unconscionability."

75 The business purpose of performance bonds is to provide a form of security which is readily, promptly and assuredly realisable when the prescribed call is made. "The arguments for certainty and commercial efficacy must surely prevail here, otherwise banks will bear the onerous burden of deciding whether payment when demanded has to be made." See *Bocotra* at [25].

76 The fact that there are disputes between Astrata and Tridex with respect to the Supply Agreement, does not *ipso facto* render the call on the Performance Bond to be abusive or unconscionable for the reason that the parties are entitled to protect their own interests. See *Eltraco* at [76].

77 I will now proceed to examine the Performance Bond, the call on it and the factual matrix relied on by Astrata in support of its application for the Call Injunction. The terms of the Performance Bond obliges OCBC Bank to "pay upon presentation of your first written demand specifying the amount claimed hereunder and certifying that the Supplier has failed to fulfil its obligation to you under the Supply Agreement."

78 The Performance Bond, worth US$490,000, was required under clause 9.5 of the Supply Agreement and it has been extended to 31 December 2011. The relevant terms of the Performance Bond are:

> We hereby irrevocably undertake to pay to you such amount as you may claim from us hereunder upon presentation of your first written demand signed by your authorized signatory specifying the amount claimed hereunder and certifying that the Supplier has failed to fulfil its obligations to you under the Supply Agreement.
>
> The Bank shall not require the Beneficiary to justify the breach of the obligations indicated in its demand for payment, nor shall the Bank have any recourse against the Beneficiary in respect of any payment made hereunder. The Beneficiary's demand, stating the sum demanded, shall be final and conclusive that the sum demanded is due and owing by the Supplier to the Beneficiary.
>
> The payment of any claim shall be made on written demand as aforesaid regardless of any dispute between the parties concerned as to the validity of otherwise of the demand.
>
> No variation in or alteration to the terms of the Supply Agreement, nor failure by the Beneficiary (as Customer) to insist on proper performance of the Supply Agreement or to pursue all remedies available to it against the Supplier shall in any way release the Bank from all or any part of its liabilities under this Performance Bond.

79 Tridex made a call on the Performance Bond on or about 8 February 2010. That there are

disputes between the Supply Agreement parties arising out of the Supply Agreement is undisputed and these are to be resolved not by this court, but by arbitration as agreed by the parties thereto. The only question before this court is whether Astrata has made out a case of unconscionability such that Tridex should not be permitted to call on the Performance Bond which is in the nature of an on-demand bond.

80 To support its claim of unconscionability, Astrata relies on the static and dynamic tests described as CAT 1 B which procedures are set out in clause 8 of POA#10. The Static Test comprises three test reports: testing a sample of 100-500 E-Plates against the test bench; physical installation of the E-Plates on vehicles to be sent by the customer to the installation site; registration and association of the tested E-Plates with the Command and Control Backend ("CCB") using the PDA to instruct the Logic Centre ("LGC") in the E-Plate to send data and SMS commands to register the LGC with the CCB and testing the CCB on the test population.

81 The Static Test was conducted onsite in the state between 21 July 2009 and 4 August 2009. Paragraph 14 of the second affidavit of Astrata's production, quality assurance and project director, Chng Hak Kiat, filed on 15 April 2010, revealed that one problem that arose was that it took 30 minutes to 1 hour for the PDAs to cause the LGC to register with the CCB, with the knock-on consequence that the installation of the E-Plate took 1.3 to two hours. The complaint was that this was unacceptable as the norm was one hour which was the indicative norm stated in Astrata's manuals. Chng Hak Kiat's affidavit also reveals that the telecommunications provider in the state was unable to process the SMS requests in a timely fashion as a result of these requests exceeding the limits set by the provider on the number of SMS messages per second. The CCB acceptance test was also conducted during this time. The Dynamic Tests were originally planned to be conducted from 5 to 19 August 2009.

82 On 14 September 2009 Tridex sent Astrata the CATP 1B Static Test Results. The acceptance criteria and the performance at the test are set out as follows:

	Test criteria	**Test results**
System failure	zero defect	5 system failures 1 test bench failure
Component failure	2% of sample	19.4% failure

Tridex having set out these test results then concluded: "Static Test of CATP 1B-failed. As a result of this we are unable to continue with the dynamic test." This was followed by a letter on 19 October 2009 reiterating the failure and noting that the cure periods prescribed in the POA had lapsed.

83 On 21 October 2009 Astrata responded to reject the conclusion of test failure and complained about the refusal to return faulty units for analysis and that Tridex had failed to cooperate in its efforts to manage the outcome of the failure declaration. During this time there were meetings between the technical teams but Astrata submits that because it did not have the defective products in hand it could not propose solutions during the cure period. Astrata asserts that Tridex deliberately let the time run and let the cure period expire. Astrata next points out to without prejudice meetings between lawyers but conceded that these meetings do not suggest any unconscionability. Tridex, seeking a global solution first required Astrata to admit its breaches before proceeding any further. There was in evidence an admission which was later denied.

84 Tridex in reply pointed out the following: Astrata had obtained an *ex parte* interim injunction before another judge, on the back of an affidavit by Martin George Euler, the chief financial officer of Astrata, to the effect that, right up to 5 August 2009 there were no problems with the Supply Agreement and it was only after AGI's Chapter 11 that Tridex contrived reasons to end the Supply Agreement. During the hearing of the *ex parte* injunction, no disclosure was made to the court that prior to 5 August 2009 Astrata had already breached the Supply Agreement and accepted this in writing. These breaches were evidenced by a letter by Tridex to Astrata acknowledging and agreeing with the contents of a letter dated 3 August 2009 in which Tridex set out the excessive time taken for registration and association, and stated that the total time taken for the E-Plate installation work was untenable. This letter states: "the "dynamic phase" of CATP 1B shall be conducted if you acknowledge the above defects and shortcomings and assure TT that they will be rectified to TT's satisfaction before CATP 2. The CATP 2 tests among other tests will include the check on the above defects. The conduct of the "dynamic phase" of CATP 1B is not an acceptance by TT of the current "registration and association" part of the entire E-plate installation work." Astrata signed and acknowledged the contents of this letter on the same day. The test that Astrata had failed according to Tridex was conducted between 21 July and 4 August 2009. Astrata had only requested the return of the components on 4 September 2009 by which time the deadlines had lapsed and it could not rectify. Astrata's denial of breach, which it had admitted previously, appears to have arisen only after AGI's Chapter 11.

85 Astrata points out that Tridex's call on the Performance Bond does not specify breaches. But it is not in dispute that the Performance Bond by its express terms does not require breaches to be specified. Astrata also points out that the termination letter of 5 February 2010 referred to some breaches but made no reference to the call on the Performance Bond. Astrata submits that even if it had breached the Supply Agreement, Tridex is obliged to give it a 60 day cure period which it did not. In short, even if there were other unremedied failures, Astrata submits that to invoke those failures to call the performance bond is unconscionable because Tridex ought to have given Astrata a further 60 day cure period before calling on the performance bond. It submits that the performance bond cannot be invoked unless the Supply Agreement is terminated. I find this last submission to be remarkable given the business function of performance bonds in general and in particular the express terms of this performance bond to the contrary. Whether or not there have been breaches of the Supply Agreement between the parties will be determined in due course by the arbitrators.

86 The final argument made by Astrata is that the nature of the Performance Bond originally issued on 17 May 2007 had been altered when the parties agreed that it was part of the Retention Monies under paragraph 6 of POA#10 dated 3 September 2008 and can only be paid out in accordance with the POA. This is a desperate argument without merit. A reading of this paragraph in full reveals the lack of any foundation for this argument. The retention monies mechanism was agreed because Astrata was unable to provide suitable bank performance bonds amounting to 5% and revised to 8% of the Full Price of Phase 1A and 1B. The relevant portions of paragraph 6 of POA#10 read as follows: "As agreed between AS and Tridex, the Retention Monies created for the purposes of this Agreement is in lieu of the Performance Bond (amount previously agreed by Tridex and AS as 5% for the Price for Phase 1A plus Price for Phase 1B (together, "Full Price"), now agreed to be 8% of the Full Price) that AS is to give to Tridex. AS had informed Tridex that they are not able to have a financial institution acceptable to Tridex to issue the Performance Bond in the amount as specified above, Tridex and AS had agreed to set up the Retention Monies structure as contained in the Agreement ("Retention Monies Structure") with the condition that the Retention Monies Structure functions and operates effectively in the same manner as a Performance Bond, in particular the Performance Bond issue by OCBC to Tridex as beneficiary dated 17 May 2007 for an amount of USD 412,987. Other than the Performance Bond (see (i) below), all other Retention Monies shall be held by the Escrow Agent. The Retention Monies shall be built-up as follows: (i) Performance Bond of US$412,987 (already issued-but

AS to extend expiry date to 31 December 2011 ....”

87 The only question before me is whether Astrata has on the basis of its submissions made out a strong *prima facie* case of unconscionability such as to merit an injunction on the call and payment of the performance bond. It is evident that there are ongoing disputes between Astrata and Tridex which the parties have agreed to resolve by arbitration but this by itself does not warrant an injunction to call on what by its terms appears to be an on-demand performance bond. In these circumstances, Astrata has not met the burden that a strong *prima facie* case of unconscionability has been made out to restrain the call and payment of the performance bond according to its terms. There is nothing unconscionable or improper on the part of Tridex in calling on the bond. The disputes that might exist between Astrata and Tridex with respect to the Supply Agreement remain to be resolved by their chosen arbitration proceedings.

88 The Call Injunction Application is therefore denied.

89 Tridex is entitled to recover its costs of the Call Injunction Application from Astrata, to be agreed or taxed.

[note: 1] See page 176 of Colonel Rasu’s first affidavit filed in OS No 171 of 2010.