

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO. 0003 OF 2022

5 **POLAT YOL YAPI SANVETIC SA**
APPLICANT

VERSUS

UGANDA NATIONAL ROADS AUHORITY
10 **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

15 On or about 7th November, 2019 the respondent signed a contract with the applicant for civil works involving the up-grading of the Muyembe-Nakapiripirit Road. The parties agreed that 30th March, 2020 would be the commencement date. The respondent was subsequently dissatisfied with the applicant’s delayed commencement of execution of the contract and accused the applicant of breach of contract. By a letter dated 18th January, 2022 the respondent proceeded to
20 call on the applicant’s advance payment guarantee in the sum of shs. 14,259,362,014/= and US \$ 12,413,382 issued by DFCU Bank Limited and on 25th January, 2022 the respondent issued the applicant with a notice of termination of the contract. Contending that its inability to commence implementation of the contract o time was caused by disruptions in the supply chain of materials required for the contract caused by the Covid19 pandemic, the applicant seeks to prevent the
25 respondent from cashing that guarantee as well as its intended call on the performance guarantee taken out with KCB Bank limited.

b. The application.

30 This application is made under the provisions of section 6 of *The Arbitration and Conciliation Act*, and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks an interim measure of protection restraining the respondent from terminating the applicant’s contract for up-

grading of the Muyembe-Nakapiripirit Road (92 kms) of paved (bituminous) standard and secondary link roads, and from enforcing, collecting or calling on the advance payment and performance guarantees issued by DFCU Bank Limited and KCB Bank limited respectively, pending arbitration. It is the applicant's contention that the delayed commencement of execution
5 of the contract was occasioned by the fact that for long periods of time between the date of signing the contract and the appointed date of commencement of the contract, the country was under nationwide lock-down, an event that cause disruptions in its supply chain for materials needed for the civil works. Despite this, the applicant had by 25th January, 2022 mobilised all the equipment necessary for the successful completion of the project, yet the respondent issued a
10 notice of termination of the contract and made a call on the advance payment guarantee, hence this application. In the meantime, the applicant has prepared a notice to arbitrate.

c. The affidavit in reply;

15 The respondent never filed an affidavit in reply.

d. Submissions of counsel for the applicant.

M/s Kampala Associated Advocates were not in court when the application was called for
20 hearing.

e. Submissions of counsel for the respondent.

Counsel from the respondent's Legal Department on behalf of respondent submitted that the
25 Court does not have jurisdiction to entertain the application since the dispute raised by the applicants touched on a contract signed between them and the respondent which has a dispute settlement clause providing for adjudication and arbitration. None of those has been pursued by the applicant and the matter should therefore be dismissed. Termination of the contract is a right under the contract given to the respondent when there is failure on the part of the party who was
30 contracted. The notice to terminate was duly issued and the days lapsed however the parties in the matter obtained the intervention of the Minister for Works and they agreed that the contract

should be left to continue running with the contractor continuing the project. The application has been overtaken by events and should have been withdrawn.

f. The decision.

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According to section 6 of *The Arbitration and Conciliation Act*, a party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure. The jurisdiction exercised by the Court under section 6 of *The Arbitration and Conciliation Act* is ancillary to the process of arbitration.

10 While the subject matter jurisdiction rests with the chosen arbitrator, that of this court is invoked only in aid of, or supplementary to, the process of arbitration for the purpose of: (i) procuring or preserving evidence; (ii) facilitating the proceedings as the justice of the case might require; (iii) restraining the assertion of doubtful rights; (iii) providing for the safety of property either pending arbitration or when it is in the hands of accounting parties or limited owners; (iv) where
15 the efficacy or integrity of the arbitral proceedings is in jeopardy; (v) enforcing awards obtained, and so on. The Court is empowered to grant whatever interim protective measures it deems necessary, including injunctive relief and measures for the protection and conservation of property.

20 When court is called upon to grant injunctive relief as an interim measure of protection pending arbitral proceedings, the court will generally have regard to the following: (a) the nature and strength of the applicant's case, i.e., whether there is a serious question to be arbitrated, in respect of which the applicant demonstrates a sufficient likelihood of success; (b) whether there is an imminent risk of irreparable loss, by considering whether damages are an adequate remedy
25 to the perceived risk of harm; and (c) the course of action favoured on a balance of convenience, i.e. the course of action that results in the lower risk of injustice if the decision to grant the restraining order is incorrect. The purpose of granting an interim protective measure is for preservation of the parties' legal rights pending arbitration. The court doesn't determine the legal rights that will be the subject of the arbitration but merely preserves it in its current condition
30 until their respective rights can be established or declared by the arbitrator. If failure to grant the

restraining order might compromise the applicants' ability to assert their claimed rights, there is a very high likelihood of occasioning a loss that cannot be compensated for with money.

It has been established by the law and the decided cases that, the main purpose for issuance of a
5 restraining order is the preservation of property the subject of arbitration and the maintenance of
the *status quo* between the parties pending the disposal of the main proceeding. The conditions
for the grant of an interlocutory restraining order are now, well settled. First, an applicant must
show a *prima facie* case with a probability of success. Secondly, an interlocutory restraining
10 order will not normally be granted unless the applicant might otherwise suffer irreparable injury,
which would not adequately be compensated by an award of damages. Thirdly, if the court is in
doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods*,
[1972] E.A. 420 American Cyanamid Co v. Ethicon Limited [1975] AC 396; Geilla v. Cassman Brown Co. Ltd
[1973] E.A. 358 and GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013).
15 The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory
restraining order have been well laid out as the following: -

1. The applicant has shown a *prima facie* case or a serious question to be arbitrated, with a probability of success.
2. The likelihood of the applicant suffering irreparable damage which would not be
20 adequately compensated by an award of damages.
3. Where in doubt in respect of the above two considerations, then the application will be decided on a balance of convenience

The applicant seeks to restrain payment under an advance payment guarantee. The independence
of the demand guarantee from the underlying contract has the effect that, in principle, the
25 guarantor must pay a demand presented in compliance with the terms of the guarantee,
irrespective of whether or not the principal has, in fact, committed a breach of the underlying
contract with the Beneficiary. Therefore, Courts will very rarely order a guarantor not to pay a
beneficiary who has made an apparently complying demand. However, in order to preserve the
autonomy between the guarantor' obligations, on the one hand, and the rights and obligations of

the parties to the underlying contract on the other, the law applies a separate, more stringent, test in the case of injections sought against the payment of demand guarantees.

The exceptions are; (i) fraud affecting the documents presented by the beneficiary (for example
5 if they have been forged). Fraud is not limited to dishonesty or fraudulent intent, but extends to an absence of objective good faith, as where no reasonable person would have considered the demand to be justified e.g. if the beneficiary had no honest belief in the validity of its demand; (ii) illegality in the demand guarantee contract or underlying contract; (iii) the infringement of international obligations and express contractual derogation from the principle of autonomy; and
10 (iv) the total failure of the basis of the contract, i.e. the reason for its existence.

In order to obtain a restraining order, the applicant will be required to establish that: (i) there is a serious question to be arbitrated as to whether the respondent has a right to call on the guarantee; (ii) that if the application is not granted, the applicant stands to suffer irreparable damage; and
15 (iii) the balance of convenience favours leaving the guarantee intact until the dispute is resolved. This will often be the case where the applicant can demonstrate that the payment of damages in lieu of a restraining order would be an inadequate remedy.

While it might appear that these requirements could be readily satisfied where there is a bona
20 fide dispute, particularly where the applicant stands to suffer significant reputational damage if a call were to be made, in the context of demand performance guarantees, courts will typically refuse a restraining order unless there are special circumstances that suggest they should do otherwise. The rationale behind this is that, by agreeing that the applicant will provide the demand performance guarantee on the terms set out in the contract, the parties have also agreed
25 to allocate the financial risk of any dispute to the applicant until it is finally resolved.

There are however at least three instances where courts will deviate from this position: (i) where there is compelling evidence of fraud on the part of the beneficiary; (ii) where there is compelling evidence of unconscionable conduct on the part of the beneficiary; or (iii) to ensure
30 the beneficiary adheres to any contractual promise not to call on the performance guarantee (i.e.,

a negative stipulation). Unless the above circumstances are present, a court is likely to refuse a restraining order for the reasons set out above.

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- i. Whether the applicant has a *prima facie* case or a serious question to be arbitrated, with a probability of success against the 1st respondent.

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First, a preliminary assessment must be made of the merits of the matter taken to arbitration, to ensure that there is a “serious question to be arbitrated.” One of the criteria to be applied when considering whether or not to grant a restraining order is disclosure by the applicant’s pleadings, of a “serious arbitrable issue,” with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon* [1975] AC 396; [1975] ALL ER 504; *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others*, [2001 –2005] HCB 80 and *Nsubuga and another v. Mutawe* [1974] E.A 487). There is no need to be satisfied that a permanent restraining order is probable at arbitration; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be arbitrated. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met. The Court must be satisfied that there is a serious question to be arbitrated as to whether the respondent has a right to call on the guarantee (see *G&S Engineering Services v. MACH Energy Australia Pty Ltd* [2019] NSWSC 407).

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The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be arbitrated, and that there is at least a reasonable chance that the applicant will succeed at the arbitration. The applicant needs to show only a reasonable likelihood of success on the merits; a better than negligible chance of success otherwise, parties with weak cases will be encouraged to seek interim injunctive relief in cases where permanent relief may not be possible. The applicant’s burden on this part of the test is relatively low, and in

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most cases an applicant will be able to show that there is a serious question to be arbitrated. The court must not decide issues that the parties have left to arbitrators. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such
5 infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

On basis of the facts pleaded by the parties, the controversy between them seems to rotate around the question whether the respondent has a right to call on the guarantee. While the applicant
10 contends that it fully mobilised equipment required for execution of the contract and thus fully satisfied the requirements of the advance performance guarantee despite the delay occasioned by the Covid19 pandemic, the respondent argues that it has the contractual right to terminate the contract on account of delayed commencement of the works. These are sufficiently serious questions going to the merits to make them a fair ground for arbitration. To obtain an
15 interlocutory restraining order an applicant must show only that its claim is not frivolous or vexatious, that is to say, it has a serious issue to be arbitrated. The applicant has satisfied this requirement.

ii. Whether the applicant will have an adequate remedy at law or will be irreparably
20 harmed if the restraining order does not issue.

Second, the applicant must show that it will suffer irreparable harm if the court refused to grant the restraining order and the respondents were allowed to continue in their course of conduct. “Irreparable” in this context refers not to the size of the harm that would be suffered, but its
25 nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the availability of damages often precludes such a finding.

Irreparable damage has been defined by *Black’s Law Dictionary*, 9th Edition page 447 to mean;
30 “damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.” It has also been defined as “loss that cannot be compensated for with money”

(see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*).

The purpose of granting a restraining order is for preservation of the parties' legal rights pending arbitration. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the restraining order might compromise the applicants' ability to assert their claimed rights, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money.

The Court may grant a restraining order if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant's rights. The court will particularly be inclined to grant the restraining order where there appears to be a *prima facie* breach of property rights, or where the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the arbitration, or where the damages when awarded may be irrecoverable (see *Itek Corp. v. First Nat. Bank of Boston, 566 F. Supp. 1210 (D. Mass. 1983)*). The fact that damages may be reasonably calculable will provide an applicant with little consolation in the event those damages ultimately prove uncollectable.

As a restraining order is an equitable and discretionary remedy, it is a general rule that a restraining order will not be granted where damages are an adequate remedy. Before a restraining order is ordered, it must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor. Courts often will step in to preserve the status quo where the withholding of injunctive relief would render the process of arbitration meaningless or a hollow formality because an arbitral award, at the time it was rendered, could not return the parties substantially to the status quo ante i.e., conditions would be so changed that no arbitral award could substantially remedy the grievances. A restraining order ought not to be granted where the respondent would be restored to the financial position it would have been in had the restraining order not been granted.

In order to establish that damages are not adequate, the innocent party will generally have to evidence either that a) the subject matter of the contract is rare or unique or b) damages would be financially ineffective. Damages may be found to be an inadequate remedy in the following circumstances, among others: (a) the damage is impossible to repair; (b) the damage is not easily susceptible to be measured in economic terms; (c) the harm caused is not a financial one; (d) monetary damages are unlikely to be recovered; (e) an award of damages is inappropriate in light of the importance of the interest in issue; and (f) the harm has not yet occurred or the wrong is continuing. If there is an adequate alternative remedy, the claimant should pursue such remedy.

10 Examples of rare or unique subject matters might be the sale of an interest in land (as no two pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an adequate remedy because no market substitute exists, and the innocent party would therefore be unable to secure equivalent performance (no matter what the price). Examples of circumstances where damages may be financially ineffective might be where the defaulting party is insolvent and unable to pay; if damages would be difficult to quantify (e.g., a contract to indemnify); if an order for the payment of damages would be difficult to enforce (e.g., because any enforcement would need to be in a foreign country); or if an express term of the contract restricts or limits the damages recoverable for that particular breach.

20 The calling up of a demand guarantee, especially if it is an unfair or fraudulent calling, often has the following severe consequences for the principal: irreparable damage to his commercial reputation; cash liquidity problems; and the risk that the cash will be misappropriated by the beneficiary and no longer recoverable. Courts have recognised on a number of occasions that calls upon performance guarantees may cause significant damage to a contractor's reputation and financial standing that is not readily curable by an award of damages (see for example *Barclay Mowlem Construction Ltd v. Simon Engineering (Aust) Pty Ltd* (1991) 23 NSWLR 451 at 461 – 462; *Reed Construction Services Pty Ltd v. Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158 at 167; *Lucas Stuart Pty Ltd v. Hemmes Hermitage Pty Ltd* [2010] NSWCA 283 at [45]; *Austrak Pty Ltd v. John Holland Pty Ltd* [2006] QSC 103 and *Structural Systems (Constructions) v. Hansen Yuncken Pty Ltd* [2010] FCA 1358.).

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Calling of a guarantee tends to erode the confidence banks and other financiers have in the contractor's systems and project management. It tarnishes the business image of a contractor, especially where such contractor has built its business on meeting its contractual obligations, meaning completing its obligations without the need for security ever being called upon.

5 Irreparable damage will be done to its reputation as: (a) its clients may question its ability to meet its contractual obligations; (b) its prospects of future successful tenders will be diminished; and competitors will take advantage to the contractor's detriment.

The fees payable in respect of the face value of each bank guarantee and the amount of the facility which the bank is prepared to advance to the contractor is directly referable to how the bank assesses the contingent risk that the bank guarantee will be called upon. As a result of a call on a guarantee, the bank will be likely to assess the contractor's contingent liability risk as being higher. If the bank were to assess that the contingent liability of the contractor in relation to bank guarantees is higher than in previous years as a result of the respondent calling the guarantee, then those fees may increase and the limit of the facility may decrease for the contractor specifically. Furthermore, in the world of commerce, a contractor's reputation is paramount. A contractor's "security" history (in the sense of whether any of its bank guarantees have ever been cashed) is an important part of that contractor's reputation, and is taken into account by prospective clients of the contractor when considering "Expressions of Interest" or tenders. If loss is suffered, for example, through failure to obtain tenders, the assessment of damages would be a difficult and unsatisfactory process.

The calling up of a performance guarantee is a serious matter, with the potential to irreparably damage the contractor's reputation as a competent service provider, which might be taken advantage of in future projects by the contractor's competitors. It is in that context that Hunter J in *Abigroup Contractors Pty Ltd v. Peninsula Balmain Pty Ltd 2003] HCA Trans 688* opined:

30 The question of commercial reputation and the effect of a demand on a large contractor, with a record to date which has been evidenced in that context, should not be underestimated and there is a strong legitimate entitlement on the part of such a contractor to protect that reputation to the hilt.

Similarly, Rolfe J in *Barclay Mowlem v. Simon Engineering (Australia) Pty Ltd (1991) 23. NSWLR 451* stated;

5 Once the evidence [of damage to reputation] is admitted...it demonstrates how inadequate a remedy in damages would be. The matter, so far as the plaintiff is concerned, which is detrimentally affected upon a performance bond being called up, is the perceived ability of the plaintiff to properly perform its obligations under a contract. If the plaintiff's ability in this regard is called in question, even improperly, it is not difficult to infer that there will be damage to its reputation in the industry in which it operates. Nor is it difficult to infer that its competitors would be quick to
10 utilise such information in competing with the plaintiff. Finally, particularly as matters presently stand in the commercial world, questions may be raised as to the financial viability of the plaintiff ... This would be underlined if ... there has not previously been any call upon a performance bond. In other words, people may be tempted to ask whether the plaintiff's business was "going downhill."

15 Irreparable damage may be occasioned to the commercial reputation of the principal by an abusive enforcement of a first demand guarantee. For that reason, a restraining order may be issued in order to prevent the abusive and imminent enforcement of a first demand guarantee, pending a decision of the arbitrator. The restraining order will be granted in case of a *prima facie*
20 or manifest abuse or fraud by the beneficiary, or in case of collusion of the latter with the principal. In such cases the fraud or the abuse merges with the bad faith of the beneficiary who seeks to enforce his/her guarantee while he/she/it is fully aware that the enforcement requirements are not met. While the Courts acknowledge that the beneficiary of a first demand guarantee has the right to enforce such guarantee without having to worry immediately of what
25 the principal owes or does not owe, the beneficiary may not, on the other hand, knowingly exercise his/her/its right to enforce the guarantor's commitment with a view to receiving funds that are not due to him/her/it. As such, a request for enforcement of a guarantee must be held manifestly abusive wherever there is a *prima facie* awareness of the lack of right by the beneficiary and the knowledge of such abuse by the guarantor, are both established.

30 Our legal system must of necessity entail mechanisms to prevent the wrongful, fraudulent and/or otherwise unconscionable calling of performance guarantees, even on-demand performance guarantees, without compromising the independence or autonomy principle, the documents principle and the strict compliance principle underpinning their utility in commerce. The court

will thus now proceed to determine whether the applicant has made out a case of an unfair or fraudulent calling of the guarantee, by considering the following sub-issues; (a) whether the applicant has made out a *prima facie* case of fraud in the documents rather than the underlying transaction; (b) whether the 1st respondent could not honestly have believed in the validity of its demand under the guarantee; (c) whether the 2nd respondent knew of the fraud at the time the 1st respondent sought payment under the guarantee.

- a) Whether the applicant has made out a *prima facie* case of fraud in the documents presented, rather than the underlying transaction.

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Three core principles underpin the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees (URDG 758): the independence or autonomy principle, the documents principle and the strict compliance principle. By virtue of those principles, demand guarantees, standby letters of credit, and commercial letters of credit are all treated as autonomous contracts whose operation will not be interfered with by courts on grounds irrelevant to the guarantee or credit itself. Guarantors are concerned with documents, rather than with goods, services or performance of the underlying contract (see *Leonardo S.p.A v. Doha Bank Assurance Company LLC* [2019] QIC (F) 6; [2020] QIC (A) 1). Under the autonomy principle, an issuing bank must make payment under a demand guarantee on receipt of compliant documents irrespective of any dispute which may have occurred in respect of the underlying transaction.

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The independence or autonomy principle, insulates the bond or guarantee from the terms in the underlying contract. This is important because the autonomous nature of the bond or guarantee means that conditions giving rise to the obligation to pay are found exclusively in the bond or guarantee. This independence principle is embodied in Article 5 (a) of the URDG 758. As discussed, in by the Privy Council in *Alternative Power Solution Ltd v. Central Electricity Board* [2014] UKPC 3, there is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts, but the presumption is rebuttable (see *IE Contractors v. Lloyd's Bank* [1990] 2 Lloyd's Rep. 496). However, the appropriateness of the distinction between letters of credit and demand guarantees had been doubted in a more recent English Commercial Court judgment with suggests that the intention of

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the URDG is that the principle of strict compliance should apply both to letters of credit incorporating UCP 600 and demand guarantees incorporating URDG (*see Teare J in Sea-Cargo Skips v. State Bank of India [2013] EWHC 177 (Comm)*).

5 Demand guarantee undertakings rest on two legal principles: the principle of documentary or strict compliance, and the independence principle. The first legal principle essentially means that the guarantor is obliged to pay if the documents submitted with the demand for payment comply with the terms of the demand guarantee. The second legal principle is that the guarantor's obligations against the beneficiary are determined in the instrument itself, and are independent,
10 or abstract, of the underlying contract between the applicant for, and the beneficiary of, the guarantee, as well as the contract of mandate between the applicant and guarantor.

The essential characteristic of a demand guarantee is that it is independent of the underlying transaction between the applicant and the beneficiary that prompted the issuance of the
15 guarantee. Further, a demand guarantee is also independent of the instruction relationship pursuant to the applicant having requested the guarantor to issue the guarantee in favour of the beneficiary. The conditions giving rise to the obligation to pay are found exclusively in the demand guarantee and the terms of the underlying contract are of no relevance (*see Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] 1 All ER 976, [1978] 1 QB*
20 *159, [1977] 3 WLR 764, [1978] 1 Lloyds Rep 166*). A direct consequence brought about by the independence principle is the “pay first, argue later” rule; the beneficiary of a demand guarantee can expect payment under the guarantee as soon as it is able to tender the documents stipulated in the demand guarantee, irrespective of any dispute arising from any of the contracts other than the demand guarantee itself.

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There are of course exceptions to the strict general rule that the court will not intervene to prevent a guarantor from making payment under a demand bond or guarantee following a compliant presentation of documents; the fraud exception that is more or less universally acknowledged, and illegality exception applied in some jurisdictions. In the United States of
30 America (*see Intraworld Industries, Inc. v. Girard Trust Bank, 336 A.2d 316 (Pa. S.C. 1975)*); *Sztejn v. J. Henry Schroder Banking Corp. - 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941)*;

Asbury Park & Ocean Grove Bank v. National City Bank of New York 35 N.Y.S.2d 985 (N.Y. Sup. Ct. 1942) and *New York Life Insurance Co. v. Hartford National Bank & Trust Co.*, 378 A.2d 562 (Conn. S.C. 1977) at p. 567), and South Africa (see *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v. South African National Roads Agency Soc*
5 *Ltd and Another* [2020] ZASCA 146), illegality in the underlying contract is also an exception. When the issuer of a demand guarantee knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognise such a document as complying with the terms of the demand guarantee. Where the documents or the underlying transaction are tainted with intentional fraud, the guarantee need not be honoured by the bank,
10 even though the documents conform on their face and the court may grant injunctive relief restraining such honour (see *NMC Enterprises v. Columbia Broadcasting System, Inc* 14 U.C.C. REP. SERV. 1427 (N.Y. Sup. Ct. 1974).

In Australia, a contractor may restrict the beneficiary from making a call on a performance
15 guarantee if the contractor can show that the call would be a breach of a term in the underlying contract. It is not necessary to allege any fraud on the part of the beneficiary (see *Uber Builders and Developers Pty Ltd v. MIFA Pty Ltd* [2020] VSC 596, where Nichols J re-affirmed that “where the contract does impose an obligation on the right to access the security, the party seeking to restrain recourse must establish the existence of a serious question to be tried as to
20 whether the beneficiary has in fact met the contractual requirements”).

In all the above-mentioned jurisdictions, where the beneficiary’s fraud had been called to a bank’s attention, before the documents have been presented for payment, the principle of the independence of the bank’s obligation under the demand guarantee should not be extended to
25 protect an unscrupulous beneficiary. The courts aver that when the issuer of a guarantee knows that a document, although correct in form, is false or illegal, it cannot be called upon to recognise such a document as complying with the terms of the guarantee. A bank should be vitally interested in assuring itself that there is some exchange of value represented by the documents.

30 The Courts in England do not consider illegality in the underlying contract to be a valid exception to the autonomy principle of demand guarantees. They however attempted to

acknowledge as the second exception in addition to that of fraud, situations where a beneficiary seeks payment in circumstances where the underlying contract clearly and expressly prevents it from doing so. The Courts' view in principle, was that if the underlying contract (in relation to which the bond has been provided by way of security) clearly and expressly prevents the beneficiary from making a demand under the bond, it can be restrained by the court.

For example, in *Simon Carves Ltd v. Ensus UK Ltd* [2011] EWHC 657 (TCC), [2011] BLR 340, 135 Con LR 96, the underlying construction contract contained a provision stating that the performance bond shall become null and void, and returned to the contractor, immediately upon the issue of an acceptance certificate by the employer. The employer issued an acceptance certificate prior to the expiry date of the bond and subsequently purported to make a call on the bond. The court held that the bond remained valid between the employer and the issuing bank, but as between the employer and the contractor the bond was null and void. The court, however, did not grant a restraining order preventing a call on the bond *per se* but instead granted a restraining order preventing a breach of an express term of the underlying contract which regulated the ability of the employer to call on the bond. In its passing comments the court contemplated the existence of an alternate possible ground on which a contractor might resist a call on a bond straight breach of contract.

Similarly in *Doosan Babcock Ltd v. Comercializadora de Equipos y Materiales Mabe Limitada* [2013] EWHC 3010 (TCC) the underlying construction contract contained similar provisions to those in *Simon Carves* in that the contract stated the bond was to expire on the earlier issue of a taking-over certificate by the employer or a fixed expiry date. The employer did not actually issue the taking over certificate prior to making a call on the bond. The contractor, however, sought a restraining order against the employer's subsequent call on the basis that the employer ought to have issued a taking-over certificate but had not done so in breach of the underlying contract, and had it done so it would have no entitlement to call on the bond. The court granted a restraining order preventing the call on the bond, relying on the common law principle that a party should not profit from its own breach of contract.

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The decisions in *Simon Carves* and *Doosan*, however, indicate a departure from the traditional exceptions of fraud and illegality. Commentators have much-maligned the two decisions for their perceived broadening of the circumstances in which a court may enjoin a call on a bond beyond fraud and illegality. Nevertheless, these decisions suggest that the courts may look to provisions in an underlying contract, which regulate calls on a bond related to such contract, in a way that pierces the autonomy between the parties' obligations under the contract and the issuing banks obligation under the associated bond.

The distinction between *Alternative Power Solution*, on the one hand, and *Simon Carves* and *Doosan*, on the other seems not that the former concerns a letter of credit and the latter a performance bond, but that the latter concerned a contract which contained provisions regulating the beneficiaries call on the bonds, whereas the former did not. Moreover, the contractual provisions which the courts looked to in *Simon Carves* and *Doosan* were technical in nature, essentially preventing a call on the bond where the discharge of obligations under the contract meant the security afforded to the beneficiary through the bond had, or ought to have, effectively expired.

In *Alternative Power Solution Ltd v. Central Electricity Board & Anor (Mauritius) [2014] UKPC 31*, the Privy Council found that the Mauritian Central Electricity Board was not entitled to an interlocutory restraining order to prevent payment under a letter of credit, notwithstanding its allegations of fraud and the fraud exemption. In that case, Alternative Power Solutions Ltd ("APS") entered into an agreement (the "Agreement") following a bid process to supply 660,000 compact fluorescent lamps ("CFLs") to the Mauritanian Central Electricity Board ("CEB"). The means of payment was by letter of credit ("LOC") which was issued by Standard Bank ("SB") in favour of APS. Inspection at the place of manufacture was required under the Agreement but there was no requirement for certificates of inspection or similar documentation to be presented to SB under the LOC. APS and CEB failed to come to any arrangement relating to delivery and inspection of the CFLs. With the expiry date of the LOC approaching, the Chinese manufacturers shipped the CFLs. APS tried to claim payment under the LOC. Whilst SB considered the documentation discrepant, SB made it clear that it would be prepared to pay against compliant documents. CEB sought a restraining order to prevent SB releasing the payment. CEB alleged

that APS's bid mentioned that the CFLs would be manufactured by Philips or under licence by Philips in China. It further alleged that APS was throughout in breach of the tender documents because it had not allowed CEB to inspect and verify the 660,000 CFLs at the place of manufacture in China. It was also alleged that at an initial hearing one of APS's representatives
5 had stated that the goods would not be shipped until the inspection took place, when the goods were, in fact, in transit. The court at first instance and the Mauritian Court of Appeal both ruled in favour of CEB as they felt that there was enough evidence to engage the fraud exemption.

On appeal to the Privy Council, it held that the test for the fraud exemption cannot be quite the
10 same as at a trial and that the test at the interlocutory stage can properly be described as whether it is seriously arguable that, on the material available, the only realistic inference is that the beneficiary could not honestly have believed in the validity of its demands on the letter of credit and that the bank was aware of that fact. The difficulty with CEB's allegations was that they were allegations of breach of contract and thus matters for arbitration and irrelevant to the
15 liability of SB under the LOC. In so far as the judges in the lower court relied upon them they erred in principle. In all these circumstances, the Privy Council concluded that, whatever test is applied, neither the judge nor the Court of Appeal was entitled to reach the conclusion that the fraud exception was satisfied, in the case of either APS or SB.

20 In Singapore, the position of the courts is similar to the position of the courts in England. Calls on on-demand Bank Guarantees can be restrained, either on the account of "fraud" or "unconscionability," which are treated as two distinct and independent grounds of restraint (see *Bocotra Construction Pte Ltd v. Attorney General (No. 2)* [1995] 2 SLR 523; *GHL Pte Ltd v. Unitrack Building Construction Pte Ltd* [1999] 4 SLR 604; *Dauphin Offshore Engineering & Trading Pte Ltd v. HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] SGCA 4 and
25 *Shanghai Electric Group Co Ltd v. PT Merak Energi Indonesia* [2010] SGHC 2). In Malaysia, "unconscionability" is recognised as a separate and independent ground to issue a restraining order, which stems from the "general underlying notion.... of equity's traditional jurisdiction to grant relief against unconscientious conduct namely, that a person should not be permitted to use
30 or insist upon his legal rights to take advantage of another's special vulnerability or misadventure

for the unjust enrichment of himself...” (see *Sumatec Engineering & Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401).

5 The Courts in Singapore have defined “unconscionability” as “...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” (see *Kiso (S) Pte Ltd v. Lum Chang Building Contractors Pte Ltd* [2013] SGHC 86). A contractor applying for a restraining order on the basis of “unconscionability” has to establish a “strong *prima facie* case of unconscionability,” in which case the parties’ conduct leading up to a call on a bond and the presence of notice are all relevant considerations (see *Tactic Engineering Pte Ltd (in liq) v. Sato Kogyo (S) Pte Ltd* [2017] SGHC 103). The Singapore courts have allowed the exception of unconscionability to cater for situations where the conduct of the beneficiary was sufficiently reprehensible to justify an interdict in circumstances where the facts do not amount to fraud.

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The case law canvassed here demonstrates that the principle of independence continues to be a dominant theory in demand-guarantee practice. With varying outcomes, Courts in the different jurisdictions have considered whether the application of the fraud rule should be confined to cases of forged or fraudulent documents or extend to fraud in the underlying transaction. As a general proposition, restraining orders will not be granted to prevent a party from calling upon a demand bank guarantee, except in cases of fraud, unconscionability, or breach of a negative stipulation in the underlying contract. It is this court’s considered view that provisions in an underlying contract, which regulate calls on a bond, should only be considered with circumspection where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man. Resort to the underlying contract requires a certain and compelling case to be established; cases where the demand on the guarantee can be said to be “clearly untrue or false,” or “utterly without justification,” or where it is apparent there is “no right to payment.” Cases in which proof is furnished of the absence of any colourable or plausible basis under the underlying contract for the beneficiary to call the guarantee.

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While the notion of fraud may elude precise definition, it is a concept well known to the law, connoting some aspect of impropriety, dishonesty or deceit. Fraud is not mistake, error in interpreting a contract; fraud is something dishonest and morally wrong, resulting in mischief or unnecessary pain. Fraud is defined as the unlawful and intentional making of a misrepresentation
5 that causes actual prejudice or is potentially prejudicial to another. The traditional approach of English courts to the calling of Bank Guarantees is to limit restraining orders to situations where there is clear evidence of “fraud,” which under English law can only be proven if it is demonstrated that a false representation has been made (i) knowingly; or (ii) without belief in its truth; or (iii) recklessly without caring as to whether it be true or false (see *Derry v. Peek* [1889]
10 *14 App Cas 337*). Fraud in relation to the calling of Performance Bonds has been extensively discussed in cases such as *Enka Insaat Ve Sanayi v. Banca Popolare Dell’Alto Adige* [2009] *EWHC 2410*, which further confirms the high threshold for proving fraud under English law.

In light of the foregoing comparative analysis, given that the purpose of the fraud rule is to stop dishonest beneficiaries from abusing the demand guarantee system, this court is inclined to state
15 that the test for fraud is met, not by showing breach or other non-compliance with the terms of the underlying contract, but when strong or compelling evidence is led to show that the documents presented to the Bank are forgeries or contain any express material misrepresentations. As in any other case, where fraud is alleged, it will not be inferred lightly and mere error, misunderstanding, non-compliance with the terms of a guarantee or oversight
20 does not translate into fraud and will not amount to fraud. It should rise to the level of egregious conduct; meaning conspicuously, glaringly, or staggeringly or flagrantly bad, of a nature that would vitiate the very foundation of the bank guarantee. A kind of outrageous conduct which shocks the conscience of the court, such as or where the guarantee is called upon with absolutely no basis in fact. Courts will not permit a guarantee to be used for a purpose for which it was
25 never generated. The facts of the case should depict that fraud committed by the beneficiary is of such nature that it destroys the entire underlying transaction.

A colourable claim is a plausible legal claim, one that may reasonably be asserted on the basis of facts presented and current law. This means that the claim is “strong enough” to have a
30 reasonable chance of being valid if the legal basis is generally correct and the facts can be proven in court. The insolvency of the contractor and/or the automatic determination of the employment

of the contractor usually constitutes an event of default for the purposes of calling the bond. That the underlying contract was terminated before completion, in the absence of any fraud, bad faith or other special circumstances, usually presents a justifiable basis for a beneficiary of a performance guarantee, to make a call thereon. To overcome that seemingly valid or genuine basis for the plausible call, the applicant must present a case of manifest fraud to justify an injunctive interim relief. A manifest fraud is one that is obvious or easily demonstrable without extensive investigation. The alleged fraud should be so obvious as to admit of no difference of opinion. It is one that can be demonstrated immediately and almost conclusively. This relatively high standard is intended to avoid applications introduced only as a subterfuge or means of evading a call.

In the instant case, it is not in dispute that the applicant had not executed the contract fully at the time of its termination whereafter a call was made on the guarantee. That a call thereon was made after full mobilisation of equipment required to execution of the contract, albeit belatedly, as claimed by the applicant, but disputed by the respondent, is not a fact of a nature that is easily demonstrable without extensive investigation. On basis of the evidence availed to court at this stage, the applicant has not furnished proof of the absence of any colourable or plausible basis under the contract for the respondent to call on the guarantee. It is not seriously arguable that on the material available the only realistic inference is that the respondent, as beneficiary, could not honestly have believed in the validity of its demand. In light of the delay, that the respondent was notified of that mobilisation the very day the notice to terminate and call on the guarantee were issued does not constitute a denial of the legitimacy of the beneficiary's demand or constitute a manifest fraud.

Although the merits of the parties' respective cases and their relative strengths are not to be considered at this stage, the court is of the view that the applicant has not established a strong *prima facie* case of manifest fraud, or that the guarantee was called upon with absolutely no basis in fact. The applicant has not satisfied this requirement.

b) Whether the 1st respondent could not honestly have believed in the validity of its demand under the guarantee.

Other than in cases of illegality, a court may only step-in to enjoin a call on a guarantee in the case of fraud on the part of the beneficiary. A restraining order will only be granted against a bank if there is a seriously arguable case that the person calling on it, did not honestly believe the validity of the cause (see *United Trading v. Allied Arab Bank [1981] 2 Lloyds 256, at para 257*).
5 When determining this in interlocutory proceedings, the Courts apply a two-stage test: (a) that the beneficiary could not honestly have believed in the validity of its demand under the guarantee and (b) that the bank knew of the fraud at the time the beneficiary made the demand. It must be seriously arguable on the material available that the only realistic inference is that 3rd
10 respondent could not honestly have believed in the validity of its demand under the guarantee.

The correct test is stated in *United Trading Corporation S.A. v. Allied Arab Bank Ltd [1985] 2 Lloyd's Rep 554*, namely; whether it is seriously arguable that, on the material available, the only realistic inference is that the beneficiary could not honestly have believed in the validity of its
15 demands and that the bank was aware of that fact. To successfully rely on fraud, a party has to go further and show that the beneficiary made the call, in bad faith, knowing it to be incorrect. If a beneficiary makes a false representation without actual knowledge that it is false, but with no honest belief in its truth, this too could constitute a fraud in terms of the fraud exception. This is because fraud connotes the absence of an honest belief in either the entitlement to claim under
20 the guarantee or in the amount claimed.

A restraining order will be granted where, for the purpose of drawing on the guarantee, the beneficiary fraudulently presents to the bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue (see *United City
25 Merchants (Investments) Ltd. v. Royal Bank of Canada, [1983] 1 A.C. 168 at 183*). A material fraudulent misrepresentation occurs where the beneficiary makes a false statement or representation, knowing the representation to be false, or without belief in its truth; or recklessly, careless whether it be true or false. The word “material” means “material to the bank’s duty to pay, so that if the document stated the truth the bank would be obliged to reject the document.

30

Demanding payment in the knowledge of the absence of material entitlement, constitutes fraud. There must be no honest belief in the validity of a demand for the fraud exception to apply (see *Uzinterimpex JSC v. Standard Bank plc* [2007] 2 Lloyd's Rep 187 para 107; *Intraco Ltd v. Notis Shipping Corporation (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256 and *National Infrastructure Development Co Ltd v. Banco Santander SA* [2016] EWHC 2990 Comm para 11). The fraud must be clearly illustrated, or it must be the only realistic inference that may be drawn from the available circumstantial evidence. Conduct whereby the beneficiary's submission of the demand rests on statements of fact which, to its own positive knowledge, are incorrect or contain misrepresentations, may translate into fraud.

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Advance payment guarantees manage the risk of the contractor's failure to earn the whole of any advance payment from the employer by failing to provide services to an equivalent value. The failure may result from the contractor's insolvency, fraud or default through using the advance payment for another purpose. Such guarantees usually contain a reduction clause, just as the one now in issue does, whereby the amount of the guaranteed reduces in accordance with monthly certificates until the certified value of work done exceeds the advance payment. It appears that in this case by the time the contract was terminated, the applicant had not mobilised equipment of a value that equalled or exceeded that of the advance payment guarantee, so as to effectively discharge it.

20

That aside, a demand guarantee will always have an expiration date, which the beneficiary must respect. The right to invoke the guarantee is only for a default of the contractor which occurs during the validity period of the bank guarantee (see *Yuanda (UK) Co Ltd v. Multiplex Construction Europe Ltd (formerly known as Brookfield Multiplex Construction Europe Ltd) & Anor* [2020] EWHC 468 (TCC). The claim period is a contractually agreed period of time between the beneficiary and the contractor which provides a grace period beyond the validity period to make a demand on the guarantor for a default which has occurred during the validity period. A claim period may or may not exist in the guarantee. Unless a call under the guarantee is filed before the date of expiry, all the beneficiary's rights under the said guarantee are forfeited and the guarantor is relieved and discharged from all liability thereunder.

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Considering that the advance payment guarantee expired on 6th December, 2022, there is no evidence to show that the respondent could not honestly have believed in the validity of its demand when it made a call based on that guarantee on 18th January, 2022. The applicant has not satisfied this requirement as well.

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- c) Whether the 2nd respondent knew of the fraud at the time the 1st respondent sought payment under the guarantee.

10 It is necessary that at the time of the calling of the guarantee, the guarantor should have notice of the fraud. Moreover, such fact of notice along with its evidence has to be averred in the application. A guarantor should not pay where a fraud by the beneficiary of the guarantee has been sufficiently brought to its knowledge before payment or demonstrated to a court called on by the beneficiary to issue an interlocutory restraining order to restrain the guarantor from honouring the draft (see *Bank of Nova Scotia v. Angelica-Whitewear Ltd [1987] 1 SCR 59*). In
15 the instant case, having found that the applicant has not established a strong *prima facie* case of manifest fraud, or that the guarantee was called upon with absolutely no basis in fact, this element does not arise at all.

- 20 iii. Balance of convenience (whether the threatened injury to the applicant outweighs the threatened harm the restraining order might inflict on the respondents).

When the court is in doubt considering the outcome of its consideration of the first two factors, the third part of the test involves the court assessing which of the parties would suffer greater harm from the granting or refusal of the restraining order pending arbitration. Unless the material
25 available to the court at the hearing of the application for an interlocutory restraining order fails to disclose that the applicant has any real prospect of succeeding in his or her claim at the arbitration, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

This part of the test is referred to as the “balance of convenience.” Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of restraining order. It is necessary to assess the harm to the applicant if there is no restraining order, and the prejudice or harm to the respondent if a restraining order is imposed. The courts examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the restraining order, and the current *status quo* as at the time of the restraining order. The court should then take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong.” It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties.

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The Court has the duty to balance or weigh the scales of justice by ensuring that the arbitration is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her contractual rights. No doubt it would be wrong to grant an injunctive interim protective measure pending disposal of the arbitration where the claim is frivolous or where such order would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an injunctive interim protective measure will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the arbitration may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for all of them.

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The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the arbitration is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should first consider whether if the applicant were to succeed at the arbitration in establishing his or her right to a permanent restraining order, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent’s continuing to do what was sought to be enjoined between the time of the application and the time of the arbitration. If damages in the measure recoverable at common law would be adequate remedy and the respondent would be in a financial position to pay them, no interlocutory restraining

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order should normally be granted, however strong the applicant's claim appears to be at this stage.

5 If, on the other hand, damages would not provide an adequate remedy for the applicant in the event of his succeeding at the arbitration, the court should then consider whether, on the contrary hypothesis that the respondent were to succeed at the arbitration in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the arbitration. If damages would be an adequate remedy and the
10 applicant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory restraining order.

Even if a party is able to establish the fraud exception, it still faces an insuperable difficulty, in that it will have an adequate remedy against the bank in damages if it pays despite being on
15 notice of fraud. By contrast, a restraining order might cause greater damage to the bank than the party seeking the restraining order could pay on their undertaking as to damages. In these circumstances, the balance of convenience will almost always be in favour of allowing the bank to pay. The balance of convenience will almost always militate against the grant of a restraining order. The reasons for this disinclination become readily understandable when one contrasts the
20 uncertainty in which a court finds itself with respect to the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a restraining order, not only for the parties to the arbitration but also for the public at large.

In the instant case a restraining order would have the effect of providing the applicant with the
25 entire relief that is sought in the arbitration itself, which may not be undone by an award favourable to respondent on the merits. On the other hand, the guarantee was issued on the understanding that if the applicant used the advance payment for purposes other than the costs of mobilisation in respect of the works or failed to repay the advance payment in accordance with the contract conditions, then it would be the applicant as guarantor's obligation to perform the
30 principal's task. The performance guarantee serves as a risk management tool for the beneficiary,

as the guarantor assumes liability for financing the completion of the contract to the limit of the guarantee, should the contractor default on its contractual obligations.

Secondly, an advance guarantee serves as an agreed allocation of risk as to which of the parties is to be out of pocket pending resolution of the dispute about breach of the underlying contract (see 5 *Clough Engineering Ltd v. Oil & Natural Gas Corp Ltd* (2008) 249 ALR 458; *Fletcher Construction Australia Ltd v. Varnsdorf Pty Ltd* [1998] 3 VR 812, 826; *Marcon Pty Ltd v. Kerman Contracting Pty Ltd* [2015] WASCA 7 and *Sugar Australia Pty Ltd v. Lend Lease Services Pty Ltd* [2015] VSCA 98). It is a promise by the guarantor that it will pay to the 10 beneficiary named in the guarantee an amount up to the limit set out there in unconditionally or on specified conditions, without reference to the terms of the contract between the parties.

Thirdly, in considering whether or not to grant an interlocutory restraining order the judge ought not to give full weight to all the practical realities of the situation to which the restraining order 15 will apply (see *NWL Ltd v. Woods* [1979] 1 WLR 1294; [1979] 3 All ER 614). Consequently, Courts will grant restraining orders against termination of contracts in very exceptional cases. This is because an order preventing a termination is effectively an order requiring the party terminating to continue with performance of the contract. The effect of a restraining order to prevent termination would be in effect to require two parties who have fallen out with each other 20 and one of whom has lost confidence in the other to continue to work together in circumstances where they have a sophisticated contract which purports to provide commercial solutions and remedies when a lawful or unlawful termination occurs. Construction contracts consist of a wide variety of rights and obligations on each party and the courts will not police compliance with such wide-ranging provisions. The Courts do not consider it unjust that a party is confined to the 25 recovery of such damages as the contract, which it has entered into freely, permits it to recover, rather than granting restraining orders.

For example, in *Ericsson AB v. EADS Defence and Security Systems Limited* [2009] EWHC 2598, There were two applications for restraining orders before the court: Ericsson sought to 30 prevent EADS from terminating the agreement between the parties before the adjudication and the EADS sought an order preventing Ericsson from taking any further steps in the adjudication

and a declaration that any decision of the adjudicator would be invalid. The Judge considered the test applicable to interim restraining orders. While Ericsson had a real prospect of success of obtaining the restraining order at full trial the Court was not concerned with determining the final rights of the parties at this stage. He considered that damages would be an adequate remedy
5 between two very substantial commercial parties that had freely negotiated their own contract. In addition, any damage to reputation that Ericsson may have suffered would be for a relatively limited duration. Further, the contract provided that Ericsson could refer a matter to both mediation and adjudication. It stated that the parties “may” refer the matter to mediation or adjudication, not that it “shall” refer a dispute to one or the other. Ericsson could pursue
10 remedies in adjudication even though they had sought such remedies via mediation. Finally, the contract as stated that adjudicators’ decisions shall be valid and enforceable by the court, subject to manifest error. Both applications were dismissed.

The fact that there is an agreed mediation and/or adjudication process in this particular contract
15 does not serve to prevent the exercise of contractual rights such as the ability to terminate prior to the conclusion of the dispute resolution process. If the parties wished the dispute resolution process to have the effect of suspending or otherwise preventing a party from exercising such contractual rights, then very clear contractual wording would be needed in order to achieve this.

20 Although the beneficiary can claim under a guarantee in respect of any claims which have been notified to the guarantor on or before the expiry date but which have not been determined by the expiry date, claims under guarantees are often made immediately prior to the expiration date. This usually means that the beneficiary has one shot to make a complying presentation, and if the guarantor rightfully rejects the claim after the expiration date, the beneficiary has lost his rights
25 to claim. I therefore find that the balance of convenience is in favour of not granting the interim measure of protection sought. The application is accordingly dismissed with costs to the respondent.

Delivered electronically this 1st day of February, 2023
30 **Mubiru**.....

.....**Stephen**

Stephen Mubiru
Judge,

1st February, 2023.