

“SPECIAL EQUITIES” AS AN EXCEPTION TO RESTRAIN BANK GUARANTEES INVOCATION

JAIDEEP KHANNA*

Bank Guarantees are the bedrock of security in modern commercial contracts and have invited minimal judicial intervention at the interim stage. In exercise of equitable jurisdiction, Indian courts have followed common law jurisprudence to lay down the exceptions of “fraud” or “irretrievable harm” to grant injunctive relief. Additionally, a third exception of “special equities” allows a party to establish the existence of a “special circumstance”. However, “special equities” by itself cannot be pleaded for grant of an injunction. It must be additionally supplemented with irretrievable harm/injustice. In 2019, the Supreme Court of India in the Standard Chartered Bank case, has marked a departure from a catena of decisions to allow a party to plead “special equities” as an independent exception. As a consequence, the Delhi High Court, in recent decisions has been tasked to adjudicate cases where the “COVID-19 pandemic” itself has been pegged as a circumstance worthy of granting injunctions. The paper argues that the ambiguity created by the Standard Chartered case has attracted judicial criticism and will lead to an increase in injunction applications pleading the exception of “special equities” without establishing causation of irretrievable harm. Therefore, there is a dire need to “course-correct” to restore the sanctity of bank guarantees.

* Jaideep Khanna is a dispute resolution counsel practicing across judicial forums in New Delhi and has appeared before the Supreme Court of India, Delhi High Court, and Arbitral Tribunals. He can be contacted at jaideepkhanna.lawchambers@gmail.com. He is grateful for the research assistance rendered by Mr. Punishk Handa.

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I. INTRODUCTION

The exceptions to injunct invocation of bank guarantees stands at a crucial juncture for Indian commercial jurisprudence. The recent lacunae and ambiguity created by Supreme Court's 2019 decision of *Standard Chartered* has created a ripple effect on the precise contours of the exception of "special equities". The decision of *Standard Chartered* has allowed contracting parties to plead for injunctions on invocation of bank guarantees on the sole exception of a special circumstance. The previous requirement of satisfying the court on causation of "irretrievable injustice or harm" has been diluted. With the advent of the COVID-19 pandemic, commercial courts of the country have been tasked to interpret conflicting and unclear jurisprudence on the issue. The paper marks an attempt to locate the divergence of Indian jurisprudence on the issue and highlight its potential ramifications for commercial transactions in the country. Further, the paper illustrates how Indian law must be swift in addressing the lacunae to avoid multiplication of litigation on the issue and a consequent breakdown of commercial contracts which are dependent on bank guarantees as secure instruments of security.

Part I of the paper illustrates the importance of bank guarantees in modern commercial transactions. In doing so, it is established that common law jurisdictions have insisted on ensuring judicial restraint in granting injunctions to prevent a rupture in commercial transactions. In continuance, Part II explains the principle of autonomy and the doctrine of strict compliance as the bedrock of common law jurisprudence for bank guarantees. Further, it is argued that Indian jurisprudence has undergone a significant departure from the common law exceptions of "fraud", "irretrievable harm/injustice" and "special equities". Notably, it is argued that common law jurisdictions like Singapore have made

efforts to expand the equitable jurisdiction of courts to grant injunctive relief by introducing the broad exception of “unconscionability”. However, it is shown that there is a natural tendency of private contracts to push-back against such over-reaching principles of equity in commercial transactions.

Part III traces the source of the exception of “special equities” by the Supreme Court of India. This is done by analyzing a catena of judgments from 1988 to 2019 that establish that “special equities” was never intended to exist as an independent factor of consideration for grant of injunctive relief. The exception was always to be supplemented by establishing cause of irretrievable harm or injustice. Part IV of the paper illustrates the consequence of the lacunae created by the 2019 Supreme Court judgment in *Standard Chartered*. The consequence is brought to the fore before the Delhi High Court in multiple decisions where the High Court has had to deal with litigants who have taken the defense of the COVID-19 pandemic as a “special equity” without establishing irretrievable harm or injustice.

In conclusion, Part V of the paper depicts the judicial awareness of the Delhi High Court to ensure that parties do not misuse the lacunae created by *Standard Chartered*. However, it is argued that until the Indian judiciary is able to rectify the ambiguity created by reference to a larger bench, it is anticipated that litigants will continue to exploit the needless ambiguous divergence of the Supreme Court on the issue.

II. BANK GUARANTEE OR LETTERS OF CREDIT

In contract law, a contract of guarantee provides for an undertaking by a surety to pay a contractually decided amount of money to the creditor or beneficiary on a default of performance by the principal debtor.¹In contemporary commercial relationships, bank guarantees form the backbone of most commercial transactions. The incentive for commercial relationships to rely upon bank guarantees is to ensure that

¹ UTKARSH AGARWAL & SHAILJA AGARWAL, INTERNATIONAL CONTACTS II: IDENTIFY AND COMPARING THE TRENDS IN INTERNATIONAL CONTRACT LAWS AND PROBING THE CRITICAL ISSUES FOR MULTINATIONAL CONTRACTING (Joshua Aston ed., 2016).

the interests of parties are protected.² For example, a sales contract which provides for shipment of goods by a manufacturer to a retailer may be fraught with market risks and contract breaches. However, if either of the parties are able to agree upon a guarantor bank, the guarantor is able to protect the parties' interests by ensuring the payment is released upon performance of contractual obligations.

The scope of this review and concern of most courts of law is the jurisprudence of when parties are allowed to seek an injunction against invocation of bank guarantees. In most common law jurisdictions including India, courts have often restrained from issuing injunctions against invocation of bank guarantees and have in turn laid down strict standards that must be met by a party seeking an injunction.

It is evident from common law jurisprudence established by the English courts, which has been later relied upon by jurisdictions such as Singapore, that courts often exercise restraint from injuncting invocation of bank guarantees. The rationale behind such restraint is to ensure that commercial transactions are not halted by injunctive relief. However, the scope of debate emerges in how jurisdictions have practiced equitable jurisdiction is granting injunctive relief.

III. COMMON LAW JURISPRUDENCE

As alluded to in the previous section, bank guarantees offer contracting parties a significant "risk-reduction" in terms of securing payment irrespective of contractual disputes that may emanate from the main contract itself. In turn, the guarantor bank is legally bound to ensure payment of the secured amount. This fundamental characteristic of bank guarantees has led to the crystallization of the principle of autonomy. The principle of autonomy separates the bank guarantee from its underlying contract.³ The principle of autonomy in bank guarantees is supplemented with the doctrine of strict compliance which ensures that a demand for payment or invocation of bank guarantee must be met

² Mirjana Knezevic and Aleksandar Lukic, *The Importance of Bank Guarantees in Modern Business (Business Environment in Serbia)*, INV. MGMT. & FIN. INNOVATIONS, 13 (3-1) 215-221 (2016).

³ Hamed Alavi, *Comparative Study of Unconscionability Exception to the Principle of Autonomy in Law of Letter of Credits*,¹² ACTA UNIVERSITATIS DANUBIUS (2016).

with payment by the guarantor as long as requirements of the guarantee are fulfilled.⁴

Indian jurisprudence has consistently accepted that a court cannot interfere with the enforcement of a bank guarantee except only in cases where fraud or special equity is prima facie made out so as to prevent irretrievable injustice.⁵ Common law jurisdictions have shown a consistent approach to follow the exceptions of “Fraud”, “Irretrievable harm/injustice” and “special equities”.

The common feature amongst most common law jurisdictions to injunct bank guarantee invocation is the exception of “Fraud”. To be precise, under the basic element of fraud it must be established that the beneficiary’s demand for invocation must be fraudulent. Needless to state, the element of establishing fraud would depend on the evidence produced at the interim stage before the appropriate court. However, disagreements begin to emerge across common law jurisdiction in exceptions other than establishing fraud.

The subject of divergence shown by courts in India is that of interpreting the exception of “Irretrievable Injury/Harm/Injustice” and “Special Equities” to justify grant of injunctions. Indian Courts have largely been attuned to exercise equitable jurisdiction in cases where there are “special equities” in favor of an injunction which create “irretrievable injury” or “irretrievable injustice”. This interpretation of articulating “special equities” as a result of irretrievable injury has its roots in English law which shall be elaborated in the following section.

However, the controversy at the moment lies in the 2019 Supreme Court of India’s decision in *Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*⁶ which has classified a circumstance of “Special Equities” to be an independent factor from the causation of irretrievable injustice or injury to a party. This ambiguity has led to a situation where Indian courts are left grappling with a lack of academic and jurisprudential

⁴ M. Kelly-Louw, *The Doctrine of Strict Compliance in the Context of Demand Guarantees*, THE COMP. & INT’L L. J. OF SOUTHERN AFR., 49(1), 85-129 (2016).

⁵ *Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd.*, (1996) 5 SCC 450.

⁶ *Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574 : 2019 SCC OnLine SC 1638.

analysis regarding the principle of autonomy in commercial transactions involving letters of credit or bank guarantees.

It can be argued that certain circumstances other than fraud may be at play when courts are tasked with exercising equitable jurisdiction. Most notably, parties may find it hard to satisfy a court on the ground of causation of irretrievable injury if the bank guarantee is invoked. For example, the COVID-19 pandemic may be a circumstance in itself which justifies grant of injunctive relief.

However, it may be argued that the exception of "Unconscionability" may be better suited to alleviate the ambiguity surrounding the "Irretrievable Harm-Special Equity" test. Singapore law has pioneered the jurisprudence on utilizing the exception of unconscionability to decide bank guarantee injunction cases. The concept of unconscionability is most notably expressed in *BS Mount Sophia Pte. Ltd. v. Join-Aim Pte. Ltd.*⁷ wherein the Singapore Court of Appeal laid down unconscionability to involve 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. It was apparent that the exception of unconscionability was elastic enough for courts to consider the terms of the underlying contract to establish whether an invocation of bank guarantee could be justified in exercise of equitable jurisdiction. Therefore, the exception of unconscionability is one which is born in equity and does not create specific contours for its invocation.

However, one may argue that the exception of unconscionability is one which loosens the principle of autonomy as it necessarily requires courts to go beyond the terms of the bank guarantee. It is for this reason that the exception of unconscionability has been nullified to an extent by the addition of contractual clauses into bank guarantees that preclude parties from relying upon the exception of unconscionability to injunct bank guarantees. This was most pertinently reflected in *CKR Contract Services Pte. Ltd. v. Asplenium Land Pte. Ltd.*⁸ wherein the Singapore Court of Appeal was tasked to decide whether parties

⁷ *BS Mount Sophia Pte. Ltd. v. Join-Aim Pte. Ltd.*, (2012) 3 SLR 352.

⁸ *CKR Contract Services Pte. Ltd. v. Asplenium Land Pte.*, (2015) SGCA 24.

can agree to exclude the unconscionability exception as a ground for invocation of a performance guarantee. The court in *Asplenium* held that under private law and consequent private contracts, parties are free to exclude common law remedies. The scholarship of *Garth C. Woller* aptly summarizes the position to now be one where the enforceable *Asplenium* Clause emerges in common law to defeat the unconscionability exception that was born in equity, sired from the general principles of equitable fraud, and midwived by injunction law.⁹ It is therefore apparent that there is a natural tendency of a push-back by commercial entities when courts expand principles of equity to grant invocations.

As shall be elucidated in the subsequent section, Indian jurisprudence was largely in sync with the trend of non-interference in invocation of bank guarantees except in situations of fraud and/or irretrievable harm or injustice. The introduction of “Special Equities” has had a linear development and has its roots in English common law jurisprudence. The subsequent section takes a dive into the roots of the “Special Equity” exception and analyses its unprecedented departure from commercial prudence.

IV. TRACING THE HISTORY OF THE SUPREME COURT OF INDIA’S ANALYSIS OF “SPECIAL EQUITIES”

In 1988, a division bench decision of the Supreme Court in *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*¹⁰ had the occasion to consider multiple High Court decisions and position of English law to begin the crystallization of the principles and exceptions to injunct the invocation of bank guarantee. Justice Mukharji’s judgment in *U.P. Cooperative Federation Ltd.* relied upon the decision of the English Court of Appeal in *Elian and Rabbath v. Matsas and Matsas*¹¹ and the Queen’s Bench Division in *R.D. Harbottle (Mercantile) Ltd. v.*

⁹ Garth Wooler, *The New ‘Asplenium Clause’ — Unconscionability Unwound?*, SINGAPORE J. OF LEGAL STUD., 169 (2016).

¹⁰ *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174.

¹¹ *Elian and Rabbath v. Matsas and Matsas*, (1966) 2 Lloyd’s Rep 495.

National Westminster Bank Ltd.¹² to establish that an unconditional bank guarantee can only be enjoined on the ground of fraud or in case of a question of apprehension of irretrievable injustice. However, Justice Mukharji sought to articulate the concept of irretrievable injustice through the concept of "special equities". Reliance was placed upon a 1978 Calcutta High Court decision in *Texmaco Ltd. v. State Bank of India*¹³, wherein it was held that an exception of "special equities" will entitle a party to attain an injunction for invocation of an unconditional bank guarantee. Intriguingly, the relied upon Calcutta High Court decision *Texmaco* was authored by Justice Mukharji himself during his tenure as a Calcutta High Court judge.

It can be seen that Justice Mukharji's opinion in *U.P. Cooperative* was based on the premise that the exception of "special equities" must include a situation where an injunction was sought for to prevent injustice which was irretrievable. In other words, "irretrievable injustice" may be considered as a specie of the "special equities" genus.¹⁴

Thereafter, the next notable consideration by the Supreme Court was in 1997, in *U.P. State Sugar Corpn. v. SUMAC International Ltd.*¹⁵. It was observed that courts should ordinarily desist from enjoining the invocation of bank guarantees. Further, it was noted that courts must be conscious of the fact that bank guarantees form an intrinsic component of commercial dealings and therefore the exceptions to enjoin the invocation of a bank guarantee must be limited and exceptional in nature. In this regard, the court held that an injunction of an unconditional bank guarantee is warranted in cases where there is a prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties.

The Supreme Court was able to outline two broad exceptions under which injunctive relief could be granted:

¹² *R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.*, 1978 QB 146 : (1977) 3 WLR 752.

¹³ *Texmaco Ltd. v. SBI*, 1978 SCC OnLine Cal 140.

¹⁴ *U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.*, (1988) 1 SCC 174, ¶31 (Hari Shankar, J).

¹⁵ *U.P. State Sugar Corpn. v. SUMAC International Ltd.*, (1997) 1 SCC 568.

- a. A fraud in connection with the bank guarantee which would vitiate the foundation of the bank guarantee.
- b. If the encashment of the bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.

Thereafter, the next significant decision concerning injunction of unconditional bank guarantees was revived in 2006, by the Supreme Court in *BSES Ltd. v. Fenner India Ltd.*¹⁶ The Court placed reliance on *U.P. State Sugar Corpn.*, to clarify that courts may grant injunctive relief if there are 'special equities' in favour of the injunction which will cause 'irretrievable injury' or 'irretrievable injustice'.

The threshold for special equities was further analyzed in a 2007 decision of the Supreme Court in the case of *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*,¹⁷ which re-iterated that an injunction can be granted against the invocation of an unconditional bank guarantee if its encashment will result in irretrievable harm or injustice to one of the parties concerned.

The Supreme Court decision in 2007 in *Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd.*¹⁸ re-iterated that a court should ordinarily restrict itself from injuncting encashment of bank guarantees except on the ground of "fraud and irretrievable injury". Soon after, the Supreme Court in the division bench decision of *Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd.*¹⁹ took note of the co-ordinate division bench decisions of *U.P. State Sugar Corpn*, *Fenner India Ltd.*, *Himadri Chemicals* and *Mahatma Gandhi* to crystallize the following principles:

"The only exceptions, to this general rule, are where there exist/ exists:

- (a) *fraud of an egregious nature, or*
- (b) *irretrievable injustice resulting to the parties, at whose instance the bank gave the guarantee, were the injunction not granted, or*

¹⁶ *BSES Ltd. v. Fenner India Ltd.*, (2006) 2 SCC 728.

¹⁷ *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, (2007) 8 SCC 110.

¹⁸ *Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd.*, (2007) 6 SCC 470.

¹⁹ *Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd.*, (2008) 1 SCC 544.

(c) *special equities, of which the possibility of irretrievable injustice is itself one.*²⁰

In 2016, the Supreme Court in another division bench judgment of *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Ltd.*²¹ relied upon the law re-affirmed in *Himadri Chemicals* to hold that an invocation against an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned.

Therefore, what emerges is that the Supreme Court had not observed or held that “special equities” by itself would justify grant of an injunction. It was apparent that the Supreme Court required the applicant to establish causation of irretrievable injustice or injury to take the benefit of the “special equities” exception. This was in teeth of Justice Mukharji’s opinion in the 1988 decision of *U.P. Cooperative Federation Ltd.* The co-ordinate benches of the Supreme Court had effectively settled the law on this point until a divergence emerged in 2019.

In 2019, the Supreme Court in a division bench, delivered a judgment in *Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*²² after observing a catena of judgments on the issue came to the puzzling conclusion that “special equities” and “irretrievable injustice” can exist as distinct circumstances to justify an injunction of invoking a bank guarantee. Pertinent reference is drawn to the following extract of *Standard Chartered*:

“23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary, and the bank is always obliged to honor its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has

²⁰ CRSC Research and Design Institute Group Co. v. Dedicated Freight Corridor Corpn. of India Ltd., 274 (2020) DLT 89, ¶25 (Hari Shankar, J.).

²¹ *Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46.

²² *Standard Chartered Bank v. Heavy Engg. Corpn. Ltd.*, (2020) 13 SCC 574 : 2019 SCC OnLine SC 1638.

given the guarantee is immaterial and is of no consequence. There are, however, exceptions to this Rule when there is a clear case of fraud, irretrievable injustice or special equities...”

The effect of the Supreme Court’s decision in *Standard Chartered* is that the court has effectively thrown a catena of co-ordinate bench judgements in limbo by denoting “special equities” as a distinct circumstance. The problem which emerges is that the term of “special equities” in Indian jurisprudence as propounded by Justice Mukharji was never defined in its entirety and its scope of enquiry remains a subject of contention for litigants and High Courts that must now muscle between multiple co-ordinate bench decisions of the Supreme Court to adjudicate on injunction applications. After the decision of *Standard Chartered*, a strategic litigant may not have to establish the causation of irretrievable injury or injustice but merely rely on “special equities”. The 2019 decision of *Standard Chartered* was followed by the COVID-19 pandemic. A litigant’s defense of the COVID-19 pandemic under the exception of “Special Equities” was fast approaching.

V. MURKY WATERS

The ambiguity created by *Standard Chartered* was put to action before the Delhi High Court in an April 2020 interim decision of *Halliburton Offshore Services Inc. v. Vedanta Ltd.*,²³ authored by Justice C. Hari Shankar.

In *Halliburton*, the Petitioner argued that the COVID-19 pandemic was a special circumstance in itself that justified the court to injunct the invocation of the bank guarantee. In other words, the Petitioner argued that the advent of COVID-19 and its subsequent impact on economic activities would amount to the existence of “special equities.” The presiding judge at the interim stage had the task of interpreting the Supreme Court’s decision of *Standard Chartered* to decide whether the Petitioner was required to satisfy the court on the exception of irretrievable injustice.

²³ *Halliburton Offshore Services Inc. v. Vedanta Ltd.*, 2020 SCC OnLine Del 542.

Interestingly, the interim order of *Halliburton* interpreted the Supreme Court's decision of *Standard Chartered* to hold that the Supreme Court visualized irretrievable injustice and special equities as distinct circumstances. Pertinent reference is drawn to the following extract of the interim decision which invited criticism:

*"17. ...It is significant, however, that, where the earlier understanding of the expression "special equities", as a circumstance in which invocation of bank guarantees could be inducted, was that such equities were limited to cases where irretrievable injustice resulted, the recent decision **Standard Chartered Bank Ltd** seems to visualize irretrievable injustice, and special equities, as distinct circumstances, the existence of either of which would justify an order of injunction."*

The interim decision of *Halliburton* invited criticism on the ground that the Delhi High Court had effectively diluted the element of establishing "irretrievable injustice".²⁴ The Court instead appreciated the fact that an injunction could be given on the sole ground of the COVID-19 pandemic. In fact, the Court rejected the argument that the Petitioner could still recover the amount if they succeed in the arbitration proceedings. In effect, the Court had diluted the requirement for the Petitioner to establish the causation of "irretrievable injustice".

The interim decision in *Halliburton* invited overseas criticism as well which was articulated through the sanctity of financial instruments such as bank guarantees. It was argued that the interim decision seemed to "buck the trend" of courts shying away from interfering in injuncting bank guarantees.²⁵

As anticipated, the interim decision in *Halliburton* came to be reversed by a final judgment authored by Justice Pratibha M. Singh.²⁶

²⁴ Jaideep Khanna, "*Special Equities*" in *Light of COVID-19 and its Impact on Invoking Bank Guarantees*, SCC OnLine BLOG OpEd 22 (2020).

²⁵ Shourav Lahiri, *Halliburton v Vedanta: Performance bonds and COVID-19*, ATKIN CHAMBERS (Apr. 24, 2020), <https://www.atkinchambers.com/halliburton-v-vedanta-performance-bonds-and-covid-19/>.

²⁶ *Halliburton Offshore Services Inc. v. Vedanta Ltd.*, 2020 SCC OnLine Del 542.

An intriguing point to note is that there was a change in the presiding judges who authored the interim order and final decision respectively.

Surprisingly, the final decision in *Halliburton* reversed the interim decision but was silent on the ambiguity created by the Supreme Court in *Standard Chartered*. Instead, the interim order was reversed on the basis of a factual analysis which found that COVID-19 was not the reason for the Petitioner's non-performance and breach of contract which led to a claim for invocation. The decision made a cursory reference to the ambiguously worded decision in *Standard Chartered* to state that the law was clear and repeatedly settled. Pertinent reference is made to the following extract of the final judgment in *Halliburton*:

"78. The law relating to Bank Guarantees is extremely clear and has been repeatedly settled by the Supreme Court including in Standard Chartered v. Heavy Engineering Corporation Ltd & Ors. (supra).

...

The remaining authorities cited by the Company are on the same lines and are not repeated for the sake of brevity."

The ambiguity created by the decision of *Standard Chartered* read with the interim decision of *Halliburton* resurfaced in the Delhi High Court's decision in *CRSC Research and Design Institute Group Co. Ltd. v. Dedicated Freight Corridor Corpn. of India Ltd.*²⁷ which was authored by Justice Hari Shankar. As mentioned above, Justice Hari Shankar had also authored the interim decision in *Halliburton*. However, in *CRSC Research*, the Delhi High Court had another opportunity to analyze the lacunae created by the Supreme Court's decision in *Standard Chartered* and the interim decision of *Halliburton*. Interestingly, the decision in *CRSC Research* recorded the controversy and scope for debate surrounding the treatment of "special equities" as a distinct circumstance from "irretrievable injustice". Justice Hari Shankar candidly acknowledged that the Supreme Court's decisions have failed to define the scope and ambit of "special equities" which would be

²⁷ *CRSC Research and Design Institute Group Co. v. Dedicated Freight Corridor Corpn. of India Ltd.*, 274 (2020) DLT 89, ¶25 (Hari Shankar, J.).

necessary to ascertain when a party can agitate the same before court. In this regard, the following key observations were laid down in *CRSC Research* that are material to this controversy:

- i. "Irretrievable injustice" must be of the magnitude that would override the twin considerations of the terms of guarantee and the adverse effect from the grant of the injunction to the commercial dealings in the country.
- ii. "Special Equities" must be so "special" so as to prevail over the aforementioned twin considerations.
- iii. "Special Equities" cannot be conferred an elastic construction that would snap the rule.

From the above findings, it is fair to say that the decision of *CRSC Research* acknowledges the lacunae and deviation created by the Supreme Court's judgment in *Standard Chartered*. The decision makes an effort to ensure that litigants cannot escape the burden of establishing the ground of "irretrievable injustice". In effect, Justice Hari Shankar in his decision in *CRSC Research* has remedied the effect and controversy surrounding his interim decision in *Halliburton*. However, this is not to say that the controversy is at rest. As expressed in *CRSC Research*, there remains some controversy surrounding the interpretation of *Standard Chartered*, and this may raise numerous cases before High Courts across the country. Pertinent reference is drawn to the following extract of *CRSC Research*:

"31. Some scope for debate, however, arises, on the concept of 'special equities'. The decision of the Supreme Court – perhaps, advisedly- do not delineate, in precise contours, the ambit of the expression..."

Considering the fact, that the decision of *CRSC Research* was a single judge decision, the matter travelled in appeal to a division bench of the Delhi High Court which upheld the single judge judgment on the issue. In fact, in its appreciation of arguments the division bench opined that "special equities" is a facet of the second exception of irretrievable injustice. In other words, the division bench echoed the reasoning employed by Justice Mukharji in 1998 in *U.P. Cooperative*. Pertinent

reference is drawn to the following extract of the Division Bench judgment in *CRSC Research*²⁸:

“15. As far as the argument of the senior counsel for the appellant, of special equities is concerned, the same is but a facet of the second exception aforesaid of irretrievable harm or injustice...”

VI. THE PATH FORWARD

As pointed by the division bench decision in *CRSC Research*, litigants have begun to misuse and nullify bank guarantee invocation by stalling payment and filing repeated cases. Pertinent reference is made to the following observations in the division bench decision of *CRSC Research*:

“10... It cannot be lost sight of that by approaching the Court, the plaintiffs/petitioners, though not able to succeed ultimately, often succeed in delaying encashment, thereby gaining vital time, to favorably negotiate with the beneficiary of the guarantee...”

In the opinion of the division bench in *CRSC Research*, the Appellant had no locus to approach the court in appeal. As a result, a cost of Rs. 5 Lakhs was imposed on the Appellant. However, one cannot fault the Appellant for filing an appeal against the Single Judge’s judgment which has sought to extend the scope of “special equities” which has largely remained undefined by the Supreme Court in the context of bank guarantees. Considering the fact that the decision of *CRSC Research* is yet to travel to the Supreme Court, there still remains a possibility that the Supreme Court may have to clarify the decision of *Standard Chartered*. It would be more appropriate to refer the same to a three-judge bench so as to create a binding authority over any ambiguity.

As expressed in the earlier sections of this paper, common law jurisdictions such as the UK and Singapore have shown a consistent effort to tighten the scope of courts to grant injunctions in bank guarantee calls. It is possible that if India does not clarify or tighten the

²⁸ *CRSC Research and Design Institute Group Co. v. Dedicated Freight Corridor Corpn. of India Ltd.*, 2020 SCC OnLine Del 1526.

exception of "special equities", it may result in a situation akin to the situation in Singapore in *CKR Contract Services Pte. Ltd. v. Asplenium Land Pte. Ltd.*²⁹ However, this may only serve a limited purpose, as courts would still have to assess the reasonableness of such exclusion clauses under the domain of private law and its conflict with ousting common law remedy.³⁰ The natural sequitur of this would be that Indian commercial contracts will begin including contractual clauses that oust the ability of a party to seek equitable remedy under the exception of "special equities."

Additionally, the Indian legislature may consider introducing a temporary COVID-19 driven legislation that may assist courts to steady the ship and ensure that all bank guarantee calls that stem for COVID related breaches are governed under the legislation. A fruitful example of this has emerged in Singapore with the introduction of the COVID-19 (Temporary Measures) Act, 2020.³¹ The Act specifically provides for parties to avoid approaching court for injunctive relief if parties are at agreement that the breach is related to COVID-19 restrictions.³²

Lastly, it is reasonable to argue that the COVID-19 pandemic has re-ignited the urgency for the Supreme Court to clarify the extent and scope of "special equities". However, at this stage, High Courts are left with the task of grappling with serial litigators who have relied upon an ambiguous divergence of the Supreme Court in *Standard Chartered*. In times where COVID-19 has ravaged commercial dealings across the country, it is imperative that mitigating steps are taken to ensure that commercial instruments are not misused.

²⁹ *CKR Contract Services Pte. Ltd. v. Asplenium Land Pte. Ltd.*, 2015 SGCA 24 (Singapore).

³⁰ Lim Dao Kai & Tham Hsu Hsien, *Singapore Court of Appeal Holds that Clause Restraining Call on Performance Bond on Any Ground, Including Unconscionability, was Enforceable*, LEXOLOGY (Jul. 30, 2015), <https://www.lexology.com/library/detail.aspx?g=04c33dd0-22d3-4423-98b0-27bdc3f6abc2/>.

³¹ COVID-19 (Temporary Measures) Act, 2020, No. 14, Acts of Parliament (Singapore).

³² § 6, COVID-19 (Temporary Measures) Act, 2020, No. 14, Acts of Parliament (Singapore).