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# UNCONSCIONABILITY, UNDUE INFLUENCE AND UMBRELLAS: THE "UNFAIRNESS" DOCTRINES IN SINGAPORE CONTRACT LAW AFTER *BOM V BOK*

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This article explores the impact of the Singapore Court of Appeal's landmark decision in *BOM v BOK*, where a full panel of five Supreme Court judges re-examined the status and scope of several closely-related doctrines of "unfairness" recognised under Singapore's contract law. The apex court formally articulated a three-pronged test for an unconscionability doctrine, taking pains to emphasise that Singapore should only recognise a "narrow doctrine" of unconscionability, while dismissing the possibility of an "umbrella doctrine" that merges the doctrines of duress, undue influence and unconscionability despite the court's view that there were "close linkages" between them. The breadth of the *obiter dicta* found in the decision, along with its 22-paragraph coda, agitated the doctrinal waters surrounding these vitiating factors and triggered a spirited riposte from a contributor to the March 2019 edition of this journal in which a detailed critique of the decision was canvassed. This article seeks to do three things. Firstly, it *explains* why the Court of Appeal's decision to adopt a narrow formulation of the doctrine of unconscionability for Singapore was the sensible thing to do. Secondly, it *examines* some of the conceptual difficulties associated with the equivocal statements made by the Court of Appeal in relation to the doctrinal overlaps between these adjacent vitiating factors. Thirdly, it *proposes* an organisational framework, consistent with *BOM v BOK*'s rejection of an all-encompassing umbrella *doctrine* of unconscionability, for the Singapore courts to visualise the relationship between these vitiating factors so that future judicial developments of these doctrines bring greater clarity and coherence to this dynamic frontier of contract law.

## I. INTRODUCTION

Like a trio of tributaries feeding the river of contract law with various conceptions of procedural and substantive unfairness, the doctrines of duress, undue influence and unconscionability have developed into overlapping vitiating factors despite flowing from distinct headsprings in the common law and in equity. All three doctrines involve broadly similar relational dynamics: the "weaker" party seeks to set aside the contract on the basis of some impropriety in the conduct of the "stronger" party at the time of contract formation, with differing emphases placed on their respective states of mind and the one-sidedness of the transaction they have entered into. Duress is primarily concerned with the stronger party's application of illegitimate pressure to coerce the weaker party into entering the contract. Undue influence pays closer

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attention to the diminished degree of independent decision-making by the weaker party while operating under the undue influence of the stronger party, where such influence arises because of the specific characteristics of the relationship between the parties. Unconscionability focuses on the stronger party's exploitation of the weaker party's vulnerability to induce the latter into entering an obviously disadvantageous transaction. Each of these "unfairness" doctrines has a distinctive epicentre. Given their close proximity to each other, where the facts of a particular case might potentially attract the application of two or more of these doctrines, clarity and coherence in this sphere of the law may be elusive unless sound conceptual framework is constructed to undergird the relationship(s) between these legal doctrines.

In *BOM v BOK*[1], the Singapore Court of Appeal ("SGCA") upheld an appeal from the decision of the High Court to set aside a trust deed that purportedly transferred the entire beneficial interest in all of a wealthy young father's assets to his infant son. That deed, which had been prepared by the formerly-practising-lawyer wife of the settlor (and mother of the beneficiary), was set aside on grounds of misrepresentation, mistake, undue influence and unconscionability. While the specific issues raised on appeal concerned the formulation and application of these particular contract law doctrines, the SGCA went further to explore the nexus between the cluster of contractual vitiating factors concerned with various forms of "unfairness"—the doctrines of duress, undue influence and unconscionability.[2] This article taps into this rich vein of jurisprudence in three ways. Firstly, it explains the wisdom of the SGCA's decision to adopt a "narrow" formulation for the doctrine of unconscionability in Singapore, and responds to some of the criticism that the judgment has attracted. Secondly, it examines some of the conceptual difficulties that the courts, post-*BOM*, will need to sort out because of the equivocal statements made by the SGCA about the extent of the doctrinal overlaps between these vitiating factors, particularly between the doctrines of unconscionability and undue influence. Thirdly, it seeks to propose an organisational framework, consistent with the SGCA's decision in *BOM* to reject an "umbrella" doctrine of unconscionability, that may help the Singapore courts to more accurately visualise the relationships between these three vitiating factors such that future doctrinal developments in this area of the law will bring greater clarity and coherence to this dynamic frontier of contract law.

Section II will explain the SGCA's emphatic preference for a slightly-modified "narrow doctrine of unconscionability"[3] to be adopted in Singapore instead of the "broad doctrine of unconscionability"[4] that other Commonwealth jurisdictions appear to have developed. This section will also respond to some of the academic

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1 [2018] SGCA 83 [*BOM*], on appeal from [2017] SGHC 316.

2 Both the doctrines of undue influence and unconscionability, as creatures of equity, are certainly engaged beyond the realm of contract law—to the extent that they are relevant vitiating factors applicable to all voluntary dealings including conveyances of property. However, I have chosen to confine the ambit of the discussion in this article to how the SGCA's pronouncements on these doctrines should influence our understanding of these doctrines as vitiating factors in the law of contract so that they can be conveniently analysed alongside duress, as a contract-law-specific legal doctrine. The observations made about the relationship between these legal doctrines in Part IV should thus be viewed in this light.

3 *Supra* note at paras 140-144.

4 *Ibid* at para 148, with an explicit declaration that the Judges of Appeal "eschew and reject the broad doctrine of unconscionability and declare that it does not represent the law in the Singapore context" (emphasis removed).

criticism the judgment received shortly after it was issued. Next, Section III will scrutinise the extent of the doctrinal overlap between unconscionability and undue influence, examining in closer detail the SGCA's hypothesis that this overlap is so great that the former might be regarded as redundant. This section will discuss the difficulties with the proposition that unconscionability can, or should, be subsumed entirely within the ambit of the "Class 1" undue influence doctrine.[5] It will be argued that, despite the undoubted existence of an overlap between them, the two doctrines should not be collapsed into one and that, in order begin to properly understand the conceptual borders between them, future courts need to start by reaffirming the status of the *Etridge* principles of undue influence as the applicable law in Singapore. Section IV will pick up on the SGCA's discussion (and rejection) of the "umbrella doctrine" of unconscionability in the coda accompanying its judgment, where it dismissed the viability of merging the doctrines of duress, undue influence and unconscionability into a single doctrine.[6] I will argue that even as the "umbrella doctrine" of unconscionability is discarded in Singapore, the "umbrella" metaphor should be retained by future courts as a useful organisational framework for visualising and conceptualising the overlaps that cut across this trio of vitiating factors, while simultaneously conveying the inherent distinctiveness of each of them. This section will propose how such an "umbrella" framework might be helpful to the courts, post-*BOM*, when analysing the simultaneous availability of these vitiating factors in situations which could potentially straddle more than one of these doctrines.

## II. Adopting a Narrow Doctrine of Unconscionability in Singapore: Precision and Prudence

In this section, an explanation of the wisdom of the SGCA's decision to adopt a narrow doctrine of unconscionability in Singapore will be proffered, along with a response to some of the criticisms that have been levelled against this facet of *BOM*. Following a brief summary of the decision and the academic criticism it attracted, the merits of the specific doctrinal formulation embraced by the SGCA will be analysed, particularly how it reflects a desired degree of linguistic precision that is consistent with the prudent approach expected of the lower courts in subsequent cases—that the doctrine of unconscionability should only be available in a very limited range of circumstances. The reasons for the SGCA's rejection of the Australian approach to unconscionability will be scrutinised alongside the counter-arguments put forward by a contract law scholar in response to the judgment. A side-by-side comparison of the Singapore unconscionability doctrine and the Australian version which was rejected by the SGCA will also be carried out to demonstrate the narrower focus of

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5 *Ibid* at paras 149-152, reaching the tentative conclusion that the "hypothesis (to the effect that the narrow doctrine of unconscionability is coincident with or identical to Class 1 undue influence) remains just a hypothesis, at least for the time being–until such time when we receive detailed arguments that would enable us to arrive at a definitive conclusion on this particular issue" (emphasis removed).

6 *Ibid* at para 180, taking the view that "such a novel as well as radical shift towards such an umbrella doctrine should not be undertaken" because of "the absence of principled as well as practical legal criteria that would enable an umbrella doctrine of unconscionability (that subsumes within itself the doctrines of duress and undue influence) to function in a coherent as well as practical manner" (emphasis removed).

the SGCA's formulation, as well as to locate the outstanding doctrinal gaps in this formulation that will need the attention of subsequent courts before the scope of this vitiating factor can be fully understood.

### A. *The Court of Appeal's Decision and its Aftermath*

The validity of the trust deed at the centre of the dispute in *BOM* was challenged by the settlor-husband during divorce proceedings against his wife, who had drafted the deed by hand shortly after the former received information about his very substantial inheritance from his deceased mother. The deed, which named both spouses as joint trustees, had made their infant son the sole beneficiary of all the assets owned by the settlor father. The deed was executed in the wife's bedroom by the settlor-husband, who was grieving the recent loss of his mother, with the involvement of her father, a senior lawyer. The SGCA upheld the trial judge's findings that the deed could be set aside, apart from the grounds of misrepresentation and mistake, on the basis of "Class 1" undue influence and unconscionability. The wife "knew that the [settlor-husband] was a lonely individual and [their son] and her were the only family that he had left", pressurised him into "signing the [deed] under threat of being chased out" of the house, such that she was, in the view of the SGCA, "taking advantage of [his] grief by badgering him into signing the [deed]" thereby "exploiting [his] acute sense of loneliness in a time of grief".[7] After surveying precedents from across the Commonwealth, the SGCA decided that a modified version of the narrow doctrine of unconscionability, based on the classic formulations found in English cases like *Fry v Lane* and *Cresswell v Potter*,[8] should be adopted in Singapore. A three-pronged legal test was formulated by the SGCA. To successfully invoke this narrow doctrine of unconscionability as a vitiating factor: (1) the plaintiff had to show that he was suffering from an infirmity (which could extend beyond poverty and ignorance to include other physical, mental or emotional infirmities that acutely affected his ability to "conserve his own interests") which "must. . . have been, or ought to have been, evident to the other party procuring the transaction"; (2) the plaintiff had to show that this infirmity was "exploited by the defendant in procuring the transaction"; and (3) the defendant had to be unable to "demonstrate that the transaction was fair, just and reasonable".[9] Whether or not the transaction was at a considerable undervalue or whether or not the plaintiff had received independent advice were designated "very important factors" that the court would take into account in the application of the trio of criteria set out above.

The SGCA explicitly rejected the broad doctrine of unconscionability, which it regarded as "best exemplified by the leading High Court of Australia decision

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7 *Ibid* at para 106.

8 *Fry v Lane* (1888) 40 Ch D 312 [*Fry*]; *Creswell v Potter* [1978] 1 WLR 255 at 259, 260 [*Creswell*]. The four "classic" elements of the unconscionability doctrine associated with these cases are (1) poverty or ignorance of the plaintiff, (2) that the transaction was at a considerable undervalue and (3) the absence of independent advice given to the plaintiff, the totality of which amounts to "oppression or abuse of confidence which will invoke the aid of equity" where (4) the defendant is unable to prove that the transaction was "fair just and reasonable".

9 *BOM, supra* note 1 at paras 141, 142.

of *The Commercial Bank of Australia Limited v Amadio*"[10] ("*Amadio*"), because it resembled "a broad discretionary legal device which permits the court to arrive at any decision which it thinks subjectively fair in the circumstances" and "does not provide the sound legal tools by which the court concerned can explain how it arrived at the decision it did based on principles that could be applied to future cases of a similar type".[11] In *obiter dicta*, the SGCA hypothesised that the narrow doctrine of unconscionability might be "redundant because it is but another way of describing Class 1 undue influence", which would then provide a different basis for rejecting even a narrow version of the unconscionability doctrine, but ultimately chose to keep the two vitiating factors separate, "at least for the time being", since they had not received detailed arguments on this particular issue.[12] In a coda to its written judgment, the SGCA surveyed the "linkages" between the doctrines of duress, undue influence and unconscionability and "possible virtues" of merging them together, before ultimately rejecting the suggestion of "a new an umbrella doctrine of unconscionability" because it would entail accepting "broad and vague legal criteria" that would not have been able to constrain such a wide doctrine in a principled manner.[13]

Shortly after the publication of the SGCA's decision in *BOM*, a detailed critique of the case was put forward by Professor Rick Bigwood in the March 2019 edition of this journal.[14] Bigwood sought to defend the *Amadio* doctrine of unconscionability from the SGCA's charge that the Australian approach had to be rejected because it exemplified the "broad doctrine of unconscionability" that was "phrased in too broad a manner inasmuch as it affords the court too much scope to decide on a subjective basis".[15] In addition, Bigwood's detailed analysis of the case also identified a number of "quibbles. . . with the main judgment" relating to several "basic doctrinal propositions upon which key aspects of [the SGCA's] reasoning was based".[16] As a widely-published contract law scholar, Bigwood's sharp observations about the judicial pronouncements made in *BOM* deserve closer scrutiny and will be discussed further below.

### B. *Limiting Unconscionability to a "Narrow Doctrine" in Singapore: Why Was the Australian Approach Rejected?*

The SGCA's resounding decision to adopt a "narrow doctrine of unconscionability" for Singapore, in clear preference over the "broad doctrine" that it associated with the

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10 (1983) 151 CLR 447. The SGCA focused on Deane J's formulation of the Australian doctrine of unconscionability. See *infra* note 26.

11 *BOM, supra* note 1 at para 148 (emphasis removed).

12 *Ibid* at paras 149-152.

13 *Ibid* at paras 175-180. The same reasons (legal uncertainty, excessive subjectivity and impracticality) for the SGCA's rejection of the broad doctrine of unconscionability, which was necessary to provide the basis for a new "umbrella doctrine" of unconscionability, applied with equal force against the development of such an umbrella doctrine.

14 R Bigwood, "Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore" [2019] Sing JLS 29 [Bigwood, "Straw Man"].

15 *BOM, supra* note 1 at para 133.

16 Bigwood, "Straw Man", *supra* note 14 at 40.

Australian High Court's decision in *Amadio*, should be understood in the following context. The "narrow" epithet was probably selected for ideological, rather than strictly descriptive, reasons to define the breadth or scope of the doctrine. It is clear that the scope of the doctrine was widened marginally, at least when compared against the "classic" formulations of the doctrinal elements laid out in in *Fry* and *Cresswell*,[17] when the SGCA was prepared to accept a wider definition of what constituted an eligible "infirmity" for the purposes of invoking the unconscionability doctrine. By allowing weaker parties to rely on a wider range of personal circumstances, beyond their poverty and ignorance, that make them vulnerable to exploitation, the SGCA has made the doctrine potentially available to a broader class of plaintiffs. Furthermore, the decision by the court to downgrade two of the "requirements" from these English precedents (that the transaction was at a considerable undervalue and that the weaker party had not received independent advice) into "very important factors" that the court would take into account in applying its three-pronged test has quite clearly added to its flexibility as a doctrinal device. Affixing the "narrow" label to Singapore doctrine of unconscionability was probably intended to send a signal to the lower courts. The implicit message conveyed by the SGCA in designating the doctrine of unconscionability in Singapore as a "narrow doctrine" was, in essence, a pointed reminder that this vitiating factor should only be capable of undermining the security of transactions in very exceptional circumstances.[18]

What the SGCA was trying to do was to distance itself, in a very visible manner, from broader judicial formulations of the unconscionability doctrine that have emerged from other Commonwealth jurisdictions, categorically asserting that they would "eschew and reject the broad doctrine of unconscionability and declare that it does not represent the law in the Singapore context".[19] The SGCA's aversion towards the *Amadio* version of the unconscionability doctrine and the line of English cases that adopted "the same broad language that was utilized in *Amadio*"[20] was fuelled by its concern that such formulations were unsuitable doctrinal tools because they would end up conferring "broad and unbridled discretion"[21] upon the courts tasked with their application.

Bigwood took issue with the SGCA's interpretation of the Australian High Court's decision in *Amadio*, arguing that the court had given an unfair and inaccurate assessment of the *Amadio* doctrine of unconscionability as being overly broad when, in Bigwood's view, the *Amadio* doctrine was actually a narrow doctrine of unconscionability because of the way it has been stringently interpreted and applied by subsequent Australian courts.[22] Bigwood argues that the "distance between the *Amadio* and *BOK (CA)* formulations of unconscionability is much smaller" than implied

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17 See *supra* note 8.

18 Hence the SGCA's portrayal of unconscionability as an doctrinal "exception" that would have "undermined the rule", where the "the 'rule' in this particular context (viz, sanctity of contract) is not a mere theoretical concept but is, in fact, fundamental to the conduct of daily commerce in all its multifarious forms" and that "the need to maintain 'legal stability' in so far as this rule is concerned is of the first importance." See *BOM, supra* note 1 at para 177 (emphasis removed).

19 *Ibid* at para 148 (emphasis removed).

20 *Ibid* at paras 135, 136, referring to *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 and *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 [*Alec Lobb*].

21 *BOM, ibid* at para 148 (emphasis removed).

22 Bigwood, "Straw Man", *supra* note 14 at 47.

by SGCA's judgment, while going further to suggest that the *Amadio* unconscionability doctrine "both in its form and in its actual applications in subsequent cases, is *narrower* than" the SGCA's doctrine of unconscionability in *BOM*.[23]

The crux of Bigwood's critique of the SGCA's judgment on this issue lies in his view that the court's decision to adopt its own statement of the law, and rejecting the Australian version of the unconscionability doctrine set out in *Amadio*, was infected by "the straw man fallacy"—a logical fallacy committed when the opposing position has been either "oversimplified or exaggerated" to "demonstrate the wisdom" of the position favoured—such that the SGCA's stated preference for its own "narrow doctrine" of unconscionability should be called into question because its conclusion was reached "by (unintentionally) misrepresenting the opposing position (as represented by the so-called 'broad' formulation of the doctrine in *Amadio*)".[24] To properly evaluate these assertions, it is necessary to reproduce the relevant legal tests from the apex courts of these two jurisdictions.

The relevant passage containing Deane J's articulation of the Australian unconscionability doctrine in *Amadio*, which the SGCA referred to in *BOM v BOK* (and specifically rejected) is set out below. For ease of reference and completeness, Mason J's alternative formulation of the unconscionability doctrine in the same case, which Bigwood points out has gained more traction in subsequent Australian cases (which have taken the position that there is "no real difference" between these tests)[25], is set out as well:

> The jurisdiction [of courts of equity to relieve against unconscionable dealing] is long established as extending generally to circumstances in which (i) a party to a transaction was **under a special disability** in dealing with the other party with the consequence that there was an **absence of any reasonable degree of equality between them** and (ii) that disability was **sufficiently evident to the stronger party** to make it *prima facie* **unfair or 'unconscientious'** that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the **stronger party to show that the transaction was fair, just and reasonable**. . . (per Deane J)[26]

> [R]elief on the ground of "unconscionable conduct" is usually taken to refer to the class of case in which a party makes **unconscientious use of his superior position or bargaining power** to the detriment of a **party who suffers from some special disability** or is placed in some **special situation of disadvantage**, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink. . . the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party **by reason of some condition of circumstance** is **placed at a special disadvantage** vis-a-vis

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23 *Ibid*.

24 *Ibid* at 48.

25 *Ibid* at 51.

26 *Amadio*, *supra* note 10 at 474 (emphasis added). This will be referred to below as the "*Amadio (Deane)"* version of the Australian High Court's unconscionability doctrine.

> another and **unfair or unconscientious advantage is then taken** of the opportunity thereby created. I qualify the word "disadvantage" by the adjective "special" in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which **seriously affects the ability of the innocent party to make a judgment as to his own best interests**, when the **other party knows or ought to know of the existence of that condition or circumstance and of its effect** on the innocent party. (per Mason J)[27]

As the SGCA's attention in *BOM* was focused primarily on the *Amadio (Deane)* version of the unconscionability doctrine, all references made in the discussion below to the "*Amadio* doctrine" or the "Australian doctrine of unconscionability" are intended to refer to this formulation rather than the *Amadio (Mason)* version of the unconscionability doctrine unless otherwise stated.

In contrast, the SGCA's formulation of its "narrow doctrine" of unconscionability in *BOM* is couched in the following terms:

> In summary, and at risk of oversimplification, the ***narrow* doctrine of unconscionability** applies in Singapore. To invoke the doctrine, the plaintiff has to show that he was suffering from an infirmity that the other party exploited in procuring the transaction. Upon the satisfaction of this requirement, the burden is on the defendant to demonstrate that the transaction was fair, just and reasonable. In this regard, while the successful invocation of the doctrine does not require a transaction at an undervalue or the lack of independent advice to the plaintiff, these are factors that the court will invariably consider in assessing whether the transaction was improvident.[28]

Bigwood argues that the SGCA misapprehended the true nature of the *Amadio (Deane)* and *Amadio (Mason)* versions of the doctrine of unconscionability, which he regards as "actually a *narrow* doctrine and not, as feared [by the SGCA], a dangerously broad one" based on its "modern application" by subsequent Australian courts which have "significantly narrowed the doctrine's rescissory reach in Australia".[29] Post-*Amadio* decisions, particularly *Kakavas v Crown Melbourne Ltd*,[30] were relied upon to demonstrate how the scope of the *Amadio* doctrine has been circumscribed by the Australian courts to require the weaker party's "special disadvantage" to have been exploited in a "*deliberate* (intentional, reckless, predatory)... manner" such that it was necessary to show, from the outset, that the stronger party

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[27] *Ibid* at 461, 462. This will be referred to below as the "*Amadio (Mason)*" version of the Australian High Court's unconscionability doctrine. For the purposes of this paper, it will be assumed that the *Amadio (Mason)* version of the Australian unconscionability doctrine is, in substance, essentially the same as the *Amadio (Deane)* version set out above.

[28] *BOM, supra* note 1 at para 142 (emphasis in original).

[29] *Amadio, supra* note 10 at 52-54. Bigwood refers to later Australian High Court decisions that have explained and applied the *Amadio* principle, particularly Mason J's two-pronged formulation (one party under special disadvantage + other party taking unfair or unconscientious advantage), which have construed "unfair or unconscientious advantage[-taking]" as "nothing short of proof of naked exploitation suffices for relief in the name of the doctrine."

[30] (2013) 298 ALR 35 (HCA).

had "*actual* knowledge" of this "special disadvantage".[31] This led him to conclude that "'actual knowledge' and 'exploitation' represent very high standards of proof, which, in addition to the significant threshold for 'special disadvantage', further constricts the reach and potential for the *Amadio* doctrine, rendering it a *very narrow doctrine indeed*", while contending that the SGCA's formulation was "a *considerably broader doctrine*" because of the "attenuated knowledge standards" associated with the "infirmity" element of the SGCA's test (that "[s]uch infirmity must also have been, or ought to have been, evident to the other party procuring the transaction").[32]

In my view, Bigwood's criticism of the SGCA's negative treatment of the *Amadio* unconscionability doctrine is misplaced, even if the SGCA did not fully appreciate all the nuances of the Australian position. The *Amadio* doctrine of unconscionability was not erected as a "straw man" or presented as an easy target to be attacked. The SGCA was simply rejecting the linguistic *breadth* of the judicial *formulation* used by the Australian High Court to articulate the *Amadio* doctrine. That subsequent Australian courts have interpreted the language found in *Amadio* in a narrow manner, leading to the development of a practically-circumscribed unconscionability doctrine, is not an inevitable trajectory that Singapore, or any other jurisdiction, will inevitably follow if the doctrinal language of the Australian High Court were embraced. The current interpretation given by the Australian courts to the judicial formulations articulated in *Amadio* was arrived at after thirty years of subsequent caselaw, a process through which the meaning of the actual words used had to be diluted and contextually qualified to restrain the operational scope of the doctrine. Adopting the *Amadio* formulation for the doctrine of unconscionability may not *necessarily* lead to the dangers of "broad and unbridled discretion"[33] that the SGCA had strong reservations about *if* the SGCA had embraced the *Amadio* formulation *and* the entire line of cases that refined the law in that case. However, it would seem that the SGCA took a far more straightforward approach, given that it was starting with an almost-clean slate as far as the local jurisprudence was concerned. The SGCA simply adopted a less open-ended judicial formulation that directly achieved the intended end result—a narrowly-worded doctrine of unconscionability—instead of importing the *Amadio* formulation together with decades of post-*Amadio* jurisprudence in tow.

Bigwood points out that the fears associated with an overly broad doctrine of unconscionability are "directed at the risk or anticipation of uncertainty rather than its actualization", that such consequences are "purely rhetorical rather than experiential" since there are "no empirical studies. . . to substantiate that to be the case in Australia, New Zealand and/or the United Kingdom" or that "the [broader versions of the] unconscionability doctrine [have] led to intolerable transactional uncertainty."[34] However, these arguments why the SGCA should have viewed the *Amadio* doctrine of unconscionability more favourably teeter on the edge of two other logical fallacies: the appeal to ignorance (*argumentum ad ignorantiam*) and the bandwagon

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[31] Bigwood, "Straw Man", *supra* note 14 at 54, while acknowledging the inconsistency between these judicial interpretations and other (more literal) interpretations of Mason J's judgment in *Amadio* that "the other party knows or ought to know of the existence of [the special disadvantage]"—see *supra* note 27.

[32] *BOM, supra* note 1 at para 141; see *supra* note 9.

[33] See *supra* note 22.

[34] Bigwood, "Straw Man", *supra* note 14 at 46 and 63.

(*argumentum ad populum*). The former is triggered when one bases a conclusion (that a broadly-worded doctrine of unconscionability will not lead to excessive uncertainty) on the absence or ignorance of evidence to the contrary. The latter is triggered when one bases the merit of a proposition on the fact that many others have chosen to adopt it.

Bigwood's contention that the SGCA's own formulation of the Singapore unconscionability doctrine was "arguably a considerably broader doctrine than the broad doctrine their Honours eschewed and rejected"[35] pivots on the breadth of the knowledge element, relating to the stronger party's awareness of the weaker party's infirmity when the latter is exploited, that needs to be satisfied before the doctrine can be successfully invoked. This was not an issue properly considered by the SGCA, with only a passing reference to the requirement that the infirmity "must... have been, or ought to have been, evident to" the stronger party. On the facts of the case before the SGCA, this was a non-issue as the claimant's wife was undisputedly aware of the claimant's state of grief and emotional vulnerability. It is debatable whether the SGCA had intended to articulate a knowledge element that encompassed both actual and constructive knowledge of the weaker party's infirmity. Indeed, the wording that Bigwood focuses upon is extremely similar to the language used by Mason J reproduced above ("... when the other party knows or ought to know of the existence of that condition or circumstance...")[36] which, as Bigwood points out, has not been interpreted so widely by the Australian judiciary.[37] I would venture to guess that subsequent courts would interpret the phrases "ought to have been evident" or "ought to know of" contextually (as the Australian courts have done post-*Amadio*)—in light of the repeated and explicit statements by the court that the unconscionability doctrine should be confined to a narrow scope–and conclude that it simply requires the claimant to establish that the stronger party had knowledge, at least objectively, of the vulnerability he was exploiting. No court could realistically expect a claimant to show, subjectively, what was in going on in the mind of the stronger party while the transaction was being pursued.

### C. *Textual Comparison: The Singapore and Australian Unconscionability Formulations*

How, then, does the Singapore doctrine of unconscionability *actually* compare against the *Amadio* formulations of the Australian equivalent? Bigwood argues that they are "very similar" in form and are "comparable in substance" in relation to the plaintiff-sided and defendant-sided criteria, such that the "distance between the *Amadio* and [SGCA] formulations of unconscionability is much smaller than [the SGCA] judgment implies".[38] If this is correct, then the deliberate efforts made by the SGCA

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35 *Ibid* at 54 (emphasis removed).

36 See *supra* note 29.

37 It is also worth noting that, even in Deane J's formulation of the *Amadio* doctrine of unconscionability, it was enough to show that the weaker party's disability was "sufficiently evident" to the stronger party. So perhaps both Deane J and Mason J had deliberately chosen to avoid hemming in their respective doctrinal formulations with overly-specific wording couched in terms of requiring the proof of the specific knowledge behind the stronger party's actions.

38 Bigwood, "Straw Man", *supra* note 14 at 47, 48.

to steer away from the broad doctrine of unconscionability it associated with the Australian doctrine did not achieve their intended effect. A side-by-side comparison of the linguistic formulations of the Singapore and the Australian doctrines is revealing:

| Doctrinal elements | *Amadio* formulation (Focusing on the *Amadio (Deane)* formulation, but with references to the *Amadio (Mason)* formulation for comparative analysis) | *BOM v BOK* formulation |
|---|---|---|
| Vulnerability of weaker party | Deane J: Weaker party under a "special disability in dealing with the other party" such that "there was an absence of any reasonable degree of equality between them"[39] | Weaker party suffers from an "infirmity. . . of sufficient gravity" which "acutely affected. . . his ability to 'conserve his own interests"' [Note: Infirmity can extend beyond poverty and ignorance to encompass other forms of infirmities that physical, mental and or emotional in nature][40] |
| Misconduct engaged in by stronger party | Deane J: Disability was "sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it"[41] | Stronger party "must have. . . or ought to have" known of weaker party's infirmity and "exploited it in procuring the transaction" |

[39] Mason J's substantive criterion is for the weaker to party to show that he "suffers from some special disability or is placed in some special situation of disadvantage".

[40] This is subject to the explicit caveat, at para 144 of *BOM, supra* note 1, that the criteria of infirmity is not overly broad to "stretching [the] narrow approach to cover a fact situation that is not intended to fall within it", and that the doctrine is "to be applied through the lens of cases exemplifying the narrow doctrine (e.g. *Fry* and *Creswell*) rather than embodying the broad doctrine (e.g. *Amadio* and *Alec Lobb*)" and represents a "middle ground based on practical application rather than theoretical conceptualization".

[41] Mason J's two-pronged formulation, unlike Deane J's three-pronged formulation, requires the stronger party to take "unfair or unconscientious advantage" of the weaker party's special disability or special situation of disadvantage.

| | | |
|---|---|---|
| Shifting of burden of proof | Deane J:<br>Where the above circumstances exist, "an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable" | Upon establishment of first two requirements, "the burden is on the defendant to demonstrate that the transaction was fair, just and reasonable"<br><br>[Note: Other "very important factors" to be taken into account—whether transaction was at a considerable undervalue and whether weaker party had received independent advice] |

There are obvious similarities between the Singapore and *Amadio* formulations of the unconscionability doctrine. Both adopt similar substantive criteria that provide definitional boundaries to the characteristics of the weaker party and the character of the stronger party's behaviour towards the weaker party. Both rely on evidentiary devices that aid the weaker party by shifting part of the burden of proving that the transaction was "fair, just and reasonable" onto the stronger party.[42] However, upon closer inspection of the precise wording of these two doctrinal formulations, I would submit that the SGCA had intended to, and indeed actually did, articulate a narrower version of the doctrine of unconscionability.

The label used in the *Amadio (Deane)* version of the unconscionability doctrine to describe the position of the weaker party—"special disability" (or Mason J's "special situation of disadvantage")[43]—appears *capable* of covering both constitutional and situational disadvantages[44] that make the weaker party vulnerable. The SGCA's choice of the noun "infirmity" to describe the disadvantageous position of the weaker

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[42] Though, as Bigwood has pointedly observed in his critique of the judgment, the forensic structure of the Singapore formulation is problematic because once the claimant has shown the first two requirements to the satisfaction of the courts on a balance of probabilities,

> "[t]he third criterion makes little additional sense because it is impossible to imagine what burden of production could plausibly remain on the plaintiff after she or he has already shown there to be 'exploitation of infirmity', the 'exploitation' concept itself definitionally enclosing a judgment of 'unjustness' sufficient to denominate the transaction 'improvident'. . . ".

The "factors" of whether the transaction was at a "substantial undervalue" or whether the weaker party received independent advice "speak to the first two criteria and are not part of some 'third' criterion that purports to create an evidential presumption which, given the burden required to be discharged at the second step, must surely be incapable itself of being discharged." See Bigwood, "Straw Man", *supra* note 14 at 50, 51.

[43] In Bigwood's view, the practical experience of the Australian courts has been to interpret these criteria stringently—as "a significant threshold not lightly applied in the modern cases"—such that "nothing short of proof of naked exploitation suffices for relief in the name of the doctrine." See *ibid* at 52, 54.

[44] Bigwood explains how these concepts are used in Australia, distinguishing between disadvantages which are inherent characteristics of a person and disadvantages that arise because of the circumstances in which a person finds himself. See *ibid* at 53.

party appears confined to a limited range of constitutional qualities personal to him or her. It would probably not be enough, for example, to plead vulnerability on the basis that a party faced difficult circumstances in his personal life (i.e., a situational disadvantage); it would probably be necessary to go further to establish how these circumstances had an adverse impact on that party's *ability* or *capacity* to look after his own interests (i.e., a constitutional disadvantage).

Furthermore, not every constitutional disadvantage is likely to be regarded as an "infirmity" for the purposes of the Singapore doctrine of unconscionability. Someone suffering from a diagnosable medical condition (such as depression or some other neuro-psychiatric condition associated with a severe state of shock, horror or grief) might be eligible—but it is far from certain whether "infirmity" would cover a foolish, naïve or immature individual (who falls short of the "ignorant" level of incompetence envisaged in *Fry* or *Cresswell*) who has entered into a bad bargain. While a narcoleptic individual whose state of fatigue makes him an easy target for exploitation would probably be regarded as someone afflicted with a qualifying "infirmity", someone else similarly fatigued because his exhausting lifestyle choices is unlikely to be an eligible candidate.[45] The wider breadth of the *Amadio* doctrine is apparent, at least from the way it was *formulated* by Deane J, in the explanatory phrase "absence of any reasonable degree of equality" between the parties which follows closely from the "special disability" criterion, seemingly emphasising the *relative disparity* between the positions of the stronger and weaker party rather than focusing upon the inherent weaknesses of the latter. This was probably what prompted the SGCA to remark that "the broad doctrine as formulated in *Amadio* came dangerously close to the ill-founded principle of inequality of bargaining power as introduced in *Lloyd's Bank v Bundy*".[46]

This side-by-side comparison between the Singapore and Australian formulations also reveals a significant conceptual gap in the SGCA's articulation of the unconscionability doctrine in *BOM*. When describing the misconduct of the stronger party in taking advantage of the other party's weakness or vulnerability, the criterion articulated in *Amadio* doctrine of unconscionability is couched in the language of the former taking advantage of the latter in an "unfair or unconscientious" manner. In contrast, the SGCA deploys the language of "exploitation" of the weaker party's infirmity. Unfortunately, the SGCA did not provide any additional clarification as to the scope of the meaning of "exploit" in its judgment.[47] It cannot simply mean

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45 Similarly, someone intoxicated because of an alcohol addiction disorder is more likely to be viewed as suffering from an "infirmity" while someone who was careless enough to enter into a transaction while in a state of drunkenness may not be regarded in the same way. I am grateful to one of the anonymous reviewers of this article for the example.

46 [1975] QB 326 [*Bundy*]. See *BOM, supra* note 1 at para 133. However, it is worth repeating Bigwood's critique of the SGCA's misapprehension of the *Amadio* doctrine of unconscionability, which has been conventionally understood to be focused upon *procedural* unfairness, by likening this Australian doctrine to unconscionability doctrines like the *Bundy* doctrine which are also concerned with aspects of *substantive* unfairness. See Bigwood, "Straw Man", *supra* note 14 at 47.

47 Even though the SGCA observed that "the concept of 'unconscionability' as a rationale refers to the spirit of justice and fairness that is embodied in the maxim that 'one is not permitted to take unfair advantage of another who is in a position of weakness"', it did not explain how the legal criteria it chose to define the Singapore doctrine of unconscionability embodied, or was built upon, this rationale. See *BOM, ibid* at para 119.

"taking advantage of", since it must be, generally speaking, legitimate for contracting parties to pursue their own interests and seek the best outcomes for themselves. Something must be egregious about *the way* he or she took advantage of the other party. That the SGCA did not delve deeper into the meaning of this legal element, in the interests of providing more explicit guidance to future courts, might be explicable on the basis that there was no perceived need to do so in light of the manifestly deplorable nature of the wife's conduct towards her grieving husband on the facts of *BOM*. However, the conspicuous *absence* of words or phrases traditionally deployed by other courts to define such objectionable behaviour—"reprehensible", "unfair" and "unconscientious" for instance—that one might expect in any attempt to formulate such an equitable doctrine, is in itself revealing about the SGCA's approach towards framing the Singapore unconscionability doctrine. It was almost as if the court had, consciously, avoided usage of any descriptive adjective that might have given subsequent courts even any semblance of "wriggle room" to apply the doctrine in a manner more flexibly than the SGCA would have countenanced. Ironically, the SGCA hit the nail on the head in following *obiter dicta*:

> ". . . [E]ven the seemingly trite proposition that there are factual matrices which are clearly egregious begs the question for it does not answer the root question of the inquiry—under what circumstances is a transaction so unfair as to be unconscionable?
>
> In other words, the chief weakness of the doctrine of unconscionability is that it is a rather general and vague doctrine that does not furnish sufficient legal criteria in order to enable the court to apply it so as to arrive at a just and fair result in the case at hand. This is especially the case in fact situations that are not obviously egregious. . . As we have seen, it can deal with clarity with only the most egregious fact situations (although, as we shall see, the legal or normative formulation would necessarily have to be extremely narrow and specific)".[48]

Without sufficient elaboration about what more is required for a stronger party to be regarded as "exploiting" the infirmity of the weaker party, uncertainty about this central element of the legal test for unconscionability will continue to linger post-*BOM*. As Bigwood correctly points out, "'exploitation' is an essentially contested concept" and there is "very little consensus on what exploitation comprises and why a normative system. . . should object to it as a practice".[49] Having taken such great pains to explain why a "narrow doctrine" of unconscionability was the right jurisprudential path for Singapore take, it was unfortunate that the SGCA missed out on the opportunity to properly explain the scope of "exploitation"—*the* core legal concept which lies at the doctrinal heart and epicentre of this vitiating factor. Does it require the stronger party to have actively sought out, and brought about, the impugned transaction, or would passive acceptance of the benefits from

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[48] *BOM, supra* note 1 at paras 120, 121 (emphasis removed).

[49] Bigwood, "Straw Man", *supra* note 14 at 64.

the transaction with (prior?) knowledge of the vulnerable circumstances facing the weaker party suffice?[50]

The meaning of "exploitation"—as a legal concept—is thus a matter of some priority that subsequent courts should focus their attention upon, post-*BOM*, always bearing in mind the strong signal sent by the SGCA that the unconscionability must be understood as a "narrow doctrine" in Singapore. On the topic of what needs to be done to properly delineate the scope of the unconscionability doctrine, we turn to the controversial *obiter dicta* in *BOM* which suggests that the doctrine might not even have an independent existence of its own and should, instead, be subsumed within the neighbouring doctrine of undue influence.

## III. Delineating the Doctrinal Overlap Between Adjacent Vitiating Factors

While the SGCA expended considerable effort to justify its preference for a narrow doctrine of unconscionability, the court also sowed seeds of uncertainty through its *obiter dicta* by leaving it an open question as to whether unconscionability should even exist as a separate doctrine, or whether it can be absorbed into the doctrine of undue influence. This section will examine the conceptual difficulties with construing unconscionability as entirely coincidental with undue influence, despite the extent of the overlap between these adjacent vitiating factors. It will be submitted that a coherent understanding of their respective inner workings requires them to be doctrinally disentangled from each other which, in turn, requires the courts post-*BOM* to reaffirm that the Singapore position on the law on undue influence is aligned with the *Etridge* principles of undue influence developed by the English courts.

### A. *The Doctrines of Unconscionability and Undue Influence are Not Coincident With Each Other*

In *obiter dicta*, the SGCA hypothesised that "the narrow doctrine of unconscionability is coincident with or identical to Class 1 undue influence" on the basis that both equitable doctrines appeared to emerge around the same time during the eighteenth century, speculating that "unconscionability. . . was another species of undue influence—what we have come to term today as Class 1 undue influence".[51] This led

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[50] There have been long-running academic debates on this issue. See, for example, P Birks and NY Chin, "On the Nature of Undue Influence", in J Beatson and D Friedmann, eds. *Good Faith and Fault in Contract Law*, 1st ed (Oxford: Clarendon Press, 1997) at 60, 61; D Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479 at 498 [Capper, "Rationalisation"]; R Bigwood, "Contracts by Unfair Advantage: From Exploitation to Transactional Neglect (2005) 25 OJLS 65 [Bigwood, "Unfair Advantage"]; JP Devenney and A Chandler, "Unconscionability and the Taxonomy of Undue Influence" [2007] JBL 541 at 560, 561.

[51] *BOM, supra* note 1 at paras 145, 152 (emphasis in original judgment removed). The SGCA recognised that the 18th and 19th century equity cases from which the doctrines of undue influence and unconscionability were subsequently developed were focused on achieving just results for the specific disputes brought before the Chancery courts, rather than developing general doctrinal principles. It was thus difficult to rely on such historical antecedents to invalidate the "various classifications and categories [that] only emerged later in the more modern case law." See *BOM, supra* note 1 at para 149.

the SGCA to contemplate whether there was any proper historical basis for the doctrine of unconscionability and whether even a narrow doctrine of unconscionability should be recognised if it was "redundant simply because it is but another way of describing Class 1 undue influence".[52] Ultimately, this question was not definitively addressed because no detailed arguments were submitted by the parties to enable the court to arrive at a definitive conclusion, and since recognising a narrow doctrine of unconscionability "would not lead to any obvious legal anomalies. . . since it has been generally accepted across the Commonwealth", the SGCA saw "no reason to take special pains to declare that it is no longer part of Singapore law".[53]

The danger with leaving this issue unresolved is that it potentially undermines all the judicial effort expended by the SGCA to develop an independent, albeit narrow, doctrine of unconscionability for Singapore. Future litigants may interpret this unsettled state of affairs as an invitation to plead both unconscionability and undue influence in their cases interchangeably, thereby running the risk of linguistic imprecision and, consequently, conceptual confusion. This is thus a matter of some importance which the Singapore courts need to address post-*BOM*.

The SGCA's assertion that the overlap between Class 1 undue influence and the narrow doctrine of unconscionability is "so extensive as to result in both doctrines being virtually coincident with or identical to each other"[54] is problematic. Going back to first principles, Class 1 undue influence, which the SGCA had accepted as an applicable operating vitiating factor on the facts of this case, involves an inquiry into whether the stronger party has "exercised such domination over the plaintiff victim's mind that his independence of decision was substantially—or even totally—undermined".[55] In other words, Class 1 undue influence as a vitiating factor is, ultimately, concerned with the weaker party's lack of decisional autonomy (arising from the stronger party's undue exercise of influence over him) when he entered into the contract. This might be understood as an expression of a public policy interest in ensuring that legal transactions are the entered into by parties who have exercised a sufficient degree of voluntariness and volition.

The narrow doctrine of unconscionability, on the other hand, is premised on the "exploitation" by the stronger party of the weaker party's "infirmity"—an inquiry that focuses on both the reprehensible nature of the stronger party's behaviour towards the weaker party *and* the weaker party's vulnerable status.[56] There is certainly room for overlap insofar as the misbehaviour is regarded as an exercise of the stronger party's capacity to influence the weaker party in an undue manner, and the impairment of the

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[52] *Ibid* at para 149 (emphasis in original judgment removed). Other academic writers have proposed a merger of these doctrines in the opposite direction—that "unconscionability, as the broader of the two doctrines, allows undue influence to be subsumed under it." See Capper, "Rationalisation", *supra* note 50 at 480. See also, D Capper, "The Unconscionable Bargain in the Common Law World", (2010) 126 LQR 403 at 419 [Capper, "Unconscionable Bargain"], where it is argued that "if the courts cannot find any clear theoretical basis for distinguishing undue influence and the unconscionable bargain, the best way forward of all is surely to merge the smaller (undue influence) into the larger (unconscionable bargain)."

[53] *BOM, ibid* at para 149 (emphasis in original judgment removed).

[54] *Ibid* at para 152 (emphasis in original judgment removed).

[55] *Ibid* at para 103, citing Andrew Phang Boon Leong, ed. *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at para 12.123.

[56] The analytical distinction between undue influence and unconscionability described here is similar to the "plaintiff-sided" and "defendant-sided" dichotomy drawn by Birks and Chin, *supra* note 50.

weaker party's decision-making independence by an "infirmity" that makes him or her vulnerable to exploitation. But to say that both doctrines are "virtually coincident with or identical to each other" overstates the position.

Post-*BOM*, some degree of circumspection should be expected when a future court applies the SGCA's narrow doctrine of unconscionability and must decide whether or not the weaker party is afflicted by a sufficiently "acute infirmity".[57] Someone who was extremely naïve, highly superstitious or fanatically pious would probably not qualify for the doctrine of unconscionability to apply, but he would surely be susceptible to the exercise of undue influence by those who deal with him. In the realm of undue influence, the traditional types of "infirmity" associated with the narrow doctrine of unconscionability—"poverty" and "ignorance"[58]—may or may not deprive weaker parties of the capacity to make independent decisions (which go against their interests) for themselves. The exploitation of such infirmities by the stronger party does not necessarily have to undermine the weaker party's decisional autonomy. An elderly benefactor with one of these infirmities may, despite having sharp mental faculties, be persuaded by an avaricious relative (who knows exactly how to exploit these infirmities of the former) to part with a valuable asset. The infirm party may, in the right exploitative circumstances, be eligible to set the transaction aside on grounds of the narrow doctrine of unconscionability. However, if the former had understood exactly what he was doing in his dealings with the latter and, having demonstrated adequate decision-making independence, intended to part with the asset, then a plea of undue influence is unlikely to succeed. Unconscionability and undue influence are thus not completely interchangeable with each other.

The doctrines of unconscionability and undue influence should not be merged into single doctrinal amalgamation and it is submitted that the Singapore courts should continue developing them as separate vitiating factors, though always cognisant of their close proximity to each other. Figure 1 below attempts to provide a visual representation of how the scope of the doctrines of unconscionability and undue influence (Class 1, in particular) might overlap with, without necessarily being congruent to, each other. The exploitative behaviour of the stronger party of the weaker party's infirmity can occur in many ways, with varying degrees of reprehensibility or egregiousness. One would expect that a narrow doctrine of unconscionability would only be triggered when the gravity of such misconduct is egregious enough, with the gravity of the reprehensibility required to correlate to the weaker party's inability to make independent decisions for himself because of his vulnerable status. Where the doctrine of undue influence is concerned, however, the vitiating factor may be available in situations even where the stronger party has not behaved in an *obviously* or *overtly* reprehensible manner towards the weaker party,[59] so long as it can be shown (by inference or otherwise) that the latter's decision-making independence has been

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57 *Supra* notes 7 and 9.

58 *Supra* note 8.

59 In the classic undue influence case of *Allcard v Skinner* (1887) 36 Ch D 145, for instance, there was no suggestion of any improper conduct by the lady superior of the religious order, which the claimant had bequeathed all her property to, towards the claimant when the latter sought to recover her property after leaving the sisterhood. Instead, relief was granted based on the "necessity of grappling with insidious forms of spiritual tyranny" that would have placed the claimant under the undue influence of the religious leader.

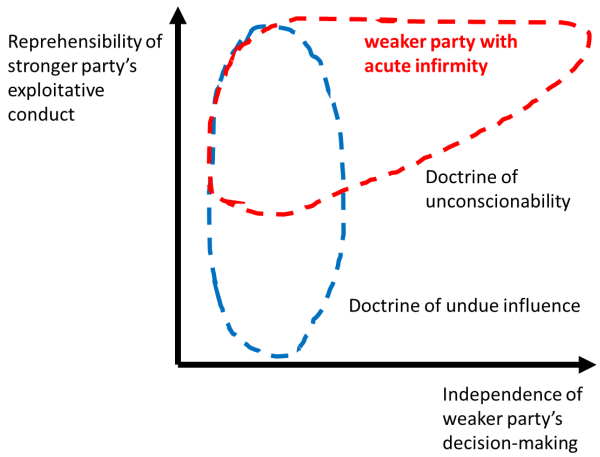


**Fig. 1.** Undue Influence vs Unconscionability.

sufficiently compromised by the exercise of influence upon him or her. In future cases, if Singapore courts are prepared to develop the doctrine of unconscionability along the trajectory taken by the courts of Ireland, Australia, New Zealand and Canada—whose courts, unlike the English courts, have been prepared to regard contracts as "unconscionable because the terms are very much to the advantage of the stronger party [who has] passively received those advantages in the knowledge that the [weaker] party was vulnerable"[60]—the perigee of the triangular shape representing the scope of the unconscionability doctrine can be stretched further downwards to encompass less reprehensible forms of conduct by the stronger party, where perhaps merely taking the benefits of a substantively unfair transaction with knowledge of the weaker party's vulnerability might be enough to qualify as unconscionable conduct.

### B. *The Need to Reaffirm Singapore's Adoption of the Etridge Principles of Undue Influence*

Furthermore, the SGCA did not consider the ramifications of fusing the narrow doctrine of unconscionability with Class 1 undue influence on the doctrinal coherence of the general legal principles that underpin the law of undue influence. It is unclear from the SGCA's decision in *BOM*, or in any of the earlier decisions of the Singapore courts, whether the doctrine(s) of undue influence in Singapore are exactly the same as the English position established by the UK House of Lords in *Royal Bank of Scotland v Etridge (No.2)*.[61] The doctrinal elements of Class 1 undue influence, Class 2A undue influence and Class 2B undue influence (*pre-Etridge* categories of undue influence which Lord Nicholls eschewed in *Etridge*) that are described in *BOM*,

60 See Capper, "Unconscionable Bargain", *supra* note 52 at 416.

61 [2002] 2 AC 773 (HL) [*Etridge*]. The SGCA did, however, appear to endorse the Singapore High Court's decision in *Bank of East Asia v Mody Sonal* [2004] 4 SLR(R) 113 which, at para 6, appeared to apply the *Etridge* principles of undue influence.

where a summary of the principles found in *The Law of Contract in Singapore*[62] was reproduced,[63] appear to integrate judicial language found in *Etridge* ("transaction was one that calls for an explanation") with pre-*Etridge* precedents[64] ("actual undue influence", "presumed undue influence").[65]

One of the most significant developments to the English doctrine of undue influence which emerged from *Etridge* was the House of Lords' assertion that undue influence should be regarded as a single doctrine buttressed by one set of general principles, with each "class" of undue influence providing different *ways* of establishing the same vitiating factor. The following "first principles" were articulated by Lord Nicholls:

> ". . . Undue influence is one of the grounds of relief developed by the Courts of equity as a Court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.
>
> Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other *unacceptable forms of persuasion*. The law will investigate the manner in which the intention to enter into the transaction was secured . . . [i]f the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and *the manner in which influence may be exercised, vary too widely*. . . "[66]

This is another matter of significant importance which the Singapore courts urgently need to clarify post-*BOM*. If the *Etridge* approach towards the undue influence doctrine is, indeed, the legal position in Singapore, then "Class 1" undue influence is

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62 See Phang, *supra* note 55 at para 12.133.

63 *BOM, supra* note 1 at para 101.

64 *BCCI SA v Aboody* [1990] 1 QB 923 (CA), approved by the House of Lords in *Barclays Bank v O'Brien* [1994] 1 AC 180 (HL).

65 Bigwood identifies the inconsistencies between the test laid out by the SGCA for Class 2 undue influence and the way the law was articulated by the English law lords in *Etridge*. See Bigwood, "Straw Man", *supra* note 14 at 41, 42.

66 *Etridge, supra* note 61 at paras 6, 7 (emphasis added). Similarly, Lord Clyde, at para 93, echoed the same point—that "[t]here is considerable variety in the particular methods by which undue influence may be brought to bear on the grantor of a deed. They include cases of coercion, domination, victimization and all the insidious techniques of persuasion." This restatement of the law of undue influence, with some emphasis placed on the misconduct by the defendant which renders the exercise of influence over the weaker party undue, has been used by critics of Birks and Chin, *supra* note 50, to challenge their theoretical model of undue influence as a "plaintiff-sided" vitiating factor. See Capper, "Unconscionable Bargain", *supra* note 52 at 417-419.

inextricably interconnected to "Class 2A"[67] and "Class 2B", making it necessary to understand the legal principles associated with each class as part of a unified framework. "Class 1" undue influence cases involve the weaker party establishing, by way of direct evidence, all the constituent elements of undue influence—to show that the transaction was actually procured by the stronger party having the capacity to influence the weaker party and that influence having been exercised in an undue manner. This "class" of undue influence cases typically involves the application of threats, bullying or other forms of illegitimate pressure, where the outward appearances surrounding the interactions between the parties might be enough to show the application of undue influence, without necessarily having to rely on any pre-existing relationship dynamics between the parties. This explains the extent of the overlap between this "class" of undue influence and the "lawful act duress" cases. "Class 2A" and "Class 2B" undue influence cases differ from "Class 1" only insofar as there are additional presumptions, some rebuttable and others irrebuttable, available to assist the weaker party in establishing all these constituent elements of undue influence because of the subtle nature of the influence that is exercised within the context of the pre-existing relationship between the parties to the transaction.[68] The types of "unacceptable persuasion" that occur in the context of such relationships are more diverse and include less obvious forms of misconduct that are difficult to prove with direct evidence, making it helpful to the weaker party if he is allowed to rely on adverse inferences (from the fact that they involve transactions "which call for an explanation") to prove that he had been subjected to the undue influence of the stronger party.

Merging the doctrine of unconscionability with "Class 1" undue influence, on the assumption that the *Etridge* rendition of the doctrine of undue influence has been adopted in Singapore, would also contradict the conservative impulses underlying the SGCA's decision in *BOM*. This would lead to "potentially a *broad* doctrine of unconscionability rather than a narrow one", as Bigwood has persuasively argued[69] while highlighting the difficulties of reconciling the broader view of undue influence as a unified doctrine in *Etridge* with the SGCA's dicta, in the coda to *BOM*, that "the doctrine of undue influence seeks to address situations where illegitimate forms of pressure are applied by the defendant to influence the plaintiff into entering into certain transactions".[70]

If the *Etridge* position on undue influence does apply in Singapore, then post-*BOM* courts should come out and say so unequivocally, making it clear that other varieties of influence (apart from illegitimate forms of pressure) can be regarded as undue for the purposes of this doctrine. Once a clear judicial stand is taken on this issue, then the parameters of the overlap between undue influence and unconscionability can begin to be properly delineated, a pre-requisite for these adjacent vitiating factors to be developed further in a clear and coherent manner.

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67 Though some have taken the view that Class 2A cases of undue influence should be carved out from the general doctrine of undue influence, because such situations ought to be regarded as more closely related to the law on breach of fiduciary obligation rather than duress or unconscionability. See R Flannigan, 'The Fiduciary Obligation' (1989) 9 OJLS 285, PJ Millet, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214, and Bigwood, "Unfair Advantage", *supra* note 50.

68 *Etridge*, *supra* note 61 at paras 13-18.

69 See Bigwood, "Straw Man", *supra* note 14 at 42, 43.

70 *BOM, supra* note 1 at para 171 (emphasis in original judgment removed).

## IV. An Organisational Framework for Duress, Undue Influence and Unconscionability in Singapore?

Despite the considerable efforts made in *BOM* to clarify the status of the "unfairness" doctrines in Singapore, a residual tension remains because of the oppositional nature of the two prominent streams of *obiter dicta* that flow through the judgment and its coda. On the one hand, the SGCA's conclusion that these doctrines should *not* be united under an "umbrella doctrine" of unconscionability might point towards an unarticulated judicial agenda in favour of clarifying the distinctiveness of, and differences between, the respective doctrinal elements of each of these vitiating factors. On the other hand, the SGCA's many sweeping statements about the extent of the overlaps between these doctrines might point towards a less demanding attitude towards mapping out the boundaries of each vitiating factor, perhaps a signal to future courts that relief may be available to the weaker party if the case lies *somewhere* in between the epicentres of these doctrines. This latter impulse would not bode well for the development of these "unfairness" doctrines in Singapore and would undermine the degree of doctrinal certainty that is needed to promote the sanctity of contracts. Taking the SGCA's cue from *BOM* that the doctrines of duress, undue influence and unconscionability should be maintained as separate vitiating factors rather than unified under an "umbrella doctrine", while simultaneously recognising their interconnectedness with each other, this section outlines a proposal for an organisational framework that could assist future courts in visualising these "unfairness" doctrines as distinct parts of an integrated whole. This proposed "umbrella" framework could help future courts to pinpoint the location of a novel case, relative to the epicentres of these three doctrines, and to decide whether it is necessary or appropriate to expand or refine the doctrinal limits of any specific vitiating factor.

### A. *No Umbrella Doctrine of Unconscionability in Singapore*

Having rejected the "broad" doctrine of unconscionability in Singapore, which would have opened the possibility of developing an even wider "umbrella doctrine" of unconscionability and potentially paved the way for a merger between the trio of adjacent vitiating factors (duress, undue influence and unconscionability), it was unnecessary for the SGCA to include a coda to *BOM* to discuss the viability of such an "umbrella doctrine" as part of Singapore's private law jurisprudence. Even though the SGCA had already upheld the High Court's decision on the applicability of the doctrine of undue influence (in addition to the "narrow" doctrine of unconscionability) as a basis for setting aside the Deed of Trust, it went on to explore the viability and desirability of merging these separate vitiating factors into an "umbrella doctrine" "in order to settle this particular issue in a definitive manner".[71] The possibility of formulating a "broader umbrella doctrine of unconscionability" was also explored in the 2012 Singapore contract law textbook, edited by Phang JA, which

[71] *Ibid* at para 153. The doctrinal linkages between duress, undue influence and unconscionability had been raised by the trial judge in the High Court, prompting the SGCA to survey the academic literature on the subject, including an article by Justice of Appeal Andrew Phang while he was a legal academic prior to joining the bench. See Andrew Phang, "Undue Influence—Methodology, Sources and Linkages" [1995] JBL 552.

expressed the hope "that the Singapore courts will seriously consider adopting a bolder approach that will. . . lead the way across the Commonwealth"[72] in developing such an "umbrella doctrine". The coda in *BOM* can thus be regarded as a formal judicial response, emphatically in the negative, to this particular lingering issue.

The arguments in favour of a merged "umbrella doctrine" of unconscionability were quickly sketched out in the SGCA's coda, placing emphasis on the "close linkages" within each doctrinal pairing: (i) undue influence and unconscionability; (ii) duress and undue influence, (iii) unconscionability and duress.[73] Academic commentators who advocate the development of an "umbrella doctrine" of unconscionability were briefly discussed and their arguments "distilled into one of conceptual neatness", with the underlying premise that "a merger of these doctrines will also bring clarity and perhaps even certainty to the law."[74] However, the SGCA concluded that "such a novel as well as radical shift towards such an umbrella doctrine should not be undertaken"[75] given the impracticality of developing workable legal criteria for such an "umbrella doctrine", the potential for "excessive subjectivity on the part of the court that in turn leads to excessive uncertainty and unpredictability", as well as the theoretical difficulty of having to tolerate an exception (the "umbrella doctrine" as a vitiating factor) that would end up undermining the rule (sanctity of contract) without being "legally limited or constrained in a principled manner".[76]

The arguments in favour of merging the trio of vitiating factors—duress, undue influence and unconscionability—into a single "umbrella doctrine" hinged substantially on the "close linkages" perceived by the SGCA between them. On closer scrutiny, however, it would appear that the SGCA could have overstated the extent of these linkages, as illustrated in the section above dealing with the court's hypothesis that the narrow doctrine of unconscionability and Class 1 undue influence were "virtually coincident with or identical to each other".[77]

### B. *The Umbrella Metaphor as a Visual Representation of the Relationship Between the Trio of "Unfairness" Doctrines*

While the SGCA has unequivocally rejected the notion of an "umbrella doctrine" of unconscionability as a mechanism to *merge* these vitiating factors together into a single overarching principle, it is submitted that the courts should still consider the merits of retaining the "umbrella" metaphor in this area of law for a *different* purpose. The imagery associated with an "umbrella" can be deployed as a means to *organise* our understanding of these adjacent doctrinal devices, identify their common frontiers and provide a methodical framework for deciding which, if any, of these doctrines apply to a particular case. Duress, undue influence and unconscionability may be conceived of as the "panels" of waterproof fabric, viewed from a bird's eye-perspective, that are stitched together to form the canopy of this proposed

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72 See Phang, *supra* note 55 at para 12.253.
73 *BOM, supra* note 1 at paras 170-173.
74 *Ibid* at para 174.
75 *Ibid* at para 180.
76 *Ibid* at paras 176, 177.
77 See *supra* notes 51 to 54.

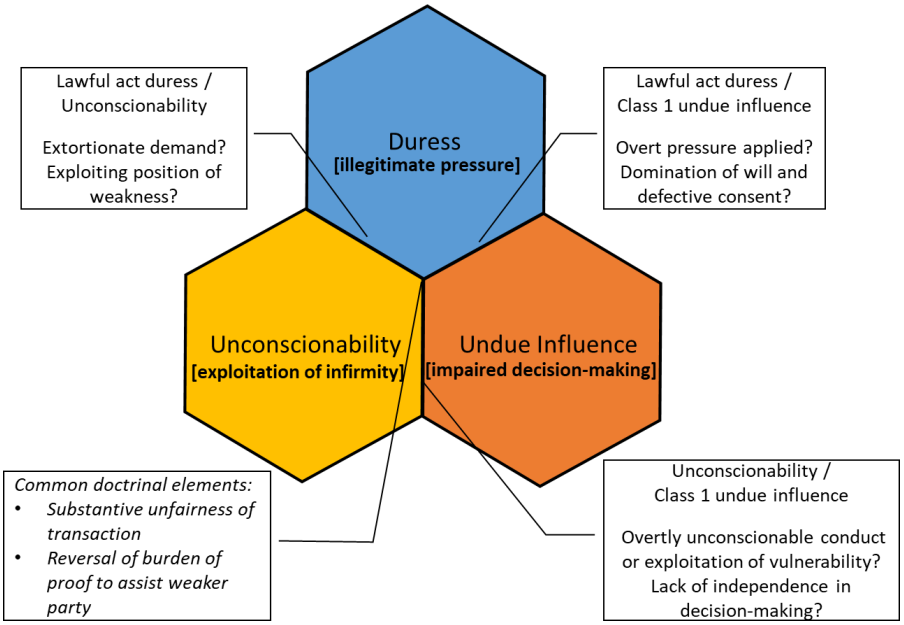


**Fig. 2.** An "umbrella" organisational framework for the doctrines of duress, undue influence and unconscionability.

"umbrella" framework. Each panel represents the individual doctrinal space, with distinctive epicentres,[78] occupied by each of these vitiating factors, while their contiguity between the panels reflects those areas where may overlap with each other. Figure 2 provides a bird's eye view of what this "umbrella" framework might look like.

If, as a starting point, *BOM* orientates the Singapore position away from consolidating these three vitiating factors into a single expansive doctrine, even as there was clear acknowledgment by the SGCA of the significant overlaps between them, the way forward for the Singapore courts must be to coherently develop duress, undue influence and unconscionability as *separate, yet unavoidably interconnected*, legal doctrines. In other words, when faced with the future opportunities to develop or refine the legal contours of any one of these doctrines, the courts should consciously recognise that they are tinkering with just one part of a composite and non-homogenous whole. Achieving desired levels of legal certainty, clarity and coherence in this area of the law will require the courts to apply analytical discipline to ensure the doctrinal integrity of each "panel" of the umbrella and to avoid making broad-brushed generalisations about the extent to which each of them overlaps with the others. The "umbrella" framework proposed here can contribute to this analytical rigour by demonstrating how some of the statements made in the coda to *BOM* may have overstated the extent of the overlaps between duress, undue

[78] To recapitulate, these "gravitational centres" are the application of illegitimate pressure (Duress), impaired decision-making independence (Undue Influence) and exploitation of infirmity (Unconscionability).

influence and unconscionability, statements that—if not approached with caution by subsequent courts—could potentially trigger conceptual confusion about the scope of each of these doctrines down the road.

### 1. *Unconscionability and undue influence*

Consider, to begin with, the adjacent "panels" of unconscionability and undue influence. The SGCA's coda referred to the close linkages between these vitiating factors and explained why it was incorrect to suggest that undue influence was not concerned with the defendant's actions, asserting that "undue influence seeks to address situations where illegitimate forms of pressure are applied by the defendant to influence the plaintiff into entering certain transactions" and "especially... where 'Class 2' undue influence is concerned... it... assumes that the plaintiff is in a disadvantaged position flowing from the trust and confidence reposed in the defendant."[79] The imprecision of this statement of the law becomes apparent upon reflection when one appreciates the "breadth" of the undue influence "panel" beyond the common boundary it shares with the other vitiating factors. Any situation involving the application of "illegitimate pressure" amounts to just one species of the wide variety of unacceptable forms of persuasion that the House of Lords in *Etridge* was prepared to recognise as undue influence. Far less overt or explicit forms of persuasion or misconduct[80] might equally qualify as undue influence in "Class 2" undue influence cases where the decision-making independence of the weaker party has been significantly impaired by his or her subservience to the stronger party.[81]

### 2. *Duress and undue influence*

Next, we can turn our attention to the adjacent "panels" of the duress and undue influence doctrines in Figure 2. The SGCA's coda declared that "duress and Class 1 (or actual) undue influence are very similar in substance... [and that] the existing legal criteria for both duress as well as undue influence are heavily correlated to (if not coincident with) the legal criteria for the narrower doctrine of unconscionability".[82] However, this statement is *only* applicable to those particular "Class 1" undue influence cases (involving the application of extortionate pressure or moral

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79 *BOM, supra* note 1 at paras 170, 171.

80 Indeed, undue influence might be established even in the absence of any misconduct by the stronger party. See *supra* note 59.

81 Bigwood has argued that undue influence involves the law responding prophylactically to the risk that the stronger party may have preferred his personal interests to those of the weaker party (not necessarily through the application of pressure) and that the vulnerability of the weaker party is different in the context of each doctrine—where unconscionability is concerned, he must suffer from an "infirmity" or "special disadvantage", while where undue influence is concerned, he must concede trust or confidence to the stronger party to such a degree that he has become "exposed... to disloyal opportunism or betrayal". See Bigwood, "Straw Man", *supra* note 14 at 59, 61. What qualifies as a "disadvantaged position" for the purposes of the doctrine of unconscionability (an "infirmity") would almost certainly be much narrower than for the purposes of the doctrine of undue influence (e.g. the weaker party having personality traits that make him susceptible to influence, being the child/patient/client in a parent-child, doctor-patient or solicitor-client relationship).

82 *BOM, supra* note 1 at para 179.

blackmail)[83] which occupy the shared boundary between these "panels", as illustrated by the point of convergence in the middle of the "umbrella", including some of the facets of exploitative conduct more immediately associated with the doctrine occupying the third "panel"—the doctrine of unconscionability. Other species of duress, such as economic duress, are located some distance away from the doctrine of undue influence.

### 3. *Duress and unconscionability*

To round things off, we might look at the relationship between the duress and unconscionability "panels" of the "umbrella". The SGCA's coda alludes to the close relationship between duress and unconscionability, remarking that "[p]ut broadly, both doctrines are in essence about the use of illegitimate pressure or the exploitation of infirmity to form a transaction that the court will not uphold".[84] This statement is accurate only insofar as it describes the narrow band of "lawful act" duress cases located at the boundary between these two "panels", where the act which the stronger party is threatening to commit is lawful and cannot, on its own, amount to illegitimate pressure. Some element of exploitation is required, such as the nature of the demand accompanying the threat, to elevate the stronger party's conduct into an objectionable form of pressure. Where duress involves threats to commit unlawful acts, however, the contract may be voidable *regardless* of whether the weaker party suffered from *any* infirmity (of the sort required for unconscionability under *BOM*) or *irrespective* of there was *any* exploitation of weakness by the stronger party.[85]

### 4. *Using the "umbrella" framework to analyse novel scenarios and develop the doctrinal elements of each individual vitiating factor*

The "umbrella" framework proposed here simultaneously conveys both the separateness as well as the connectedness of these vitiating factors. It offers a graphical representation of the conceptual topology of these three adjacent legal doctrines, capturing *which* doctrinal features are shared, and the *extent* to which they are shared, as well as the epicentre of each "panel" that give each vitiating factor a distinctive

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[83] See Bigwood, "Straw Man", *supra* note 14 at 60. Another way to distinguish the doctrines of duress from undue influence is to keep in mind that the former is triggered by the application of illegitimate pressure by the stronger party, where the pressure arises as a result of the threats (including threats of lawful action, in the case of lawful act duress) he has made to the weaker party if his demands are not carried out. The latter, being focused on "unacceptable forms of persuasion" (see *supra* note 66), encompasses all kinds of situations where the stronger party has exercised his influence in an undue manner, whether or not through the application of pressure and whether or not that pressure results from the issuance of threats. The undue influence doctrine could be triggered, for instance, by acts of bullying, badgering or brainwashing so long as the independence of the weaker party's decision-making has been compromised to a sufficient degree.

[84] *BOM, supra* note 1 at para 173.

[85] See Bigwood, "Straw Man", *supra* note 14 at 60. Put another way, the overlap between the duress and unconscionability doctrines is limited to the field of "lawful act duress", where a sufficient degree of "exploitation" must be established to transform the stronger party's threat of lawful action (i.e. something which the law permits him to do) into a part of the "illegitimate pressure" (along with, in all likelihood, a suitably extortionate demand) that has been applied upon the weaker party.

character. Furthermore, the physical structure of an umbrella further augments the appropriateness of the metaphor, with the umbrella's "ribs" (supporting the canopy) and its central "shaft" capable of representing the underlying principles of procedural and substantive unfairness that buttress the doctrines of duress, undue influence and unconscionability.

Understanding the doctrines of duress, undue influence and unconscionability as individual yet interconnected parts of an "umbrella" framework of "unfairness" for contract law can assist the courts in identifying—with greater accuracy—which one, two or three of these vitiating factors should be available to the weaker party in a particular factual context. For example, a situation involving the application of illegitimate pressure, without the exploitation of any relevant "infirmity" of apparent compromise of the decision-making independence of the weaker party could only fit within the duress "panel" of the "umbrella". On the other hand, if the vulnerabilities of the weaker party are exploited by the stronger party without the issuance of any threats or any apparent impact on voluntariness or consensual character of the weaker party's conduct, then the starting point for the analysis must lie somewhere within the unconscionability "panel" of the "umbrella". And if the weaker party was persuaded to enter into the transaction without any overt acts of aggression, threats or exploitative behaviour, while enthralled by the influence of the stronger party, then the case might sit in one of the extreme corners of the undue influence "panel" (if at all) of the "umbrella" framework.

If a court were to use this "umbrella" framework to analyse a particular allegation of "unfairness" against a stronger party that is relied upon by the weaker party to set aside a contract, then the first step is to locate the conduct of the stronger party somewhere within these "panels" by identifying its relative proximity to the three epicentres. Cases that are found to be exactly at an epicentre of one of these "panels" can *only* be dealt with using the doctrinal elements of *that* vitiating factor. Less obvious cases that are harder to categorise because they demonstrate features associated with two or three "panels" need to be scrutinised more carefully to determine if they exhibit the factual characteristics of the band of cases found at the shared borders of these panels. If so, then two or more of these doctrines might be sensibly applied, as was the case in *BOM*. If not, then the case is one which lies *too far away from all the epicentres* of these "panels" such that it falls completely outside the "canopy" of the umbrella altogether. This leads to two possible alternative outcomes: either no relief should be granted to the weaker party or that the case might lie just close enough to the margins of one of these "panels" to possibly justify an incremental extension of doctrinal coverage of *that* particular vitiating factor.

This "umbrella" framework perspective could thus be useful to a court when deciding *which* of these "unfairness" doctrines should be developed or "stretched" to accommodate unusual cases down the road. The "umbrella" metaphor might also be helpful in identifying any "gaps" in the "canopy" of "panels" when there is an unusual case which does not satisfy *all* of the formal legal elements of any one "panel". For example, in a purely commercial context without any elements of blackmail or extortionate demands being made, the weaker party that has contractually agreed to make a payment to the stronger party at the insistence of the latter (who mistakenly believes that he is entitled to such payment) may find himself unable to satisfy all the formal requirements of either the doctrines of (lawful act) duress or

unconscionability.[86] In such a case, if a court had to consider which of these "panels" might possibly provide shelter to the weaker party, it could start by trying to establish its proximity to established precedents located within the spatial confines of the "umbrella" framework and then decide which of these doctrines might most easily accommodate the case at hand. Of course, the court may also choose, in the interests of commercial certainty or as a matter of policy, *not* to close these gaps or to deliberately leave this scenario "unsheltered" beyond the coverage of the "canopy", whereupon it would then have to explain why it was unable to stretch the doctrinal fabric of the closest "panel" to grant relief to the weaker party.

Furthermore, adopting the "umbrella" framework proposed above for this trio of vitiating factors might possibly facilitate a more coherent understanding of the recurring thematic elements found in the different individual doctrines. For instance, the requirements relating to the substantive unfairness of the contract found in each doctrine—duress (particularly for lawful act duress, which requires the substance of the stronger party's demands to be extortionate), undue influence (particularly in Class 2 cases, which have incorporated the concept of "transactions which call for an explanation") and unconscionability (besides transactions at a considerable undervalue, what other harsh, oppressive or one-sided bargains might qualify?)—could be better understood if their legal significance were rationalised across these doctrines.[87]

## V. Conclusion

The jurisprudential significance of the SGCA's landmark decision in *BOM* to Singapore's contract law regime is readily apparent: we now have, for the first time, an authoritative statement from Singapore's highest appellate court of the existence of a (narrow) doctrine of unconscionability that will have to co-exist with the more established doctrines of duress and undue influence. The elements of the Singapore doctrine of unconscionability were deliberately designed to be more flexible than the traditional English formulations of this doctrine, permitting weaker parties to invoke the doctrine even when their "infirmities" do not amount to "poverty" or

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[86] See *CTN Cash and Carry Ltd v Gallaher* [1994] All ER 714, at 719, 720, where Steyn LJ acknowledged that while "[t]he aim of. . . commercial law ought to be to encourage fair dealings between parties. . . it is a mistake for the law to set its sights too highly when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable". This led Steyn LJ to reject the application of the doctrine of duress as a ground for recovery of a contractual payment, even though Sir Donald Nicholls was of the view, in the same case, that "it would be unconscionable for the defendant company to insist on retaining the money. . . [i]t [had] demanded. . . when under a mistaken belief as to its legal entitlement to be paid."

[87] A multiplicity of interesting legal issues cut across these three vitiating factors, which might be more meaningfully analysed by the courts if they are viewed against the "umbrella" framework backdrop proposed in this paper, include the following. Firstly, to what extent do each of these doctrines incorporate evidential mechanisms that reverse the burden of proof from the weaker party to the stronger party? Secondly, to what extent is it relevant for the stronger party to have subjective knowledge of the vulnerabilities of the weaker party, and are there common rules about when knowledge of the "unfairness" towards the weaker party may be invoked in tripartite scenarios where the other contracting party is not the one who engaged in the misbehaviour? Thirdly, should the doctrines be applied uniformly, as a matter of policy, to both contractual bargains and voluntary conveyances (particularly gifts), regardless of whether the impugned transaction occurs in a commercial or a non-commercial context?

"ignorance". The explicit preference the court has given to a "narrow" doctrine of unconscionability highlights the importance it has placed on circumscribing the scope of this vitiating factor, wary of the dangers of unbridled subjectivity and the risks to commercial certainty associated with broader doctrinal formulations preferred elsewhere. This explains the court's decision to reject the *language* used in *Amadio* to frame the Singapore doctrine of unconscionability. Looking ahead, it is now up to future courts to build on this decision and develop a coherent framework to analyse the meaning of "exploitation"[88] and demonstrate in what circumstances this doctrine might *still* be available as a vitiating factor *even* where the weaker party is unable to establish the non-essential but nonetheless "important factors" (that the "transaction was at a considerable undervalue" or the "absence of independent advice") articulated by the SGCA.

It is submitted that, for further developments to this area of law to be productive, future courts need to perform the following tasks. Firstly, some judicial effort needs to be expended towards defining the scope of the "exploitation" element of the doctrine of unconscionability, an issue that was not explicitly addressed by the SGCA in *BOM*. Secondly, the extent of the overlaps between these doctrines, particularly between undue influence and unconscionability, needs to be understood with greater precision and more carefully analysed. The SGCA's *obiter dicta* about the degree of coincidentality or identicality between these undue influence and unconscionability should not be followed without critical appraisal by future courts, which could seek to restore clarity to this doctrinal confluence by making it explicit whether the *Etridge* rendition of the doctrine of undue influence is indeed the position taken in Singapore. Thirdly, the distinctiveness of the trio of vitiating factors needs to be maintained even as their close linkages with each other are recognised. In light of the SGCA's decision to keep the doctrines of duress, undue influence and unconscionability in separate doctrinal streams, it is submitted that the courts should pay closer attention to their respective headwaters and trajectories in order to develop a more coherent and nuanced understanding of the distinctive characteristics of each vitiating factor. This will provide valuable guidance to litigants to critically evaluate which specific stream(s), if any, their case falls within, rather than flooding the court with amorphous allegations of "unfairness" surrounding the transactions they wish to challenge. To this end, it has been proposed that even though an "umbrella" doctrine of unconscionability has been firmly rejected, the "umbrella" metaphor should be retained and reconfigured as an organisational framework that can potentially enhance the analytical rigour and precision with which these legal doctrines are developed and applied in Singapore.

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[88] It should be noted that, apart from quoted material and a passing reference to the "narrow doctrine of unconscionability [having its] roots in equity" (*BOM, supra* note 1 at para 150), the SGCA's judgment did not elaborate upon the significance of this vitiating factor as a doctrinal creature of *equity*. The 65-page judgment consciously avoided the language of "unconscionability" and "unfairness" (except when referring to other cases or commentary) and demonstrated wariness towards conventional legal formulations that described the stronger party's conduct as "morally reprehensible" (*BOM, supra* note 1 at paras 135-139).