

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1528 of 2015

BEFORE:

Mr. Justice Arshad Hussain Khan

M/s. Shabber Enterprise

vs

M/s. National Bank of Pakistan & Others.

Plaintiff: *M/s. Shabber Enterprise*
through Mr. Sarfaraz Ahmed, advocate

Defendant *M/s. National Bank of Pakistan*
No.1: *Through Ms.Saman Rafat Imtiaz Advocate*

Defendant *M/s. Bank Islami Pakistan Limited*
No.2: *Through Ms. Samia Faiz Durrani Advocate*

Defendant *Director, State Bank of Pakistan*
No.4 *Through Mr. Manzoorul Haq Advocate*

Date of Hg: *09.04.2019*

JUDGMENT

ARSHAD HUSSAIN KHAN, J. The present suit was filed on 19.08.2015 against the defendants for Settlement of Accounts and Damages amounting to Rs.84,867,763/- with the following prayers:-

- (a) *Declare and Decree the claim(s) amounts to the tune of PKR 18,867,763.00 plus mark-up @ 0.75 from 01.08.2015 till realization concerning overdue bills.*
- (b) *Declare and Decree the damages to the tune of PKR.66,000,000.00 claim under para 26 v to vii in favour of the Plaintiff Company [the Beneficiary].*
- (c) *Declare and pass a consolidated Decree to tune of PKR 84,867,763.00 in favour of the Plaintiff Company [the beneficiary] and against the Defendants jointly and severally.*
- (d) *A mandatory injunction / an order to investigate from the authorities in power of the LCs advising Bank, LCs opening Bank and the dealing officials to let this Honourable Court know the reasons and justification NOT to honour the commitments and obligations as per the terms and conditions of the **Inland**. Usance Letters of Credits duly*

authenticated under international system of Banking called 'SWIFT' communication.

- (e) *An order to the Director, SBP Consumer Protection Department Karachi to explain his point of view for poor, checks controls, supervisions and resolution of customers related problems / issues unnecessarily generated and created by the LCs opening / advising Banks and its dealing officials.*
- (f) *An order to the **Chartered Accountants** named above, to let this Honourable Court know as to the booking of the assets and liabilities in the **Books of Accounts** of both the Banks concerning overdue bills drawn under LCs [Inland]*
- (g) *Grant any further / additional relief which this Honourable Court deems fit and proper under the circumstances of the case.*
- (h) *Grant costs of the suit.*

2. Briefly stated the facts of the case are that the plaintiff is a sole proprietorship concern, registered under the laws of Islamic Republic of Pakistan, inter alia, engaged in the business of import, export, whole sell and manufacturing and in this regard, the firm enjoys good reputation in the marketplaces both locally and internationally. The plaintiff-firm is also registered with the Sales Tax, and Income Tax Departments, Government of Pakistan. It is also stated that the plaintiff-firm for the purposes of its business transaction is maintaining Current Bank Accounts in different banks namely (i) Bank Islami Pakistan Limited, Progressive Plaza, PIDC, Karachi, (ii) M/s. Habib Metropolitan Bank, Jodia Branch and (iii) M/s. Silk Bank Limited, Jodia Bazar, Karachi. It is further stated that in the month of May 2014, the plaintiff entered into business transaction to supply different types of yarn with defendant No.3 and in connection thereof defendant No.3 established two (2) irrevocable inland letter of credit [LC]; bearing Nos. (i) U/1862/399/14, opened on 29.05.2014 for an amount of PKR 7,000,000.00 expiring on 31.07.2014 duly amended on 18.06.2014, and (ii) No. U/1862/LO/401/14, opened on 29.05.2014 for an amount of PKR 8,000,000.00 expiring on 27.07.2014 in favour of plaintiff firm [the beneficiary] through LC Opening Bank [National Bank of Pakistan- defendant No.1] on behalf of M/s Cresox (Pvt) Limited [the Applicant]. It is also stated that the plaintiff supplying the goods to defendant No.3 submitted the Bills through the LC advising Bank

(Bank Islami-defendant No.2) to LC opening Bank, for payments on due date(s) as per the terms and conditions, stipulated in the above letter of credit. It is further stated that LC advising Bank had been pursuing regularly constantly and reminding to the LC opening Bank [NBP] for payment of overdue bills, but of no effect, violating the terms and conditions of local Usance LC. It is on the record of the LC Opening Bank and as well as to the knowledge of LC Advising Bank that the applicant [defendant No.3] of the above letter of credit accepted the documents and directed the LC opening bank for payment to the beneficiary [plaintiff]. The payments despite repeated follow ups and reminders had not been paid. It is also stated that the delay in payments of above overdue bills through LCs advising Bank for onward credit to the beneficiary account had extraordinarily burdened the financial management of the Plaintiff Company with an ultimate result(s) of huge fiscal losses on continued basis from the due date(s) stated above, till realization of the bills. The Company had also suffered heavily while managing its day to day business activities as to the purchase of yarn from the local market. The cheques in normal course of business, which customer used to accept had been returned unpaid which had drastically spoiled/ruined the business image, perception, reputation and goodwill of the Company. It is further stated that the Plaintiff had suffered colossal damages/losses due to unethical and unlawful attitude, behavior and handling of a Non-Funded having technical aspects of the Banking transactions based upon LCs. It is further stated that due to gross commercial, business malpractices and breach of irrevocable inland letters of credits both the Defendants [NBP-LCs Opening Bank and Bank Islami Pakistan Limited-LC advising /presenting bank] are liable jointly and severally to make the payments as claimed in the plaint. It is also stated that the plaintiff also served two legal notices dated 05.06.2015, upon the LCs advising Bank and LCs Opening Bank however the same were replied to by the LCs Advising Bank as well as LCs opening Bank, which is tantamount to an admission of plaintiff's claim as mentioned in the said notices. The plaintiff having no other option, for redressal of its grievances, has filed the present case.

3. Upon summons of the present suit, only defendant No.2 (M/s. Bank Islami Pakistan Limited) and defendant No.4 (State Bank of Pakistan) filed their written statements whereas defendants No. 1, 3, 5 & 6 have chosen not to contest the present proceedings as they did not file any written statement despite sufficient opportunities provided to them, resulting which they were declared ex-parte on 16.1.2017.

4. Defendant No.2, in its written statement taking the preliminary legal objections stated that the suit is not maintainable against them as there was no financial or contractual obligations upon them; the suit is hit by the provisions of Civil Procedure Code, and the same has been filed without any cause arising out against defendant No.2; the suit is liable to be dismissed under the provisions of Order 7 Rule 11 CPC as the plaint has badly failed to point out any cause of action accrued against defendant No.2. Besides legal objections the said defendant while denying the contents of the plaint also stated that defendant No.2 acted only as an advising bank and no financial or contractual obligations or liability cast upon them in respect of the subject transaction. It has been further stated that it is defendant No.1 to explain as to why the payments were not released. The defendant No.2 being just an advising bank sent various reminders to defendant No.1 and forwarded the subject LCs to defendant No.1, however, these documents were refused by defendant No.1 due to certain discrepancies, which fact was conveyed to the Plaintiff whereas defendant No.2 has extended full cooperation to the Plaintiff without any responsibility on the part of defendant No.2, therefore, the suit is liable to be dismissed. The defendant No.2 being just an advising bank had submitted documents, which were provided by the Plaintiff, to defendant No.1 and then it was entire up to defendant No.1 to consider, accept or otherwise reject the said documents as the case could be or if there were any discrepancies in the documents of LC which had nothing to do with defendant No.2. It is stated that the matter/ dispute is actually between the Plaintiff and Defendant No.1 whereas defendant No.2 has been un-necessarily been impleaded in this case. It is further stated that defendant No.2 did not cause any damage to the Plaintiff and the Plaintiff has no cause of action against them. It is stated that the

Plaintiff is not entitled to claim and/or any relief against defendant No.2 and as such the suit is liable to be dismissed against defendant No.2.

5. Similarly, Defendant No.4 (State Bank of Pakistan), in its written statement taking the preliminary legal objections stated that the Plaintiff has failed to establish any cause of action against them and that no commission / omission or illegality on the part of Defendant No.4 has been alleged in the Plaint and it is not a necessary party for effectual determination of the dispute, therefore, the suit merits dismissal to the extent of Defendant No.4. Whereas while denying the contents of the Plaint, it has been further stated that defendant No.4 [SBP] probed the matter and it transpired that Defendant No.1 [NBP] had acted in accordance with the applicable law / rules / regulations, therefore, the Plaintiff was advised through letter No.CPD [RD-3]/4-2015/3236 dated 09.02.2015 to approach Defendant No.3 for amicable settlement. It is also stated that the Plaintiff has falsely claimed damages against Defendant No.4 as Defendant No.4 acted strictly in accordance with law and it properly regulates and monitors banks and DFIs. Finally, it is stated that Defendant No.4 is not liable to pay any damage to the Plaintiff and the prayer of the Plaint has vehemently been denied and that compensatory costs may be granted under Section 35-A of the Civil Procedure code,1908.

6. Out of the pleadings of the parties, considering the consent issues of Plaintiff and Defendant No.4, following issues in the matter were framed by this Court on 08.05.2017.

1. *Whether the suit of the Plaintiff is maintainable against the Defendant No.2 in the capacity of its advisory role?*
2. *Whether the LC documents are legitimate in accordance with law and not of discrepant referring to Article 16 of UCP 600?*
3. *Whether the Defendant No.3 accepted / waived all the discrepancies in LCs documents?*
4. *Whether the Plaintiff is entitled for the recovery of Rs.18,867,763.00 plus mark-up @ 0.75 paise from 01.08.2015 till realization of the amount from the Defendant No.01 ?*
5. *Whether the Plaintiff is entitled for any relief against the defendant No.02 ?*

6. *Whether the Plaintiff suffered any loss due to non-payment of LCs amount by Defendant No.01? If yes, to what extent ?*
7. *Whether the Plaintiff has suffered any loss due to any act or omission of the Defendant No.02?*
8. *Whether the Plaintiff is entitled for recovery of damages of Rs.66,000,000.00 from the Defendant No.01 ?*
9. *What should the decree be ?*

7. Thereafter, on the same date i.e. 08.05.2017, with the consent of the learned counsel appearing for the Plaintiff and defendant No.2, Commissioner for recording evidence in the matter was appointed who after completing the commission filed his report on 21.02.2018. From perusal of the Commissioner's report, it appears that the plaintiff in support of its stance in the case examined Mr. Faisal Amjad, the attorney of Khalid Majeed the sole proprietor of the plaintiff as PW-1 [Exh.P], and produced the documents as Exhibits PW-1/1 to PW-1/117.

The plaintiff's witness was subsequently cross-examined by the counsel for defendant No.2 and 4, whereas defendant No.1 despite several opportunities provided by the court did not cross examine the plaintiff's witness. Cross examination of plaintiff's witness is reproduced as under:

**“CROSS-EXAMINATION TO MR. FAIZ DURRANI
ADVOCATE FOR DEFENDANT NO.2.**

I am the Manager of the plaintiff's company. It is correct to suggest that present suit was filed by the company against National Bank of Pakistan and others wherein Bank Islami Limited, formerly known as KASB Bank has been impleaded as defendant No.2. I have not claimed any financial or contractual claims against the defendant No.2 “Voluntarily say” we have continuous relationship with the defendant No.2. I have no claim/cause of action against the defendant No.2. It is correct to suggest that I have no claim against the defendant No.2 in the present suit nor I want any decree against defendant No.2 in the present suit nor I want any decree against the defendant No.2.”

**“CROSS-EXAMINATION TO MR. MANZOOR-UR-HAQ
ADVOCATE FOR DEFENDANT NO.4 [SBP]**

I have no claim against the defendant No.4 in the present suit. I have gone through the contents of memo of plaint filed by the plaintiff and say that the defendant No.4 is a Performa Defendant. The actual dispute is between the plaintiff and the defendant No.1. It is correct to suggest that no cause of action

has arisen against the defendant No.4. Voluntary say that I have written several letters/complaints to the defendant No.4 (State Bank of Pakistan) against National Bank of Pakistan, as National Bank of Pakistan has violated the prudential regulations whereas National Bank of Pakistan is duty bound to fulfill the prudential regulations but despite of various directions given by the State Bank of Pakistan to National Bank of Pakistan to fulfill their obligations and settled the matter with the plaintiff but the National Bank of Pakistan has failed to do so nor complied with the direction of State Bank of Pakistan.”

8. None of the defendants produced their evidence in the present case.

9. Learned counsel for the plaintiff, during the course of his arguments, reiterating the contents of the plaint, has contended that defendants 3,4,5 & 6 were impleaded as perfunctory defendants in this suit for rendering their assistance to this Honourable Court on the issues framed in this Suit. It is contended that it is disappointing and unfortunate that SBP and NBP had given no consideration to the laws and definitions of the International Chamber of Commerce, though Government of Pakistan is a signatory to Geneva Convention not to avoid international laws and disrespects the Banking norms and established international practices, for good office order, international business sake. It is contended that the Plaintiff had delivered the goods to M /s. Cresox (Pvt) Limited (defendant No.3) in compliance of two (2) Inland letters of credit (LCs). It is also contended that the goods of the subject LCs are high quality of cotton yarns specially needed by the exporters and other business entrepreneurs dealing in textile related businesses. It is also contended that though except defendants 2 & 4 none of the defendants have filed their written statements in the present case, yet none of the defendants led their evidence in the present case. Furthermore, issuance of subject LCs and correspondence exchanged between the parties are not disputed. Further contended that Defendant No.1 never exercised Article 16 of UCP 6000, after issuance of letter of Acceptance an Undertaking by defendant No.3 whereby defendant No.3 waived the discrepancies and accepted the documents submitted by the Plaintiff for payment. Conversely, defendant No.1 upon the said acceptance by defendant No.3 requested to defendant No.3 to arrange sufficient funds to effect payment at the earliest by its letter dated 19.2.2015. Further contended that Exh. P/114, issued by Defendant

No.1, is worth consideration, which states about the payment to the Plaintiff. In this document, Defendant No.1 has mentioned the Number of LCs with name of Plaintiff, therefore, the delivery documents submitted by the Plaintiff cannot be treated as discrepant document and Defendant No.1 is liable to make payment to the Plaintiff. It is also contended that the principle of estoppel is fully applicable upon Defendant No.1 as after accepting waiver of discrepancies by Defendant No.3, Defendant No.1 cannot seek enforcement of Article 16 of UCP 600 against the Plaintiff, which prima facie, is not applicable in the light of un-rebutted oral as well as documentary evidence produced by the plaintiff. Further argued that it is settled principle of law that one cannot blow hot and cold in the same breath. In this case, more particularly after accepting the waiver of discrepancies extended by the Defendant No.3 and in absence of rejection of such waiver of discrepancies by Defendant No.1, the Defendant No.1 has no right to exercise Article 16 of UCP 600. It is also argued that in the light of letter of acceptance an Undertaking available on the record and in the light of Defendant No.1's letter [Exh P/114], the delivery documents submitted by the Plaintiff are legitimate and cannot be held as discrepant. It is also argued that in view of the delivery documents, (Exhibits P/41 to P/52 and P/59 to P/101), the Plaintiff is entitled for such recovery along with mark up from Defendant No.1. Further argued that non-payment of LCs amount to the Plaintiff in time caused severe loss in business, therefore, the plaintiff is also entitled to the damages claimed in the present case. Learned counsel lastly argued that in the light of evidence, the Plaintiff has successfully proved that it is entitled to the relief prayed in its suit as Defendant No.1 without any justification, cause and reasons denied the lawful payment of the Plaintiff and illegally deprived it from such payment since the month of July 2014. In support of his arguments he has relied upon the case of *AZIZULLAH v. JAWAID A BAJWA and 3 others* [2005 SCMR, 1950] and *ABDUL MAJEED KHAN v. TAWSEEN ABDUL HALEEM and others* [PLD 2012 SC 80].

10. Conversely, learned counsel for the Defendant No.4, during the course of arguments, reiterating the contents of the written statement has contended that it is a proforma defendant. The Plaintiff has no

cause of action to file the suit against Defendant No.4. Learned counsel contended that no commission / omission or illegality on the part of Defendant No.4 has been alleged in the Plaintiff and the actual dispute is between the Plaintiff and Defendant No.1, the defendant No.4 is not a necessary party for effectual determination of the dispute and defendant No.1 has nothing to do with defendant No.4. Learned counsel further contended that the Plaintiff filed a complaint before Defendant No.4 against defendant No.1, which was replied through letter dated 09.02.2015, wherein it was stated that the matter may be taken up with the concerned bank [NBP] for clarification. In this regard, NBP informed that it did not give acceptance to subject LCs. Furthermore, since the documents submitted against said LCs had discrepancies, NBP as issuing bank not responsible to pay under the relevant laws, thereafter, the SBP advised the Plaintiff to approach M/s. Cresox Private Limited for an amicable settlement. Learned counsel further argued that the terms and conditions of LCs are binding upon the parties who have signed the LCs and if there is any violation of terms and conditions of LCs it become civil wrong and not the regulatory issue. However, if there is any violation of any banking law, rules & regulation as well as Circulation of SBP then the Banking Mohtasib has jurisdiction under Section 82-A of Banking Companies Ordinance, 1962, and under Section 18 of the Federal Ombudsmen Institutional Reforms Act, 2013, which states no court or authority shall have jurisdiction to entertain any matter, which falls within the jurisdiction of an Ombudsman nor any court or authority shall assume jurisdiction in respect of any matter pending with or decided by an Ombudsman. Finally, learned counsel urged that the Plaintiff is not entitled for any relief against the SBP as no cause of action has been accrued to the Plaintiff and to the extent of Defendant No.4, the instant suit may be dismissed.

11. Learned counsel for Defendant No.1 [NBP], during the arguments contended that the discrepancies in the documents submitted in respect of subject LCs with the bank for payment have not been denied by the Plaintiff, however, since Defendant No.3 accepted /waived the discrepancies vide Exhibit PW-1/32, therefore, the plaintiff is not entitled for the payments under the subject LCs. She has also

argued that the Plaintiff has no right under any provision of UCP-600 to insist Defendant No.1 to accept Defendant's 3 waiver. Further argued that no case law produced by the Plaintiff whereby it is held that the Bank must pay despite discrepancies in case of waivers, similarly no case law produced by the Plaintiff whereby it is held that UCP may be ignored. Further argued that though Article 14(d)(i) of UCP 500 requires that rejection of waiver should be communicated to the beneficiary within 07 days of receipt of documents otherwise the Bank loses its right to reject the waiver, however, no such time limit is prescribed in UCP-600, which is applicable in the present case. It is also argued that the present suit may be decreed against Defendant No.3 as delivery has been confirmed by them as per Delivery receipts produced as Exhibits PW-1/41 to PW-1/52 and PW-1/59 to PW-1/101 and discrepancies in the documents have been waived. In support of her arguments, learned counsel has relied upon the following case law:-

- i. *IJAS ANIS v. TARIQ ISA & others* [2000 MLD 1337],
- ii. *HAROON RASHID CHAUDHRY v. MULIM COMMERCIAL BANK and others* [2006 CLD 1140],
- iii. *OIL and GAS DEVELOPMENT COMPANY LIMITED v. EXCEL TECHNO SOLUTIONS FZE, UAE* [2017 CLD 1274],
- iv. *HARAL TEXTILES LIMITED v. BANQUE INDOSUEZ BELGIUM S.A.* [1999 SCMR 591].
- v. *KOHINOOR TRADING (PVT.) LTD v. MANGRANI TRADING Co & others* [1987 CLC 1533].
- vi. *Dr. M. RAZA ZAIDI v. GLAXO WELLCOME PAKISTAN LIMITED, KARACHI* [2018 MLD 1268].
- vii. *CHAIRMAN, MARI GAS CO. LTD. and 2 others v. ABDUL REHMAN* [2017 YLR 2505].
- viii. *MURTAZA ALI v. SABIR ALI BANGASH* [2015 YLR 1239].
- ix. *Mst. NAGINA BEGUM v. Mst. TAHZIM AKHTAR and others* [2009 SCMR 623].
- x. *Messrs KLB-E-HYDER AND COMPANY [PVT.] LTD., through Chief Executive v. NATIONAL BANK OF PAKISTAN through President and 3 others* [2008 CLD 576].
- xi. *Messrs AL-PAK GHEE MILLS through Managing Partner v. Messrs ZEESHAN TRADERS through proprietor* [2008 CLC 120].
- xii. *MUHAMMAD AMIN BROTHERS [PVT.] LIMITED Through Director v. PAKISTAN AGRICULTURAL STORAGE AND SERVICES CORPORATION LIMITED* [2007 CLD 1445]

xiii. *CHIEF OFFICER, DISTRICT COUNCIL, SHEIKHPURA and 2 others v. Haji SULTAN SAFDAR and 2 others [1999 YLR 1963].*

12. I have given due consideration to the arguments advanced by the learned counsel for the parties and their submissions in writing, minutely perused the material/evidence available on the record as well as the case law cited at the bar and my findings on the issues are as under:-

13. **ISSUES 1, 5 & 7:** Since these issues are connected with each other and related to defendant No.2, hence the same are taken up together. Learned counsel for the plaintiff at the outset has given up these issues, therefore, being redundant, no finding is required to be made on these issues.

14. **ISSUES 2, 3 & 4:** These issues are also related to each other, therefore, I have taken these issues together. From the record, it appears that defendant No. 3 for the purposes of purchase of different types of yarn from the plaintiff established two (2) irrevocable Inland letter of credit [LC]; bearing Nos. (i) U/1862/399/14, opened on 29.05.2014 for an amount of PKR 7,000,000.00 expiring on 31.07.2014 duly amended on 18.06.2014, [Exh.PW-1/6] and (ii) No.U/1862/LO/401/14, opened on 29.05.2014 for an amount of PKR 8,000,000.00 expiring on 27.07.2014 [Exh.PW-1/24] in favour of the plaintiffs' firm [the beneficiary] through LC Opening Bank [National Bank of Pakistan-Defendant No.1] on behalf of M/s Cresox (Pvt) Limited [the Applicant]. The Plaintiff after supplying the goods to defendant No.3 submitted the Bills through the LC advising Bank-defendant No.2 (Bank Islami former KASB Bank) to LC opening Bank, for payments on due date(s) but the payments despite repeated request and follow ups were not made/released. The bills/documents submitted by the Plaintiff through defendant No.2 to defendant No.1 for payments in respect of the subject LCs, were acknowledged by defendant No.2 through its two letters both dated 11.09.2014 [Exh.PW-1/14] and [Exh.PW-1/28]. Details of bills reference and the documents value, for the sake of ready convenience are reproduced as under:-

[Exh.PW-1/14]

**BILLS DRAWN UNDER INLAND LC NO.U/1862/LO/399/14
DATED 29.05.2014.**

S.NO.	REFERENCE	DOCUMENT VALUE IN PKR
1	COLLBD0002/20316	1,709,685.00
2	COLLBD0002/20327	75,416.00
3	COLLBD0002/20347	960,156.00
4	COLLBD0002/20358	1,615,165.00
5	COLLBD0002/20379	745,469.00
6	COLLBD0002/20391	419,879.00
7	COLLBD0002/20392	<u>1,478,150.00</u>
	Total:	7,003,920.00

[Exh.PW-1/28]

**BILLS DRAWN UNDER INLAND LC NO.U/1862/LO/401/14
DATED 29.05.2014**

S.NO.	REFERENCE	DOCUMENT VALUE IN PKR
1	COLLBD0002/20077	4,469,046.00
2	COLLBD0002/20104	1,066,139.00
3	COLLBD0002/20144	1,248,544.00
4	COLLBD0002/20159	1,019,956.00
5	COLLBD0002/20209	75,000.00
	TOTAL	7,878,685.00

Before going into the discussion on these issues, it would be appropriate to discuss what is UCP and its applicability:

“UCP” stands for Uniform Customs and Practice for Documentary Credits, which is a body of rules (not laws) on letters of credit. The commercial parties, particularly banks, have developed the techniques and methods for handling letters of credit in international trade finance. This practice has been standardized by the ICC (International Chamber of Commerce) by publishing the UCP in 1933 and subsequently updating it throughout the years. The latest version, called the UCP600, formally commenced on 1 July 2007.

15. In the present case though defendant No.1 neither filed any written statement nor led any evidence nor cross-examined the plaintiff's witness, yet the counsel for defendant No.1 argued that the bank under Article 16 of UCP600 is not obliged to pay under the subject LCs on discrepant documents despite waiver given by the applicant. Here, it would be advantageous to reproduce Article 16 of UCP as under:

“UCP 600 - Article 16

Discrepant Documents, Waiver and Notice

- a.** When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.
- b.** When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b).
- c.** When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

- i.** that the bank is refusing to honour or negotiate; and
- ii.** each discrepancy in respect of which the bank refuses to honour or negotiate; and
- iii.**
 - a) that the bank is holding the documents pending further instructions from the presenter; or
 - b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or
 - c) that the bank is returning the documents; or
 - d) that the bank is acting in accordance with instructions previously received from the presenter.
- d.** The notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.
- e.** A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16 (c) (iii) (a) or (b), return the documents to the presenter at any time.
- f.** If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.

g. When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made.

UCP 600 - Article 14

Standard for Examination of Documents

“b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.”

16. In the present case, the plaintiff (beneficiary) after delivering the goods under the subject LCs submitted documents for payment. The issuing bank notified the discrepancies in the documents to the plaintiff and also approached defendant No.3 (applicant) for waiver upon which defendant No.3 issued letter of acceptance and under-taking and also indemnified in respect of documents lodged under the subject LCs. Record transpire that defendant No.1 after receiving waiver from defendant No.1 never communicated its decision to the plaintiff as to whether it accepts or rejects the waiver and documents lodged under the subject LCs nor made payments to the plaintiffs. Conversely, from the letter [Exh.P/114 page No.683] addressed by defendant No.1 to defendant No.3 reflects the waiver and documents were accepted by the Bank. For the sake of ready reference, Exh.P/114 is reproduced as under:-

“NBP/CPBK/M/FEX-2015/#/1469

February 19th, 2015

M/s Cresox Private Ltd
A-40 Manghopir Road S.I.T.E.,
Karachi

Subject: Non Payment of Local LC Bills

Dear Sir,

Please refer to our various letters against LC No.U/1862/401/14 & 399/14 issued in favour of Shabber Enterprises. We are continuously receiving reminders from presenting bank to effect payment against above Captioned LCs. As you have already accepted all the discrepancies hence you are requested to kindly arrange sufficient funds in your account to effect payment at your earliest.

Further please be informed that M/s. Shabber Enterprises has lodged complaint to State Bank of Pakistan for non-payment of captioned bills hence arrange funds without any further delay to avoid any disciplinary action.

Sd. Pervez Ahmed Memon Manager Foreign Exchange	Sd. S. Imtiaz Ahmed Subzwari AVP/ Chief Manager
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1. Shabber Enterprises, MR-5/126, Zakai Lane, Judia Bazar
2. Syed Nadeem Ahmed, Unit Head, C & IBC, Head Office, 1st Floor, Karachi,”

[emphasis supplied]

17. The stance of the learned counsel for defendant No.1 was that the bank (NPB) under article 16 of UCP600 is within its right to refuse payment on the discrepant documents despite waiver received from defendant No.3 (the applicant). It was also the stance of the learned counsel for defendant No.1 that though Article 14(d)(i) of UCP 500 required that rejection of waiver should be communicated to the beneficiary within 07 days of receipt of documents otherwise the Bank loses its right to reject the waiver, however, no such time limit is prescribed in UCP 600, which is applicable in the present case.

The Court of Appeal (Civil Division) on appeal from the High Court of Justice Queen’s Bench Division (Commercial Court) in the case of *Fortis Bank and Stencor UK Limited v Indian Overseas Bank* [2011] EWCA Civil 58, while dilating upon the Article 16 of UCP-600 adopted a purposive interpretation of the UCP 600 in accordance with its underlying aims and reflecting international banking practice. While giving the international application of the UCP-600, the Court of Appeal considered that a literalistic and national interpretation need to be avoided. Further considered that though there was no express obligation on the issuing bank to return the documents promptly and without delay upon giving notice, such an obligation was implicit in the wording of the article and was in line with international practice. Once IOB had elected to reject the documents, it breached this obligation by failing to return the documents for a substantial period of time and was therefore precluded under article 16 from relying on the discrepancies.

Relevant portions of the judgment for convenience’s sake are reproduced as under:

- “ 29. In my view, a court must recognize the international nature of the UCP and approach its construction in that spirit. It was drafted in English in a manner that it could easily be translated into about 20 different languages and applied by bankers and traders throughout the world. It is intended to be a self-contained code for those areas of practice which it covers and

to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literalistic and national approach must be avoided.

32. The judge succinctly summarized their evidence on practice at various paragraphs of his judgment:

23..... I was referred to a number of ICC Opinions under UCP 500 in which it was recognized that the issuing bank would be liable if it failed to act in accordance with the required statement it had made, although none of them specifically addressed the issue of preclusion. The experts said that the requirement to act in accordance with the disposal statement made related back to the 1963 revision of UCP, although it was thought that the consequent preclusion was introduced in the 1970's. It has therefore long been the position under UCP that the issuing bank is required to act in accordance with its disposal statement.....

73. ... The expert evidence in this case is that it is normal and expected international banking practice for documents to be returned and document disposal instructions to be complied with promptly"

34.Article 14 of UCP 500 provided:

"d(i) If the Issuing Bank ...decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means without delay, but no later than the close of the seventh banking day following the day of receipt of the documents. ..."

ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presenter.

iii. The Issuing Bank... shall then be entitled to claim from the remitting bank refund, with interest, of any reimbursement which has been made to that bank.

e. If the Issuing Bank...fails to act in accordance with the provisions of this Article and/or fails to hold the documents at the disposal of, or return them to the presenter, the Issuing Bank ... shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit."

45. sub-article 16 (c) can and must be read as expressing an obligation that the issuing bank would act in accordance with the option it elected. Thus, as in most of the presentations in this case, where a bank elects to return the documents, the bank is required to return the documents with reasonable promptness.

18. In the present case, there is nothing available on the record, which could suggest that defendant No.1 after receiving waiver from

defendant No.1 ever opted to exercise article 16 of UCP-600 and/or returned the documents to the plaintiffs. On the contrary, defendant No.1 continuously demanded money from defendant No.3 for payment to the plaintiff as reflected in Exh.P/114. In the circumstances, and keeping in view the ratio of the Court of Appeal as mentioned in the preceding paras, the defendant/issuing bank could not have refused the payment under the subject LCs on the ground that the documents are discrepant and further the Defendant Bank is within its right to accept or reject the waiver received from defendant No.3 (applicant) for an indefinite period. The defendant No.1 loses its right to take such objection under UCP-600 when defendant No.1 itself failed to communicate its decision as to whether accept or reject the waiver and the documents. In absence of such decision defendant No.1 cannot take refuge under the said UCP-600 and to refuse payment. It may be observed that when an issuing bank finds discrepancies in the documents, it has two options available to it under article 16: to provide a refusal message to the presenter in terms of sub-articles 16 (c) and (d) or, to approach the applicant for a waiver without first providing a notice of refusal [sub-article 16 (b)]. When the option of approaching the applicant for a waiver is chosen, and such waiver is given and accepted by the Issuing Bank, the Issuing Bank has to honour. Recognizing that the ultimate function of an LC is to facilitate payment, the provision under UCP in allowing an issuing bank to seek the applicant's waiver provides the beneficiary a chance to get paid, unlike the situation where an issuing bank rejects the presentation outright, without consulting the applicant.

19. In the instant case, the Defendant/Issuing Bank chosen the option to approach the applicant (defendant No.3) for a waiver, upon which the discrepancies as notified by defendant No.1 through letters viz. Exhs.PW-1/53, 1/54, 1/55, 1/56, 1/57, 1/58, 1/102, 1/103, 1/104, and 1/105 were waived by defendant No.3 not only through the endorsement and acknowledgement on the said letter but also through execution of a separate letter of acceptance and undertakings [available at pages 497, 505, 513, 521, 529, 537, 543, 633, 641, 649, 657 of evidence file] . For the sake of ready reference one of the above letters issued by the NBP and letter of acceptance are reproduced as under:

[Exh.PW-1/53]

“NBP/CPBK/FEX/IMP-14/1383

JULY 11,2014

M/s. Cresox Pvt Ltd.
A-10 Manghopir Road, SITE,
Karachi

Dear Sir (s),

ORIGINAL SHIPPING DOCUMENTS
UNDER L/C. NO.U/1862/I.O/399/14

We have received original shipping documents for PKR 1,709,685/- & PKR 75,416/- from KASB BANK under your captioned L/c with following Discrepancy(s):

- Late presentation.
- Truck Receipt not signed by issuer

In this connection, please find enclosed herewith BILL OF EXCHANGE for PKR 1,709,685/- & PKR 75,416/-. Kindly sign the same with word ‘ACCEPTED’ and return it back to us immediately and note that the aforesaid Bills will be mature on AUG 15, 2014 & AUG 18, 2014 respectively; we hold the documents at your risk and responsibility.

Your prompt action will be highly appreciated.

Yours faithfully

ACCEPTED

Sd/-
Danish Anwar
Officer imports

Sd/-
CRESOX (PRIVATE) LIMITED”

AND

“LETTER OF ACCEPTANCE AN UNDERTAKING

The Manager,
National Bank of Pakistan
Corporate Branch (1862)
Chapal Plaza Hasrat Mohani Road
Karachi – Pakistan

Dated 14-Jul-2014

Dear sir,

Drawing of document for PKR 1,709,685/- UNDER USANCE LETTER OF CREDIT No. U/1862/I.O/399/14 dated 29-05-2014 issued in favour of M/s. SHABBER ENTERPRISE, MR-5/126, ZAKARIA LANE, JODIA BAZAR, KARACHI pursuant to application and agreement for opening of L/C dated 29-05-2014 pertaining to raw material issued on behalf of M/s. CRESOX (PVT) LIMITED payment due on August 15, 2014.

We the applicant of the L/C hereby acknowledge receipt and confirm our irrevocable acceptance of the document lodged Under L/C No. U/1862/LO/399/14 for the amount of the drawings.

We hereby irrevocably agree to pay to you the “buy-back-price”, Calculated in respect of the drawing in the terms of the application on or before the due date in accordance with our obligations under application.

You are irrevocably authorized to make payment of the value of the drawings on the due date in terms of the L/C to the debit of our account. The amount certified by you as being the amount due from us under the terms hereof shall be conclusive and binding us.

We hereby further expressly accept the document for payment notwithstanding discrepancies, if any in the documents known or which may become known at any time hereafter and we expressly waive all such discrepancies of any nature whatsoever. Our obligation to make payment of the buy-back price on the due date shall not be effected in any way on beneficiary, which will be absolute responsibility. We further authorize you to instruct your agents or correspondent bank to release any guarantee or indemnity that may have been obtained or held in respect of the document lodged under L/C.

This letter of acceptance & undertaking constitutes an irrevocable and unconditional promise and undertaking on our part to pay the “buy-back price” under and in terms of the application, which constitutes “finance” due from an customer as defined under the provisions of the financial institutions (recovery) of finances Ordinance 2001.

Sd/-
CRESOX (PRIVATE) LIMITED”

20. It is established principles of the administration of justice that nobody/party can be allowed to bow hot and cold at the same time and nor any person can be allowed to approbate and reprobate in the same matter. In this case, Defendant No.1 (NPB) on the one hand, accepted the waiver received from Defendant No.3 [Exh.P/114], and on the other hand not honoring the subject LCs on the ground that the documents are discrepant. In the circumstances, Defendant No.1 is precluded from claiming that the documents presented as part of the LC drawing did not comply with the terms of the LC.

From the record, it also appears that Defendant No.1, accepted such waiver as reflected in Exh.P/114, [reproduced in preceding para]. It may also be observed that the plaintiff’s vested right has been created when he while acting upon the subject LCs delivered the goods to defendant No.3 and who accepted the same without any objection of whatsoever nature and further he waived all the discrepancies. Such

right cannot be taken away at the whims of Defendant No.1 and as such Defendant No.1 is liable to honor its commitments and obligations under the subject LCs and make payments to the plaintiff. The above issues are answered accordingly.

21. **ISSUES 6 & 8:** Since these issues pertain to damages and related to each other, therefore, the same are taken up together. From perusal of the record, it appears that the Plaintiff in the Plaint has stated that non-payment of LCs amount to the plaintiff has caused severe loss in the business, therefore, due to unlawful act of Defendant No.1, the Plaintiff is entitled to the damages as claimed in the Plaint against Defendant No.1. It shows that the nature of the damages claimed by the Plaintiff in the instant case falls within the ambit of general damages, which is required to be established through a cogent and reliable evidence mere feeling of resentment in one's mind is not sufficient to establish general damages. And if a person claims mental torture/agonny or damage/injury, initial burden would lie upon him to lead evidence on such point. Furthermore, determining the general damages for mental torture, agony, defamation and financial losses, they are to be assessed following the "rule of thumb" and the said exercise falls in the discretionary jurisdiction of the Court, which has to decide in the facts and circumstances of each case. Reliance in this regard can be placed upon cases of *MURTAZA ALI v. SABIR ALI BANGASH* [2015 YLR 1239], *Mst. NAGINA BEGUM v. Mst. TAHZIM AKHTAR and others* [2009 SCMR 623], *Messrs KLB-E-HYDER AND COMPANY [PVT.] LTD., through Chief Executive v. NATIONAL BANK OF PAKISTAN through President and 3 others* [2008 CLD 576] & *CHIEF OFFICER, DISTRICT COUNCIL, SHEIKHPURA and 2 others v. Haji SULTAN SAFDAR and 2 others* [1999 YLR 1963], *GOVERNMENT OF KHYBER PAKHTUNKHWA and others v. Syed JAFFAR SHAH* (2016 MLD 223) and *MUBASHIR AHMAD v. Syed MUHAMMAD SHAH through Legal Heirs* (2011 SCMR 1009), *Dr. M. RAZA ZAIDI v. GLAXO WELLCOME PAKISTAN LIMITED, KARACHI* [2018 MLD 1268] & *CHAIRMAN, MARI GAS CO. LTD. and 2 others v. ABDUL REHMAN* [2017 YLR 2505].

In the present case, the Plaintiff did not lead any evidence to establish his claim in respect of damages, hence I am of the opinion that the Plaintiff has failed to discharge his burden to prove his stance. Accordingly, these issues are answered in negative.

22. **ISSUE No.9.** From the record, it appears that the evidence produced by the Plaintiff has gone un-rebutted and unchallenged. In the circumstances and in terms of the findings on Issues 2, 3 and 4, I am of the considered view that in the instant matter the plaintiff has established his case in respect of recovery of amount under subject LCs against defendant No.1 (NBP). Accordingly, the suit of the plaintiff is decreed against defendant No.1 in the following terms:

- (a) **Rs.1,48,82,605.00** Rupees One Crore, Forty-eight Lac Eighty-two Thousand and Six Hundred and Five only, [(i) Rs.70,03,920.00 under Inland Letter of Credit bearing No. U/1862/399/14 {*Exh.PW-1/6*} and (ii) Rs.7,878,685.00 under Inland Letter of Credit No.U/1862/LO/401/14 {*Exh.PW-1/24*}]
- (b) Markup on the aforesaid sum at the rate of 12% per annum from the date of the filing of the suit till the date of this decree.
- (c) Markup at the rate of 12% on the decretal amount from the date of the decree until the realization of the said amount.
- (d) The cost of this suit shall also be borne by the defendant No.1.

JUDGE