IN THE HIGH COURT OF SINDH, KARACHI

Present

Muhammad Shafi Siddiqui, J

Suit No.1797 of 2022

[The Hub Power Company Ltd & Others v.
China Power Hub Generation Company (Private) Ltd & Others]

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For the Plaintiffs	Mr. Rashid Anwar, Advocate
For Defendant No.1	Mr. Zahid F. Ebrahim, Advocate
For Defendants No.2&3	Ch. Atif Rafiq, Advocate
Dates of hearing	28.11.2022, 29.11.2022 & 30.11.2022

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J U D G M E N T

Muhammad Shafi Siddiqui, J.- The Plaintiffs in this suit, being aggrieved by a call to encash Standby Letter of Credit [SBLC] by defendant No.1, filed this suit for injunction and declaration.

2. In 2015 Hub Power Company Ltd [HubCo]/Plaintiff No.1 and China Power International Holding Limited [China Power]/Defendant No.2 registered a [project company] i.e. China Power Hub Generation Company (Pvt) Ltd., defendant No.1, under the laws of Pakistan through their respective subsidiaries i.e. plaintiff No.2/Hub Power Holding Ltd [HPHL] and defendant No.3/China Power Pakistan. The shareholders agreement executed on 12 June, 2015 which was reinstated and amended on 9th March, 2016 and 29.11.2019 respectively. Plaintiff No.1 through plaintiff No.2 nominated three directors to the board of the project company whereas defendant No.2 through defendant No.3/China Power International Pakistan Investment nominated four.

3. Plaintiff No.1 owns 47.5% of the shareholding in the project company through its wholly owned subsidiary i.e plaintiff No.2, whereas defendant No.2 i.e. China Power holds 52.5% of the shareholding in the project company through its wholly owned subsidiary i.e. defendant No.3 [China Power Pakistan].

4. The project company is set up to construct own and operate two coal-fired power generating units, each to generate 660 Megawatts in the Province of

Balochistan. For finance purposes the project company entered into facility agreement on 24.10.2017 with a consortium of banks i.e. original lenders which include [i] China Development Bank, [ii] The Export and Import Bank of China, [iii] Industrial and Commercial Bank China Ltd, [iv] China Construction Bank Corporation, [v] Bank of Communication Company Ltd and respective finances as consortium was provided. Apart from this finance facility agreement dated 24.10.2017 referred above, the parties also executed completion guarantee agreement of 24.10.2017. Its clause 7 states HubCo`s obligations to provide security to cover its maximum liability till the completion of the project i.e. till the announcement of the date of completion of project hence security to remain in force till the project completion date.

5. It is the plaintiffs` case that since the project completion date is provided in clause 1 of the facility agreement dated 24.10.2017 which contained all the pre-requisites, it [project company] for all intent and purposes achieved all events and its objects which mainly concerned with technicalities, finances and project`s operations. It is the plaintiffs` case that long awaited demand of the defendants particularly of lenders, to the effect of a revolving account, by the Govt of Pakistan was also made functional for the issuance and declaration of the project completion date by lenders/agents.

6. In order to comply with their commitments and obligation arising out of their contract, HubCo is required to provide Standby Letter of Credit [SBLC] in favour of the project company as being a beneficiary. Consequently, an irrevocable SBLC was issued by defendant No.4 i.e. National Bank of Pakistan. The SBLC was issued on November 24, 2017 and would have expired on November 23, 2021 i.e. essentially after four years of its execution, which was/is for USD 150 million, however, it was extended for another period of one year, effective from 24.11.2021 to 23.11.2022.

7. It is plaintiffs` case that the project was essentially completed in 2019 when its commercial operation started and despite this fact the lenders refused to acknowledge date of the completion of the project and in consequence whereof the plaintiff is open to a risk of the encashment of the subject SBLC.

8. It is argued by Mr. Rashid Anwar, learned counsel for the plaintiffs that discriminatory treatment is being given to the plaintiffs as only, in pursuance of sponsor support agreement entered into between the parties, the plaintiffs were asked to provide security in the form of SBLC in favour of defendant No.1 as against defendant No.2 who was called upon to execute a corporate guarantee only. It is argued by Mr. Rashid Anwar that despite fulfillment of all pre-requisites until the successful operation of the project, the lenders purposely are not providing a completion date of the project and thus causing hurdles in the release and discharge of SBLC/performance guarantee. It is argued that numerous emails have been exchanged with the defendants that part from opening and operation of the revolving account by the Govt of Pakistan, all other pre-requisites have been fulfilled and no sooner the revolving account is made functional by the Govt of Pakistan, in the recent past, the project completion date should have been announced and be declared by lenders. Mr. Rashid Anwar argued that the defendants were/are aware that this requirement of revolving account is not the obligation of plaintiff No.1 and also of the fact that HubCo was trying to get the said revolving account made functional through Govt of Pakistan yet knowingly of such facts, they have made call for encashment of the bank guarantee and this stance of defendant No.1 is attributed as a bad faith and unconscionable act on their part. Learned counsel for the plaintiffs submits that this is not a normal letter of credit or performance guarantee as all judicial precedents of court`s disagreement to interfere is with regard to normal LCs which are different and distinguishable from the one under consideration. Hence routine principles of law as applied to normal letters of credit and performance guarantee cannot be applied to the case in hand.

9. Mr. Rashid Anwar, learned counsel for the plaintiffs in support of his arguments mainly has relied upon the following case laws and some interim orders at Sr.No [vi] and [vii]:

[i] EFU General Insurance Ltd v. Zhongxing Telecom Pakistan (Pvt) Ltd & Others - 2022 SCMR 1994,

[ii]. BS Mount Sophia Pte Ltd v. Join-Aim Pte Ltd – (2012) SGCA 28 (Pgs.5,6 and 13),

[iii]. State Life Insurance Corporation of Pakitan v. Rana Muhammad Saleem – 1987 SCMR 393 (Pg. 395),

[iv]. M/s Uzin Export v. M/s M. Iftikhar – 1993 SCMR 866 (Pg.876),

[v]. FAL Oil Company Ltd v. Pakistan State Oil Company Ltd – PLD 2014 Sindh 427 (Pgs. 429, 434 and 441),

[vi]. Adelte J.V & others v. Pakistan Civil Aviation Authority & Others – Suit Nil of 2022, Interim order dated 08-06-2022.

[vii]. Adelte J.V & others v. Pakistan Civil Aviation Authority & Others – Suit No.-1405 of 2022, Interim order dated 02-08-2022.

[viii]. Mir Jeeand Badini v. Model Collectorate of Custom Appraisement & Others – 2020 PTD 213

10. On the other hand, Mr. Zahid F. Ebrhaim, learned counsel for defendant No.1 argued that this court does not enjoy the jurisdiction over the dispute as, in pursuance of completion guarantee dated 24.10.2017 entered into between plaintiffs No.1&2, defendants and Chinese lenders, the dispute arising out of or connected with this instrument, including the dispute as to the availability of the existence of the aforesaid document, shall be referred to and resolved by the Arbitrator in Singapore pursuant to Arbitration Rules of Singapore International Arbitration Centre. It is therefore, argued, at the very outset, that the proceedings be stayed and the matter be referred under Section 4 of the Recognition and Enforcement [Arbitration Agreement in Foreign Arbitral Award], Act 2011. It is further argued by Mr. Ebrahim that as per clause 7.1 (b)(ii) read with clause 7.3 (b) of the completion guarantee, HubCo is required to maintain and renew the SBLC until the project completion date which has not been announced by the lenders as it is their domain and discretion. It is claimed that defendant No.1, in exercise their rights under SBLC called the encashment of SBLC and the plaintiffs should have no grievance in this regard and no objection/grievance of the plaintiffs could be entertained or call of lenders be interfered by this court. It is the defendants` case that the letter of credit could only be released/discharged on a statement of beneficiary and the lenders which has not been encashed as yet and the plaintiffs on their own cannot conceive a date of the `operation` of the project as a date of `completion` of the project. It is claimed that a dispute even in this regard has to be referred to the Arbitrator instead of judging the date of completion of the project on its own. It is claimed that SBLC is a separate independent contract between the bank and its beneficiary i.e. defendant No.1

and it has to be seen independently notwithstanding any dispute between the shareholders of the project company and/or lenders. These purported disputes do not come in the way of encashment and enforcement of the SBLC. Defendant No.4 claimed to have issued an unqualified, irrevocable and unconditional letter of credit in favour of defendant No.1 as reflected in clause 7.

11. In support of his arguments, Mr. Ebrahim has relied upon the following case laws:-

[i]. Sazco (Pvt) Ltd v. Askari Commercial Bank Ltd – 2021 SCMR 558

[ii]. Sambu Construction Co. Ltd v. Laraib Energy Ltd – 2021 CLC 1914 Islamabad

[iii]. Order dated 28.3.2019 passed in Suit No.2349 of 2018 [Wartsila Pakistan (Pvt) ltd. V. Gul Ahmed Energy Ltd and Another (Unreported).

[iv]. Allied Plastic Industries (Pvt) Ltd v. ICC Chemicacl Corporation – 2020 CLD 720.

[v]. SepcoIII Electric Constructions Co. Ltd v. Federation of Pakistan – 2022 PLD 628 Lahore

[vi]. Bharat Aluminum Co. v. Kaiser Aluminum Technical – 2012 9 (SCC) 5252 Supreme Court of India.

12. Ch. Atif Rafiq, learned counsel appearing for defendant No.2 although supported and adopted the arguments of Mr. Zahid F. Ebrahim, however, in addition to it he submits that in terms of clause 7.3(c) of the completion guarantee agreement dated 24.10.2017, if plaintiff does not renew SBLC and the funds have been received in pursuance of a call of defendant No.1, it will be kept in Pakistani rupees suspense account and will remain with defendant No.1 in Pakistan and can only be used for future obligations, if any, of plaintiffs No.1 and 2 under completion guarantee agreement. He further argued that in case the plaintiffs provides substitute LC and project completion date is reached and announced, the said amount will be returned with interest to the plaintiff by defendant No.1. It is seriously denied that the SBLC was given for the project cost escalation/over run but in fact it is integral part of HubCo`s legal and financial obligation as security. In respect of arguments relating to the funds of USD 400 million available with defendant No.1 as profit, it is submitted that as a

matter of right it cannot be claimed as dividends by plaintiffs and/or substitute of SBLC. It is claimed to be a discretion of defendant No.1 and not of individual shareholders, as far as utilization of this amount (company`s profit) is concerned. The fate of this amount is to be decided by the company and not by any individual shareholder.

13. I have heard learned counsels and perused the materials available on record.

14. Defendant No.1 being a project company calls for the encashment of irrevocable SBLC issued on 24.11.2017 having its expiry on 23 November, 2021. It was once extended and the extended SBLC would have expired on 23.11.2022 but a call for its encashment was made before and defendant No.4 held its encashment until filing of the suit on 24.11.2022 when no interim was granted. Application was essentially heard and decided on 30.11.2022 and these are the reasons.

15. The project company entered into facility agreement on 24.10.2017 with consortium of Chinese Banks as described above. The consortium banks are described as agents/original lenders who committed and extended their respective amounts to the project company as consortium finance. Clause 7 of the completion guarantee agreement sets the plaintiff/HubCo`s obligation to provide security to cover up its liability, till project completion date is reached. Clause 7.1 of the completion guarantee agreement oblige and binds HubCo for issuance of letter of credit. By virtue of Clause 7.1 (b) (ii) read with Clause 7.3 (b) of the completion guarantee, HubCo is required to maintain and renew the SBLC until project completion date to be announced by the lenders which extension is now refused by plaintiff. The plaintiff has by virtue of Clause 7.3(a) authorized the borrower to satisfy any funding/shortfall and/or any demand on the plaintiff under Clause 5 (Debt Service Undertaking) by making demand for payment under plaintiff`s letter of credit. Clause 7.3 (b), further provides that if the plaintiff`s letter of credit is not renewed or replaced by SBLC, complying with its requirement of clause 7.2, the borrower i.e. project company shall make demand for payment of the full amount of the plaintiff`s letter of credit. Clause 7.3(c) further provides that demand made pursuant to clause 7.3 (b) shall be deposited

in interest bearing suspense account and apply to meet future obligations of plaintiff under this deed.

16. In essence for a discharge of obligation under SBLC, it is a project completion date, to be announced by lenders and till such time the security/LC to remain enforceable. Nonetheless, the objective question of the plaintiff is whether such date is achieved and whether it is unfair for lenders to hold such certificate and is an unconscionable act under the circumstances. The plaintiff`s case is based on these two limbs; firstly that since the project is in operation it is effectively completed and the completion date is actually a date when the project company started and commenced its operation and notwithstanding the withholding of the lenders to issue a certificate in relation to a completion date, project stands completed, in terms of facility agreement. The second limb of the arguments is that this call of the project company, allegedly to save it (project company) from any default, is neither justified nor bonafide and would be an unconscionable act on the part of the company and lenders which may be sum-up as a fraud.

17. Genesis of disputes arising out of normal/standard letter of credit and performance guarantee are now almost settled, however in the recent past, courts, in dispensation of justice found a more justified and diversified way to intervene, particularly in the cases where fraud is apparent. In our jurisdiction, conclusive determination of such letters of credit was reached and one such earlier determination is in the case of Shipyard[1], when a leave was refused with reasons therein. The Bench concluded that the performance guarantee stands on similar footings as that of irrevocable letter of credit of the bank which indeed calls for honouring the performance guarantee agreement according to its terms. It was not made dependent of the contract between the performance contract and/or sale purchase agreement. The bank was under obligation to pay its guarantee on demand/call if the documents so suggest. The only exception carved out was that if there is a clear fraud of which the bank has conscious notice.

18. SBLC under consideration has absolutely nothing to do with the dispute of any performance arising out of main contract. This SBLC is based on completion guarantee of 24.10.2017 between sponsors, the shareholders, the borrowers and

[1] Shipyard K. Damen International v. Karachi Shipyard Engineering reported in 2003 CLD 1

the agents. The issuing bank in terms of Clause 4 of irrevocable LC, undertook the payment in respect of any amount to be paid. There is nothing to suggest in this independent LC that the bank had any role to enquire about project and its completion. The only event that could cut off such call is if the validity of SBLC ceases before calling the encashment or upon occurrence of the project completion date to be confirmed in writing by agent/lenders, whichever is earlier. The agents are in fact lenders who sponsored/financed the project for the shareholders. The issuing bank cannot penetrate or lift the veil beyond this point. The completion contract may have defined certain events as to its operation and completion of the project but the call for declaring a completion date has to be made by the lenders and it is agreed by shareholders and the agents/lenders when the finances were made and agreement was executed. No doubt a revolving account has to be made functional and funded too, to which the plaintiff may not be a direct party, but it is for the plaintiffs to seek such declaration certifying completion date of the project by lenders before a forum as agreed. The plaintiff may and may not have a good cause to establish a completion date but this perhaps will not be a forum for such adjudication as the parties through the agreement, referred above have already selected a forum for resolution of any dispute arising out of their contractual commitment and they have not even attempted to avail such forum. Plaintiff`s reliance on the case of Messrs EFU[2] is not proper as in case where Arbitral forum is being agreed and settled, parties have a right to select the forum for Arbitration and it is not a deviation from normal procedure where parties cannot select a jurisdiction and it has to be enforced by law.

19. Clause 39.1 of the facility agreement provides that any dispute arising out or connected with this agreement including a dispute as to the validity or existence of the said agreement, shall be resolved by arbitration in Singapore, pursuant to the arbitration rules of the Singapore International Arbitration Centre and all parties, irrevocably submitted to the non exclusive jurisdiction of the courts of Singapore to support and assist arbitration process pursuant to the aforesaid clause and the governing law of the facility agreement as per clause 38 is English law. Similarly, clause 19.1 of the completion guarantee states that any dispute arising out of or connected with the said deed including a dispute as to

[2]Messrs EFU General Insurance Ltd v. Messrs Duty Free Shops Ltd – 2013 CLD 1313

the validity or existence of the deed shall be resolved by arbitration in Singapore and all the parties irrevocably submitted to the non exclusive jurisdiction of court of Singapore to support & assist arbitration process pursuant to the referred clause including if necessary, for grant of interlocutory relief pending the outcome of that process and the governing law of the completion guarantee as per clause 18 thereof is also English law.

20. This tentative understanding of law however is for the purposes of deciding the interim injunction application of the plaintiff. The dispute in relation to the project completion date, to the extent it pertains to the completion guarantee/facility agreement, shareholder agreement and/or sponsor support agreement, prima facie are covered under arbitration clauses and all such contracts provide for arbitration in Singapore, as an agreed venue.

21. I am not judging conclusively whether the project stands completed and/or ought to have been certified by the lenders, however, for the purposes of deciding the call for encashment SBLC, issuing bank on its own cannot conceive that the lenders have purposely & consciously withheld such project completion date/certificate, which may be defined as kind of fraud or a kind of act that relates to unconscionability. The bank is under obligation to honour the call of beneficiary for lenders in terms of clause 6 & 8 atleast if not more of the irrevocable SBLC and it could only be released on the happening of an event, as such, written notice of discharge duly signed by the beneficiary and the agent, to be addressed to the issuing bank is essential or if the call is not made prior to its expiry date of the credit document itself and/or announcement of project completion date by lenders.

22. The two contracts i.e. those between plaintiff and defendants No.1,2&3 cannot be mixed up. The borrower`s request to the issuing bank for opening letter of credit on certain terms is one contract which generally is not dependent on the other contracts between supplier of the goods, services or if someone has to perform under the contract.

23. Such credit documents such as one under consideration are governed by UCP, as highlighted in Clause 9 of the letter of credit which credit document is otherwise also saved, if found inconsistent with International usage under UCP;

the subject letter of credit was issued in terms of uniform customs and practice for documentary credit, 2007, revision, international chambers of commerce publication No.600, hence anything contrary therein will be governed by UCP. Letters of Credit governed under UCP clearly states under Article 7(b) that the issuing bank is bound to honour an irrevocable LC.

24. Cardinal principle in the letter of credit transaction is the principle of autonomy. It is this principle that has governed the international trade through the commitments of the financial institutions as undertaken. These undertaking make the documentary credit as a powerful tool in financing international trade. Thus in the contract between the issuer bank and the beneficiary, the bank is obliged to pay the beneficiary if the documents presented for the credit drawing, regardless of any dispute between the beneficiary and the applicant. When such documents are presented such as the one under consideration, the issuing bank, confirming bank or nominated bank acting on its nomination, must examine the presentation and determine on the basis of the documents alone.[3]

25. The extent to which this principle applies in credit transaction is encapsulated by House of Lords judgment in United City Merchants[4] as under:

> *If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit…, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price.*

26. Even if an issuing or confirming bank knows that defective goods have been shipped, or that goods have been shipped late, or that some other precondition of the underlying contract has not been met, it is still obliged, (subject to the fraud/unconscionable exception discussed later), to honour its obligations under the credit cover provided that facially conforming documents are presented. The issuing and confirming bank are similarly bound to reimburse a nominated bank that has honoured or negotiated a complying presentation.

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[3] UCP 600 Article 14-A, corresponding provision of UCP 500 Article 13
[4] United City Merchants (Investments) Ltd v. royal Bank of Canada (1983) 1-AC 168 183 (Lord Diplock)

27. The rationale for the principle of autonomy stems from the fact that the system of documentary credits in international trade was developed to give to a seller on assurance that no sooner the holder of such credit documents presents the conforming documents, he would be paid before he parted with control of the goods/services/performances, regardless of any dispute that one might have with the buyer regarding the performance of contract.

28. Coming to Mr. Rashid Anwar`s arguments that it is not a standard letter of credit rather designed as standby, i.e. per learned counsel, designation itself suggest that there has to be an event, on the occurrence of which this SBLC would come into play.

29. My understanding of this document is that despite different designations there are in fact `legal similarities` attached to both the documents i.e. standard letter of credit and standby letter of credit, if compared. There may be some differences in the banking practice but are functionally similar and makes no material difference when it comes to execution and implementation. The SBLC thus has evolved as one of the kind of letter of credit and forms on independent guarantee such as performance bond/surety ship guarantee.[5]

30. Thus in my understanding if a document labeled as standby and beneficiary presents it for encashment it is unlikely that a judicial interference is made to investigate any extraneous facts, not in their jurisdiction. The rules thus in relation to independent guarantee are similar to those of commercial letter of credit. It is the autonomy of credit that governs the events and the governing principle is that the independent guarantee just like commercial credit is an irrevocable undertakings of bank and to be dealt with independently under law.

31. Coming to the exceptions, such as fraud/unconscionability as argued, Lord Diplock`s doctrine, as described in the United City Merchants case caters for such consideration and a departure from normal application of law may be seen to be applied. For it to be applicable, the documents must contain expressly or by implication material representation of fact that are untrue to the knowledge of beneficiary and beneficiary must have a fraudulent intent in presenting the documents, for the purpose of drawing the credit with knowledge of such untruth.

[5]Mir Jeeand Badini v. Model Collectorate of Custom Appraisement & Others – 2020 PTD 213

32. In the present case the project company who calls for encashment under no circumstances be framed in such a situation where such allegation could be attributed to the beneficiary. It is not for the project company to compel the lenders/financer to issue certificate of completion of the project nor the company would let it [LC] go expire, as on a call from lenders for their finances, company would then be responsible and would expose itself to financial risk. The project company is committed to certain financial terms for the lenders, and the lenders of the money as defined, would not hesitate or show any lenient attitude, to recover such finances in case any commitment under subject documents is not honoured. Therefore, call for encashment of credit documents could only be interfered where it could be convincingly conceived that a misrepresentation has perpetuated for the purposes of deceiving. Interference, thus is such matter is an exception.

33. For aforesaid interference if inevitable, the standard proof required is expressed by Ackhner Lj[6] i.e. whether the applicant seeking intervention has established a seriously arguable case that on the material available, the only realistic inference is that the beneficiary could not have honestly believed in the presentation of document and in the validity of its demand. Above obligation on beneficiary, referred to by Mr. Rashid Anwar does not arise out of subject SBLC, rather may be an offshoot of an independent contract, to which bank is not privity. Reasons have also been assigned above that in case beneficiary does not call, he would suffer financially on a call by lenders.

34. The courts are expressive on the subject that the legal rules relating to independent guarantee are similar to those relating to commercial letters of credit. Most of the cases in which such view is expressed, concern is shown for the autonomy of credits and the fraud is only an exception. The conventional position is that under common law, courts having jurisdiction to consider injunction against issuing bank from honouring a commercial credit is only where clear fraud is evident on the beneficiary presenting document not others, as in this case where lenders have been accused.

[6] United Trading Corporation SA v Allied Arab Bank Ltd and others [1985] 2 Lloyd's Rep 554,561.

35. On the concept of unconscionability Singapore court has distinguished a normal treatment of LC by treating these credit documents separately. The concept was developed that independent guarantees, being merely a security for payment, need not always be treated in the same way as commercial letters of credit are being considered and that led to creation of a new regime of unconscionability which is an exception to autonomy principle. It was initially considered in the court of appeal in the case Bocotra[7]. It is now recognized as conscious departure from conventional English law where only fraud was required to be established before an injunction could be granted. In the case of GHL Pte Ltd[8], the observation is as under:

> *We are concerned with abusive calls on the bonds. It should not be forgotten that a performance can operate as an oppressive an oppressive instrument, and in the event that a beneficiary calls on the bond in the circumstances where there is prima facie evidence of fraud or unconsionability the court shall step into intervene an interlocutory stage until the whole of the circumstances of the case has been investigated.*

Above concept is perhaps developed in a court where the Arbitration jurisdiction also vests.

36. Douphin`s[9], however, described that it is not possible to define unconscionability other than to give some very broad indication such as lack of bonafides as it depends on the facts and circumstances of each case.

37. I, in consideration of the above authorities, have come to the conclusion that there is one way overlapping of the two propositions. Conveniently, to understand, the situation, I describe that while in every instance where there is a fraud there would have been a lack of bonafides as well, however, to its contrast it does not mean that in every instance where beneficiary of credit lacks bonafides there is necessarily a fraud behind it. One may be compelled to or had no choice, despite having knowledge.

38. The concept of unconscionability runs the same way i.e. the concept of unconscionability involves unfairness as distinct from dishonesty or fraud or conduct of a kind so reprehensible or lacking in good faith that the court of

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[7] Bocotra Construction Pte Ltd v. A-G (No.2) (1995) 2SLR 733
[8] GHL Pte Ltd v. Unit Track Building Construction Pte Ltd and another (1999) 4SLR 604 (16)
[9] Douphin Case (2000) 1 SLR 657 (4).

conscience either restrain the party or refuse to assist the party. Mere breaches of contract by a party would not by themselves be unconscionable. Thus unfairness is also excluded for the concept of unconscionability to prevail. In the case of Eltraco International (2000) 4SLR 290 (30) the court observed as under:

> *In every instance of unconscionability there could be an element of unfairness. But the reverse is not necessarily true. It does not mean that in every instance where there is unfairness it would amount to unconscionability. That is a factor, an important factor nodoubt in the consideration. It is important that the courts guard against unnecessary interference with contractual arrangement freely entered into by the parties. The parties must abide by the deal they have struck.*

39. Some of the foreign judgments when the above exception is created discussed it as under:

40. In the case of Bolivinter[10], held as follows:

> *The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be make will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank`s knowledge. It would certainly not normally be sufficient that this rests upon the uncorroborated statement of the customer, for irreparable damage can be done to a bank`s credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.*

41. In the case of Edward Owen Engineering[11] held as follows:

> *A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customs; nor with question whether the supplier has performed his contractual obligation or not; nor with the question whether supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.*

42. In the case of R.D. Harbottle (Mercantile) Ltd[12], expressed the following views:-

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[10] Bolivinter Oil SA v. Chase Manhattan Bank [1984] 1 All E.R. 351, by Sir John Donaldson, Master of Rolls

[11] Edward Owen Engineering Ltd. V. Barclays Bank International Ltd [1978] 1 All E.R. 976 = [1977] 3 W.L.R. 764

It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants of either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of unconditional wording of the guarantees. The machinery and commitments of banks are on the different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparable damaged.

43. In the case of Howe Richardson[13], held as follows:

Whether the obligation arises under a letter of credit or under a guarantee, the obligation or the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank there is simply concerned to see whether the event as happened upon which its obligation to pay has arisen.

44. This court in Wartsila[14], expressed similar views:

In "Letters of Credit, The Law and practice of Compliance" by Ebenezer Adodo published by Oxford University Press, after a detailed and threadbare examination of law and precedents from International Jurisdiction, it has been explained that Standby Letter of Credit is an undertaking by a bank or other financial institution at the instance of a party (i.e. the account party) to pay a certain sum of money to the beneficiary should a specified event occur. The contemplated event is almost always a default by the applicant on its obligation to the beneficiary. Standby Credit performs the function of the conventional performance bond or on-demand guarantee. The instrument differs from the traditional guarantee in that the issuing bank's obligation to pay under

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[12] R.D. Harbottle (Mercantile) Ltd v. National Westminister Bank Ltd [1977] 2 All E.R. 862 = [1977] 3 W.L.R. 752

[13] Howe Richardson Scale Co. Ltd v. Polimex-Cekop and National Westminister Bank Ltd (June 23, 1977: Bar Library Transcript No.270), by Roskill Lj

[14] Wartsila Pakistan (Pvt) ltd. V. Gul Ahmed Energy Ltd and Another (Unreported). Order dated 28.3.2019 passed in Suit No.2349 of 2018

the former is conditional upon the presentation by the beneficiary of proper documents asserting the applicant's default, whereas under a guarantee, payment is conditional upon proof of the fact of default. In other words, a standby credit creates a primary liability to pay on presentation of the required documents, whilst a guarantee creates a secondary liability to pay only if the beneficiary establishes the fact of the applicant's default. Standby letters of credit originated in the late forties in the United States where most banks were legally forbidden to issue guarantees; it is used in greater classes of transactions, as opposed to the traditional letter of credit, employed mainly as a means of payment in sales of goods contracts. Likewise, standby credits continue to be resorted to extensively in Canada, Australia, and New Zealand. But in the UK, Singapore, and many other Commonwealth countries, the instrument is infrequently utilized; instead its functional equivalent variously designated as the performance guarantee, performance bond, first demand guarantee, or bank guarantee-features prominently. The standby credit has one major advantage over its counterpart, although both are governed by the same general legal principles; the standby credit has into a financial support instrument used for a far wider range of purposes than the performance guarantee, including support for money obligations and the provisions of credit enhancement for the public bond issues. More importantly, the standby credit is covered by the more detailed and highly successful UCP regime, whereas the performance guarantee has no such a regime except the comparatively seldom used Uniform Rules for Demand Guarantees (URDG).

45. In Allied Plastic[15] the bench expressed itself as under:

There is no gainsaying that the Letter of credit is primarily a contract between two banks and the encashment of the sale proceeds had hardly any nexus with the dispute between an exporter and an importer or for that matter between a vendor and a vendee. To my mind, obligations arising under a letter of credit lay down and absolute and unconditional obligation on the Bank to pay in respective of any dispute between the parties on the question whether they had performed their part of the contract or there was a breach in the discharge of their respective obligations.

46. Neighbouring jurisdiction in the case of Bharat[16] is not different.

In our opinion, the aforesaid judgment does not lead to the conclusion that the parties were left without any remedy.

[15] Allied Plastic Industries (Pvt) Ltd v. ICC Chemical Corporation – 2020 CLD 720.

[16] Bharat Aluminum Co. vs. Kaiser Aluminum Technical [2012 (SCC) 552 Supreme Court of India]

> *Rather the remedy was pursued in England to its logical conclusion. Merely, because the remedy in such circumstances may be more onerous from the view point of one party is not the same as a party being left without a remedy. Similar would be the position in cases where parties seek interim relief with regard to the protection of the assets. Once the parties have chosen voluntarily that the seat of the arbitration shall be outside India, they are impliedly also understood to have chosen the necessary incidents and consequences of such choice. We, therefore, do not find any substance in the submissions made by the learned counsel for the appellants, that if applicability of Part I is limited to arbitrations which take place in India, it would leave many parties remediless.*

47. In our jurisdiction, the case of Sazco[17] is of much significance. It disclosed the importance of letter of credit, where commercial transactions are required to be honoured internationally. It provides for a prompt payment being a separate contract, independent of a contract between seller and buyer. The Hon`ble Supreme Court summed up conclusion in para 26 which is as under:

> *I.* *All documents stipulated in the credit are to be tendered by or on behalf of the seller/beneficiary to the bank for seeking payment under the credit.*
>
> *II.* *When the requisite documents are presented by or on behalf of the seller, the same are to be examined by the bank "with reasonable care", to ascertain whether or not, the documents so tendered, on the face of it, comply with the terms and conditions of credit.*
>
> *III.* *The doctrine of strict performance of the terms of the credit be observed and construed with such rigidity, so as to preserve the legitimacy of documentary credits subject to the facts and circumstances of each case.*
>
> *IV.* *The rule of autonomy mandates bank to make the payment on the tender of conforming documents, irrespective of any dispute between the parties in respect of the underlying contract.*
>
> *V.* *The rule of autonomy is, however, not absolute. It has an exception, <u>when there is a clear fraud, of which the paying bank has notice before the payment is made to the seller/beneficiary, and the evidence of the fraud is clear and convincing</u>.*

[17] Sazco (Pvt) Ltd v. Askari Commercial Bank Ltd – 2021 SCMR 558

48. The case laws cited by Mr. Rashid Anwar are all distinguishable and on the strength that concept and analysis are same but the standard of proof is lacking in the case under consideration, for applying exception rules to interfere.

49. On 30.11.2022, I had announced a short order in the court whereby Miscellaneous application No.17751 of 2022 (under order 39 Rule 1 and 2) was dismissed and these are my reasons for the same.

J U D G E

Karachi;
Dated: **07.12.2022**