IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 105

Suit 2594/1987

Between

Union Bank of Switzerland

… Plaintiff

And

Indian Bank

… Defendant

And

South Asian Exports Pte Ltd

… Third Party

GROUNDS OF DECISION

Banking — Letters of credit; Banking — Letters of credit — Confirming bank; Banking — Letters of credit — Negotiable credit

Version No 1: 11 Sep 2026 (01:05 hrs)

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Union Bank of Switzerland v Indian Bank (South Asian Exports Pte Ltd, Third Party)

[1993] SGHC 105

Suit 2594/1987
Goh Joon Seng J
10 May 1993

1 Cur Adv Vult

2 By a confirmation note dated 21 August 1985, South Asian Exports Pte Ltd (`SAE`), the third party in these proceedings, agreed to purchase 1,500 metric tons of Turkish Chick Peas from Kagex BV of Oostvoorne, Holland (`Kagex`) at US$511.00 per metric ton, shipment from Turkish ports to Bombay.

3 The terms of payment were to be `by confirmed irrevocable, unrestricted, transferrable L/C to be established by the buyer in favour of the seller for 100% of contract value for payment to be made by buyer within 120 days of B/L date ... .

4 Pursuant to the confirmation note, SAE on 27 August 1985 submitted an application to the Indian Bank (`IB`), the defendants herein. The application stated:

> *Please open by full telex through your correspondents an irrevocable letter of credit in favour of (Beneficiary) M/s Kagex*

Version No 1: 11 Sep 2026 (01:05 hrs)

> *BV for the sum of US$766,500.00 ... available by draft on* ***(Openers) South Asian Exports Pte Ltd*** *... at 120 days without recourse for 100% invoice value accompanied by ... . (Emphasis added.)*

5 Among the documents required were `full set of clean shipped "on board" bills of lading. Freight prepaid to order and blank endorsed and notify Openers, to be signed by owners or master of vessel or their approved agents. ... L/C to be unrestricted and transferrable. ... L/C to be advised thru: Swiss Credit Bank, Luzern, Switzerland. L/C to be confirmed by the advising bank at opener`s account.` Quite clearly `Opener` in the application referred to SAE. Pursuant to the application, the letter of credit was established.

6 IB did not have any banking relationship with Swiss Credit Bank (`CS`). So IB had their letter of credit No 1964/85 (`LC`) confirmed by the plaintiffs, the Union Bank of Switzerland, Zurich (`UBS`). This was acceptable to Kagex.

7 It is necessary to set out the material terms of the original LC and of the subsequent amendments. The material terms of the original LC read:

> *To: Union Bank of Switzerland, Zurich*
>
> *From: Indian Bank Singapore*
>
> *28 August 1985 (2709/LC/85)*
>
> *For US$766,500 on 28 August 1985. Please advise the LC through Swiss Credit Bank, Luzern Switzerland ... and add your confirmation on opener`s account. Established irrevocable credit No 1964/85. Dated 27 August 1985 fvg M/s Kagex BV PO Box No 347 Oostvoorne Netherlands (Holland) A/c South Asian Exports Pte Ltd PO Box 2215 Singapore 9042 for US$766,500 covering shipment of 1,500 (fifteen hundred) metric tons with a 5 pct more or less allowed Turkish Chick Peas ... price at US$511 ... per metric ton gross for nett C and F Bombay Liner terms from Mersin or any Turkish port to Bombay ... Shipment latest 17 September 1985.*

8 Negotiation till 8 October 1985. Documents required.

> (1) Draft at 120 day DA from B/L date ***drawn on openers*** bearing the clause drawn under documentary credit No 1964/85 of ***Indian Bank*** Singapore;
>
> (2) Beneficiaries signed invoices for full value in duplicate for each lot;
>
> (3) Full set clean `shipped on board` ocean bills of lading issued to order marked `freight prepaid` ***and notify openers*** to be signed by owners or master of vessel or their approved agents.
>
> *Additional conditional [sic] -*
>
> …
>
> (2) survey report of SGS for weight and quality for each lot in duplicate;
>
> (3) fumigation and phytosanitary certificate for each lot in duplicate;
>
> …
>
> (5) this LC is unrestricted for negotiation.
>
> …
>
> *In reimbursement please debit our USDLR account No 04-027/673 with Bankers Trust Co 16, Wall Street, New York NY10005 USA, on maturity date, certifying that all the terms and conditions of the credit have been complied with.*

9 We hereby engage with drawers and or bona fide holders that drafts drawn and negotiated in conformity with the terms of the credit will be duly honoured by us on presentation.

10 The negotiating bank must send the original draft and documents direct to us by airmail and the remaining documents by subsequent airmail certifying that documents negotiated are in conformity with the terms and conditions of the credit.

Version No 1: 11 Sep 2026 (01:05 hrs)

11 This credit is subject to Uniform Customs and Practice of Documentary Credits (1983) Revision International Chamber of Commerce Publication No 400. Please advise beneficiaries.` (Emphasis added.)

12 In view of the contra-distinction between between `openers` and `Indian Bank` and the requirement in the LC that the bills of lading should be issued `to order` and `notify openers`, `openers` in the LC must also be referring to SAE and not IB.

13 On 29 August 1985 UBS gave instructions to CS as advising bank to advise Kagex accordingly.

14 At the request of SAE, IB on 3 September 1985 made five amendments to the LC. The material amendments read:

> (1) Draft to be drawn on Union Bank of Switzerland Zurich instead of openers.
>
> (3) Confirmed fumigation and phytosanitary certificate acceptable.
>
> (5) Clause 8 under additional conditions to be deleted and substituted with `Liner B/L with reference to charterparty of carrying vessel acceptable …
>
> *All other terms and conditions remained unchanged.*

15 On 20 September 1985, the LC was amended for the second time. The material amendment read:

> *Shipment and negotiation dates extended till 30 September 1985 and 21 October 1985 respectively.*

16 On 9 October 1985 the LC was amended for the third and last time as follows:

Shipment and negotiation dates extended till 10 October 1985 and 31 October 1985 respectively.

17 In due course Kagex presented the draft drawn on UBS and the documents to CS. The date on which all the documents were presented to CS and the purpose for which the presentation to CS was made are in dispute. But on the evidence I find that all the documents were presented by Kagex to CS by 21 October 1985 for the purpose of negotiation by CS and not for transmission to UBS for collection.

18 CS then transmitted the draft and the documents to UBS. They arrived at the counters of UBS on 23 October 1985. The draft was made out to the order of CS.

19 On 28 October 1985 UBS returned to CS the draft maturing on 28 January 1986 duly accepted. At the same time UBS forwarded the other documents to IB. UBS`s transmittal letter stated that `the documents were presented in due time`.

20 On the same day UBS submitted to Bankers Trust Co a claim for commission and for reimbursement in the sum of US$766,500 on maturity of the draft on 28 January 1986.

21 CS received the accepted draft on or about 29 October 1985. On 30 October 1985 CS credited Kagex`s account with the amount of the draft presumably less interest commission and other charges.

22 The other documents arrived at the counters of IB on 2 November 1985. IB completed checking the documents for discrepancies by 8 November 1985 and found seven discrepancies. According to one Ang Kim Hua (`DW1`), the

Version No 1: 11 Sep 2026 (01:05 hrs)

assistant manager, trade and finance department of IB, IB was requested by SAE through its director one Mr Mehta to withhold sending out the rejection notice as SAE had a `banking expert and he might be able to find more discrepancies and to rephrase the rejection in a more professional way.` One set of photocopy documents was then handed to Mr Mehta to enable him to consult the banking expert one, Mr VV Keshkamat. SAE then reverted on 12 November 1985 to IB agreeing with the seven discrepancies pointed out by IB and adding one more relating to the marine insurance policy. IB then sent out its rejection notice to UBS on the same evening at 7.43pm Singapore time. This rejection notice read:

> *We regret to inform you our rejection of the docs on a/c of glaring and patent discrepancies/ irregularities enumerated hereunder:*
>
> (1) Docs hv been presented/negotiated later than 21 days from the date of bill of lading (art 47[A] of UCPDC 1983 Revision).
>
> (2) As per terms of the LC the draft though required to be accepted by you should hv been forwarded to us.
>
> (3) The description of goods/specifications in the invoice differs from that given in the SGS certificate of survey, quality, weight and packing.
>
> (4) LC called for survey report of SGS for weight and quality for each lot whereas survey report/certificate of survey (addition of survey - apparently unauthenticated) weight and packing (L/C does not call for packing report) submitted which indicates that SGS supervised and not surveyed the weight and quality for which their survey report was called for under the LC.
>
> (5) LC calls for combined fumigation and phytosanitary certificate whereas only a phytosanitary certificate submitted which merely states: fumigation or disinfectant treatment (if required by the importing country) was carried out on various dates by a firm.
>
> (6) Bill of lading not signed by the approved agents of the owners or master of vessel as required by the LC.
>
> (7) LC called for B/L marked freight prepaid whereas mutually contradicted notations regarding payment of freight, viz freight prepaid (not authenticated) freight details, charges etc, as per

Version No 1: 11 Sep 2026 (01:05 hrs)

> charterparty dated 22 September 1985 and freight payable at Holland/prepaid appear on the bill of lading.
>
> (8) Marine insurance policy apparently signed by eight different underwriters is issued ... in the name of bearer without indicating beneficiary or any other party (shipper) as the insured and contains contradictory terms in the body of the policy and the various institute clauses subject to which risks were required to be covered by the LC. Moreover, although it states that the insurance has been effected entirely according to the terms and requirements of the English Marine Insurance Act 1906 it stipulates that all disputes on the subject of this policy or on the insurance covered thereby are to be decided by the competent judge at Amsterdam subject to appeal to a higher court and further that the claims if any, payable at Bombay irrespective of percentage (the latter stipulation as required by the LC).
>
> *Pls telex instructions regarding disposal of documents. In the meantime we are holding them at your disposal at your risk and responsibility.*

23 UBS on 18 November 1985 rebutted IB`s reasons for rejecting the documents and maintained their position on reimbursement upon the maturity of the draft on 28 January 1986.

24 On 27 January 1986 UBS sent a debit note to Bankers Trust Co for reimbursement in the sum of US$766,500.

25 On 31 January 1986 Bankers Trust Co credited UBS with the sum of US$766,500 less US$35 being their commission. Bankers Trust Co subsequently reversed this entry. In the meantime UBS had paid CS the amount due on the draft accepted by them.

26 On 30 September 1987 UBS commenced these proceedings against IB claiming for reimbursement of the sum of US$766,500 and interest thereon. IB in turn joined SAE as third party. As against UBS, IB and SAE took a common position in their respective defence. Relying basically on the grounds disclosed

Version No 1: 11 Sep 2026 (01:05 hrs)

in IB`s rejection notice of 12 November 1986, both IB and SAE contended that UBS was not entitled to reimbursement because UBS acted outside the mandate in the LC when they accepted the draft in that:

> (1) the presentation of the draft and documents on 21 October 1985 to CS was for collection and hence the presentation by CS to UBS on 23 October 1985 was out of time;
>
> (2) if presentation to CS was for purpose of negotiation then CS as the negotiating bank should have forwarded the draft and documents direct to IB as stipulated in the LC; and
>
> (3) the documents presented did not comply with the requirements of the LC.

27 On the issue of late presentation, by amendment of 9 October to the LC `shipment and negotiation dates [were] extended till 10 October 1985 and 31 October 1985 respectively.` No date for presentation of documents was stipulated. Accordingly art 47(a) of the Uniform Customs and Practice for Documentary Credits (1983 Revision) (`UCP 400`) which was expressly incorporated by the LC applied.

28 art 47(a) reads:

> *In addition to stipulating an expiry date for presentation of documents, every credit which calls for a transport document(s) should also stipulate a specified period of time after the date of issuance of the transport document(s) during which presentation of documents for payment, acceptance or negotiation must be made. If no such period of time is stipulated, banks will refuse documents presented to them later than 21 days after the date of issuance of the transport document(s). In every case, however, documents must be presented not later than the expiry date of the credit.*

29 The bills of lading were dated 30 September 1985. Therefore the last day for presentation of documents under art 49(a) was 21 October 1985. The

Version No 1: 11 Sep 2026 (01:05 hrs)

documents were presented to CS Lucerne by 21 October 1985 and transmitted to UBS Zurich on 23 October 1985. If presentation could be made at the counters of CS Lucerne then the documents were presented on time. This depended on the nature of the credit, ie was it available by negotiation or acceptance or as UBS contended a hybrid credit. art 10 of UCP 400 reads:

> (a) An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with:
>
> (i) if the credit provides for sight payment - to pay or that payment will be made;
>
> (ii) if the credit provides for deferred payment - to pay, or that payment will be made, on the date(s) determinable in accordance with the stipulations of the credit;
>
> (iii) if the credit provides for acceptance - to accept draft drawn by the beneficiary if the credit stipulates that they are to be drawn on the issuing bank, or to be responsible for their acceptance and payment at maturity if the credit stipulates that they are to be drawn on the applicant for the credit or any other drawee stipulated in the credit;
>
> (iv) if the credit provides for negotiation - to pay without recourse to drawers and/or bona fide holders, draft(s) drawn by the beneficiary, at sight or at a tenor, on the applicant for the credit or on any other drawee stipulated in the credit other than the issuing bank itself, or to provide for negotiation by another bank and to pay, as above, if such negotiation is not effected.
>
> (b) When an issuing bank authorizes or requests another bank to confirm its irrevocable credit and the latter has added its confirmation, such confirmation constitutes a definite undertaking of such bank (the confirming bank), in addition to that of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with:
>
> (i) if the credit provides for sight payment - to pay, or that payment will be made;

Version No 1: 11 Sep 2026 (01:05 hrs)

> (ii) if the credit provides for deferred payment - to pay, or that payment will be made, on the date(s) determinable in accordance with the stipulations of the credit;
>
> (iii) if the credit provides for acceptance - to accept drafts drawn by the beneficiary if the credit stipulates that they are to be drawn on the confirming bank, or to be responsible for their acceptance and payment at maturity if the credit stipulates that they are to be drawn on the applicant for the credit or any other drawee stipulated in the credit;
>
> (iv) if the credit provides for negotiation - to negotiate without recourse to drawers and/or bona fide holders, draft(s) drawn by the beneficiary, at sight or at a tenor, on the issuing bank or on the applicant for the credit or on any other drawee stipulated in the credit other than the confirming bank itself.
>
> …

30 The obligations undertaken by the confirming bank under art 10(b) thus mirror those of the issuing bank under art 10(a). art 10 recognises three types of credit. `The UCP 1983 recognizes three types of credit viz:

> (a) available by payment [which may be at sight or deferred];
>
> (b) available by acceptance;
>
> (c) available by negotiation.`

31 per GP Selvam JC in ***Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd*** at p 946.

32 The LC in its original form before the amendments required the `draft at 120 day DA from bill of lading date drawn on ***openers*** ` that is on SAE (emphasis added). Hence the credit originally available fell under art 10(a)(iv) and 10(b)(iv), that is, the credit was available by negotiation because the draft was to be drawn on the applicant for the credit. The amendment required the draft to be drawn on UBS the confirming bank. However additional condition 5 of the original LC remained and it said `this LC is unrestricted for negotiation`.

Version No 1: 11 Sep 2026 (01:05 hrs)

But since the draft was to be drawn on UBS who were nominated to accept the draft, the credit was not available by negotiation under art 10(b)(iv) under which the draft must be drawn `on the issuing bank or on the applicant for the credit or on any other drawee stipulated in the credit other than ***the confirming bank itself*** ` (emphasis added). However since it was unrestricted for negotiation it had elements of a credit available by negotiation. Therefore presentation could be made at the counters of CS in Lucerne so long as presentation was made by 21 October 1985. But the presentation to CS must be for purpose of `negotiation` and not for collection. If it was presented to CS for collection, then presentation under the credit was made when the documents reached the counters of UBS Zurich for acceptance on 23 October 1985 in which event the presentation was out of time. On the evidence and taking into account that the credit was unrestricted for negotiation and full sets of documents were presented on the last day stipulated for presentation, Kagex could not have intended to present these documents to CS who were their bankers for collection as they would be out of time when the documents reached the counters of UBS. Also significant is the fact that the draft was made out to the order of CS. But it was contended on behalf of IB and SAE that if the presentation to CS was for negotiation then immediate value must be given by CS. Since CS only credited Kagex`s account on 30 October 1985 after the draft had been returned to them on 29 October 1985 by UBS, it was a case of collection and not negotiation and the crediting of Kagex`s account by CS was pure discounting of the accepted draft by CS and not pursuant to the credit.

33 Article 47(a) only stipulates the period of 21 days during which ` ***presentation for*** payment, acceptance or negotiation must be made.` (Emphasis added.) So long as presentation was timely it complied with art 47(a) and

Version No 1: 11 Sep 2026 (01:05 hrs)

negotiation need not be completed before the expiry of that period of 21 days. In any case the credit allowed `negotiation till 31 October 1985`.

34 In ***European Asian Bank AG v Punjab & Sind Bank,*** on 14 July 1979 Jain, an Indian company based in New Delhi, contracted to buy 300 tons of Zanzibar cloves from Bentrex, a Singapore company. The price payable for the goods was US$2,250,000 c&f payment 180 days from the date of the bill of lading by irrevocable letter of credit.

35 On 20 July 1979 Jain requested the defendants to cause to be opened a letter of credit. On 21 July the defendants telexed their correspondents in Singapore Algemene Bank Nederland (`ABN`) and instructed them to advise through the plaintiffs of the opening of the letter of credit. On 4 August ABN confirmed the letter of credit which was irrevocable and valid for negotiation at Singapore until 15 September 1979.

36 On 7 August Bentrex presented to the plaintiffs a set of documents and a draft for US$2,250,000 drawn on Jain and payable to the order of the plaintiffs. The plaintiffs endorsed the draft and sent it with the documents to the defendants in India. It was accepted by Jain and on the same day, 16 August, the defendants wrote to the plaintiffs stating that the documents had been `accepted by the party to fall due on 3 February 1980`.

37 On 20 August the plaintiffs credited Bentrex`s account.

38 On 8 September 1979 Jain was informed that the vessel on which the cloves were said to have been shipped the `Averilla` had sunk on her voyage and that the consignment of cloves had been lost.

39 On 2 February 1980 the plaintiffs enquired of Irving Trust, the New York paying bank under the letter of credit, whether they had been put in funds to honour the credit. Irving Trust advised that they had no record of the credit.

40 As the defendants were restrained by an injunction obtained by Jain from the courts in India to make payment, the plaintiffs sued the defendants in England.

41 In allowing the appeal by the plaintiffs and giving the plaintiffs judgment for their claim under O XIV of the Rules of the Supreme Court, Goff LJ at p 619 stated:

> *... Even if it were a fact that, as at August 13, the appellants had been appointed agents for collection by Bentrex, it is beyond question that by August 20, the appellants had negotiated the letter of credit, and there is no suggestion that they acted otherwise than in good faith in so doing. Thereafter, in February 1980, they claimed payment from the respondents; and this was refused. In our judgment it is not open to the respondents, on these facts, to say against the appellants that they were justified in refusing payment on the ground that the documents were fraudulent or even forged. In our judgment, the relevant time for considering this question is the time when payment falls due and is claimed and refused. If, at that time, the party claiming payment had negotiated the relevant documents in good faith, the issuing bank cannot excuse his refusal to pay on the ground that at some earlier time the negotiating bank was a mere agent for collection on behalf of the seller and allege against him fraud or forgery (if that indeed be the case) on the part of the beneficiary of the letter of credit. It follows that, even if there were (contrary to our view) a triable issue that for a short time in August 1979, the appellants were no more than agents for collection, that would be immaterial in the present case.*

42 In ***Flagship Cruises Ltd v New England Merchants National Bank of Boston*** the beneficiary of a letter of credit, Flagship Cruises Ltd (`Flagship`) brought an action against the issuing bank, New England Merchants National Bank of Boston (`Merchants`). Under the letter of credit the drafts must be

Version No 1: 11 Sep 2026 (01:05 hrs)

negotiated no later than 3 November 1972. The credit was subject to the Uniform Customs and Practice for Documentary Credits 1962 Revision (UCP 222).

43 On 31 October 1972 Flagship delivered to its bank, Chemical Bank of New York (`Chemical`) the original letter of credit, the duplicate sight drafts on Merchants ordering payment of $200,000 to Flagship. The letter of 31 October enclosing the letter of credit instructed Chemical to `present for collection`. The documents were routed not to Chemical`s letter of credit department where documents would have been examined and payment immediately made to Flagship. Instead it went to Chemical`s international collections department which merely forwarded the drafts to the issuing bank for payment. Scrutiny was directed only to whether necessary endorsements had been given. Chemical subjected the documents to this kind of processing and on 6 November 1972 mailed the letter of credit and the duplicate drafts but not the letter of 31 October to Merchants with a transmittal form dated 3 November 1972 demanding payment. The drafts had been endorsed by Chemical `for and on behalf of` Flagship. Merchants received Chemical`s transmittal form and the documents on 9 November 1972. Chemical rejected the documents for, inter alia, late presentation. On 13 November Chemical wired Merchants that the draft had been `negotiated by us within validity of credit`. On the same day Merchants wired back that it was too late.

44 In delivering the judgment of the US District Court of Appeal, Chief Judge Coffin said at p 704:

> *We agree that negotiation did take place even though Chemical apparently did not give Flagship value for the drafts. The letter of credit clearly distinguishes between the act of negotiation, which the beneficiary (Flagship), must accomplish before a*

> *certain date (3 November), and the act of presentation to the drawee (Merchants), which is not governed by a specific time limit except that presentation must be `due`. We infer from this distinction that the beneficiary is entitled to deal with its own bank which then in turn passes the papers on to the drawee bank. Flagship`s duty, as we read the letter of credit, was to present the bills of exchange to its bank before November.*

45 We agree with the district court`s conclusion that Flagship did so. Flagship presented all the necessary documents to Chemical on 31 October. The Chemical`s form, calling on Merchants to honour the draft, was dated 3 November. ***Some time during this interval negotiation occurred*** . The fact that Chemical did not send anything to Merchants until the following Monday, 6 November, does not affect our conclusion that negotiation was timely. (Emphasis added.)

46 In my view therefore the documents were presented by Kagex to CS for negotiation within the 21 days stipulated by art 47(a) of UCP 400 and was negotiated by CS within the period stipulated in the credit for negotiation. The credit however stated that `the negotiating bank must send the original draft and documents direct to us [ie IB] by airmail and the remaining documents by subsequent airmail certifying that documents negotiated are in conformity with the terms and conditions of the credit`. CS whilst in the process of negotiation forwarded the original draft and the other documents to UBS the confirming bank. UBS after accepting the draft returned the original draft to CS. The other documents were then transmitted to IB.

47 It must be remembered that this provision requiring the original draft to be forwarded to IB was in the original LC of 28 August 1985. At that stage the draft was to be drawn on `openers` that is SAE. Therefore it was in accordance

Version No 1: 11 Sep 2026 (01:05 hrs)

with banking practice to require the draft to be sent to IB who would then obtain SAE`s acceptance of the draft or negotiate.

48 However by the amendment of 3 September by telex and confirmed by letter of 5 September 1985, the draft was to be drawn on UBS and therefore the draft had to be sent by the negotiating bank to UBS for acceptance. The accepted draft would then be returned to the drawer or the negotiating bank. If the draft and the other documents were to be sent to IB bypassing UBS, Kagex and or CS would have lost the benefit of having UBS as a confirming bank. The original requirement that the negotiating bank should send the draft and the other documents to IB became irrelevant due to the amendment. This was in fact admitted by one TN Santhanakrishnan, the assistant general manager of IB at the material time, in his affidavit (exh P17) of 19 March 1986 filed in a related suit No 1108 of 1986 by SAE against IB to restrain IB from reimbursing UBS for the amount claimed in this suit. In para 7(c) he affirmed as follows:

> *The plaintiffs [SAE] contend that the drafts drawn by the seller, Kagex BV and payable 120 days after the bill of lading date should have been drawn on UBS and presumably, accepted by UBS and then retained by UBS and sent on to the defendants with the other documents. The credit advice of 28 August 1985 in relation to this point states as follows:*
>
> *`Draft at 120 days D A from B/L date drawn on openers bearing the clause drawn under documentary credit No 1964/85 of Indian bank, Singapore.`*
>
> *and further on, states as follows:*
>
> *`We hereby engage with drawers and or bona fide holders that drafts drawn and negotiated in conformity with the terms of the credit will be duly honoured by us on presentation.*

49 The negotiating bank must send the original draft and documents direct to us by airmail and the remaining documents by subsequent airmail certifying

that documents negotiated are in conformity with the terms and conditions of the credit.`

> *Thereafter, by a letter dated 5 September 1985 (exh PNM2 of Prawin N Mehta`s affidavit) the credit in relation to the draft was amended as follows:*
>
> *`Draft to be drawn on Union Bank of Switzerland, Zurich instead of openers.`*
>
> *Therefore, under the original arrangements, it was intended that Kagex BV would present the drafts with the other documents and that the defendants [IB], on receiving the drafts, would add their acceptance and return the drafts to the drawer at once and the drawer would then be free to discount the drafts. If the documents were not in conformity with the letter of credit, the defendants could have refused to accept the drafts. It would have been a condition precedent to the defendants` right to acceptance of the draft that the other documents were exactly as required. Therefore, the only function for the transmission of the drafts to the defendants under the original arrangements was to enable the defendants to add their acceptance to the drafts, having checked that the other documents were in order.*

50 But the alteration of the terms of the credit by the defendants` letter to Kagex BV of 5 September 1985 requiring UBS to be the drawer (sic) and acceptor appears to have removed the only commercial purpose in having UBS send the drafts to the defendants and with the amendment, there was no reason why the defendants would even need to look at the drafts as the drafts would have already been accepted by UBS and UBS would have irrevocably rendered itself liable as acceptor provided all the other documents comply with the terms of the credit. The defendants would have to reimburse UBS on maturity of the drafts if they were for the correct amount and in correct terms.

51 As such, if the drafts do comply with the requirements, the defendants are entitled to reimburse UBS. As such, the return by UBS of their accepted drafts to the defendants do not have any purpose and would, in fact, have been in breach of the agreement in which it was intended for Kagex BV to raise the

Version No 1: 11 Sep 2026 (01:05 hrs)

cash immediately on discounting of the drafts if it did not want to wait until maturity thereof.

52 It appears, therefore, that just because in the amendment of 5 September 1985, there was no express deletion of the requirements that the negotiating bank (UBS) must send the original drafts to the defendants, the requirements still had to be complied with even though the drafts were now to be accepted by UBS.

53 I am advised, therefore, that that part of the credit which required the negotiating bank to send the drafts direct to the defendants, which was not deleted when the credit was amended to make UBS the acceptor and drawer (sic) of the drafts, ceased to have any effect.

54 That this accords with banking practice is reinforced by Case 211 of Case Studies in Documentary Credits:

> *Art 16(d)*
>
> Query: UCP art 16 seems to admit that under a credit advised through another bank than the issuing bank, the beneficiary could forward documents directly to the issuing bank.Taking into account that art 11(b) requires all credits to nominate the bank authorized to pay/accept/ negotiate - unless it allows free negotiation by any bank - and supposing that the credit so nominates another bank, we believe that there is ***non-compliance with credit conditions*** if the beneficiary sends his documents to the issuing bank without going through the nominated bank.
>
> Answer: In respect of possible negotiation through a non-nominated bank, please consult ICC Publication 434, item R.95, and Publication 469, item R.150. On the other hand, the credit is an irrevocable undertaking of the issuing bank to the beneficiary; the beneficiary ***is therefore entitled to present documents directly*** to the issuing bank if he so desires and if it is not contrary to the obvious payment terms of the credit (if the credit calls for a draft to be drawn on a nominated bank at

Version No 1: 11 Sep 2026 (01:05 hrs)

> a tenor accepted by that bank, it would not make sense for the beneficiary to send the documents to the issuing bank). ICC Publication No 411 (page 32) gives a list, which is not exhaustive, of the cases in which a beneficiary will send the documents directly to the issuing bank.

55 In any case IB were the makers of the LC. If there was any doubt it should be construed against IB. I therefore hold that CS did not act outside the credit when they transmitted the draft and the other documents to UBS.

56 Besides the alleged breaches of non-documentary conditions, IB and SAE also contended that the documents were discrepant or non-conforming to which arts 15 and 16 of UCP 400 applied. Articles 15 and 16 read:

> (15) Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit.
>
> (16) a If a bank so authorized effects payment, or incurs a deferred payment undertaking, or accepts, or negotiates against documents which appear on their face to be in accordance with the terms and conditions of a credit, the party giving such authority shall be bound to reimburse the bank which has effected payment, or incurred a deferred payment undertaking, or has accepted, or negotiated, and to take up the documents.
>
> b If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, it must determine, on the basis of the documents alone, whether to take up such documents, or to refuse them and claim that they appear on their face not to be in accordance with the terms and conditions of the credit.
>
> c The issuing bank shall have a reasonable time in which to examine the documents and to determine as above whether to takeup or to refuse the documents.
>
> d If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or,

Version No 1: 11 Sep 2026 (01:05 hrs)

> if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting bank), or to the beneficiary, if it received the documents directly from him. Such notice must state the discrepancies in repect of which the issuing bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presentor (remitting bank or the beneficiary, as the case may be). The issuing bank shall then be entitled to claim from the remitting bank refund of any reimbursement which may have been made to that bank.
>
> e If the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.
>
> f If the remitting bank draws the attention of the issuing bank to any discrepancies in the documents or advises the issuing bank that it has paid, incurred a deferred payment undertaking, accepted or negotiated under reserve or against an indemnity in respect of such discrepancies, the issuing bank shall not be thereby relieved from any of its obligations under any provision of this article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained.

57 In ***Amixco Asia (Pte) Ltd v Bank Bumiputra Malaysia Bhd,*** GP Selvam JC in construing art 16 said at p 950:

> *... In my judgment, under the UCP (1983) the issuing bank must state all the discrepancies it seeks to rely on in the notice of rejection without delay. This means within reasonable time. No new discrepancies may be raised after the lapse of reasonable time. ...*

58 He then reviewed various authorities and at p 953 he said:

> *... when a statute or contract imposes a time limit to give reasons for doing or refusing to do an act, all grounds to be relied upon must be given within the time allowed. The party must stand or fall on the grounds given within the time. It would be illogical if some grounds may be given at a later time as it would negate the statute or contract. I would, accordingly, hold that in credits subject to the UCP new grounds for rejecting documents may not*

Version No 1: 11 Sep 2026 (01:05 hrs)

> *be given after reasonable time. Article 16(d) and (e) bars a second bite at the cherry. By this article the parties have clearly contracted out of the liberty of adducing additional discrepancies after the lapse of reasonable time.*

59 In so holding I would adopt the reasoning given in ***Case Studies in Documentary Credits*** (1989) Case 53:

> `Query: If documents contain several discrepancies but the issuing bank only states one of them in its notice of refusal and if that discrepancy turns out to be invalid can the issuing bank then legitimately raise the other discrepancies to refuse the documents?
>
> Answer: Article 16(d) gives the answer to this question because it clearly evidences that `such notice must state the discrepancies`. Since the discrepancies is to be understood to mean all discrepancies, the issuing bank would not be entitled to raise discrepancies which it had not raised in its notice of refusal.
>
> Article 16(d) is perfectly clear in its statement that in respect of rejection of documents and giving notice of rejection `Such notice must state the discrepancies in respect of which the issuing bank refuses the documents …`
>
> *This is common sense since it might be possible for the discrepancies to be rectified and the documents to be represented within the time limits of arts 46 and 47(a).*

60 If therefore, the issuing bank rejects the documents and states only one discrepancy but later tries to raise other discrepancies for the purpose of refusing the documents, obviously this is contrary to UCP 1983 and also contrary to what would be fair treatment of the beneficiary.

61 The United States Court of Appeal in ***Kerr-McGee Chemical Corp v Federal Deposit Insurance Corp*** in applying the discrepancy provision in the UCP 1983, held that a bank would be estopped from subsequently asserting a ground not taken initially. Associate Justice Powell put it succinctly:

Version No 1: 11 Sep 2026 (01:05 hrs)

> *`The question presented is whether, after initially dishonouring a letter of credit on the basis of specified grounds, a bank may subsequently dishonour the credit on the basis of a different ground. We think that under the Uniform Customs and Practice for Documentary Credits which are expressly incorporated by letter of credit at issue here, appellee bank was required to state all of its reasons for dishonouring the credit when it was first presented.`*
>
> *My conclusion also follows from the logic of the decision of the English Court of Appeal in* ***Bankers Trust Co v State Bank of India****. In that case Hirst J and the English Court of Appeal held that if the issuing bank failed to state valid discrepancies within the reasonable time, it would be precluded from avoiding liability on the ground that the documents were discrepant. Time would not be extended to enable it to consult the applicant for additional grounds.*

62 In ***United Bank Ltd v Banque Nationale de Paris*** the plaintiffs were a bank carrying on business in the United Arab Emirates (`UBL`). In October 1980 the third defendant applied to the plaintiffs to open a letter of credit in the amount of US$220,000 in favour of a Singapore company called Pan Associated Ltd (`the beneficiary`) for the purchase of bran; subject to the provisions of the Uniform Customs and Practice of Documentary Credits (1974 Revision) (`the UCP`). On the issue of the letter of credit, the second defendants (`HSBC`) informed the beneficiary of the opening of the letter of credit. The letter of credit was also posted by the plaintiffs to the second defendants. In the meantime the third defendant requested the plaintiffs to amend the letter of credit. The amendments were conveyed from the plaintiffs in a letter dated 6 November 1980 (`the amendment letter`) to the second defendants for onward transmission to the beneficiary. The plaintiffs also sent a telex to the second defendants three days later detailing the amendments (`the amendment telex`). However, the second defendants on receiving from the plaintiffs the letter of credit, forwarded it to the beneficiary on 12 November 1980. On 19 November 1980, the first defendants (`BNP`) negotiated the letter of credit in favour of Pan Associated

Version No 1: 11 Sep 2026 (01:05 hrs)

Pte Ltd. On the same day, the second defendants sought clarification from the plaintiffs whether the beneficiary should be Pan Associated Ltd or another company, Naraina Trading Pte Ltd. On 20 November 1980, the second defendants forwarded the amendment letter to Pan Associated Ltd, before even receiving a reply from the plaintiffs. Only when clarification was received from the plaintiffs on 23 November 1980 that the beneficiary had not changed, and that the only amendment was that further certificate be obtained from Naraina Trading Pte Ltd, did the second defendants send the amendment telex to the beneficiary. However, on 3 November 1980 the beneficiary replied to say that the amendments could not be accepted as shipment of the goods had been effected. Having negotiated the letter of credit and reimbursed itself of the amount due thereunder, the first defendants forwarded all the documents to the plaintiffs. The plaintiffs replied by telex on 30 November 1980 pointing out certain discrepancies and asking for a refund. The telex concluded in these terms: `Documents treated on collection basis. Kindly refund the negotiated amount ...`. On 3 December 1980 the first defendants replied rejecting the plaintiffs` contention that the documents were not in order and also pointed out that the plaintiffs` telex of 30 November 1980 did not comply with art 8(e) and (f) of the UCP. On 4 December 1980 the plaintiffs replied concluding:

> *Meanwhile advice disposal instructions. Documents holding at your risk and responsibility. All rights reserved. Rush confirmation.*

63 The plaintiffs then commenced legal action to recover the sum of US$220,000 from the defendants. The plaintiffs claimed that the first defendants were in breach of the duty of care in negotiating the letter of credit and paying to a person other than the beneficiary named in the letter of credit. They also claimed that pursuant to art 8(e) of the UCP, they were entitled to a refund of money paid out under the letter of credit. Against the second

Version No 1: 11 Sep 2026 (01:05 hrs)

defendants, the plaintiffs claimed for loss suffered on account of the second defendants` failure to exercise reasonable diligence, skill and care as advising bankers in promptly notifying the beneficiary and/or its bankers of the requested amendments and/or in seeking agreement to such amendments.

64 In dismissing the plaintiffs` claim against the first defendants, Chao Hick Tin J at pp 76-77 said:

> *The next point to consider is whether the defect in the telex of 30 November 1980 could be made good by the telex of 4 December 1980. Counsel cited to me the case of* ***Bankers Trust Co v State Bank of India****, a decision of Hirst J. The case is yet to be reported in the law reports. That case concerned art 16 of the 1983 revision of the UCP. On this point, art 16 is very similar to art 8 of the 1974 revision. Hirst J held that under art 16 of the UCP (1983) a reasonable time, when an issuing bank had to examine the documents presented to it before refusing them on the ground that they appeared upon their face not to accord with the terms of the credit agreement, was the time required by the bank to determine on the basis of the documents alone whether to take up or refuse them. He rejected the argument that a reasonable time included time for the issuing bank to refer to the applicant of the letter of credit; but this would not preclude the issuing bank consulting the applicant whether he wished to waive the discrepancy provided, and this was very important, that that was done within the reasonable time needed by the issuing bank itself to carry out its function and did not extend it.*

65 ***In my judgment, I think there are two reasons by UBL must live with their notice of 30 November 1980. First, having decided to hedge their notice, I am afraid UBL had used up its option on 30 November 1980. I do not think it was open to UBL to have a second bite.*** Article 8(e) and (f) is very clear on this. The notice must state that the documents are being held at the disposal of the negotiating bank or are being returned thereto. This was not done. Second, I think the telex of 4 December 1980 is in any case too late. Under art 8(d), the issuing bank has a reasonable time within which to examine the documents and to determine whether to make a claim. Article 8(e) provides that if a claim is to

Version No 1: 11 Sep 2026 (01:05 hrs)

be made, the notice must be given without delay by cable or other expeditious means to the negotiating bank. Dr Ellinger (1DW5) expressed the view that from his knowledge and experience, a notice given within three to four working days for a normal sort of a case would not be unreasonable. For a case involving voluminous documents, a period of up to seven or eight working days might still be reasonable. But in the present case, as a matter of fact, UBL completed the examination of the documents within a day. They in fact replied on 30 November 1980. To reply on 4 December 1980 when it could be done on 30 November 1980 must necessarily suggest that there was delay. The fact that 2 December 1980 was the national day of the United Arab Emirates does not really alter the fact that there was delay.

66 Accordingly, I hold that the plaintiffs, having failed to comply with art 8(e) and (f) of UCP, are precluded from making a claim against BNP for a refund.` (Emphasis added.)

67 Therefore by art 16(d) of UCP 400 the issuing bank cannot have a second bite at the cherry. The documents herein were received by IB on 2 November 1985. IB checked the documents and found seven alleged discrepancies. They were ready to send out their rejection notice based on the seven alleged discrepancies on 8 November 1985. But at the request of SAE, they withheld sending out the same until the evening of 12 November 1985. There were disputes on what is reasonable time within which IB`s rejection notice should have been sent. But the fact remains that IB though ready with their notice on 8 November waited until 12 November to send out their notice which incorporated an additional alleged discrepancy which was not pursued at the trial. The evidence of banking experts including that of Prof Ellinger was also that by waiting until 12 November 1985 to reject the documents, IB had

Version No 1: 11 Sep 2026 (01:05 hrs)

not acted within reasonable time. In my view IB ought to have acted by 8 November 1985 at the latest. I therefore hold that IB having failed to comply with art 16(c) and (d) are precluded by art 16(e) from claiming as against UBS that documents are not in accordance with the terms and conditions of the credit and are accordingly liable to reimburse UBS.

68 This disposes of the matter between UBS and IB. But since IB is seeking indemnity from SAE, it is necessary to examine if the documents were indeed discrepant. If they were not, then any failure on the part of IB to act within reasonable time would not disentitle them to indemnity by SAE. For this we must look at the rejection notice only. It had the concurrence of SAE and any documentary discrepancy relied on in IB`s defence which was not in their rejection notice would be a second bite at the cherry. UBS had in their telex of 18 November 1985 replied specifically to the eight alleged discrepancies, both documentary and non-documentary, listed in IB`s rejection notice. For convenient reference I set out the point by point reply of UBS:

> *This refers to your telex of 12 November 1985, where you reject the documents tendered. May we comment as follows:*
>
> (1) Late negotiation:
>
> We have it on record that the documents were presented within the 21 days and we clearly said so in our remittance letter.
>
> (2) Draft to be sent to you:
>
> With your amendment dated 5 September 1985 you required the draft to be drawn on us. Therefore, for our bank, the terms changed in that credit became available by acceptance. Please refer to art 10 of UCP. Under such a credit, the beneficiary is entitled to receive the draft. We acted precisely in that way, accepted the draft and returned it to the remitter.
>
> (3) Different description in invoice and SGS certificate:

Version No 1: 11 Sep 2026 (01:05 hrs)

Despite careful re-examination of copies on hand we cannot find any discrepancy between the two documents. They clearly are on their face not only in accordance with the terms but also consistent with one another.

(4) Survey Report not in order:

You required a survey report for weight and quality. All certificates submitted do fulfill this condition. The fact that on top of weight and quality also the packing was examined is immaterial. Also the entire documents seem to be properly authenticated.

(5) Only phytosanitary certificate submitted instead of combined fumigation and phytosanitary certificate:

What really matters here is the content of the document and there you cannot deny that part two of the document clearly deals with fumigations. Through the fact that you changed the terms of the credit later on, allowing both statements to be embodied in one paper, we undoubtedly acted in accordance with the credit terms when we accepted this document. It may also be of interest to you that the International Chamber of Commerce in other instances confirmed the position we maintain here in that the nature of a document is determined by its data content and not by its title.

(6) B/L not properly signed:

The B/Ls are marked quote for and on behalf of master and owners (Transocean Management SA) of M/V Dutchman (as agents) unquote. Further more a statement is provided, certifying that Atako are the approved agents. We wonder how better this condition could have been fulfilled.

(7) Freight specification on B/L not in order:

The bladings evidence that the freight had been prepaid. This is all what matters. That the freight has been prepaid in Holland and in accordance with a charterparty is immaterial and certainly not inconsistent (please remember that reference to c/p terms was allowed as per your amendment dd Sept 5, 1985)

(8) Insurance policy not as per L/C terms:

You required an insurance document in negotiable form. The papers tendered were bearer policies and hence negotiable. You did not require them to be issued in a particular name. Moreover, they indicated, word by word, the risks covered, risks which in turn tallied entirely with the L/C conditions. The fact that several underwriters signed the policy certainly is no

Version No 1: 11 Sep 2026 (01:05 hrs)

> hindrance to accept such a document. It is indeed quite common if not normal that underwriters participate in an insurance deal.

69 Contrary to their stand in these proceedings and to their rejection notice, IB through the said TN Santhanakrishnan in Suit 1108 of 1986 had contended that the documents were conforming and not discrepant.

70 In my view the documents did conform. Therefore IB`s late rejection of the documents did not prejudice their position and that of SAE. In any case this late rejection was because IB was requested by SAE to withhold sending out the same pending SAE`s banking expert`s advice. I therefore hold that SAE are liable to indemnify IB.

71 There was another issue raised at the hearing, namely, the proper law that should apply. Should it be the law of Singapore or that of Switzerland? See ***The Law of Bankers` Commercial Credits*** by HC Gutteridge & Maurice Megrah (7th Ed) at p 243:

> *... However, matters connected with the performance by the bank of its contract under a commercial credit are to be regulated by the law prevailing at the place of performance, ie the law of the territory in which the seller`s draft is presented to the bank for acceptance or payment. This statement appeared to have the approval of Ackner J in* ***Offshore International SA v Banco Central SA & Anor*** *in which a letter of credit was issued by the first defendant through the Chase Manhattan Bank NA of New York, but not confirmed by it, and it was held that in the absence of any express provision the proper law was that with which the transaction had its closest connection. Since the credit was issued through a New York bank and payment was to be made in US dollars against documents presented in New York, the proper law was that of New York, not Spain from where the credit emanated.*

72 Applying this statement of law to the facts of our case I hold that the law of Switzerland applies. But nothing turns on this as I find from the evidence

Version No 1: 11 Sep 2026 (01:05 hrs)

adduced that there is no material difference between Swiss law and the law of Singapore touching on the questions in issue in this case. Accordingly I enter judgment for UBS the plaintiffs against IB the defendants in the sum of US$766,500 with interest thereon from 28 January 1986 at the rate of 6% pa to date of judgment and costs. I declare that IB are entitled to be indemnified by SAE the third party in respect of the UBS`s claim. I also award IB costs of the third party proceedings.

73 Plaintiffs`s claim allowed.

Goh Joon Seng J

Scott Thillagaratnam and Kenny Chooi (Khattar Wong & Pnrs) for the plaintiffs
Tan Teng Muan (Mallal & Namazie) for the defendants
Alan Thambiayah and Goh Su Lin (Cooma Lau & Loh) for the third party

Version No 1: 11 Sep 2026 (01:05 hrs)