

# Cargo Readiness



## Case No. 1 - 2004

Claimants:	Buyers
Respondents:	Sellers
Product:	RBD Palm Olein
Contract:	PORAM Contract No. 2 – Joint PORAM/MEOMA FOB Contract for Processed Palm Oil and Palm Kernel Oil Products in Bulk
Matter in Dispute:	Buyers Claimed That Sellers Had Failed to Provide Cargo Readiness upon Vessel's Arrival
Year of Award:	October 2004

### CONTRACTUAL MATTERS

1. The contract was made and confirmed between the parties through a broker.
2. There was no dispute as to the terms and conditions of the contract.

### SUBMISSION OF CLAIMANTS

1. The Claimants as Buyers had entered into a contract with Respondents as Sellers on 2nd October 2003 to ship 500 MT RBD Palm Olein at a price of US\$437 PMT for shipment in November 2003. The terms of payment were to be on CAD basis or document by-pass to third party on mutual agreement.
2. On 15th October 2003, the Claimants nominated to the Respondents, the vessel "MV XYZ" or substitute with a laycan of 1st -7th November 2003. On 5th November 2003, the Claimants made a final substitution of the vessel to "MV PQR" or substitute with a laycan of 22nd – 29th November 2003. On 6th November 2003, the Claimants passed on the documentary instructions pertaining to the shipment to the Respondents. The Claimants also notified the Respondents the name of the vessel's agents at load-port on 14th November 2003.
3. On 17th and 19th November 2003, the Claimants confirmed through the brokers of the parties in the string the vessel's ETA at load-port, and requested the Respondents to provide shipper's name by the close of business day on Monday, 24th November 2003 as 25th November 2003 was a holiday, and hence no communication could be



possible prior to the vessel's arrival. In the event the Respondents failed to notify the shipper's name and confirmed cargo readiness, the Claimants would hold the Respondents in default.

4. On 24th November 2003, the Claimants sent a notification to the Respondents that the vessel was expected to arrive load-port Port A at approximately 0900 hours on 26th November 2003, and requested the cargo to be ready for loading. On 27th November 2003, the Brokers notified the Claimants of a notice originating from the ship owner that the vessel had arrive Port A on 26th November 2003 at 0620 hours and scheduled to berth at 2000 hours. The vessel finally berthed at 2130 hours and at that time, no cargo was available for loading.
5. On 28th November 2003, parties in the string, including Respondents were notified that the Respondents were held to have defaulted. The parties in the string proceeded to cover the cargo from the open market (bought from "DEF") at the price of US\$540 PMT for loading on the "MV PQR". Ultimately, a quantity of 500.286 MT was loaded against the replacement cargo.
6. On 28th November 2003, the Claimants claimed the following damages from the Respondents:
  - a. The difference between the price of the replacement cargo at US\$540.00 per tonne and the contract price of US\$437.00 PMT on the replacement quantity of 500.286 tonnes, amounting to US\$51,529.46.
  - b. Interest from the date of default till the date of payment of the claim.
  - c. Cost and fees of this arbitration
  - d. Cost and fees of the sub-arbitration between JJ and KK (parties next in the string)

## SUBMISSION OF RESPONDENTS

1. The Respondents contended that the Claimants were aware that the Respondents had entered into a contract with "Hhh" to purchase 500 MT of RBD Palm Olein.
2. On 6th November 2003, the Respondents provided documentary evidence to "Hhh" with regard to the shipment. On 14th November 2003, "Hhh" were given the name of the vessel's agents at load-port. On 17th and 19th November 2003 respectively, the Respondents confirmed the vessel's ETA at load-port and notified "Hhh" to confirm cargo readiness. In the premises, the Respondents contended that as a party in the string they had performed their obligation in preparation of delivery or shipment by "Hhh".
3. The Respondents averred that it was ready to ship the 500 MT of RBD Palm Olein had "Hhh" not defaulted in delivering the cargo to the Respondents. Respondents contended that as party to the string, it had performed its obligations in preparing for the shipment.
4. Further, the Respondents contended that the Claimants and/or the eventual Buyers in the string had not mitigated losses, and that the rate of US\$540.00 PMT was not

the average price in the market at the relevant time. The Respondents thus denied liability.

### ARBITRATORS' OBSERVATIONS

A meeting was held among the Arbitration Panel members on 7th July 2004, where the Claimants were requested to submit proof of repurchase of the replacement cargo. The Claimants complied with the request on 14th July 2004.

### ARBITRATORS' FINDINGS

Having considered the submissions of the Claimants and the Respondents, we find that:

1. There is no dispute as to the existence and on the terms and conditions of the contract. It was recognized that the case formed part of a string of trades.
2. The nomination of the vessel and its substitution ultimately resulted in the "MV PQR" being the performing vessel with a laycan of 22nd – 29th November 2003. The vessel arrived Port A on 26th November 2003 and berthed at 2130 hours.
3. The Respondents submitted that as party in the string, they had purchased a cargo from "Hhh", to be shipped against their sale to the Claimants under this dispute. However, Respondents were unable to deliver the cargo for loading as result of "Hhh" failure to deliver the same. The Respondents contended that they had performed their obligation in preparation of delivery/shipment by "Hhh".
4. We find this contention to be unacceptable. The contractual obligations of principal parties under a contract entered into on the basis of the standard PORAM Contract No. 2 terms are towards each other, and could not be assigned to any other party without the agreement of the parties to the contract. The matter of "string" is clearly specified under Clause 16 of the contract by the provision that *"the establishment of the string shall for all intents and purposes be to facilitate the performance of the contract and is without prejudice to the rights and obligations of the respective Buyers and Sellers to each other."*

Therefore, principal parties to a contract are responsible for specific performance and at no stage could they absolve themselves from such specific terms and conditions expressed in the contract.

The Respondents and Claimants whilst relying on their own string parties to facilitate the execution of the contract did not have the benefit of exercising rights to perform subject to the performance, in turn, by Sellers or Buyers. On the same basis, the onus of carrying out contractual obligations such as confirming cargo readiness and shipping the cargo, i.e. performing as end-shipper was with principal Sellers to the contract.

5. The Respondents contended that the Claimants and/or the eventual Buyers in the string had not mitigated losses by buying-in at US\$540.00 PMT. We find that, in the absence of any alternative action by the Respondents to supply and load the cargo (even until the time of loading vessel had berthed), the Claimants had limited



alternative of making an alternate purchase, for loading the cargo and in doing so performed their contractual obligation.

The Respondents contended that the price of the replacement cargo was not the average price in the market at the relevant time. The Claimants had submitted that the price was so determined by an actual transaction. As in normal trade practice, we find the price determination process to be relative and reflective of conditions surrounding the trade. Under the circumstances of this case, the cargo to be replaced was for prompt loading and the Buyers were under pressure, distress and time constraints to cover the cargo for loading on the vessel that was already waiting at port. Under customary practice, transactions for palm oil business are normally conducted on “forward month basis” and prices determined could easily be averaged, as opposed to “prompt basis” where the prices so determined would be influenced by more than just normal market forces. We therefore conclude that the Claimants had no choice but to purchase the replacement cargo at US\$540.00 PMT. In accordance with PORAM Contract No. 2, we exercise our authority as provided for in Clause 24 – Default to determine this price of US\$540.00 PMT as the market price for settlement of this dispute.

6. While we find in favour of the Claimants in regards to their claims for price difference, we are not able to award in favour of Claimants their claim for the costs and fees of the sub-arbitration between JJ and KK (parties next in the string). It is for Claimants to determine how they would settle their obligations under their contract with parties next in the string separately.
7. The Respondents also sought an indemnity and contribution from “Hhh” for any damages and/or costs awarded against them under this arbitration. We are not in a position to make any ruling on this issue as the settlement of dispute between the Respondents and “Hhh” is not part of this arbitration.
8. We also find the quantity determined for the Award is 500.286 MT, which was the actual quantity loaded for the contract.
9. The date of default is determined to be on 26th November 2003.

## THE AWARD

Accordingly, we award the dispute in favour of Claimants and direct the Respondents to pay the Claimants the following within fourteen (14) days of this Award.

### 1. Price Difference

Purchase of Replacement Cargo	500.286 MT at US\$540.00 PMT	US\$270,154.44
Less: Contract Value	500.286 MT at US\$437.00 PMT	US\$218,624.98
Price difference		<u>US\$ 51,529.46</u>

Add interest at 8% per annum from the 26th November 2003 up to the date of this Award

### **Categories of Arbitration Cases**

2. If payment is not made within fourteen (14) days of demand being made by the Claimants pursuant to this Award, interest at 8% to accrue further from the date of demand up to date of payment.
3. We further award that the Respondents pay the costs of this arbitration proceeding as assessed by PORAM.