



Demurrage Claim



Case No. 7 – 2003

Claimants:	Sellers
Respondents:	Buyers
Product:	RBD Palm Olein and Crude Palm Stearin
Contract:	FOSFA 81
Matter in Dispute:	Demurrage Claims
Year of Award:	March 2003

PRELIMINARY ISSUES

1. In their written submissions, the Respondents raised two (2) preliminary issues namely:
 - a. The limitation of claims, and
 - b. Impartiality of the Arbitrators.
2. The Respondents request that the Arbitrators ensure that the reference made by the Claimants is within the period of limitation as applicable by laws of Malaysia.
3. The Respondents further submit that it is for the Claimants to prove by citing law that their claim is not barred by limitation. The Claimants cannot be allowed to take advantage of the ignorance of the Respondents about the Malaysian laws. Malaysian Arbitration Act 1952 is silent on the issue and therefore, it is more important for the Claimants to establish beyond doubt that their claim is within the period of limitation.
4. The Respondents explained that under the FOSFA Rules, there are stipulated limits for claiming arbitration for all issues including quality and monetary claims. As the contractual terms were on the basis of FOSFA 81, FOSFA 81 terms and conditions would apply.
5. The Claimants were of the opinion that it was for the Respondents to prove that the claim was time- barred.
6. Further, the Claimants reiterated that although the terms and conditions for the contract were on FOSFA 81 basis, there was a special provision that arbitration, if any, would under contract to be in Malaysia as per PORAM Rules of Arbitration and Appeal. That exception has overridden the FOSFA Rules. Under PORAM Rules, there is no limitation for filing of claims.
7. The Respondents informed the proceeding that they wish to withdraw the second preliminary issue regarding the impartiality of the Arbitrators.

FINDINGS

1. I note that the contract terms and conditions are as per FOSFA 81 but with the exception of the Arbitration Clause which is to be in Malaysia and under the PORAM Rules of Arbitration and Appeal.

2. The PORAM Rules are guided by the Malaysian Arbitration Act 1952 and the Malaysian laws where the statute of limitation is specified as 6 years.
3. Accordingly, I rule that the claims are not time-barred and rule that the arbitration should proceed. I then proceeded to consider the written submissions of both parties and noted the following:

CLAIMANTS' STATEMENT OF CLAIM

1. The Claimants submitted that demurrages were incurred under the said contracts. Respective demurrage invoices and supporting documents were forwarded to the Respondents. The quantum were as follows:

Contracts	Amount (US\$)
1	1,570.21
2	44,031.96
3	8,979.60
4	9,445.30
Total	64,027.07

2. In spite of repeated reminders, the Respondents neglected and / or failed to make payment for the outstanding demurrages totalling US\$64,027.07. During personal meetings and repeated telephone conversations, the Respondents gave repeated assurances that payment in full would be made shortly and that they just needed some time to overcome some financial tightness they were experiencing. At no stage did the Respondents ever deny liability.
3. Failing to reach settlement after a long period of time, the Claimants through their lawyers send a demand by facsimile dated 19th July 2002 to the Respondents. The Claimants' lawyers sent a further facsimile to the Respondents on 10th August 2002 providing details as requested by the Respondents. After exchanges of various communications, the Respondents, through their Director, replied by facsimile dated 6th September 2002. In this facsimile, the Respondents raised some counter-claims in regard to some other contracts between Claimants and Respondents. The important point to note in this facsimile is that the Respondents have, unequivocally, confirmed their acceptance of the demurrage liability for US\$61,314.44 against the claim of the Claimants for US\$64,027.07.

The Claimants' lawyers wrote back to the Respondents by facsimile dated 28th September 2002 stating that:

- a. The Claimants were prepared to accept US\$61,314.44 in full and final settlement provided immediate remittances were made; failing this, the Claimants' claim would revert to the full amount of US\$64,027.07.
- b. The Claimants denied liability for the counter-claims and pointed out that such counter-claims could not be made an issue herein as they related to completely different contracts. The Respondents were free to initiate arbitration against the Claimants under such contracts if they wished to.



4. Subsequently, there had been no effort on the part of the Respondents to settle the matter. This has forced the Claimants to initiate this arbitration against the Respondents.
5. The Claimants respectfully submit to the Arbitrators for a reasoned award and ask for relief for:
 - a. The demurrage outstanding for an aggregate amount of US\$64,027.07.
 - b. Interest on respective debit notes / invoices from the dates thereof until the date of payment at 18% per annum.
 - c. Costs, etc. of this arbitration.
 - d. Legal costs incurred by Claimants in the pursuance of these claims against the Respondents. Amount will be quantified in due course.
 - e. Any other amount that the Arbitrators, at their discretion, deem appropriate as exemplary damages to deter parties in the trade for committing similar breach of their obligations.

RESPONDENTS' STATEMENT OF DEFENCE

1. In the above statement of demurrage claims, the Claimants have included alleged demurrage in respect of one contract which is not the subject matter of the present proceedings. Also, in respect of their claim on Contract No.2 the Claimants have considered the quantity of invoice / Bill of Lading as 1,500 MT as against the actual shipped quantity of 1,200 MT. Such discrepancies are detailed in the following:
 - a. Claim of US\$1,5701.21 in respect of Contract 1 dated 6th December 2002. The factual position is that this demurrage of US\$1,570.21 was in respect of another contract dated 16th December 2002 for 1,000 MT which is not the subject matter of the present arbitration proceedings.
 - b. In proof of the above fact, reliance is placed on relevant commercial invoices dated 1st January 2003 and 16th December 2002 for 1,000 MT.
2. For claim of US\$44,031.96, this is in respect of Contract 2 dated 2nd April 2002; the Claimants have considered the quantity of shipment as 1,500 MT. The factual position is that the quantity actually shipped / invoiced was 1,200 MT as against 1,500 MT considered by the Claimants. As such the demurrage calculation should have been:

US\$44,031.96 x 1,200 MT = US\$35,225.57
(Instead of 1,500 MT at US\$44,031.96)

In proof of the above facts, reliance is placed on relevant Bills of Lading No. AB/X-J pertaining to 3 commercial invoices totalling 1,200 MT.

Bill of Lading CD/P-R dated 9th May 2002 for balance 300 MT does not pertain to Respondents but another company.

3. Based on the facts given in paragraph 2 above, only the following amounts of demurrage qualify for consideration:

Contracts	Claimed by the Claimants (US\$)	Qualify for Consideration (US\$)
1	1,570.21	NIL
2	44,031.96	35,225.57
3	8,979.60	8,979.60
4	9,445.30	9,445.30
Total	64,027.07	53,650.47

4. Out of the qualifying amount of US\$53,650.47, the Respondents admit their liability to the following extent.

Contracts	Qualifying Amount (US\$)	Amount admitted by the Respondents (US\$)
1	NIL	NIL
2	35,225.57	35,225.57
3	8,979.60	8,979.60
4	9,445.30	8,573.15
Total	53,650.47	52,778.32

5. Reason for admitting the lesser amount of demurrage for Contract 4 is that as the Claimants have claimed demurrage for 31 hours 16 minutes as against the actual demurrage time of 28 hours 31 minutes.
6. The admitted amount of demurrage as per above claim, had been set off by the Respondents against their lawful recoverable amount aggregating to US\$23,841.14 from the Claimants.
7. For the balance of US\$28,937.18, the Respondents have exercised their lien on account of dues aggregating to US\$70,896.34 owed by the Claimants to another group company of the Respondents.
8. It is admitted that at one point of time, the Respondents were agreeable to accept the demurrage liability for US\$61,314.44 but a final settlement could not be reached. The Respondents' offer was for the mutual cordial settlement in respect of all the issues between the parties and acceptance to the demurrage liability for US\$61,314.44 was not in isolation.
9. The Respondents submit to the Arbitrators for a reasoned award and request to rule in favour of the Respondents in the following terms:
- 9.1 No demurrage claim is payable by the Respondents, the same having been:
1. Set off against their lawful dues against the Claimants; and
 2. The Respondents having exercised their lien on the same against the lawful dues of their group company against the Respondents.
 - i. Legal cost to be quantified.



- ii. Costs, etc. of this Arbitration.

ORAL HEARING

During the Oral Hearing, both parties further presented their case on the said contracts.

a. Contract 1 – Invoice amount RM1,570.21

- A1. The Claimants admitted that this was an error and should relate to another contract. The Claimants requested the Respondents to allow them to include this contract in this proceeding.
- A2. The Respondents disagreed to the inclusion of any new contract into this proceeding.
- A3. In view of the Respondents' disagreement, the Claimants' agree to drop this claim from this proceeding.

b. Contract 2 – Invoice amount RM44,031.96

- B1. The Claimants advised that the contract was issued in the name of an Associate Company and / or Respondents.
- B2. In their contention, both companies are jointly and severally responsible for the contract in all respects. The contract may have been paid for partly by the Respondents and partly by their Associate Company but payment is an entirely different issue from contract liability. Payment can even be made by a third party and invoices may be issued to such party as per the requirements of the Letter of Credit but this cannot dilute the liability of the contracting party.
- B3. The Claimants feel that their claim should stand or alternatively they would not object if the Respondents agreed for the claim for the balance 300 MT (US\$8,806.39 as calculated by the Respondents) to be transferred to the other arbitration with the Associate Company.
- B4. The Respondents contend that at the time of contract the identity of the Buyers is left open. The contract could then be signed by either party who would then open the Letter of Credit. The party signing the contract and establishing the Letter of Credit would be deemed to be the Buyers.

c. Contract 3 – Invoice amount US\$8,797.60

The Umpire notes that the Respondents accept the claim.

d. Contract 4 – Invoice amount US\$9,445.30

The dispute revolves around the discrepancy in calculation of demurrage incurred.

FINDINGS

A. Contract 1

I note that the Claimants have agreed to drop this claim from this proceeding. Accordingly, I am not considering this claim

B. Contract 2

1. The phrase “and/or” imply joint and several responsibility and accountability of the contracting parties. As the Respondents have objected to pass the partial claim to the other contracting party, the Respondents will assume full responsibility of the claim.
2. I rule in favour of the Claimants.

C. Contract 3

Since there is no dispute, the Claimants’ claim stands.

D. Contract 4

I have calculated the demurrage as follows:

Total waiting time for 5,499.299 MT	76 hours 40 minutes
Pro-rated waiting time for 999.419 MT	13 hours 56 minutes
Time used for Discharging	29 hours 5 minutes
Total	<u>43 hours 1 minute</u>
<u>Less:</u>	
Laytime allowed	12 hours 30 minutes
Discharge stoppage for reheating	2 hours 30 minutes
Total	<u>29 hours 1 minute = 1.2090 day</u>

At US\$7,250 per day = US\$8,765.45

SUMMARY

I allow the following claim:

Contracts	Amount in US\$
1	NIL
2	44,031.96
3	8,979.60
4	8,765.45
Total	<u>61,777.01</u>

THE AWARD

Based on my findings, I therefore award in favour of the Claimants and direct the Respondents to pay the Claimants within fourteen (14) days the following amount:

	(US\$)	(US\$)
1. Contract 2	44,031.96	
Interest at 8%	<u>12,970.73</u>	57,002.69
2. Contract 3	8,979.60	
Interest at 8%	<u>2,592.03</u>	11,571.63

3. Contract 4	8,765.45	
Interest at 8%	2,516.76	11,282.21
Total		79,856.53

If payment is not made within fourteen (14) days for the date of this award, interest at 6% is to accrue from the date of this award until date of payment. I further award that the cost of this arbitration proceeding as assessed by PORAM to be paid by the Respondents.