# Dispute Over Existence Of Contract

## Case No. 9 – 2009

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| Claimants: | Sellers |
| Respondents: | Buyers |
| Product: | Crude 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: | Existence of Contract |
| Year of Award: | November 2009 |

### FACTS OF THE CASE

1. The Claimants claimed to have sold to the Respondents 6,000 MT of Crude Palm Olein (Edible) in bulk at a price of US$1,224.00 per tonne, FOB Port X for shipment during August 2008 via contract dated 23rd June 2008. The contract includes the clause under *"Other Terms"* to incorporate the terms of "PORAM/MEOMA FOB contract for processed palm oil contract in bulk currently in force to govern".

2. The Respondents denied having entered into the contract. By the denial of the Respondents, this dispute centres on the existence of the contract

### SUBMISSION OF CLAIMANTS

1. On 23rd June 2008, the Claimants claimed to have sold the said cargo to the Respondents through their brokers, "BB". The Contract provided for payment to be made by an irrevocable sight Letter of Credit to be established one (1) week before the nominated vessel's ETA or alternatively 100% by cash through telegraphic transfer (TT) before the commencement of loading of the cargo.

2. Claimants submitted that the Respondents, via "BB" verbally requested the shipment to be deferred from August to September 2008. The Claimants agreed but required the Respondents to establish the Letter of Credit by 1800 hours on 10th September 2008 Singapore time.

3. There was no reply received by 10th September 2008. The Claimants via "BB" sent a reminder on 12th September 2008 giving the Respondents until 17th September 2008 to establish the Letter of Credit. The Respondents failed to respond.

4. "BB" sent another email on 26th September 2008 notifying that the September 2008 shipment period was expiring and the Respondents were required to establish the Letter of Credit as the Claimants had fixed the vessel with ETA 5th – 10th October 2008.

5. Claimants further submitted that a meeting was held between "BB" and the Respondents on 18th October 2008 at the Respondents' office. The Respondents were said to have admitted during the meeting that "due to the market conditions they were in financial difficulties and could not perform the contract". However, the Respondents were said to have agreed to visit the Claimants during the first half of November 2008 to resolve all issues relating to the Contract. Emails were sent by "BB" to the Respondents confirming their meeting and also on their intended visit to Claimants' office. However, the Respondents did not reply to the emails. The meeting in the Claimants' office did not take place as planned.

6. By a letter dated 30th January 2009, the Claimants informed the Respondents that the Respondents had failed to complete the purchase and declared the Respondents in default and subsequently claimed damages.

7. The Claimants claimed to rely on the evidence of a broker (Mr X) from "BB" to prove that they entered into a valid and binding Contract for the sale of the cargo with the Respondents. The broker was said to have made a statutory declaration under Claimants' Country's Oaths and Declarations Act (Cap 211) on 23rd January 2009, attesting to the existence of the Contract. Mr X mentioned that he was dealing with one Mr Y of "CC Corporation" in Respondents' Country, who was claimed to be the broker (co-broker) for the Respondents (as Buyers).

**SUBMISSION OF RESPONDENTS**

1. The Respondents denied having entered into the Contract with the Claimants, and specifically denied the existence of the so-called contract.

2. The Respondents claimed to have no connection with "BB" and had not signed any contract. The Respondents denied the issues of contract, deferment and other correspondences. The Respondents asserted that there was no connection with "BB" and the Respondents had not done any business with "BB". The "meeting in Respondents' Country" was also claimed to be false and *mala fide*.

3. The Respondents further contended that the "alleged statutory declaration" by Mr X did not create any obligation on the part of the Respondents, as Mr X was not known to the Respondents. The Respondents contended that the co-broker was never appointed as their agent or broker. Respondents further said that co-broker "is not duly authorized by the Respondents' government to deal with import/export of indenting business". The Respondents strongly believed that the co-broker had fraudulently used the name of the Respondents, with ulterior motive, for making illegal gain out of the alleged import. The Respondents said that it had initiated criminal case in Bangladesh against the fraudulent acts of the co-broker.

**ARBITRATORS' OBSERVATION**

1. The further submissions by both parties cantered on the role of the "Mr X" from broker "BB" and "Mr Y" of "CC Corporation" in concluding the Contract. The admission of "BB" and the statutory declaration by Mr X to having concluded the business was later denied by Mr Y.

2. The other documentary evidence forwarded by the Claimants did not indicate that the business had in fact been concluded and some kind of trade confirmation been exchanged between the parties.

3. The incidental issues and documents raised, forwarded via email and the meeting and purported agreement between the parties were glaringly divided into two parts, namely (i) involving the Claimants and the broker who in turn communicated with the co-broker, and (ii) the silence on the part of the Respondents and the co-broker's inability to secure any form of acknowledgement from the Respondents to his enquiries / emails.

4. Whilst efforts were made to secure evidence that a contract had been concluded, the submissions by both parties have failed to indicate that the Contract had been agreed upon. Further, the events from the stage of negotiation until conclusion were only referred to in either verbal form, or limited to between the Claimants and their respective brokers. There was no reciprocal acceptance from the Respondents.

5. According to the submissions, the Respondents had indicated that they did not know the parties (Claimants and "BB") and had never done business with them before. The Claimants did not specifically deny this. There is also absence of the action by the Claimants to secure and confirm the trade in the most safe manner (considering it's their maiden trade), which is essential and necessary to later prove the trade's existence. This leaves us with doubt as to the proper handling to support the conclusion that the contract is in fact in existence.

6. The Claimants and Respondents were ultimately engaged in making allegations and countering those allegations as to the conduct and credibility of the parties including themselves. The Tribunal strongly feels that these after-events are just a product of their earlier failure in conducting the business transaction in a normal, secure and appropriate manner. These after-events in no way could prove conclusively that the contract has been concluded beyond any reasonable doubt.

**ARBITRAL TRIBUNAL'S FINDINGS**

1. The submissions by the Claimants centred on the existence of the contract by virtue of the confirmation of the business by the broker "BB" together with the broker's claimed confirmation to the co-broker (to which the latter was not in written basis).

2. The Claimants had relied principally on the evidence of the broker "BB", to prove that the transaction had in fact taken place and it is customary that such transactions in the Respondents' country were conducted in those manners without specific performance such as the exchange of copies of signed contracts and / or written agreements.

3. The Respondents continuously denied the existence of the contract and that the whole episode had been an attempt to victimize and discredit them.

4. The Tribunal identified the following three issues:

   i. The existence of the contract,

ii. The claims as submitted by the Claimants,

iii. The counter-claims as submitted by the Respondents

***The Existence of the Contract***

5. The customary practice of the trade is for the Sellers and Buyers to have direct negotiation or through brokers or their respective brokers. In this case, we conclude that four (4) parties were to have been involved, namely the Claimants as Sellers, the broker as an intermediary to the Claimants, the co-broker as an intermediary to the Respondents and the Respondents as Buyers.

6. The submissions provided us with proof of the contract existence between the Claimants and their broker, "BB". The involvement of the co-broker is deemed to have been limited initially to only "BB", as no reciprocal evidence existed to have connected the co-broker to the Respondents.

   In so far as the contract copy issued between the Claimants and the broker had been signed, the copy between the co-broker and the Respondents should have also been signed, and this would have conclusively affirmed the contract existence.

7. The conclusion of a contract practiced by the trade is evidenced by an exchange of contract document. In this case, without a signed contract, it would have been adequate to have a confirmation between the parties and / or at a later stage an exchange of communication relating to contractual execution. However, in this case, the broker and the co-broker did not secure the confirmation in any manner. The Tribunal finds this to be an unacceptable conduct which obviously had jeopardized the contract, if at all there was one.

8. The Tribunal would not speculate on the reasons for such conduct. The Tribunal therefore finds that all the submissions incidental to the behaviour of the parties and the subsequent actions taken either to prove their involvement, intention and denial or admission are irrelevant and would not alter the fact that the contract could not be proven to have existed.

9. In the same manner and related to the above-mentioned conduct, the purported request for shipment deferment by the Respondents, was also said to have been done on a verbal basis. We also find this to be an unacceptable practice as deferment is a major contractual term deviation and parties normally exchanged written agreement / acknowledgement on such an important matter.

10. The act of asking for deferment is part of executing the contract and a written request and acknowledgement by both parties is not only essential but would have implied the contract's existence.

    We find the Claimants and both the brokers were acting on unilateral basis and the Respondents' position was not related or connected in any way to the agreement involving the three parties. Even the witness (Mr X) during the Oral Hearing could not explain satisfactorily as to why there was no written evidence whatsoever on the contract before, during and after the so-called conclusion of the business. Nor was there any form of minutes or evidence so as to signify that the purported meeting in the Respondents' country had taken place save for submission of travel plan and document.

11. The Respondents continued to deny subsequent events that had purportedly taken place including the meeting in the Respondents' country. The Tribunal is again perplexed by the events that the parties made no effort to secure some kind of notes / minutes / confirmation that could have proven the events to have taken place. The Tribunal ruled that such conduct is a deviation and contrary to normal practice, which had resulted in the inability of the parties to prove the contract's existence.

12. The Tribunal finds that for reasons and submissions made before us, the contract was not concluded. The Tribunal having relied on facts presented and taking into account the contractual and customary practice of the trade, even at its minimum and loose form, a contract could be construed to have been concluded, if there exist a glimpse of proof such as a simple acknowledgement or a written and proven request even for change of a minor issue.

    The contract in itself need not be signed by both parties to prove its existence but the action would imply its existence. This we have not found to have existed in the case before us. The Tribunal therefore rule that the contract was not in existence and hereby dismiss the case.

***The Claims As Submitted By the Claimants***

13. The Claimants' claim for the sum of US$3,924,000.00 or alternatively damages to be assessed, interest, cost and such further or other relief as the Tribunal deems fit are also dismissed.

***The Counter-claims As Submitted By the Respondents***

14. The Tribunal could not consider the punitive damages as claimed by the Respondents and therefore dismiss them.

    The Tribunal, however considered the case to have been a burden to the Respondents who had incurred costs to prepare and attend the proceedings. The Tribunal rule that the Respondents had been compelled to defend themselves and therefore will, in exercising the absolute discretion conferred on it by Clause 24 of the PORAM Contract No. 2 to award additional damages, herewith allow the actual expenses incurred by the Respondents amounting to US$22,054.64 be compensated to the Respondents (the Claims document as submitted by the Respondents dated 15th September 2009).

    The Tribunal finds this discretionary award to be essential in safeguarding the interest of parties drawn into dispute where the existence of the contract is an issue but would limit them to reasonable amount with basis on the claims so as to mitigate losses.

**AWARD**

The Tribunal directs the Claimants to pay the Respondents the following:

1. US$22,054.64 to the Respondents.
2. Payment of the above to be made within fourteen (14) days of this Award otherwise interest at the rate of 8% per annum to accrue until the date of payment.
3. The cost of this Arbitration as assessed by PORAM.