



Failure to Issue Letter of Credit



Case No. 33 – 1989

Claimants:	Sellers
Respondents:	Buyers
Product:	RBD Palm Stearin
Contract:	PORAM Contract No. 5 – CIF Contract for Processed Palm Oil Products in Drums.
Matters in Dispute:	Failure of the Buyers to Establish the Letter of Credit Led to the Cancellation of the Contract.
Year of Award:	1989

MATTERS AT ISSUE

1. The Claimants claimed to have entered into a contract with the Respondents through an agent via telex and later confirmed whereby the Claimants sold and Respondents bought 2000 MT RBD Palm Stearin for shipment during the second half September 1988 and first half October 1988 at the price of US\$472 PMT CNF, Letter of Credit to be opened within seven days.
2. The Respondents failed to establish the required Letter of Credit by 5th October 1988. The Claimants then gave the Respondents a final one week allowance to establish the Letter of Credit.
3. On 17th October 1988, the Claimants were forced to cancel the contract at the price of US\$459 PMT CNF as the Respondents failed to establish the Letter of Credit.
4. The Respondents in their facsimile message dated 4th October 1988, indicated that they there were of the opinion that:

"The Claimants must prove that 'Company ABC' has acted as exclusive selling agent on their behalf and that their agent has given full details of their relationship with their principal from the very beginning to clarify and confirm their legal relationship with each other. Since there is no legal and direct contract made between the Claimants and us, it is not necessary for us to respond to any query from them".

This point is invalid because it was clearly stated in Company ABC's telex message to the Respondents dated 18th August 1988 that the Claimants were the Sellers and they were the agent.

5. The Respondents only informed the Claimants on 23rd September 1988, that the contract was made subject to import license approval by their customer, i.e. more than a month after the contract was made. The Respondents cannot introduce new conditions into the contract after such a long time.

6. It is customary in fast moving commodities market that confirmations of contracts are done via telex. The contract was confirmed by the Sellers (Claimants) through their agent on 18th August 1988 and it would be the responsibility of the Buyers (Respondents) to object to any inaccuracies if any. The Respondents did not raise any objection and on 22nd August 1988, the Respondents requested from company ABC the name of Claimants' banker. Further on 23rd August 1988 the Respondents telexed company ABC that they were returning the purchase contract.
7. The Respondents' explanation to company ABC's representative was that the contract could only be confirmed subject to import license approval in China. If this was a condition on the contract, the identity of the customer in China should be declared and discussed at time of contract.
8. As a whole, the Respondents' contentions that there was no legal and direct contract made between them and the Claimants. They claimed that since they did not sign and return the contracts to the Claimants, there should be no dispute and demanded that this case be dismissed.

ARBITRATORS' FINDINGS

- A. Based on the facts presented before us, our considered opinion and findings are:

That the following telex message dated:

- i) 18th August 1988, company ABC confirmed sale of goods with the Respondents,
- ii) 22nd August 1988, the Respondents sought from company ABC the Claimants' bankers,
- iii) 23rd August 1988, the Respondents informed company ABC that they would be returning the purchase contract, and
- iv) 21st December 1988, the Respondents requested from the Claimants via company ABC for an alternative settlement.

Show beyond reasonable doubt that there was a contract which the Respondents cannot claim otherwise.

- B. In our view there was a default by the Respondents. We consider the 17th October 1988 as the date of default. The PORAM Price Settlement Committee has determined that the price of RBD Palm Stearin FOB Malaysian Port (in used drums) on 17th October 1988 (date of default) to be US\$469 PMT. Adding the freight factor, the price of RBD Stearin CNF will be more than the contract price of US\$470.

As the Claimants are unable to satisfy us that they have suffered financial losses, we dismiss the Claimants claim and direct that the arbitration costs of this proceeding as assessed by PORAM, be paid equally by the Claimants and the Respondents.

The Claimants not being satisfied with the award, made an appeal against the said award.



THE APPEAL BOARD'S AWARD

In the matter of application from the Appellants for an appeal against an award of the Arbitrators dated 18th August 1988 for 2000 MT of RBD Palm Stearin CNF in used drums for shipment later half September 1988 / first half October 1988 between the Appellants (Sellers) and Respondents (Buyers);

We the undersigned duly appointed by the Management Board of PORAM as the Appeal Board to hear the said appeal and having reviewed the case, evidences and statements made by both parties, our observations are:

1. The Appellants were disputing the settlement price of US\$469 PMT, FOB Malaysian Port (in used drums) determined by the PORAM Price Settlement Committee and accepted by the Arbitrators, which subsequently led to the determination that no loss was suffered by the Appellants as the sale price was US\$472 PMT in used drums or equivalent to US\$448 PMT FOB Malaysian Port in used drums, freight being US\$24 PMT.
2. The Appellants claimed that the export price of RBD Palm Stearin in bulk as reported by PORLA on 14th October 1988 (the last traded day before 17th October 1988 – date of default) was US\$392.50 PMT for November 1988 and December 1988 delivery and therefore for October 1988 prompt shipment, the price of US\$390 PMT was considered by the Appellants as a reasonable one.
3. The Appellants have also indicated that the cost of used drums for packing RBD Stearin was US\$45 PMT at the time of the contract and at the time of default, and freight was US\$24 PMT. Hence, the Appellants contention that the CNF price on the day of default as estimated by them at US\$459 PMT was reasonable.
4. The Respondents on the other had claimed that there was no ground for the Appellants to claim / appeal on the case and the Respondents were of the opinion that the case should be closed.

Having reviewed the Arbitrators' award and on the basis of the facts presented before us and in the absence of any evidence to the contrary, we find that:

1. The Appellants appeal against the award of the Arbitrators be allowed as they have every right to do so.
2. Section 3, Sub-section II, 7 of the PORAM Rules of Arbitration & Appeal states that:
"The Appeal Board may by a simple majority, either confirm or vary the award, as it considers fit, by each of the members signing thereto and such award shall be final and binding on both parties"
3. The crux of the case is in determining the settlement price on the date of default, i.e. 17th October 1988.
4. The Appeal Board had taken into consideration and prices published by the PORLA in coming to its decision, after taking into consideration the following:
 - a. That normally, there are price differentials because of different grades / specifications of stearin products, and

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- b. That the price on 14th October 1988 seemed to be the closest to the date of the default and since November 1988 and December 1988 were priced at US\$392.50 PMT FOB, bulk basis, the Appeal Board views that the Arbitrators have erroneously fixed the settlement price at US\$469 PMT for stearin in used drums, bulk basis. The Appeal Board concludes that the applicable price should be based on US\$392.50 PMT FOB basis plus US\$45 PMT for second-hand drum charges plus US\$24 PMT for freight to arrive at US\$461.50 PMT CNF for stearin in second-hand drums.

THE AWARD

We accordingly vary the award of the Arbitrators and direct the Respondents to pay the Appellants within fourteen (14) days of the date of this award, the following:

2000 MT at contract price of US\$472 PMT	US\$944,000.00
<u>Less:</u> 2000 MT at US\$461.5 PMT the price determined by the Appeal Board to be the ruling price as on 17th October 1988	<u>US\$923,000.00</u>
	US\$ 21,000.00
<u>Plus:</u> Interest at 10% per annum (638 days)	<u>US\$ 3,670.68</u>
	<u>US\$ 24,670.68</u>

If payment is not made within fourteen (14) days of the date of this award, interest at 10% to accrue from date of award until date of payment.

We further award that the Respondents pay the costs of this appeal proceeding as assessed by PORAM.