

# Failure To Nominate Vessel



## Case No. 26 – 1991

Claimants:	Buyers
Respondents:	Sellers
Products:	RBD Palm Stearin
Contract:	PORAM Contract No. 2 - Joint PORAM/MEOMA FOB Contract for Processed Palm Oil and Palm Kernel Oil Products in Bulk
Matter in Dispute:	Nomination of Vessel was Short of the 14 Days Pre Advice; the Sellers declared the Buyers in default. <ul style="list-style-type: none"><li>– Was this within the Sellers' right as per the contract terms?</li><li>– Was the nomination in accordance with the terms of the contract?</li></ul>
Year of Award:	1991

### MATTERS AT ISSUE

1. The Claimants in their Statement of Claim stated that they had contracted a parcel of 500 MT RBD Palm Stearin in bulk at US\$206.50 FOB Malaysian Ports for shipment in December 1990 from the Respondents. All terms and conditions were as per the PORAM Contract No. 2 prevailing at time of purchase. The contract was concluded through a broker.
2. The Claimants claimed that on 17th December 1990 at the request of their Buyers, they had asked for an extension of the shipment period to January 1991 at a premium of US\$3.00 PMT. Respondents replied on 12th December 1990 that they could accommodate provided they were paid by 20th December 1990 a sum of US\$105,750.00 (500 MT x contract price plus store rental, interest and premium of US\$5.00 PMT) and the Claimants were to give a confirmation by 17th December 1990.
3. Claimants claimed that, in the meantime, whilst awaiting agreement from their Buyers on the Respondents' expressed conditions they tried to find alternative vessel to lift the cargo around 25th December 1990 or thereabouts and requested Respondents' confirmation of cargo readiness.
4. According to the Claimants, the brokers informed them that the Respondents would confirm cargo readiness upon sighting official nomination. Claimants alleged that Respondents subsequently confirmed verbally to load cargo on 19th December 1990. Claimants claimed that they notified Respondents they were awaiting vessel nomination and would revert as soon as possible.
5. On 30th December 1990, Claimants again requested for Respondents' assistance for a deferment of shipment into January 1991 at a premium of US\$5.00 PMT.
6. On 21st December 1990, Respondents held Claimants in default for breach of contract. Claimants were shocked at the action of the Respondents and claimed that they were talking to Respondents for an alternative arrangement.



7. Claimants claimed that via their telex of 21st December 1990, they had made certain proposals to settle the matter. On 22nd December 1990, the Claimants nominated 'XYZ' ETA 28th – 31st December 1990 because no reply was forthcoming from the Respondents on their telex. On 24th December 1990, Claimants requested for cargo readiness and requested reply by 1600 hours as the vessel was expected shortly. On the same day Respondents replied, that since they had already declared Claimants in default there was then no question of them accepting a vessel nomination. On 26th December 1990, Claimants informed Respondents that as a result of their action they had suffered financial losses.

The Claimants claimed the following losses from the Respondents:

a. Purchase Price	US\$206.50 PMT
Market Price (21st December 1990)	US\$243.00 PMT
Price differential	US\$ 36.50 PMT
Total loss incurred US\$36.50 x 500 tonnes	US\$18,250 PMT

- b. Interest at 12% per annum from 21st December 1990, up to date of payment.
- c. Costs of this arbitration proceeding.
- d. Other damages as the arbitration may deem appropriate.

8. The Respondents in their Statement of Defence denied having any verbal conversations with anyone to load the cargo at any time.

The Respondents also disclaimed any knowledge of what transpired between the Claimants and the brokers. The Respondents also stated that whatever arrangements the Claimants had with their sub-Buyers is of no concern to the Respondents. The Claimant's obligation was to nominate a vessel to the Respondents before the Respondents were obliged to load.

9. The Respondents' contention was that; since Claimants were already held in default, whatever proposals made by them, became irrelevant and immaterial, not of intention and if performance was not made, a breach would naturally arise whatever the intention of the other party. Also, the late nomination of the vessel 'XYZ' was contractually out of time and therefore imposed no obligation on the Respondents to load. If there was such a vessel, nomination could have been given to the Respondents before the expiry of the time limit allowed instead of putting forward numerous requests for extension.
10. The Respondents claimed that the nomination of 'XYZ' ETA 28th – 31st December 1990 made on 22nd December 1990 was invalid as it was contractually out of time as there was only 9 days pre-shipment notice instead of the mandatory 14 days as stipulated in the contract.
11. The Respondents also stated that Clause 3 "Nomination of Vessel" of the contract clearly stated that 14 days advance notice of a vessel nomination must be given within the contract period and if this condition is not complied with, the Sellers is entitled to hold the Buyers in default of the contract. A similar case was quoted, where the Court of Appeal held that as the Sellers' obligation to ship during June

was a condition, the Buyers' obligation to give notice of readiness should equally be treated as a condition without enquiry in particular cases as to whether delays had caused any serious consequences. Based on this judgment, a case the Respondents claimed to be similar to the present case, the Claimants had breached the condition of the contract by not giving 14 days' notice and were therefore, in default.

12. The Respondents in their Defence also stated that the revised PORAM Contract No. 2 Clause 3(ii) is an improvement of the old contract and implies that failure to comply with such provision amounts to a default. Clause 3 (ii) expressly states that failure to comply with such provision is deemed to be a default. Although the new PORAM Contract No. 2 was not the contract traded upon in this particular case, the Respondents wished to draw the attention of the Tribunal to the fact that PORAM had deemed it necessary to amend the old contract to make the intention clearer. Where a contract specifies a time limit, i.e. 14 days advance notice of shipment, this term in a FOB Contract is regarded in the trade as of such great and fundamental importance that any breach thereby goes to the root of the contract.

The Respondents, by reason of the Claimants breach of contract claimed against the Claimants:

- i. Normal damages
- ii. Costs
- iii. Such further or other reliefs or order as the Arbitral Tribunal deems fit.

### THE UMPIRE'S FINDINGS

Having given due consideration to the submission of both parties, I am of the opinion that:

1. The decision of this Award is based on an interpretation of the terms of the contract entered into between the parties. Reference made by the Respondents to legal judgments or to the revised PORAM Contract No. 2 was taken into account to support the Defence of the Respondents but could not be deemed to affect the terms and conditions on which the contract was concluded.
2. The dispute revolves around the determination of whether or not the holding of the Claimants to be in default by the Respondents on 21st December 1990 was within their rights as per the contract terms, and whether or not a nomination given by the Claimants on 22nd December 1990 was in accordance with the terms of the contract.
3. In my opinion as the Umpire, this issue depends on an interpretation of Clause 3 (ii) of the relevant contract which reads as follow:

*"If the Buyer or Intermediate Buyer fails to give such advance nomination the first Seller is not entitled to reject such nomination but is obliged to load the cargo only 14 days after the receipt of such nomination provided always such nomination is within the contract period".*



The following is the interpretation of the Arbitrators:

- 3.1 Did the Buyers (the Claimants) fail to give such advance nomination?  
Yes, the Buyers failed to do so.
- 3.2 Then what is the Sellers' (the Respondents) right?  
He has no right to reject a nomination but only the right to load the cargo 14 days after the receipt of such nomination (if a nomination is received).
- 3.3 Was such a nomination made by the Buyers even if not with a proper advance notice?  
Yes, the Buyers made a nomination on 22nd December 1990.
- 3.4 Was such a nomination for a shipment within the contract period?  
Yes, the nomination was for shipment between 28th – 31st December 1990.
4. I, thus, find that by holding the Claimants in default on 21st December 1990 and consequently rejecting the nomination of vessel on 22nd December 1990 the Respondents had not acted within their rights as per contract terms. Because of this premature action by the Respondents, the Claimants were not obliged to present the vessel as nominated; accordingly, the consequences of having to load outside the contract period remains only an academic question.

## THE AWARD

In view of the above, I award the case in favour of the Claimants and direct the Respondents to pay the Claimants the following:

### 1. Price difference US\$ / PMT

Contract price	206.50
Market price as at 24th December 1990	246.50
Difference PMT	39.50
Total price difference to be paid by Respondents to Claimants: (basis contract quantity 500 MT)	<b>US\$19,750.00</b>

### 2. Interest

Interest on US\$19,750.00 per annum, i.e. US\$1,281.32

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

### 3. Costs

Costs of this arbitration proceeding, as determined by PORAM, are to be paid by the Respondents.

## APPEAL AWARD

The Respondents appealed against the Umpire's Award. The Award issued by the Board of Appeal is as follows:

## Categories of Arbitration Cases

In a matter of application by the Appellant for an appeal against an award of arbitration issued in Malaysia on a contract for 500 MT of RBD Palm Stearin in bulk for delivery in the month of December 1990 between the Appellants and the Respondents; We the undersigned dully appointed by the Management Board to hear the said appeal and having deliberated on the facts so presented in the form of documentary and oral evidences and having reviewed the case, award, evidences and statements by both parties, our findings are:

The main contention of the Appellants here is that the Respondents had failed to give them the required advance notice of 14 days.

Going back to Clause 3 (ii) a very relevant part of the clause to this case which reads:

*"If the Buyer or intermediate Buyer fails to give such advance nomination, the first Seller is not entitled to reject such nomination but is obliged to load the cargo only 14 days after the receipt of such nomination provided always such nomination is within the contract period".*

The Respondents, on 22nd December 1990, nominated 'XYZ' ETA 28th – 31st December 1990. The Respondents therefore failed to give the required advance notice of 14 days. The contract however, clearly says (Clause 3 (ii) that the *"Sellers is not entitled to reject such nomination but is obliged to load the cargo 14 days after the receipt of such (late) nomination."*

The 'XYZ' was nominated on 28th – 31st December 1990 which was within the contract period. The nomination had complied with the contract and therefore was valid. If the nomination fell outside the contract period, the Sellers could reject it. The Sellers were "obliged to load the cargo only 14 days after the receipt of such nomination". If the vessel had to work out the 14 days, it would be for the account of the Buyers. However, the contract did not allow the Sellers to call the Buyers in default.

The Appellants had not satisfied us as to how they had the right on 21st December 1990, when the contract was still valid, to declare the Buyers in default.

In view of the above, we dismiss the Appellants appeal. We also award that the costs of the appeal as assessed by PORAM be paid by the Appellants.