



Failure To Deliver Cargo



Case No. 18 – 1992

Claimants:	Buyers
Respondents:	Sellers
Products:	Malaysian Crude Palm Kernel Oil (CPKO)
Contract:	MEOMA II Contract – Domestic Contract for Malaysian Crude Palm Kernel Oil
Matters in Dispute:	Non-Delivery of CPKO within the Contract Period.
Year of Award:	1992

The Arbitrators having failed to reach an agreement have referred the dispute to the Umpire. This is an umpire's award.

POINTS AT ISSUE

1. The Claimants and the Respondents entered into two contracts for the purchase / sale of CPKO in accordance with the terms and conditions as specified under MEOMA II.
2. Both the contracts were for the delivery of CPKO in the month of September 1991.
3. The CPKO was not delivered at any time. The Claimants then requested for deliveries from the Respondents by telex dated 18th December 1991.
4. The Respondents by telex of 24th December 1991 informed the Claimants that:
"We are unable to deliver the CPKO as per your delivery schedule due to long overdue of contractual terms and conditions and also shortage of kernels supply. Therefore, we will inform you about the deliveries or to do a washout on the said contracts".
5. Via telex dated 26th December 1991, the Claimants requested the Respondents to provide a specific delivery schedule or, alternatively, proposed a "washout on prompt basis".
6. Via telex also dated 26th December 1991, the Respondents informed the Claimants that they are not agreeable to settlement on prompt basis and it would be fair to base the settlement on the price at end September 1991. The Respondents alleged further that the Claimants had defaulted the contract.
7. Via telex dated 26th December 1991, the Claimants rejected the alleged default and had again requested for specific delivery schedule. Claimants also referred to a meeting between the Respondents and themselves on 12th September 1991 and contended that it was mutually agreed to defer delivery of above mention oil to a later date.
8. Thereafter, there were several communications between the two parties, including correspondence through solicitors, each party sticking to their above stated stand.

9. Having failed to reach an amicable settlement, the Claimants initiated arbitration proceedings.

UMPIRE'S FINDINGS

Having considered the submissions of both parties in writing as well as an Oral Hearing on 8th April 1992, I find that:

1. The dispute revolves around the submission of the Claimants that at a meeting held on 12th September 1991, the Respondents had agreed for a deferment of deliveries whereas the Claimants maintained that at the said meeting no such agreement was reached.
2. In the normal course of business, such agreement, if any, would have been put in writing. In the absence of any such written agreement, I rely upon the subsequent conduct of both parties to reach my decision.
3. It is rather unusual for a sale / purchase contract to have remained unfulfilled for a period of 3-4 months (from September 1991 to December 1991 in this case) for neither party to have put into writing what their intentions were in relation to the contracts.
4. The contracts stated that *"Non- collection/delivery of the oil by the end of the extended period shall constitute a default, unless otherwise determined by mutual agreement between Sellers and Buyers"*. In the present case, it is not clear whether it was the Claimants (as Buyers) who failed to take the delivery or it was the Respondents (as Sellers) who failed to make delivery. To establish their respective rights they should have written to the other about their intentions after the last date of delivery had expired. Since neither party did so, it became difficult to establish who was at fault. It is not just the responsibility of one party but of both parties to take action to perform the contract. Neither did the Claimants inform the Respondents where the oil was to be delivered nor did the Respondents take steps to find out from the Claimants where the oil was to be delivered.
5. Accordingly when on 18th December 1991, the Claimants requested for deliveries, I am forced to presume that neither party had any intentions in October 1991 (i.e. after the end of the contractual delivery period). This is further borne out by the telex dated 24th December 1991 from the Respondents wherein they claimed their inability to deliver the oil for various reasons. If it was their view that the Claimants were already in default, they should have stated so clearly in this telex and not give reasons for their inability to give deliveries.
6. I find that the request by the Claimants on 18th December 1991 for deliveries has been accepted as being in good order. The Respondents by not delivering the oil have committed a breach of the contracts. However, I am unable to accept the delay by the Claimants in buying against the Respondents on 24th March 1992. As the Respondents had made their position clear by 26th December 1991 the Claimants should have taken immediate steps to protect their interests instead of waiting till 20th March 1992 to buy against the Respondents. The date of default by the Respondents is deemed to be 26th December 1991 and the Claimants are allowed



their claim based on market prices on 30th December 1991 (being 2 working days after date of deemed default).

The market price as determined by PORAM for 30th December 1991 is RM1637 PMT. In the normal circumstances the award would have been based on this market price. However, since the Claimants have only suffered lesser losses as submitted in their claims, I base my award on such basis.

THE AWARD

Accordingly, I award the dispute in favour of the Claimants and direct the Respondents to pay the Claimants within fourteen (14) days of the date of this award the following:

Market price as at 25th March 1992 (RM1,554.00 PMT x 750 MT)	RM1,165,500.00
<u>Less contract price at:</u>	
250 MT x RM905.27	RM236,317.50
500 MT x RM1,091.28	RM545,640.00
	RM 771,957.50
	RM 393,542.50
Plus interest at 10% per annum from 26th March 1992 to date of this award	RM 47,548.56
Total	RM 441,091.06

If payment is not made within fourteen (14) days of the date of this award, interest at 10% per annum to accrue from date of award until date of payment. The date of this award shall be taken as from the date of dispatch of this award by PORAM.

I further award that the costs of this arbitration proceedings shall be borne equally by both parties.

The Respondents not satisfied with the Award filed an appeal with PORAM against the said Award.

THE APPEAL BOARD'S AWARD

In a matter of application from the Appellants for an appeal against an amended award of the Umpire dated 9th June 1992 issued in Kuala Lumpur on contracts for 250 MT of Malaysian CPKO and 500 MT of Malaysian CPKO, both for deliveries in bulk in September 1991 between the Appellants (Sellers) and Respondents (Buyers)

We, the Appeal Board, appointed by the Management Board to hear the said appeal, and having deliberated on the facts, documentary evidence, and having reviewed the case, award, evidences and statements by both parties are unable to reach a total consensus on our findings.

This award, is thus given on a simple majority (2 agreed and 1 disagreed).

The Appellants have earned our sympathy but they have not given new reasons to alter

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the material findings of the learned Umpire. We wish to add, inter alia, that if the Appellants wish to consider the contracts as cancelled, there was no written notice of cancellation being served on the Respondents. In the absence of such notice, it would be unfair to penalize the Respondents. Moreover when the Respondents requested for delivery on 16th December 1991 the Appellants only responded on 24th December 1991. Not only did the latter refer to the contracts as “outstanding contracts” but also stated that “Therefore, we will inform you about the deliveries or to do a washout of the above mention contracts”. The above documentary evidences are explicit in confirming the status of the contract.

The Appellants were unhappy with the Respondents over outstanding matters in other contracts between themselves. However, every contract must be considered as separate and distinct. The Appellants cannot introduce matters of other contracts into the contracts in question. If there had been late payments in other contracts, such issues are irrelevant to the matter at hand.

The contract under dispute calls for payment after delivery. Under such circumstances, it is of paramount importance for the Appellants to show material evidences of its intention to effect delivery. In this case, the failure of the Appellants to tender or serve notice of delivery within the original contractual period, has effectively waived its right of default on the Respondents.

We agree with the Umpire that it is unusual for the contracts to be prolonged for such a long time without proper documentation. The Respondents are not entirely faultless in this respect. Taking all the above factors into consideration we consider it appropriate to waive the Umpire’s award of interest payment to the Respondents. This is further justified because we believe that the Appellants had the goods to deliver and due consideration should be given to this.

We, thus, vary the Umpire’s award by awarding the sum of RM393,542.50 only to the Respondents. If payment is not made within fourteen (14) days of the date of this award, interest at 3% per annum to accrue from date of award until date of payment. The date of this award shall be taken as from date of dispatch of this Award by PORAM.

We further award that the costs of this appeal proceeding to be borne equally by both parties.