



6th **LAWASIA** International Moot

MOOT PROBLEM 2011



Organiser of the LAWASIA International Moot Competition

ASTORIA PRODUCE COMPANY
(CLAIMANT)

V

ROLGA FARMER'S EXCHANGE
(RESPONDENT)

MOOT PROBLEM

The Rolga Farmer's Exchange [RFE] is an agricultural cooperative organized under the laws of Rolga, a large tropical island in the Western Pacific. One of its major export crops is bananas. Lenore Rocco is RFE's General Sales Manager.

Astoria Produce Company [AP] is a major distributor of produce to retail grocery stores throughout Astoria – a large industrialized country approximately 6,000 nautical miles from Rolga. Michael Vogel is AP's Chief Purchasing Agent and Dr. Basilio Bartolo, PhD, is its Director of Food Safety.

On July 15, 2010, Mr. Vogel contacted Ms Rocco by telephone [AP had never done business with RFE in the past] and ordered a large quantity of bananas. Later that day, Ms. Rocco sent a confirming Bill of Sale (as an email attachment) to Mr. Vogel which indicated that the shipment would be made "FOB Rolga City", the major port in Rolga. It also contained the following forum selection clause:

Any dispute, controversy or claim arising out of this contract shall be settled by arbitration in accordance with the Rules of the Western Pacific Regional Centre for Arbitration. The number of arbitrators shall be one. The place of arbitration shall be Rolga City.

An exchange of emails followed – see Exhibits #1 and #2

Mr. Vogel subsequently signed ["Accepted, M. Vogel/Astoria Produce"] and returned the Bill of Sale having revised the original forum selection clause as indicated:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Rules of the ~~Western Pacific Regional~~ Kuala Lumpur Regional Centre for Arbitration. The number of arbitrators shall be ~~one~~ three. The place of arbitration shall be ~~Rolga City~~ Kuala Lumpur.

RFE arranged for shipment on the M/S PINAFORE which arrived in Rolga City on September 20, 2010; loading of the bananas began the following day. The captain of the Pinafore, Renas Vermelho, signed a clean bill of lading prepared by RFE for the cargo on September 23, 2010. The Bill of Lading contained the following *Special Instructions*: "This cargo of bananas must be stored in a cool, dry location with good circulation to prevent spoilage."

AP had previously furnished a letter of credit covering the shipment and when RFE presented the required documents to the Farmers Bank of Rolga (the “confirming bank”) on September 30, 2010; RFE was paid in full for the bananas.

The PINAFORE departed early on the morning of October 1, 2010. It arrived at Astoria City on the night of November 24, 2010. Before unloading, Dr. Bartolo, accompanied by an inspector from the Astorian Department of Agriculture inspected the shipment. Some of the bananas were found to be ripe or ripening. The most ripening occurred to the bananas stored in the number #2 hold where the bananas had been packed in boxes. Ripening was less prevalent in the number #1hold, where the bananas had been stowed [hung] by the stem.

John Sparrow, a professional Maritime Surveyor retained by Astoria Produce, inspected the bananas the next day and reported that:

Approximately 30% of the bananas were ripe or ripening. The normal and expected percentage of ripe or ripening bananas reaching the port of destination is from 3% to 5%; more than 10% is considered excessive. The ripened state of the bananas was clearly due to the high temperatures at which they had been transported.

In the No. 2 hold the cartons of bananas were tightly stowed. No slots or wooden separators had been used to facilitate the flow of air between the cartons. The cartons were stowed an average of eight tiers high in both compartments of the No. 2 hold. No space was left between the cartons.

The bananas were properly packed in boxes or cardboard cartons especially designed for and used in the transporting of bananas. These cartons were well ventilated and their construction in no way caused or contributed to the damage to the bananas.

Based on Mr. Sparrow’s report and his own observations, Dr. Bartolo recommended that the entire shipment of bananas be rejected. After meeting with AP’s management, Mr. Vogel sent an email to Ms Rocco on November 26, 2010 informing her:

“The bananas arrived yesterday. We had a professional surveyor inspect them and he found excessive ripening. [Report Attached]. On the basis of Mr. Sparrow’s report and our own inspection, we have no choice but to reject the entire shipment. Please advise the Captain of the M/S Pinafore *immediately* as to how you would like the bananas to be disposed of. We expect a full refund of the purchase price within 30 days.”

Ms Rocco immediately replied (by email):

“We certainly regret that your bananas did not arrive in pristine condition but we are certain you could have sold most, if not all, of the cargo. You are certainly aware that fully ripe bananas can be sold to many of the numerous commercial bakers in your country who use them to make banana bread and muffins.

We have no intention of paying for the damage to the bananas as our responsibility ended when the bananas were loaded onto the M/S Pinafore.

As the Pinafore had other “ports of call,” Captain Vermelho had no option but to arrange to have the bananas unloaded and stored in a nearby warehouse. He notified Mr. Vogel that he needed to pick up the bananas within forty eight hours as the warehouse would not be responsible for the goods if they remained longer. The following day, an inspector for the Astoria Department of Agriculture found that 54% of the bananas were over-ripe and the remainder ripe or ripening. Again, Mr., Vogel was notified but refused to dispose of the bananas. The following day the warehouse owner attempted to salvage the non-ripe bananas but concluded that by then the process of sorting and repacking had become so difficult as to render it economically unfeasible. Two days later, the Department of Agriculture supervised the dumping of the entire shipment as waste.

The Arbitration

On June 1, 2011, Astoria Produce commenced this arbitration by filing a request for arbitration with the Kuala Lumpur Regional Centre for Arbitration [KLRCA or “The Center”] pursuant to Rule 3 of the UNCITRAL Arbitration Rules (2010). It designated Bernard Bodd as its party appointed arbitrator. The Center’s Director notified RFE of the filing of the Request for Arbitration on June 15, 2011 and enclosed a copy of the KLRCA 2010 Rules. The Director requested that RFE appoint its party appointed arbitrator within 30 days. {FRE does not deny that it received both notices.} After 45 days had elapsed without RFE making an appointment, the Director appointed Riska Benti, a prominent Rolgan attorney as the second arbitrator and Judge John Chong, the former Chief Justice of Malaysia as the presiding arbitrator. {Neither party questions the competence or integrity of any of the three arbitrators.}

An initial hearing was scheduled on 15 August 2011 and both parties received timely notice. Less than an hour before the hearing was scheduled to begin, the Director received an e-mail from Ms Rocco stating that RFE would not appear as it intends to challenge the authority of the tribunal to hear the dispute and was concerned that an appearance would be viewed as a waiver of its right to do so.

The Director then advised both parties that the Tribunal would entertain challenges to its jurisdiction at another hearing to be scheduled on 10 October 2011 and that an appearance by a representative of RFE at that hearing would not be treated as a waiver of its objection to the tribunal authority. Shortly thereafter, a representative of RFE notified the Director that it would be represented by an attorney at the October hearing who should be appointed as its "party appointed arbitrator." The Director immediately responded: "I regret that it is much too late to substitute your attorney for Ms. Benti as a member of the arbitration panel."

Subsequently, both parties learned that a fire had destroyed the Pinafore while at sea and that its owners are now insolvent. They agree that "this unfortunate event would eliminate the possibility of either AP or RFE seeking any damages from the owners of the M/S Pinafore and/or from the vessel itself for mishandling the cargo of bananas."

At the request of the Director, the Presiding Arbitrator conferred by phone with the other two arbitrators and submitted the following "Hearing Agenda" for the October hearing:

1. Does the KLRCA have the authority to resolve the dispute between the parties, specifically, was there an agreement between the parties to submit this dispute to it?
2. Were the three arbitrators properly appointed, specifically, was RFE improperly denied the opportunity to select its "party appointed arbitrator" and was the Presiding Arbitrator or Chairman improperly appointed?
3. Does the arbitration panel have the authority to impose sanctions in the form of a fine on RFE for failing to appear at the initial hearing and/or for not providing adequate notice that it would not appear and, assuming it does, what sanction would be appropriate under the circumstances?
4. What law or legal principles apply to this dispute? {The parties advised the Tribunal that it is REF's position that general principles of international law, i.e., UNIDROIT, should govern this dispute while AP asserts that the United Nations Convention of the International Sale of Goods should apply.}
5. Did the shipment of bananas arrive at its destination in an unsatisfactory condition due to improper storage during the voyage from Rolga to Astoria and, if so, does this constitute a breach of the seller's obligation under the contract between the parties?
6. Did either party have a legal obligation to attempt to sell the bananas – or a portion of them – soon after the Pinafore docked at the Port of Astoria?

After these issues are resolved, the Tribunal plans to schedule another hearing to consider, inter alia, the amount of damages owed by either party; which party will be responsible for the warehouse and disposal costs; which party will be responsible for the cost of the hearings (fees and costs); the amount of any fine to be imposed on RFE; and any other matters not resolved in the October hearing. All have agreed that these issues should not be raised at the October hearing.

Exhibit #1 e-mail from Michael Vogel [AP] to Lenore Rocco [RFE]

Date: 1 August 2010

From: Michael Vogel

To: Lenore Rocco

Subject: Green Bananas

We are looking forward to a long and mutually prosperous relationship.

We understand that you have arranged for shipment on the M/S PINAFORE which should be arriving at Rolga City by 20 September. We have never used this carrier before and, as you well know, bananas ripen quickly and we must receive them in an unripened (still green) condition in order to sell them to the local retail stores which are our customers. They must be stored in a cool location on the ship where the temperature will not exceed 12 or 13°C.

You are obviously in a better position to insure proper handling and storage of the bananas than we are – 6,000 miles away here in Astoria. We are counting on you to make sure the bananas arrive in excellent condition.

Please call if you have any questions or any problems develop.

Mike

Exhibit #2 e-mail from Lenore Rocco [RFE] to Michael Vogel [AP]

Date: 2 August 2010

From: Lenore Rocco

To: Michael Vogel

Subject: Green Bananas

Don't worry – we fully understand your concern. We are experienced in ocean shipping and have never have had a problem. We will make sure that the Captain is well aware of the special care that our lovely bananas must receive while under his protection.

Regards,

Lenore

Appendix A Governing Law

Conventions: Assume that both countries – Astoria and Rolga – are contracting parties to the following UNCITRAL conventions and Model Laws, *unless otherwise indicated*:

1. Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974, as amended by the Protocol of 11 April 1980 [Rolga has neither signed nor ratified this Convention, i.e., it is NOT a contracting party.]
2. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)
3. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) [Rolga has neither signed nor ratified this Convention, i.e., it is NOT a contracting party.]
4. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Both Astoria and Rolga have adopted the following model laws, i.e., they are now part of the domestic (internal) law of both countries.

- a. UNCITRAL Model Law on International Commercial Arbitration (1985)
- b. UNCITRAL Model Law on International Credit Transfers (1992)
- c. UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)
- d. UNCITRAL Model Law on Electronic Commerce (1996)
- e. UNCITRAL Model Law on Electronic Signatures (2001)

Other International Agreements

Shippers and freight forwards in both Astoria and Rolga commonly use ICC INCOTERMS, even when they are not specifically identified as such.

Domestic Law

Rolga is a civil law jurisdiction; it generally applies UNIDROIT principles. It has recently enacted a law governing which is identical to European Community Regulation No 593/2008 on the law applicable to contractual obligations.

Astoria is a common law country; it has adopted the American Law Institute Uniform Commercial Code; it also applies U.S. Restatement (Second) of Conflict of Laws.

Appendix B

The delicate nature of bananas necessitates special care in transportation. Bananas customarily are cut in a hard green state and are shipped under such refrigeration as will delay the ripening process. The ripening temperature for bananas is generally a pulp temperature of approximately 15°C. Banana shippers regard a transport temperature of about 12°C as appropriate. Temperatures below 10°C have a deleterious chilling effect on the fruit. The general effort is to transport the bananas at a low temperature, retarding the ripening process, but safely above the level at which the fruit is chilled.

The ripening process of the banana produces several effects on the fruit, including a color change from grass green to yellow, and, ultimately, to brown. Ripening bananas exude, *inter alia*, ethylene gas and heat, both of which tend to accelerate the ripening of other bananas in proximity.

Tuesday, 08 March 2011