



APPEAL AWARD NO.3781
AWARD OF ARBITRATION NO. 12-173

FTC UZDON, Tashkent (BUYERS)
(APPELLANTS)

= V =

ROMAK S.A. Geneva (SELLERS)
(RESPONDENTS)

Dated:



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APPEAL AWARD NO.3781

The Board of Appeal comprising R.A.Barber, J. St. C. Gainer, C.A.Koppen, M.P.Meadows (Chairman) , W.Schenk, elected to hear the Appeal presented by FTC Uzdon (Appellants) against the Award of Arbitration of R.J.Short, J.D.Allen, and F.M.Aldridge No. 12-173 dated 22nd August, 1997 considered only the question of Appellants being out of time in lodging their Appeal and the discretion vested in the Board for extending the time limit **DO HEREBY FIND and AWARD** as follows:-

1. THE CONTRACT

DATE: ON OR ABOUT 10th JULY 1996

QUANTITY: UP TO 50,000 MT AT SELLER'S OPTION

COMMODITY: KAZAK ORIGIN MILLING WHEAT

**SHIPMENT/
DELIVERY:** DELIVERY PERIOD IS TILL DECEMBER 31ST.1996
EARLIER COMPLETION OF SHIPMENTS IS ALLOWED

PRICE: USD.235.00 PER MT C.I.P. (CARRIAGE AND INSURANCE PAID)

ARBITRATION: THE PARTIES WILL ENDEAVOUR TO SETTLE ANY DISPUTES IN A FRIENDLY WAY, BUT IN CASE IT SHOULD BE IMPOSSIBLE TO REACH A MUTUALLY ACCEPTABLE SOLUTION OF ANY SUCH DISPUTES



THE CASE TO BE SUBMITTED FOR ARBITRATION TO GAFTA LONDON FOR FINAL AND BINDING ARBITRATION AS PER RULES OF GAFTA NO. 125.

THE RELEVANT RULES OF GAFTA NO. 125 ARE AS FOLLOWS:-

8: **RIGHT OF APPEAL**

8:2 IF ANY PARTY BE DISSASTIFIED WITH AN ARBITRATION AWARD, A RIGHT OF APPEAL SHALL LIE TO A BOARD OF APPEAL PROVIDED THAT THE FOLLOWING CONDITIONS ARE COMPLIED WITH:-

NO LATER THAN 12 NOON ON THE 30TH CONSECUTIVE DAY AFTER THE DATE OF THE AWARD OF ARBITRATION THE APPELLANTS SHALL:-

GIVE A WRITTEN NOTICE OF APPEAL TO THE ASSOCIATION;

GIVE A NOTICE OF HIS INTENTION TO LODGE AN APPEAL TO THE OTHER PARTY WITH COPY TO THE ASSOCIATION;

AND (SUBJECT TO THE PROVISIONS OF RULE 14) MAKE PAYMENT TO THE ASSOCIATION OF THE APPEAL FEE STATED ON THE AWARD OF ARBITRATION ON ACCOUNT OF THE COSTS FEES AND EXPENSES OF THE APPEAL.

10: **APPEAL PROCEDURE**

10:9 IF THE BOARD OF APPEAL SHALL DETERMINE THAT ANY OF



THE CONDITIONS IN RULES 8 TO 14 HAVE NOT BEEN COMPLIED WITH, IT MAY IN ITS ABSOLUTE DISCRETION EXTEND THE TIME FOR COMPLIANCE (NOTWITHSTANDING THAT THE TIME MAY HAVE ALREADY EXPIRED) OR DISPENSE WITH THE NECESSITY FOR COMPLIANCE AND MAY PROCEED TO HEAR AND DETERMINE THE APPEAL AS IF EACH AND ALL OF THOSE CONDITIONS HAD BEEN COMPLIED WITH. THE DETERMINATION BY THE BOARD OF APPEAL OF ANY MATTER TO WHICH THIS PARAGRAPH APPLIES SHALL BE FINAL, CONCLUSIVE AND BINDING.

14 **CURRENCY REGULATIONS**

14:1 IF AN APPELLANT IS PRECLUDED BY CURRENCY REGULATIONS FROM PAYING ANY MONEY DUE TO BE PAID BY HIM AS REQUIRED BY RULE 8, AND NOTIFIES THE ASSOCIATION IN WRITING (A) IN THE CASE OF PAYMENT OF THE APPEAL FEE WHEN GIVING NOTICE OF APPEAL AND (B) IN THE CASE OF ANY FURTHER SUM BEING CALLED FOR UNDER RULE 8:2 (E) OR BEING DIRECTED TO BE PAID UNDER RULE 10:8, WITHIN 9 CONSECUTIVE DAYS OF THE MONEY BEING DEMANDED, ACCOMPANIED IN EVERY CASE BY EVIDENCE FROM A BANK THAT HE HAS ALREADY MADE APPLICATION FOR THE TRANSFER OF THE REQUIRED SUM, HE SHALL BE ENTITLED TO AN EXTENSION OF UP TO 35 CONSECUTIVE DAYS FROM THE DATE WHEN THE SAID PAYMENT BECAME DUE IN WHICH TO PAY THE SUM.



15. **DEFAULTERS**

15:1 IN THE EVENT OF ANY PARTY TO AN ARBITRATION OR AN APPEAL HELD UNDER THESE RULES NEGLECTING OR REFUSING TO CARRY OUT OR ABIDE BY A FINAL AWARD OF THE ARBITRATOR(S) OR BOARD OF APPEAL MADE UNDER THESE RULES, THE COUNCIL OF THE ASSOCIATION MAY POST ON THE ASSOCIATION'S NOTICE BOARD AND/OR CIRCULARISE MEMBERS IN ANY WAY THOUGHT FIT NOTIFICATION TO THAT EFFECT. THE PARTIES TO ANY SUCH ARBITRATION OR APPEAL SHALL BE DEEMED TO HAVE CONSENTED TO THE COUNCIL TAKING SUCH ACTION AS AFORESAID

17. **DISCRETION TO EXTEND TIME LIMITS**

17:1 WHENEVER IT SHALL APPEAR TO THE COUNCIL THAT BY REASON OF A STATE OF WAR, WAR-LIKE OPERATION, STRIKE, LOCKOUT, RIOT OR CIVIL COMMOTION, PARTIES TO CONTRACTS WHICH HAVE BEEN OR MAY HEREAFTER BE MADE INCORPORATING THESE RULES, HAVE BEEN OR MAY BE PREVENTED FROM EXERCISING ANY OF THEIR RIGHTS WITHIN THE TIME LIMITS PRESCRIBED BY THESE RULES, THE COUNCIL SHALL HAVE, AND SHALL BE DEEMED ALWAYS TO HAVE HAD, THE POWER TO EXTEND ANY OF SUCH TIME LIMITS AT ANY TIME AND FROM TIME TO TIME AND TO ANY EXTENT NECESSARY TO ENABLE JUSTICE TO BE DONE BETWEEN THE PARTIES. SUCH EXTENSION MAY BE MADE GENERALLY OR WITH REFERENCE TO ANY PARTICULAR DISPUTE.

IN THE EVENT OF THE COUNCIL DECIDING SO TO EXTEND ANY SUCH TIME LIMITS WITH REFERENCE TO ANY PARTICULAR DISPUTE, NOTICE THEREOF SHALL BE GIVEN BY THE COUNCIL TO SUCH OF THE PARTIES TO THE CONTRACT AS MAY BE AVAILABLE.

2. **THE FACTS**

- 2:1 The Award of the first tier Arbitrators was dated 22nd August 1997 and inter-alia carried the following notice:-
" In the event of an Appeal being lodged against this Award, Appeal fee for Members and Non-Members shall be £1750.00"
- 2:2 The Award of the first tier Arbitrators was received by the Appellants in this Appeal on 26th August 1997.
- 2:3 Upon application to GAFTA by the Claimants in the Arbitrators' Award, on 3rd November 1997 a letter was addressed to Appellants advising them that it had been reported that a breach of the Arbitration Rules had been committed in that the Arbitrators Award had not been complied with and, a request was made for written confirmation by 3rd December 1997 that Appellants had fully complied with the terms of the Award, failing which the matter would be referred to the GAFTA Council who would be entitled to implement Rule 15 of the Arbitration Rules without further notice.
- 2:4 On 19th December 1997 GAFTA wrote a further letter to the Appellants advising them that as requested by the Claimants in the first tier Arbitrators' Award the GAFTA Council had been notified of



the Appellants failure to comply with the Award and a decision had been taken to notify Members of the failure in accordance with Rule 15 of the Arbitration Rules. Further, that should Appellants fail to comply with the Award by 19th January 1998 Members would be informed without further notice.

2:5 Appellants having failed to comply with the Award, GAFTA Members were given notice under Rule 15 of the Arbitration Rules by a letter from GAFTA dated 26th January 1998.

2:6 The Appellants gave Notice of Appeal against the Arbitrators' Award on 27th March 1998.

3. APPELLANT'S SUBMISSIONS

3:1 The Appellants acknowledge that the Appeal was made some six months beyond the 30 days allowed in the GAFTA Arbitration Rules, but request the Board of Appeal to exercise the discretion to allow the appeal to proceed after taking into account:

The Appellants explanation why the notice of appeal was given late; and a summary of why the Appellants consider the original Award of Arbitration to be wrong.

3:2 There is no desire to delay in order to avoid payment. The Award is wrong in fact and in law, and given the very substantial amount of money involved it is their wish that the case is fairly and fully put before the Board of Appeal.



- 3:3 The Arbitration is the first experience that the Appellants have had of arbitration proceedings, either before GAFTA or elsewhere. The reference to arbitration before GAFTA in clause 11 was inserted in the draft at the last minute at the insistence of the Respondents.
- 3:4 When Arbitration proceedings were commenced the Appellants were not aware of GAFTA Rules of Arbitration and were not able to obtain any information concerning the Rules until after the Arbitration Award was issued and the time for appealing had passed.
- 3:5 The Appellants participated in the first tier Arbitration under a complete misunderstanding not appreciating that Arbitrators in a GAFTA Arbitration are completely independent and do not represent the interests of the party on whose behalf they are appointed.
- 3:6 When the Appellants established that they had a right of Appeal it was beyond the time for lodging an Appeal and they neither knew nor were told that there was any discretion in the Board to extend the time within which to Appeal.
- 3:7 In January 1998 the Appellants, after receiving a letter from GAFTA and informing the Arbitrator appointed on their behalf as well as Mr. J. Covo that they did not agree with the result of the Award, sought and obtained a meeting with the Director General of GAFTA in late February. At the meeting the Appellants explained why they did not agree with the Award; the Appellants were still unaware that they were able to appeal the Award and seek an Order from the Board extending the time for appealing. The Appellants wrote further letters

in March 1998 explaining why they considered the Award to be wrong.

- 3:8 Matters only became clear to the Appellants after consulting their Solicitors. This is not a case of a losing party sitting back and doing nothing; they have protested the result of the Award.
- 3:9 The Award is wrong and to allow it to stand would be a gross miscarriage of justice and the Appellants submitted that the Board should take into account submissions that the Appellants would wish to make should the appeal proceed. The matter involves serious legal arguments which were not properly, or not at all, argued at the first tier Arbitration. There is a very substantial amount of money involved (now exceeding \$11,000,000 including interest)
- 3:10 The contract which was no more than a draft, did not come into effect because it was an implied condition precedent to the contract being effective that it be registered with the relevant government departments which could take place following the allocation of a quota; a quota was not allocated.
- 3:11 Since the contract did not come into effect the Arbitrators had no jurisdiction since there was no binding arbitration agreement.
- 3:12 Such deliveries as were made were not under the terms of the draft contract and the Appellants have at no time received any of the milling wheat.



4. **RESPONDENT'S SUBMISSIONS**

- 4:1 The Appellants acknowledge that their notice of appeal was given over 6 months beyond the time limit prescribed in the Arbitration Rules.
- 4:2 The Appellant's conduct demonstrates that they desire to delay in order to avoid payment. As stated in the Award the Appellants failed to make a timely appointment of an Arbitrator and following an application to GAFTA an Arbitrator was appointed on 21st April 1997.
- 4:3 The Award was published on 22nd August 1997 and the Appellants admitted that they received a copy on 26th August 1997. Following numerous requests by the Respondents for payment of the amount awarded to them, the Respondents applied to GAFTA for the posting of the Appellants as defaulters. On 3rd November 1997 GAFTA gave to the Appellants notice to comply with the Award, but the notice was ignored by the Appellants. On 19th December 1997 GAFTA gave a further notice and this was also ignored. Members of GAFTA were notified of the default of the Appellants on 26th January 1998.
- 4:4 The Appellants have, throughout, disregarded the Arbitration Rules and the Board should refuse to exercise its absolute discretion in favour of the Appellants.
- 4:5 The representatives of the Appellants never questioned or disputed the provision for GAFTA Arbitration. This is the first time that the word "draft" has been used by the Appellants. All previous communications and submissions have referred to "the contract" as have the Contract itself, the Addendum, the Quadripartite Agreement and the Letter of

Guarantee.

- 4:6 The contract expressly spelled out the GAFTA Rules Form 125 and the Appellants could have asked GAFTA or Respondents for a copy of the Rules. The Appellant's Chief Legal Adviser and Consultant made submissions to the Arbitrators and it is not credible that such a person would not have known the arbitration rules under which the arbitration was being conducted.
- 4:7 From April to August 1997, the parties extensively and repeatedly discussed the GAFTA Arbitration and the Appellants must have been well aware of the procedure and that the Arbitrator appointed by GAFTA was a member of a Tribunal of three which would determine the issues. Furthermore the matter had been made clear to the Appellants in the notification given by GAFTA on the 7th May 1997 as to the appointment of the Chairman and the production of submissions and documents.
- 4:8 The Appellants would know that they had a right of appeal when they received the Award which itself makes reference to the appeal fee in the event of an appeal being lodged. Further the covering letter which GAFTA sent with the Award (22nd August 1997) specifies the time within which either party must lodge an appeal.

Meetings took place in Tashkent early in September, 1997 when the parties discussed their respective rights of appeal and the Appellants decided not to appeal within the time limit.

- 4:9 Ultimately and belatedly an appeal was lodged by the Appellants who could no longer ignore the Award under the pressure to honour the Award legally and because of the posting by GAFTA and diplomatic intervention.
- 4:10 The contract expressly provides that *"the present contract is in force from the moment of it's signing by both the parties and is valid until complete execution of their obligations by both parties"*. As appears from the contract document the contract was signed by Mr. D. Pletcher on behalf of the Respondents and by Mr. B.M. Kadyrov on behalf of the Appellants. There could be no implied condition precedent in the light of this specific provision nor does the law of the Republic of Uzbekistan have any application.
- 4:11 Any discussion regarding quotas was in respect of additional and new business, not the instant contract which was covered by a previous and existing quota.
- 4:12 By seeking to appeal, the Appellants are affirming the jurisdiction of the arbitrators of first instance.
- 4:13 By their conduct such as the communications between the parties and the participation by the Appellants in the performance of the contract, any submission by the Appellants that the contract did not exist is unwarranted.
- 4:14 The giving of the notice of appeal by the Appellants was so far out of time that it would make a mockery of the GAFTA Rules of Arbitration



which the parties have agreed to observe if the Board were now to exercise its discretion in favour of the Appellants.

4:15 The Respondents submitted that the Board should refuse to exercise its absolute discretion in favour of the Appellants.

5. **FINDINGS**

5:1 The following are the relevant communications sent to the Appellants by GAFTA:-

APPOINTMENT OF A CHAIRMAN & TIMETABLE

Dear Sirs,

Contract Dated: 10th July 1996

In Respect of: 50,000 T Kazak Origin Milling Wheat

With regard to the Arbitration arising out of the above contract, you are notified that Mr F.M.Aldridge of Category D1 has been appointed the third arbitrator and therefore Chairman of the Tribunal.

Please note the timetable for producing submissions/documents to the Association is as follows:-

Buyers, in response to the first set of submissions and documents received from Romak S.A., through Mr J.Covo have 21 days from today to provide their submissions and documents to the other party, with 3 copies to the Association, in accordance with Rule 4:2 of the Arbitration Rules.

In reply, Sellers then have 14 days from receipt of the defence submissions to submit further written comments and/or documents to



the other party, with 3 copies to the Association, as per Rule 4:3.

Yours faithfully,
Mrs P. Kirby Johnson
Director General.
Case No: 12-173
Date: 7th. May, 1997

c.c R.J.Short
J.D.Allen
F.M.Aldridge

22nd August, 1997

Dear Sirs,

AWARD OF ARBITRATION NO. 12173

Romak S.A. -v- FTC Uzdon Foreign Trade Company

Having received full settlement of the fees, I enclose herewith your copy of the above Award of Arbitration, which is dated today 22nd August 1997. Copies have been sent to those mentioned below. Please note that if either party intends lodging any appeal against the above Award of Arbitration, the notifications and appeal deposit fee must reach the Association as required by the Arbitration Rules, no later than 12 noon on the 30th consecutive day after the date of the Arbitration Award.

Yours faithfully,
Mrs P. Kirby Johnson
Director General



3rd November, 1997

Dear Sirs,

AWARD OF ARBITRATION NO: 12173

Romak -v- FTC UZDON

It has been reported to this Association that you have committed a breach of duty under the Arbitration Rules by failing to comply with the above Award of Arbitration which is dated August 1997.

Rule 15 of the Arbitration Rules give authority to the Council to post on the Association's Notice Board and/or to circularise and to mention in any way thought fit notification of the particular breach of duty complained of, but before taking either of these steps it is desired to give you the opportunity of remedying the breach.

Please therefore advise me in writing, by fax or letter by 3rd December 1997 that you have complied in full with the terms of the above mentioned Award otherwise I will be obliged to refer the matter to the Association's Council who would be entitled to take action in accordance with Rule 15 may be taken without further notice to you.

Yours faithfully,

Pamela Kirby Johnson

DIRECTOR GENERAL



19th December 1997

Dear Sirs,

AWARD OF ARBITRATION NO. 12173

Romak S.A. -v- FTC UZDON

As requested by Romak S.A., Geneva, the Council has been notified that you have failed to comply with the above Award of Arbitration and they have decided that Members should be notified of this failure in accordance with Rule 15 of the Arbitration Rules.

Please note therefore that should you fail to comply with this Award by 19th January 1998, Members will be informed of this failure without further notice.

Yours faithfully,
Pamela Kirby Johnson
DIRECTOR GENERAL.

5:2 The Award was not complied with by 19th January 1998 and a Notice dated 26th January 1998 was sent to Members advising them regarding the Appellant's failure to comply with the Award of Arbitration.

6. THE DECISION OF THE BOARD OF APPEAL
ON THE EVIDENCE, SUBMISSIONS AND FINDINGS BEFORE US, THE BOARD OF APPEAL DO NOT USE ITS ABSOLUTE DISCRETION TO

EXTEND THE TIME FOR COMPLIANCE OF THE TIME LIMITS FOR
APPEALING.

BOARD:-

R.A.Barber

J.St.C.Gainer

C.A.Koppen

M.P.Meadows (Chairman)

W.Schenk

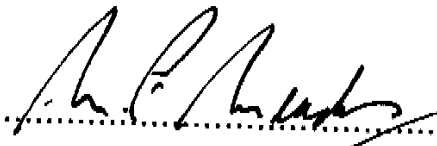
And the Fees and Expenses of this Appeal as under:-

	£
Association Fees	1430.00
Board of Appeal's Fees	1965.00

VAT	0.00

	£3395.00
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are to be paid by Appellants.


.....
CHAIRMAN OF THE BOARD

GAFTA's VAT Identification No: GB 243 8967 24

Seller's VAT Identification No: not applicable

Buyer's VAT Identification No: not applicable

