ARBITRATION DECISION & AWARD

UNDER THE MEDIATION AND ARBITRATION RULES OF THE FRUIT AND VEGETABLE DISPUTE RESOLUTION CORPORATION (DRC)

Date: 15 May 2023 **DRC File # 20948**

CLAIMANT: Michoacan, Mexico.

RESPONDENT: Montreal, QC, Canada.

Arbitration Appointment

I, Arbitrator, having been duly selected and confirmed by the Fruit and Vegetable Dispute Resolution Corporation (DRC) as Arbitrator in the above referenced case, hereby render the following Decision and Award. This Decision is rendered under the mediation and arbitration rules as set forth by the DRC.

Both parties were members of the DRC at the time of the transaction, which binds them to these proceedings.

Both parties have been provided with exact copies of all correspondence in this arbitration proceeding and therefore the documents exchanged between the parties will not be quoted in complete detail.

According to Article 46 of the Dispute Resolution Rules, the place (seat) of arbitration for this procedure is Ottawa, Ontario, Canada.

Statement of Facts

There are a number of facts concerning this claim which are not in dispute. Three shipments of avocados were made by Claimant to Respondent in October and November 2021.

All three shipments were loaded at origin on to Mexican trucks which crossed into the United States at the Laredo port of entry, from which the cargoes continued their transit onward to Montreal after cross-docking. The first shipment (001), which arrived in Montréal on 16 October 2021, carried 2280 cases, with a total invoice value of $44,480. The second shipment (002), which arrived in Montréal on 7 November 2021, carried 1600 cases, with a total invoice value of $47,040. The third shipment (003), which arrived in Montréal on 13 November 2021, carried 1776 cases, with a total invoice value of $44,128. The total aggregate invoice value of these three shipments amounted to $135,648.

Timely CFIA inspections were conducted for each of the three shipments, yielding the following results:

Defect	001	002	003
Decay	0%	0%	0%
Discoloration	19%	22%	23%
Scars	5%	na	na
Internal Discoloration	0%	na	na

Held up to the DRC Good Arrival tolerances of 15% allowable 8% serious 3% decay, each of these three shipments failed to meet the DRC's five day good arrival terms.

Following each inspection, Respondent offered Claimant two options: move the cargo to a different receiver, or allow Respondent to handle the cargo for shipper's account. Respondent proceeded to sell/consign the entirety of these three shipments to Company X, which yielded proceeds – net of freight, inspection, clearing and lost profits – of $20,286.65. Claimant refused to accept this outcome, and filed its notice of claim with the DRC.

Statement of Claim

In its Statement of Claim, Claimant argues that it should receive the full FOB invoice value of $135,648. It bases its position on several arguments:

1. Claimant shipped excellent quality fruit according to Codex Alimentarius standards.
2. Respondent failed to follow Claimant's temperature instructions for the transit from Laredo to Montréal, which failure led to the surface discoloration upon arrival noted in the CFIA inspection reports.
3. By stating in its invoice that its terms of sale were CPT Laredo, Claimant maintains that its responsibility for the quality of its shipments transferred wholly and completely from seller to buyer at the moment of transshipment in Laredo.
4. Based on its post-sale interviews with other Mexican shippers who had collaborated with Respondent in recent years, Claimant is of the opinion that Respondent is guilty of abusive practices as a way to extract price reductions on purchases from Mexican suppliers.
5. Despite the findings of the CFIA inspections, a return which delivers only $0.15 on the dollar is out of proportion and unacceptable.

For these reasons, Claimant seeks the following compensation:

Original invoice value for the three shipments:	$135,648.00
Arbitration fees	$ 10,305.00
DHL expenses	$ 125.00
Interest (1% monthly for 15 months)	$ 20,347.35
Translation Services at hearing	$ 2,730.00
Total Claim Amount	$169,155.35

Statement of Defense to Statement of Claim

Respondent maintains that claimant did not honor the commercial agreements between the two companies:

1. The condition of the fruit on arrival did not meet DRC good arrival guidelines, as evidenced by the CFIA infections. Claimant was offered the option to move the fruit to a different location, but chose not to exercise that option.
2. Temperature readings were inconsistent for the three voyages from origin to Laredo. Respondent's reading of the temperature charts notes that set points appear to be below Claimant's own specifications for portions of these transits, with fruit pulp temperatures ranging from 39F to 43F across the loads.
3. Respondent is also critical of the placement of Claimant's temperature recorders within the trailers, contending that wall placement can lead to incorrect temperature registration.
4. Respondent states that it "performed to reach sales of fruit based on the conditional problems received on arrival."
5. Respondent further rejects Claimant's contention of abusive practices with respect to Mexican suppliers, detailing its performance on each of the five supplier relations cited by Claimant.

Respondent maintains that Claimant should accept the accounts of sale provided by Respondent, yielding the follow net remittances:

001:	$ 6,861.75
002:	$ 7,090.76
003:	$ 6,334.14
Total proceeds	$ 20,286.65

Virtual Hearing

A virtual hearing was held on Monday, 3 April 2023, organized by The Arbitration Place, Toronto, Canada. At this hearing, parties had the opportunity to expand on their original written submissions, and to introduce witnesses in support of their arguments.

Extracts from Claimant Testimony at Hearing

1. "We agreed the sales structure or the International Incoterm, which is CPT delivered as at Laredo. This means that Claimant was going to be responsible for the point of origin all the way up to delivery and Laredo to their customs broker, covering all expense, risks and liabilities that could arise, and after this shipment was delivered to Respondent's broker, from Laredo to their warehouse is their liability, all the way to final destination."

- Stipulated a 44 F setpoint for the first cargo; actual carriage at lower temperatures to Canada caused lenticel damage.
- Moreover, the temperature readings provided by Respondent were illegible and inconsistent in terms of dates and temperatures. Claimant maintains that, although legible, the temperature charts demonstrate that cargo is carried at 34 F – 36 F for portions of the transit.
- Upon questioning, Claimant states that the enlargements of the seemingly illegible temperature charts which it received from Respondent are not part of its submission.
- The lenticel damage discovered during the CFIA inspection was not present on the cargo at time of loading, as confirmed by the photographs submitted by Claimant. Therefore, this lenticel damage could only have been caused by errors in temperature management during the transit from Laredo to Montréal.
- CFIA inspection results showed pulp temperatures of 40 F-41 F, 46 F, and 42 F. Since pulp temperature normally would be higher than setpoint temperature, this indicates that fruit was carried at temperatures outside of the recommended 43 F-44 F.
- Lenticel damage disappears or dilutes the color and the fruit darkens all the way up to ripening.
- This lenticel damage did not take place at origin; this took place from Laredo onwards or at respondent warehouse due to excessive low temperatures.
- Claimant never agreed to consignment sale. Many sales by Respondent were made 7/10/12/15 days after inspection, with one lot sold 30 days after inspection.
- It is difficult to understand why the fruit from all three shipments was sold only to Company X.
- With regard to temperature there are variances, but that variance must remain within the range, one or 2° above are one or 2° below.
- There was a detection of defects between 15, 20, 25 – – up to 25%. So, we do not accept 85% discount. And we don't consider that 20, 25, 30% of punishment is appropriate.

Extracts from Witness Testimony at Hearing

- Photographs from Respondent showed individual fruits rather than a random sampling in their original packaging.
- These photographs show just a few fruits, where they show the damage because of lenticels.
- In October 2021 in Michoacan, we still had some rainy season, which causes the fruit to have led to cells. It's more sensitive to the damage of the management after the harvest, which can be because of the friction of the different management of temperature.
- Temperatures to the use by the transportation or storage of the fruit are established based on an oil percentage that is related directly to the percentage of dry matter in the fruit before cutting.
- It was difficult to see the recordings by the thermographer.
- Based on my experience I see that this is a lenticel damage that was due to cold or because of the friction. However, with one fruit, five fruits, or seven fruits, in some cases it's complicated to say it.
- Lenticel damage is surface damage only. With the ripening of the fruit, when the Hass avocado fruit ripens in a dark color, then this is lost and there is no damage in the fruit.
- So, there were some questions that I have myself about the handling of the fruit, because there is not enough data in order to determine if the fruit was actually damaged in a high percentage. In the information, as I was saying, is scarce.
- Respondent questioned which procedure – – touching the fruit physically or analyzing photos of the fruit – – gives a better appreciation of the condition of the fruit. Witness responded that definitely, it's physically.
- Arbitrator asked whether, if fruit is carried at 40 F rather than 44 F for the five day transit from Laredo to Montréal, there exists a scientific basis to estimate to what extent the damage might appear on arrival at the end of the five days. Witness responded that there exists no specific percentage which can be applied to calculate the likely level of lenticel damage resulting from a 4F temperature variance below recommendation over a five day period.
- Arbitrator further asked the Witness to estimate the point of maturity at which lenticel damage was likely to become invisible. Witness responded that lenticel damage disappears, at least to the eye, when it ripens. But it's just in terms of perception – – but there is no regression of the damage.
- As a rebuttal to comments from Respondent, Witness confirms that our statement that in that period of shipment there can be a lot of humidity because of the rain, and therefore it becomes more sensitive in terms of the temperature and handling. However, she states for the record that she never said that the fruit had been damaged by the rain.

Extracts from Respondent Testimony at Hearing

- "There's a reason why I came into this business in 2007 for companies like Claimant, that we filter what gets to the retail. And if people are not happy with hearing what I have to say, that the product is no good, it's no good, end period."
- "I'm not that person that handles rejected loads in Canada. I don't take the leftovers that everyone wants to dump in Canada."
- According to the recorder, the temperature set point leaving Michoacán into Laredo was a little underneath 40° F.
- I don't know why he's changing it today now to 44° F when it was always 43° F. It's all on paper and it's on email. The second load was sent an email saying it had to be put at 42° F.
- Company X reported they had a network of customers for distressed fruit. My accounts are retail, some of them owned by Company A, some of them owned by Company B or Company C, and they cannot have used this fruit.
- When we put temp recorders on the wall, you don't know how they're going to react. That's why it's going up and down. It's all distorted.
- Claimant never responded. It was a consignment, handling for shippers account where send it to someone else in the city if you feel that someone else is more appropriate for you to give it to them. Claimant could have responded. He was entitled to take it out and send it to someone else in the city if you feel that someone else is more appropriate.
- When there is rain in the period of September, October, the season where it's raining in Mexico, it affects the quality of the fruit.
- My fruit was damaged from Michoacán to Laredo. Whoever is that fault, only Claimant will know.
- Respondent handle the product as best I can. Whatever discounted prices I gave it, I didn't want any returns. I don't want any headaches. From my clients, from whoever I sold it to, I didn't want anything coming back and ending up dumping, which I've had in the past. We saved your product from being dumped because it was damaged.
- When food is damaged by cold any fruit damaged by cold, whether it's bananas, pineapples, whatever it is, there's going to be an appearance after several days. If I do an inspection after seven days of the fruit the fruit breaks down even more when it's damaged by cold.

Discussion

Claimant argues that it should receive the full FOB invoice value based on five principal arguments. I will address each of them in sequence:

1. ***Claimant shipped excellent quality fruit according to Codex Alimentarius standards.***

DRC dispute resolution rules rely on the findings of qualified inspection agencies operating at product destination. According to the DRC Good Arrival Guidelines, "In Canada, the Corporation's Good Arrival Guidelines are a combination of the PACA 5 Day FOB Good Delivery Guidelines and Canadian Destination Tolerances and Suitable Shipping Condition Guidelines. In default situations in Canada the Corporation will use the PACA 5 Day Good Delivery Guidelines for all commodities, with the exception of those commodities for which there are grade standards under the Canadian Fresh Fruit & Vegetable Regulations. The Canadian Board of Arbitration established Suitable Shipping Condition Guidelines which form the basis of Canadian FOB Destination Tolerances." For avocados, the operative grade standards for product arriving in Canada stand at 15% total defects, 8% serious defects and 3% decay. Exceeding any one of these three maximum values, based on an inspection by CFIA personnel, is considered proof that the product did not meet DRC good arrival delivery guidelines. For each of the three shipments under review in this dispute, total defects exceeded the 15% threshold, and thus failed to meet DRC Good Arrival Guidelines.

The Codex Alimentarius standards for avocados (file:///C:/Users/patri/Downloads/CXS 197e.pdf) speaks only in general terms as to the minimum quality requirements, and states that Class I avocados should have only "slight defects in shape and coloring". The percentages identified in the CFIA inspection reports would certainly appear to exceed this standard. More importantly, Codex standards were never discussed between buyer and seller, and therefore cannot be considered to prevail over the default provisions of the DRC Good Arrival Guidelines. Unless there is clear prior agreement to a standard of quality which is different from those stipulated under DRC rules, then DRC rules must be considered determinative in the course of any dispute resolution proceedings.

In summary, then, all three of the shipments which constitute the subject of this dispute failed to meet DRC Good Arrival Guidelines and need to be considered as apt for rejection by the buyer under DRC rules.

2. ***Respondent failed to follow Claimant's temperature instructions for the transit from Laredo to Montréal, which failure led to the surface discoloration upon arrival noted in the CFIA inspection reports.***

This contention, in order to be proven, would need to demonstrate conclusively that Respondent failed to follow sound temperature practices during the transit between Laredo and Montréal, and that this failure alone was responsible for the surface discoloration upon arrival noted in the inspection reports. There is lack of clarity regarding Claimant's temperature recommendations, lack of clarity regarding temperature instructions from Claimant's transfer agent in Laredo, lack of clarity regarding actual transit temperatures from Michoacán to Laredo, lack of clarity regarding the readings from the different sources of in-transit temperature data, lack

of clarity regarding the role which rain/humidity at origin might have played in this discoloration, lack of clarity regarding the role of in-transit jostling at any point during the transit from Michoacán to Montréal could have played in this discoloration. This cumulative lack of clarity makes it impossible for me to ascribe full responsibility to Respondent for the lenticel damage described upon inspection in Canada.

According to a 2018 publication by CIRAD, a French research center working with developing countries, on international issues of agriculture and development, (https://www.fruitrop.com/en/Articles-by-subject/Quality- defects/2018/Common-Avocado-Quality-Defects), "the primary cause of damage to lenticels is rough handling during the taking or packing process. The susceptibility of the lenticels to damage is also sometimes increased by cold and wet weather during or immediately preceding harvest. Cold air flowing across the surface of the fruit can also induce lenticel damage." While the possible role of cold air flow, as was emphasized by Claimant's expert witness, is repeated in the above excerpt, it is only one of several possible causes for the discoloration discovered during inspection in Canada.

3. ***By stating in its invoice that its terms of sale were CPT Laredo, Claimant maintains that its responsibility for the quality of its shipments transferred wholly and completely from seller to buyer at the moment of transshipment in Laredo.***

Claimant states CPT terms on its invoice to Respondent. Under the International Chamber of Commerce's Incoterms, its rules for the use of domestic and international trade terms, Carriage Paid To (CPT) means that "the seller delivers the goods – and transfers the risk – to the buyer by handing the goods over to the carrier contracted by the seller. Once the goods have been delivered to the buyer in this way, the seller does not guarantee that the goods will reach the place of destination in sound condition, in the stated quantity are indeed at all."

Under the terms of trade of the DRC Trading Standards, however, Section 20 states that for transactions characterized as CFR, CIP, and CIF – Cost and Freight, Cost and Insurance Paid, and Cost, Insurance, and Freight – all such sales shall be deemed to be the same as FOB sales, except that the selling price shall include the correct freight charges to destination (in the case of CFR sales), or except that the selling price includes the correct freight and insurance to the named destination (in the case of CIP and CIF sales). CPT transactions would fall under this same treatment, whereby they would be deemed to be the same as FOB sales except that the selling price shall include the correct freight charges to the specified intermediate destination (in this case, to Laredo).

4. ***Based on its post-sale interviews with other Mexican shippers who had collaborated with Respondent in recent years, Claimant is of the***

opinion that Respondent is guilty of abusive practices as a way to extract price reductions on purchases from Mexican suppliers.

While this survey of the experiences of Mexican avocado shippers with Respondent might have been a worthwhile exercise for Claimant prior to entering into these three transactions, I am disinclined to incorporate hearsay as of probative value in the course of this deliberation.

5. ***Despite the findings of the CFIA inspections, a return which delivers only $0.15 on the dollar is out of proportion and unacceptable.***

Of the five arguments raised by Claimant, I find this argument to be most compelling. Unlike most fresh produce condition problems, lenticel damage appears to become less of a problem over time, as the natural color progression proceeds during the maturation cycle. While there is some difference of opinion among experts as to the root causes of lenticel damage, there is universal agreement that it is purely cosmetic, and has no adverse effect on the internal presentation or eating quality of the fruit.

Based on the CFIA inspection results, Respondent would have been within its rights to reject each of these three cargoes entirely. At that point, Respondent's responsibilities with respect to these shipments would have ceased. Instead, Respondent elected to retain control over the shipments, thereby subjecting itself to DRC's Trading Standards, which include, in Section 10, Art 2 (iii), the following requirement:

> "where any portion of the shipment is marketable, make every reasonable effort to market that product as soon as is practicable in the circumstances."

The fact that Respondent, through its sole customer for these 5,656 cartons of avocados, was able to market the entirety of the three shipments provides de facto evidence that all portions of these shipments were marketable. The timeliness of these sales, as highlighted by Claimant, can also be called into question.

Perhaps had Respondent chosen a conduit more experienced in the sale of avocados, with a broader and deeper customer list, sales of product might have been accomplished on a timelier basis at prices closer to market value. Perhaps had Respondent chosen to distribute these three shipments across a wider array of potential handlers, sales might have been made at prices closer to those supported by then-current market conditions. (My assumption here regarding higher prices at then-current market conditions is based on the price which Respondent actually agreed to pay at the outset of these transactions.) In its comments, both in its defense to the statement of claim and in its oral testimony at the hearing,

Respondent did not appear to understand its residual responsibility under DRC rules for obtaining fair market value for the product under its control.

If, indeed, Respondent believes that “I’m not that person that handles rejected loads in Canada. I don’t take the leftovers that everyone wants to dump in Canada,” as was stated during the hearing, then Respondent should have rejected these shipments immediately following the CFIA inspections, and instructed Claimant to move the cargoes to a handler or handlers of Claimant’s choice. This is not the path which Respondent chose, and DRC rules hold Respondent responsible for failing to make a reasonable effort to market the 5,656 cartons of avocados which are the subject of this dispute.

Taking as a basis the purchase prices agreed by both parties for each of these three shipments, I have determined that fair market value, net of total defects and including a 50% addition to incentivize timely sale, would produce the following results:

	001	002	003	TOTAL VALUE
FOB, ORIGINAL INVOICE	$ 44,480.00	$ 47,040.00	$ 44,128.00	$ 135,648.00
Total Defects	24%	22%	23%	
+50% for quick sale	12%	11%	12%	
Total Discount	36%	33%	35%	
Adjusted FOB Value Net of Defects +	$ 28,467.20	$ 31,516.80	$ 28,903.84	$ 88,887.84

Decision and Award

I, as arbitrator, have reviewed the documents submitted by Claimant and Respondent, as well as the testimony provided during hearing by both parties and by the Witness. With due respect to all parties, and without prejudice, I submit my decision as follows:

As to the claim that Respondent owes Claimant compensation for failure to make every reasonable effort to market its fruit on a timely basis, I find in favor of the Claimant and order Respondent to pay the sum of US$88,887.84 to Claimant.

As to the DRC filing and arbitration fees, the claims of both parties are found to have some measure of validity. As such I elect to have each party bear the costs involved in its pursuit of this arbitration. Net of translation services, which I assign entirely to the claimant, these arbitration fees amount to US$10,305.00. As Claimant has

already paid this entire amount to the DRC, I order respondent to reimburse claimant for half of this amount, or US$5,152.50.

Calculation of the amount due from Respondent to Claimant is as follows: Less

than reasonable effort to market the fruit	US$ 88,887.84
Respondent share of arbitration costs	US$ 5,152.50
Total due to Claimant	**US$ 94,040.34**

Respondent is hereby ordered to pay claimant US$94,040.34 no later than 30 days from the date of this decision.

I certify that this decision has been sent electronically and by mail to the Claimant, the Respondent and the DRC.

Signed by me this 15th day of May 2023

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Arbitrator