

## **ARBITRATION DECISION & AWARD**

October 6, 2006

**DRC File No. 18249**

**CLAIMANT:** California, United States

**vs.**

**RESPONDENT:** Mississauga, Canada

### **Statement of Claim**

This Arbitration arises from the Claimant's claim that on April 26, 2006, it sold broccoli to the Respondent at an FOB price of \$8,033.00, that it received payment of \$2,360.06, and that it continues to be owed \$5,672.94. Claimant submitted its invoice #520610 reflecting its sale of 1232 cartons of its "Crowns Lung Chu" label broccoli at 6.50 per carton for \$8,008.00 plus a temperature recorder charge of \$25.00 for a total of \$8,033.00. Claimant also submitted a copy of Respondent's check #21095477 for \$2,360.06.

### **Statement of Defense**

Respondent acknowledges that it paid \$2,360.06 of the invoice price of \$8,033.00, but claims that it did not receive the ordered "oriental cut" crown broccoli. Respondent submits Certificate of Inspection for Fresh Fruit Vegetables, Certificate 851055404441316, which describes the length of the stalk and head ("Appeal Inspection"). Respondent also submits post-delivery e-mails between the parties, and two e-mails containing industry opinions of the appropriate length of stalks for "Asian cut" broccoli.

### **Discussion**

The parties agree that the purchase price was \$8,033.00, but give diametrically opposite accounts about the type of broccoli ordered. Claimant says Respondent ordered "short cut" broccoli without discussing the length of the stalk. Respondent says it ordered "oriental cut crown broccoli" after Claimant assured it that its "Crowns Lung Chu" label had a head size of 3 to 6 inches wide and a stalk length of 1 % inches.

Where parties put forth affirmative, but conflicting, allegations with respect to a term of the contract, the burden rests upon each to establish their allegation by a preponderance of the evidence. Here, neither party has met this burden with respect to the type of broccoli ordered during a phone call between two persons without a substantial history of dealing with one other. There is no way to know which account is accurate.

Respondent, though, accepted the broccoli by unloading it, and so bears the burden of demonstrating that Claimant breached the contract, and any resulting damages. Respondent cannot establish that Claimant breached the contract by shipping "oriental cut" broccoli since it has not established that the contract was for "oriental cut" broccoli.

Respondent could still prevail if it could establish that Claimant breached an obligation to ship "short cut broccoli" since Claimant admits that it was obligated to ship such broccoli. The Appeal Inspection in the remarks section provides:

"The average and range shown on inspection results shows crowns measuring 3 1/2 inches to 6 inches wide, however, the length showed 4 inches to 6 1/2 inches long the majority between 4 and 5 inches long."

There are no USDA or Agriculture Canada standards for "short cut" broccoli from which one could determine whether the length of the stalk mentioned in the Appeal Inspection fails to conform with such a standard. While Respondent submits two industry opinions, the opinions concern "Asian cut" broccoli, which is presumably the same as "oriental cut" broccoli, and so do not bear upon whether there was a breach of an obligation to ship "short cut" broccoli.<sup>1</sup> And while Claimant apparently believed that the stalk length of the broccoli was longer than usual, as evidenced by the Claimant's e-mail sent on May 1, 2006, this is not sufficient to establish that the length was so long as to constitute a breach. Thus, Respondent does not establish a breach of an obligation to ship "short cut" broccoli.

Even if Respondent could establish a breach of contract, its Response in this Arbitration does not contain an accounting of its damages.<sup>2</sup> Thus, there is no way to determine the amount of damages to be awarded to Respondent.

### **Decision & Award**

Respondent's failure pay Claimant USD \$5,672.94 is a violation of DRC Trading Standards, § 1 (d), which provides that it shall be considered unfair conduct for any "commission merchant, dealer, or broker. . . fail or refuse to . . . [to] make full payment promptly." §2 provides that a person who violates §1 is liable for the damages caused.

Claimant is awarded USD \$5,672.94 plus the \$600.00 filing fee for a total of USD \$6,272.94. Respondent shall pay Claimant USD \$6,272.94 within thirty (30) days from the date of this award.

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Arbitrator

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1 Respondent did not argue that, even if the contract was for "short cut" broccoli, the Appeal Inspection showed a breach of an obligation to ship "short cut" broccoli, nor did Respondent provide industry opinions from qualified persons which would support any such claim.

2 Respondent's Response at page "3" makes reference to its having provided Claimant with "an account of sale breakdown"; however, none was attached to the Response.