Concerning a contract dated 10 April 1996 for 4,000 metric tons of Sunflowerseed Oil of edible grade of Argentine origin for May 1996 shipment, Cost and Freight Indian port. Sellers failed to ship the goods within the contractual shipment period and the dispute concerns damages arising therefrom. Sellers counter claimed that Buyers’ arbitration claim was not in accordance with the Rules and that no damages were due. The Arbitrators, having failed to agree, appointed an Umpire.

From the evidence, I find the following -

1.0 THE CONTRACT

1.1 The Sale Confirmation was dated 10 April 1996 and a ‘revised contract’, drawn up by Buyers, was sent to Sellers on 23 April 1996.

1.2 The ‘revised contract’, dated 10 April 1996, contained the following terms and conditions -

<table>
<thead>
<tr>
<th>Term</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commodity</td>
<td>Sunflowerseed Oil of edible grade of Argentine origin</td>
</tr>
<tr>
<td>Specification</td>
<td>FFA basis 2 max 3 pct (non-reciprocal allowance 2:1), M &amp; I 0.5 pct maximum</td>
</tr>
<tr>
<td>Quantity</td>
<td>4,000 metric tons, plus/minus 5 pct at Seller’s option. On contract price</td>
</tr>
<tr>
<td>Price</td>
<td>US$587.00 per metric ton, basis Cost and Freight Indian Port</td>
</tr>
<tr>
<td>Shipment</td>
<td>During May 1996</td>
</tr>
<tr>
<td>Payment</td>
<td>By confirmed, irrevocable Letter of Credit to be opened and operative by latest 23 April 1996. (Buyers will open Letter of Credit for 180 days and arrange to get the payment at sight to the Seller immediately on presentation of documents)</td>
</tr>
<tr>
<td>Other Terms</td>
<td>1. Shipped weight/shipped quality.</td>
</tr>
<tr>
<td></td>
<td>2. Demurrage as per Charter party, but max US$15,000.00/=PDPR</td>
</tr>
<tr>
<td></td>
<td>3. Discharge rate at 100 metric tons per running hour, SHINC</td>
</tr>
<tr>
<td></td>
<td>4. Sellers can only discharge Sunoil for Buyers in Indian Port. Vessel must leave last South American load port by latest 31 May 1996, and will endeavour to make Indian Port as 1st Discharge port</td>
</tr>
<tr>
<td></td>
<td>5. Buyers to guarantee 10.5 metres draft at discharge port</td>
</tr>
<tr>
<td></td>
<td>6. All other terms and conditions, when not in contradiction to the above as per FOSFA Contract No 54 to govern.</td>
</tr>
</tbody>
</table>
THE FACTS

On 23 April 1996, Buyers faxed Brokers confirming that they had established a Letter of Credit and informing them that the copy of the Letter of Credit would be faxed to them on the following day.

The date of issue on the Letter of Credit was 23 April 1996; showed the latest day of shipment as 31 May 1996 and expiry date as 21 June 1996.

In a telex message dated 3 May 1996, Sellers informed Buyers through the Brokers that -

“….We have so far not booked any tanker and are still working on our logistics. The shipment is not likely to take place till end May”.

On 24 May 1996 Buyers sent the following telex to Sellers via Brokers -

“We refer to recent conversation through Brokers in which you indicated that you may not be in a position to ship the above goods in accordance with the contractual shipment period.

For the record, we hereby give you notice that should you fail to ship the above goods by 31st May 1996, we reserve all our rights to hold you in default in accordance with the terms of the above contract. Further, we also reserve our rights to take whatever further action may be necessary to recover our losses and protect our position.”

On 28 May 1996 Buyers received the following message from Sellers through Brokers -

“Herewith confirm receipt of your message which contents are noted. As stated shipment period reads May 1996 and despite the fact it remains difficult to secure proper freight due to lack of vessels, we continue our efforts to finalise the a/m contract in the best way. If you prefer not to receive the goods and declare us in default, suggest you forward yr intentions more properly, it would save us some time and headaches.

Look forward to yr urgent reply in this matter.”

On 29 May 1996 Buyers responded stating that they saw no reason to declare Sellers in default if they performed the Contract by shipping the goods within May 1996. Buyers continued -

“… should you fail to ship the abv goods by 31st May 1996, our position remains as per message to you, through broking channels of 24th May 1996”. (see Paragraph 2.4)

On 28 May 1996 Buyers received the following message from Sellers through Brokers -

“…Despite our efforts we have not been in a position to secure a vessel load ready in May to lift the above-mentioned cargo. Last Friday we chartered a vessel which can lift your cargo on or about June 10/15 depending on load port. Based on this information we therefore kindly ask you to grant us an extension up to June 15th, 1996 and amend the L/C accordingly.

In a telex message of 3 June 1996 via Brokers, Sellers informed Buyers that they were not in a position to secure a vessel load ready in May and asked Buyers to grant an extension up to 15 June 1996 and to amend the Letter of Credit accordingly. The message read -

“…In view of your failure to ship the cargo within the contractual shipping period, we regret to have to inform you that we hold your conduct as a repudiatory breach of contract, which we hereby accept, and we regard the contract as having been terminated.

We reserve our right to claim damages of whatsoever kind and however arising as a result of your breach including our right to claim an allowance against you for any claim which may be made against us by our buyer following your breach of contract.”
Sellers replied on the same day, 4 June 1996, through Brokers, which was sent to Buyers on 5 June 1996 -

"We hereby confirm receipt of your message dtd 4th June sent via Brokers. We noted your default declaration and refusal to accept shipment within the first fifteen days of June and accept your declaration to cancel the contract. However we want to make clear to you that by declaring the contract as being terminated, you as per terms and conditions of the FOSFA contract do not have the right anymore to claim damages and/or an indemnity from ourselves.

We consequently consider the file as closed."

On 7 June 1996 Buyers sent the following to Sellers -

"We do not understand the point you are making. We held you in default on 4th June following your failure to ship the cargo in May.

Please note that we did not cancel the contract but rather the contract came to an end following your repudiatory breach of contract, which we accept. We shall therefore claim damages against you in accordance with the default clause in the contract and we shall also claim an indemnity from you."

On 10 June 1996 Sellers replied maintaining their position, stating that Buyers were precluded from claiming damages having terminated the Contract.

On 20 September 1996 Buyers sent a debit note to Sellers claiming damages of US$78,135.98 for payment within 7 days.

On 25 September 1996 laywers acting on behalf of Buyers, gave notice by fax of the commencement of arbitration proceedings and appointed an arbitrator.

In November 1996 Buyers, having failed to receive the name of an arbitrator from Sellers, asked FOSFA International to appoint on Sellers’ behalf.

As a result, on 12 December 1996, in reply to a letter from FOSFA International dated 29 November 1996, Sellers, "entirely without prejudice to our rights", nominated an Arbitrator.

On 30 July 1998 an Umpire was appointed.

BUYERS’ SUBMISSIONS

Buyers submit that Sellers were in default by not shipping the goods within the contractual shipping period, and that damages totalling US$78,135.98, together with interest thereon at 18% from the date of default ie from 1 June 1996 until payment or realisation.

SELLERS’ SUBMISSIONS

Sellers submit that Buyers’ claim for arbitration was not in accordance with Clause 2 (c) of the Arbitration Rules and Notices Clause of the Contract - the use of facsimile machines for passing notices is excluded.

Apparently Buyers sent the notice claiming arbitration by facsimile machine, and when FOSFA International provided a hard copy of the fax with their letter dated 29 November 1996, requesting Sellers to nominate an arbitrator, the time limit for claiming arbitration had expired. Sellers responded by nominating an arbitrator but entirely without prejudice to their rights which were all reserved.
4.2 Sellers submit that Buyers’ claim should fail because it is out of time, waived and absolutely barred. This with all costs of the arbitration, including Sellers’ legal costs, to be for Buyer’s account, which are to be taxed by the Arbitrators, if not agreed.

4.3 In case Buyers would request the Arbitrators to exercise their discretion, Sellers submit the Arbitrators should not do so because non-compliance with an express rule cannot and should not be excused. It is a fact that Buyers and/or their lawyers (acting for account and risk of Buyers) knew about the provisions and simply did not comply.

Substantive Issue

4.4 There is no evidence to support Buyers’ contention that they applied to their Bankers on 23 April 1996 to open a Letter of Credit in favour of Sellers. Sellers submit that the Letter of Credit was not opened and available in time.

4.5 Sellers submit that their request for an extension of shipment was not a repudiatory breach of the contract. Sellers were merely checking whether Buyers would agree to a later shipment, an enquiry Sellers were perfectly entitled to make. Had Buyers refused the request, Sellers would still have been in a position to have fulfilled the Contract by buying from a third party goods already afloat (shipped within the shipment period). Sellers were continuously making efforts to perform the Contract in the best possible way.

4.6 Buyers’ unjustified default declaration was a repudiatory breach by Buyers which Sellers accepted. Sellers submit that it was Buyers who were in default, not Sellers, and accordingly Buyers cannot claim damages.

4.7 The quantum of damages is based on an alleged default value of US$602.50 per metric ton and Sellers do not provide any evidence of this price. Buyers submit that the default value is maximum US$590.00 per metric tons CIF, which is equivalent to US$686.00 per metric ton CANDF. The FOB value for Argentine Crude Sunflowerseed Oil was around US$520.00 per metric ton.

The amount of Bank charges claimed is outrageous and documents provided do not substantiate the claim made. Sellers submit that it is clear that no United States dollars were charged and there is no proof of actual payment. Arbitrators should reject these costs.

4.8 Sellers submit that Buyers’ claim fails and request the Arbitrators to award accordingly together with all costs of the Arbitration, including Sellers’ legal costs, which are to be taxed, by the Arbitrators, if not agreed.

5.0 BUYERS’ REPLY SUBMISSIONS

5.1 On 25 February 1997 Buyers served their Claim Submissions. Sellers did not serve their Defence Submissions until 3 December 1997, ie after a further delay of some nine months.

5.2 Buyers submit that Seller’s defence may be summarised as follows -

a. The Notice of Arbitration was sent by facsimile and is therefore invalid. When FOSFA International passed the hard copy of the fax to Sellers with their letter dated 29 November 1996 the claim was timebarred under Rule 2(c) of the Rules of Arbitration and Appeal dated 1 July 1992. The result is that the claim is deemed to be waived and absolutely barred.

b. The Letter of Credit was not opened and available by 23 April 1996.

c. Sellers’ request made on 3 June 1996 was not a repudiatory breach, but merely a request for Buyers to agree to a later shipment. Had Buyers refused the request,
Sellers would still have been in a position to fulfil the Contract by buying the goods afloat. Sellers accordingly consider that Buyers were in repudiatory breach by declaring Sellers wrongfully in default.

d. No evidence has been provided to support the damages claimed. The default price was alleged to be in fact US$590.00 per metric ton on a CIF basis which was equivalent to US$585.00 per metric ton on a C & F basis. The FOB value for the commodity was around US$520.00 per metric ton. The bank charges are alleged to be outrageous and there is no documentation provided to substantiate the claim made.

Quantum

5.3 The Default Clause of FOSFA Contract No 54 reads -

"In default of fulfilment of this contract by either party, the other party at his discretion shall, after giving notice, have the right either to cancel the contract, or the right to sell or purchase, as the case may be, against the defaulter who shall on demand make good the loss, if any, on such sale or purchase. If the party liable to pay shall be dissatisfied with the price of such sale or purchase, or if neither of the above rights is exercised, the damages, if any, shall, failing amicable settlement, be determined by arbitration...“

5.4 Buyers submit that the date of default in the present case was either 4 June 1996 or alternatively 1 June 1996.

5.5 Contrary to Seller’s submissions, the market price on the date of default was higher than the contract price with the result that Buyers have suffered substantial losses. According to an agency, the C & F price in India on 4 June 1996 was US$613.50 per metric ton and according to marketing services the price was US$614.50 per metric ton. The average price on that date is US$614.00 per metric ton. Both brokers agree that the C & F price India on 1 June 1996 was US$612.00 per metric ton. The difference between the contract and market price on 4 June was therefore US$108,000.00 to which must be added bank charges and Letter of Credit opening and cancellation charges of US$16,135.98 making a total claim of US$124,135.98 plus interest and arbitration costs and legal fees.

5.6 If the default date was 1 June 1996 the difference between contract and market price is US$100,000.00 and the total sum claimed is US$116,135.98 plus interest and costs. Buyers claim interest at 8% per annum from 4 or 1 June 1996 to the date of the Award.

The Law

5.7 Buyers submit that their claim against Sellers falls within Rule 2 (b) (i) (1) of the FOSFA Rules of Arbitration and Appeal from which it follows that the claim for arbitration had to have been made not later than 120 consecutive days after the last day of the contractual delivery period, ie by 28 September 1996. Notice of arbitration was in fact given by fax on 25 September 1996 and therefore was given within time unless Sellers are correct in holding that a faxed Notice is invalid.

5.8 Rule 2(c) of the FOSFA Rules of Arbitration and Appeal revised and effective from 1 July 1992 provide that claims for arbitration shall be made in accordance with the Notices Clause of the Contract. The provisions of the Non Business Days Clause shall also apply. On this argument, the notice of appointment given by lawyers by fax on behalf of Buyers on 25 September 1996 was invalid as it was given by facsimile and no valid notice to commence arbitration was given by 28 September 1996.

5.9 In Buyers’ opinion this is a highly technical argument and entirely without merit. Sellers were given notice within the 120 day period that Buyers had claimed arbitration and they have suffered no prejudice whatsoever as a result of a failure to receive Notice of Arbitration by facsimile. The Tribunal will note that as Sellers failed to respond to the notice served by fax
on 25 September 1996, Buyers requested FOSFA International to make an appointment on their behalf and FOSFA International informed Buyers on 29 November 1996 that they had sent an International Recorded Letter to Sellers giving them until 13 December 1996 to appoint an arbitrator, failing which they would make an appointment on their behalf. FOSFA International had been copied lawyers' fax to Sellers dated 25 September 1996 and FOSFA International had no problems in considering that notice to be valid. The Tribunal will further note that Arbitrator was appointed by Sellers on 13 December 1996 entirely without prejudice to Sellers’ rights. The Tribunal will further note that the timebar point was not taken by Sellers until they served their Defence Submissions as late as 3 December 1997, ie some fifteen months after the Arbitration had been commenced. In the meantime, Buyers had incurred considerable costs in instructing lawyers to serve Claim Submissions which could have been avoided if the point had been taken immediately and the Tribunal asked to determine the matter as a preliminary issue.

5.10 As the Tribunal is well aware, Rule 2(d) of FOSFA International’s Rules of Arbitration and Appeal provides that the Arbitrators may in their absolute discretion extend the time for the commencement of arbitration. We invite the Tribunal to use their absolute discretion to extend time for the commencement of the Arbitration, should they be of the opinion that notice of commencement of arbitration cannot be served by fax. We invite the Tribunal to find that the point is entirely without merit and is perhaps an indication of the weakness of Sellers’ defence. In any event, following the decision of the House of Lords in Comdel -v- Siporex (No 2) 1992 LLR 207, the Court has power to extend the time for commencement of arbitration under Section 27 of the Arbitration Act 1950 in the event that the first tier Arbitrators or the Board of Appeal refuse to extend time. We submit that the Court would not hesitate on the facts of this case to extend time as absolutely no prejudice whatsoever has been suffered by Sellers as a result of the alleged failure to service notice otherwise than by facsimile and we invite the Tribunal to extend the timebar, thereby avoiding the considerable additional legal costs which would be wasted if it became necessary for the matter to be determined by the Board of Appeal and/or the Commercial Court. We further submit that in view of the strength of Buyers’ case against Sellers, this should be a factor to be borne in mind by the Tribunal when considering whether or not to exercise their discretion to extend time.

5.11 With regard to the merits of the dispute, we submit that Buyers are in a very strong position. FOSFA Contract No 54 does not contain an extension of shipment clause and even if it had, Sellers were bound to have requested an extension of shipment prior to the last day of the contractual period. In the present case Sellers waited until 3 June 1996, which was three days after the end of the shipment period. Buyers therefore had every right to hold Sellers in default for having failed to ship in accordance with the Contract.

5.12 Sellers seek to defend their position by alleging that they were not in 'default' as of 3 June as they could have bought goods afloat and their only obligation was to have shipped a cargo which had left a South American load port by 31 May 1996. We submit that this argument is an afterthought made in an endeavour to justify the failure to ship and is totally at variance with Sellers’ stated position on 3 June 1996 when they stated that they had not been in a position to “secure a vessel load ready in May to lift the above mentioned cargo”. This telex clearly demonstrated that Sellers did not contemplate chartering or buy afloat May goods. In our submission this argument is quite disingenuous and there is nothing to suggest that the Contract was for goods which had been sold afloat. If the Contract was on such terms then we would have expected the other terms in the Contract to have made this clear and to have named the vessel, in particular for the Letter of Credit to have reflected this fact. The communications with Sellers did not suggest that they were treating the Contract as one for goods sold afloat and we consider that the argument is an unjustified attempt to defend a clear case of default on the part of Sellers. If Sellers truly had the intention to buy afloat, we would have expected them to have said so between 3 May and 3 June 1996. As of 4 June 1996 Sellers’ argument was that Buyers, having terminated the Contract, were not entitled to claim damages against Sellers. That is an entirely different argument from the argument now being advanced that Sellers could have performed the Contract by buying afloat.
5.13 Sellers’ next defence is that Buyers have lost the right to claim damages because they held the Contract to be “terminated” on 4 June 1996 and that by cancelling the Contract on that date they had lost their right to claim damages. The Tribunal is referred to Buyers’ fax to Sellers dated 4 June which is a classic acceptance of a repudiatory breach of contract. Following the acceptance of a repudiatory breach, the Contract comes to an end and is therefore terminated. Such termination does not affect accrued rights and enables the buyer to sue the seller for having failed to ship the goods. This is trite law and requires no citation of authority. Indeed the default clause in FOSFA Contract No 54 itself refers to the right either to cancel a contract or the right to sell or purchase against the defaulter. In our submission there is absolutely nothing in the argument that Buyers lost their right to claim damages by accepting Sellers’ repudiatory breach of contract and holding them in default.

5.14 Sellers’ final defence is that the Letter of Credit was not opened and available by 23 April 1996. The Letter of Credit was in fact opened on 23 April 1996 and there was no requirement for it to be "available" on that date. The requirement was that the Letter of Credit had to be operative by the latter date. The Letter of Credit was operative as of 23 April 1996 notwithstanding that a copy was not sent to Brokers for onward transmission to Sellers until 24 April 1996. As Sellers were finding difficulties in obtaining tonnage as of that time, they can hardly complain that they did not have sight of the Letter of Credit until 24 April 1996. In any event, Sellers accepted the Letter of Credit and made no complaint about it being opened late. It follows that they have waived their right to contend that the Letter of Credit had not been opened in accordance with the Contract. As on 3 June 1996 Sellers requested the Letter of Credit to be amended to extend the shipment period, it follows that they must have accepted that the Letter of Credit opened was in accordance with the Contract and they waived any right to contend that it was opened late.

Summary

5.15 Buyers’ claim against Sellers’ damages for non-shipment based upon the difference between the contract and market price on 4 June 1996 alternatively 1 June 1996 together with interest, arbitration costs and legal expenses. Should it be necessary, the Tribunal is invited to extend time in accordance with the absolute discretion given to it by FOSFA International’s Rules of Arbitration and Appeal. The Tribunal is requested to proceed to an award at its earliest convenience.

6.0 FINDINGS

Preliminary Issue

6.1 The relevant parts of FOSFA Rules of Arbitration and Appeal applicable at the date of the Contract (revised and effective from 1 July 1992) state -

"2. PROCEDURE FOR CLAIMING ARBITRATION AND TIME LIMITS.
(a) ------
(b) Claims other than on quality and/or condition shall be notified by the claimant with the name of an arbitrator to the other party and to the Federation within the time limits stipulated in this rule:
(i) For goods sold

(1) On CIF terms: not later than 120 consecutive days after the expiry of the contract period of shipment or the date of completion of final discharge of the goods whichever period shall last expire.
(2) ------
(3) On any other terms: not later than 120 consecutive days after the last day of the contractual delivery period.

(ii) ------"
(c) Claims for arbitration shall be made in accordance with the Notices Clause of the contract. The provisions of the Non-Business Days Clause shall also apply.

(d) In the event of non-compliance with any of the preceding provisions of this Rule, and of such non-compliance being raised by the respondents as a defence, claims shall be deemed to be waived and absolutely barred unless the arbitrators, umpire or Board of Appeal referred to in these Rules, shall, in their absolute discretion, otherwise determine, whereupon the substantive case shall be considered first by the arbitrators and subsequently, if necessary, by an Umpire and the Board of Appeal in accordance with these Rules.

(e) -----"

The Notices Clause of FOSFA Contract No 54 referred to above reads -

“NOTICES: Notices to be despatched by any means of rapid written communication (facsimile machines excluded). All notices shall be under reserve for errors in transmission. Notices shall be passed on with due despatch by intermediate Buyers and Sellers. Any notices received after 16.00 hours on a business day shall be deemed to have been received on the following business day. Notice from a broker shall be a valid notice under this contract.”

6.2 I FIND that the claim for arbitration sent by Lawyers on behalf of Buyers to Sellers, on 25 September 1996, was within the correct time limit of 120 days; however it was not sent in accordance with Clause 2 (b) (c) of the relevant Arbitration Rules and the Notices Clause of the Contract, as the sending of Notices by facsimile machines is excluded.

6.3 I FIND that Sellers suffered no prejudice as a result of the Notice of Arbitration being sent by facsimile machine and HEREBY USE MY ABSOLUTE DISCRETION as allowed under Clause 2 (b) (d) of the FOSFA International Rules of Arbitration and Appeal revised and effective from 1 July 1992, and allow the substantive case to proceed.

Substantive Issue

6.4 Sellers submitted that the Letter of Credit was not opened and available on time. However the ‘revised’ contract, although dated 10 April 1996, was not sent to Buyers until 23 April 1996. It was on this same day that Buyers notified Brokers that they had established the Letter of Credit, a copy of which they faxed to Sellers on 24 April 1996. I THEREFORE FIND that the Letter of Credit was opened and operative in accordance with the Payment Clause of the Contract.

6.5 On 24 and again on 29 May 1996 Buyers gave notice to Sellers that if they failed to ship the goods by 31 May 1996 they would reserve all their rights to hold Sellers in default in accordance with the terms of the Contract. Sellers submitted that their message of 3 June 1996 was merely checking whether Buyers would agree to a later shipment and, if Buyers had refused the request, Sellers would still have been in a position to have fulfilled the Contract by buying in goods already afloat. I FIND no evidence to support this claim and FURTHER FIND that Sellers’ message of 3 June 1996 was a definite statement - "----- we have not been in a position to secure a vessel load ready in May ----- we chartered a vessel to lift your cargo on or about June 10/15 ----- we ask you to grant us an extension upto June 15th 1996 and amend the L/C accordingly." - and that the message was a repudiatory breach of the Contract, as claimed by Buyers in their message to Sellers of 4 June 1996, and that Buyers had the right to put Sellers in Default and to claim any damages due.

6.6 I FIND that the Date of Default was 4 June 1996.

6.7 The Default Clause of the FOSFA Contract No 54 reads -
"In default of fulfilment of this contract by either party, the other party at his discretion shall, after giving notice, have the right either to cancel the contract, or the right to sell or purchase, as the case may be, against the defaulter who shall on demand make good the loss, if any, on such sale or purchase. If the party liable to pay shall be dissatisfied with the price of such sale or purchase, or if neither of the above rights is exercised, the damages, if any, shall, failing amicable settlement, be determined by arbitration..."

6.8 Both Parties submitted independent evidence with regard to the value of the goods on the date of default. After carefully studying all the evidence, I prefer that submitted by Buyers and accordingly FIND that the value of the goods on the 4 June 1996 to be US$610.00 per metric ton C & F Indian Port and confirm this to be the settlement price.

7.0 AWARD

7.1 I AWARD that Sellers shall pay to Buyers forthwith the sum of US$92,000.00 (Ninety Two Thousand United States Dollars), being the difference between the contract price of US$587.00 per metric ton and the settlement price of US$610.00 per metric ton, together with interest thereon at the rate of 7% (Seven Per Cent) per annum from 4 June 1996 to the date of this Award.

7.2 I FURTHER AWARD that the fees, costs and expenses of this Award shall be for Sellers’ account. If Buyers shall have paid any or all such costs in the first instance, they shall be entitled to immediate reimbursement.

7.3 Buyers’ claim for charges relating to the Letter of Credit FAILS, as these would normally be incurred by any buyer during the course of business.

7.4 Both Parties claimed legal costs, but as the dispute is not of such complexity as to require legal involvement, I AWARD that each party shall pay their own legal costs.