

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED TRADING & SHIPPING, INC.	:	
Plaintiff,	:	
	:	CIVIL ACTION
	:	NO. 94-4742
v.	:	
COMMONWEALTH INSURANCE	:	
COMPANY and TRADERS, LTD.	:	

**GREEN, S.J.**

**SEPTEMBER 10, 1999**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. FINDINGS OF FACT**

**A. Procedural History**

1. United Trading and Shipping, Inc., (“United Trading”), filed suit against Commonwealth Insurance Company, (“Commonwealth”), and Traders, Ltd., (“Traders”), to enforce the obligation of Commonwealth under a bond it issued as surety for an international sugar transaction between United Trading and Traders.
2. On December 23, 1996, Judge Rendell, then of this Court, granted United Trading’s motion for summary judgment against Commonwealth and denied Commonwealth’s cross motion for summary judgment.
3. On December 27, 1996, the Clerk of Court entered an Order on liability adjudging Commonwealth liable to United Trading.
4. However, the Order did not specify the amount of damages and final judgment was not entered.
5. Therefore, a hearing on damages was subsequently held on May 13, 1999.
6. After the hearing, the parties submitted proposed post-hearing findings of fact and

conclusions of law as ordered by the Court.

**B. The Parties**

7. Plaintiff, United Trading, is a Virginia Corporation.
8. Dr. Omar Fathaly is the President of United Trading.
9. Plaintiff, United Trading, is the Buyer identified in Contract Number 30011994/SAND-29, (the "Contract"), entered into between United Trading and Traders. (Defs.' Ex. 2).
10. Plaintiff, United Trading is the Buyer identified in the Product Procurement Performance Guarantee Bond Number TOOG2-0013, (the "Bond"), executed on behalf of Commonwealth as the surety on January 8, 1994. ( Defs.' Ex. 4).
11. Traders is identified in Contract Number 30011994/SAND-29 as the Seller and was identified as a Defendant in this case.
12. On June 27, 1995, Traders was dismissed from this case without prejudice for lack of prosecution. (Docket Entry # 5).

**C. The Contract**

13. On January 30, 1994, Plaintiff, United Trading, entered into a contract for the purchase of sugar with Traders.
14. Pursuant to the Contract, Traders agreed to sell and Plaintiff agreed to buy 100,000 metric tons of sugar under the terms and conditions set forth in the Contract. (Defs.' Ex. 2 at Article 7).
15. The Contract required the delivery of sugar in installments over the course of one year, with each installment containing no less than 12,500 M.T. of sugar,

deliverable each month until the contract was fulfilled. ( Defs.’ Ex. 2 at Articles 6 and 7).

16. The purchase price of the sugar was \$214.00 per metric ton of sugar for the first 12,500 metric tons of sugar, and \$200.00 per metric ton for the remaining shipments. (Defs.’ Ex. 2 at Article 9).
17. The procedure for the transaction is set forth in Article 13 of the Contract which states in relevant part:

*ARTICLE 13: PROCEDURE:*

1. Buyer and Seller sign this contract in four hard copies.
2. Seller places conditional 2% performance bond.
3. Within three banking days, buyer issues the financial instrument(s) in the amount of 2, 675,000 USD for the first shipment and within thirty days after the vessel sails for Latakia the amount of USD 17,500,000 for the remaining shipments.
4. Seller issues irrevocable pay orders to the appropriate parties.
5. Delivery commences within twenty days, plus six, days for loading of the vessel.
6. Shipment commences and Seller issues documentation and is allowed to draw against the letter of credit.
7. Shipment continues as per Schedule.

**D. The Performance Bond**

18. The performance bond states: “ This Bond shall incorporate the Contract by reference as if same shall be fully set forth herein. (Defs.’ Ex. 4 at ¶4).
19. The conditional performance bond provides that Defendant, Commonwealth

binds itself in favor of United Trading in the event of a default by Traders under the Contract. (Defs.' Ex. 4 at the second unnumbered ¶).

20. The Bond obligates Defendant, Commonwealth to pay United Trading “the sum of 2% of the value of undelivered shipments of sugar, which amount shall be limited to Four Hundred Seven Thousand Dollars ( \$407,000.00) to be paid to the Buyer subject to the conditions contained [in the bond].” ( Defs.' Ex. 4 at third unnumbered ¶).
21. Delivery of the sugar in accordance with the terms and conditions of the contract would render the performance bond null and void; otherwise, the bond remained in effect until delivery occurred. (Defs.' Ex. 4 at ¶1).
22. Pursuant to Paragraph 2 of the Bond, if Traders failed to deliver the sugar in accordance with the contract, but partially delivered during the effective term of the Bond, then Commonwealth’s obligation under the Bond would be limited to 2% of the value of the undelivered shipments remaining.
23. The performance bond became active upon receipt by Traders of acceptable Letters of Credit issued by United Trading. (Defs.' Ex. 4 at ¶3).
24. The performance bond defined default as (i) failure by the Seller to make delivery of the cargo in accordance with the terms and conditions of the Contract and (ii) to cure such non-performance within 45 days of receipt of notice of default from the buyer. (Defs.' Ex. 4 at ¶5).
25. Upon the occurrence of Default, United Trading was entitled to make a claim under the Bond and Commonwealth could then at its option, either make delivery

in accordance with the terms of the Contract, or pay United Trading the limit of liability set forth in the Bond. (Defs.' Ex. 4 at first unnumbered ¶ after ¶5).

26. In the event of default, the bond required the Buyer to notify Commonwealth Insurance by faxed message within twelve (12) hours of the occurrence and to forward written notice of the circumstances surrounding the default no later than seven (7) days after its occurrence. (Defs.' Ex. 4 at second unnumbered ¶ after ¶5).

27. Pursuant to the language set forth in the bond: " Each claim shall be limited to the specific shipment against which Default is claimed, and no acceleration of claims for shipments not yet due will be considered on any grounds whatsoever." (Defs.' Ex. 4 at third unnumbered ¶ after ¶5).

**E. Performance Under the Contract**

28. In accordance with the contract, United Trading and Traders signed the contract in four hard copies.

29. Traders, Ltd. secured a conditional 2% performance bond issued by Defendant, Commonwealth.

30. On or about February 23, 1994, United Trading issued the financial instruments required by the Contract by causing a revolving letter of credit, in the amount of \$2,675,000.00, to be posted in favor of Traders, Ltd. for the first shipment of sugar. (Defs.' Ex. 5).

31. Traders failed to arrange for delivery of the first shipment of sugar as required by the Contract. (Defs.' Ex. 5).

32. Because Traders failed to deliver the first shipment of sugar, the first letter of credit was not paid to Traders. (Defs.' Ex. 5).

**F. Default Under the Contract and Bond**

33. On April 11, 1994, United Trading sent written correspondence to Traders, Ltd., via facsimile. In the letter, Dr. Omar Fathaly, indicated that United Trading expected Traders to begin loading the first shipment of sugar thirty days after receipt of the first letter of credit which occurred on February 22, 1994. ( Def.'s Ex. 8 at ¶1).

34. The letter further states that United Trading was willing to extend the shipping validity deadline if Traders provided shipping information prior to the deadline identified in the Contract. ( Def.'s Ex. 8 at ¶2).

35. The April 11, 1994 letter from United Trading informed Traders that the contract with Syria was lost because Traders failed to perform according to the Contractual agreement between it and United Trading. ( Def.'s Ex. 8 at ¶3).

36. Finally, Dr. Fathaly's letter to Traders declared Traders to be in default of the contract for non-delivery of the first shipment and demanded the surrender of the Performance Bond in the amount of \$53,500.00, which represented 2% of the value of the first undelivered shipment. ( Def.'s Ex. 8 at ¶4).

37. Pursuant to the default procedures set forth in the performance bond, after United Trading issued the notice of default, Traders' had 45 days from receipt of the notice to cure the non-performance. ( Defs.' Ex.4 at ¶ 5).

38. As of May 26, 1994, 45 days after United Trading issued a notice of default,

Traders still had not cured its non-performance.

39. In accordance with the default procedures outlined in the performance bond, United Trading issued a notice of default to Commonwealth Insurance on June 1, 1994, more than forty five days after United Trading transmitted notice of default to Traders. ( Defs.' Ex. 7).
40. In the notice of default, United Trading included a written description of the default in the form of an affidavit of Dr. Omar Fathaly. ( Def's. Ex. 7).
41. The notice of default notified Commonwealth that the value of the undelivered shipments exceeded the face amount of the Bond. Therefore, United Trading demanded immediate payment of \$407,000.00, the full value of the performance bond.

## **II CONCLUSIONS OF LAW**

1. The Court has diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a).
2. The parties do not dispute that Pennsylvania law is applicable to the issues presented.<sup>1</sup>
3. The contract between Traders and United Trading involved the sale of sugar, a "transaction in goods" under Article 2 of the Uniform Commercial Code, as adopted by the Commonwealth of Pennsylvania (hereinafter referred to as "the Uniform Commercial Code"). See 13 Pa.C.S.A. § 2102 *et seq.*

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<sup>1</sup> Despite the interstate, and indeed international, nature of the transactions at issue in this case, the parties have not chosen to raise choice-of-law issues. Accordingly, this cause of action is governed by Pennsylvania law.

4. Under the Uniform Commercial Code, an “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted. 13 Pa.C.S.A. § 2612(a).
5. In a transaction involving the sale of goods, wherein the parties agree to delivery of the goods in installments, nonconformity or default with respect to one or more installments results in a breach of the whole contract when such nonconformity or default substantially impairs the value of the whole contract. 13 Pa.C.S.A. § 2612(c).
6. Therefore, because Traders failed to deliver the sugar in accordance with the terms and conditions of the Contract, which resulted in United Trading’s inability to meet its contractual obligations to the end user of the sugar, United Trading had a right to declare Traders in breach of the whole contract.
7. Commonwealth’s obligation to United Trading, however, is not equivalent to the amount of damages flowing from Traders’ breach under the Contract.
8. Rather, to determine Commonwealth’s obligation as surety in this case, I must look to the language of the performance bond and the underlying agreement as incorporated by reference in the bond. Pepka v. Schang, \_\_ Pa. Super. \_\_\_, 704 A.2d 127, 130 (1997).
9. According to the Bond, default occurred when Traders failed to make delivery of the sugar in accordance with the terms and conditions of the contract and the time for cure expired.
10. Therefore, United Trading was entitled to make a claim against the bond for each

defaulted installment at least forty five days after it became due.

11. United Trading initiated this suit for damages on the theory that delivery of all of the installments under the contract were past due at the time of the filing of suit and therefore Commonwealth is obligated to pay United Trading at least 2% of the value of all of the undelivered shipments.
12. Commonwealth argues that Dr. Omar Fathaly's letter of April 11, 1994, effectively canceled the contract and prohibited them from attempting to make further deliveries under the contract.
13. However, there is no evidence before me that provides a basis for the conclusion that Traders intended to and could continue to perform under the Contract. In fact, even after Dr. Fathaly offered to extend the shipping deadline to accommodate Traders, delivery was still not forthcoming.
14. Therefore, I conclude that at the time United Trading filed this suit, without acceleration of deliveries and payments, all of the deliveries under the contract were due and Dr. Fathaly's letter of April 11, 1994 did not cancel Commonwealth's obligation to pay United Trading 2% of the value of each undelivered shipment under the Contract.
15. I further conclude that United Trading satisfied the criteria set forth in the performance bond for declaring default and making claim for 2% of the value of all of the undelivered shipments under the Contract.
16. Therefore, Commonwealth is liable to United Trading for 2% of the value of all of the undelivered shipments of sugar due under the Contract.

17. According to the provisions of the Contract, incorporated by reference into the performance bond, the total value of the sugar equaled \$20, 157,000.00.
18. Therefore, 2% of the total value of shipments against which United Trading claimed default equaled \$403,500.00.
19. Commonwealth Insurance Company is liable to United Trading for 2% of the value of the all of the undelivered shipments due under the Contract in the amount of \$403,500.00.<sup>2</sup>

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Although Dr. Omar Fathaly's testimony at the hearing on damages included undisputed evidence of United Trading's damages in excess of the maximum face value of the bond, I will only award damages in the amount of 2% of the value of the undelivered shipments, which is the limit set forth in the contents of the bond agreement.

An appropriate Order of Judgment follows.

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v. :  
COMMONWEALTH INSURANCE :  
COMPANY and TRADERS, LTD. :  
Defendants. :

**JUDGMENT**

**AND NOW**, this 10th day of September 1999, for reasons set forth in the accompanying Findings of Fact and Conclusions of Law, I **HEREBY ENTER JUDGMENT** as follows:

1. Final Judgment **IS ENTERED** in favor of Plaintiff, United Trading & Shipping, Inc., and against Defendant, Commonwealth Insurance Company; and
2. Plaintiff, United Trading & Shipping **IS HEREBY AWARDED** damages in the amount of **\$403,500.00** for the value of undelivered shipments, pursuant to the terms and conditions of Product Procurement Performance Guarantee Bond Number T00G2-0013.

BY THE COURT,

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CLIFFORD SCOTT GREEN, S.J.

