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Arbitration Award

Date of Issue: Interim Award published on 26 June 2006
Final Award published on 31 October 2006

Arbitration number: 12

Claimant: Grain Buyer (Buyer)
&
Respondent: Grain Seller (Seller)

ARBITRATORS

- Peter Howard, arbitrator nominated by Claimant
- David Dossor, arbitrator nominated by Respondent
- Lloyd George, arbitrator nominated by NACMA and Committee Chairman

CLAIM

The Claimant (Buyer) alleged that the Respondent (Seller) caused the loss of the contract it had entered into with third party. It claimed the value of that contract.

AWARD

The Claim is denied on the basis that by signing the title transfer, without reservation, the Claimant (Buyer) has extended the time for performance and accepted title to the goods.

DETAILS

- The Claimant (Buyer) entered into a contract with a third party to supply grain. The Claimant (Buyer) entered into a contract to purchase grain from the Respondent (Seller).
- To deliver the grain the Respondent (Seller) had to title transfer the grain no later than 31 January 2005. The title transfer was not sent until 1042 hours on 1 February 2005.
- The Claimant (Buyer) signed the transfer and returned it to the Respondent (Seller), without reservation.
- The Claimant (Buyer) then transferred the grain to the third party. The third party claimed the transfer was out of time and called the Claimant (Buyer) in default.

MAJOR FINDINGS

The Committee:

- Agreed that time was of the essence and the contract granted a time extension until 1000 hours the following day. If the documents were not delivered by this time the Respondent (Seller) would be in breach of the contract providing the Claimant (Buyer) with a right to terminate the contract.
- Concludes that that by signing the title transfer, without reservation, the Claimant (Buyer) has extended the time for performance and accepted title to the goods, thereby electing to extend the delivery period and affirming the continuing performance of the contract.

IMPORTANT POINTS

- When entering into back to back contracts it may be prudent to ensure that the delivery periods do not end at the same time. If they do, you may only wish to reserve your rights when accepting the goods.

AWARD IN DETAIL

This award has been stripped of any detail that may identify the parties to this arbitration.

INTERIM ARBITRATION AWARD

1. INTRODUCTION

The Claimant (Buyer) in this arbitration is a company incorporated under the laws of Australia.

The Respondent (Seller) is a company incorporated under the laws of Australia. It contracted to supply the Claimant (Buyer) with canola. The Claimant (Buyer) alleges that by its acts or omissions the Respondent (Seller) caused the loss of the contract it had entered into with a third party.

The contract incorporates the Trade Rules ("Trade Rules") of the National Agricultural Commodities Marketing Association Ltd ("NACMA") and NACMA Track Contract No.2 – "Grain and Oilseeds in Bulk – Basis Track" ("Track Contract") which requires disputes to be referred to Arbitration under the NACMA Dispute Resolution Rules.

The Arbitration Committee duly comprised:

- Mr Peter Howard, nominated by the Claimant
- Mr David Dossor, nominated by the Respondent
- Mr Lloyd George, Arbitration Committee Chairman, appointed by NACMA

The following submissions were received from both parties and have been considered by the Committee:

1. Claimant (Buyer)'s Submission ("CS"), dated 20 January 2006
2. Respondent (Seller)'s Defence Submissions ("RD"), dated 16 March 2006
3. Claimant (Buyer)'s Rebuttal of Defence ("CR"), dated 5 April 2006
4. Respondent (Seller)'s Surrebuttal ("RS"), dated 27 April 2006

References in this award in square brackets are references to the parties' submissions and to documents annexed to those submissions.

The parties waived their right to make oral submissions and the Committee has deliberated solely upon the information provided in the above submissions and annexures.

The Committee was asked by the Claimant (Buyer) to determine the following issues:

1. Was there a breach of the contract by the Respondent (Seller)?
2. If so, was the Claimant (Buyer) entitled to terminate the contract?
3. If so, what damages are the Claimant (Buyer) entitled to?

The Claimant (Buyer) seeks the following relief [CS:2]:

- i. Damages in the amount of \$297,500.00 or in such other amount as the Committee thinks fit;
- ii. Damages in the amount of \$8,694.50;
- iii. Restitution in the amount of \$119,000.00;
- iv. Interest at 9% per annum on any amounts found to be due to the Claimant (Buyer); and
- v. Costs.

The Respondent (Seller) seeks the following relief [RD:1.2]:

- i. Cross-Claim: damages in the amount of \$19,510.00,
- ii. Interest at 9% per annum on any amounts found to be due to the Respondent (Seller); and

iii. Costs.

2. AGREEMENT ON THE FACTS

2.1 Jurisdiction

The Track Contract states that the contract is to be governed by and shall be construed to be in accordance with the laws of Victoria. The Trade Rules state the Trade Rules are governed by and construed in accordance with the laws of Australia and in the State or Territory in which the transaction is executed. As there have been no submissions regarding this matter, and as the Track Contract specifically states a domicile, and while nothing turns upon it, the Committee has taken Victorian law to be the relevant law of the contract and for this arbitration.

2.2 Contract Specifications, terms and conditions

Save for one important matter which we will canvas below, the parties agree as to the terms of the relevant contracts. The contract was evidenced by a Broker's Note [CSA: 2, RDA:1] as to the following terms:

Contract No. XXX1 ("Seller's Contract")

- Contract Date: 4/01/05
- Commodity: Canola 04/05 Vic or SA Origin at Sellers Option
- Quality: AOF, oil content 42%, determined on date of title transfer
- Quantity: 1000mt
- Delivery Period: By title transfer in Ausbulk Depots in Port Adelaide,
at any time at Seller's Option Between 4th and 31st January 2005
- Destination: Buyers Care after completion of title transfers
- Freight: Seller's Account until title transfer thereafter for buyers account
- Price: \$318/tonne AUD delivered Port Adelaide
- Payment Terms: Net Cash Payable upon Completion of Conveyance
- Other Terms: All terms and conditions not conflicting with above shall be in
accordance with the Terms and Conditions of the Track Contract

The Respondent (Seller) claims that it entered into the above contract without knowledge of the following sales contract between the Claimant (Buyer) and the third party. The following contract was evidenced by a Claimant (Buyer) Sales Contract [CSA:5].

Contract No. XXXX-01 – issued by the Buyer ("Sales Contract")

- Contract Date: 21/6/04
- Commodity: Canola
- Quality: As per BHC Stack average at time of conveyance
- Quantity: 5000mt (*2500mt already settled*)
- Shipment Period: Dec/Jan 2005; 1/12/04 – 31/01/05
- Ship Mode: Ausbulk Storage / Title Transfer
- Del Basis/FOB Point: Adelaide
- Price: \$401/tonne AUD
- Payment Terms: Cash against Documents
- Note: At Seller's Risk until conveyed to the Buyer
- Other Terms: All terms and conditions not conflicting with above shall be in
accordance with the Terms and Conditions of the Track Contract

The Committee notes that the delivery period ended 31/1/05 and per the contract, subject to Clause 18 of the Track Contract, the last business day for delivery of documents was at 1600hrs 31/1/05.

2.3 Timeline of Events

A summary of facts follows:

1. On 31/1/05 after 1600hrs two telephone conversations took place between the Claimant (Buyer) and the Respondent (Seller) regarding the title transfers. The Respondent (Seller) informed the Claimant (Buyer) that the title transfer had not yet been effected and would be effected on 1/2/05.
2. At 1006hrs on 1/2/05 the Respondent (Seller) emailed the Claimant (Buyer) stating that per Contract No. XXX2 it was transferring 1000mt [CSA:6].
3. At 1042hrs on 1/2/05 the Respondent (Seller) faxed the title transfer to the Claimant (Buyer). The title transfer was received by the Claimant (Buyer) at this time. The Claimant (Buyer) signed the transfer without reservation and dated it 1/2/05 [CSA:8].
4. The title transfer was sent back to the Respondent (Seller) and faxed to the relevant bulk handler for processing, although this transfer was later purportedly cancelled by the Claimant (Buyer) [RSA: 5].
5. On 2/2/05 the Claimant (Buyer) paid the Respondent (Seller) for the goods transferred by the above title transfer without reservation.
6. At 1735hrs on 3/2/05 the Claimant (Buyer) emailed the Respondent (Seller) advising them that the third party had held the Claimant (Buyer) in default on the Sales Contract by reason of late transfer. The Claimant (Buyer) also asked the Respondent (Seller), for the purposes of arbitration against the third party, to prove that title had been passed in a timely manner so the claim could be passed down the string. [CSA:17]
7. At 1306hrs on 9/2/05 the Respondent (Seller) emailed the Claimant (Buyer) advising that there was an agreement to transfer the goods on the morning of the 1/2/05, that the Respondent (Seller) was unable to provide details of string contracts and that as the Claimant (Buyer) had paid the invoice the Respondent (Seller) considered the contract completed [CSA:20].
8. At 1335hrs on 9/2/05 the Claimant (Buyer) emailed the Respondent (Seller) advising that it had not taken title as the transfer was received after 1000hrs and that the Claimant (Buyer) was passing the default down the string. The Claimant (Buyer) requested the Respondent (Seller) return the monies paid by the Claimant (Buyer). [RDA:8]
9. At 1257hrs on 11/2/05 the Claimant (Buyer) emailed the Respondent (Seller) advising that to maintain the integrity of the string it was giving notice and rejecting the 1000mt of grain conveyed after 1000hrs 1/2/05 and placing the Respondent (Seller) in default. [RSA:9]

3. DISAGREEMENT ON THE FACTS

The parties disagree to the facts as follows:

1. The Respondent (Seller) submits that on 31/1/05 after 1600hrs the Claimant (Buyer) agreed to accept the transfer at any time on the 1/2/05. The Claimant (Buyer) denies such an agreement.

With regard to the evidence of this conversation and its alleged contents both parties have submitted Statutory Declarations [CRA:1] and [RSA:13].

4. SUBMISSIONS

Timing of Notices

The Claimant (Buyer) submits that pursuant to the Track Contract, transfer is to be effected no later than 1000hrs on the next business day following the last day for delivery and as time is of the essence, failure to transfer title by 1000hrs is breach of the contract. As the term was a condition of the contract, any breach will give a right to terminate and sue for damages. As the Respondent (Seller) transmitted the documents after 1000hrs the Respondent (Seller) is in breach of the contract which the Claimant (Buyer) terminated on 11/2/05 by email as above.

The Respondent (Seller) denies breach of contract on the basis of variation of contract, unconditional acceptance and estoppel.

Variation of Contract: The Respondent (Seller) submits that the conversation on 31/1/05 was a verbal agreement to extend the delivery period to anytime on 1/2/05 and that it was not necessary to reduce the agreement into writing. Trade Rule 1.3 does not invalidate an amendment not reduced to writing and there is no requirement per the *Goods Act 1958 (Vic)* for amendments to be in writing. The Respondent (Seller) submits that a verbal contract is enforceable.

The Claimant (Buyer) submits that it did not waive or elect, by unequivocal words or actions, its right to insist upon strict compliance of the contract, thus it did not extend time for delivery. If approached as a variation, the Claimant (Buyer) submits that the Respondent (Seller) must prove the mutual intention of the parties during the telephone conversation, which on the evidence it has not.

Unconditional Acceptance: The Respondent (Seller) submits that the Claimant (Buyer) should have been aware of its options under the terms of the Track Contract (Rule 17) upon being informed that the Respondent (Seller) had not affected the transfer after 1600hrs on the last day for delivery. The Claimant (Buyer) chose not to hold the Respondent (Seller) in default but agreed to perform the contract (Rule 17.1(1)(a)). Furthermore the Claimant (Buyer) accepted the transfer and paid without reservation. The Claimant (Buyer) did not purport to hold the Respondent (Seller) in default until 11/2/05 by which time the contract had been discharged. Finally per the contract the Claimant (Buyer) was only obliged to pay upon completion of the conveyance which it did without reservation.

The Claimant (Buyer) submitted that Rule 16 did not contemplate the discharge of liability for late delivery upon tender or acceptance of the canola. The Committee must then apply the common law principles for surrender of a right to damages for breach of contract, entitlement to which may only be lost by either release under seal or accord and satisfaction. As these steps have not been taken the Claimant (Buyer) submits this defence fails.

Estoppel: the Respondent (Seller) submits that by relying on the assumption that delivery would be permitted on 1/2/05, an assumption induced by the conduct of the Claimant (Buyer), it acted on that assumption in not seeking to affect transfer by 1000hrs and will suffer detriment if the Claimant (Buyer) does not adhere to that assumption. Thus the Claimant (Buyer) should be estopped from terminating the contract.

The Claimant (Buyer) denies making such a representation nor has the Respondent (Seller) proved detriment. The evidence does not establish that had the Respondent (Seller) contacted the bulk handler prior to 1000hrs it would have been able to transfer the goods before 1000hrs.

Damages: Causation, Remoteness, Mitigation

The Claimant (Buyer) submits that the Respondent (Seller)'s breach of the contract caused the loss of the third party Sales Contract for as a matter of common sense and experience the breach was a sufficient cause of the loss. As a matter of common sense if the Respondent (Seller) had delivered by 1000hrs the Claimant (Buyer) would have been in a position to deliver to the third party. The modern test of causation requires only that the Respondent (Seller)'s breach was a cause of the Claimant (Buyer)'s loss or damage. The Claimant (Buyer) submits that the contractual breach was causative of the loss of the bargain with the Respondent (Seller) and the third party.

The Respondent (Seller) denies causation on the basis that it was only contracted to deliver 1000mt and the Sales Contract required 2500mt therefore even if the Respondent (Seller) had

delivered prior 1000hrs the Claimant (Buyer) would have been short 1500mt. The loss arises out of the Claimant (Buyer)'s own breach of the third party contract. The Respondent (Seller) submits that the Claimant (Buyer)'s basis for the loss arising in the "ordinary course of events" is flawed as being a "sophisticated trader" does not impact upon the loss. The Respondent (Seller) also submits that they were never aware of the existence of the Sales Contract.

Damages: Measure

The Claimant (Buyer) claims \$297,500 in damages (the Sales Contract price minus the market value multiplied by 2500mt: 401-282x2500) or \$119,000 from the Respondent (Seller) if severally liable. The Claimant (Buyer) submits that Clause 24 is not an exclusive code for calculation of damages and common law should be applied. If Clause 24 is an exclusive code then the Committee should award additional damages.

The Respondent (Seller) denies the above measure of damages and submits that damages should be measured in accordance with Trade Rule 17.5 and Clause 24, whereby the contract price is \$318 subtract market value and multiply by 1000mt resulting in \$36,000. Alternatively the Respondent (Seller) submits that the Claimant (Buyer) is not entitled to damages as the Claimant (Buyer) did not suffer loss by saving \$36,000 as the Claimant (Buyer) and third party benefited from not having to take up the canola at the higher price. Furthermore the Claimant (Buyer) took no pro-active steps to protect its interests and should not be entitled to additional damages. The Respondent (Seller) also suggests that on the available documentation inference can be drawn that the Claimant (Buyer) had a large proportion of grain available that could have been passed onto the third party thus mitigating its losses up to 88.72%.

Cross-Claim

The Respondent (Seller) claims for storage costs as the grain remains stored at the bulk handler awaiting the Claimant (Buyer)'s collection. The Respondent (Seller) had incurred charges from the bulk handler for \$19,510 up to 31/1/06. The Claimant (Buyer) is liable for these charges as the goods were validly transferred.

The Claimant (Buyer) submits that storage costs depend upon the Committee's decision as to the extension of time. Nor has the Respondent (Seller) submitted evidence that the stored canola is the same as per the above contract.

Claim in Restitution

The Claimant (Buyer) claims it is entitled to restitution of \$119,000 of the monies paid under the Contract to it on the basis of a total failure of consideration, even if it is found that the Claimant (Buyer) accepted the title transfer, the Claimant (Buyer)'s termination is sufficient to re-vest title of those goods in the Respondent (Seller). The Claimant (Buyer) submits that Clause 13 permits the Claimant (Buyer) a right to reject documents transferred outside the agreed delivery period, and thus terminate the contract. The Claimant (Buyer) submits this is supported by Trade Rule 17.4.

The Respondent (Seller) denies that there has been a total failure of consideration and that the grain has been available to be picked up by the Claimant (Buyer) from the bulk handler since 1/2/05. The fact that the Claimant (Buyer) has not taken physical possession of the grain does not equate to a failure of consideration. The Respondent (Seller) submits that Clause 13 conveyances are irrespective of time and that Rule 15 and 17.4 are irrelevant.

Claims for Costs of the Third Party Arbitration

The Claimant (Buyer) claims costs of the unsuccessful third party Arbitration on the basis that in mitigation of its losses and acting reasonably sought to enforce the Sales Contract. The argument of *force majeure* were reasonable, the construction of which hinged on the Committee's decision.

The Respondent (Seller) denies that the arbitration was reasonable as a sophisticated trader should have known that it was not a *force majeure* situation and thus the arbitration was ill-conceived and flawed.

5. DECISION

Applicable Rules

This dispute is governed by the Track Contract and Trade Rules, where they are silent the law of Victoria (notably *Goods Act 1958 (Vic)*) and common law will apply.

The relevant Trade Rules are as follows:

Rule 1.0: "...A contract may be created either verbally or in writing and once reached shall be legally binding on both parties..."

Rule 1.3: "The specifications of a contract can not be altered or amended without the expressed consent of both Buyer and Seller. Any alteration mutually agreed upon between Buyer and Seller must be immediately confirmed in writing."

Rule 3: "All stipulations set forth in the Terms of Trade as to "Time" are of the essence."

Rule 14.0(1): "Title to goods as well as risk of loss and/or damage remain with the Seller until the goods have been conveyed to the Buyer at the designated point of conveyance."

Rule 17.1(1): "When the Seller finds that they are or will be in default on fulfilment of contract, they shall notify the Buyer at once. Upon receipt of such notice, the Buyer shall, within 24 hours thereafter, notify the Seller, declaring which of the following options they elect to exercise:

- (a) Agree to extend the Delivery Period, and/or accept the quality and/or condition of the commodity tendered; or
- (b) Repurchase of all or any part of the defaulted portion of the delivery;
- (c) Cancel all or any part of the defaulted portion of the delivery at Fair Market Price based on the close of business of the market next business day."

Rule 17.5: "In the case of default, the party in default must pay within 7 business days of demand by the non-defaulting party, by way of liquidated damages, and amount equal to the undelivered contract quantity of the commodity multiplied by the difference between the contract price and the Fair Market Price of the Commodity."

The relevant clauses of the Track Contract are as follows:

Clause 13: "The Sellers have the right of conveyance. Conveyance shall be by ... Title Transfer(s) "In-Store" an applicable Australian bulk handling facility. The time of conveyance is when goods are presented to the Buyers by means of ... Title Transfer, or when goods are otherwise made available to the Buyers by the Sellers."

Clause 18: "...Should the notice be received after 1600hrs EST on the last business day permissible under this contract, the Sellers shall pass it on as soon as practical, but no later than 1000hrs EST on the next business day thereafter. Upon request, the Sellers shall provide the Buyers with documentary evidence of Seller's receipt of notice."

Clause 24: "In default of fulfilment of this contract by either party, the other party at his discretion ... shall, after giving proper 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 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. The damages awarded against the defaulter shall be limited to the difference between the contract price and the actual or estimated market price on the day of default. Damages to be computed on the mean contract quantity. If the arbitrators consider the circumstances of the default justify it they may, at their absolute discretion, award damages on difference quantity and/or award additional damages."

The Dispute

The Committee must determine what the terms of the contract between the parties were, and in particular whether the time for performance appearing in the contract documents was extended. It must determine whether there was a breach of those contract terms and if there was, what flows from that breach.

Critical in this case is the time for performance, specifically the time for the conveyance of the goods by transfer of title. In the normal course title must be transferred by 1600 hrs on the last day for delivery, unless the time is extended by operation of clause 18 of the Track Contract to 1000 hrs on the business day following the final day.

Timing of Notices

In submissions the parties referred to an industry practice of receiving notices on the business day following the last day of the contract. This practice derives from Clause 18 of the Track Contract and the common occurrence of strings. There appears to be some confusion as to its application.

Clause 18 provides that where notices are received 'after 1600hrs' on the last day of business the Seller shall pass it on 'as soon as practicable' but not later 'than 1000hrs'. A seller is not automatically entitled to the 1000hrs extension. First they must prove that a notice was received after 1600hrs, that the same notice was "passed on", and that it was passed on as soon as practicable, that being as soon as it was received back from the bulk handler. Then the 1000hrs is a permissible extension but also the absolute deadline for the documents to be delivered.

In this instance the delivery period ended at 1600hrs 31/1/05. The Respondent (Seller) has adduced no evidence as to the time the title transfer was received from its supplier, nor that it passed the documents on as soon as practicable. Thus *prima facie* the Respondent (Seller) was not entitled to the 1000hrs extended deadline.

Time of the Essence

The *Goods Act (Vic) 1958* provides that unless the contract specifically provides a time stipulation, time is not of the essence. As the NACMA Trade Rules were incorporated into the Contract and Rule 3 specifically provides time of being of the essence, the time for delivery of the goods under the Track Contract is of the essence. The common law provides that in a contract where time is of the essence, terms to which it attaches are conditions of the contract, any breach of which gives rise to a right to terminate the contract (See *Legione v Hateley* (1983) 152 CLR 406). This is particularly pertinent in contracts for sale of goods (See *Bunge Corp. New York v Tradax Export S.A. Panama* [1981] 1 WLR 711). Thus at 1600hrs on 31/1/05 unless the Respondent (Seller) had otherwise been provided an extension to deliver on 1/2/05, it was in breach of the contract, providing the Claimant (Buyer) with a right to terminate the contract.

Variation, Election, Waiver & Estoppel

The Respondent (Seller) made a number of submissions as to being provided an extension of time within which to deliver the documents. However there appears to be confusion between the parties as to the applicable doctrines. On a broad construction waiver is a term used to refer to the application of election or estoppel. On a narrow construction is it the 'unilateral abandonment of an alternative inconsistent right or reliance by another to its detriment' and is for the sole benefit of the party possessing it, such as the right to damages (See *Commonwealth v Verwayen* (1990) 170 CLR 394)). In this instance the right to waive termination of the contract was for the benefit of the Respondent (Seller) and not the Claimant (Buyer) who possessed the right. Thus 'waiver' in itself is inapplicable.

An election is a choice between rights that the innocent party knows it possesses and which are alternative, mutually exclusive and inconsistent (*Commonwealth v Verwayen* (1990) 170 CLR 394, *Sargent v ASL Developments* (1947) 131 CLR 634). Estoppel exists where a party has acted in reliance on what another has represented or promised suffers no unjust detriment (of being in breach of the contract) a party may be estopped from asserting the contractual right (*Commonwealth v Verwayen* (1990) 170 CLR 394). Variation is an alteration of the terms of a contract but also requires an exchange of consideration, whether financial or some potential benefit/detriment exchange for the variation.

As the contractual terms consider the application of election and variation, those terms *prima facie* govern the resolution of the dispute.

Rule 17.1 states the options open to the buyer if the seller has defaulted. It may agree to extend the delivery period, repurchase the defaulted portion or cancel the contract. These options are expressed to be in the alternative and they remain the same whether the seller notified the buyer or not.

The choice permitted to the innocent party under these contractual options is one of election. The doctrine of election requires unequivocal words or conduct, with knowledge of the alternative rights, to evince an intention to continue with performance or terminate the contract (*Sargent v ASL Developments* (1947) 131 CLR 634). Once the election has been made the right is permanently forfeited and cannot be revived unless by a subsequent breach of the contract (*Wendt v Bruce* (1931) 45 CLR 245, *Stocznia Gdanska SA v Latvian Shipping Co* [No 2] [2002] 2 LR 436 (CA)).

On the facts of this case, conversations between the Claimant (Buyer) and the Respondent (Seller) took place on the afternoon and evening of the 31/1/05. The following morning the Respondent (Seller) sent the Claimant (Buyer) an email (1006hrs 1/2/05) notifying that the title transfers were being transmitted and the Claimant (Buyer) received the title transfer at 1042hrs, at which time they were signed [CSA: 8] and forwarded to the bulk handler for processing [RSA:5 & 9].

Whilst the parties have submitted evidence as to the content of the telephone conversations, the Committee has decided that the greater evidentiary weight should be given to the actions of the parties and the documents exchanged at the time of the contract's conclusion rather than to inconsistent recollections considered in statements drafted later in time.

Therefore the notification of the late delivery on 31/1/05 by the Respondent (Seller) permitted the Claimant (Buyer) the options that arose under Rule 17.1 or to alter the contract per Rule 1.3. The latter requires that both parties had expressly consented and that the contract was 'immediately confirmed in writing'.

Neither party has submitted that the Claimant (Buyer) cancelled the contract on 31/1/05, after which time the Respondent (Seller) delivered the documents after the 1000hr deadline, which were then signed by the Claimant (Buyer). These documents were accepted by the Claimant (Buyer) without reservation. The signed title transfer was then forwarded to ABB for processing, which the Claimant (Buyer) later sought to cancel.

Title Transfers

Section 22 of the *Goods Act 1958* provides that property in the goods is transferred 'at such time as the parties to the contract intend it to be transferred.' The *Act* states that 'intention' should be ascertained from the 'terms of the contract, the conduct of the parties and the circumstances of the case.'

Trade Rule 13 provides the seller with the right of conveyance, by title transfer, the time of conveyance being when the goods are presented to the buyers by the title transfer. Clause 21 (Rule 14) provides that title in the goods remains with the seller until the goods have been conveyed to the buyer at the designated point of conveyance. Clause 21 states that upon presentation of the title transfer the care of the goods passes to the Buyer.

According to these clauses, title to the goods passes to the buyer upon presentation of the title transfer and per the contract (Rule 15) the buyer may only reject the documents if the goods do not accord with its terms. The Claimant (Buyer) submitted that the literal construction of Rule 13 would deny the buyer the right to reject the documents after the time for delivery has passed which would unfairly benefit the seller.

The Committee does not dispute that the buyer has a right to reject documents tendered after the time for delivery has passed and where the time for delivery has not been extended. Submitting the documents late in breach of the contract does not alter the fact that many transfers are accepted after this time. In practice these transfers are accepted unconditionally or with some reservation as to title which may later be rejected if the goods cannot be passed on. The Committee accepts that a buyer has the right to accept the documents with a reservation, such as

stated in the London based *Grain and Feed Trade Association* (GAFTA) publication *Guidelines for Appropriation*. Whilst the GAFTA Guidelines are not binding nor incorporated into the contract they provide a sound guideline for providing notice as to a defect of title as purported to exist in the *Goods Act 1958* (Section 29).

The contractual terms purport to transfer title upon presentation of the documents. However simply presenting the documents may not always be sufficient to pass title. In turning to look at the title transfer document itself, the buyer and the seller must each sign an authorisation:

Seller: "I...confirm that the tonnage of grain has been sold to the buyer and agrees to accept storage charges applicable...Authority has been given to the Company to transfer grain accordingly."

Buyer: "I...confirm acceptance of the above tonnage of grain from the above seller and agree to accept the charges plus all ongoing fees and all conditions as per the buyer's storage and handling agreement as if the grain had been delivered to the company in the buyer's name."

Finally, "Transfer of the above grain will not be deemed effective until this title transfer has been executed by the Company. Subject to Company approval, the effective date of the transfer shall be the date of the sellers' signature." (Where 'Company' appears to be the bulk-handler.)

Therefore three options arise, firstly that title passes when the seller signs the title transfer; secondly when the buyer signs the title transfer; or when the bulk-handler processes the title transfer document. The processing of the title transfer by the bulk-handler requires updating their records with the buyer's details and issuing a new transfer number. These are actions of a third party to the sale of goods contract and the transference is incidental to the ownership of the goods. The title transfer acts as evidence of the contract between the parties.

On signing the title transfer the buyer purports to accept the 'above tonnage of grain'. Unless this is done with a reservation as to title, such an acceptance of the goods must constitute the passing of title.

In determining when the parties intended title to be transferred, the terms of the contract pass title on presentation of the documents by the seller. In this instance the documents were presented late, providing a right to reject the documents, however the Claimant (Buyer) signed the title transfer purporting to accept the specified grain. As this was done without reservation the parties objectively intended to pass title at this time. This conclusion is further supported by the Claimant (Buyer)'s unreserved payment of the grain. The cancellation of the title transfer, by the Claimant (Buyer), does not alter the title of the goods as title passed on the buyer's signature of the transfer documents.

The Committee concludes that by signing the title transfer, without reservation, the Claimant (Buyer) has unconditionally accepted title to the goods.

The Committee considers such acceptance to be an unequivocal act constituting an election of Rule 17.1(1)(a) to agree to extend the delivery period and thus affirming the continuing performance of the contract. To the extent that the Respondent (Seller) may have been in breach or default, that breach or default is in effect cured by the extension.

The Committee considers that the subsequent payment of the canola by the Claimant (Buyer) supports the contention that the Claimant (Buyer) intended to affirm and discharge the contract. The Claimant (Buyer)'s attempt to terminate the contract on the 11/2/05 must fail as the right to terminate must exist at the time the party purports to terminate, an election is final and it is irrelevant if the right to terminate had existed but has since been lost (*Scarf v Jardine* (1882) 7 App. Cas. 345).

Alternatively the Committee considers that by signing the title transfer and subsequently making payment under the contract, both without reservation, the Claimant (Buyer) has confirmed the existence of an amendment to the contract. The signed transfer document constituted an alteration in writing for the purposes of Trade Rule 1.3. It follows that the documents were not tendered late and no breach of contract occurred. Thus no right to terminate the contract arose. Furthermore the Claimant (Buyer)'s failure to expressly reserve its rights when accepting late delivery effectively

waived its right to reject the documents (See *Panchard Freres S.A. v Etablissements General Grain Co* [1971] 1 LR 53).

Mitigation

The Respondent (Seller) alleged that the Claimant (Buyer) had sufficient grain available prior to the transfer deadline which could have been passed onto ACTI thus mitigating the Claimant (Buyer)'s losses. Although discovery was requested, the Claimant (Buyer) has not provided sufficient information to refute this claim. Thus the Committee is entitled to infer, per the rule in *Jones v Dunkel*, that such evidence would not have assisted the Claimant (Buyer)'s case.

Damages

Whilst the Committee does not think it appropriate to award damages in this case, it is opportune to comment upon the appropriate construction of damages under contracts incorporating the NACMA Trade Rules. Where the NACMA incorporated terms consider the type of default that has occurred, such as to breach of terms or insolvency, the NACMA terms will govern the calculation of damages per Clause 24 and Rule 17.5. Where the contract is silent as to the type of default that has occurred the calculation of damages should then consider the application of the common law. Pursuant to a NACMA contract the incorporated contractual terms should *prima facie* govern the resolution of the dispute and the calculation of damages if appropriate.

6. INTERIM AWARD

Having considered the Submissions and for the reasons stated above, we make the following Interim Award:

That the Claimant (Buyer) is unsuccessful and is directed to pay the Respondent (Seller) forthwith:

1. Grain Storage Costs of the Respondent (Seller) as at the date of this Interim Award. The Respondent (Seller) to make submissions as to an invoice amount. The Committee will make an award in relation to storage as part of its final award;
2. NACMA Arbitration fees paid by the Respondent (Seller) of AUD\$3,700;
3. The Respondent (Seller)'s legal costs, such costs to be fair and reasonable. The Committee requests the parties to attempt to negotiate as to costs within the next 14 days, failing which the Committee requests the parties to make submissions to the Committee (with Copy to the Claimant (Buyer)) in support of any claim for legal fees. The Committee will make an award in relation to costs as part of its Final Award.

The Claimant (Buyer) is also directed to pay NACMA's legal costs. Supporting invoices will be provided by NACMA and the amount will form part of the Final Award.

As the Respondent (Seller)'s Cross-Claim was successful, the Respondent (Seller) is instructed to:

4. Provide necessary information to the Claimant (Buyer) with regard to the grain held at the bulk handler so as it is at the Claimant (Buyer)'s disposal (NB: Grain must be in accordance with terms of the Contract).

FINAL ARBITRATION AWARD

For the reasons stated in our Interim Award dated 26 June 2006, we now make the following Final Award:

1. The Claim is dismissed;
2. The Claimant (Buyer) shall pay the Respondent (Seller)'s legal costs in the amount set out in the Respondent (Seller)'s invoice no. 837 and dated 28 August 2006;

3. The Claimant (Buyer) shall reimburse the Respondent (Seller) for the NACMA Arbitration fees paid by it of AUD\$3,700;
4. The Claimant (Buyer) shall pay the Respondent (Seller)'s storage costs in the amount AUD\$26,731.33 (inclusive of GST).