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Member Update – Arbitration Award

Date of Issue: 27 May 2008

Arbitration number: 14 – issued on 21 May 2007

Claimant: Insolvent Company
&
Respondent: Non-Insolvent Company

ARBITRATORS

- Mr John Orr, arbitrator nominated by Claimant
- Mr Kim Vater, arbitrator nominated by NACMA in lieu of Respondent nomination
- Mr Gerard Langtry, arbitrator nominated by NACMA and Committee Chairman

CLAIM

The Claimant (Seller) claimed the fair market value of terminated contracts following an insolvency event. Total amount claimed \$136,000.00.

AWARD

Claim allowed and Respondent (Buyer) ordered to pay the fair market value of the terminated contracts and arbitration costs and legal fees.

DETAILS

- The Claimant (Seller) and Respondent (Buyer) entered into 8 contracts for the sale and purchase of grain.
- The Claimant went into external administration on 17 August 2005.
- The Claimant advised the Respondent of the insolvency event, closed out the contracts and requested payment of the fair market value.
- The Respondent argued that the Claimant's standard terms and conditions meant that the Trade Rules did not apply and that upon insolvency the contracts were terminated without compensation.
- The Respondent also submitted that the Arbitration Committee lacked jurisdiction to determine the dispute and that a time bar prevented the Claimant's application.

MAJOR FINDINGS

The Committee found:

- A broker's note is primary evidence of the contract between the parties;
- Determined that it had jurisdiction to determine the dispute as the NACMA arbitration agreement formed part of all of the contracts.
- Determined that the claims were not time barred.
- Held that it was not the parties' intention that a standard condition was to govern an insolvency event and it was not evidence of an "express written agreement" for the purposes of Trade Rule 17.6.2.

IMPORTANT POINTS

- Ensure that any standard terms and conditions that depart from the Trade Rules are expressly incorporated into the contract by the brokers note or by notation to the contract confirmation.

AWARD IN DETAIL

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

1. INTRODUCTION

The Claimant in this arbitration is in liquidation.

The Respondent is a company incorporated under the laws of Australia. It contracted to buy grain from the Claimant. The Claimant became insolvent in 2005 and alleges that the Respondent owes the Claimant the fair market price of the terminated contracts.

Eight contracts are the subject of this arbitration. Five contracts have a broker's note and three do not. All contracts have signed contract confirmations from both parties.

The main issues for determination by the Committee are the terms of each contract and how those terms govern insolvency events.

The Arbitration Committee duly comprised:

- Mr John Orr, nominated by the Claimant
- Mr Kim Vater, nominated by NACMA in lieu of no nomination by the Respondent
- Mr Gerard Langtry, Arbitration Committee Chairman, appointed by NACMA

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

1. Claimant's Submission, dated 12 October 2006
2. Respondent's Defence Submissions, dated 19 December 2006
3. Claimant's Rebuttal, dated 19 January 2007
4. Respondent's Surrebuttal, dated 5 March 2007.

The Respondent appeared under protest and did not sign the NACMA arbitration contract or pay the fees due to NACMA.

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 Claimant seeks the following relief:

- i. An award in favour of the Claimant in the amount of \$136,000 be paid within 14 days;
- ii. Interest at 9% per annum on any amounts found to be due to the Claimant; and
- iii. Costs.

2. JURISDICTION

The Respondent disputes the nature of the agreement to arbitrate and on that basis appeared under protest. As the Respondent disputes the Committee's jurisdiction to arbitrate, it is necessary to determine this preliminary issue first.

Pursuant to the *competence-competence* rule the Committee can determine its own jurisdiction. The Respondent alleges that the Committee lacks jurisdiction to arbitrate as the arbitration agreement between the parties did not provide for arbitration to be conducted pursuant to NACMA's Dispute Resolution Rules.

The contract between the parties is evidenced by the contract confirmation of each party and the brokers note, where applicable. On the reverse, or attached, to each contract confirmation is a document headed 'Terms and Conditions' (Claimant's confirmation) or 'Contract Conditions' (Respondent's confirmation). These are standard terms and conditions attached to each contract confirmation of the relevant party. These documents will be referred to as the 'terms and

conditions' of the appropriate party. Each party's terms and conditions contain an arbitration clause.

The arbitration clause in the Claimant's 'terms and conditions' does not specifically refer disputes to NACMA for resolution. The Respondents 'terms and conditions' do refer disputes to NACMA, similarly the brokers notes refers to the NACMA Trade Rules which contains an arbitration clause.

The Respondent submits that NACMA, and consequently this Committee, lacks jurisdiction. It says the 'terms and conditions' set out in the Claimant's confirmation prevail and the NACMA Trade Rules apply 'where not in conflict' with the Claimant's 'terms and conditions'. The Respondent submits that the arbitration clauses in the Claimant's contract and the NACMA Trade Rules are in conflict and that the Claimant's 'terms and conditions' must prevail.

The Claimant submits that the party's respective 'terms and conditions' are not in conflict, nor is there any inconsistency between them, as the Claimant's arbitration clause does not exclude the NACMA Trade Rules or NACMA's jurisdiction to resolve disputes.

For the Committee to determine whether it has jurisdiction it is necessary to consider the arbitration agreement between the parties and in this instance that requires the evaluation of the various contractual documents and the arbitration agreements contained within. As there is a *prima facie* conflict between the 'terms and conditions' of each contract confirmation, it will also be necessary to consider the intention of the parties at the time the contracts were formed.

The Committee first considered the five contracts evidence by a broker's note and a contract confirmation issued and signed by both parties. The brokers note is the first document issued in these circumstances and thus it is important to look at the role and authority of a broker. A broker is deemed to have the authority to bind two parties. A broker who exceeds his authority may be liable to an aggrieved party for damages. A contract negotiated by a broker is valid and binding between the parties the same as if it had been negotiated between them. These principles are encapsulated by NACMA Trade Rule 2.0, however the Committee agrees that this is the general rule and custom within the industry and understood by grain traders generally. As the broker's note contains only the instructions as agreed between the parties and no party has alleged that the broker's note is incorrect or the broker exceeded its authority, the Committee agrees that the broker's note is primary evidence of the agreement between the parties.

As a broker's note is only issued pursuant to the instructions of the parties it is primary evidence of the intention of the parties at the time contractual agreements were entered into, more clearly than the contract confirmations. As where a brokers note is issued, contract confirmations are issued as a matter of course and are not necessary to bind the parties to the agreement.

As such the Committee concludes that where a brokers note has been issued it is the primary evidence of the contract between the parties and it is not necessary to refer to contract confirmation issued after the brokers note.

Brokers note's XXXX1 and XXXX2

Brokers note's XXXX1 and XXXX2 states "Trade Rules to Apply: Where not in conflict with the above Terms and Conditions they shall be in accordance with the Trade Rules of the National Agricultural Commodity marketing Association." The brokers note does not include an arbitration agreement or refer to other terms and conditions. The NACMA Trade Rules contain an arbitration clause which states "If any dispute arises out of or relates to any contract subject to these Trade Rules or a breach, termination or subject matter of a contract, the dispute shall be submitted to and settled by Arbitration in accordance with the NACMA Dispute Resolution Rules in the edition current at the date of the establishment of the terms of Trade in the contract, such rules forming an integral part of the contract and of which both parties to the contract shall be deemed to be cognisant."

The Committee concludes that the NACMA arbitration clause is the arbitration agreement between the parties.

The arbitration agreement refers disputes to NACMA arbitration where the dispute 'arises out of or relates to' contracts pursuant to the Trade Rules or the termination of the contract. The substantive dispute before the Committee relates to an insolvency event which terminates the contract. The

consequences of termination are in issue, the process of which is in the Trade Rules. As the brokers note specifically states that the Trade Rules apply the Committee agrees that the dispute falls within the scope of the arbitration agreement. The Committee determines that it has jurisdiction to determine this dispute pursuant to the NACMA Dispute Resolution Rules under which it was appointed.

Brokers note XXXX3

Brokers note XXXX3 states “When not in conflict with the above conditions as per NACMA terms and conditions.” The brokers note does not contain a dispute resolution clause or refer to other terms and conditions. NACMA Terms and Conditions, the same ‘terms and conditions’ on the reverse of the Respondent’s contract confirmation, contains the following arbitration clause “If any dispute arises out of or relates to this contract or the breach, termination or subject matter thereof, the dispute shall be submitted to and settled by Arbitration in accordance with NACMA Arbitration Rules in the edition current at the date of the establishment of the Terms of Trade in the Contract, such rules forming an integral part of the contract and of which both parties hereto shall be deemed to be cognizant.”

The same phrasing is used in this clause as above in the NACMA Trade Rules. For the same reason stated above, the Committee determines that it has jurisdiction to determine this dispute pursuant to the NACMA Dispute Resolution Rules.

Brokers notes XXXX4 and XXXX5

Brokers notes XXXX4 and XXXX5 states “Any terms not in conflict with the foregoing shall be in accordance with the standard terms and conditions of the current contract of the National Agricultural Commodity Marketing Association Incorporated.” NACMA publishes a number of standard grain trade contracts. The Brokers note refers to the ‘NACMA Track Contract’. The NACMA Track Contract contains the following arbitration clause “Any dispute arising out of this contract, including the existence of the contract and any question of law arising in connection therewith shall be referred to arbitration in accordance with the Dispute Resolution Rules of NACMA in force at the date of this contract and of which both parties hereto shall be deemed cognizant.”

The above clause refers solely to disputes ‘arising out of’ this contract. As the dispute arises due to the insolvency event and consequential termination of the contract, the dispute falls within the scope of the arbitration agreement. As such the Committee determines that it has jurisdiction to determine this dispute pursuant to the NACMA Dispute Resolution Rules.

Contracts XXXX1, XXXX2 and XXXX3

The Committee now turns to the three contracts that are not evidenced by a brokers note. The face of both the Claimant’s and Respondent’s contract confirmations refer to NACMA. The Respondent’s confirmation states “This contract is governed by the standard terms and conditions and general trade rules currently in force of the National Agricultural Commodity Marketing Association Ltd... the Buyer and the Seller acknowledge that they have read and understood the terms and conditions of the contract and have read and understood the NACMA trade rules that are deemed to be incorporated in and form part of this contract ” The arbitration clauses contained in the attached ‘terms and conditions’ and the trade rules have been referred to above. NACMA’s standard terms and conditions are attached to the Respondent’s contract confirmation.

The Claimant’s confirmation states that “Where not in conflict with the above all other terms as per the National Agricultural Commodities Marketing Association (NACMA) standard terms and conditions.” The confirmation also refers to the terms and conditions hereon and attached to the confirmation is a document headed ‘terms and conditions’. The Arbitration clause contained within these ‘terms and conditions’ states “Any dispute where necessary, is to be settled by Arbitration in accordance with the provisions of the Arbitration Act, or any amending or substituted act in the State where the Seller is resident. The Buyer and Seller shall each appoint an Arbitrator and the two Arbitrators shall have power to appoint an umpire.”

The Respondent alleges that the ‘Arbitration Act’ referred to shall be construed to be the *Commercial Arbitration Act 1984* (‘the Act’). The Respondent submits that the Act conflicts with the NACMA Dispute Resolution Rules with regard to a number of procedural aspects. To the extent that

this Act contains procedural rules they are subject to express agreement by the parties. Similarly the manner in which arbitrators are appointed in a matter for the agreement between the parties.

In this case the parties have agreed that NACMA 'terms and conditions' primarily apply as both contract confirmations state that the contract is governed by NACMA 'terms and conditions' which refer to NACMA Trade Rules and Arbitration or Dispute Resolution Rules. The Respondent's contract states these rules apply without exclusion and the Claimant's contract states that they apply unless in conflict. The Committee concludes that it was the intention of the parties that NACMA Trade Rules and Dispute Resolution Rules would apply primarily unless a conflict arose.

The Committee must now determine whether the arbitration clause contained within the Claimant's 'terms and conditions' conflicts with the NACMA Arbitration clause. The clause states that arbitrations are to be conducted pursuant to the Act but does not mention or exclude a service administering the process. The Act outlines the procedure for appointing arbitrators, the manner in which the award is to be made and so on. Any differences between the Act and NACMA Dispute Resolution Rules are procedural, variations to which are permitted by the Act. NACMA arbitrations are conducted pursuant to the Act and any variations are as agreed between the parties. Similarly, the manner in which the Chairman is appointed is a procedural aspect of the arbitration that the parties can vary.

As the parties intended that NACMA Rules to prevail and as the Act permits the parties to expressly agree to their arbitration procedure, the Committee considers that the parties intended that disputes would be resolved pursuant to NACMA's Dispute Resolution Rules. Given the flexibility of the Act, the Committee does not consider that the arbitration clause contained within the Claimants 'terms and conditions' to be in conflict with the NACMA arbitration clause.

Finally, as discussed above, as the dispute falls within the scope of NACMA arbitration clause, which is the primary agreement between the parties, the Committee has jurisdiction to determine the dispute.

Thus the Committee agrees that it has jurisdiction to determine the current dispute pursuant to all eight contracts.

3. TIME BAR

The Respondent submits that if there is a binding agreement to resolve disputes pursuant to NACMA's Dispute Resolution Rules, then the time for commencing a claim has expired. The Respondent submits that the Claimants term, which states that 'Arbitration shall be claimed...in relation to technical claims within 120 consecutive days from the last day of the delivery period', has expired.

The time limit for commencing arbitration pursuant to NACMA Dispute Resolution Rules is 12 months.

With regard to the five contracts with a brokers note the NACMA time limit applies and thus the arbitration was commenced within time.

With regard to the remaining three contracts it is necessary to determine whether the time limitation is in conflict with the NACMA time limit. The Respondent submits that the time limit has expired but do not provide further submissions on the matter. The Claimant denies that the time limit has expired and that there is no inconsistency and the time limits contained in it 'terms and conditions' have expired and thus the NACMA time limits apply.

Given these submissions, it was necessary for the Committee to consider the intention of the parties, language and structure of the time limit clause and determine whether it is indeed in conflict with the NACMA time limit.

As noted above, the Clause refers to "technical claims" having to be brought within 120 days from the last day of the delivery period. Neither party has made submissions as to the meaning of "technical claims". Assuming these are "technical claims", the last day of the delivery period in the relevant contracts is 31 July 2006, 30 June 2006 and 31 July 2006. The arbitration was commenced by NACMA on 14 July 2006 when the Notice of Arbitration was sent to the parties.

Whilst the contracts may have terminated following the insolvency event, it appears that the intention of the parties was not to severely limit the time for commencing arbitration in regard to these claims, either through the NACMA time limit or through the Claimant's time periods. The Committee notes that if the Claimant had intended that a shorter time limit would apply following an insolvency event, it would have so stated in the relevant clause. The Committee also notes that Clause 7 of the Claimant's terms and conditions provides a 12 month time limit for commencing proceedings regarding breach of contract.

As such the Committee determines that there is no conflict between the NACMA time limit and the Claimant's time limit and that the Claimant's claims were brought within time.

4. INSOLVENCY EVENT

As determined above, the five contracts with brokers notes are governed by NACMA Trade Rules. Therefore the insolvency event is governed by Trade Rule 17.6.2.

Trade Rule 17.6.2(a) states that "if before the fulfilment of a contract the Buyer or the Seller commits an insolvency event, the Buyer or Seller shall immediately notify the other party within two business days of the occurrence and shall be deemed to be in default." The insolvency event occurred upon 17 August 2005 and the Claimant notified the Respondent late on 19 August 2005, outside the two day rule. Pursuant to Rule 17.6.2(b) the Respondent has the option of 'declaring the contract closed out at either the Fair Market Price on the first business day after the date when such party first learnt of the occurrence of the act of insolvency or at the Fair Market Price ruling on the first business day after the date of the insolvency event occurred.'

The Committee agrees that the Claimant was entitled to close out the contracts and as the contracts were in the Respondent's favour, the Respondent must pay the difference between the contract price and the *Fair Market Price*.

The Claimant has provided a spreadsheet of Fair Market Price but has not provided direct evidence of these amounts. The Committee requests that both parties submit evidence within 7 days of the date of this Interim Award of the Fair Market Price for these five contracts. The Committee will then determine the total Fair Market Price owing between the parties and make an award accordingly. If no evidence is received, the Committee will assume that the amounts provided are not contested and will award accordingly.

With regard to the three contracts not governed by a brokers note, it is necessary to determine whether Clause 12(b) of the Claimant's terms and conditions is in conflict with NACMA Trade Rule 17.6 which, as stated above, is the primary agreement between the parties.

Clause 12(b) states that where the seller enters into liquidation "the Buyer shall have the right...to terminate this contract at any time thereafter and to refuse to accept any further deliveries without any payment of compensation to the seller."

The Respondent submits that this is the relevant term governing the insolvency event and that they terminated the contracts on 23 December 2005. The Committee has not been provided with any evidence of this termination. The Respondent submits that 12(b) applies as Trade Rule 17.6.2 states that it only applies 'in the absence of any express written agreement to the contrary' and that Clause 12(b) is an express written agreement to the contrary.

The Claimant submits that Clause 12(b) only operates upon termination of the contract and does not remove any obligations to pay amounts already incurred. The Claimant also submits that 12(b) only relates to a parties right to refuse to accept any further deliveries after termination and even if the clause was revoked after an insolvency event it would not retrospectively affect the close out of the contracts. In essence the Claimant appears to be submitting that there is no conflict between Rule 17.6.2 and Clause 12(b).

To determine whether Clause 12(b) gives rise to a conflict with Rule 17.6.2 it is necessary to determine the agreement between the parties with regard to the party's intention at the time of the agreement and the language and structure of the terms.

The Committee has determined that the party's primary intention was for the contract to be governed by NACMA Trade Rules, as evidence by the Respondent's contract confirmation and the Claimants contract confirmation. As such it was the intention of the parties that Rule 17.6.2 would apply, except to the extent of 'any express written agreement to the contrary.' The question for the Committee is whether Clause 12(b) is an express written agreement to the contrary.

While the Creasy's contract confirmation is signed by both parties on its face there is no indication on any of the contractual documents provided that Clause 12(b) is to be the primary insolvency clause. The Committee considers that if the Claimant or the Respondent has considered that Clause 12(b) should override NACMA Rule 17.6.2 a note would have been included on the face of the contract confirmation, most likely to appear on the Respondent's confirmation or in the brokers note. Merely including the clause in the standard terms and conditions appearing on the back of the contract confirmation is not a express written agreement to the contrary. Thus it cannot have been the parties intention that Clause 12(b) would apply in exclusion to Rule 17.6.2.

The Committee does not consider that Clause 12(b) in the Claimant's attached terms and conditions is an 'express written agreement' as required by Trade Rule 17.6.2(b).

The Committee determines that Trade Rule 17.6.2 governs the insolvency event occurring pursuant to all eight contracts submitted to arbitration. The Committee repeats its request for evidence of the Fair Market Price.

5. AWARD

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

1. The Claim is allowed;
2. The Respondent shall pay the Claimant AUD\$136,000.00 (which equates to Fair Market Price in the absence of any submission to the contrary by the Respondent);
3. The Respondent shall reimburse the Claimant for the NACMA Arbitration fees paid by it of AUD\$4,900.00;
4. The Respondent shall reimburse the Claimant for NACMA's legal costs of AUD\$2,726.90;
5. The Respondent shall pay NACMA's management and arbitration fees for this reference of \$4,900.00.
6. The Respondent to pay interest on \$136,000.00 to be paid at the rate of 9% from 24 August 2005 until 31 December 2006 and at the rate of 10% thereafter;
7. The Respondent to pay the Claimant's costs of the arbitration as agreed or assessed by the Court on a party-party basis.