

Arbitration 8 (NACMA)

Notice to Members

Date of Issue: 7th May 2009

Claimant: Commodity Seller
&
Respondent: Commodity Buyer

Arbitrators

- Alick Osborne, arbitrator nominated by the Claimant a Commodity Seller
- Guy Allen, arbitrator nominated by the Respondent a Commodity Buyer
- Tim Teague, arbitrator nominated by NACMA & Committee Chairman

Claim

Payment for deliveries already made by the Claimant and losses incurred due to failure to take delivery.

Award

The Claimant was successful and awarded costs including reasonable arbitration and legal fees.

Details

The seller supplied product as per the agreed terms of a set tonnage per month and had right of conveyance. The buyer was bound to accept deliveries as per the set monthly tonnage at any time during the month. They were not entitled to tonnage in excess of the monthly set amount.

The buyer withheld payment for deliveries already made.

Award findings

The Committee found that:

- The Claimant delivered product as per the agreed monthly tonnage.
- The Claimant as the seller has the right of conveyance.
- Agreed deliveries of a set tonnage per month does not imply “even spread”.

Take out for Members

- Payment cannot be withheld for deliveries made and accepted.
- Understand the definition of “even spread”.

**IN THE MATTER OF THE
COMMERCIAL ARBITRATION ACT 1984 (NSW)
AND IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF THE NATIONAL
AGRICULTURAL COMMODITIES
MARKETING ASSOCIATION LTD**

NACMA Arbitration No. 8

Commodity Seller

Claimant/Cross-Defendant

and

Commodity Buyer

Respondent/Cross-Claimant

Arbitration Award

1. INTRODUCTION

The Claimant has made representations to National Agricultural Commodities Marketing Association Limited (NACMA) that it entered into Contract No. 1234 (the Contract) that incorporated NACMA Trade Rules, for the sale of the commodity to the Respondent.

The Claimant has referred the dispute arising under the Contract between itself and the Respondent to NACMA to be the subject of a Full Arbitration process under the NACMA Dispute Resolution Rules.

The Arbitration Committee duly constituted consisted of:

- Mr Alick Osborne, nominated by the Claimant
- Mr. Guy Allen, nominated by the Respondent
- Mr Tim Teague, 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 9 December 2004
2. Respondent's Defence Submissions, dated 11 January 2005 from ABC Barristers & Solicitors, solicitors for the Respondents
3. Claimant's Rebuttal of Defence, dated 14 February 2005
4. Respondent's Surrebuttal, dated 4 March 2005 from ABC Barristers & Solicitors, solicitors for the Respondents

The pages to the submissions were hand numbered from 1 to 170 in black pen in the top right hand corner. The arbitration documents are referred to in this document as AD.

The Arbitration Committee was asked by the Claimant to arbitrate on the following points;

1. Payment of the outstanding amount (\$638,277) for deliveries already made be paid to the Claimant, plus interest;
2. That the Respondent make good the losses incurred by the Claimant due to the failure of the Respondent to take delivery of the outstanding tonnage of 626.28 mt;
3. Costs for arbitration and legal costs; and
4. Interest and storage on the residual unsold commodity.

The Cross-Claimant/Respondent lodged a counter-claim based on the refusal of the Claimant to supply commodity.

The Cross-Claimant claimed the following losses flowing from the Cross-Defendant's refusal to supply;

1. Supply of commodity (\$11,731.49 inc GST);
2. Margin due to Commodity Buyer (\$3,419.38 inc GST);
3. Further September supply of commodity (\$4,308.71);
4. Loss of margin (\$704.48 inc GST);
5. NACMA Arbitration costs (A\$3,700);
6. Legal Fees (\$4,009.50); and
7. Staff Time (\$586.64)

There was substantial documentation provided that details the break down in the business relationship between the two parties. The Arbitration Committee confined their deliberations to the documentation that supported the arguments concerning the arbitration of the above points including the Respondent's counter-claim.

2. AGREEMENT ON THE FACTS

Contract specifications, terms and conditions

Contract 1234 was tabled by the Claimant. The contract was signed by both parties.

Sales Contract 1234 (the contract)

- Contract date 11/5/2004
- Commodity: The commodity
- Quality: hammermilled
- Quantity 1,500 mt per month, 6000mt in total
- Delivery period: June – September inclusive
- Packaging: Bulk
- Price Basing Point: FOT (Free on Truck)
- Weights: first official
- Price /tonne: \$ 220
- Payment terms : 20 days end of month
- Comments: No increments to apply should product be unsold outside the contract period.
- Terms & Conditions All terms and conditions as per NACMA. All terms and conditions written or typed on the face of this contract shall overrule all NACMA conditions with which they conflict to the extent of the inconsistency.

The Committee particularly notes the Price Basing Point as a critical element in this arbitration.

3. DISAGREEMENT ON THE FACTS

Contract specifications, terms and conditions

The contract clearly states the following:

- Quantity: 1,500 tonnes per month

The Respondent claims this “was a guide only”, refer AD page 50 and that ‘A consensual accelerated delivery arrangements was entered into (sic)’, refer AD page 53.

Both parties agreed that deliveries in June/July and August were on an accelerated basis and exceeded the specified monthly quantity.

The Claimant maintains that it was its prerogative to deliver over the 1,500 tonnes per month but this action does not automatically mean that it is contractually obliged to do so. Refer AD page 31.

On this issue, the Arbitration Committee finds in favour of the Claimant in that the quantity as listed is not a guide. The Claimant was entitled to withhold delivery when it had delivered 1,500 tonnes in any one calendar month as occurred in August 2004 when 873.72 tonnes of the September quantity was delivered.

4. FOT (Free on Truck)

The Claimant submits that the key contractual term as per the reverse side of the contract is “Conveyance and Delivery Instructions” which states that “Unless otherwise agreed, the Seller shall have the right of conveyance.”

The Claimant further argues that delivery is at the Seller’s discretion, refer email Mr Ato Mr B dated 24 August 2004 at 6.43 pm, AD page 31.

However, it is quite clearly stated on the face of the contract that the Price Basing Point is FOT (Free on Truck).

The Arbitration Committee finds, that while the term FOT (Free on Truck) is not specifically defined by NACMA, a FOT (Free on Truck) contract is analogous with the NACMA Term of “Free on Board” (FOB) and consistent with “Free Carrier” (FCA) contract as defined in INCOTERMS 2000 (ICC Publication No. 560).

The time of loading, as with the shipping period in a FOB contract, is of the essence.

Therefore, provided the Buyer has given the requisite notices and loading instructions, the Seller is bound to load the appropriately presented transport. A failure to load within the relevant delivery/loading period is a breach so serious so as to entitle the buyer to reject and claim damages or simply to accept the shipment and claim damages.

This interpretation aligns to the manner in which the contract was performed, i.e. the Respondent would fax delivery instructions, refer AD pages 112 to 118 detailing Load Dockets, requesting delivery arrangements be initiated. Also the note from Mr C to Mr B, refer email dated 31 July 2004, 1.16 pm, AD page 68 stating “Everything you can move as you’ve discussed will be beneficial and appreciated. By the way I want to say well done on current drawdowns.” This indicated that the Claimant was fully cognisant with the process of conveyance, i.e. it was initiated by the Respondent.

The Arbitration Committee finds that these words indicated that the delivery process was initiated by the Respondent and was consistent with the definition as detailed above from Incoterms 2000.

The Claimant, however, submitted that deliveries of the required 1,500mt each month were to be “reasonably even spread” within each calendar month.

In the absence of express words to that effect, the Arbitration Committee is not prepared to imply such an obligation. Had the Respondent wished to take delivery of the entire 1,500mt on the first day of each month, the Claimant would have had to so deliver.

Tonnage was a limiting factor, in that the Claimant was not obliged to deliver more than 1,500 mt per month. Therefore, once the August deliveries had been made, the Claimant was not obliged to make any more deliveries until the commencement of September 2004. With the consent of the Respondent, the Claimant could do so if it wished. In choosing to do so however it did not, without more, become obliged to do so.

However, the Claimant would have been obliged to effect deliveries for product with delivery dates starting 1 September 2004 as long as reasonable notice had been given.

Load Dockets 9071, 9072, 9073 and 9074, refer AD pages 112 to 115, only gave the Claimant one day's notice which had until that time, been the accepted practice, indicating that the Claimant had accepted this amount of notice as "reasonable".

However, the Claimant rejected these advices and maintained that delivery would be effected from 13th September 2004, refer Mr A to Mr B, 24 August 2004 at 6.38 pm, AD page 30.

On 13 August 2004, the Respondent wrote by email to the Claimant seeking confirmation whether the Claimant intended to maintain its position with regard to delivery of the contract quantities for September, refer AD page 84.

The Claimant responded on 23 August 2004 that the contract was "even spread" and "This being the case, we will ensure that we have the balance of September product available from Sept 13th at the rate of about 50 tonnes per day, or slightly higher tonnage to accommodate non business days." Refer AD page 99.

As stated above, the Arbitration Committee finds that in the absence of express words, this was not an "even spread" contract and that the Claimant's statements to that effect and refusal to make deliveries in the first week of September were repudiatory.

In its email of 24 August 2004, refer AD page 100, the Respondent replied that "you have stated that you will not supply the commodity until the 13th September, which is in breach of our contractual arrangement and accordingly we cancel this contract."

The Arbitration Committee finds that the Claimant was in repudiatory breach and that the Respondent was entitled to accept that conduct as repudiatory, and to cancel the default tonnage of 626mt, being the balance of the contract.

5. DAMAGES

The Respondent is entitled to damages.

Damages on this issue are limited as the Respondent had contracted to purchase the contracted tonnage at \$220, however the Respondent was advertising to sell the commodity to farmers at \$190/tonne plus GST, a reduction of \$30/tonne from the original contracted value ex store on 11th August 2004, whilst the Claimant was advertising to sell the same product at the same price on 18th October 2004. Also, the Respondent expected to purchase the product in mid September for \$185/tonne.

Damages will be assessed in accordance with Rule 17.7 of the NACMA Trade Rules. Determination of Fair Market Price must be made against like commodity, i.e. the commodity. On the evidence presented and based on reasonable probabilities, the Respondent would have been able to procure replacement product at a reduced rate to the original contracted price.

6. PAYMENT

Payment terms were 20 days end of month, i.e. deliveries for August were due by 20th September 2004. The Respondent offered full payment for the deliveries effected however it attached terms to acceptance of this payment, refer AD pages 15.

The Arbitration Committee finds that the Respondent was not entitled to attach terms to the acceptance of the payment by the Claimant as there was no dispute concerning the deliveries covered by the payment by either the Respondent or the Claimant.

The Arbitration Committee finds that the Respondent should immediately release the funds and pay interest.

7. DAMAGES, ARBITRATION FEES AND LEGAL FEES

7.1 Claimant/Cross-Defendant

7.1.1 The Arbitration Committee finds that the Respondent should immediately:

- release the funds of \$638,267.85 currently held in the Respondents' Solicitors Trust Account;
- pay interest on the funds from 29th September 2004 to the date of this Award using the bank overdraft rate of 9.5%, refer AD page 11 . This amount is \$33,557.15. The Arbitration Committee selected the 29th September as the Claimant was unable to give exact details required to organise payment to the Respondent , refer AD page 121 and AD page 122 from the Claimant dated 29/9/04 and faxed same day.

7.1.2 As the Respondent legitimately cancelled the contract following the Claimant's repudiatory breach of its contractual obligations, the Claimant is not entitled to any further compensation.

7.1.3 As both parties were found to be at fault in various aspects of the execution of this contract the Arbitration Committee finds that the individual parties will find their own Arbitration Fees and Legal Fees.

7.2 Respondent/Cross-Claimant

7.2.1 While the Cross-Claimant may have been entitled to compensation for losses flowing from the repudiatory breach and cancellation of the contract, in fact that Cross-Claimant has suffered no loss as the market price at the time of the cancellation was lower than the contract price.

7.2.2 For the reasons stated above, it must also bear its own legal and arbitration fees.

8. AWARD

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

That the Respondent is instructed to pay the Claimant forthwith:

1. payment for deliveries of \$638,267.85
2. interest due to late payment of \$33,557.15

And we so publish our Award.

.....**Date** 19 April 2005
Alick Osborne, Arbitrator nominated by Commodity Seller

.....**Date** 19 April 2005
Guy Allen, Arbitrator nominated by Commodity Buyer

.....**Date** 19 April 2005
Tim Teague, Arbitrator appointed by NACMA and Arbitration Committee Chairman