GRAIN TRADE AUSTRALIA

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Arbitration No. 116

Notice to Members

Date of Issue: **May 2011**

Claimant: **Grain Buyer**
&
Respondent: **Grain Seller**

Arbitration Committee (AC)

- Mr Chris Heinjus, nominated by the Claimant;
- Mr Ray Marshall, nominated by GTA in lieu of nomination by the Respondents;
- Mr Richard Clark, Chairman appointed by GTA.

Dispute

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA"). At issue in this dispute is an alleged breach of contract, but this award is concerned solely with the jurisdiction of the Tribunal to deal with this dispute.

1. Jurisdiction

This dispute concerns a contract between the Claimant and the Respondent. The Claimant says this contract was negotiated by phone on 15 May 2006, and a Contract Confirmation form was faxed to the Respondents that same day.

In answer, the Respondents appear to accept that there was a contract[1] but say that this Tribunal does not have jurisdiction. Their Points of Defense allude to other grounds for resisting the claim but they have asked for jurisdiction to be dealt with as a preliminary matter.

First, they say that the claim was not made in accordance with article 3.1 of the GTA Dispute Resolution Rules (the "Time Bar Point").

Second, they say that there was no arbitration clause in the contract (the "Arbitration Point").

2. Findings

The Tribunal found:

1. that they had no jurisdiction in relation to this matter. While there appears to have been a contract for the sale of canola, there is no evidence that the Respondents agreed to refer disputes to NACMA or GTA arbitration. The Contract Confirmation faxed to the Respondents is unsigned by the Respondent. The standard terms do not appear to have been faxed.

   The face of the Contract Confirmation does not reference the GTA or NACMA Trade Rules or Dispute Resolution Rules. While it does refer to terms and conditions it does not identify what those terms might be. The contract was unperformed. Even if Mr DP for the Claimant advised Mr Grain seller that the Claimant's standard terms were to be incorporated, there is insufficient evidence of a course of dealings and insufficient evidence that Mr Grain seller objectively or subjectively understood those terms to include a reference to NACMA or GTA arbitration.

2. Having reached this conclusion, there is a difficulty in relation to the Time Bar Point. Having found that we agree with the Respondents' submission that the NACMA/GTA Dispute Resolution Rules were not incorporated, Art 6.3.1 can have no application as it was not incorporated, either.

The somewhat frustrating conclusion therefore is that while there appears to have been a contract, and the claim is not time barred, we have no jurisdiction to determine disputes arising under it, and the parties will need to refer the matter to the Courts if they wish to pursue it.

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 1984 (NSW) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF GRAIN TRADE AUSTRALIA LTD

GTA Arbitrations No. 116

Grain buyer
(Claimant)

and

Grain seller
(Respondents)

Final Award

1. Introduction

This is an arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").

At issue in this dispute is an alleged breach of contract, but this award is concerned solely with our jurisdiction to deal with this dispute.

The Arbitration Committee comprises:

- Mr Chris Heinjus, nominated by the Claimant;
- Mr Ray Marshall, nominated by GTA in lieu of nomination by the Respondents;
- Mr Richard Clark, Chairman appointed by GTA.

As the Arbitration Committee was constituted prior to 1 October 2010, this award is governed by the *Commercial Arbitration Act* 1984[1].

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

1. Claimant's Claim dated 7 December 2010 ("Claim Submissions");
2. Respondents' Points of Defence dated 4 January 2011 ("Points of Defence");
3. Respondents' Application for Determination of Jurisdiction as a Preliminary Issue, dated 4 January 2011 ("Respondents' Application");
4. Claimant's Reply dated 4 February 2011 ("Claimant's Reply");
5. Respondents' Submissions on Jurisdiction dated 14 March 2011;

[1] Schedule 1 sub-section 2(2) of the *Commercial Arbitration Act* 2010 NSW.

6. Claimant's Supplementary Submissions dated 14 April 2011 ("Claimant's Supplementary Submissions");
7. Respondents' Supplementary Submissions dated 19 April 2011 ("Respondents' Supplementary Submissions").

2. Jurisdiction

This dispute concerns a contract between the Claimant and the Respondent. The Claimant says this contract was negotiated by phone on 15 May 2006, and a Contract Confirmation form was faxed to the Respondents that same day.

In answer, the Respondents appear to accept that there was a contract (presumably concluded during the 15 May phone call)[2] but say that this Tribunal does not have jurisdiction. Their Points of Defence allude to other grounds for resisting the claim but they have asked for jurisdiction to be dealt with as a preliminary matter.

First, they say that the claim was not made in accordance with article 3.1 of the GTA Dispute Resolution Rules (the "Time Bar Point").

Second, they say that there was no arbitration clause in the contract (the "Arbitration Point").

3. The Time Bar Point

There is some confusion in the submissions as to which version of the GTA or NACMA Dispute Resolution Rules applies.

For reference, the National Agricultural Commodities Marketing Association Ltd ("NACMA") changed its name to Grain Trade Australia Ltd ("GTA") on 1 March 2009.

The Dispute Resolution Rules first published by NACMA ("Old Rules") were substantially amended and re-published with effect from 18 August 2007 ("New Rules").

The Respondents in their Application seek to rely on Article 3.1 of the New Rules.

Art 3.1 of the New Rules provides;

A Request must be lodged with GTA on or before 12 months after the expiration date for performance of the contract(s) otherwise any claim is deemed to be waived and absolutely barred.

However in the Respondent's Submission on Jurisdiction they argue that the Old Rules apply. Article 6.3.1 of the Old Rules provides;

The original complaint in connection with any disputed matter proposed for resolution must be filed with the NACMA CEO within 12 months after expiration date for performance of the contract or contracts involved.

In the event we find that the Old Rules apply, but that there is no significant difference in application of the two Rules. Neither party has sought to argue other than that both Rules operate as a 12-month time bar.

The Respondents' argument is straightforward.

It says the contract was made on 15 May 2006, and the last date for performance was 31 December 2007. By that reasoning, in the event of default the last day for commencement of arbitration was 31 December 2008, or at latest 1 January 2009.

[2] See para 1(b) of the Points of Defence

As a side argument, the Respondents submit that the arbitration was only commenced on 13 March 2009 as the attempt to commence on 30 January was ineffective.

It is not in dispute that the Claimant sought to commence arbitration for the first time on 30 January 2009. This request was in respect of several contracts and for procedural reasons GTA requested that the Claimant commence separate arbitrations in respect of each contract, which it did on 13 March 2009. While nothing in our decision turns on this point, and subject to what follows, we find that the Claimant commenced arbitration on 30 January 2009.

That was the date on which it lodged the dispute with GTA as required by the Old Rules. The *Commercial Arbitration Act* 2010 is not applicable to this dispute.

However nothing turns on whether the purported date of commencement was 30 January or 13 May. Even if we took the earlier date as the relevant one, the claim would still appear have been commenced more than 12 months following the last date for performance.

For its part, Grain buyercontends that following the default by the Respondents, the Respondents "agreed to washout the contract"[3].

As evidence of this agreement the Claimant has produced a "Contract Amendment" and a "Grower Washout and Rollover Agreement", both dated 2 January 2008. While these appear to have been faxed to the Respondents, they are unsigned. The Respondents do not admit entering into any washout agreement.

The alleged agreement to wash out the contract is relevant because the Claimant says that the washout was payable on 16 February 2008, and that the 12-months did not start to run until 17 February 2008, and time therefore expired on 17 February 2009 meaning that the claim is not time barred so long as the proceedings were commenced on 30 January 2009.

We find that without evidence of receipt and agreement by the Respondent the "Contract Amendment" and a "Grower Washout and Rollover Agreement" cannot be considered a valid extension to the original contract and time therefore would have expired on 31 December 2007.

4. The Arbitration Point

The Respondents have identified this point at paragraph 1(b) of their Points of Defence.

As mentioned above, the Respondents appear to accept that there was a contract with the Claimant, but dispute the incorporation of an arbitration agreement into the contract.

The Respondent's case is that the document faxed on 15 May 2006 did not include the terms and conditions on the reverse which included an arbitration agreement. .

There is nothing on the face of the document faxed which refers to the GTA or NACMA Trade Rules, Dispute Resolution Rules, or arbitration. The faxed document does refer on its face to "printed terms and conditions on the back" but does not indicate what those terms and conditions may be; it does not identify them as Grain buyer standard terms and conditions, or NACMA terms and conditions.

There is no evidence that when Mr D Pfor the Claimant spoke with Mr C H for the Respondents, he specifically mentioned or sought to incorporate the GTA or NACMA Trade

[3] See para 6 of the Claim.

or Dispute Resolution Rules. Indeed the day-book extract produced by the Claimant contains no reference to GTA or NACMA.

Mr DP does say in his statutory declaration made 4 February 2011 that while he does not recall this transaction he believes he would have followed his standard practice of informing the seller (in this case, CP) that he was posting a copy of the Grain buyer Contract Confirmation and Additional Terms and Conditions.

There is some evidence of a course of dealings between the Claimant and Respondent on terms incorporating the GTA or NACMA Trade or Dispute Resolution Rules. In his statutory declaration Mr Patterson refers to an earlier contract no. 01541001 which he says was made on 13 April 2006, and a 5-page fax sent that day which incorporated the Grain buyer standard terms. There does not appear to be any evidence that the 13 April Contract Confirmation was signed, or that that contract was performed.

5. Findings

Dealing first with the Arbitration Point, we find that we have no jurisdiction in relation to this matter. While there appears to have been a contract for the sale of canola, there is no evidence that the Respondents agreed to refer disputes to NACMA or GTA arbitration. The Contract Confirmation faxed to the Respondents is unsigned by the Respondent. The standard terms do not appear to have been faxed. The face of the Contract Confirmation does not reference the GTA or NACMA Trade Rules or Dispute Resolution Rules. While it does refer to terms and conditions it does not identify what those terms might be. The contract was unperformed. Even if Mr DP for the Claimant advised Mr Grain seller that the Claimant's standard terms were to be incorporated, there is insufficient evidence of a course of dealings and insufficient evidence that Mr Grain seller objectively or subjectively understood those terms to include a reference to NACMA or GTA arbitration.

This appears to us to be consistent with the approach being taken by the Courts, for example in *Adrian Beard v Cargill Australia Ltd* [2011] NSWSC 142.

Having reached this conclusion, there is a difficulty in relation to the Time Bar Point. Having found that we agree with the Respondents' submission that the NACMA/GTA Dispute Resolution Rules were not incorporated, Art 6.3.1 can have no application as it was not incorporated, either.

The somewhat frustrating conclusion therefore is that while there appears to have been a contract, and the claim is not time barred, we have no jurisdiction to determine disputes arising under it, and the parties will need to refer the matter to the Courts if they wish to pursue it.

6. AWARD

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

1. The Claim is dismissed for want of jurisdiction.

2. The Claimant shall indemnify the Respondents in respect of any fees paid by the Respondents to GTA in relation to this arbitration.

3. The Claimant shall pay the Respondents' legal costs on a party and party basis. The parties are directed to attempt to settle costs between them within the next 14 days, failing which the costs shall be assessed by the Supreme Court of New South Wales in accordance with section 34(1)(c) of the *Commercial Arbitration Act (NSW) 1984*.

And we so publish our Final Award.

……...**Date: …...../…...../2011**

Chris Heinjus, Arbitrator nominated for the Claimant.

……...**Date: ……..../…...../2011**

Ray Marshall, Arbitrator nominated by GTA for the Respondent.

……...**Date: ..……../…...../2011**

Richard Clark, Arbitration Committee Chair, appointed by GTA.