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Arbitration 187
This Arbitration was governed by the International Arbitration Act 1974 (Cth).
Contract type - GTA FOB Contract No. 1

Date of Issue: **January 2014**

Claimant: **Export FOB seller**
&
Respondent: **Export FOB buyer**

Arbitration Committee (AC)
- Mr John Orr, nominated by the Claimant;
- Mr Robert Dickie, nominated by the Respondent; and
- Mr Stephen Thompson, Chairman appointed by GTA.

Claim
At issue in this dispute are the terms of a GTA FOB Contract No. 1 dated 7 March 2013 for the sale of 51,700 tonnes of Australian canola ("**Contract**"), whether the Respondent breached that Contract and if so, whether the Claimant suffered loss that is recoverable from the Respondent, ("**Dispute**").

The Claimant seeks recovery from the Respondent of port storage charges in the amount of USD156,473.58, which it says were incurred by reason of the Respondent's breach of the Contract. The Claimant seeks:
1. an order that the Respondent pay to the Claimant damages for breach of Contract in the amount of USD156,473.58; and
2. interest.

Award
1. The Claim is allowed.
2. The Respondent shall pay the Claimant USD156,473.58 by way of damages.
3. The Respondent shall pay the Claimant interest on USD156,473.58 from 22 May 2013 to the date of this Award in the amount of USD6,684.42 (6.75% pa).
4. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this arbitration.
5. The Respondent shall pay the Claimant's 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 Federal Court of Australia in accordance with section 27(3) of the International Arbitration Act 1974 (Cth).

Details
Delivery Period
A central issue between the parties is the proper construction of the "Delivery Period" clause of the Broker's Note. The Tribunal found that the Contract:
- conferred on the Claimant an express obligation to nominate an amended Delivery Period of its choosing and that the Claimant complied with that obligation.
- and indeed, like many traders, the parties in their correspondence, used the phrases "Delivery Period", "Arrival Window", "Shipment Period", "Laycan" and "Load Window" interchangeably.

Notice of Readiness
The Claimant alleges it suffered loss and damage as a result of the Respondent's failure to tender a valid Notice of Readiness within the narrowed Delivery Period. The Tribunal was satisfied that the losses for which the Claimant seeks to recover were of a type such as to be within the reasonable contemplation of the parties at the time of contracting.

Mitigation of loss
The Respondent submitted that if the Claimant was entitled to recover damages from the Respondent, such damages should be reduced, since the Claimant did not comply with its obligation to mitigate its loss by challenging the amount charged by CBH Operations as being inapplicable and/or being an unenforceable penalty. The Tribunal found that the Claimant took reasonable steps to mitigate its loss.

IN THE MATTER OF THE INTERNATIONAL ARBITRATION ACT 1974 (CTH) AND IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF GRAIN TRADE AUSTRALIA LTD

GTA Arbitration No. 187

Export FOB seller
(Claimant)

and

Export FOB buyer
(Respondent)

Final Award

1. INTRODUCTION

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

At issue in this dispute are the terms of a contract dated 7 March 2013 for the sale of Australian canola ("**Contract**"), whether the Respondent breached that Contract and if so, whether the Claimant suffered loss that is recoverable from the Respondent, ("**Dispute**").

The Tribunal comprises:

- Mr John Orr, nominated by the Claimant;
- Mr Robert Dickie, nominated by the Respondent; and
- Mr Stephen Thompson, Chairman appointed by GTA.

This Final Award is governed by the *International Arbitration Act 1974* (Cth).

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

1. Claimant's Points of Claim dated 26 August 2013 ("**Points of Claim**");
2. Respondent's Points of Defence sent to the Tribunal on 4 October 2013 ("**Points of Defence**");
3. Claimant's Points of Reply dated 4 November 2013 ("**Claimant's Points of Reply**"); and

4. Respondent's Points in Reply dated 21 November 2013 ("**Respondent's Point in Reply**").

The above submissions annexed and relied on certain documentary evidence.

In addition to the above:

1. On 9 December 2013, the Tribunal requested the Claimant provide certain evidence, if it was within its possession;
2. On 13 December 2013, the Claimant provided further evidence it says responded to the Tribunal's request of 9 December 2013; after which
3. On 16 December 2013, the Tribunal requested the Respondent make any submissions it might have in reply to the Claimant's further evidence by 4.00 pm on Monday 23 December 2013; and
4. The Respondent did not make any submissions in reply to the Claimant's further evidence.

The Arbitration proceeded on documents alone. No oral hearing was held.

The Claimant seeks recovery from the Respondent of port storage charges in the amount of USD156,473.58, which it says were incurred by reason of the Respondent's breach of the Contract. The Claimant seeks:

1. an order that the Respondent pay to the Claimant damages for breach of Contract in the amount of USD156,473.58; and
2. interest.

The Respondent denies that it has any liability to the Claimant in respect of this Dispute.

2. JURISDICTION

There has not been any challenge as to the jurisdiction of this Tribunal. It is common ground between the parties that the Contract incorporated the GTA FOB Contract No.1, including the referral of disputes to GTA, under the GTA Dispute Resolution Rules.

As neither party has put in issue the Tribunal's jurisdiction to deal with the matters referred to it for determination, and by virtue of the incorporation of the GTA FOB Contract No.1 and GTA Dispute Resolution Rules into the Contract, we find that we are a validly constituted Tribunal, with jurisdiction to determine the Dispute.

3. BACKGROUND TO THE DISPUTE

It is common ground between the parties that:

1. Under the terms of the Contract, the Claimant agreed to sell and the Respondent agreed to buy, 51,700 MT (10% less at the Respondent's option) of Australian Canola, Free on Board (FOB) Albany, Western Australia.

2. The written terms of the Contract were set out in broker's confirmation note no. ABCXYZ and dated 7 March 2013 (the "**Broker's Note**"), which expressly incorporated the terms of the GTA FOB Contract No. 1, to the extent that such terms were not in conflict with the terms recorded in the Broker's Note.

The Broker's Note contained the following terms which are relevant to this dispute:

"DELIVERY PERIOD:	*1 APRIL 2013 TO 30 APRIL 2013, BOTH DATES INCLUSIVE SELLER'S TO DECLARE 7 DAY ARRIVAL WINDOW 20 DAYS PRIOR TO COMMENCEMENT OF SHIPMENT PERIOD*"
…	
GOVERNING TERMS:	*WHERE NOT IN CONFLICT WITH THE CONDITIONS CONTAINED HEREIN, GTA FOB CONTRACT NO.1 TO APPLY, INCLUDING ARBITRATION CLAUSE FOR WHICH BOTH PARTIES ADMIT TO HAVE KNOWLEDGE AND NOTICE. TERMS USED HEREIN SHALL HAVE THE SAME MEANING AS DEFINITIONS ASSIGNED IN* INCOTERMS 2010 *EDITION.*
	…
	+IT IS THE RESPONSIBILITY OF THE BUYER TO ENSURE THE PERFORMING/NOMINATED VESSEL COMPLIES WITH ALL RESTRICTIONS OF THE LOAD PORT AND LOAD BERTH. SHOULD LOADING OF THE VESSEL BE PRECLUDED OR DELAYED DUE TO NON-COMPLIANCE, ALL RESULTING COSTS AND PENALTIES ARE FOR BUYER'S ACCOUNT."

The GTA FOB Contract No. 1 contained the following terms which are relevant to this dispute:

"*9.1 DELIVERY PERIOD:*	*Vessel to arrive and tender valid NOR at first loading port between _____, ("**Delivery Period**") both dates inclusive.*
9.2 NOMINATION	*Buyers to give Sellers notice of vessel nomination at least 22 consecutive days before the first day of the Delivery Period, declaring the vessel's laytime-cancelling range ("laycan") (which laycan must fall wholly within the Delivery Period), together with vessel ETA, vessel name, ships agent, vessel details, approximate loading tonnage, demurrage/despatch rate (if applicable) and destination. Final Loading tonnage as per stow plan to be confirmed 10 days prior to vessel ETA. Should a trade string exist, proof of string to be provided, if required, by either party. All Notices as per clause 20. (Refer to Note 2)*
…	
12.FREIGHT AND CLASSIFICATION	*… Buyers are to ensure that Vessel(s) hold(s) are clean, easily accessible and if necessary cargo duly protected.*
…	
14 NOTICE OF READINESS	*… Should the Buyers nominated Vessel(s) fail to present valid notice of readiness to load within the Delivery Period, the Sellers may at their option declare the Buyers in default and claim damages for costs directly incurred as a result of the buyers default or in their absolute discretion affirm this contract or the Sellers may carry the goods for the Buyers' account at the rate for storage, interest and insurance current at the time of the Vessel's presentation. Such carrying charges (refer note 5) shall accrue*

	from the day following the expiration of the Delivery Period until the day that goods are loaded and must be paid by the Buyers upon the Sellers' invoice.
…	
15. LOADING	*… Before loading is commenced, and at each loading port, the vessel must pass the customary survey of a) Australian Quarantine and Inspection Service (or substitute successor body) and b) a recognised Marine Surveyor appointed by the Buyers and acceptable to the Sellers. The cost of the surveys are for the Buyers account. Time spent for all surveys not to count as time used, even if the vessel is on demurrage.*
…	
31. ARBITRATION	*Any dispute arising out of this contract, including any question of law arising in connection therewith shall be referred to arbitration in accordance with the GTA Dispute Resolution Rules in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant except that this contract prevails to the extent of any inconsistency but no further.*"

It is also common ground that:

By email dated 8 March 2013, the Claimant declared the 7 day "*arrival window*" to be 9 to 15 April, both dates inclusive.

By email dated 28 March 2013, the Respondent nominated the the vessel ("**the Vessel**") to load 51,700 MT (10% less at the Respondent's option) with laycan "*9th-15th April*".

At 07:06 hours on 12 April 2013, the Vessel arrived at the load port and tendered a Notice of Readiness.

At 15:00 hours on 18 April 2013, the Vessel failed a pre-loading survey at anchor. As a result, the Notice of Readiness as tendered on 12 April 2013 was invalid.

At 12:30 hours on 23 April 2013, following cleaning of the Vessel's holds, the Vessel passed a re-survey at anchor. At that time, the Master of the Vessel re-tendered a Notice of Readiness, which was accepted by the Claimant.

At 09:10 hours on 26 April 2013, the Vessel commenced loading.

Loading was completed at 18:20 hours on 29 April 2013.

It is the Respondent's position that in addition to the written terms, the Contract contained the following implied terms:

1. Implied terms of cooperation;
2. Prevention principle; and
3. Implied terms of good faith, (together "**Implied Terms**").

In its Submissions, the Respondent objected to the admission of certain communications adduced by the Claimant, on the basis that they were marked "without prejudice". In particular, the Respondent objected to the admission of Annexures D, E and J to the Claimant's Points of Claim.

The Tribunal does not express a view as to the admissibility of these communications as it has not been necessary to have regard to such challenged evidence in reaching its decision.

4. BREACH OF CONTRACT

A central issue between the parties is the proper construction of the “Delivery Period” clause of the Broker’s Note. It is the Claimant's position that its email of 8 March 2013 narrowed the Delivery Period from 1-30 April 2013, both dates inclusive, to 9-15 April 2013, both dates inclusive.

The Respondent's position can be summarised as follows:

1. The Respondent complied with the requirements in respect of the tendering of a valid Notice of Readiness under the Contract and tendered a valid Notice of Readiness which was accepted by the Claimant within the Delivery Period;
2. The Delivery Period is defined in the Contract as being 1-30 April 2013;
3. The Claimant "could" declare a 7 day Arrival Window 20 days prior to the commencement of the shipment period, the term "shipment period" referring to Delivery Period;
4. The Delivery Period and Arrival Window are different and separate concepts under the Contract;
5. On a proper construction of the Contract, the declaration of an Arrival Window by the Claimant does not vary the Delivery Window such that the Arrival Window becomes the Delivery Period;
6. Under the terms of the Contract, the Vessel was required to arrive at loadport within the Arrival Window, which must be within the Delivery Period;
7. Consistent with the implied terms of cooperation and good faith in the Contract, the Arrival Window was required to be mutually acceptable to both parties;
8. Although the Contract required the Respondent to ensure that the Vessel arrived at the loadport within the Arrival Window, it did not require the Respondent to tender a valid Notice of Readiness within that same period. Rather, the Contract required the Respondent to tender a valid Notice of Readiness within the Delivery Period.

The Respondent's alternative arguments to the above can be summarised as follows:

1. If the Arrival Window does vary the Delivery Period, it only does so where the Arrival Window period is mutually agreed between the parties, which did not occur and as such, the declaration of the Arrival Window by the Claimant did not vary the Delivery Period; alternatively, the Claimant's insistence of an Arrival Window 9-15 April both dates inclusive, was a breach of the implied terms of cooperation and/or the implied term of good faith; alternatively
2. If the Arrival Window does vary the Delivery Period, the Claimant when exercising its discretion to declare an Arrival Window, must do so in good faith and not act unconscionably. The Claimant's unilateral declaration of the Arrival Window 9 -15 April 2013 both dates inclusive, over the objections of the Respondent without a

valid cause, breached the implied term to act in good faith and in the circumstances did not vary the Delivery Period.

The Respondent also argued it was a term of the Contract that the Claimant's loadport agent would assist the parties to carry out the steps required and would present certain documents. In the Respondent's submissions, the parties had a duty to cooperate so as to allow each other to obtain the benefit of the Contract and in breach of such implied duty of cooperation and/or good faith, the Claimant's agent failed to ensure the Vessel was surveyed in a timely manner. The Respondent alleges that, had the survey taken place in a timely manner, there would have been sufficient time to clean the Vessel and re-tender the Notice of Readiness within the Arrival Window and in such circumstances, the Claimant is precluded from relying on the Respondent's failure to obtain survey clearance within the Arrival Window as the basis for any default by the Respondent.

In response to the Respondent's Points of Defence, the Claimant says:

1. the Broker's Note compulsorily required the Claimant to declare the Arrival Window;
2. once declared, the Delivery Period was narrowed to 9-15 April 2013, both dates inclusive and the Respondent was obliged to present a valid Notice of Readiness within that period; and
3. as a matter of law, none of the Implied Terms form part of the Contract.

In their Points in Reply, the Respondent made certain submissions as to how the Contract should be interpreted, acknowledged that the construction of the Contract must make commercial sense and submitted that the Claimant was asking the Tribunal to re-write the Contract to give effect to the Claimant's subjectively "*favoured 'commercial' construction*" of the Contract. The Respondent also made submissions in support of its position that the declaration of the Delivery was a matter for negotiation.

Having carefully considered the parties' submissions and supporting documents, the Tribunal finds that the Contract conferred on the Claimant an express obligation to nominate an amended Delivery Period of its choosing, provided that the amended Delivery Period was: (i) a period of 7 days between 1 - 30 April 2013; and (ii) declared at least 20 days prior to the commencement of the original Delivery Period. The Claimant complied with that obligation when on 8 March 2013, it declared an amended Delivery Period of 9 - 15 April 2013, both dates inclusive.

The Tribunal further finds that the Contract, and indeed, like many traders, the parties in their correspondence, used the phrases "Delivery Period", "Arrival Window", "Shipment Period", "Laycan" and "Load Window" interchangeably. In the context of the Contract they are not different and separate concepts where, as here, they are used to create a narrow obligation on a buyer to make a vessel available for loading at the load port within a particular, and not unusually short, period of time. We accept the Respondent's submission in their Points in Reply that the construction of the Contract must make commercial sense. And it is the Tribunal's finding that this is achieved by reading the Claimant's email of 8 March 2013 as narrowing the Delivery Period to 9 - 15 April 2013, both dates inclusive.

It is also the Tribunal's further finding that the Contract imposed no requirement, express or implied, to negotiate and/or agree the timing of the amended Delivery Period with the Respondent,

although the Tribunal notes, in any event, the Respondent's nomination of the performing Vessel dated 28 March 2013, included a laycan period that was the same as the narrowed Delivery Period.

Once declared by the Claimant on 8 March 2013, the Contract required the Respondent to tender a valid Notice of Readiness within the narrowed Delivery Period of 9 to 15 April 2013, both dates inclusive.

It is common ground that the Vessel failed to arrive and tender a valid Notice of Readiness on or before 15 April 2013. The Respondent was therefore in breach of the Contract in failing to tender a valid Notice of Readiness before the expiry of the narrowed Delivery Period.

The Tribunal accepts the Claimant's submissions in their Points of Reply that none of the Implied Terms form part of the Contract.

5. CAUSATION OF LOSS

The Claimant alleges it suffered loss and damage as a result of the Respondent's failure to tender a valid Notice of Readiness within the narrowed Delivery Period.

The Claimant alleges CBH Operations levied an additional port storage charge under its Grain Services Charge Schedule 2012/13 (the "**Port Storage Charges**"). Item 26 of the CBH Operations' Charge Schedule 2012/13 provides that an "*Additional Port Storage Charge*" will apply "*in instances [w]here a Nominated Vessel has not commenced loading within the nominated Shipping Window due to reasons detailed in Clause 12 of the Grain Services Agreement and Grain is stored in the Port Facility until the vessel is loaded or cancelled*." The applicable relevant charge under Item 26 is, on the "*7th day after the end of the Shipping Window, $3.15 per MT*".

The Tribunal notes that on the materials before it, the parties do not dispute that the CBH Operations' "*Shipping Window*" for the purposes of the CBH Operations' Grain Services Charges Schedule finished at the same time as the narrowed Delivery Period, i.e. on 15 April 2013. The Tribunal has proceeded on that basis.

The Respondent's position is that if there was a breach, which is denied:

1. The Claimant has failed to establish it did suffer any loss and/or damages from such breach of Contract; in the alternative
2. If the Claimant has suffered any loss and/or damages, it is not entitled to recover same because the parties were required to agree carrying charges before entering into the Contract, which they failed to do; alternatively
3. The Claimant was not contractually liable to pay monies to CBH Operations; in the alternative
4. There is no evidence that the Claimant has in fact paid any monies to CBH Operations; alternatively
5. If the Claimant is entitled to recover carrying charges, such recovery should be reduced to zero, alternatively $93,060.00, because the Claimant was experiencing

delays in the accumulation of its cargo for loading onboard the Vessel, not withstanding the invalidity of the Notice of Readiness.

The Tribunal accepts the Claimant's submission that the Respondent's breach in failing to tender a valid Notice of Readiness before the expiration of the narrowed Delivery Period did cause it to suffer loss and damage. Further, the Tribunal accepts the Claimant's submission that, as a result of the Respondent's breach, it incurred the Port Storage Charges, (which it paid to CBH Operations) and it was not necessary for the parties to agree carrying charges before entering into the Contract, for such charges to be recoverable by the Claimant under the terms of the Contract.

The Tribunal finds that the Port Storage Charges were for the Buyer's account by operation of clause 14.1 of the GTA FOB Contract No.1. The Tribunal also accepts the Claimant's alternative submission that the Port Storage Charges were a default cost incurred by the Claimant as a result of the Respondent's breach, and were for the Respondent's account under the "*Governing Terms*" clause of the Broker's Note. Further, contrary to the Respondent's Points in Reply, the Tribunal is satisfied that the losses for which the Claimant seeks recovery were of a type such as to be within the reasonable contemplation of the parties at the time of contracting.

The Tribunal does not accept the Respondent's submissions that the Claimant's delays in accumulating the canola for shipping caused a delay in the berthing of the Vessel to the extent that the CBH Operations' additional Port Storage Charges would have applied notwithstanding invalidly of the Notice of Readiness.

On the Respondent's own evidence, before the Respondent served an invalid Notice of Readiness, the Vessel was expected to berth and commence loading before the CBH Operations' additional Port Storage Charges applied.

6. MITIGATION

The Respondent submitted that if the Claimant was entitled to recover damages from the Respondent, such damages should be reduced, since the Claimant did not comply with its obligation to mitigate its loss by challenging the amount charged by CBH Operations as being inapplicable and/or being an unenforceable penalty.

The Tribunal finds that the Claimant took reasonable steps to mitigate its loss. The Tribunal is not satisfied that the Port Storage Charges amounted to an unenforceable penalty, or that it was incumbent on the Claimant to challenge those Port Storage Charges as penalties. In the Tribunal's opinion, such a challenge would likely have involved speculative litigation in an uncertain area of law, involving legal costs not justified by the amount levied under the Port Storage Charges.

7. AWARD

Having carefully considered the submissions and further evidence requested from the parties and for the reasons stated above, the Tribunal makes the following Award:

1. The Claim is allowed.
2. The Respondent shall pay the Claimant USD156,473.58 by way of damages.

3. The Respondent shall pay the Claimant interest on USD156,473.58 from 22 May 2013 to the date of this Award in the amount of USD6,684.42 (6.75% pa).

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

5. The Respondent shall pay the Claimant's 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 Federal Court of Australia in accordance with section 27(3) of the *International Arbitration Act 1974* (Cth).

And so we publish our Final Award, at Sydney, 8 January 2014.

……..
Mr John Orr (nominated by the Claimant)

……..
Mr Robert Dickie (nominated by the Respondent)

……..
Mr Stephen Thompson (Chair, nominated by Grain Trade Australia)