GRAIN TRADE AUSTRALIA

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Arbitration 190 – Fast Track Arbitration

Date of Issue: **20 May 2014**

Claimant: **Commodity Seller**
&
Respondent: **Commodity Buyer**

Arbitration Committee (AC)

- Mr Chris Heinjus, appointed by GTA

Claim

The Claimant commenced proceedings in the Local Court to recover the funds owing against a Contract. The Respondent successfully applied for the proceedings to be stayed and for the dispute to be referred to GTA to determine whether it had jurisdiction to determine the Claim and, if it did, to make a substantive determination of the Claim.

Issue(s) for determination:

1. The issue for determination in this Arbitration is whether it was a term of the Contract that any dispute arising in relation to it be determined in accordance with the GTA Dispute Resolution Rules. If it was not a term of the Contract, then GTA does not have jurisdiction to arbitrate the Claim.

Award

1. The Tribunal does not have jurisdiction to arbitrate the Claim.
2. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this Arbitration.
3. 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 Supreme Court of New South Wales in accordance with section 33B(5) of the Commercial Arbitration Act 2010 (NSW) .

Details

The Claimant (seller) and Respondent (buyer) agreed to contract approximately 120-150 tonnes of APW grade wheat following a series of telephone conversations on either 10 or 11 January 2013.

There is no evidence that the parties discussed the application of the GTA Trade Rules and/or Dispute Resolution Rules to the Contract during those telephone conversations.

The Respondent's submitted that on 11 January 2013, they generated a document entitled "Purchase Contract" which incorporated the terms discussed on the telephone. Critically this document, detailed the exact tonnage delivered, i.e. 131.46 tonnes.

Between 11 and 15 January 2013, the Claimant made three separate deliveries of wheat under the Contract, which totalled 131.46 tonnes of wheat.

Summary

The Tribunal ruled that:

- the Respondent was not able to demonstrate that there was any discussion/agreement that the GTA Trade Rules and Dispute Resolution Rules had been expressly incorporated in the contract in the telephone discussions.
- The contract confirmation relied on as evidence that the GTA Trade Rules and Dispute Resolution Rules had been expressly incorporated could only have been generated after delivery as it reflected the exact tonnage delivered rather than the agreed range.
- Therefore, there was no evidence that the Claimant had agreed to the incorporation of the GTA Dispute Resolution Rules; and it therefore follows that
- the Tribunal had no jurisdiction to hear the matter.

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 2010 (NSW) AND
IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF GRAIN TRADE
AUSTRALIA LTD

GTA Arbitration No. 190

Grain seller
(Claimant)

and

Grain buyer
(Respondent)

Final Award

1. INTRODUCTION

This is a Final Award in a Fast Track Arbitration pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("**GTA**").

At issue in this dispute is whether the Tribunal has jurisdiction to arbitrate the claim brought by the Claimant against the Respondent (the "**Claim**"). The Tribunal took submissions in relation to, and rules upon, its jurisdiction as a preliminary issue.

The Tribunal comprises Mr Chris Heinjus, appointed by GTA.

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

1. Claimant's Submissions on Jurisdiction dated 28 March 2014 ("**Claimant's Submissions**"); and
2. Respondent's Submissions on Jurisdiction sent to the Tribunal on 30 April 2014 ("**Respondent's Submissions**").

The above submissions annexed and relied on certain documentary evidence.

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

2. BACKGROUND TO THE DISPUTE

The Claimant is a sole trader farmer from New South Wales, who annually grows approximately 8000 acres of wheat. The Respondent is an Australian commodities trading company, which buys and sells commodities such as wheat.

It is common ground between the parties that the Claimant agreed to sell to the Respondent, and the Respondent agreed to buy from the Claimant, approximately 120-150 tonnes of APW grade wheat at the quoted price of $242.00 plus GST per tonne (the "**Contract**") in accordance with a series of telephone conversations which occurred on either 10 or 11 January 2013.

Between 11 and 15 January 2013, the Claimant made three separate deliveries of wheat under the Contract, which totalled 131.46 tonnes of wheat.

On or about 12 March 2013, the Respondent paid the Claimant the amount of $5,582.06 plus GST in partial satisfaction of the amount owing under the Contract but did not make any further payments.

The Claimant commenced proceedings in the Local Court to recover the balance owed under the Contract. The Respondent successfully applied for the proceedings to be stayed and for the dispute to be referred to GTA to determine whether it had jurisdiction to determine the Claim and, if it did, to make a substantive determination of the Claim.

Before the Local Court and this Tribunal, the Claimant has maintained that GTA does not have jurisdiction to arbitrate the Claim.

3. JURISDICTION

The issue for determination in this Arbitration is whether it was a term of the Contract that any dispute arising in relation to it be determined in accordance with the GTA Dispute Resolution Rules. If it was not a term of the Contract, then GTA does not have jurisdiction to arbitrate the Claim.

I Background

On 10 or 11 January 2013, two telephone conversations were held between Mr H on behalf of the Claimant and Mr T on behalf of the Respondent. During those telephone conversations, the parties discussed the quality, volume, price and time for delivery and payment of the wheat, and the Claimant agreed to deliver wheat to the Respondent on those terms. There is no evidence that the parties discussed the application of the GTA Trade Rules and/or Dispute Resolution Rules to the Contract during those telephone conversations.

The Respondent's evidence is that on 11 January 2013, Mr T (for the Respondent) on behalf of the Respondent generated a document entitled "Purchase Contract" through the Respondent's computer system which incorporated the terms discussed on the telephone ("the **Confirmation**"). As the Claimant does not have a fax or email address and relies on the postal service for delivery of business documents, the Respondent says that it posted the Confirmation to the Claimant on 11 January 2013.

The Confirmation expressly stated that the "GTA Terms and Conditions Apply" and that "This contract expressly incorporates the GTA Trade Rules and Dispute Resolution Rules in force at the time of this contract. Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by arbitration in accordance with the GTA Dispute Resolution Rules in force at the time of the contract" ("the **GTA Term**").

The Claimant disputes that the Confirmation was posted to the Claimant 11 January 2013. The Claimant notes that the Confirmation refers to a total volume of wheat of 131.46 tonnes, however:

(a) the telephone conversations on that date identified a general volume of wheat in the range of 120-150 tonnes;
(b) as at 11 January 2013 only two deliveries of wheat totalling 98.36 tonnes had been made to the Respondent; and
(c) the third delivery of 33.10 tonnes (bringing the total to 131.46 tonnes of wheat) was made to the Respondent on 15 January 2013.

Accordingly, the Claimant submits, the earliest possible date on which the Respondent could have posted the Confirmation was 15 January 2013.

The Claimant also disputes that the Confirmation "incorporated the terms" agreed in the telephone conversations, because, it asserts, no mention was made of the GTA Trade Rules and/or Dispute Resolution Rules in the telephone conversations of 10 or 11 January 2013, pursuant to which the parties reached offer and acceptance.

II Analysis

Two critical questions arise – when was the Contract formed and what are the terms of the Contract?

It is elementary that only those terms which were incorporated into a contract at or before the time the contract was entered into form part of the contract. Those terms can be incorporated, relevantly, by express agreement, notice and/or a course of dealings.

Once a contact has been entered into, its terms can only be added to or varied by fresh agreement; that is, the relevant term must be supported by consideration separate and distinct from that which was provided under the original contract.

The Tribunal finds that the Contract was formed orally on 10 or 11 January 2013 by virtue of the two telephone conversations that took place between Mr H (for the Claimant) and Mr T (for the Respondent). There is no evidence that the parties considered their discussions to be in the nature of negotiations only and subject to execution of a formal contract or to the Claimant receiving and not rejecting within a reasonable time the terms of a written contract to be sent to him by the Respondent.

The evidence is that Mr T (for the Respondent)stated on the telephone "I am happy to book this business. I will prepare the paperwork with the terms and have that ready tomorrow." That statement is consistent with a contract having been concluded orally, and the "paperwork" being prepared as a formality. Although it is arguable that by that statement Mr T (for the Respondent)meant that there was to be no binding agreement between the parties until the "paperwork" had been prepared and the terms contained therein accepted by the Claimant, that argument is not sustainable when viewed in context. The relevant context is that it was made during discussions about deliveries of wheat which were to commence "immediately", and indeed two deliveries did take place on 11 January 2013. It was made in the knowledge that the "paperwork" would be sent by post, and that the Respondent would therefore not receive it prior to the deliveries commencing. In those circumstances, Mr T (for the Respondent)on behalf of the Respondent could not on any reasonable construction have intended for the "paperwork", that is the Confirmation, to be the contractual basis for the deliveries.

Accordingly, the Confirmation does no more than record, to the extent that it is consistent with the terms agreed by telephone, the terms of the Contract. It is not capable of adding to or varying the terms of the Contract entered into orally on 10 or 11 January 2013 as it was brought to the Claimant's notice only *after* the oral contact was formed, was not supported by any fresh consideration from the Claimant and in any event was not acceded to by the Claimant. Critically, it was not capable of adding the GTA Term to the Contract.

The Respondent submitted that the two contracts previously entered into by the Claimant and Respondent, which both contained a term to the effect of the GTA Term, constituted a course of dealings between the parties sufficient to support the incorporation of the GTA Term (or a term to that effect) into the Contract. If that submission is accepted, it is not material that the Confirmation was sent to the Claimant after the contract was formed. The Tribunal finds that there was no course of dealing of the requisite nature to support the incorporation of the GTA Term in that way. Amongst other reasons, the course of dealing was not consistent nor sufficiently long. There were only two prior contracts. Further, both prior contracts were brokered by a third party. There is no evidence of any course of dealing between the Claimant and Respondent dealing directly with one another which may be relied upon or be of any evidentiary weight.

Finally, it is not to the point that the Claimant did not have access to facsimile or email facilities and was therefore difficult to contact. The Respondent would, or should, have known and taken into account the inherent difficulty in ensuring that the Claimant would receive the Confirmation in a timely way if the Respondent was to attach any legal significance to the Confirmation. In those circumstances, the Respondent is taken to have accepted the attendant risk of contracting on terms which were not documented. The Respondent could have taken measures to validly incorporate the GTA Term into the Contract, such as by discussing the application of the GTA Dispute Resolution Rules on the telephone. It did not do so.

On the basis of the Tribunal's findings above, it is strictly unnecessary to decide on what date the Confirmation was sent to the Claimant. Nonetheless, the Tribunal wishes to make some remarks about the evidence provided by the Respondent to the Tribunal on this issue. It was not open on the evidence for the Tribunal to find that the Confirmation was sent to the Claimant on 11 January 2013. First, no mail records were provided. Second, the Respondent provided the Tribunal with a version of the Confirmation that could not possibly have been sent to the Claimant on that date. The Respondent does not dispute that as at 11 January 2013, only a general volume of wheat (in the range of 120-150 tonnes) had been agreed. It can therefore be inferred that any version of the Confirmation posted to the Claimant on 11 January 2013 would have referred to this range rather than to the exact sale

tonnage (131.46 tonnes). It is that version which might have been provided to the Tribunal if it indeed exists.

III Conclusion

On the basis of the Tribunal's findings set out above, the Tribunal does not have jurisdiction to arbitrate the Claim.

4. COSTS

The Claimant seeks an indemnity from the Respondent in respect of the fees he has paid to GTA in relation to this Arbitration. He also seeks his costs of the Arbitration on an indemnity basis. The Respondent has not made any submissions as to costs.

The Claimant was forced to bring this claim as a result of the Respondent's application for the proceedings in the Dubbo Local Court to be stayed and the dispute referred to GTA. It is therefore appropriate that he be indemnified for the fees paid to GTA in relation to this Arbitration.

In relation to its costs, it is appropriate that the Respondent pay the Claimant's costs on the ordinary basis. To the extent that the Claimant has incurred additional expense in the conduct of its court proceedings, that is a matter for the court when it determines costs and is not a matter for this Arbitration.

5. AWARD

Having carefully considered the submissions and for the reasons stated above, the Tribunal makes the following Award:

1. The Tribunal does not have jurisdiction to arbitrate the Claim.
2. The Respondent shall indemnify the Claimant in respect of any fees paid by the Claimant to GTA in relation to this Arbitration.
3. 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 Supreme Court of New South Wales in accordance with section 33B(5) of the *Commercial Arbitration Act 2010* (NSW) .

This award is published the day of 2014.

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Mr Chris Heinjus, Arbitrator appointed by GTA.