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. 205

Grain Buyer (Trader)
(Claimant)

and

Grain Seller (Grain Producer)
(Respondent)

Final Award

A. Introduction

1. This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("**GTA**"). The main issue for us to determine is whether the Claimant breached the parties' contract No 35448 for the sale and purchase of 300mt of Chick Peas ("**Contract**").

2. Our jurisdiction has not been challenged as the Contract clearly contains a referral of disputes to GTA Arbitration.

3. We find therefore that we are a validly constituted Tribunal under the *Commercial Arbitration Act 2010* (NSW) and with jurisdiction to determine all issues in dispute between the parties.

4. This Tribunal comprises:

   (a) Mr Leo Delahunty, nominated by the Claimant;

   (b) Mr Klaus Pamminger, nominated by the Respondent, and

   (c) Mr Chris Heinjus, nominated by GTA to Chair this Tribunal.

5. The arbitration has proceeded on written submissions and documents alone and neither party has asked for an oral hearing.

6. The Claimant has relied on Points of Claim submitted to GTA under cover of a letter from the Claimant's legal counsel dated 22 December 2015. Annexed to the Points of Claim are a copy of the Contract and correspondence passing between the parties.

7. The Respondent relies on Points of Defence dated 4 February with 5 annexures which include statements by the respondents both dated 3 February 2016.

8. The Claimant and the Respondent have both submitted Points of Reply.

9. We have carefully considered these submissions, statements and supporting documents and base our decision on the facts and circumstances gleaned from these sources.

10. As will become apparent, we have been unable to reach unanimous agreement and Chris Heinjus dissents from the conclusion and this Award is made by a majority.

B. Background to the dispute

11. The Claimant trades in agricultural commodities.

12. The Respondent is a grain and pulse producer.

13. A copy of the Contract in dispute between the parties is Annexure A to the Points of Claim. There is no dispute about the existence of the Contract or that the said Annexure A is copy of it. The document at Annexure A is unsigned but neither party has taken any issue with that.

14. It is a relatively standard and simple form of contract in a form commonly used in the Australian grain trade. It is written on a "delivered" basis, with the Shipment Period expressed to be "Buyers Option", starting 1 April 2015 and ending 30 April 2015, for delivery to a packer.

15. The parties have agreed that this is a "Buyer's Call" contract, even though those words do not expressly appear on the document.

16. GTA Trade Rules definitions state that

    Buyer's Call means that the Seller shall have fifteen [15] Calendar Days or such other time specified in the contract after receipt of instructions from the Buyer to make Delivery or Shipment.

17. By default notice dated 29 April 2015, the Respondent held the Claimant in default of its obligations under the Contract. The Respondent alleged that it was entitled to do so because the Claimant had not "called" for delivery by 15 April 2015. According to the default notice the effect of this was to "prevent the Seller from exercising its entitlements as to the time available to it in which it may give delivery", that is, on or before 30 April 2015, the "end" of the contractual period.

18. It proceeded to give notice cancelling the disputed portion of the Contract. The Seller did not claim damages nor reserve its rights in this regard. It appears to have been accepted that the Respondent had not suffered any loss as a result of the Claimant's default.

C. The Parties' Arguments

19. The parties' positions were strenuously and vigorously set out in their submissions and also in their correspondence which was annexed to those submissions.

20. Some of the arguments raised in the correspondence differed from the arguments in the submissions.

21. For example, on page 2 of the letter dated 19 May 2015 from the Claimant's legal counsel to the respondent[1] the Claimant disputes that the Contract can be characterised as "Buyer's Call". This

[1] Annexure "F" to the Points of Claim

was addressed by the Respondent at para (13) of its letter to the Claimant's legal counsel dated 26 May 2015. [2]

22. This argument was not however pursued in the Points of Claim where it is accepted that this was a Buyer's Call contract and the parties have based their submissions on this concession. We consider therefore that any argument around the meaning of "Buyer's Call" and the distinction (if any) between Buyer's Call and Buyer's Option has been abandoned by the Claimant.

23. The parties made the following arguments.

(a) **The Course of Dealings Argument**

Having accepted that this was a Buyer's Call contract and that the definition of that term appearing in the Trade Rules applied, the Claimant submits that there was a course of dealings between the parties by which the parties adopted a facilitative rather than strict contractual approach to delivery. It refers to 9 contracts between it and the Respondent which the Claimant alleges established a course of conduct that the Respondent "represented to the other it would follow, being verbal agreement of delivery schedule and raising of a CMO before delivery." [3]

It was assumed in the Points of Claim that the "Commodity Movement Order" (CMO) were the "instructions" referred to in the definition of "Buyer's Call." It is apparent from the Claimant's submissions that it would be "impracticable" for the Claimant to issue instructions in the form of a CMO without first discussing the terms of the CMO with the Seller, in this case the Respondent.

The Respondent says in summary that "absent any agreement for some other time period to apply in respect of the time for delivery, or for an extended delivery period, the grain buyer was contractually obliged to give the grain seller 15 calendar days in which to deliver after receipt of delivery instructions, so as to allow delivery within the delivery period identified in the Contract; that is, delivery instructions were to be given by 15th April 2015." [4]

The Respondent does not however say what the form of those instructions was required to be, and whether (for example) instructions could be given without having first discussed those instructions with the Seller.

In reply, the Claimant asserts that "notice can be given for delivery in the 15 days before the end of the delivery period and the parties can then, if necessary agree to have the deliveries take place after the delivery period, as occurred for several of the contracts referred to in the Claim with which the grain seller did not take issue. "

The Claimant raises a related argument in relation to an estoppel alleging that the prior course of dealings gives rise to an estoppel preventing the Respondent from seeking to rely on a strict construction of the contract.

(b) **The Notice Argument**

The Claimant challenges the notice of default given by the Respondent.[5] Specifically the Claimant states "If the grain seller truly believed the buyer was "in default" by not ordering

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[2] Annexure "G" to the Points of Claim

[3] Page 5 of the Points of Claim

[4] Para [A](3) of the Points of Defence.

[5] Page 7 of the Points of Claim

on the product prior to 15 April then we ask the question: why did they for two weeks wait under 29 April to issue notice calling the grain buyer into default."

That notice by the Respondent was in the form of 2 notices dated 29th April 2015 purporting to be notices pursuant to Trade Rule 17(4). That rules provides;

In a case of actual default where no notice has been given, the liability will remain in force until the non-defaulting party, by the exercise of due diligence, can determine the default. The party not in default must then give the defaulting party notice containing the details in (2) above and as soon as is practical thereafter advise the defaulter which of the options in 3 above it elects to pursue.

It is not doubted that time is of the essence of GTA contracts by virtue of Rule 4. The Respondent has provided no evidence or explanation of why it took 14 days hold the Claimant in default.

The Respondent does however make submissions at paragraphs 66-70 of the Points of Defence to the effect that the Respondent was under no obligation to bring the default or possible default to the attention of the Claimant to allow them to remedy that default.

D. Discussion and Determination

24. The construction of any contract comes from reading the document objectively as a whole in a way that makes commercial sense. This is a Trade arbitration so it should be assumed that we will bring our own experience to bear giving the contract a commercial construction that reflects the reality of the grain (and pulse) trade in which we individually and collectively have many years of experience.

25. In this case the relevant part of the Contract reads as follows;

    "Shipment Period: Buyers Option START: 1/04/2015 END: 30/04/2015"

26. As we have stated above, despite the fact that the words "Buyer's Call" do not appear on the document, the parties have agreed that it is a Buyer's Call contract as that term is defined under the GTA Trade Rules.

27. An alternative construction to the effect that the shipments were to commence within the period 1-30 April 2015 was not pursued. It appears to have been assumed by both parties that the effect of the words extracted at para [25] required that the Seller had the right to complete deliveries by 30 April 2015, and be given at least 15-days' notice to do so, even if physical delivery may not have actually commenced until (say) a few days before the end of the Shipment Period.

28. The definition (see para [16]) refers to "Delivery" or "Shipment". This tends to support the alternative interpretation referred to above that the contract could require either that shipments commence within the "shipment" period or that delivery be completed within the "delivery" period.

29. This gives rise to another issue which perhaps goes to the heart of this dispute and the intention of the parties.

30. One would assume that only in unusual cases would 15-days' notice not be sufficient time for the Seller to arrange transport to commence shipments. The Seller knows that under the contract it must have or be able to access the goods to ship or deliver within 15-days of receiving instructions. This is a liberty granted to the Seller but it is also a right of the Buyer to call for shipments to commence within a stipulated date range.

31. The Seller does not need to be holding the commodity when it enters into the contract. The Seller knows that it will be given up to 15-days in which to source the commodity and to commence making shipments.

32. While the words “Ex Farm Delivered” appear under the heading “Weight to Govern”, the Contract does not otherwise identify the required origin of the commodity. While the Respondent in this case is a producer of chick peas, the Contract does not say that that the commodity delivered must be from the Respondent’s own crop. All it requires is that “shipments” be commenced within the shipment period, and that the destination of those shipment should be identified.

33. Clause 17 of the Trade Rules is headed “Default” and describes what may happen when a party is “in default of any of its obligations” under a contract. It gives the innocent party an option to affirm the contract or to terminate the contract. This is a serious provision indicating that the “obligation” must be in the nature of a condition of the contract.

34. According to the default notice dated 29th April the relevant “obligation” in this case was to provide “delivery instructions” no later than 15th April.

35. But what were those instructions to be? The Seller already knew from the face of the contract that the last day on which it was able to make shipments was 30 April. And it knew the destination of those shipments. It was able to arrange to make shipments within the contract period without any information from the Buyer. It also knew from previous dealings that instructions could not be given until shipment had been discussed between the Buyer and Seller.

36. It is a Buyer’s Call contract because the Buyer can call for shipment or delivery at any time within the stipulated period by giving at least 15-days’ notice. The Contract in this case was entered into on 5 February 2015. The Buyer could have given delivery instructions at any time after 5 February requiring commencement of shipments from 1 April 2015.

37. However it must be obvious to the Seller that in the absence of express instructions 15-days before the end of the shipment or delivery period, the Buyer has elected not to exercise its right to call for early delivery, and the express contractual obligation to deliver to the named destination before the end of the shipment or delivery period remains.

38. The alternative would be to impose a condition on the Buyer to give instructions to the Seller to commence shipments by 30 April when that is obvious from the face of the Contract.

39. It cannot have been in the contemplation of the parties that a failure to give instructions which simply repeat the words of Contract would give the Seller the option to terminate the Contract.

40. This is where we as arbitrators differ.

41. It is the view of the majority that we are constrained to make our determination on the case that the Claimant has chosen to advance and on that case we agree with the Respondent that there was no relevant course of dealings which served to vary the strict terms of the contract. Nor was there conduct giving rise to an estoppel.

42. In relation to the notice argument, the Respondent’s obligation was not to give notice “immediately” or “as soon as practicable”: it was to exercise “due diligence”. The Respondent took 14-days to give that notice. We are not satisfied a 14-day period is obvious evidence of a lack of due diligence.

43. Mr Heinjus does not agree with this result.

44. It is Mr Heinjus’ opinion that the definition and indeed commercial practice of Buyer’s Call contracting does not impose a condition upon the Buyer to provide instructions at least 15-days

before the end of the shipment or delivery period, such that failure to provide those instructions within that time gives the Seller the option to hold the Buyer in default. While the Claimant may not have put its case on this basis it is so fundamental to commercial practice that in Mr Heinjus' view the Respondent cannot succeed on this basis.

45. Further, Mr Heinjus is of the view that there was no evidence that the Respondent could not have made delivery as required under the Contract between 24 April 2015 when the Claimant first contacted the Respondent, and the end of the Delivery Period. Mr Heinjus believes that it is fundamental to grain contracting in Australia that the parties who enter into contracts intend to perform their obligations, and they should meet those obligations unless the Contract provides otherwise in clear terms. In this case it does not.

E. Final Award

46. For the reasons above, our Final Award (by Majority, with Mr Heinjus dissenting) is;

    (i) The Claimant's claim fails.

    (ii) No order as to costs.

This award is published the   day of May 2016.

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Mr Chris Heinjus, Chair Arbitrator appointed by GTA

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Mr Leo Delahunty, Arbitrator appointed by the Claimant

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Mr Klaus Pamminger, Arbitrator appointed by the Respondent