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. 336

CLAIMANT
(Buyer)

and

RESPONDENT
(Seller)

Final Award

INTRODUCTION

This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**GTA**). The dispute relates to the consequence of the insolvency of the Claimant in relation to two contracts between the Claimant and Respondent. In accordance with GTA practice, the Claimant commenced two arbitrations (GTA Arbitration Numbers 327 and 328) which were consolidated into the present reference by Interim Award made by the Chair on 8 December 2020.

Each of those contracts was evidenced by a Brokers Note contract issued by BROKER A. Each Brokers Note contained the following clause:

"Dispute resolution: When not in conflict with the terms above this contract expressly incorporates the GTA Trade Rules and Dispute Resolution Rules in force at the time of this contract, under which 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."

There is as a result no dispute as to jurisdiction. The contract documents clearly provide for the referral of disputes to arbitration to be administered by GTA pursuant to GTA's Dispute Resolution Rules.

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.

This Tribunal is comprised of:

1. Mr Justen Schofield, nominated by the Claimant;

2. Mr Peter Howard, nominated on behalf of the Respondent; and

3. Mr Stephen Howells, Chair nominated by GTA.

The parties have exchanged;

(a) Points of Claim dated 23 December 2020;

(b) Points of Defence (undated);

(c) Claimant's Points of Reply dated 26 February 2021;

(d) Respondent's Points of Reply (undated);

(e) Statement of Mr J dated 23 March 2021;

(f) Claimant's Further Points of Reply dated 31 March 2021;

(g) Respondent's Further Points of Reply (undated but received by GTA on 16 April 2021).

These submissions were supplemented by supporting documentation and correspondence to which we shall refer as required.

The parties have chosen not to conduct a hearing in relation to this reference.

We have carefully considered these submissions, statements and supporting documents and base our decision on the facts and circumstances thereby adduced.

BACKGROUND TO THE DISPUTE

1. Prior to its insolvency, the Claimant was a grain trader.

2. The Respondent is a grain trader.

3. Pursuant to an BROKER A Brokers Note numbered AAAA (**Contract AAAA**) dated Tuesday 15 May 2018, the Respondent Sellers contracted to sell the Claimant Buyers 1000 mt +/- 12mt Seller's option of Australian Origin feed barley No. 1 as per current GTA Standards, delivered Geelong/Melbourne between 1 January 2019 and 30 June 2019 at a price of $295 per tonne, plus carry.

4. As is common in the grain trade, the Claimant Buyers also produced a Purchase Contract document with the same date and referencing BROKER A Contract 1234. The Claimant allocated the contract number BBBB (**CLAIMANT Contract BBBB**) and it is referred to as the **First Agreement** in the Points of Claim.

5. Pursuant to an BROKER A Brokers Note numbered CCCC (**BROKER A Contract CCCC**) dated Friday 18 May 2018, the Respondent Sellers contracted to sell the Claimant Buyers 1000 mt +/- 12mt Seller's option of Australian Origin feed barley No.1 as per current GTA Standards, delivered Darling Downs between 1 January 2019 and 30 June 2019 at a price of $352 per tonne, plus carry.

6. As with the First Agreement the Claimant Buyers also produced a Purchase Contract document with the same date and referencing the same Brokers Note. The Claimant allocated the contract number DDDD (**CLAIMANT Contract DDDD**) and this is referred to as the **Second Agreement** in the Points of Claim.

7. It was a term of both contracts, appearing on the face of the Brokers Note that;

   "All other terms and conditions as per GTA Specifications and delivered no.3 contract where not in conflict with the above."

8. The reference to the 'delivered no.3 contract' is a reference to the 'GTA Contract No.3 – Contract Confirmation.'

9. As mentioned above, the Brokers Note contracts also provided;

   Dispute Resolution: When not in conflict with the terms above this contract expressly incorporates the GTA Trade Rules…."

10. For present purposes, it is sufficient to say that it is common ground that each contract incorporated and was subject to the GTA Trade Rules.

11. On 18 October 2018, the Claimant went into Administration.

12. According to the Claimant, pursuant to GTA Trade Rule 17(8), on 22 October 2018 the Administrators of the CLAIMANT wrote to its Creditors (including the Respondent) advising of their appointment (**22 October Notice**). The Administrators did not by that notice seek to close out or wash-out the First or Second Agreement.

13. It is common ground that on 23 November 2018 the Administrators wrote to the Respondent formally closing out the First Agreement at a price of $435 per tonne and the Second Agreement at $425 per tonne and issuing demands for payment of $130,000 in respect of the First Agreement and $41,500 in respect of the Second Agreement.

14. By letter dated 18 December 2018 the Respondent's solicitors wrote to the Administrators rejecting their demands; denying that their client had received the 22 October Notice, and holding the Claimant in default.

15. On 6 March 2019, the Claimant went into Liquidation.

16. It is a feature of the GTA Trade Rules, to be found in Trade Rule 17 (as annexed) that on the happening of an Insolvency Event affecting a party, open contracts are 'closed out'. If the insolvent party happens to be 'in the money' on the contract, that party (via its insolvency practitioners) is entitled to payment from the solvent party.

17. This is a long-standing provision, not without controversy. The idea of making a payment to an insolvent party is anathema to many, particularly as when the roles are reversed, the solvent party may receive (at best) 'cents on the dollar'.

18. There is no statement of policy published by GTA explaining why the Trade Rules have this effect. One justification may be that if it were otherwise, the insolvency would result in a 'windfall' to the solvent party.

19. Regardless of any possible policy behind the Rule, our role is to interpret the Rules and adjudicate this dispute based on the facts and submissions presented by the parties in this particular case.

20. The Claimant's position is clear; it says that Rule 17 has been triggered and it is entitled to payment.

21. The Respondent resists payment on several grounds.

22. The first ground advanced is that the Claimant 'clearly defaulted' on the contracts. It says that contrary to the assertion of the Claimant, it did not receive the 22 October Notice and had no notice that the Claimant had entered Administration.

23. It then says that the effect of the 23 November 2018 correspondence was in effect repudiatory and by the letter dated 18 December 2018, the Respondent accepted that repudiation.

24. The effect, according to the Respondent, was a simple default under Rule 17(1) and (2) giving the Respondent rights under Rule 17(3), as opposed to the rights sought to be exercised by the Claimant, under Rule 17(8) and 17(10).

25. Fundamental to this argument is what we might call the 'Insolvency Trigger'. The Respondent says that for the Claimant to be able to rely on sub-Rules 17(8) and 17(10), it must have 'pulled that trigger' by giving the Notice referred to in 17(8). The giving of notice is, in effect, a condition.

26. The Claimant says the happening of an Insolvency Event is a question of fact, and that the relevance of the Notice given under 17(8) only affects the calculation of Fair Market Price.

27. Moreover it says that it did give the required notice and seeks to rely on the sworn statement of Mr J sworn 23 March 2021 in which Mr J gives evidence of instructions he provided to Company G to send out notices to all parties on a list of entities appearing at Annexure B to his statement, which list includes the Respondent.

Determination

28. We find, based on the affidavit of Mr J, that on the balance of probabilities, notice of insolvency was given to the Respondent by post in the form of the 22 October Notice. In doing so we do not need to make any finding as to whether the notice was actually received by the Respondent because GTA Trade Rule 20(3) provides that the sender bears the onus of providing that notice was "sent ***or*** received" (our emphasis). We are satisfied that the Claimant has discharged the onus that it was sent.

29. Even if the notice was not provided, we find that on a proper reading of GTA Trade Rules 17(8), 17(9) and 17(10), 17(10) expressly contemplates the consequences where notice is "not given as required", that is, the solvent party is given an option as to which date is used for determining 'Fair Market Price', that is the date on which notice should have been given, and the date on which the solvent party discovered the insolvency. The giving of the notice is not therefore a condition and the Respondent was not entitled to hold the Claimant in default and terminate the contract.

30. The final point relied on by the Respondent is the contention that a party is not entitled to profit from its own default. It refers to and relies on a line of legal authority the leading authority for which is TCN Channel 9 Pty Ltd v Hayden Enterprises (1989) 16 NSWLR 130 (**Channel 9 Point**). It is not entirely clear whether the Respondent raises this argument as a further answer to the case under sub-rules 1-7, or whether the Respondent also relies on the Channel 9 Point as an answer to the case under sub-rules 8-10.

31. At a conceptual level, it is hard to see how it could be said that the entity which entered into the transactions was the same as the Claimant in this case; it is an entity in external administration, in liquidation, and bears scant resemblance to the entity that entered into the transactions. If anyone stands to 'benefit' it is the creditors of the Claimant (which includes the Respondent), not the Claimant itself.

32. Second, while we accept that Rule 17 is headed 'Default', given its proper reading, it is quite clear that sub-rules 1-7 apply to contractual default, and sub-rules 8-10 apply to insolvency. The only commonality between the two sets of sub-rules is the reference to closing out of contracts at Fair Market Price. It is quite clear from the language of sub-rules 5 and 6 that only the party not in default is entitled to claim damages, from the party in default.

33. But the language in sub-rules 8-10 is consciously different. There is no reference to 'default' or 'party in default' in those sub-rules, only to the 'Solvent Party' and the 'Insolvent Party'.

34. To the extent that the Channel 9 point is relevant to the operation of sub-rules 1-7 we agree that a party should not benefit from its own breach or default, and the sub-rules appear to reflect this concept.

35. However this case falls for determination under sub-rules 8-10 which are distinct to which the concept of 'default', and therefore the Channel 9 Point, does not apply.

36. Two other points fall for determination. The first is the date for determination of Fair Market Price. The Points of Claim are expressed in the alternative viz;

    (a) $41,500 calculated at $435.00/metric tonne or in the alternative, $39,500 calculated at $431.00/metric tonne;

    (b) $130,000 calculated at $425.00/metric tonne or in the alternative, $127,000 calculated at $422.00 metric tonne.

37. The values of $435 and $425 respectively are the values appearing in the letter dated 23 November 2018 (**November Notice**).

38. The explanation for these alternatives appears to be found at paragraph 2, 3 and 7 of the Claimant's Points of Reply.

39. As we have determined that the 22 October Notice was properly given we accept that the relevant Fair Market Price was $435 and $425 per tonne and we note in doing so that the Respondent has not challenged these values.

40. The final issue for resolution is the submission raised by the Respondent at paragraph 2 of its Points of Defence. It says that by agreement of the parties, the tonnage to be delivered under the Second Agreement was reduced to 500 tonnes by virtue of a partial wash-out. Included at Exhibit 1 to the Points of Defence is an email string dated 28 August 2018 between Mr H for the Claimant and Mr K of the Respondent.

41. In its Points of Reply, the Claimant denies the agreement and says that any agreement evidenced by the 28 August 2018 emails related to contract number "CCCC and not the Second Agreement, being contract no AAAA."

42. As the Respondent points out in its Points of Reply, the Claimant appears to be confusing the First Agreement (BROKER A Contract AAAA and CLAIMANT Contract BBBB) and the Second Agreement (BROKER A Contract CCCC and CLAIMANT Contract DDDD). This is perhaps compounded by the fact that paragraph 14(a) of the Points of Claim relates to the Second Agreement, while paragraph 14(b) relates to the First Agreement.

43. That said, there is no dispute by the parties that the claim in respect of the First Agreement relates to 1000 tonnes, while the claim in respect of the Second Agreement relates to 500 tonnes. So much is clear from the November Notice.

44. For these reasons we conclude that the Claimant is entitled to the payment it seeks in relation to the First Agreement based on 1000 tonnes, the Second Agreement based on 500 tonnes.

Costs

45. In keeping with GTA practice, the parties were asked to advise their legals costs, in the event they were successful.

46. The Claimant, being entitled to costs, has advised legal costs of $40,710. This compares with the Respondent's legal costs of $39,643.45. While neither party has produced copies of fee note or itemized costs, the fact that the costs incurred are nearly identical satisfies us that the costs claimed are reasonable and proportionate.

AWARD

47. For the reasons stated above, we make the following award;

    (a) The Claimant's claim is allowed, with costs;

    (b) The Respondent shall pay the Claimant;

        (i) $[redacted] (500 tonnes @ $[redacted] tonne); and

        (ii) $[redacted] (1000 tonnes @ $[redacted] tonne).

    (c) The Respondent shall pay the Claimant interest on $[redacted] at 5% from 23 November 2018.

    (d) Fix the costs payable by the Respondent to the Claimant at $[redacted] (inc GST); and

    (e) The Respondent shall indemnify the Claimant for arbitration fees paid by the Claimant to GTA.

This award is published at Sydney, the 1st day of June 2021.

Mr Justen Schofield

Mr Peter Howard

Mr Stephen Howells

Rule 17.0 DEFAULT

1) A party in default of any of its obligations under a contract or who anticipates that it will default must serve notice on the other party as soon as practicable.

2) The notice must state the date of default or anticipated default and the nature of and reasons for the default.

3) The party in receipt of such notice must immediately, or as soon as is reasonably practical, notify the other party of its election to either;

    a. affirm the contract; or

    b. buy in, or sell against the defaulter; or

    c. cancel all or any part of the defaulted portion.

4) 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.

5) Default by either party in performance of the contract in accordance with the contract terms shall entitle the other party to damages in respect of and/or reject only the actual defaulted portion.

6) A party in default is liable to pay damages based on the defaulted quantity multiplied by the difference between the contract price and Fair Market Price as at the date of default, within 7 days of receipt of a demand to pay.

7) Where either party is dissatisfied with the ascertained Fair Market Price and damages cannot be mutually agreed, then the determination of Fair Market Price may be referred by either party for Expert Determination according to the Dispute Resolution Rules, and which shall, for the purpose of this sub-rule only, be final and binding on both parties.

8) On the happening of an Insolvency Event the Insolvent Party shall give notice of insolvency to the Solvent Party within 2 business days.

9) Unless otherwise expressly agreed in writing, any contracts between the parties will be closed out at the Fair Market Price on the business day following the giving of notice under Rule 17(8).

10) If notice is not given as required, the Solvent Party shall, on learning of the (or any prior) Insolvency Event, have the option of declaring the contract(s) closed-out at either the Fair Market Price on the first business day after the date when the Solvent Party first learned of the Insolvency Event, or at the Fair Market Price on the first business day after the date of the earliest Insolvency Event known to the Solvent Party.

11) This Rule 17 [Default] does not apply to Circle Trades except as provided by Rule 18 [Circle Trades].