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

GTA Arbitration No. 372

[redacted]
(Claimant)

and

[redacted]
(Respondent)

Final Award

INTRODUCTION

1. This is a Final Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**DR Rules**). The proceedings were commenced on 10 August 2022 pursuant to a Notice of Arbitration prepared by [redacted], solicitors for the Claimant.

2. It is also the disposition of an application made by the Claimant for leave to submit further points of reply. We deal with that application at the conclusion of this Award.

3. As mentioned above, the Claimant is represented by [redacted] solicitors [redacted] and [redacted].

4. The Respondent is represented by Mr [redacted], of counsel.

5. This reference relates to a dispute concerning a contract between the Claimant Buyer ([redacted] and **Buyer**) and the Respondent Seller [redacted] and **Seller**). In summary, Claimant contracted with Respondent for the purchase of wheat which was ultimately not delivered. Claimant and Respondent have each held the other in default and claimed compensation.

6. For present purposes the particulars of that contract are as follows:

Contract No.	Broker	Date	Commodity	Tonnes	Base Price	Delivery
[redacted]	[redacted]	16/02/2022	AH9 Grade Wheat of the 21/22 Season	1200mt +/- 5% or 12mt whichever is less	$250mt plus GST	Ex Farm [redacted] NSW.

7. The contract is evidenced by a Claimant Purchase Contract document dated 16 February 2022 (**Contract Document**). The contract was signed by Mr A on behalf of Claimant. While it was not signed by Respondent, there does not appear to be any dispute that the Contract Document evidenced the terms of the agreement between the Parties.

8. It is worth commenting at this stage on the role of "Advisors". At paragraph 10 of her witness statement dated 31 January 2023, Respondent states that in early February 2022 she "decided to engage Advisors in order to sell 1200 metric tonnes of wheat." No further details of this engagement are provided.

9. In any event, Advisors produced a Contract Confirmation document dated 16 February 2022. This document was first produced by the Claimant in Exhibit 2 to its Points of Reply dated 27 February 2023. The Respondent has made no reference to this document. Neither party appears to suggest that this document evidences the contract in priority to the Contract Document and both appear to rely on and refer only to the Contract Document. The only relevance of the Contract Confirmation appears to be that it references the Respondent's NGR (being the National Grower Registration Number [redacted]) and identifies Mr B as the 'Contact'. For completeness, the number also appears on the Contract Document (though it is not expressly described as the NGR).

10. The Contract Document identifies 'Advisors' as 'Broker'. It is apparent from the correspondence relating to the transaction that the Buyer regularly corresponded with:

    a. Mr C, Commodity Advisor, Advisors; and

    b. Mr D, Advisors.

11. We know from our experience of the grains industry that Advisors is a well-known 'grower broker,' meaning that they regularly advise and act as agents for growers in advisory, contracting and execution of contracts. As will become apparent in the course of this Award, the Respondent denies that it was represented by any agent in this transaction.

12. The Contract Document contains on its face the following clause:

> *This contract expressly incorporates the GTA Trade Rules [or standard GTA contract reference] 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 contract.*

13. The version of the Trade Rules current at 16 February 2022 is applicable to the contract. The current version of the Rules became effective on 1 March 2021, so it is the version applicable to this dispute.

14. Pursuant to Article 13 of the DR Rules (headed 'Governing Legislation'), the provisions of the *Commercial Arbitration Act 2010* (NSW) (**CAA**) shall apply. The Parties having chosen the NSW legislation to govern this arbitration and we find that NSW and specifically Sydney is the seat of this Arbitration as that term is defined in Article 38(1)(a) of the DR Rules.

15. We are listed on the GTA list of arbitrators under Article 6.1 of the DR Rules.

16. We have been appointed to this Tribunal as follows:

    a. Robert Dickie – Chair appointed by GTA;

    b. Simon Clancy – appointed by the Claimant; and

    c. Rebecca Reardon – appointed by the Respondent.

17. For the reasons set out above, we find therefore that this is a validly constituted Tribunal under the CAA with jurisdiction to determine all issues in dispute between the Parties.

18. As neither party has requested a hearing we have proceeded on documents alone.

Procedural History

19. By way of background and procedural history:

    (a) As observed above, this matter was commenced by way of Notice of Arbitration dated 10 August 2022.

    (b) In accordance with GTA practice, a Notice of Dispute was mailed to the Parties dated 8 September 2022 which included, among other things, a Contract for Full Arbitration.

    (c) Mr E of Claimant signed and returned the Contract for Full Arbitration and dated it 7 October 2022. No signed Contract was received from the Respondent.

    (d) The Parties have exchanged the following submissions and evidence:

        a. Claimant's Points of Claim dated 7 December 2022, including supporting documents at Exhibit 1;

        b. Respondent's Points of Defence (and cross-claim) dated 31 January 2023;

        c. Witness Statement of Ms B dated 31 January 2023, including supporting documents at Exhibit ST-1;

        d. Claimant's Points of Reply dated 27 February 2023 including supporting documents at Exhibit 2; and

        e. Respondent's Points of Reply dated 21 March 2023.

Facts

20. The existence and terms of the contract are not in dispute. It is evidenced by the Contract Document.

21. Materially, the contract is expressed to be Ex Farm NSW. Weights and grades are described as 'Destination,' which must be a reference to the farm and not, as suggested by the Respondent, the ultimate destination intended by the Buyer.

22. Relevantly, it is not disputed that the property is accessible by two unsealed roads – Road 1 on the northern boundary and Road 2 on the southern boundary.[1]

23. The Shipment Period stated in the Contract Document was "START 16/02/2022 – END 31/03/2022".

24. The Contract Document further stipulated "Trade Rules to Govern: GTA Terms and Conditions apply."

25. There is no dispute that the contract was subject to the GTA Trade Rules.

26. The GTA Trade Rules relevantly provide:

Definitions

Delivery Instructions *means (unless otherwise agreed) written notice specifying*

1. *Tonnes to be delivered;*
2. *Delivery Location;*
3. *Delivery date range.*

Ex Farm *means the goods are delivered when loaded upon an appropriately presented form of transportation at the Seller's nominated farm.*

Rule 13.2 Delivery Instructions

(2) In cases of a contract with terms Ex-Store, ***Ex-Farm*** (our emphasis) *or Free on Board instructions for Delivery, other than contracts with Loaded, Immediate or Prompt instructions, the Buyer shall give the Seller not less than seven [7] Business Days written notice of intent to present appropriate transportation for the commencement of loading. Upon receipt of such notice, the Seller shall give the Buyer written Delivery Instructions, not less than five [5] Business Days prior to the commencement of loading.*

(3) Once tendered under Rule 13.2(1) or Rule 13.2(2), Delivery Instructions may only be varied by the Buyer at the Buyer's expense.

Rule 17.0 Default

(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.

[1] Points of Defence – paragraph 9

(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.

***Fair Market Price** means:*

(a) the price per tonne ascertained by Repurchase or Resale for a commodity which is actively trading, or

(b) in the case of default, the market price on the Business Day following the receipt of the notice under Rule 17 (1) or 17(4) being:

(i) In the case of Seller default, the price being offered by other sellers;

(j) In the case of Buyer default, the price being offered by other buyers.

(c) in the case of insolvency, the market price on the Business Day following the receipt of the notice under Rule 17 (8), or exercise of the option under 17(10) being:

(k) In the case of Seller insolvency, the price being offered by other sellers;

(l) ii) In the case of Buyer insolvency, the price being offered by other buyers."

27. It is the Claimant's case that on 10 March 2022 pursuant to Trade Rule 13.2(2) the Claimant gave the Seller written notice of its intention to commence collection in the week commencing 21 March 2022 and finish collection in the week commencing 28 March 2022.

28. The Claimant says that the Seller failed at that time, and at all, to provide Delivery Instructions as required under Trade Rule 13.2(2).

29. Discussions and negotiations followed.

30. On 1 April 2022,the Seller formally held the Buyer in default under Rule 17(4) (**First Default Notice**), giving as reasons that:

    a. The Claimant has failed to comply with TGA Rule 13.1(1); and

    b. the Claimant has failed to collect the wheat by 31 March 2022.

31. The First Default Notice also provided:

    We require a response in writing by 4pm Monday 4 April 2022.

    We reserve all of our rights.

32. Despite the First Default Notice, the negotiations continued between the Buyer and Advisors.

33. On around midday on Friday 8 April 2022, the Seller wrote to Advisors 'without prejudice' advising that:

    "The time of ten days is extended to allow the grain to be picked up ending 18th April 2022."

34. On the same day, the Buyer gave the Seller notice of its intended trucking program to load the grain.

35. It is worth noting that Friday 15 April 2022 was the Good Friday public holiday, and Monday 18 April 2022 was also a public holiday.

36. The Parties continued to negotiate to attempt to arrange collection of the grain but access roads were (apparently) affected by rain. It is agreed by the Parties that [redacted] Shire Council gave notice that public unsealed roads were closed on 8 April 2022 and they were reopened on 14 April 2022.[2]

37. Despite continuing negotiations, no grain was loaded.

38. On 8 June 2022, the Seller formally held the Buyer in default, cancelling the contract.

39. On 10 June 2022, the Buyer (via their solicitors) held the Seller in default.

40. In summary, the Seller asserts that:

    a. The Buyer was responsible for procuring delivery of the grain within the Shipment Period (as extended);

    b. It failed to do so and was therefore in default; and

    c. it could not provide delivery instructions as the conditions were too wet to allow trucks to access the relevant sites.

41. In summary, the Buyer asserts that

    a. It gave the required notices under Rule 13.2(2); and

    b. The Seller failed to provide Delivery Instructions.

Consideration

42. All issues have been thoroughly and professionally raised in submissions drafted by the Parties' legal representatives.

43. Significant quantities of grain are transacted 'ex farm' every season. Such contracts allow growers to sell their crop without first having to transport it to external bulk storage.

44. The Buyer bears the cost of and responsibility for logistics, namely booking road transport ('appropriately presented transportation', as per the Definition).

45. The Buyer will then need to liaise between the transport provider and the Seller to ensure that the vehicles can access the farm and, specifically, that the part of the farm where the grain is located is ready for loading.

46. That may require road transport to traverse a combination of sealed and unsealed and private and public roads.

[2] Points of Defence paragraph 22.

47. In practice it is common for buyers to provide their logistics contractor with the seller's contact details and the truck driver will often call the grower directly to make arrangements to enter the farm and load the grain.

48. For the reasons highlighted in this dispute, 'ex farm' contracting can present some challenges.

49. First, access to the farm (and/or the grain) must be possible during the contractual shipment or delivery period and specifically in the period identified in any Delivery Instructions.

50. GTA 'ex farm' contracts do not routinely include a diagram of the relevant farm highlighting the place where the grain will be loaded. Coordinating heavy vehicle access to the right part of the farm to maximize efficiency requires effective communication between the Buyer, its contractor, and Seller.

51. This is reflected in Trade Rule 13.2 of which states that;

    a. The Buyer shall give the Seller not less than seven [7] Business Days written notice of intent to present appropriate transportation for commencement of loading; and

    b. Upon receipt of such notice, the Seller shall give the Buyer written Delivery Instructions, not less than five [5] Business Days prior to commencement of loading.

    Delivery Instructions *are defined in the Trade Rules as*

    (unless otherwise agreed) written notice specifying

    i. Tonnes to be delivered;
    ii. Delivery Location;
    iii. Delivery date range.

52. It is worth observing that Trade Rule 13.2 contains formalities for both the timing and form of notices , in that it requires notices to be in writing. As in any contract, while the Parties are entitled to insist on strict performance (particularly as to timing), the Parties are also free to waive strict compliance with contractual terms, which in our experience they commonly do when it is reasonable to do so.

53. Trade Rule 13.2 seeks to codify or provide a framework for the communication that is necessary between a buyer and seller to ensure that grain sold 'ex farm' can be loaded and delivered within the Shipment Period.

54. We note that the contractual Shipment Period was approximately 6 weeks long. The contract did not stipulate 'even spread' delivery. As such, the Buyer's obligation was to give notice of intent within sufficient time to allow the Seller to provide Delivery Instructions to permit and complete loading within the Shipment Period.

55. Taking all these matters into consideration, and on a reading of the submissions and correspondence as a whole, in our view the critical points are these:

    a. On 8 April 2022, the contractual Shipment Period was extended to 18 April 2022. While the Seller challenges the nature of this extension, which was also marked 'without prejudice', in our objective view the clear intention was to extend the period for contractual performance. The Buyer apparently shared the same view and acted on the same day by giving notice of intent to commence loading a total of 13 B doubles on 10, 11 and 12 April 2022.

b. We find that for the purposes of this contract, the notice given by the Buyer on 8 April 2022 was a notice of intent for the purposes of Trade Rule 13.2(2). Thishad the effect of shifting the burden of contractual performance to the Seller to provide Delivery Instructions. As observed above, while Trade Rule 13.2 contains requirements as to form and time, the Parties are free to waive the requirement of strict compliance.

c. The effect of the 8 April extension also was, in our view, to render the somewhat confusing events prior to the extension largely irrelevant.

d. Having agreed to an extension of the time for performance on 8 April 2022, the unsealed roads in the area (including Road 1 and Road 2) were then closed between 8 and 14 April 2022.

e. Neither party has invoked Force Majeure or Frustration to justify non-performance or extend the time for performance.

f. At 12.18pm on Wednesday 13 April 2022, Mr B sent a text message to Mr F saying "Gday Mr F. We are ready to load, access through XXXX shire. Road 2. Please reply with transport schedule Cheers."

g. This communication in our view constituted Delivery Instructions for the purposes of Trade Rule 13.2(2).

h. We find that Mr B was authorized to give those Delivery Instructions on behalf of the Seller.

i. Mr F replied by text message at 1.29pm with a schedule for "1 road train at your loading site Thursday morning approximately 8am" and advised there will be 2 further pickups for Thursday.

j. At 6.32 pm, Mr B texted Trent advising "No good Mr F. Tractor bogged. This grain should have been picked up months ago!!!"

56. In our view, Mr Bs' 6.32 pm text amounted to unilateral withdrawal of the Delivery Instructions provided earlier. It is entirely unsurprising that having received that message the Buyer did not send trucks to the farm. Viewed objectively, that can have been the only intention of the message. The Buyer had no obligation to send trucks to the farm until it received workable Delivery Instructions, which it never did.

57. It appears from the exchange referred to in paragraphs 53(f) to 53(i) above, that the Buyer provided notice of intent to commence loading, but the Seller failed to provide workable Delivery Instructions before the expiry of the extended Shipment Period on 18 April 2022.

58. In circumstances where a Seller could not provide valid Delivery Instructions to facilitate delivery within a contracted Shipment or Delivery Period due to a force majeure event, including flooding, the Seller could have relied on the force majeure provisions of Trade Rule 21 to extend the time for performance. However, in this case the Seller chose not to do so.

59. The effect of this failure was to place the Seller in default as at 19 April 2022.

60. Despite this default, and as contemplated in Trade Rule 17(3)(a), the Buyer sought to affirm the contract and continued to work towards securing delivery of the grain until the Seller, who erroneously considered the Buyer to be in default, gave notice of default on 8 June 2022.

61. The Buyer, correctly in our view, then held the Seller in default by notice given by XXX on 10 June 2022.

Other Submissions by the Respondent

62. For completeness, we wish to address other submissions made by the Respondent.

63. At paragraph 2 of her Points of Reply, the Respondent submits that the Applicant must show at all times it was ready, willing and able to perform its obligations under the contract.

64. As we have explained above, an 'ex farm' contract is executory. The Buyer's ultimate obligation is to take delivery of the grain within the shipment period. However, it can only do that (including for example by booking freight) having received Delivery Instructions from the Seller.

65. It appears that, on 8 April 2022, Mr A believed that the Buyer was able to source freight when he wrote to the Seller that "we will be looking to load at least 2 x B Doubles on Sunday 10th, 7 x BD on Monday 11th and 7 x BD Tuesday 12th at the moment." We have no reason to think that he did not believe that, and no evidence has been produced by the Seller to suggest that it was impossible for the Buyer to source that transport.

66. It was submitted by the Respondent at paragraph 5(a) of her Points of Reply that "the difficulty with access was getting to the property, which was the obligation of the applicant."

67. We can't accept that submission. In the absence of any express terms, it must be implicitly warranted by the Seller that in any 'ex farm' contract, absent weather or other conditions that may constitute 'force majeure', the relevant farm (or at least the part of the farm where the relevant grain is or will be situate) will be accessible in the shipment or delivery period, by generally acceptable road transport combinations including B-Doubles.

68. The farmer knows his or her farm, and the relevant access points, better than anyone, particularly in relation to unsealed and private roads. To the extent that the Seller bears the risk of temporary inaccessibility, it is entitled to relief under Trade Rule 21 [Force Majeure].

Damages

69. Having found the Seller to be in default as at 10 June 2022, we now turn to the question of damages.

70. The Buyer's position is as set out in its Points of Reply. It has produced evidence from 2 well know market participants about the price of SFW1 in the Newcastle zone on around 10 June 2022. The two prices are extremely close, producing a claim of A$174,000 or alternatively A$169,824.

71. Given the small difference between the two it is entirely appropriate to 'split the difference' and award A$172,000.

Other Matters

72. Following receipt of the Respondent's Points of Reply, the Claimant sought leave to serve and rely on further submissions in response, on the basis that the Respondent had raised new issues in her Points of Reply to which the Claimant ought to be allowed to respond.

73. The Respondent did not consent to this course and the Claimant made a formal application for leave which we considered as part of our deliberations. In view of the conclusion we have reached and the reasons set out above, we decided that we did not need to hear

further from the Claimant and its (undated) application is dismissed with each party to bear their own costs associated with the application.

Costs and Interest

74. Having been successful, there is no reason that we should not also award the Buyer its costs (save for the avoidance of doubt costs associated with the application referred to at paragraphs 72 and 73 above).

75. As is customary, the GTA secretariat has asked the Parties to indicate recoverable legal costs incurred.

76. The Claimant has advised legal costs of A$31,692. This appears to us to be reasonable and proportionate to the amount in dispute.

77. The Claimant has claimed interest but has not stipulated an amount. The Contract Document does not include a provision for interest on outstanding payments meaning that we are entitled to exercise our discretion under section 33E(1) of the CAA and award interest at the rate of 5% from 20 April 2022 to the date of this Award.

Final Award

For the reasons stated above, we make the following Final Award:

1. The Respondent shall pay the Claimant the sum of A[redacted] forthwith.

2. The Respondent shall pay the Claimant A$[redacted] in respect of legal costs.

3. The Respondent shall pay Interest on A$[redacted] at 5% per annum from 20 April 2022 to the date of this Award.

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

This award is published and dated at Sydney, the 22nd day of June 2023.

Mr Robert Dickie, Chair

Ms Rebecca Reardon

Mr Simon Clancy