Date of Issue: November 2007

Arbitration number: 13
- Interim Award published 9 February 2007
- Final Award published 1 November 2007 (following determination of Appeal)

Claimant: Grain Seller Pty Ltd (Sellers) (In Liquidation)
&
Respondent: Grain Buyer Pty Ltd (Buyers)

ARBITRATORS
- Mark O’Brien, arbitrator nominated by Claimant
- Ron Storey, arbitrator nominated by Respondent
- Michael Chaseling, arbitrator nominated by NACMA and Committee Chairman

CLAIM
The Claimant went into liquidation and pursuant to the Trade Rules sought the fair market price of the defaulted contracts. The Respondent disputed that the Trade Rules permitted an insolvent party to receive payment for contracts that it defaulted on by the insolvency event. The Respondent alleged that the Claimant’s insolvency clause applied.

AWARD
The Committee held that the NACMA Trade Rules applied and the Claimant was entitled to close out the contracts and as the contracts were in the Respondent’s favour, the Respondent must pay the difference between the contract price and the Fair Market Price.

DETAILS
- The Claimant entered into 6 contracts with the Respondent for the sale of grain.
- The Claimant went into liquidation prior to the contracts being discharged.

MAJOR FINDINGS
The Committee:
- Agreed that where a broker’s note has been issued it is primary evidence of the contract between the parties.
- Trade Rule 17.6 permits an insolvent party to recover the fair market price of a contract that it defaulted on due to insolvency.

IMPORTANT POINTS
- If you do not wish Rule 17.6 to apply to your contract in the event of an insolvency, the contract must clearly state and exclude this Rule in the contractual documentation.
**AWARDS IN DETAIL**
These awards have been stripped of any detail that may identify the parties to this arbitration.

**INTERIM ARBITRATION AWARD**

1. **INTRODUCTION**

The Claimant in this arbitration is in liquidation and the claim is brought by the receiver.

The Respondent is a company incorporated under the laws of Australia. It contracted to buy grain from the Claimant. The Claimant became insolvent in 2005 and alleges that the Respondent owes the Claimant the fair market value of the terminated contracts.

It is not in dispute that all of those contracts relevantly incorporated the Trade Rules of the National Agricultural Commodities Marketing Association Ltd (NACMA) and the relevant Dispute Resolution Rules by which the parties have referred their disputes to NACMA arbitration in accordance with those rules.

Six contracts are the subject of this arbitration. The Broker confirmation numbers are XXX1, XXX2, XXX3, XXX4 and XXX5 and the Claimant's contract number are XXXA, XXXB, XXXC, XXXD and XXXE respectively (the Contracts). Contract XXX3/XXXC covered barley from two separate locations. The main issues for determination by the Committee were the terms of each contract and how those terms govern insolvency events.

The Arbitration Committee duly comprised:
- Mr Mark O'Brien, nominated by the Claimant
- Mr Ron Storey, nominated by the Respondent
- Mr Michael Chaseling, Arbitration Committee Chairman, appointed by NACMA

The following submissions were received from both parties and have been considered by the Committee:
1. Claimant's Submission ("CS"), dated 11 October 2006
2. Respondent's Defence Submissions ("RD"), dated 23 November 2006
3. Claimant's Rebuttal ("CR"), dated 15 December 2006

The parties waived their right to make oral submissions and the Committee has deliberated solely upon the information provided in the above submissions and annexures.

The Claimant seeks the following relief:

i. An award in favour of the Claimant in the amount of $22,090.00 be paid within 14 days;

ii. Interest at 9% per annum on any amounts found to be due to the Claimant; and

iii. Costs.

2. **AGREED FACTS AND SUBMISSIONS**

There was no dispute as the existence of the Contracts between the parties and that the Contracts were not performed prior to the appointment of receivers on 17 August 2005 which constituted an Insolvency Event for the purposes of the NACMA Trade Rules. The Claimant gave the Respondent notice of the Insolvency Event on 19 August 2005.

The parties however disagree on which contractual provisions apply in the case of insolvency. The Claimant submits that the NACMA Trade Rules were incorporated into the contract and that Trade Rule 17.6.2 applies. That rule states that the insolvent party is in default and must notify the other
party within two business days after which the contracts are closed out at *Fair Market Price* (as defined) on the business day following the notice.

The Respondent alleges that the Contracts relevantly incorporate the terms and conditions found on the reverse of the Claimant contract document, clause 12(b) of which states that if a receiver is appointed, the buyer has the right to terminate the contract and refuse to accept further deliveries without having to pay compensation.

Both parties agree that the documentation in Annexure A of the CS form part of the contracts. These include the six contracts and five broker’s notes.

The parties disagree on whether the Claimant's terms and conditions formed part of the terms of the contract. The parties also disagree as to the interpretation of NACMA Trade Rule 17.6.2.

3. DECISION

In determining the terms of the Contracts, the Committee has focused upon the documentation provided by the parties, namely the broker's notes and the Claimant's contract confirmations, which both parties agree evidence the contractual agreements between them.

The broker's notes are generally dated earlier or the same day as the Claimant's confirmation, except in one instance.

The XXX1, XXX2 and XXX3 Broker's notes state: “All contracts come under NACMA trading terms and conditions. Qualities unless otherwise stated.”

The XXX4 and XXX5 Broker's notes state that: “For the purpose of the contract the parties hereto agree to comply with the laws in the States and Territories of Australia affecting this transaction and where not in conflict all other terms and conditions are to comply with the ‘National Agricultural Commodities Marketing Association Ltd’ terms of trade in place at the time this contract was made.”

The Committee then considered the Claimant’s confirmation note. The Committee assumes that the copy of the Claimant’s terms and conditions supplied by the Respondent are generally located on the reverse of the Confirmation. The Claimant’s note states that “Where not in conflict with above all other terms as per the National Agricultural Commodities Marketing Association (NACMA) Standard Terms and Conditions.”, above which are the terms of the contract such as quantity and delivery and above which states “subject to the terms and conditions hereunder and/or endorsed hereon.”

The bottom of the Claimant confirmation states that “the buyer and the seller acknowledge that they have read the terms and conditions of this contract and have read and are familiar with the NACMA contract that is deemed to be incorporated in and form part of this contract and each of them fully understands and accepts all such terms and conditions.”

The Committee agrees that this last clause refers to the terms on the front of the contract and NACMA Trade Rules. The Committee considers that the terms on the reverse side of the contract are only included into the terms of the contract by use of the word “hereon” which indicates that any terms on the reverse page are included.

The Committee agree that if the contract was evidenced solely by the Claimant’s Contract Confirmation that the contractual terms between the parties would include the Claimant’s terms and conditions and, where not in conflict, the NACMA Trade Rules. In this event, clause 12(b) of the Claimant’s Contract in relation to insolvency would apply.

However it is not the only evidence of the contract. The broker's notes also evidence the contract. The Committee had to evaluate the relationship between these two sets of documents to determine (if necessary) which is the primary contractual document.

NACMA Trade Rule 1.2.3 states that when a trade is made through a broker it is the duty of the broker to send a written confirmation to each party. Upon receipt of that confirmation, each party is to check the specifications and upon finding any differences notify the other party immediately.
Trade Rule 1.2.3 then states that “In the absence conflict or default of such notice of Contract Confirmation, the document shall be fulfilled in accordance with the terms of the Contract Confirmation issued by the Broker.”

The Committee acknowledges that Trade Rule 1.2.3 gives effect to a common trade usage, namely that in the event of conflict, the broker’s note prevails. Trade Rule 1.2.3 provides that where a conflict between the parties arises regarding the contract confirmations, such as to the terms of the contract, the broker’s note shall be the primary evidence of the contract.

There is clearly a significant conflict in this case, namely that between clause 12(b) of the Claimant Contract, and NACMA Trade Rule 17.6.

The Committee concludes that where a broker’s note has been issued, it is the primary evidence of the contractual agreement between the parties and any conflict should be resolved by reference back to the broker’s note. As broker’s notes were issued for each disputed contract we consider that the note is the primary evidence of the contract. As stated above, each note refers only to the NACMA Trade Rules and the Committee finds that to the extent of conflict between the NACMA Trade Rules and Claimant’s terms, the NACMA Trade Rules apply.

Therefore the insolvency event is governed by Trade Rule 17.6.2 only. Trade Rule 17.6.2(b) states that “in the absence of any express written agreement to the contrary, any contracts between the parties shall be closed out at Fair Market Price.”

For the reasons given above, there is no express written agreement to the contrary and the parties are to close out the contracts at the Fair Market Price. A contract is closed out by terminating the contract and the ‘party in the money’ must pay the difference between the contract price and fair market price to the other party. A party is ‘in the money’ where the difference between the contract price and the market price is in its favour. The Fair Market Price is generally determined in the industry by the mid-point between the buy and sell prices.

The Claimant closed out the contract by providing notice to the Respondent in writing on 19 August 2005. As notice was outside the two days notification required by Rule 17.6.2(a) (at 6.38PM on 19 August, 98 minutes later then two business days) the Respondent had an option to choose the day from which to calculate the Fair Market Price. The Respondent has not made such a nomination, most likely because it did not apprehend that it had to. Notwithstanding this right to select (presumably) the most favourable date for calculation of Fair Market Price, we note that the Claimant has claimed the lower of the amounts in any event, so that we accept the claim made of $22,090.

The Committee agrees that the Claimant was entitled to close out the contracts and as the contracts were in the Respondent’s favour, the Respondent must pay the difference between the contract price and the Fair Market Price, the calculation of which has been provided by the Claimant and which the Committee accepts.

4. **INTERIM AWARD**

Having considered the Submissions and for the reasons stated above, we make the following Interim Award:

1. The Claim is allowed;
2. The Respondent is to pay the Claimant A$22,090.00 within 14 days of the final award;
3. The Respondent shall pay the NACMA Arbitration fees of the Claimant of AUD$3,700;
4. The Respondent to 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 on application by either party the Committee will invite the parties to make submissions in relation to costs and assess costs accordingly. The Committee will make an award in relation to costs as part of its Final Award.
**FINAL ARBITRATION AWARD**

1. **APPEAL AWARD**

   This Arbitration Committee (“AC”) issued an Interim Award on 13 February 2007 in favour of the Claimant. The Respondent appealed that award to the Arbitration Appeal Committee (“AAC”). The AAC issued its Appeal Award on 8 September 2007 dismissing the appeal and affirming the Interim Award. The AAC referred the matter back to this Committee to finalise the arbitration.

   The AAC made that reference on the basis of the agreement between the parties as to how the appeal would proceed as noted in the letter from NACMA dated 2 April 2007. That agreement stated the appeal could proceed from the Interim Award (specifically, without a Final Award) and that the matter of costs of this arbitration and the appeal would be resolved by this Committee as it had not discharged those responsibilities and was not functus officio at the time the appeal was made.

   Following the AAC issuing its Award, the parties were invited to settle costs between them within 14 days. Neither party has responded to that direction.

2. **FINAL AWARD**

   The AC makes the following final award:

   1. The Claim is allowed;
   2. The Respondent is to pay the Claimant A$22,090.00 within 14 days;
   3. The Respondent shall pay the Claimant A$3,700 representing the NACMA Arbitration fees paid by the Claimant in Arbitration No. 13;
   4. The Respondent shall reimburse the Claimant for NACMA’s legal costs of Arbitration No. 13 of AUD$845.90;
   5. The Respondent shall reimburse the Claimant AUD$3433.90 in respect of legal support costs incurred by NACMA in the conduct of the appeal;
   6. The Respondent to pay the Claimant’s costs of the Arbitration No. 13 and Appeal No. 32 as agreed or assessed by the Court on a party-party basis;
   7. The Respondent to pay the Claimant interest on the award amount from the date the cause of action arose until the date of this Award at a rate of 9% per annum up to 31 December 2006 and at a rate of 10% thereafter. Until the award is paid, interest will continue to accrue at a rate of 10%;
   8. The security for costs held in trust by Norton White on behalf of the Claimant shall be released to the Claimant in full as per the agreement dated 10 November 2006.