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. 213

GRAIN SELLER (Trader)
(Claimant)

and

GRAIN BUYER (Trader)
(Respondent)

Final Award

1. INTRODUCTION

1.1 This is Final Award in an arbitration conducted pursuant to the Fast-Track Dispute Resolution Rules of Grain Trade Australia Ltd ("GTA").

1.2 There has been no challenge to my appointment as both the Broker's Note dated 10 March 2016 (**Broker's Note**) and the Respondent Contract Confirmation dated 11 March 2016 (**Contract Confirmation**) clearly contains a referral of disputes to GTA Arbitration.

1.3 I find therefore that I am a validly appointed arbitrator under the *Commercial Arbitration Act 2010* (NSW) and with jurisdiction to determine all issues in dispute between the parties.

1.4 As is standard for Fast-Track arbitration, it has proceeded on written submissions and documents alone and without a hearing.

1.5 The Claimant has relied on Points of Claim submitted to GTA on or about 23 March 2017.

1.6 The Respondent relies on Points of Defence received by GTA under cover of an email dated 21 April 2017.

1.1 I have read and considered these submissions and supporting documents and base my decision on the facts and circumstances arising from these materials.

2. THE RELEVANT FACTS

2.1 The issues that arise in this reference are of some significance for the Trade. Nevertheless, as is the parties' right, they have elected to proceed with a Fast Track arbitration meaning that the length of submissions and number of supporting documents is restricted. It also means that the Claimant had no right of reply to the Respondent's Points of Defence.

2.2 There are also no statements of evidence nor an agreed statement of facts so I base this Award on the following factual findings which I glean from the papers and which don't appear to be in dispute.

2.3 Firstly, there is no dispute that the parties contracted for the sale by the Claimant to the Respondent of 2000mt ASW1 at an agreed value (plus carry) for delivery at an agreed location (Mill) July/September (**Contract**). Both parties agree that the Contract is evidenced by the Broker's Note.

2.4 The parties agree that the contract was "Buyer's Call".

2.5 The Broker's Note clearly stipulates

Delivery Period: DELIVERED Mill JULY/SEPTEMBER 2016. BUYER'S CALL. MAXIMUM 500 MT PER WEEK.

2.6 Second, the Claimant and Respondent regularly did business together and on terms similar to the contract in dispute.

2.7 Third, as is common in the Trade, the Respondent prepared its own Contract Confirmation (which also specified "Buyer's Call") which it sent to the Claimant under cover of an email dated 12 March 2016. That email contained the following statements;

Please check the contract specific details and ensure the details are consistent with your understanding of the contract.

Should any of the details be inconsistent with your understanding of the contract, you may request an amendment.

If you are satisfied that the details are correct, please confirm your acceptance.

If (we) do not receive a response from you within 24 hours from the sending of this e-mail, the contract details will be confirmed as final.

2.8 The Claimant did not sign that Contract Confirmation.

2.9 That email and the Contract Confirmation set out a *Delivery Procedure for the Mill* (**Delivery Procedure**). In summary, that provided that the Respondent would contact the Claimant and issue a Supplier Load Summary including allocated delivery dates and Transport Load Identification (TLI) numbers. The Claimant was expected to acknowledge receipt of the Supplier Load Summary within 48 hours and then use the TLI's to book delivery slots at the Mill on the dates and times required by the Respondent.

2.10 Fourth, and consistently with the Delivery Procedure, there was a practice between the parties in respect of some or all contracts (including the Contract) by which the Respondent would issue to the Claimant a Supplier Load Identification Summary (**Load Summary**) breaking the contract tonnage into separate equal deliveries approximating a truck-load and allocating each a delivery date and Transport Load Identification (TLI) Number. The Claimant would then book a delivery time slot on the relevant date using the TLI.

2.11 While the Respondent is an "end user", the Claimant is a trader. As such it is possible that it would not be directly responsible for each delivery to the Respondent in the sense that the delivery to the Respondent might have been made pursuant to a contract between the Claimant and a 3rd party.

2.12 I note that in respect of the Contract, around 75 deliveries appear to have been booked and delivered commencing on 6 July 2016.

2.13 The bulk of the contract quantity appears to have been delivered by 5 September 2016 though the last delivery appears to have been made on 22 (or perhaps 27) October 2016.

2.14 For the purposes of this dispute it appears that the Respondent issued two relevant Load Summaries. The first was issued on or about Friday 24 June 2016 for deliveries required on 20-22 July 2016. The second was issued on Monday 18 July 2016 for deliveries required on 27-29 July. It also appears that the delivery slots were booked on 22 July and 28 July but no vehicle presented. Deliveries were required on 28 July and 29 July but no slot was booked or delivery made.

2.15 On 4 August 2016 the Respondent wrote to the Claimant by email advising that 4 deliveries had not been made in accordance with the relevant Load Summary. In the same email the Respondent advised that the total contract tonnage would be reduced by 120mt reflecting the allegedly defaulted deliveries.

2.16 Correspondence between the parties ensued in which the Claimant disputed the Respondent's authority to reduce the contract tonnage.

2.17 The Claimant continued to make and the Respondent to accept deliveries under the Contract.

2.18 On 12 October the Claimant held the Respondent in default for failing to agree to accept delivery of the 4 missed deliveries.

3. THE CLAIMANT'S CASE

3.1 The essence of the dispute between the parties is whether the Delivery Summary published by the Respondent became part of the contract with contractual force such that a failure to comply with the Delivery Summary was a default in respect of the "missed" deliveries.

3.2 The Claimant submits that it didn't sign the Contract Confirmation and so was not bound by its terms. It says that the Delivery Summary was simply a guide such that if a slot was "missed" the delivery could take place at another agreed time.

3.3 The interpretation advanced by the Claimant is that this was and at all times remained a Buyer's Call contract under which the Claimant had;

fifteen [15] Calendar Days or such other time specified in the contract after receipt of instructions from the Buyer in which to make Delivery or Shipment.

3.4 The Claimant's argument emphasizes the primacy of the Broker's Note. As per Trade Rule 3.1, it is an essential element of the GTA Trade Rules that to the extent of any inconsistency between contractual documents, the Broker's Note prevails, and it specifically says Buyer's Call with no reference to the Delivery Procedure.

3.5 Further, missing a slot was not a default and by holding the Claimant in default the Respondent itself was in default.

4. THE RESPONDENT'S CASE

4.1 The Respondent says that the Delivery Procedure and the Load Summary were part of the Contract. In sending the Contract Confirmation it invited the Claimant to provide comment and by remaining silent it acquiesced in the terms of the email and contract confirmation and by its performance of the Load Schedule it affirmed the terms of the Delivery Procedure.

4.2 The Respondent says that the Contract Confirmation (and implicitly, the Delivery Procedure) "overrode" the 15-day rule.

5. MY DECISION

5.1 There is no doubt that this was a Buyer's Call contract.

5.2 Under any Buyer's Call contract delivery instructions must be issued. The parties could not have executed against the Broker's Note alone. Delivery instructions are essential.

5.3 The definition of Buyer's Call (see para 3.3 above) specifies 15 Calendar Days' notice of delivery instructions ***or such other time specified in the contract***.

5.4 I don't think there is any doubt that the Claimant intended to and did comply with the Delivery Procedure and Load Schedule which were in effect the delivery instructions.

5.5 It does not matter that the delivery instructions were issued sometime after the Contract was concluded on or about 10 March 2016, particularly when delivery was due to take place over a 3 month period commencing 5 months after the Contract was entered into. This was foreshadowed in the Contract Confirmation and 12 March email which were received without protest.

5.6 The Claimant expressed no reservations about its ability to comply with or its acceptance of the Load Schedules. If it did it should have made this clear.

5.7 By receiving without protest and then complying with the Delivery Procedure and Load Schedule the Claimant had objectively agreed that these were the notice periods specified in the Contract. Silence may not be acquiescence but silence coupled with performance objectively amounts to acceptance.

5.8 Again, I do not think that there is any doubt that failure to comply with a Buyer's delivery instructions is a default, at least for those loads which are not delivered. So much is clear from Trade Rule 13.2 as well as the Contract Confirmation and Load Summary.

6. FINAL AWARD

6.1 For the reasons set out above, I make the following Final Award;

(a) The Claimant's claim is dismissed.

(b) The Claimant shall indemnify the Respondent in respect of the GTA Arbitration fees it has paid in relation to this matter being $5,900

This award is made at_____ this _____ day of May, 2017.

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Matt Kelly, Sole Arbitrator appointed by GTA.