

Arbitration No. 128**Notice to Members**

Date of Issue: 15 April 2010

Claimant: Commodity Seller
&
Respondent: Commodity Buyer

Arbitration Committee (AC)

Mr. David Dossor, Arbitrator appointed by GTA.

This arbitration was conducted as a Fast Track arbitration and hence has only one arbitrator nominated by GTA and approved by the parties.

Claim

The dispute concerns determination of the validity of a contract and the subsequent repudiation of the contract under which the Claimant sold grain to the Respondent.

Issue for determination

1. Did GTA have jurisdiction to hear the matter? To determine this issue, point 2 needs to be resolved.
2. Was a contract in existence?
3. If a contract was in existence, was it repudiated?

Details

The Claimant submits it entered into a contract via a verbal contract which was subsequently confirmed by a Contract Confirmation faxed the same day. The Respondent claimed they did not receive the fax from the Claimant.

The Respondent at a later date flatly denied the existence of the contract and indicated there would be no performance against the Contract.

The Respondent says no contract existed and accordingly, there is no repudiation. In addition, the Respondent says that because there was no contract that, therefore, GTA has no jurisdiction.

Award findings

In evidence of the existence of a contract, the Claimant relied on:

- A prior course of dealing with the Respondent;
- Diary notes of the broker on the day of contract
- Diary notes of the seller on the day of contract;
- Fax records of day of contract.

The decision that a contract was in existence was based on the ‘balance of probabilities’ that the Claimant and Respondent did contract on the terms contained in the Claimants sale Contract Confirmation.

Given the existence of the contract, the next issue for determination by the Arbitrator was whether there was repudiation of the contract? This was resolved by reference to remarks made by the Respondent to the Claimant, which were not denied, that as there was no contract, that therefore there would be no performance. The Arbitrator noted that:

“A blunt denial that a contract exists, along with non performance, is a classic example of repudiation of the contract....”

Award

The Claimant was successful and the Sole Arbitrator made the following Final Award:

1. That the Respondent pay the Claimant \$20,000:
2. That the Respondent indemnify the Claimant in respect of fees paid to GTA by payment of \$2000.

**IN THE MATTER OF THE
COMMERCIAL ARBITRATION ACT 1984 (NSW)
AND IN THE MATTER OF
AN ARBITRATION UNDER THE
RULES OF GRAIN TRADE AUSTRALIA LTD**

GTA Arbitration No. 128

Commodity Seller

(Claimant)

and

Commodity Buyer

(Respondent)

Final Award

1. INTRODUCTION

As the amount in dispute is \$20,000.00, the matter is governed by Art 15 of the GTA Dispute Resolution Rules, under which I have been appointed as sole arbitrator.

The dispute concerns the alleged repudiation of an alleged contract under which the Claimant says it sold grain to the Respondent.

The Respondent says no contract existed and accordingly there is no repudiation. More significantly, the Respondent says that because there was no contract, I can have no jurisdiction.

2. Jurisdiction

The Respondent has participated in this arbitration, and has served Points of Defence dated 1 February 2010. The Respondent has accordingly invited me to find that I have no jurisdiction, which is appropriate given that Article 24 Rule 1 of the GTA Dispute Resolution Rules provide that I have jurisdiction to decide whether I have that jurisdiction.

The Claimant submits that it entered into a contract no.XXXX dated 11 September 2008 with the Respondent under which the Claimant sold and the Respondent purchased 250mt of F1 Barley for \$285mt on terms delivered Buyer's call 1 January 2009 – 31 December 2009. The contract incorporated "terms and conditions as per NACMA Rules."

The Claimant says that the contract terms were agreed during a telephone call on 11 September 2008¹between Claimant and the Respondent. While the Respondent agrees that the call occurred, it denies that it resulted in a contract.

The Claimant says it then prepared a contract document reflecting the above terms and faxed the same to the Respondent on 11 September 2008.

The Respondent denies receiving any fax, saying that it has a combined phone and fax machine which must be switched manually between modes. It says that the call must have gone through to the answering machine.

In evidence of the existence of the contract, the Claimant relies on;

1. A prior course of similar dealings with the Respondent;
2. A diary note made by the Claimant of the conversation with the Respondent on 11 September 2008;
3. A corroborating diary note made by an Associate of the Claimant on 11 September 2008 when advised of the terms of the contract by the Claimant, it being the Associate's responsibility to execute the contract.
4. A telephone record indicating that on 11 September 2008 at 1418rs a 43 second call was made to the Respondent's fax number appearing on the contract document.

I have come to the view, based on a careful consideration of the above evidence, that on the balance of probabilities the Claimant and Respondent did contract on the terms contained in the Claimant's Sale Contract Confirmation XXXX dated 11 September 2008.

I note that the NACMA Rules were incorporated into that contract. It is well known that those Trade Rules include at Rule 26 an agreement to refer all disputes to arbitration under the GTA (formerly NACMA) Dispute Resolution Rules. This, along with a consideration of the prior course of dealings between the parties leads me to the conclusion that I have jurisdiction to determine this dispute.

3. Performance of Contract XXXX

Having reached the conclusion that a binding and enforceable contract was concluded between the parties, I need now to consider whether there was breach or repudiation of that contract and if there was, what consequences flow.

¹ I note that the Points of Claim refer to 11 April 2008 and assume this is an error.

It is freely admitted by the Respondent that it told the Claimant that no contract existed. At paragraph 16 of the Points of Defence, the Respondent submits that during a conversation between the Respondent and the Claimant (neither party seems to recall precisely when this meeting took place, but both agree that it did²) the Claimant stated either that (according to the Claimant) the Respondent could “pull out of the contract at any time” or (according to the Respondent) there was no contract at all.

In my view, a blunt denial that a contract exists, along with non-performance, is a classic example of repudiation of the contract which the Claimant accepted by the commencement of this arbitration process on 1 June 2009.

I find therefore that the Respondent has repudiated Contract XXXX, that the Claimant has accepted that repudiation, and is entitled to maintain a claim for damages.

4. The Damages Claim

The Claimant claims \$20,000 in damages. It says that the repudiation was accepted by the commencement of arbitration on 1 June 2009 and that that is the relevant date for assessing damages. I agree and find that 1 June 2009 is the appropriate date for assessing damages.

It says that the contract price on 1 June 2009 was \$305mt, made up of \$285mt plus \$4mt carry from 1 February 2009.

The Claimant has produced evidence in the form of a Fox Commodities “Weekly Wire” dated 1 June 2009 and I agree and find that the market price for F1 barley on 1 June 2009 was \$230mt, or a difference of \$80mt over 250mt producing a loss of \$20,000.

5. FINAL AWARD

Having considered the Claim and for the reasons stated above, I make the following Final Award:

1. That the Respondent pay the Claimant \$20,000;
2. That the Respondent indemnify the Claimant in respect of fees paid to GTA by payment of \$2000.

And I so publish my Final Award.

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Dated April 2010

David Dossor, Sole Arbitrator, appointed by GTA

² See paragraphs 16 of the Points of Claim, and Points of Defence respectively.