

**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. 368

██
(Claimant)

and

██
(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 6 April 2022 pursuant to a Grain Trade Australia (**GTA**) initiation form signed by ██████████ for the Claimant.
2. Neither the Claimant nor Respondent appear to be legally represented.
3. This reference relates to a dispute concerning a contract between the Claimant Buyer ██████████ and the Respondent Seller ██████████. In summary, the Claimant contracted the Respondent to purchase SFW1 wheat which was not delivered. The Claimant claims compensation.

4. For present purposes the particulars of that contract are as follows;

Contract No.	Broker Reference	Date	Commodity	Tonnes	Base Price	Delivery
██████████	██████████ ██████████ ██████████	12/01/2022	SFW1 21/22 Season	1500mt +/- 5% or 12mt whichever is less	\$310mt plus GST	Delivered Buyer

5. The contract is evidenced by;

- a. A ██████████ Broker Note, number ██████████, dated 12 January 2022; and
- b. a ██████████ Contract Confirmation also dated 12 January 2022.

6. The terms of the Broker Note and Contract Confirmation are materially the same.

7. The Broker Note contains the following provision;

The GTA Trade Rules and Dispute Resolution Rules in force at the date of this Contract form part of and are incorporated into 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.

8. The Contract Confirmation contains on its face the following clause;

Incorporation of GTA Trade and Dispute Resolution Rules. *This contract expressly incorporates the GTA Trade Rules in force at the time of this contract and Dispute Resolution Rules in force at the time of commencement of the arbitration, 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.*

9. As is apparent, there is a discrepancy between these two clauses in that the former adopts the Dispute Resolution Rules in force as at the date of contract, being 12 January 2022, while the latter adopts the form of the Dispute Resolution Rules current at the date of referral to arbitration, being 6 April 2022.
10. Neither party has made submissions in relation to this discrepancy which suggests that it is not material. We note that the most current version of the Dispute Resolution Rules is as at July 2022, which was preceded by the October 2021 revision.
11. This October 2021 revision was current at both 12 January 2022 and 6 April 2022 and is the form of the DR Rules which we shall apply.
12. The version of the Trade Rules current at 12 January 2022 is applicable to the contract. The current version of the Rules became effective 1 March 2021, so it is the version applicable to this dispute.
13. 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.

14. We are listed on the GTA list of arbitrators under Article 6.1 of the DR Rules.
15. We have been appointed to this Tribunal as follows;
 - a. Charlie Coventry – Chair appointed by GTA
 - b. Steve Howells – appointed by the Claimant
 - c. Mark O'Brien – appointed by the Respondent
16. 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.
17. As neither party has requested a hearing we have proceeded on documents alone.

Procedural History

18. By way of background and procedural history,
 - (a) As observed above, this matter was commenced pursuant to a GTA initiation form signed by [REDACTED] for the Claimant on 6 April 2022;
 - (b) In accordance with GTA practice, a Notice of Dispute was mailed to the parties dated 20 April 2022 which included, among other things, a Contract for Full Arbitration;
 - (c) The Respondent signed and returned the Contract for Full Arbitration, and dated it 21 April 2022 and The Claimant executed the Contract for Full Arbitration and dated it 18 May 2022;
 - (d) The parties have exchanged the following submissions;
 - a. Claimant's Timeline Summary (received by GTA on 10 June 2022)
 - b. Respondent's Response to Claimant's Timeline Summary (received by GTA on 18 July 2022)
 - c. Claimant's Points of Reply – (received by GTA on 1 August 2022)
 - d. Respondent's Points of Reply (received by GTA on 16 August 2022)
19. The Tribunal conferred on 30 August 2022 and directed GTA to invite the parties to submit additional information as follows;
 1. *the capacity of NAT Agri Terminal (NAT) to accept deliveries of SFW1 during March 2022 (including any Segregation Plan produced by NAT and/or advice or confirmation from NAT confirming either the availability or unavailability of SFW1 segregation into NAT during March 2022)*
 2. *attempts made by the Respondent (including its agents and subcontractors) to make deliveries of SFW1 to NAT during March 2022;*
 3. *all communications passing between the parties (including brokers and agents) relating to delivery of SFW1 during March 2022.*
20. The following further information was provided
 - Claimant evidence - email [REDACTED] 22Feb2022
 - Claimant evidence - email [REDACTED] 11Mar2022
 - Claimant evidence - [REDACTED] March SFW1 FED1 Road
 - Claimant evidence - email [REDACTED] 1Sep2022

- Respondent evidence - email [REDACTED] 6 Mar2022
- Respondent evidence - email [REDACTED] 11Mar2022
- Respondent evidence - [REDACTED] ROAD ORDER 209064
- Respondent evidence - email [REDACTED] 1Sep2022

21. Neither party chose to make additional submissions.

Facts

22. The existence and terms of the contract are not in dispute. It is evidenced by the Broker Note and Contract Confirmation.

23. Materially the contract is expressed to be Delivered Buyer, with the Delivery Point the [REDACTED] Newcastle Port Zone.

24. The Delivery period was 1-31 March 2021, and nominated as 'Buyer's Call'.

25. Pursuant to Rule 13.1 of the GTA Trade Rules;

*The term **Buyer's Call** when used in a contract means that the Buyer shall have the right of conveyance. The Seller shall have not less than fifteen [15] Calendar Days or such other time specified in the contract after receipt of Delivery Instructions from the Buyer in which to make Delivery or Shipment.*

26. Delivery Instructions are defined in the Trade Rules as

(unless otherwise agreed) written notice specifying

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

27. It is the Claimant's case that on Friday 25 February 2022, it sent a CMO (Customer Movement Order) by email to the Respondent. That document, headed Movement Order Request, nominated 1500mt, Destination Location Newcastle Agri Terminal, and delivery between 7/03-31/03/2022. This was consistent with the terms of the contract and we find constituted valid Delivery Instructions for the purposes of Rule 13.1.

28. The Claimant acknowledges in its Timeline Summary that in the period following provision of Delivery Instructions "there were issues with the delivery point NAT (Newcastle Agri Terminal) being unable to take regular delivery of grain due to port closures, dangerous weather, flooded road/rail lines and a large ocean swell event."

29. It says that on 22 March 2022 it contacted the Broker, to offer alternative delivery arrangements.

30. According to the Claimant, the Respondent responded to the effect that the Delivery Instructions were invalid as they only provided 10 days'-notice for commencement of delivery and not the 15 calendar days required by Rule 13.1.

31. In summary therefore, the Claimant's case is that valid Delivery Instructions were given, and while the Claimant attempted to reach some accommodation with the Respondent around delivery, the Respondent is in default for failing to deliver the contracted tonnes.

32. The Respondent's primary defence (expressed more clearly in correspondence¹ than in the submissions themselves) is that the Delivery Instructions were invalid as they did not provide 15 calendar days'-notice.
33. The second main line of defence (as set out in the submissions) is that the Respondent could not make delivery at NAT during the delivery period because no segregation for SFW1 was available.
34. Dealing with the first aspect of the Defence, we have already found (at para [27] above) that the Delivery Instructions were valid in accordance with the Trade Rules. The Respondent may have been within rights not to commence deliveries for 15 calendar days following 25 February 2022 (being 12 March 2022, by our calculation) but that was still well within the Delivery Period and there is no evidence that in the period following 12 March 2022, the Respondent made attempts but was unable to complete delivery in accordance with the contract.
35. Which is in effect the second element of the defence.
36. Having provided valid Delivery Instructions, this being a Buyer's Call contract the onus was on the Respondent to deliver the grain in accordance with those instructions.
37. Sound and sensible commercial practice would suggest that if the Respondent took issue with the validity of the 25 February 2022 notice, or were unable to make delivery for any reason, either due to weather factors or NAT's inability to receive the grain, this should have been communicated to the Claimant sooner rather than later.
38. Evidence produced by the parties² does indicate that NAT was experiencing weather related difficulties receiving SFW1 in the first half of March 2022.
39. There is no persuasive evidence however that the Respondent made any attempt to deliver the contracted tonnes in the period following 22 March 2022, or that it could not deliver the tonnes in that period, whether for reasons for Force Majeure or other logistical obstacles.
40. To the contrary, on 25 March 2022 the Respondent erroneously held the Claimant in default and refused to entertain any attempt to resolve the matter.
41. We find therefore that the Respondent is in default of the contract and liable to compensate the Claimant.

Damages

42. Having found that the Respondent is in default, we now turn to the question of damages.
43. The Claimant issued a Washout Invoice on 1 April 2022, at a washout price of A\$80mt against a contract price of A\$310, for a total washout claim of A\$120,000.
44. The washout value is based on the market price at 1 April 2022 of A\$390. This is evidenced by an email dated 1 April 2022 from the Broker StoneX Financial Pty Ltd.
45. In response the Respondent rely on a price provided by the broker Aglink of \$375mt delivered Newcastle on 31 March 2022.
46. There is no basis for us to doubt the assessment of the Broker. He is an independent broker whose assessment relates to the price of SFW1 on 1 April 2022.

¹ See for example the email from Respondnet to Claimant on 25 March 2022 at 8.56am) ² Emails from NAT dated 6 and 11 March 2022

Costs

47. Having been successful, there is no reason that we should not also award the Claimant its costs.
48. The Claimant does not appear to be legally represented nor has it claimed legal costs.
49. We therefore award the Claimant an indemnity in respect of arbitration fees paid to GTA.

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. 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 at Sydney, the 18th day of October 2022.

Mr Charlie Coventry, Chair

Mr Mark O'Brien

Mr Stephen Howells