

**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. 373

██
Claimant

and

██
Respondent

Final Award

A. Introduction

1. This is the Final Award in an arbitration conducted pursuant to the Fast Track rules of the Dispute Resolution Rules (**DR Rules**) of Grain Trade Australia Ltd (**GTA**).
2. This arbitration was commenced on submission by the Claimant of an Initiation of Dispute Resolution form dated 26 August 2022.
3. Pursuant to the DR Rules, I have been appointed sole arbitrator by GTA.
4. Neither party appears to have external legal representation.
5. The dispute concerns the existence of a contract between the parties allegedly concluded on 28 February 2022. Materially it is alleged that the contract, which was concluded via the Clear Grain Exchange, an electronic trading platform akin to a broker, incorporated and was subject to the Grain Trade Australia Trade Rules (**Trade Rules**). Rule 23 of the Trade Rules provides that;

Any dispute or controversy or claim arising out of, relating to or in connection with a contract incorporating the Rules, including any question regarding its existence, validity or termination shall be resolved by arbitration in accordance with the Dispute Resolution Rules in force at the commencement of the arbitration.
6. The version of the DR Rules current at 26 August 2022 is applicable to this arbitration. The version of the DR Rules in effect from July 2022 is therefore the version applicable to this arbitration.
7. 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 I 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.
8. I am listed on the GTA list of arbitrators under Article 6.1 of the DR Rules.

9. I have read and considered the;
- (a) Claimant's Points of Claim dated 4 April 2023 (**Claim Submissions**);
 - (b) Respondent's Points of Defence dated 26 May 2023 (**Defence Submissions**).

B. Facts

10. This arbitration has been conducted under the GTA Fast Track Rules, which support a quick and low cost process. There is no hearing and there are no formal statements of evidence. I establish the facts on which I make my decision on the balance of probability as appearing to me from the parties' submissions.
11. I find the following facts to be established beyond reasonable doubt based on the parties' submissions and supporting documents, including where the Respondent has not disputed a factual assertion made by the Claimant.
12. Both the Claimant and Respondent were registered users of Clear Grain Exchange (CGX). On registering as users they became bound by the CGX Terms and Conditions.
13. At 8.09am on 28 February 2022 the Respondent posted the following offer to sell grain on the Clear Grain Exchange (CGX).
- (a) Grade: APW1 (Wheat)
 - (b) Price: \$340.00/mt
 - (c) Expiry: Good till cancelled
 - (d) Season: 21/22
 - (e) Payment: Within 7 business days
 - (f) Delivery: Now
 - (g) Location: [REDACTED] (AWB)
 - (h) Quantity: 1,000 mt
14. This offer was subject to the CGX Terms and Conditions.
15. At 9.50am on 28 February 2022 CGX notified the Respondent by email that it had an open offer posted on the CGX site, in the terms set out at paragraph 13 above.
16. At 4.33pm on 28 February 2022 the Claimant created a bid on the CGX site in the same terms as the Respondent's offer, which was accordingly matched by the CGX system with the Respondent's offer creating a contract between the Claimant and Respondent.
17. At 4.34pm on 28 February 2022 CGX issued a Seller Confirmation Note 71077 with the following details
- (a) Trade date: 28 February 2022
 - (b) Trade ref: 71077
 - (c) Commodity: Wheat
 - (d) Grade: APW1

- (e) Location: [REDACTED] (AWB), VIC
 - (f) Season: 21/22
 - (g) Quantity: 1,000 mt
 - (h) Price: \$340.00/mt (\$367.00 Port Equivalent Melbourne)
 - (i) Delivery Period: Now
- 18. At the same time it sent the Respondent instructions to deposit the grain at AWB in accordance with the contract.
 - 19. At 4.34 on 28 February 2022 CGX also sent the Claimant an invoice in the amount of \$386,595.00 payable on 7 March 2022.
 - 20. In the event, the Respondent did not deposit the grain as required by the 'Settlement Expiry Date' being 5pm on 7 March 2022. Nor did the Claimant pay the invoice.
 - 21. The Claimant exercised its option under clause 9.4(a)(iii) of the CGX terms to extend the Settlement Expiry Date to 9 March 2022 however the grain was still not deposited.
 - 22. On 11 March 2022 the Claimant gave the Respondent notice of default under the rule 17(4) of the Rules and on 15 March 2022 it gave the Respondent notice of the Fair Market Price of \$405 for the purposes of rule 17(6), amounting to a total claim of \$38,000 for which an invoice was issued on 15 March 2022.

C. Respondent's Position

- 23. The facts as stated above are taken largely from the Claim Submissions. They are not substantially challenged in the Defence Submissions.
- 24. For its part, the Respondent makes three main submissions.
- 25. First it says that the offer was posted in error. It says that it has two accounts with Clear Grain Exchange, both as Seller and Buyer, and it intended to post a bid, as Buyer, rather an offer, as Seller.
- 26. My task is to make factual findings based on objective facts. There is no evidence that the Respondent posted its offer in error. Even if there was, I would have found based on the objective evidence of Clear Grain Exchange's own records and uncontradicted correspondence with the parties that an offer was made by the Respondent in the terms posted on the Exchange, which offer was accepted by the Claimant, so that a binding and enforceable contract came into existence in accordance with the CGX Terms and Conditions.
- 27. Second it says that the Claimant failed to pay the CGX invoice. If this was intended to be a submission to the effect that the Claimant was in fact in default, I would reject that submission for the following reasons.
- 28. First, there is no suggestion that the payment of the invoice was a condition precedent to the transfer of the grain. To the contrary, clause 9.1 of CGX Terms and Conditions expressly required the Respondent to transfer the grain in order for the Claimant to pay the invoice. Once the Claimant held the Respondent in default of transferring the grain it had no obligation to perform the contract by paying the invoice.
- 29. Second, it is patent that the Respondent had no intention of performing the contract which it now says it had entered into in error.

30. Finally, it is not apparent what if any loss the Respondent may have suffered as a result of the alleged breach in circumstances where the Respondent had not held the Claimant in default in any event.
31. The Respondent's third submission relates to the assessment of Fair Market Price by the Claimant. The Claimant has produced evidence from a well-known broker that the price of APW as at the date of default was \$405. The Claimant also provides evidence of other transactions on 15 March to support its claim for Fair Market Price. The Respondent does not advance an alternative price and in all the circumstances we accept that \$405 is a conservative assessment of Fair Market Price, producing a difference of \$30 per tonne over the contract price of \$367, for a total claim of \$38,000.

D. Other Matters

32. Having found that the claim is made out, the Claimant has also claimed interest and costs.
33. The Claimant has not identified a rate of interest so I exercise my discretion under section 33E of the CAA to award interest at the rate of 5% per annum from 17 March 2022 to the date of publication of this Award.
34. While the Claimant has claimed costs, it is not represented by external counsel so I make no award in respect of legal costs.
35. I will however order that the Respondent indemnify the Claimant in respect of arbitration fees paid by the Claimant to GTA in respect of this arbitration.

E. Award

36. For the reasons above, my Award is;
- (a) The Respondent shall pay the Claimant \$[REDACTED].
 - (b) The Respondent shall pay the Claimant interest on \$[REDACTED] calculated at 5% per annum from 17 March 2022 to the date of publication of this Award.
 - (c) 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 dated at Sydney, the 27 day of July 2023.

Mr Ron Storey