



National Grain and Feed Association Arbitration Decision

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March 27, 2019

CASE NUMBER 2813

**PLAINTIFF: CLARKSON GRAIN COMPANY, INC.
CERRO GORDO, IL**

**DEFENDANT: CLICHY, INC.
HOUSTON, TX**

STATEMENT OF THE CASE

The plaintiff in this case, Clarkson Grain Company (Clarkson), contracted to provide the defendant, Clichy, Inc., with 12,500 metric tons of non-GMO U.S. No. 2 yellow corn at \$185 per metric ton (Clarkson sales contract no. 0027445). The contract provided for the corn to be loaded onto barges in Beardstown, IL in February 2017, for shipment to New Orleans and elevating onto an ocean vessel on March 7-15, 2017. Clarkson also prepared a “Proposal to Supply” in advance of the final contract confirmation in which the parties agreed that 50% of the funds due under the contract were to be paid prior to loading with the remainder paid upon landing of the barges in New Orleans.

In this dispute, Clarkson requests damages in the amount of \$260,811.94 resulting from Clarkson selling-out the contract to another buyer after Clichy failed to pay the 50% due in advance under the contract.

The arbitrators identified the following sequence of events as most pertinent to this dispute:

- On January 25, 2017, Clichy and Clarkson began discussions to enter into a contract pursuant to the terms and quantities indicated above. The agreement was confirmed by a sales contract written by Clarkson, dated February 7, 2017, and signed by both parties on February 8, 2017.
- Between January 25 and February 9, 2017, multiple emails and text messages were exchanged between the parties to address details of the agreement such as logistics, payment, and grading certificates.
- Clarkson began loading barges in early February 2017 (probably on or about February 9).
- On February 10, 2017, Clichy advised Clarkson to stop loading the first barge because Clichy’s buyer had not wired funds to Clichy to cover the 50% payment under the contract. Clarkson continued to load the first barge and two subsequent barges (for a total of three loaded barges) despite multiple requests from Clichy to stop the loading.
- On February 14, 2017, the parties were notified that the first barge loaded had graded U.S. No. 3, which was outside of the specifications agreed upon in the contract. Following this issue with the grading of the corn, frequent communication ensued between the parties (mostly in electronic format) as they disagreed on the significance and handling of the “off grade” barge load. The next two barges graded U.S. No. 2, but on the high side of No. 2 and approaching No. 3, which Clichy

found to be unsatisfactory out of concern that after elevating and reloading the corn on the ocean vessel in New Orleans, the No. 2 grain would likely be degraded to No. 3 and fail to meet the contract specifications.

- On February 20, 2017, Clarkson notified Clichy of its intent to cancel the contract and sell-out to another buyer for account of Clichy due to non-payment of the 50% advance.

Clarkson argues Clichy breached the contract because it failed to make the 50% payment and failed to provide adequate assurance to Clarkson that the funds would be paid.

Clichy argues Clarkson's cancellation of the contract was improper because Clarkson was instructed, on multiple occasions, not to load the barges until funds for the 50% payment were received from Clichy's buyer. Clichy also argues the off-grade corn loaded by Clarkson failed to meet the contract specifications. Clichy further argued during the oral hearing conducted in this case, that Clarkson failed to provide a basis for how it determined the amount of damages claimed.

THE DECISION

The arbitrators unanimously determined that Clarkson acted outside of its own contract terms by loading the barges prior to receiving the payment in dispute. The Proposal to Supply stated terms of 50% down before shipment as well as Clichy providing copies of numerous text and email messages demonstrating that Clichy requested Clarkson not to load the barges until a wire for the 50% payment had been received. Since the funds never arrived, Clarkson should have never started loading any barges.

The arbitrators referred to NGFA Grain Trade Rule 5 (Electronic Communication), which provides that an exchange of communication between parties by electronic means constitutes acknowledgment of that means as a viable method of contractual communication. Much of the logistics and other particulars in this case were communicated by electronic means. Clichy's instructions not to load the barges should have been followed by Clarkson.

The arbitrators further determined Clarkson failed to document or otherwise substantiate or support the amount of damages claimed. Even if Clarkson had prevailed on the merits, Clarkson failed to sufficiently support its claim for damages of \$260,811.94.

THE AWARD

No damages are awarded in this case.

Decided: February 6, 2019

Submitted with the unanimous consent of the arbitrators, whose names appear below:

Chad Nagel, *Chair*
Manager of Trading
Nagel Farm Services
Wye Mills, MD

Chad Carlson
Director of Grain Operations
Aurora Cooperative
Aurora, NE

Joe Smith
Merchandising Manager
Arizona Grain
Casa Grande, AZ