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Arbitration Decision
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August 30, 2017

CASE NUMBER 2770

PLAINTIFF: **ZEN-NOH GRAIN CORPORATION**
MANDEVILLE, LA, USA

DEFENDANT: **AGRIBUSINESS UNITED DMCC**
DUBAI, UAE

STATEMENT OF THE CASE

Description of agreements involved in the case

On or about June 9, 2015, Agribusiness United DMCC (Agribusiness United) purchased 400,000 bushels of U.S. No. 2 yellow soybeans from Zen-Noh Grain Corporation (Zen-Noh). On June 10, 2015, Zen-Noh issued a confirmation for this sale to Agribusiness United (Zen-Noh sales confirmation no. S113902). Agribusiness United also on June 10 issued a contract confirmation to Zen-Noh (Agribusiness United confirmation no. AUD 44-1024). The trade between the parties included the terms “As Is”; “CIF NOLA” and “Inport” with demurrage, re-consignment and switching costs for the account of Agribusiness United. Agribusiness United was to take over demurrage on June 10, 2015.

On September 1, 2015, Agribusiness United agreed to purchase 13,500 metric tons of U.S. No. 2 yellow soybeans from another company, which is not a party to this dispute, with the terms “CIF Myrtle Grove Midstream Terminal” (Agribusiness United contract confirmation no. AUD 44-1050).

On September 16, 2015, Agribusiness United purchased 20,000 metric tons of U.S. No. 2 yellow soybeans from yet another company, which is not a party to this dispute, with the terms “CIF”, “Location: Casablanca” and “Position: 21 September 2015 – 5 October 2015.”

On October 5, 2015, Zen-Noh purchased 14,031.67 bushels of soybeans back from Agribusiness United representing a barge that Agribusiness United was unable to completely unload (Zen-Noh purchase confirmation no. P170654).

Also, previously – in May 2013 – Agribusiness United had purchased from Zen-Noh 10,000 metric tons of U.S. No. 1 yellow soybeans with the terms “FOB Miss River June 5-20” with Buyer’s option to convert to a “10,000 mt CIF NOLA barge contract by Monday June 3, 2013.” (Agribusiness United purchase confirmation no. AUD-664).

Description of claims and sequence of events: claim for breach of June 2015 contract

On December 23, 2015, Zen-Noh initiated this arbitration case seeking to recover damages in the amount of $179,340.84 from Agribusiness United. Zen-Noh claims that Agribusiness United failed to make a final payment to settle contract S113902 for the 400,000 bushels of soybeans.

On June 16, 2015, Agribusiness United transferred $3,802,200 to Zen-Noh as an advance of 95% on the contracted bushels. Per Zen-Noh, after Agribusiness United took delivery of the soybeans under the contract, it failed to pay for the remaining contracted bushels and corresponding switching, demurrage and reconsignment charges. Zen-Noh states Agribusiness United originally owed $261,886.62 under contract S113902. In its claim for damages, Zen-Noh credited $82,545.78 to Agribusiness United for the barge load that Zen-Noh had purchased back that Agribusiness United was unable to completely unload (contract P170654). Additionally, Zen-Noh seeks attorney fees of $11,637.50, arbitration filing fees of $2,690.11 and interest at a rate of 18% per annum on the principal amount of $179,340.84.

Agribusiness United agrees it contracted with Zen-Noh in June 2015 to purchase the soybeans referenced in Zen-Noh's arbitration complaint. Agribusiness United states this purchase was intended to consist of seven barges loaded on the its vessel *AEC Diligence*. Agribusiness United also agrees it tendered a 95% prepayment and accepted delivery of soybeans in accordance with the contract.

However, Agribusiness United contests Zen-Noh's claim for damages. Agribusiness United argues that Zen-Noh submitted an open account statement on September 9, 2015, which indicates the amount due under this contract was only $104,515. Agribusiness United claims it received this account statement from Zen-Noh by email along with further information on open account receivable and payment terms. Agribusiness United argues this was a final settlement invoice, which Agribusiness United was agreeable to paying. Agribusiness United also argues that the claims for charges of $78,800 for reconsignment, switching and demurrage lack merit and are undocumented and, therefore, unsubstantiated charges.

With respect to contract P170654, Agribusiness United states only 6 of the 7 barges were ultimately loaded onto the vessel *AEC Diligence*. The final barge, MTC 741, was only partially unloaded and the remainder of the load was sold back to Zen-Noh by Agribusiness United. Agribusiness United disputes the settlement of barge MTC 741 that was assessed by Zen-Noh. Agribusiness United states Zen-Noh claimed a shortage of soybeans based upon what was left in MTC 741 after it returned from the *AEC Diligence*. Agribusiness United claimed that Zen-Noh refused to accept Agribusiness United's determination of weights and attempted to pressure Agribusiness United to split the shortage in weight.

With respect to the September 9 account statement, Zen-Noh disputes that it represented an amount for a full settlement of the contract. Zen-Noh states it was only one component of an email message from Zen-Noh to Agribusiness United, which was part of an extensive email string that included questions and responses from both parties about settling the contract that continued beyond September 9. Further, Zen-Noh states that on September 16, it contacted Agribusiness United to inquire if there were any further questions regarding settlement of the contract as barge MTC 741 had not been settled. According to Zen-Noh, Agribusiness United responded on September 28 with its own calculations for a final settlement totaling $174,323.29. Zen-Noh argues this email exchange demonstrates that Agribusiness United had accepted the demurrage charges assessed by Zen-Noh and that Agribusiness United did not in fact consider the September 9 open account statement for purposes of final settlement of the contract. Zen-Noh states it further replied on October 5 to Agribusiness United's email with some minor corrections and again indicating Zen Noh's position that Agribusiness United owed $179,340.84 for settlement of the contract.

Counterclaim for breach of May 2013 contract

Agribusiness United also filed a counterclaim seeking payment of $73,550.55 for CIF barges taken under contract AUD-664 in May 2013. Agribusiness United stated Zen-Noh gave the option to convert the contract to "CIF NOLA" by June 3, 2013. Agribusiness United claimed that on June 6, 2013, Zen-Noh determined it could not comply with the FOB Mississippi River terms and coerced Agribusiness United to accept the application of CIF NOLA barges. Agribusiness United disputed Zen-Noh's conversion of this contract from FOB to CIF application. Agribusiness United claims it accommodated Zen-Noh while reserving the right to recover the $73,550.55 amount associated with contract AUD-664 through future business between the parties.

Zen-Noh argues this counterclaim is not proper and lacks merit. Zen-Noh contests this claim because NGFA Arbitration Rule 2(A) states that "any matters submitted by the defendant must be directly related to the claims in the original complaint." Zen-Noh also argues the claim is barred because it was not brought in a timely manner under NGFA Arbitration Rule 1(E), which states, "the original arbitration complaint must be filed with the NGFA Secretary within 12 months after a claim arises, or within 12 months after the expiration date for performance of the contract(s) involved, whichever occurs last." Further, Zen-Noh maintains that at no point did it agree to allow Agribusiness United the opportunity to offset costs associated with contract AUD-664 against any future business transaction.

Claim for tortious business interference

In its counterclaim, Agribusiness United also argues that Zen-Noh owes $498,662.50 for damages arising from the third-party's unwillingness to proceed under contract AUD 44-1050. The seller in that contract had stated it "will not be able to trade this proposed contract … because of credit terms." Agribusiness United claims that Zen-Noh employees communicated with traders at other companies in the market to discourage them from engaging in business with Agribusiness United and purposefully harm Agribusiness's reputation in the industry. Agribusiness United argues this was the reason the seller in contract AUD 44-1050 withdrew from the agreement. Agribusiness United states it consequently had to cover the purchase on September 16, 2015 (at an additional $16 per ton) and it incurred penalties for delivery delays arising from cancellation of contract AUD 44-1050.

Agribusiness United argues its contract confirmation contains a provision applying Delaware state law whereas Zen-Noh's confirmation does not set forth a choice of law provision. Per Agribusiness United, under Delaware law, which consequently governs, the elements of a claim for tortious interference with a contract are:(1) a contract, (2) about which defendant knew, and (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury. Agribusiness argues that its claim is meritorious because each of the elements for tortious interference under Delaware law are satisfied.

Zen-Noh responds that Agribusiness United failed to provide any direct evidence in support of the tortious interference claim. Zen-Noh states there is no reference to it in the communications between Agribusiness United and the potential seller in contract AUD 44-1050. Zen-Noh argues the only item submitted in support of this claim was a declaration by an Agribusiness United employee, which stated, "we learned through multiple brokers that representatives from Zen-Noh had been calling traders and discouraging them to do business with Agribusiness." Zen-Noh submits the employee's statement does not identify specific individuals who may have been contacted. Zen-Noh argues Agribusiness United failed to provide written or direct proof that Zen-Noh had contacted the seller in contract AUD 44-1050 or any other counterparties to discourage business with Agribusiness United.

Agribusiness United also asserts that NGFA has jurisdiction to address its tortious interference claim pursuant to the broad language in NGFA Arbitration Rule 1(A), which provides for NGFA to consider cases "involving" the storage processing, manufacturing, merchandising, financing, transportation, or distribution of grain, food or feed ingredients within or between the USA, Canada or Mexico.

Agribusiness United seeks to recover damages of $498,662.50 due to the cancellation of contract AUD-44-150 and $47,835.55 (after netting out the damages on the June 2015 contract with the May 2013 contract) resulting in total damages of $546,498.05, plus interest costs and attorney fees.

THE DECISION

The arbitrators decided unanimously to award damages to Zen-Noh in the amount of $179,340.84. The arbitrators denied Zen-Noh's claims for attorney fees and arbitration filing fees. The arbitrators also denied Zen-Noh's request for interest at the rate of 18 percent. Instead, the arbitrators awarded interest on the amount of $179,340.84, at a rate of 3.5 percent per annum (pursuant to NGFA Arbitration Rule 6(F)) from the date of the claim (December 23, 2015) until the award is paid in full.

The arbitrators concluded that Agribusiness United entered into contract S113902 for the 400,000 bushels of soybeans, but then failed to make a final payment to settle the contract contrary to industry practice and the contract terms. Agribusiness United took delivery of the soybeans under the contract, but failed to pay for the remaining contracted bushels and corresponding switching, demurrage and reconsignment charges. The damages awarded to Zen-Noh include the credit to Agribusiness United of $82,545.78 for the barge load that it was unable to completely unload. The damages awarded includes charges of $78,800 for reconsignment, switching and demurrage. The terms of the contract and email communications between the parties substantiated that any switching, demurrage and reconsignment charges would be the responsibility of Agribusiness United as of the date of the sale.

The arbitrators decided that the account statement from Zen-Noh on September 9, 2015, did not constitute a final and full settlement of the contract. The evidence produced by the parties demonstrates that this statement was part of a lengthy exchange between them that continued beyond September 9 and referred to other dollar amounts discussed by the parties to settle the contract. On October 5, Zen Noh's position was that Agribusiness United owed $179,340.84 for settlement of the contract.

The arbitrators denied Agribusiness United's counterclaim for breach of the May 2013 contract. The evidence provided failed to show Zen-Noh had allowed Agribusiness United to offset costs associated with this contract against any future business transactions. The arbitrators concluded that Agribusiness United's counterclaim is not directly related to the claims in Zen-Noh's original complaint as required under NGFA Arbitration Rule 2(A). Moreover, the arbitrators determined that the counterclaim, standing on its own, was untimely pursuant to NGFA Arbitration Rule 1(E). The arbitrators rejected Agribusiness United's request for compensation for a transaction that preceded the original claim by over two years. Due to the amount of time that has elapsed and that the counterclaim is not directly related to the original claim in this case, the counterclaim is ineligible for NGFA Arbitration.

The arbitrators also concluded Agribusiness United failed to provide direct evidence in support of its tortious interference claim. There is no reference to Zen-Noh in the email string or other communications related to the potential transaction in contract AUD 44-1050. Agribusiness United failed to provide written or direct proof that Zen-Noh had contacted the third-party seller in contract AUD 44-1050 or any other counterparties to discourage business with Agribusiness United. The email communications include a request from the seller for a letter of credit and demonstrate that the seller was declining to do business with Agribusiness United because of credit issues. There was no evidence for the claim that Zen-Noh (or anyone else) was encouraging traders to "not" do business with Agribusiness or that Agribusiness may be an untrustworthy counterparty. There was no mention of Zen-Noh in these communications. Thus, the arbitrators decided that Agribusiness United failed to support a claim for damages for tortious interference.

THE AWARD

The arbitrators ruled in favor of Zen-Noh Grain Corporation in the amount of $179,340.84. Interest shall accrue on the award per annum at the rate of 3.5 percent pursuant to NGFA Arbitration Rule 6(F) from December 23, 2015, until the award is paid in full.

Dated: July 28, 2017

SUBMITTED WITH THE UNANIMOUS CONSENT OF THE ARBITRATORS, WHOSE NAMES AND SIGNATURES APPEAR BELOW:

Jeff Mauck, Chair
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