



February 15, 2017

CASE NUMBER 2735

PLAINTIFF: THE DELONG CO., INC.
CLINTON, WI

DEFENDANT: NON-METALS, INC.
BOILINGBROOK, IL

STATEMENT OF THE CASE

This arbitration case is between The DeLong Co., Inc., the seller, and Non-Metals, Inc., the buyer, concerning 16,000 metric tons of Distillers Dried Grains with Solubles (DDGS) that were destined for China. The contracts were written between April and August 2014, providing for a series of deliveries between July and September 2014. What commenced as six contracts subsequently became three contracts by mutual consent of both parties. Ultimately, 5,065 tons of product were shipped and paid for under the three contracts. Some tonnage was executed under each of the three contracts.

The three contracts in this dispute provided as follows:

Contract Number	Original Contract Quantity	Balance Not Shipped	Shipping Period	Price
56077	3,000/MT	961/MT	July 2014	\$335/MT CFR Shanghai
57231	3,000/MT	974/MT	July 2014	\$331/MT CFR Qingdao
59811	10,000/MT	9,000/MT	August/September 2014	\$332.60/MT CFR various China ports

According to DeLong, it repeatedly requested that Non-Metals provide shipping instructions and accept delivery of the remaining tonnage under the contracts, but Non-Metals failed to do so. DeLong ultimately cancelled the remaining portions of the contracts as of August 18, 2014. DeLong is claiming market losses of \$916,348, resulting from Non-Metals' non-performance and DeLong's subsequent cancellation of the contracts, including diversion and re-consignment charges. In calculating its damages, DeLong relied upon a third party market reporting service, McDonald Pelz Global Commodities to determine the applicable market values of \$208 per metric ton. Thus, DeLong claimed damages as follows: \$87,077 for contract 56077 (contract price of \$335/MT less market price of \$208/MT for 961 tons less unapplied down payment of \$49,115 plus diversion costs of \$14,145); \$111,001 for contract 57231 (contract price of \$331/MT less market price of \$208/MT for 974 tons less unapplied down payment of \$48,855.60 plus diversion costs of \$40,055); \$718,270 for contract 59811

(contract price of \$332.60/MT less market price of \$208/MT for 9,000 tons less unapplied down payment of \$449,010 plus diversion costs of \$45,880).

Non-Metals states it was unable to perform on the contracts due to the Chinese government's restrictions on DDGS that may contain the biotechnology-enhanced trait, MIR 162. Non-Metals filed a federal lawsuit in Chicago but was compelled by the court to NGFA Arbitration for resolution of this matter.

DeLong provided the signed contracts that were presented to the arbitrators in this case. The contracts contained what the arbitrators considered to be standard applicable terms. Under the section heading entitled "Other Terms" in the contracts, the terms agreed upon between the parties concerning execution of the export process were made clear. These terms included provisions related to import permits, analysis and testing of the product, ports of shipment, packing materials and which party would bear the related costs under the contracts. In particular, the contracts stated as follows:

DDGS have the possibility of being produced from corn containing GMO traits (mir 162/duracade) which are not approved for the importation into China as well as from a production facility that is not registered by the Ministry of Agriculture. These risks are for the account of the buyer and seller will not bear responsibility for but not limited to rejection/re-export/destruction.

THE DECISION

The arbitrators unanimously ruled in favor of the plaintiff, DeLong, in the amount of \$916,348 for the reasons set forth as follows:

1. The contracts were valid and formed in good faith, and in accordance with the NGFA Trade Rules.
2. The "Other Terms" provisions in the contracts specifically identified which party would be responsible for problems related to MIR 162 should they arise.
3. The risks in execution of the contracts were specifically discussed between the parties before the trades took place. Non-Metals was aware of what it was agreeing to.
4. Non-Metals raises the issue of "fault" in its defense. However, it was the Chinese government that changed the rules and policies mid shipment. It was neither party's "fault," but it was clearly Non-Metals' risk under the contracts to be accountable for these changes.
5. DeLong adhered to NGFA Feed Trade Rule 19(B)(3) in cancelling the contracts and providing notice to Non-Metals in a timely manner after being informed of Non-Metals' inability to satisfy the terms of the contracts or otherwise mutually resolve the issue.
6. DeLong on May 22, 2014 (before shipments started), offered to washout tonnage under the contracts at \$318 per ton. Later that day, DeLong offered to fully washout the contracts in dispute at \$312 per ton. These offers were rejected by Non-Metals, which indicated it would comply with the original terms of the contracts.
7. After cancellation of the defaulted portions of the contracts, DeLong agreed to ship 1,000 tons under contract number 59811 to help mitigate the damages in this arbitration.

8. DeLong accurately calculated its damages as set forth above.
9. DeLong worked to mitigate damages under these contracts; Non-Metals did not. Thus, the arbitrators awarded interest on this award to DeLong.

THE AWARD

The arbitrators ordered Non-Metals to pay DeLong the amount of \$916,348, plus interest from the date the case was filed with NGFA (Oct. 5, 2014). Interest shall accrue on the award at the rate of 3.25 percent pursuant to NGFA Arbitration Rule 6(F) until the award is paid in full.

Decided: December 2, 2016

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

Mike Meyers, *Chair*

Director of Wheat By-Products
APEX LLC
Hamburg, NY

Edmund Hall

President
Harris-Crane Inc.
Charlotte, NC

John Augspurger

Director of Organizational Development
Livestock Nutrition Center
Overland Park, KS