

**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 Nos. 319-321

Grain Seller (Trader)
Claimant

and

Grain Buyer (Trader)
Respondent

Interim Award

INTRODUCTION

This is an Interim Award in 3 arbitrations conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**GTA**). The dispute concerns alleged default under 3 contracts for the sale and purchase of almond hulls under which the Claimant was the seller and the Respondent was the buyer.

A preliminary issue has arisen in respect of jurisdiction. The Respondent's participation in these references to date has been conditional on resolution of that issue. Its participation to date is not to be considered an unconditional submission to the jurisdiction of this Tribunal though as provided in sub-section 16(1) of the NSW Commercial Arbitration Act 2010 (**CAA**)

The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement.

I am the Chair of this Tribunal and in accordance with the GTA Dispute Resolution Rules and by agreement of the parties I am authorised to determine these preliminary issues.

For completeness, the other members of the Tribunal are:

1. Mr Matthew Kelly, nominated by the Claimant;
2. Mr Craig Perkins, nominated by GTA on behalf of the Respondent.

The parties have exchanged;

- (a) Submission on jurisdiction made on behalf of Claimant dated 27 August 2020 together with affidavit in support sworn by Mr A on 27 August 2020 (*Claimant's initial submission*);
- (b) Submission made on behalf of the Respondent with annexures served 11 September 2020 supported by an affidavit of Mr B affirmed 1 October 2020 (*Respondent's submission*);
- (c) Claimant's Reply to submission on jurisdiction made on behalf of Respondent dated 22 September 2020.

I have carefully considered these submissions, statements and supporting documents and base my decision on the facts and circumstances thereby adduced.

THE DISPUTE

1. The Claimant is a commodity trading business.
2. The Respondent is a transport company.
3. The disputes concern 3 contracts for the sale of unmilled almond hulls the documents in support of which form annexures to Mr A viz
 - (a) Contract no. 1 dated 12 November 2019
 - (b) Contract no. 2 dated 14 November 2019 and
 - (c) Contract no. 3 dated 20 February 2020.
4. Contracts 1 and 2 were both signed by the Respondent. Contract 3 was not signed by the Respondent.
5. It is alleged by the Claimant (as seller) that the Respondent (as buyer) failed to take delivery on the first two contracts and took partial delivery on the third contract.
6. At this stage I know nothing more about the underlying disputes given the parties have agreed to determine certain preliminary issues.

THE PRELIMINARY ISSUES

7. There are 2 grounds on which the Respondent challenges the jurisdiction of this Tribunal.
8. A separate and subsidiary issue is whether these three references should be consolidated under section 27C of the CAA.
9. The Respondent's first ground of jurisdictional challenge is that it did not contract with the Claimant. It says this because the contract documents referred to at [3] refer to an ABN xx xxx xxx xxx. This is not the Claimant's ABN, but is the ABN for Claimant Group (**Group**). The result according to the Respondent is ambiguity.
10. The Claimant says in response that this is a clerical error, and I agree for the following reasons;
 - (a) Mr A's email footer identifies the Claimant entity, not Group;

- (b) Prior to contracting, the Respondent entered into a credit agreement with the Claimant. There is no reference to Group either in name or by ABN in the credit agreement document (which appears at annexure-2 to *Claimant's initial submission*).
- (c) Mr B's evidence is that he contacted the Claimant to enquire about purchasing almond hulls. There is no evidence that Mr B knew of the existence of Group. He intended to, and did in my view, contract with the Claimant. There is no ambiguity around the parties to these contracts.
11. The Respondent's second ground has a little more substance.
12. The Claimant submits that this Tribunal gains jurisdiction from the following words that appear on the face of each single paged contract;
All other terms and conditions as per Grain Trade Australia (GTA) where not in conflict with the above.
13. The Claimant says that given their ordinary and natural meaning these words are a reference to the GTA Trade Rules which are a set of standard terms and conditions published by Grain Trade Australia for incorporation into contracts including those standard form contracts published by Grain Trade Australia. Those Trade Rules incorporate (at Rule 23) a referral of disputes to arbitration under the GTA Dispute Resolution Rules.
14. The Respondent's evidence in Respondent is that at the time of contracting Mr B had no knowledge of GTA or arbitration. He does not say, at the time he signed the contracts, what he understood those words to mean.
15. The Respondent refers to GTA Member Update No. 8 of 12, in which GTA advised its members to use care in the words used to incorporate the GTA Trade and Dispute Resolution Rules. That advice was that use of words similar to those in the contracts may cause difficulties, just as they have in this case.
16. That does not mean however that use of general words will always be an inadequate incorporation of an arbitration agreement. There are many factors that a decision maker must consider when deciding whether a contract contains a referral to arbitration, the form of words being one of those considerations.
17. As mentioned, in this case Mr B signed two of the three contracts. There is no evidence that he asked Mr A what Grain Trade Australia was, or that he asked Mr A to remove the reference to Grain Trade Australia. I am entitled to assume, particularly in respect of the signed contracts, that he understood the words to have some meaning. It is hard to conceive what they could mean other than that the terms and conditions contained in the GTA Trade Rules were incorporated.
18. In respect of the unsigned contract document Contract no. 3, by the time it was issued the Respondent had signed two contracts on similar terms referring to GTA terms and conditions. There is uncontradicted evidence in (*Claimant's initial submission*) that the Respondent took deliveries of product under Contract no. 3, which would amount (as the Claimant has submitted) to partial performance. Even though it was not signed, I find that the Respondent had sufficient notice of the incorporation of the GTA Trade Rules in Contract no. 3.
19. It is the Claimant's case that the words "all other terms and conditions as per Grain Trade Australia" were an incorporation of the GTA Trade Rules. It does not submit that those words also incorporated the GTA Dispute Resolution Rules.

20. It is the Claimant’s case therefore that even though the contracts may not on their face have incorporated an arbitration agreement for the purposes of section 7 of the CAA, the Claimant refers to subsection 7(8) of the *Commercial Arbitration Act 2010* (NSW) (**CAA**), which provides that
- The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.*
- The GTA Trade Rules are a document which contains an arbitration clause. The words “all other terms and conditions as per Grain Trade Australia” are sufficient in my view to make that clause part of the contracts.
21. I cannot agree with the Respondent’s submission that this amounts to incorporation by “stealth through a vague provision.”
22. First, it is expressly contemplated and sanctioned by statute.
23. Second, Mr B signed the first two contracts. The Claimant was entitled to believe that Respondent understood the words to have some meaning.
24. Finally, the GTA Trade and Dispute Resolution Rules feature prominently on the public website of Grain Trade Australian (www.graintrade.org.au) and could have been easily accessed if the Respondent chose to do so.
25. Such a finding is also consistent in my view with subsection 28(5) of the CAA which provides; *In all cases, the arbitral tribunal must decide in accordance with the terms of the contract and must take into account the usages of the trade applicable to the transaction.*
- Grain Trade Australia is an industry association for the Australian grain trade. The incorporation of the GTA Trade Rules into contracts is a well-established usage in Australian grain trade. The parties have stipulated expressly in the contracts that they are subject to the terms and conditions of Grain Trade Australia, which I find expresses a desire for the contracts to be subject to the usages of the Australian grain trade, which are widely known and understood to be subject to the GTA Trade Rules, including arbitration.

CONSOLIDATION

26. The Claimant consents to consolidation. The Respondent’s consent was understandably qualified but as I understand its position, having dismissed the challenge to jurisdiction, it does not oppose consolidation.

INTERIM AWARD

27. For the reasons stated above, on behalf of the Tribunal I make the following interim award;
- (a) The Respondent’s challenge to jurisdiction is dismissed.
 - (b) The Respondent shall pay the Claimant’s costs of this preliminary application;
 - (c) The contracts incorporate the GTA Trade and Dispute Resolution Rules;
 - (d) This Tribunal is properly constituted under the GTA Dispute Resolution Rules and with jurisdiction to determine all disputes arising under the contracts;
 - (e) The three references are consolidated pursuant to subsection 27C(3)(a) of the CAA.

This award is made and published at Sydney, the Ninth day of October 2020.

Mr Cameron Pratt, Chair on behalf of the Tribunal