

**IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT 2010 (NSW) AND
IN THE MATTER OF AN ARBITRATION
UNDER THE DISPUTE RESOLUTION RULES OF GRAIN TRADE AUSTRALIA LTD**

GTA Arbitrations No. 346

Claimant
(Buyer)

and

Respondent
(Seller)

Interim Award - Jurisdiction

INTRODUCTION

1. This is an Interim Award in an arbitration conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd (**DR Rules**). The proceedings were commenced pursuant to a Grain Trade Australia (**GTA**) initiation form signed by *Person A* for the Claimant on 27 May 2021.
2. The Claimant is represented by [REDACTED].
3. The Respondent is represented by [REDACTED].
4. This reference relates to a dispute concerning a contract between the Claimant Buyer and the Respondent Seller. In summary, the Claimant contracted with the Respondent to purchase *Commodity A* produced at the *Respondent's plant*. The Respondent ceased production at the plant on or about mid-June 2020 leaving approximately 5,100 tonnes undelivered.¹ The Claimant claims compensation.

¹ Paragraph 5 of the Submissions

5. For present purposes the particulars of that contract are as follows;

Contract No.	Broker Reference	Date	Commodity	Tonnes	Base Price	Delivery
██████	N/A	27/05/2020	██████	6000	\$92 tonne plus GST	'Ex Farm', 1 June 2020- 31 August 2020

6. The contract is evidenced by a document headed 'Sales Contract' on the Respondent's notepaper. It contains on its face the following clause;

This contract expressly incorporates the Grain Trade Australia Limited (GTA) standard terms and conditions in force at the time of establishment of this contract. For a detailed explanation of the GTA Trade Rules please go to <http://www.graintrade.org.au/contracts> and click on the GTA Trade Rules. All terms and conditions above shall overrule the GTA Trade Rules with which they conflict to the extent of any inconsistency. Any dispute controversy or claim arising out of, relating to or in connection with this contract including any questions regarding its existence, validity or termination, shall be resolved by arbitration in accordance with GTA Dispute Resolution Rules in force at the time of establishment of this contract. This contract constitutes the entire agreement between the parties in relation to its subject matter and all prior discussions and representations in relation to that subject matter have no further effect.

7. The parties have chosen to resolve any disputes in accordance with the DR Rules in force at 27 May 2020. As a result, the May 2020 version of the DR Rules govern this reference.
8. 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.
9. I am listed on the GTA list of arbitrators under Article 6.1 of the DR Rules. I have been nominated by GTA to Chair this Tribunal and I am authorised to make this Interim Award pursuant to Article 20(7) of those Rules.
10. The other members of this Tribunal (also drawn from the GTA list of arbitrators) are:
- Christopher Whitwell**, Basis Commodities Pty Ltd – nominated by GTA at the request of the Claimant; and
- Guy Allen**, Advance Trading Australasia Pty Ltd – nominated by the Respondent.
11. For the reasons set out above I find therefore that this is a validly constituted Tribunal under the CAA with jurisdiction to determine all issues in dispute between the parties, including the jurisdiction of this Tribunal.

Challenge to Jurisdiction

12. This Interim Award is concerned with the jurisdiction of this Tribunal.

13. By way of background and procedural history,

- (a) As observed above, this matter was commenced pursuant to a GTA initiation form signed by *Person A* for the Claimant on 27 May 2021, requesting a Full Arbitration;
- (b) In accordance with GTA practice, a Notice of Dispute was mailed to the parties dated 22 July 2021 which included, among other things, a Contract for Full Arbitration;
- (c) The Respondent signed and returned the Contract for Full Arbitration, and dated it 5 August 2021 and the Claimant executed the Contract for Full Arbitration on 8 March 2022;
- (d) A Preliminary Conference was conducted on Wednesday 22 September 2021 and the parties agreed on Consent Orders;
- (e) Pursuant to those Consent Orders, the Claimant filed Points of Claim and a statement of *Person A* both dated 1 December 2021;
- (f) Further Procedural Orders were made by consent on 21 December 2021. Relevantly these Orders directed the Claimant to serve particularised Points of Claim which it did by serving an Amended Points of Claim dated 21 January 2022 with a further statement of *Person A* dated 17 December 2021;
- (g) A further Preliminary Hearing was conducted on 31 January 2022 at which the Respondent advised or confirmed that it intended to formally challenge the jurisdiction of GTA to determine the claims set out in the Amended Points of Claim and that it wished the question of jurisdiction to be determined as a preliminary question as contemplated pursuant to section 16(8) of the CCA. For completeness I note that this was over the objection of the Claimant.
- (h) Further procedural orders were then made under which,
 - a. The Respondent was to serve its submissions and any evidence challenging jurisdiction on or before 5pm on 8 February 2022;
 - b. The Claimant was to serve its submissions in response on or before 5pm on 22 February 2022; and
 - c. The Respondent was to serve its submission in reply on or before 5pm on 3 March 2022.
- (i) In compliance with these procedural orders the parties have served;
 - a. Submissions of the Respondent Challenging Jurisdiction dated 8 February 2022 (**Submissions**);
 - b. Claimant’s Submissions on Jurisdiction dated 21 February 2022 (**Response Submissions**) and
 - c. Reply Submissions of the Respondent – Jurisdiction dated 3 March 2022 (**Reply Submissions**).

The Respondent’s Submissions on jurisdiction

14. According to the Respondent, the jurisdiction of this Tribunal is to be determined by a consideration of the meaning of the GTA Trade Rules dated October 2019 (**GTA Trade Rules**) and whether they affect the Claimant’s entitlement to bring the claim for relief sought by it

in the Arbitration.² It also says that in cases where the scope of the arbitration agreement is in issue, the question for determination becomes an issue of construction of the terms of the arbitration agreement in context.³

15. The Respondent challenges the jurisdiction of the Tribunal on several bases.⁴
16. The Respondent submits that the Tribunal does not have jurisdiction because the Claimant was required to refer any dispute to Expert Determination (the Expert Determination Point).⁵
17. Alternatively it submits that the Amended Points of Claim should be dismissed (I assume, for want to jurisdiction) as the Claimant is;
 - a. seeking relief not available to it in accordance with the DR Rules (the Third Party Point); and
 - b. otherwise because it has not complied with Rule 17 of the GTA Trade Rules (the Rule 17 Point).⁶

Claimant's Response

18. In summary, the Claimant's response is that the Tribunal has jurisdiction because⁷;
 - (a) The Tribunal has jurisdiction in respect of the dispute and the claims set out in the Amended Points of Claim where it was expressly agreed in the GTA Trade Rules (Rule 23) that any dispute, controversy or claim arising out of or relating to the contract shall be resolved in accordance with the DR Rules and that the substantive law of the contract was the law of NSW (Rule 24);
 - (b) the claims of the Claimant arise from an undisputed breach of the contract between the Claimant and the Respondent and the dispute to be resolved by the Tribunal will be the amount of the losses claimed in the Amended Points of Claim pursuant to normal contractual principles as applied in the law of NSW; and
 - (c) the Respondent's contentions as to the operation of and compliance with Rule 17 of the GTA Trade Rules are matters to be determined as part of the substance of the dispute.

Determination

19. As the parties have highlighted, and consistent with section 7 of the CAA, our jurisdiction comes from and is determined by the scope of the arbitration agreement.
20. The starting point is logically the clause appearing on the face of the contract which appears at paragraph 6 above. It is in the widest possible terms. It embraces:

Any dispute controversy or claim arising out of, relating to or in connection with this contract including any questions regarding its existence, validity or termination, shall be resolved by arbitration in accordance with GTA

² Paragraph 16 of the Submissions

³ Paragraph 30 of the Submissions

⁴ Paragraphs 22 and 52 of the Submissions

⁵ Paragraph 52 of the Submissions

⁶ Paragraph 53 of the Submissions

⁷ Paragraph 2 of the Response Submissions

Dispute Resolution Rules in force at the time of establishment of this contract.

21. As the parties have also observed, the contract contains an incorporation by reference of the GTA Trade Rules which contain at Rule 23 the following arbitration agreement;

Any dispute, 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.

22. Given the similarity of this wording, I shall refer to both as ‘the Arbitration Agreement’.

23. Finally, it is worth noting that section 16(1) of the CAA (as well as Article 25 of the Dispute Resolution Rules) provides expressly that;

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

24. This is mirrored in Article 25(1) of the DR Rules.

25. It seems to me that the breadth of the Arbitration Agreement is not and with respect cannot be in doubt. Its terms are clear.

26. The matter or matters for determination on this preliminary application are therefore whether the GTA Trade Rules and/or the DR Rules somehow limit our otherwise broad jurisdiction to certain ‘disputes’, as defined or delimited under the Trade and/or DR Rules.⁸

27. At a preliminary level, the Arbitration Agreement does not obviously define the term ‘dispute’ with reference to a dispute arising under the Trade Rules or as defined by the Trade Rules. The reference is to disputes arising out of or relating to ‘the contract’ (which contract may or may not incorporate the Trade Rules).

28. In this case the relevant contract did incorporate the Trade Rules, but again, neither party has submitted that the Trade Rules are an exclusive code and that other terms and conditions and indeed the common law of contract are otherwise excluded when the Trade Rules are included. The Respondent submits that Rule 17 is a “regime”⁹ and a prescribed ‘scheme’¹⁰ and submits that;

‘it is clear on the face of the Contract and the Rules that third party claims are not contemplated by the Contract, nor are they claims made in accordance with the Contract. Accordingly, they fall outside the jurisdiction of the Tribunal.’¹¹

I do not consider this is self-evidently clear at all. Even if there is an argument that Rule 17 limits the Claimant’s contractual recovery rights¹² there is no explanation as to how this limits our jurisdiction.

⁸ Paragraph 16 of the Submissions

⁹ Paragraph 46 of the Submissions

¹⁰ Paragraph 40 of the Submissions

¹¹ Paragraph 50 of the Submissions

¹² See for example paragraph 46 of the Submissions

29. This is not a question of avoidance of Rule 17.¹³ As stated above, it remains open for the Respondent to argue that the effect of Rule 17 is to limit recovery to the difference between the contract price and market price, or fair market value. This is a question of construction of the contractual terms. It does not affect our jurisdiction to decide that question.
30. With respect to the Expert Determination Point, the intention appears to me to be clear; if the only issue in dispute between the parties is the assessment of fair market price, that question alone can be referred to an Expert appointed under the DR Rules. It is an option for the parties; it is manifestly not a limitation on the jurisdiction of a Tribunal.

Costs

31. For the reasons set out above I have decided that the Respondent's challenge to jurisdiction fails.
32. Each party has claimed its costs if successful on this application.
33. Under Article 31(7) of the DR Rules, the Tribunal has power to assess and award the costs of and connected with the reference. See also Article 33 of the DR Rules.
34. As the Claimant has been successful, I see no reason why it should not also have its costs.

Interim Award

For the reasons stated above, I make the following Interim Award;

1. That the Respondent's challenge to jurisdiction is dismissed.
2. The Respondent shall pay the Claimant's reasonable legal costs of this application.

This award is published at Sydney, the 23rd day of March 2022.

Mr Gerard Langtry, Chair

¹³Paragraph 3 of the Reply Submissions