

**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. 295, 296 and 297

Seller (Producer)

(Claimant in Arbitration Nos 295 and 296)

and

Seller (Producer)

(Claimant in Arbitration No. 297)

and

Buyer (Trader)

(Respondent in Arbitration Nos. 295, 296 and 297)

Second Interim Award

A. Introduction

1. This is a Second Interim Award in 3 now consolidated arbitrations conducted pursuant to the Dispute Resolution Rules of Grain Trade Australia Ltd ("**GTA**"). The 3 arbitrations were consolidated pursuant to a first Interim Award made by the Tribunal.
2. I am the Chairman of the Tribunal and as such I am authorised under Art 20 Rule 8 of the GTA Dispute Resolution Rules to deal with preliminary issues.
3. This Interim Award is in relation to an application made by the Respondent asserting that this Tribunal lack jurisdiction on that basis that if as the Claimants assert contracts were concluded between the Claimants and Respondent, those contracts did not contain a referral of disputes to GTA arbitration.
4. I have read and considered the;
 - (a) Respondent's Submissions as to jurisdiction dated 14 June 2019 (**Respondent's Submissions**);
 - (b) Affidavit of Mr A sworn 17 June 2019 (**Mr A**);
 - (c) Claimants' Submissions as to jurisdiction dated 3 July 2019 (**Claimants' Submissions**); and
 - (d) Affidavit of Mr B sworn 3 July 2019 (**Mr B**).
5. I have concluded that there was an incorporation of a referral of disputes to GTA, and accordingly that the Respondent's application should be dismissed, for the reasons that follow.

B. Facts

6. The Claimants have commenced three arbitrations asserting claims they say arise under 3 contracts negotiated between (Mr B) for the Claimants and (Mr A) for the Respondent as follows;
- (a) Contract no. XXXX1 created on 4 October 2018
 - (b) Contract no. XXXX2 created on 5 October 2018; and
 - (c) Contract no. XXXX3 created on 11 October 2018.

(Disputed Contracts)

7. Each of the 3 Disputed Contracts related to sales of Barley, on delivered terms.
8. As I have alluded to above and as appears from the Respondent's Submissions, the Respondent says that (Mr A) had no authority to bind the Respondent to these Contracts.
9. The Respondent also says that even if there was a contract or contracts concluded, they did not include an incorporation of the GTA Dispute Resolution Rules and accordingly this Tribunal lacks jurisdiction (other than the jurisdiction under Art 25 Rule 1 of the DR Rules, and s.16(1) of the *Commercial Arbitration Act 2010*).
10. The Respondent asserts that each contract (if there was one) was formed during a telephone conversation on the dates referred to at para. 6 above¹ and that each contract was complete at the conclusion of that conversation. Any attempt to incorporate terms following the conversation would be uncontractual.
11. Following each conversation, Mr B sent Mr A a documents titled Broker's Contract Note. Each of those documents included on its face the following under the heading **Contract Conditions**;

"Grain Trade Australia (GTA) Trade Rules and Dispute Resolution procedures.... are to govern this grain contract."

12. In summary, the Respondent's position is that Mr B did not specifically reference the incorporation of the GTA Trade or Dispute Resolution Rules during the telephone conversation and while Mr A received and reviewed each of the Broker's Contract Notes, he did not notice or read the section titled Special Condition or any reference to Grain Trade Australia².
13. In making this submission, the Respondent relies on the decision of Ball J in *Adrian Beard v Cargill Australia Ltd* [2011] NSWSC 142 (*Beard*). While the facts of that case were similar to the present case, Beard turned on the question posed by the judge whether Mr Beard accepted the terms of the document sent following the telephone conversation. His Honour also posed the question "What act or acts of Mr Beard's amounted to acceptance of those terms?" In the present case, Mr A's evidence is to the effect that he did not accept the terms of the documents sent by Mr B.
14. As appears from his affidavit, Mr B is a grain broker with considerable experience. In particular, Mr B has had a working relationship with the Respondent and Mr A since at least 2009.

¹ See paras 4, 6 and 7 of Mr A.

² See paras 5, 7 and 9 of Mr A.

15. Mr B deposes that he advised Mr A in or about 2009 that all of his contractual dealings would refer to GTA terms and that Mr A understood this.
16. Mr B deposes that between 2009 to the end of September 2018 he brokered at least 160 contracts with the Respondent and that each of these contracts was negotiated in the same way as the Disputed Contracts and incorporated reference to GTA Rules and that each of these contracts was performed in accordance with its terms. The Claimant submits, correctly in my view, that this gives right to a relevant course of dealings between the parties sufficient to incorporate the GTA Trade and Dispute Resolution Rules.
17. Mr B's evidence is undisputed and is not inconsistent with Mr A's evidence. Read together, Mr B's evidence and Mr A's evidence describes a typical contracting procedure in the Australian grains industry whereby a contract is formed during a telephone conversation (or SMS) followed by a formal document in the form of a purchase order or broker's note. I observe that this contract confirmation document is usually required (among other things) to allocate the transaction a reference number. The document will usually also stipulate the payment terms and how and where payment will be made, essentials terms which are not usually discussed over the phone.
18. Even if Mr A did not consciously read the reference to the GTA Rules on the Broker's Note Contracts related to the Disputed Contracts, I am satisfied that a course of dealings had developed between Mr B (including in contracts with the Claimants) and the Respondents sufficient to incorporate the GTA Trade and Dispute Resolution Rules into the contracts between them.
19. As the Claimant observes, this is the critical difference between the facts of this case, and the determination in GTA Arbitration 190.

C. Second Interim Award

20. For the reasons above, our Second Interim Award on the jurisdiction issue is;
 - (a) By virtue of the incorporation through a course of dealings of the GTA Trade and Dispute Resolution Rules into the Disputed Contracts, this Tribunal has jurisdiction;
 - (b) The Respondent's application is dismissed;
 - (c) The Respondent shall pay the Claimants' costs of this Application.
 - (d) The Respondent shall indemnify the Claimants in relation to any fees paid by the Claimant to GTA in respect of this application.

This interim award is published at Sydney, the day of July 2019

Mr John Orr, Chair nominated by GTA