

# GTA Arbitration – ‘Proof of Contract’ Guidance Note

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## Key Points

1. **Evidence** -In any form of dispute resolution, the parties must prove their case by producing and relying on evidence
2. **Actions** - What did the offeree *do* to indicate acceptance of the offer?
3. **Jurisdiction** - The GTA Dispute Resolution Rules and the *Commercial Arbitration Act* expressly provide that an arbitrator has the power to rule on her/his own jurisdiction.
4. **Checklist** -use a Checklist, so that once a contract is concluded orally, recap the oral agreement, which will specifically include express reference to GTA Trade and Dispute Resolution Rules.
5. **Silence** is not acquiescence (acceptance)

**WARNING: This is for guidance of parties only and is not legal advice. Every situation can be slightly different and you should obtain legal advice in respect of your particular facts and situation.**

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## 1. Purpose

This GTA Arbitration Guidance note is issued to industry to assist in understanding issues with regard to “Proof of Contract” (ie being able to provide satisfactory objective evidence to demonstrate the existence of an agreement) that have been noted in GTA Arbitrations. This issue should be of interest to grain contract counterparties to review in order to mitigate the risks of contract disputes and potential arbitration.

## 2. Background

GTA arbitrators are regularly asked to determine whether the parties to an arbitration have in fact entered into a contract. A parallel issue arises around whether the parties have agreed to refer all disputes to GTA arbitration by incorporation of the GTA Trade and Dispute Resolution Rules into any contract.

In most cases referred to GTA arbitration the existence of a contract is not in dispute, even when there isn't a contract document signed by both parties. In cases where it is in dispute, the existence of the contract and its terms must be proved, by evidence.

It appears that some Counterparties still believe that simply sending a Contract Confirmation is sufficient proof of the existence of a contract. This is not always the case.

At law, the essential ingredients of a contract are;

1. Offer;
2. Acceptance and
3. Consideration.

The role of a GTA arbitration Tribunal is to make **objective** findings of fact based on the evidence presented by the parties, on the balance of probabilities.

*Objective* in this context means that the Tribunal is not concerned or interested with what either party actually thought or intended; the Tribunal is concerned with the parties' objective intention. In other words, if it appears by the parties' words and actions that they intended to enter into a contract, then the Tribunal may find that they did.

To that end, the Tribunal will place great weight on objective evidence of the existence of a contract.

An example of a typical factual scenario is outlined below:

1. An allegation of discussions/negotiations concerning a sale and purchase of grain. This can be face to face, via phone or text message, or any other means (**Negotiation Phase**).
2. Following the Negotiation Phase, Party A may believe that a contract has been agreed, and sends Party B a written contract document (**Contract Confirmation**). This document may be signed by Party A and on its face incorporate:
  - a. the GTA Trade and Dispute Resolution Rules, and/or
  - b. A statement to the effect that the recipient should carefully review the document and advise any changes/inaccuracies, failing which they will be deemed to be bound by the contract.

### **(Confirmation Phase)**

3. Party B never signs the Contract Confirmation document, and subsequently denies when asked that a contract came into existence.

It is important to consider that in the scenario above;

- a) A binding and enforceable contract may have been created during the Negotiation Phase, with the document sent during the Confirmation Phase purporting to be sent as confirmation (though perhaps introducing some new terms) or
- b) The sending of the Contract Confirmation may be considered an offer, or perhaps even a counter-offer, which the offeree may choose to accept but is under no obligation to do so.

### 3. Objective Evidence

In GTA arbitration, as in any other form of dispute resolution, the parties must prove their case by producing and relying on evidence.

Evidence can be in the form of documents or emails, written witness statements, or a combination of both.

While GTA arbitration and particularly Fast Track arbitration, is intended to be informal and therefore relatively inexpensive, the parties must still prove their case based on evidence. An arbitration award that is not based on evidence may be unenforceable.

It is 'Fast Track' arbitration, not 'Short-Cut' arbitration.

So in the scenario above, Party A may assert that a contract came into existence during the Negotiation Phase. Party A may make a note in his/her diary, and perhaps instruct his/her accounts department to prepare a Contract Confirmation, which is sent subsequently.

Party B asserts that while there were discussions, no agreement was reached, other than perhaps to ask Party B to send an offer/draft contract which it would consider.

In this scenario, what was said to who during the Negotiation Phase is critical and must be proved.

Simply producing a diary entry or internal email is unlikely to be sufficient because this evidence is not objective; it represents what the offeror believed and is private to the offeror.

Think of it this way; what did the offeree **do** to indicate acceptance of the offer?

If it's alleged that the offeree said following negotiations (words to the effect) "That's great. Happy to buy/sell the grain on that basis", followed by a hand-shake, then that needs to be put in evidence in a witness statement/affidavit, setting out the conversation as if it were a script. Even if the offeree disputes this version of events, they will have to produce some evidence and/or their own witness statement to contradict the offeror's version of events.

When sending a Contract Confirmation it may be wise to include in the covering email words to the effect of;

*"Many thanks for your new business. The annexed Contract Confirmation confirms the terms of our agreement reached [at our meeting][during our call]."*

### 4. Is there an agreement to arbitrate?

In addition to determining whether there is a contract for the sale of grain, there may be a preliminary or collateral question about whether there has been an agreement to arbitrate any disputes.

You might think that, if the incorporation of the GTA Dispute Resolution Rules is set out in the Contract Confirmation, but if no contract actually came into existence, there can be no agreement to arbitrate, either.

However the GTA Dispute Resolution Rules and the *Commercial Arbitration Act* expressly provide that an arbitrator has the power to rule on her/his own jurisdiction which means in effect that an arbitrator can make a finding that no contract came into existence, so she/he has no jurisdiction .

It is GTA's practice before it will accept a request to administer an arbitration that the party making the request (usually the Claimant) be able to demonstrate the existence of an agreement to refer disputes to GTA arbitration. GTA's role is to administer arbitrations and is not authorised to decide whether the 'prima facie' arbitration agreement is valid or not and will rely on the assertion of the Claimant.

Considering the scenario above, it is possible that the Negotiation Phase has focused solely on the sale of grain and neither party has referenced the GTA Trade and/or Dispute Resolution Rules, which are mentioned for the first time in the Contract Confirmation document sent in the Confirmation Phase.

In this case it is possible that a contract for the sale of grain has been created, but GTA has no jurisdiction to determine the dispute, unless the offeree elects to ratify the incorporation which it could do by signing the Contract Confirmation or perhaps by performing the contract (though there may still be some issue about which contract is being ratified; the verbal contract, or the Contract Confirmation).

To address this, some grain buyers use a Checklist, so that once a contract is concluded orally, the agent will recap the oral agreement, which will specifically include express verbal reference to GTA Trade and Dispute Resolution Rules. The call may also be recorded.

It should also stipulate that the agreement will be confirmed in a written Contract Confirmation.

## 5. Is there an agreement to buy and sell grain?

In the scenario above, precisely what was said and to who during the Negotiation Phase is likely to be critical in establishing whether or not a contract was formed and the terms of the contract.

If the parties verbally reach agreement on;

1. Price;
2. Quality/specification/standard;
3. Quantity;
4. Time and method/place of delivery;
5. Terms of payment,

any other terms and conditions included in the Contract Confirmation which were not expressly agreed verbally may not be enforceable and/or may constitute a 'counter-offer'.

## 6. Silence is not acquiescence

Parties should be mindful of the legal maxim that "silence is not acquiescence." This means that (generally) an offer is rarely deemed to be accepted simply by virtue of the offeree not doing or saying anything. This will be the case even if the written contract document (or Contract Confirmation) constituting the offer contains a statement with words to the effect that if the offeree does not reject the Contract Confirmation, it is deemed to have agreed.

## 7. Course of Dealings

An exception to this rule may arise where the parties have a history of contracting on similar terms. This is known as a 'course of dealings.' A typical trading history may involve;

1. Verbal negotiation and agreement; followed by

2. Sending a Contract Confirmation (which may include GTA Trade and Dispute Resolution Rules) which remains unsigned; followed by
3. Performance of the contract.

In this case, it may be that even before a written Contract Confirmation is issued, the verbal contract incorporates its terms by virtue of the trading history that the parties may have.

How long a trading history is required before a 'course of dealings' may be applied will differ in each case, though the dealings are likely to need to be substantial in both time and number of contracts.

## 8. The Brokers Note

The same principles of establishing an agreement apply to a Brokers Note. As with a Contract Confirmation, the Brokers Note is still written confirmation purporting to evidence an agreement. The benefit of a Brokers Note is that an independent third party broker may be able to provide objective evidence as to what that person believes was agreed by the parties. In the case of an arbitration, this can be considered by the arbitration panel.

There tends to be a common practice in industry when trades are agreed through a broker and documented by a Brokers Note (which references a GTA Contract and Trade Rules, GTA Dispute Resolution Services and no other extra terms or conditions), for the Counterparties to then send their own Contract Confirmations to each other. This can create 3 sets of documentation (that may or may not vary) for 1 contract.

Where the terms and conditions of such Contract Confirmations differ from the Brokers Note, GTA Contract and Trade Rules issued or referenced by the Broker, there can be unnecessary ambiguity in:

- a) the situation of a dispute as to what was agreed and
- b) the evidence that may be provided in an arbitration for the arbitration panel to consider.

To avoid such ambiguity, it is recommended as "safe practice" to include all specific requirements (eg delivery instructions, notice periods, documents, certificates etc) from both parties in or be referenced in the Brokers Note or other confirmation document issued by the Broker. The counterparties should refrain from sending their own (system generated) Contract Confirmations to each other in these circumstances, or alternatively ensure system generated confirmations are exactly the same as the documents issued by the Broker.

Further, recalling "silence is not acquiescence" as mentioned above, should parties send their own Contract Confirmation to their counterparty, the receiving counterparty should notify the sender the entirety of their contract is per the Brokers Note, Contract Confirmation or documentation issued by the Broker. Parties may wish to exchange their respective contract numbers to assist in execution of the contracts.

## 9. Training and Reference Material

GTA provides specific industry orientated training and development programs, including:

- Contracts and Trade Rules
- Arbitration
- Dispute Resolution

This training is relevant and recommended for all levels of industry experience ("old and new").

GTA website contains relevant [Fact Sheets](#) and Guidelines, including:

- Fact Sheet #8 – Dispute Resolution – Grain Contract Dispute Resolution

- Fact sheet #15 – Grain Contracts – A guide to taking out grain contracts
- [A Guide to Selling Grain Using Grain Contracts \(Producers Booklet\)](#)

## 10. Conclusion

GTA and its Tribunals can be placed in a difficult position if the Claimant does not produce sufficient evidence to prove its case, including evidence that a contract exists and the parties have chosen GTA arbitration.

While Tribunals can and sometimes do ask parties to produce additional evidence and/or submissions, this is not in keeping with GTA's approach of fast, low cost and informal dispute resolution. It may also appear that the Tribunal is helping a party to 'plug holes' in its case when a Tribunal should be entitled to be confident that each party has presented its case fully.

While legal representation is not mandatory for GTA arbitration, 'getting it wrong' can be expensive.

***Disclaimer:*** *This Guidance Note has been produced for general information purposes only and should not be construed by any person as legal advice or personal financial advice. All parties should seek and consult their own legal and financial advice, in accordance with their own personal and/or commercial circumstances.*

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