



GRAIN TRADE AUSTRALIA

GTA Dispute Resolution Guidelines

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Grain Trade Australia Limited Arbitration Guidelines - Issued 1 July 2022



Grain Trade Australia (GTA) Dispute Resolution Guidelines

Section	Subject	Page
	Introduction	2
1.	GTA Dispute Resolution Framework	3
1.1	Legal administrative support	3
1.2	Legal Technical support	3
2.	Prior to commencement	3
2.1	Arbitration Agreement	3
2.2	What disputes can be referred to GTA?	4
2.3	Multiple contracts	4
2.4	Time Limits	4
2.5	Amount in damages	4
2.6	Dispute Resolution and Trade Rules	4
2.7	Legislation	4
3.	Commencing an arbitration	5
3.1	Parties' contact details	5
3.2	Amount claimed	5
3.3	Contract details	5
3.4	GTA Arbitration Clause or Agreement	5
3.5	Nature of Dispute	5
3.6	Amount of Damages	5
3.7	Attachments	5
3.8	Respondent's non-participation	5
4.	Submissions	6
4.1	Points of Claim	6

4.2	Points of Defence	7
4.3	Parties' Points of Reply	7
4.4	Fast-Track	7
4.5	Cross-Claims	7
4.6	Expert Determination	7
5.	Costs	8
5.1	Undertaking	8
5.2	Discontinuation/Settlement prior to award	8
6.	Issues to be determined by parties	8
6.1	Parties' onus	8
6.2	Preliminary Issues	8
6.3	Breaches of Dispute Resolution Rules	8
7.	Process	9
7.1	Jurisdiction	9
7.2	International Arbitration	9
7.3	Court proceedings	9
7.4	Full Arbitration consolidation procedure	9
7.5	Fast-Track consolidation procedure	10
7.6	Default Awards	10

Introduction:

GTA works to resolve disputes by peer review, through its Dispute Resolution Process. The process is designed to save time and expense while providing an efficient, fair and equitable means to settle disputes related to commercial transactions.

Parties are reminded that arbitrators are drawn from the grains industry and act in an honorary capacity. Submissions should be prepared with this in mind. Parties usually submit on relevant GTA contracts, Dispute Resolution Rules and Trade Rules; however, arbitrations may involve complex legal arguments. Where such arguments are raised, the arbitrators may obtain legal support. The cost of this legal support will be borne by the parties.

These Guidelines should be read by anyone using the GTA Dispute Resolution Service and before directing inquiries to GTA. They set out GTA's policy and seek to provide clarification in relation to various aspects of the operation of the practice and procedure of the GTA Dispute Resolution Service.



Grain Trade Australia Limited Arbitration Guidelines – Amended 1 July 2022

They are to be read in conjunction with the applicable Trade Rules and Dispute Resolution Rules, the applicable legislation and case law.

There should be no conflict between these Guidelines, the Dispute Resolution Rules and Trade Rules but to the extent that there is, the Dispute Resolution Rules and Trade Rules prevail.

GTA periodically reviews and updates these Guidelines and welcomes any comments or suggestions.

1. GTA Dispute Resolution Framework:

GTA administers disputes referred for determination under the GTA Dispute Resolution Rules and provides administrative and secretariat support to arbitrations.

GTA should not be confused with the arbitrators and arbitration tribunals it administers. The result of arbitration is the handing down of an award signed by the arbitrators. The award is the product of **their** work not GTA.

When an Arbitration Tribunal has been convened, and has entered onto the record, that Arbitration Tribunal or sole arbitrator has power to determine how the reference should be conducted, subject to the operation of the Dispute Resolution Rules and applicable legislation.

Arbitration awards, including those issued under the Dispute Resolution Rules, are binding and enforceable and the equivalent of a judgment by a Court. They may be enforced using Court processes.

GTA is not able to give parties legal advice regarding their dispute. GTA is only able to provide guidance in the administration of the Dispute Resolution Rules and Trade Rules and the arbitration process.

In view of the binding legal consequences of arbitration, GTA recommends that parties utilising its arbitration service should consider obtaining legal advice.

1.1 Secretariat support: GTA Arbitration proceedings need to be carefully regulated and administered to ensure that the parties' rights and interests are protected and that any arbitration award is legally sound and would be upheld by the Courts. In order to maintain a high standard in arbitration, GTA uses legal counsel for secretariat support.

The secretariat ensures that:

1. The parties are given an ample opportunity to present their respective cases;
2. The Tribunal has considered all the relevant facts of the case;
3. The Award represents the findings of fact as agreed by each of the arbitrators, and correctly applies the applicable Trade and Dispute Resolution Rules and legislation; and
4. The form of the Award is correct, in that it covers all matters required by law.

Secretariat support fees are paid by GTA and are not invoiced to the parties.

1.2 Additional support: GTA is entitled to claim additional support costs as per Schedule 1 of the Dispute Resolution Fees. These will generally be incurred when a dispute is complex, or the parties diverge from the standard process, and issues arise during the arbitration that may have potential legal consequences and support is required from GTA legal counsel. Parties will be invoiced for any fees incurred by GTA in gaining legal support prior to any Award being issued. GTA may withhold the publication of an Award if the fees are not paid. Any fees incurred by GTA in assisting the Arbitration Tribunal will be borne by the parties, who are jointly and severally liable, and may form part of the Final Arbitration Award unless otherwise agreed by the parties. Irrespective, the Parties remain jointly and severally liable to pay any outstanding fees.

2. Prior to commencement:



Grain Trade Australia Limited Arbitration Guidelines – Amended 1 July 2022

The parties must consider a range of preliminary issues before lodging a GTA “Initiating a Dispute Resolution process in accordance with the Rules of Grain Trade Australia (GTA)” form.

2.1 Arbitration Agreement: Is there an arbitration agreement between the parties?

You cannot bring a dispute to GTA unless there is an arbitration agreement, preferably in writing, in accordance with the *Commercial Arbitration Act (NSW) 2010*.

The arbitration agreement may be contained in the contract the subject of the dispute, or may be entered into after the dispute has arisen (this is called an “ad hoc” arbitration agreement).

The Tribunal has jurisdiction to determine the existence (or otherwise) of an arbitration agreement.

If the parties wish to utilise Fast-Track arbitration (other than where it is mandatory), both parties must sign and return a GTA Contract for Fast-Track Arbitration in order to proceed.

If you have properly incorporated or referenced the GTA Trade and Dispute Resolution Rules into your contract, you may have a valid arbitration agreement.

2.2 What disputes can be referred to GTA? The wording of the arbitration agreement will determine which disputes you can refer to GTA. Generally, these include any claims arising under the contract between the parties and could include claims for negligence and claims under the *Trade Practices Act 1974 (Cth)* and *Corporations Act 2001 (Cth)*.

2.3 Multiple contracts: Are there multiple contracts in dispute between the parties?

The parties must commence one arbitration per individual contract/ arbitration agreement even if there are several similar disputes between the same parties under separate contracts.

However, if the contracts and disputes between the parties are similar in nature and the parties wish to have them dealt with expeditiously there are two options available to the parties.

- a) Consolidation: The parties may elect to consolidate the arbitrations in accordance with s.27C of the *Commercial Arbitration Act 2010 (NSW)*. In order to consolidate multiple arbitrations into one, parties need to submit a separate Initiating a Dispute form with relevant initiating documents for each contract, indicating in each that a request for consolidation will be made of the arbitrators (when appointed). The request for consolidation must be made before submissions are received. Please see **Section 7 Process** for further details on consolidating arbitrations.
- b) Test arbitration: The parties may agree in writing that the arbitration award in relation to one contract will bind the parties in relation to the other contracts.

2.4 Time Limits: Is the application to commence arbitration being made within 12 months after the expiration of the date for performance of the contract or ordered by the Court or similar Tribunal?

Parties shall commence the arbitration within 12 months after the expiration of the date for performance of the contract in the contract or subsequent washout agreement.

A party may ask the Tribunal for an extension of time for the commencement of arbitration.

It is not the role of GTA to monitor whether an arbitration has been commenced within time. Please see **Section 6 Issues to be determined by the parties** for further details on time limits.

2.5 Amount in damages: What is the amount of the claim?

If the amount being claimed is under \$25,000 the parties must commence the arbitration as a “Fast-Track” arbitration.

In exceptional circumstances, GTA may permit a claim for over \$25,000 to be administered as “Fast-Track”, bearing in mind the limited nature of the submissions and additional pressures which may be placed on a sole arbitrator.



Grain Trade Australia Limited Arbitration Guidelines – Amended 1 July 2022

2.6 Dispute Resolution and Trade Rules: Have the parties read the applicable Trade and Dispute Resolution Rules? The arbitration will be governed by the Dispute Resolution Rules in force at the time that GTA was requested to initiate a process.

2.7 Legislation: All GTA arbitrations are subject to the *Commercial Arbitration Act 2010 (NSW)*. It is important to read this act, in conjunction with the applicable Dispute Resolution and Trade Rules in order to understand how the arbitration will be conducted and the rules that govern it.

If one of the parties to your arbitration is foreign, the *International Arbitration Act* may also apply.

3. Commencing an Arbitration:

The party seeking to commence an arbitration (“Claimant”) needs to fill in the downloadable form “Initiating a Dispute Resolution process in accordance with the Rules of Grain Trade Australia (GTA)” from the **GTA website** and attach the required documentation. The Dispute Resolution Rules require the Claimant to send a copy of the initiating documentation to the Respondent.

Please note that the initiating documentation does *not* go to the arbitrators. Only information contained in submissions will be viewed by the arbitrators. Ensure all relevant details and documentation from your initiating documentation is included in your submission.

All correspondence sent to GTA in relation to an arbitration must be copied to the other party to the arbitration, or their solicitor, in keeping with the requirements of openness and transparency within the GTA process.

GTA will not conduct “off the record” discussions with a party. Any discussion we have will be confirmed in writing and copied to the other side.

GTA will not administer the arbitration until the Claimant’s arbitration fees have been paid in full.

3.1 Parties contact details: The Claimant is to provide the contact details of both parties including their legal representatives (if known). Details should include telephone numbers, an email address, a mailing address and contact persons.

Parties may nominate a solicitor as their contact. The nomination of the solicitor should be made in writing to GTA.

All correspondence from GTA will be directed to the party via this solicitor once that solicitor has confirmed he or she has instructions to act.

3.2 Amount claimed: The Claimant must indicate the total amount of damages claimed under the contract. The Claimant must remember that whether they will be able to commence the arbitration as a full or Fast-Track arbitration depends in part on the amount claimed. Please see Section 2.5.

3.3 Contract details: The Claimant must provide the contract number, date, commodity, tonnage and the date of the last day of delivery. A copy of the contract and any subsequent amendments or washout agreements must be attached to the initiating documentation.

3.4 GTA Arbitration Clause or Agreement: The Claimant must be able to identify a GTA Arbitration clause in the contract or a separate agreement. Without such a clause a GTA Tribunal may not have jurisdiction to arbitrate the dispute.

3.5 Nature of Dispute: The Claimant is to provide a brief summary of the dispute, including the circumstances relating to the dispute and the date of the alleged default or breach.

3.6 Amount of Damages: The full amount of damages being claimed must be included, including any losses due to non-fulfilment of the contract. Please note that this is a non-binding indication and a



Grain Trade Australia Limited Arbitration Guidelines – Amended 1 July 2022

higher or lower amount may be claimed in the Points of Claim. From that point (lodgement of the Points of Claim), the parties should not vary the amount claimed.

3.7 *Attachments:* As well as the full contract, the Claimant should attach any relevant broker's note or washout agreement. No other attachments are required at this stage.

3.8 *Respondent's non-participation:* A Respondent may choose not to participate in the arbitration process where they believe that there was no arbitration agreement or contract, or that for some other reason GTA has no jurisdiction.

The parties must be aware that arbitration may proceed without the Respondent's participation.

A Respondent who elects not to participate in GTA arbitration has several options available to it:

- a) It may seek to challenge the validity of the GTA arbitration by way of a preliminary issue, such as GTA's jurisdiction to arbitrate, the dispute being brought out of time or other reason that the Respondent may have. The Respondent may claim costs associated with the determination;
- b) The Respondent may elect to participate, but note its objection to GTA's jurisdiction or its objection on another basis;
- c) The Respondent may elect not to participate at all. In those circumstances, once the Claimant's Points of Claim have been received by the arbitrators, and in the absence of any response from the Respondent, they may proceed to publish an Award. Please note that even if the Respondent chooses to exercise this option it will be given opportunity to participate during each step of the arbitration prior to the award being issued.
- d) The Respondent may elect not to participate in the arbitration and to commence proceedings in a Court or Tribunal on the basis of GTA's jurisdiction or an alternative point. Please see **Section 7.3 Court Proceedings.**

If a Respondent elects not to participate in an Arbitration the Claimant may request the Tribunal consider a Default Award. Prior to handing down a default Award all outstanding fees (relating to both Parties) must be paid.

Should a Respondent not participate the Claimant may be asked to provide a submission relating to the Respondent's possible defence and a statutory declaration that their submission is true and correct. This is to ensure procedural rigour and strengthen the Default Award. Refer to Section 7.6 of these Guidelines.

4. Submissions:

As stated above, information provided with the initiating documentation will not go to the Arbitration Tribunal. It is only used for GTA purposes in commencing the arbitration. Only information in parties' submissions will go to the Arbitration Tribunal.

All relevant information needed to substantiate claims made by the parties (including invoices, all correspondence, file notes or daybook entries, electronic communications, contracts and statutory declarations) should be included in the parties' submissions. Failure to provide such documentation may lead to an Arbitration Tribunal finding that either the claim was not proven or that evidence relied on by a party was not adequately challenged.

The parties are encouraged to keep their submissions as brief and **"to the point"** as possible. Please see **Introduction.**



A Respondent may lodge a cross-claim, but this should be advised to GTA within 14 days of receiving the Notice of Dispute from GTA. Depending on the nature of the cross-claim (for example, if it involves a separate contract) additional fees may be payable.

Submissions may be lodged electronically and in accordance with any notice sent by GTA or the Tribunal.

4.1 *Points of Claim*: The Claimant's Points of Claim should contain:

- a) a clear timeline of the relevant events before and during the dispute;
- b) evidence of the existence of a contract. This is particularly important where the Claimant is relying (for example) on an unsigned contractual document. This will also be relevant in establishing the existence of the arbitration agreement;
- c) arguments used to support the Claimant's assertion that the Respondent's conduct constituted a breach of the contract. The Claimant should refer to the applicable trade rules, any applicable legislation and case law as appropriate;
- d) evidence to support any claim or assertion made by the Claimant; and
- e) a breakdown of the damages claimed, including any replacement costs, interest claimed, costs claimed (including legal and arbitration fees) and evidence of replacement costs incurred, plus all supporting documents.

NB: It is strongly preferred the length of the Points of Claim, including the submissions and supporting documents, should be 20-25 pages. This may vary depending on the complexity of the subject matter.

4.2 *Points of Defence*: The Respondent's Points of Defence should contain:

- a) a rebuttal of any assertions made by the Claimant (note that any point not addressed may stand as an admission);
- b) positive arguments in support of the Respondent's position, including any potential breaches by the Claimant that may have triggered the Respondent's conduct. The Claimant should refer to the applicable Trade Rules, any applicable legislation and case law as appropriate; and
- c) evidence to support any claim or assertion or any rebuttal of the Claimant's points.

NB: It is strongly preferred the length of the Points of Defence should be 20-25 pages (including the submissions and supporting documentation). This may vary depending on the complexity of the subject matter.

4.3 *Parties' Points of Reply*: Any new matters raised in the Points of Defence should be addressed in the parties' Points of Reply. Please note that the parties' Points of Reply are optional and intended to be shorter than the main submissions. The Points of Reply from either the Claimant or the Respondent should not contain new information.

NB: It is strongly preferred the length of Points of Reply should be 5 pages (including the submissions and supporting documentation). This may vary depending on the complexity of the subject matter.

4.4 *Fast-Track*: The Dispute Resolution Rules contain provisions limiting the length of parties' submissions in Fast-Track arbitration. Submissions are capped at five (5) pages in Points of Claim or Points of Defence with no more than twenty (20) pages of supporting documentation.

The parties only submit a Points of Claim and Points of Defence. The Arbitrator will request additional information if required, though the parties may submit an application for additional information to be



heard. This will generally only be granted if a party has not had a chance to submit on an issue raised by the other side. As the review of additional information falls outside the standard Fast Track process this may incur additional fees.

4.5 Cross-claims: Parties are not permitted to submit a cross-claim in Fast-Track arbitrations. Should a Respondent wish to cross-claim in Fast-Track arbitration, a separate Arbitration must be commenced and the relevant fees will apply. A party or parties can apply to consolidate the two arbitrations (at the discretion of the arbitrator) or if the new arbitration is commenced as a Full Arbitration (depending on the amount claimed and the Dispute Resolution Rules used) consolidation is at the discretion of all three arbitrators.

If a cross claim is commenced as a Full Arbitration, the Respondent's arbitration fees must be paid in full before the arbitration will be administered.

4.6 Expert Determination: The Dispute Resolution Rules contain provisions limiting the length of parties' submissions in Expert Determination. Submissions are capped at three (3) pages in Points of Claim or Points of Defence with no more than ten (10) pages of supporting documentation.

The outcome of an Expert Determination is not legally binding on the parties and cannot be used in a subsequent arbitration.

5. Costs:

5.1 Undertaking: The parties to a GTA arbitration undertake to pay GTA's legal support costs. Costs may be incurred even if an arbitration does not proceed to an award. The parties will also be jointly and severally liable for unpaid arbitration fees and the fees incurred in legal support to Arbitrators.

Arbitrations that run outside the standard process outlined in the Dispute Resolution Guidelines and Rules may incur additional fees as determined by GTA.

GTA reserves the right to withhold any interim or final award until all outstanding fees and costs of both parties have been paid.

5.2 Discontinuation/Settlement Prior to Award: If an arbitration is discontinued or settled, the parties' invoiced fees remain due and payable to GTA. The parties should allow for GTA legal support fees and outstanding arbitration fees as part of any settlement negotiations.

6. Issues to be determined by the parties:

In certain circumstances GTA will leave the parties to raise or consent to particular issues to ensure that the process remains party-driven and transparent.

6.1 Parties' onus: If a party has failed to comply with the GTA Dispute Resolution Rules in commencing or during arbitration proceedings, the onus is on the other party to raise this issue with GTA.

The parties should attempt to agree on any time extension or other steps necessary to remedy any default. If the parties cannot agree, they may refer the matter to GTA for determination.

6.2 Preliminary Issues: It is GTA's policy to accept (with limited exceptions) all disputes referred to it under the Dispute Resolution Rules, even though there may be objections to jurisdiction and/ or significant preliminary issues (such as time limits). As GTA is the administrator, and not the arbitrator, the Arbitration Tribunal will determine these issues, either as part of the final hearing, or by way of a preliminary hearing if requested by a party. If a preliminary hearing is requested, an application fee must be paid in full by the requesting party. An application for consolidation of

arbitrations will not attract this fee. The parties should also refer to section 16 of the Commercial Arbitration Act 2010 (NSW) in relation to objections to jurisdiction

GTA has adopted this policy because:

- a) in referring a matter to GTA, the Claimant warrants that it has a prima facie case, and that GTA has jurisdiction;
- b) GTA is not appraised of all the relevant facts at the commencement of a reference; and
- c) GTA is not a decision-making body and its determinations would not be subject to the operation of the *Commercial Arbitration Act*.

6.3 Breaches of Dispute Resolution Rules: Both parties may raise issues with GTA relating to general violations of the Dispute Resolution Rules including:

- a) failing to comply with directions set by the parties; and
- b) excessively long submissions.

Prior to constituting an Arbitration Tribunal, GTA has some discretion to enforce the Dispute Resolution Rules relating to these requirements. After the constitution of the Arbitration Tribunal, the matter will fall for determination to the Arbitration Tribunal.

Please note that in circumstances where submissions are out of time, the non-defaulting party may appeal to the Arbitration Tribunal that they should issue an award without the late submission. The Arbitration Tribunal has the discretion to do so.

In the event that preliminary issues are raised the Parties may incur additional fees.

7. Process:

In certain circumstances, the parties may be requested to take additional steps as part of the arbitration process.

7.1 Jurisdiction: In instances where the Respondent does not feel that GTA has jurisdiction to arbitrate the dispute, the Respondent should notify GTA and the Claimant in writing.

If the Claimant wishes to proceed with its case before GTA, the Respondent may be able to apply to a court to seek a stay of the arbitration process, in favour of court proceedings.

The other options available to the parties are:

- a) to agree that GTA does not have jurisdiction and there is a more appropriate forum for the dispute;
- b) either party notifies GTA and the other party that it would like jurisdiction to be determined as a preliminary issue before the main issues in the dispute are determined.

In the event that the arbitrators find that GTA does not have jurisdiction, they will issue an interim award to that effect. The successful party may claim costs associated with the determination of the preliminary issue. If the Respondent is successful, it may also claim its arbitration fees.

7.2 International Arbitration: Assuming the existence of an arbitration agreement between the parties (**Please see Section 2.1 Arbitration Agreement**), a Claimant may bring an arbitration against a foreign company. GTA encourages parties to consent to arbitration, however the Claimant may proceed with the arbitration, if the Respondent elects not to participate, and the Claimant may obtain an award.



Grain Trade Australia Limited Arbitration Guidelines – Amended 1 July 2022

Any arbitration will be determined in accordance with the GTA Dispute Resolution Rules, the Commercial Arbitration Act 2010 (NSW) and where one of the parties is in an overseas jurisdiction, the International Arbitration Act 1974 (Cth).

Enforcement of a successful award depends on the law and practice of the country in which the party is seeking to have the award enforced.

All parties should seek legal advice on this issue and GTA is not able to warrant that an award will be enforced in an overseas jurisdiction.

7.3 Court proceedings: If the Respondent in challenging GTA's jurisdiction or validity of GTA arbitration on other grounds elects to commence court proceedings, GTA will place the arbitration(s) on hold and abide by the decision of the court.

In circumstances where the dispute has been submitted to another tribunal or arbitration system, GTA will proceed with the arbitration unless the Claimant requests otherwise, or GTA is so ordered by the court.

7.4 Full Arbitration consolidation procedure. Please see **Section 2.3.a**

1. The party(s) requesting consolidation must notify GTA in writing of their request;
2. The Claimant must send in initiating documentation relating to each individual contract;
3. Consolidation can only occur if the parties agree to do so, or if the Arbitration Tribunal accepts a submission by one of the parties that the arbitrations should consolidate: see s.27c of the *Commercial Arbitration Act 2010 (NSW)*. The Arbitration Tribunal has the discretion not to permit consolidation if the requirements outlined at s.26 are not fulfilled.
4. In the commencement stage the parties will be charged the full fees for each arbitration being commenced. Upon payment of these fees GTA will permit the arbitrations to proceed. GTA may, at its sole discretion, rebate the parties part or all of the process fee only. This reimbursement may be for all contracts bar the contract with the highest amount of damages claimed. Rebates (if any) are at the sole discretion of the GTA CEO and will be determined with regard to the complexity and amounts being claimed in the arbitrations.
5. The parties are able to nominate the same set of arbitrators for each arbitration commenced, so that they may hear the arbitration if consolidation occurs.
6. If consolidation is agreed upon and/or permitted by the Arbitration Tribunal, rebates may be issued (where applicable) and the parties will be invited to make submissions in relation to the contracts. Please note that parties will not be permitted to extend the length of their submissions to cater for the consolidated arbitrations. The intention of consolidation is that the issues under each contract are able to be dealt with together, leading to shorter submissions than if there were separate arbitrations and the Arbitration Tribunal is not required to do the work of several arbitrations in one.

7.5 Fast-Track consolidation procedure: Parties are not able to consolidate Fast-Track arbitrations. The intention of Fast-Track arbitration is to expedite proceedings, with a single arbitrator involved in dealing with submissions. Multiple contracts invariably increase the workload and the administration of the arbitration as contracts have to be dealt with separately.

7.6 Default Awards: If a party fails to participate in an arbitration, the other party may apply to the Tribunal for a Default Award. A party seeking a Default Award should submit to GTA and the Tribunal;



7.6.1 Application for a Default Award: This should set out the basis for seeking the default award and (to the extent possible) attempt to anticipate the arguments that the non-participant would have raised and how the participant would have answered those arguments. This may apply particularly to the quantum of the claim and how any wash-out value is assessed.

7.6.2 Sworn or affirmed evidence. A party should appreciate that a Default Award may need to be enforced overseas. For that reason, it is important that the Default Award is based on facts established by the best evidence available, and not just on an assertion. In the normal course of an arbitration, facts are usually established through the exchange of submissions and supporting evidence. In the case of a Default Award, the Tribunal may only have received the Points of Claim, which will not generally be sufficient evidence on which to base the Default Award. A Tribunal may find it difficult to accept the truth and accuracy of allegations made in Points of Claim without some supporting evidence.

For example, it may be sufficient that a representative of the Claimant, with knowledge of facts and matters in dispute, deposes or affirms that the matters set out in the Points of Claim are true.

END.