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# Arbitration 174

**Date of Issue:** **November 2011**

**Claimant:** **DCT Seller**
**&**
**Respondent:** **DCT Buyer**

**Arbitration Committee (AC)**
- Andrew Wilsdon, nominated by GTA

**Claim**
Issues for determination:
- Dispute 1 – underweight container at overseas destination
- Dispute 2 – mouldy grain at overseas destination

**Details**
Dispute 1:

On or about 4 August, the Claimant received notice from the Respondent that it had been advised by its customer in China that one of the containers was significantly under weight. Container TGHU1131234 was noted on the Packing List as weighing 19.120 tonnes but on delivery was found to weigh 12 tonnes.

This assertion was supported by a photograph apparently showing the relevant container.

Dispute 2:

The complaint in this case was that at the point of destination, a substantial quantity of the oats were found to be mouldy.

**Award**
The Award is as follows;
1. That the Respondent pay to the Claimant forthwith the amount of A$33,092.32.
2. That the Respondent reimburse the Claimant for the arbitration fees the Claimant has paid, plus interest and costs.

**Award findings**
The AC found that:

Dispute 1:

The Arbitrator was not satisfied that the Respondent has produced any or any sufficient evidence on which I could find that container TGHU 1131234 was underweight at the time it was delivered at the Sydney container terminal.

Dispute 2:

The DCT Buyer faces a heavy burden of proof to prove defective quality at the time of delivery, but that is in the nature of the DCT contract and there are adequate safeguards built into the contract to protect the DCT Buyer should it choose to take advantage of them. Here the Buyer did not.

**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 No. 174**

**DCT Seller**

Claimant

and

**DCT buyer**

Respondent

# Award

## 1. Introduction

This is the award in an arbitration conducted under the Grain Trade Australia Ltd ("GTA") "Fast Track" arbitration rules. These rules are designed to facilitate the efficient resolution of disputes over relatively small amounts of money.

I was appointed by GTA as sole arbitrator. There has been no challenge to my appointment and find that this Tribunal has been validly constituted according to the GTA Dispute Resolution Rules and that I have jurisdiction to deal with the matters arising under the reference.

As it is a Fast Track arbitration, I have read and considered;

1. Submissions by the Claimant received by GTA on 15 March 2012; and
2. Submissions by the Respondent, received by GTA on or about 10 April 2012.

There is no "right of reply" in Fast Track arbitration.

### The First Dispute

There are two disputes between the parties, both concerning "DCT" or "Delivered Container Terminal" contracts.

The first dispute concerns a contract evidenced by Teague Australia Pty Ltd Broker's Note no. 18079/43107 dated 15 March 2011 for 216mt of feed oats, of the GTA standard, DCT Sydney, for "shipment" April 2011. The contract further provided that the oats were to be shipped in 12 x 20ft containers, each approximately 18mt.

The contract was performed without incident, in the sense that the containers were delivered to the terminal at Sydney. Despite the date appearing on the contract, the containers appear to have been packed in May, and delivered to the terminal in June. No complaint is made about this and I will assume this variation was by agreement.

On or about 4 August, the Claimant received notice from the Respondent that it had been advised by its customer in China that one of the containers was significantly under weight. Container TGHU1131234 was noted on the Packing List as weighing 19.120 tonnes but on delivery was found to weigh 12 tonnes.

This assertion was supported by a photograph apparently showing the relevant container.

In the 4 August email the Respondent asked the Claimant to investigate. The Claimant has produced 3 documents which appear to support the weight as noted on the Packing List, namely a Container Ticket/Weight Ticket dated 11 May 2011; a DCT Seller Delivery & Receival Sheet and a Container Weight Declaration all of which indicate the weight of the subject container as 19.12 tonnes, net.

The Respondent has little in the way of evidence to support its assertion, apart from the photograph mentioned above, and relies largely on conjecture.

Both parties refer to and seek to rely on Rule 16.1 of the GTA Trade Rules, which reads;

***Finality***

***All adjustments or compensation claimed based on defect of quality or condition or weights which shall be apparent upon reasonable inspection must be advised within five [5] business days after unloading or presentation of appropriate documents and must be formally confirmed by written notice, letter or facsimile within [30] consecutive days of delivery of the consignment.***

The application of Rule 16 to DCT contracts can produce a somewhat troublesome result, for obvious reasons.

A DCT consignment is delivered when it arrives at the container terminal. It is then shipped, usually shortly thereafter, to an export destination where the container will be opened and inspected, usually for the first time since packing. That may or may not be within the 30 days notice period. It will inevitably be outside the 5 day notice period.

This is compounded by the fact that the DCT Seller's obligation is to deliver goods of the contractual specification, quantity and weight, at the container terminal. The fact that the goods or containers fall outside that contractual specification at the point of unpacking is not necessarily evidence that they were outside specification when delivered at the container terminal.

This puts a substantial evidentiary burden on the DCT Buyer, but it is a burden inherent in the DCT Contract. Indeed, the DCT contract provides a way for this to be addressed; DCT contracts usually grant the DCT Buyer the right to inspect and sample the goods at the point

of packing. The Respondent had such a right in this case, but apparently chose not to exercise it.

**Finding in respect of the First Dispute**

In this the First Dispute, I find for the Claimant. I am not satisfied that the Respondent has produced any or any sufficient evidence on which I could find that container TGHU 1131234 was underweight at the time it was delivered at the Sydney container terminal.

**The Second Dispute**

This dispute also concerns DCT Contracts.

In this case they are also Teague Australia Pty Ltd Brokerage Contracts, nos. 17907/90936 dated 16 June 2011 and 17908/90937 dated 17 June 2011. Each contract was for 513mt Feed Oats of the GTA standard, DCT Sydney for shipment 1-31 August 2011, for shipment in 27 x 20ft containers, each approximately 19mt.

The complaint in this case was that at the point of destination, a substantial quantity of the oats were found to be mouldy.

As with the First Dispute, Rule 16 is relevant and was addressed by both parties in their submissions. Many of the comments and observations I made in respect of the First Dispute are relevant in respect of the Second Dispute both as they relate to the evidentiary burden, but also the effect of Rule 16.

Once again, the evidence supplied by the Respondent is not sufficient to allow me to find that any of the oats supplied under the above contracts were affected by mould at the time the containers were delivered at the Sydney container terminal.

Once again, the contract gave the DCT Buyer the right to inspect and sample the goods at the point of packing but, once again, the Respondent did not do so.

The failure to exercise this option to inspect and sample does not have the effect of converting the contract to a "condition final" contract. Under these contracts the Buyer will be able to take issue with the condition or quality of the grain at the point of destination, but will face a significant evidentiary burden of proving that the grain was not of the contractual specification when delivered at the terminal.

The Respondent has not done so in this case. For example, I cannot be confident that there has been identity preservation in the samples tested by SGS, Guangzhou Branch in its report of inspection carried out on 11-12 November 2011. Evidence produced by the Claimant suggests the containers said to contain the damaged oats had been collected from the container yard, unloaded then returned to the carrier on 22 October 2011, 3 weeks before the SGS inspection took place. The SGS report indicates that the oats were divided "into 4 sub-lots" but there is no confirmation, and perhaps no way that SGS could confirm, that those sub-lots related to the containers in question, or indeed from the Claimant's shipment, let alone confirm that the oats were in the same condition during the inspection in November as they must have been when delivered to the container terminal at Sydney in September 2011, 2 months earlier.

As I mentioned in relation to the First Dispute, the DCT Buyer faces a heavy burden of proof to prove defective quality at the time of delivery, but that is in the nature of the DCT contract and there are adequate safeguards built into the contract to protect the DCT Buyer should it choose to take advantage of them. Here the Buyer did not.

**Finding in respect of the Second Dispute**

In respect of the Second Dispute, I also find in favour of the Claimant.

**Award**

In both the First and Second Disputes the Respondent has purported to set-off the amounts claimed from amounts owning to the Claimant under other contracts.

It is appropriate that the Respondent pay the Claimant these amounts, plus the arbitration fees paid by the Claimant, plus interest and costs.

In respect of interest, while I note that the Claimant has a special condition in its contracts claiming interest on unpaid amounts at the rate of 10% per annum, calculated daily, this was not agreed as part of the broker's contract, nor do I believe that this is a commercial rate, and I award interest at the simple rate of 7% per annum from the date the sums were deducted.

**I therefore make my Award as follows;**

1. That the Respondent pay to the Claimant forthwith the amount of A$33,092.32.
2. That the Respondent reimburse the Claimant for the arbitration fees the Claimant has paid to GTA in the amount of $3181.81 (being $3500 less GST for which I assume the Claimant is entitled to an input tax credit, in any event).
3. That the Respondent pay to the Claimant interest on A$33,092.32 at the rate of 7% per annum from 15 October 2011.
4. It does not appear that the Claimant has incurred recoverable legal costs in respect of this arbitration, but if it has, then the Respondent should pay any reasonably recoverable legal costs.

**And I so publish my Award.**

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**Dated 23 May 2012**

Andrew Wilsdon, Arbitrator