

KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 18**

Date: **2025 02 03**
Docket: KBG-SA-01278-2022
Judicial Centre: Saskatoon

BETWEEN:

PARRISH & HEIMBECKER LTD.

Applicant

- and -

JEREMY WELTER

Respondent

Counsel:

Collin K. Hirschfeld, K.C.
Robert G. Kennedy, K.C.

for the applicant
for the respondent

FIAT
February 3, 2025

ELSON J.

Introduction

[1] The central issue in this application pertains to the enforcement, by international arbitration, of a contract under which the applicant agreed to purchase – and the respondent agreed to deliver – a quantity of canola. When the respondent did not deliver the canola on the stipulated date, the applicant took steps to enforce the contract under the framework of an arbitration scheme recognized by *The International*

Commercial Arbitration Act, SS 1988-89, c I-10.2 [ICAA]. Those steps eventually resulted in an arbitration award in the applicant's favour. It now applies for an order to enforce the award as a judgment of this Court.

[2] The respondent opposes the application. He contends that the contract underlying the arbitration award is “fundamentally unconscionable” and that public policy precludes this Court from recognizing and enforcing it. The asserted unconscionability of the contract is premised on two bases. First, it is contended that the “acts of God” clause unfairly protects only the applicant in the event of weather-related drought conditions. Secondly, the respondent notes the rules setting out the implied terms of the contract unfairly permit the applicant to stipulate its own damages, without the need to enter the marketplace and purchase the same quantity, grade and variety of canola as is outlined in the underlying contract. It follows, according to the respondent, that the resulting award is unconscionable and, therefore, contrary to public policy. As such, the applicable statutory framework precludes recognition and enforcement of the award in Saskatchewan.

[3] For the reasons that follow, I am satisfied that this Court has no choice but to recognize and enforce the arbitration award. Speaking to the respondent's objection, I do not find that recognition and enforcement of the award is contrary to public policy, a doctrine I find to be unrelated to, and distinct from, the question of unconscionability.

[4] Moreover, based on recent jurisprudence from this Court and the Saskatchewan Court of Appeal, I am satisfied that the question of unconscionability, if it did exist, is a matter the respondent was obliged to raise and argue before the arbitral tribunal. It is not a matter that can properly be addressed now before this Court.

Applicable Statutory Framework

[5] Before describing the background facts related to this application, I think

it helpful to reference the statutory framework that governs it. This Court has previously addressed the framework for the recognition and enforcement of foreign commercial arbitration awards, including cases involving the same applicant. I specifically note this Court’s decisions in *Parrish & Heimbecker Ltd. v TSM Winny Ag Ltd.*, 2020 SKQB 348 [*TSM Winny*], and *Parrish & Heimbecker Ltd. v Bukurak*, 2017 SKQB 322, 18 CPC (8th) 194.

[6] In *TSM Winny*, I referenced the multi-decade history of international negotiations that led first to the adoption of the so-called “New York Convention” (formally known as the United Nations’ Convention on the Recognition and Enforcement of Foreign Arbitral Awards) in 1958. The New York Convention ostensibly served as an international agreement designed to facilitate the cross-border recognition and enforcement of arbitral awards through a set of rules with worldwide application among its contracting states. See *Yugraneft Corp. v Rexx Management Corp.*, 2010 SCC 19 at para 9, [2010] 1 SCR 649 [*Yugraneft*]. Despite its laudable goals, the New York Convention did not catch on very quickly. For example, Canada did not accede to it until 1986.

[7] An event which may have accelerated support for the New York Convention is the adoption of the *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17, Ann I (21 June 1985) [Model Law]. The Model Law was formally adopted by the United Nations Commission on International Trade Law [UNCITRAL] and the United Nations General Assembly in 1985. Although the Model Law can be said to supplement or interact with the New York Convention, it is not an international agreement. Rather, and as aptly described by Rothstein J. in *Yugraneft*, at para 11, it is “a codification of international ‘best practices’ intended to serve as an example for domestic legislation.” In this regard, Rothstein J. specifically added that the Model Law follows the lead of the New York Convention in limiting the grounds on which a domestic court may refuse to recognize and enforce an international

arbitration award.

[8] In the mid to late 1980s, Saskatchewan enacted legislation to adopt and incorporate, as formal schedules, both the New York Convention and the application of the Model Law. Currently, ss. 4 and 5 of *The Enforcement of Foreign Arbitral Awards Act, 1996*, SS 1996, c E-9.12 [EFAA], stipulate that the New York Convention applies to the recognition and enforcement of foreign arbitral awards. Meanwhile, s. 3 of the *ICAA* stipulates that, subject to other provisions of the statute, the Model Law applies in Saskatchewan to international commercial arbitration agreements and awards. I note that in s. 2 of the *ICAA*, the Model Law is redescribed as the “International Law”. Hereafter in this judgment, I will reference the term set out in the statute.

[9] Both the New York Convention and the International Law, as incorporated in the two statutes, contain identical provisions related to the recognition and enforcement of international commercial arbitration awards. These provisions also include the stipulated grounds for refusing recognition or enforcement. In the New York Convention, the grounds are set out in Article V. In the Model Law/International Law, the identical wording appears in Article 36. Having regard to the respondent’s public policy defence, the relevant portion of Article 36 is subparagraph (1)(b)(ii), which reads as follows:

Article 36 – Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

...

(b) if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the recognition or enforcement of the award would

be contrary to the public policy of this State.

[Emphasis added]

[10] It is also noteworthy in the context of the present application, that the International Law contains provisions relating to the jurisdiction of the arbitral tribunal. Article 16 specifically sets out the jurisdiction of an arbitral tribunal, under the International Law, to rule on its own jurisdiction. This is known as the “competence-competence” principle. Article 16 reads as follows:

Article 16 — Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[Emphasis added]

Background

[11] There is no dispute that on January 5, 2021, the applicant, Parrish & Heimbecker Ltd., entered into a contract with the respondent, Jeremy Welter, for the purchase and delivery of 226.80 metric tonnes of 1CAN Canola W. A certified copy of the contract, exhibited into evidence, discloses that the respondent was to deliver the canola by September 30, 2021.

[12] The written contract between the parties consists of a two-page contract in a form prepared by the applicant, which the parties “e-signed” on each page. The second page of the contract sets out 18 clauses of terms and conditions. A central provision in the contract is Clause 12, which provides for two things. First, it stipulates to the application of the rules for grain trading adopted by the National Grain and Feed Association [NGFA]. These rules are more formally described as the National Grain and Feed Association Grain Trade Rules [Grain Trade Rules]. The Grain Trade Rules provide for terms that are to be implied in grain trade contracts unless the parties agree otherwise. Second, Clause 12 stipulates to the application of the National Grain and Feed Association Arbitration Rules [Arbitration Rules]. The Arbitration Rules essentially describes the procedure to be followed in the arbitration proceeding. Clause 12 reads as follows:

- 12) This contract shall be governed by the laws of the Province in which it was written and the laws of Canada as may be applicable therein except where an issue may be decided under the National Grain and Feed Association Grain Trade Rules. Any claim relating to this Contract shall be settled by arbitration under the National Grain and Feed Association Arbitration Rules as are in effect at the date of this agreement. The parties agree to submit to arbitration. Judgment upon any arbitration award may be entered in any court or tribunal of competent jurisdiction. Copies of the National Grain and Feed Association Trade Rules and National Grain and Feed Association Arbitration Rules are available upon request and also on the National Grain and

Feed Association's website at <http://www.ngfa.org>.

[Emphasis added]

[13] From the respondent's perspective, two other clauses factor in this dispute, namely, Clause 10 and Clause 7. Clause 10 addresses the buyer's inability to complete the contract as a result of circumstances beyond its control, including "acts of God". Clause 10 reads as follows:

- 10) Except as expressly stated herein, Buyer shall not be liable in any respect for failure or delay in the fulfillment [*sic*] or performance of this contract if hindered or prevented, directly or indirectly, by war, national emergency, inadequate [*sic*] transportation facilities, inability to secure fuel or power, fire[,] flood, windstorm or other acts of God, strikes, lockouts or other labour disturbances [*sic*], embargo, orders, or acts of any government or governmental agency or authority, accidents to machinery, or any cause of like or different kind beyond buyer's reasonable control. However, notwithstanding this provision, the Buyer shall have an additional 90 days beyond the expiry of delivery period to call for a delivery of the Commodity without penalty. If additional delivery options have not been provided by the Buyer by the end of the 90 day extension period, the Seller will be entitled to a \$3.00 per metric tonne penalty on the undelivered portion of the Contract. The original Contract and its terms will remain in force until the Buyer is able to receive and/or other delivery options are provided. If the Seller is unable to delivery the contracted quantity and quality when called for, this clause shall be deemed void and no penalty will be awarded. This clause does not pertain or apply to commercial transactions between the Buyer and other grain companies or commercial entities.

[14] Clause 7 addresses the circumstances where the seller of the grain cannot deliver it to the applicant. It obliges the seller to immediately advise the buyer, who may elect either to: (a) extend the time for delivery; (b) buy-in for the seller's account on the defaulted portion of the contract; or (c) cancel the defaulted portion of the contract at the difference between the contract price and the replacement cost plus a

stipulated fee. In this regard, Clause 7 reads as follows:

- 7) If Seller finds he/she cannot deliver the contracted quantity, Seller shall immediately advise Buyer. If Seller fails to notify Buyer of their ability to complete the contracted delivery, Seller's liability shall continue until Buyer can determine whether Seller has defaulted. Buyer, when so notified or upon such determination, shall by the close of the next business day elect either to: (a) agree with Seller to extend the time for delivery; or (b) after having given notice to Seller to complete the contract, buy-in for Seller's account the defaulted portion of the contract; or (c) after having given notice to Seller to complete the contract, cancel the defaulted portion of the contract at the difference between the contracted price and the replacement cost plus an administration fee of \$10 per metric tonne. Seller shall pay tBuyer on demand the amount as may be determined under paragraph 7(b) or (c), as may be applicable.

[15] As noted in the Introduction, the respondent did not deliver the canola by the stipulated date. Three weeks later, on October 21, 2021, the applicant sent a notice of delivery to the respondent advising that he would be in default of the contract if the remainder of the canola was not delivered by October 29, 2021. The letter also reminded the respondent that the Grain Trade Rules and the Arbitration Rules applied to the contract. This letter was followed by a default notice, dated November 1, 2021, in which one of the applicant's managers advised the respondent that he was deemed to be in default of the contract. The manager further advised the respondent that the applicant "had proceeded to buy-in a like amount of tonnage and quality". The cost of the buy-in was described as \$106,466.27. The manager informed the respondent that full payment of the said cost was required upon receipt of the cancellation invoice which had been enclosed with the letter.

[16] On November 19, 2021, the applicant submitted an arbitration complaint to the NGFA. The NGFA forwarded notice of the applicant's claim to the respondent by letter of December 15, 2021, sent by Federal Express. Despite receiving the notice,

the presented evidence and the subsequent arbitration award discloses that the respondent did not meaningfully participate in the arbitration process.

[17] Having made the above observation, I am satisfied that the respondent knew about the submission to arbitration. Although the respondent deposed otherwise, I find his evidence is persuasively contradicted by the affidavit evidence of Mary Hitchcock, the Director of Commercial/Arbitration Services and Project Management for the NGFA. Ms. Hitchcock's affidavit, which I accept as both credible and reliable, reveals that the respondent had multiple communications with her office after he received the initial notice of the applicant's claim. This communication began with an email from the respondent on January 19, 2022, which referenced the claim number and advised that the respondent would send his response "within the next few days".

[18] Following the respondent's email message, the evidence reveals further communication between the respondent and the NGFA on February 16, February 23, February 28, March 21, March 31, April 11, April 26, May 20, June 23, June 30, July 26 and July 28, 2022. The communication took various forms, including couriered documents and letters, telephone conversations, voicemail messages and another email message. In the July communications, Ms. Hitchcock had emailed another partially executed arbitration services contract, similar to one her office had earlier sent to the respondent, for him to sign. The respondent's reply email message said he would send it back shortly.

[19] As there was no further communication from the respondent by August 19, 2022, the NGFA issued an award containing an arbitration decision and default judgment, a copy of which is appended to this judgment as Schedule 1. It should be noted that, in the arbitration decision, the NGFA Secretary described its office's communications with the respondent.

[20] The specific terms of the award in the default judgment read as follows:

THEREFORE, IT IS ORDERED THAT:

1. Parrish and Heimbecker, Ltd. is awarded judgment against Jeremy Welter for 84,491,63 USD (converted by the plaintiff to equal 106,466.27 CAD).
2. Interest on the judgment shall accrue at the statutory rate available for judgments in the applicable jurisdiction from this date until paid in full. This award is not intended to preclude the plaintiff from pursuing an additional award for interest, legal fees or costs in a court of law.

Positions of the Parties

[21] Engaging the ground set out in s. 1(b)(ii) of Article 36 of the International Law, the respondent argues that it would be contrary to the public policy of Saskatchewan for this Court to recognize and enforce the arbitration award. His argument hinges on the assertion that his contract with the applicant is unconscionable and that such unconscionability compels a finding that an award based on the contract runs contrary to public policy.

[22] As stated in the Introduction, the respondent's unconscionability argument rests on two submissions. Firstly, he asserts that the "acts of God" clause in the contract is unconscionable in that it protects only the applicant in the event of weather-related drought conditions but affords no protection to the respondent. Secondly, the respondent says that the Grain Trade Rules unfairly permit the applicant to stipulate to its own damages, without the need to enter the marketplace and purchase the same quantity, grade and variety of canola as is outlined in the underlying contract.

[23] The applicant's position is much more straightforward and is also based on two submissions. First, it argues that the concept of public policy is not engaged by the unconscionability of a contract. Its second submission is that, irrespective of the public policy consideration, the contract in this case does not meet the elements of unconscionability.

Issues

[24] Having regard to the relevant statutory framework, the stated positions of the parties and a recent unreported decision of the Saskatchewan Court of Appeal, I conclude that the public policy issue is the only real issue to be resolved. Expressed more directly, that issue is whether it is contrary to the public policy of Saskatchewan for this Court to recognize and enforce an international arbitration award rendered to enforce a contract found to be unconscionable according to Saskatchewan law.

[25] In identifying this as the only real issue, I acknowledge that both parties invited the Court to address the question whether the underlying contract between the parties was unconscionable, and to do so irrespective of the Court's answer to the public policy question. Having regard to a 2024 decision of the Saskatchewan Court of Appeal that affirmed a decision of Currie J. (*Singer Enterprises Inc. v Parrish & Heimbecker Ltd.*, 2022 SKKB 268 [*Singer*], aff'd (February 7, 2024) CACV4140 (Sask CA)), I am satisfied that there is no meaningful purpose in this Court expressing a view on the alleged unconscionability of the contract in question. As I will explain later in this judgment, Currie J.'s decision related to an essentially identical contract as the present case. In it, my learned colleague concluded that the question of unconscionability was a matter that, pursuant to the competence-competence principle, fell within the jurisdiction of the arbitral tribunal. It follows, in my view, that it would be questionable, if not inappropriate, for this Court to express an opinion on a matter which, in the context of this arbitration process, it would never be called upon to decide.

Applicable Law and Analysis

Public Policy

[26] In my view, the phrase "public policy of the state", as used Article 36 of the International Law, must be seen as synonymous with the doctrine of public policy that forms part of both English and Canadian common law. This well recognized

doctrine is grounded in the notion that a superior court has the power, in specific and limited circumstances, to disable or nullify otherwise enforceable claims or defences. Although it has arguable application in other disputes, it is most often engaged in litigation challenging the terms of contracts, trust agreements and testamentary documents. As I explain under this heading, the doctrine focuses on whether the enforcement of a questioned claim or defence will harm, or will tend to harm, the public interest – not whether it portends harm to a specific party.

[27] Before going further, I would be remiss if I did not acknowledge the guidance I received from a well-cited article by Brandon Kain & Douglas T. Yoshida, “The Doctrine of Public Policy in Canadian Contract Law”, in Todd L. Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation, 2007* (Toronto: Thomson Carswell, 2007) at 1. The article sets out a helpful review of the English and pre-2007 Canadian jurisprudence that has grappled with the doctrine of public policy.

[28] As noted by Kain and Yoshida, the doctrine of public policy first emerged in England and evolved through three notable judgments of the House of Lords before the Supreme Court of Canada substantively addressed it in 1937. These judgments are *Egerton v Earl of Brownlow* (1853), 4 HL Cas 1 (HL); *Janson v Driefontein Consolidated Mines Ltd.*, [1902] AC 484 (HL) [*Janson*], and *Fender v St John-Mildmay* (1937), [1938] AC 1 (HL) (*sub nom. R v Mildmay*, [1937] 3 All ER 402 (HL)) [*Fender*]. Of the above three judgments, the decision in *Fender* has attracted the most attention from Canadian courts, having been cited in more than sixty reported decisions, including two appellate decisions in 2021.

[29] In *Fender*, a married man argued that his promise to marry the plaintiff, made after a decree *nisi* but before it became absolute, ran contrary to public policy. He posited that his promise could not be enforced because it conflicted with the matrimonial obligations he owed to his then wife.

[30] In a split decision, the Law Lords, rejected this argument. The majority, speaking through the separate judgments of Lord Atkin, Lord Thankerton and Lord Wright, affirmed the view that the doctrine of public policy has a narrow or restrictive application. Speaking directly to this point, Lord Atkin, at pages 11-12, cited earlier authority from *Janson*, which opined that categories of public policy were then closed. He followed this with the observation that the opinion expressed in *Janson* fortified the admonition for a restrictive approach to invoking public policy considerations. Lord Atkin described this restrictive approach as follows, at page 12:

... the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide. ...

[Emphasis added]

[31] Having expressed this view, Lord Atkin went on, again at page 12, to observe that the doctrine of public policy undoubtedly existed – but that it could apply only to prevent “harmful acts” and “harmful tendencies” that are “injurious to public interests”. Still later, at page 18, when discussing the nature of harmful tendencies in certain contracts, Lord Atkin drew a specific distinction between public policy reasons to enforce contracts and public policy reasons that would justify non-enforcement:

... If the public policy of enforcing contracts to do lawful acts is to be maintained, it must be defeated only where there is a practical danger of injury to the public by enforcing particular classes of contracts. ...

[Emphasis added]

[32] Six months after the judgment in *Fender*, the Supreme Court of Canada addressed the doctrine of public policy in *Millar Estate (Re)* (1937), [1938] SCR 1 [*Millar Estate*]. The appeal dealt with the enforceability of a clause in a will providing for a gift to the mother who, during the ten years after the testator’s death, had “given birth in Toronto to the greatest number of children” The Court, speaking through

the judgment of Duff C.J., concluded that the gift, as described, did not run contrary to public policy.

[33] In his reasons, Duff C.J. wrote, at page 7, that there are “at least two conditions which must be fulfilled to justify a refusal by the courts on grounds of public policy to give effect to a rule of law” As I read the two conditions, the first focuses on the underlying purpose of a public policy override, while the second focuses on the likelihood of harm if the rule of law is not overridden. Adopting language from the respective judgments of Lord Thankerton and Lord Atkin in *Fender*, Duff C.J. described these conditions as follows:

1. the prohibition based on public policy “is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole ...”; and
2. “the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds”.

[34] Since *Millar Estate*, the Supreme Court of Canada has addressed the doctrine of public policy in several cases. They include *Elsley v J.G. Collins Insurance Agencies Limited*, [1978] 2 SCR 916; *Shafron v KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 SCR 157; *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69 [*Tercon*]; *Douez v Facebook, Inc.*, 2017 SCC 33, [2017] 1 SCR 751; and *Uber Technologies Inc. v Heller*, 2020 SCC 16, [2020] 2 SCR 118 [*Uber*]. The issues engaged in these cases included the possible application of the doctrine to the enforceability of: (1) restrictive covenants in employment contracts; (2) exclusion of liability clauses; and (3) arbitration clauses.

[35] In listing the above authorities, I acknowledge that the discussions about

the doctrine's application in both *Tercon* and *Uber* appear in minority judgments. Even so, I think it noteworthy that the views about the nature of the doctrine of public policy, articulated in both minority judgments, were not expressly rejected by the respective majority judgments. I also find that these views have much to commend them.

[36] In *Tercon*, the plaintiff contractor sued the British Columbia Ministry of Transportation and Highways for breach of a contract said to have arisen from the plaintiff's submission of a request for proposal (RFP). The RFP contract contained an exclusion clause that purported to deny the plaintiff the right to pursue a claim for compensation over its participation in the RFP. Notwithstanding the exclusion clause, the plaintiff asserted that the Ministry had improperly awarded the principal contract to a non-compliant bidder. At trial, the trial judge awarded approximately \$3.3 million in damages to the plaintiff (*Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2006 BCSC 499, [2006] 6 WWR 275). In doing so, the Court determined that the Ministry's actions constituted a fundamental breach of the RFP contract. On appeal to the British Columbia Court of Appeal, the trial decision was reversed, with the Court holding that the exclusion clause was clear and unambiguous (*Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2007 BCCA 592, 289 DLR (4th) 647).

[37] On further appeal, the nine judges of the Supreme Court of Canada divided 5 to 4, with the majority restoring the trial judgment. Although all members of the Court agreed that the doctrine of fundamental breach should no longer apply, they disagreed on the interpretation and application of the exclusion clause. The majority, speaking through Cromwell J., concluded that the clause was ambiguous and should be construed *contra proferentum* against the Ministry.

[38] The minority judgment, written by Binnie J., found that the exclusion clause was not ambiguous. More particularly, the minority opined that, subject to the

possible considerations of unconscionability or public policy, there was no reason not to enforce the exclusion clause. In articulating this view, Binnie J. summarized the enquiries a court should undertake to assess the separate questions of unconscionability and public policy. As I read the summary, it contains a reasonably careful distinction between these two concepts. In this regard, Binnie J. wrote the following at paragraphs 121 to 123:

[121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter* [[1989] 1 SCR 426], at p. 462). This second issue has to do with contract formation, not breach.

[123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[Emphasis added]

[39] A similar distinction between public policy and unconscionability is discernible in Brown J.'s concurring minority judgment in *Uber*. In that case, a food delivery driver commenced a proposed class action against the defendant for violation of Ontario's statutory employment standards. The plaintiff's relationship with the defendant was purportedly governed by a service agreement containing a burdensome

dispute resolution clause. The clause required all disputes between the parties to be resolved through mediation and arbitration in the Netherlands, a process that also required administrative and filing fees of US\$14,500 and associated legal costs. At first instance, the action was stayed. The Ontario Court of Appeal set aside the stay, concluding, among other things, that the arbitration clause was unconscionable.

[40] On further appeal, the Supreme Court of Canada, in a split 8 to 1 judgment, dismissed the defendant's appeal. The majority decision, jointly written by Abella and Rowe JJ., addressed two specific issues: (1) whether it should add a new category of exceptions to the competence-competence principle for the resolution of jurisdictional questions related to arbitration; and (2) whether the arbitration clause in the service agreement was unconscionable. It decided the second question in the affirmative.

[41] Brown J. wrote a concurring minority judgment that specifically addressed the doctrine of public policy. While agreeing with the majority on the appeal's result, Brown J. rejected the application of the unconscionability doctrine in the analysis of the arbitration clause's enforceability. In the introductory synopsis of his view, at para. 101, he wrote:

[101] ... Contractual stipulations that foreclose access to legally determined dispute resolution according to law – are unenforceable not because they are unconscionable, but because they undermine the rule of law by denying access to justice, and are therefore contrary to public policy.

[42] In his more detailed reasons, Brown J. went on to reference the judgments in *Fender*, *Millar Estate* and *Tercon*. In doing so, he observed that the doctrine of public policy must not be applied through idiosyncratic judicial views and that existing public policy grounds for setting aside contracts are narrow and well-established. He then concluded that the contract before the Court came within one of those existing grounds.

Specifically, Brown J. found that it would be “injurious to the public interest” to give effect to a contract that purported to oust the Court’s supervisory jurisdiction. In these regards, he wrote the following at paras. 109-110 (several citations omitted):

[109] This public policy doctrine has been described by this Court as *fundamental* to Canadian contract law, and its “role in the enforcement of contracts has never been doubted” [citation omitted]. Of course, and as Côté J. cautions, public policy must not be used as a tool to prioritize idiosyncratic judicial views over the interests of contracting parties. But that is not a live concern under our law: courts have cautioned against the recognition of *new* heads of public policy [citation omitted], and the existing public policy grounds for setting aside specific types of contractual provisions are narrow and well-established [citation omitted]. This Court has relied on public policy sparingly, and most recently to limit the operation of forum selection clauses and exclusion clauses, which raise concerns relating to the administration of justice, and to limit the operation of restrictive covenants [citations omitted]. While the considerations relevant to each type of clause vary, public policy furnishes the common and narrowly framed solution. And by focusing on the specific rationale that suggests a certain type of clause is unenforceable, this Court has sought to ensure a disciplined approach by providing concrete guidance and developing specific principles that apply to similar provisions.

[110] The ground upon which I proceed is that which precludes an ouster of court jurisdiction or, more broadly, which protects the integrity of the justice system. As Lord Atkin stated in *Fender v. St. John-Mildmay* (1937), [1938] A.C. 1(U.K. H.L.), at p. 12, ousting the jurisdiction of the courts is harmful in itself and “injurious to public interests” [citation omitted]. A provision that penalizes or prohibits one party from enforcing the terms of their agreement directly undermines the administration of justice. There is nothing novel about the proposition that contracting parties, as a matter of public policy, cannot oust the court’s supervisory jurisdiction to resolve contractual disputes [citations omitted]. Indeed, irrespective of the value placed on freedom of contract, courts have consistently held that a contracting party’s right to legal recourse is “a right inalienable even by the concurrent will of the parties”.

[Emphasis added]

[43] I now turn to the application of the doctrine of public policy to the circumstances of this case.

[44] Based on the propositions enunciated in the relevant cases, including those in the cited minority judgments, I fully accept that the doctrine of public policy exists in Saskatchewan, albeit with a very narrow application. Described more specifically, the doctrine will disable or neutralize a rule of law or generally recognized right, asserted as part of a claim or defence, only where it is clearly shown that the operation of the rule or right is injurious to the province's public interests. In the field of contract law, this has been applied to specific types of contracts. While the list of these contracts may continue to evolve, they have thus far included: (1) contracts injurious to the state; (2) contracts injurious to or ousting the administration of justice; (3) contracts calling for or encouraging discrimination; (4) contracts in restraint of marriage; and (5) contracts in restraint of trade.

[45] The case law also suggests there are other limits to the doctrine's application. Beyond the boundary of injuriousness to a state's public interests, the doctrine of public policy, in its pure form, has no place in assessing the lawfulness, either at common law or equity, of an asserted right in an individual case. In litigation over a contractual dispute, which has no obvious public interest dimension, the resolution of that dispute will depend entirely on the application of common law and/or equitable principles of contract. By way of example, where a defendant avoids liability in contract through a successful plea of *non est factum*, the inability to enforce the subject contract has nothing to do with the doctrine of public policy.

[46] This notion also applies to an argument that a particular contract or agreement is unconscionable. To the extent the discussions in *Tercon* and *Uber* focussed on the nature of public policy, they clearly distinguished it from unconscionability. One can add to this analysis the concisely stated observation of

Griffin J.A. in *Pearce v 4 Pillars Consulting Group Inc.*, 2021 BCCA 198, 461 DLR (4th) 205. There, at para. 192, she drew a helpful and focussed distinction between these two “doctrinal cousins”:

[192] The concepts of unconscionability and public policy are separate but are doctrinal cousins, each of which provides grounds for departing from the general rule that parties’ contracts should be respected. Unconscionability focuses on the vulnerability of and unfairness to the party who is seeking to void the contract. Public policy focuses on the harm to society that would flow from upholding a particular contract.

[Emphasis added]

[47] In the context of the present application, this conceptual distinction is important because it necessarily means that, while unconscionability and public policy may both arise in a given case, the presence of one cannot, standing alone, reveal the presence of the other. An unconscionable contract between two parties, may not be injurious to the public interest or otherwise harm society – and thereby not run contrary to public policy. By the same token – and consistent with the observation of Brown J. in *Uber* – parties with no discernible inequality in bargaining power might freely enter into contracts which, if enforced, would be injurious to the public interest or otherwise harm society. Such contracts are not unconscionable but will almost certainly run contrary to public policy.

[48] Applying this understanding to the present application, I reject the respondent’s proposition that the unconscionability of his contract with the applicant – if established – means that the arbitration award enforcing the contract oversteps or defies public policy. While some members of the Saskatchewan public – perhaps even a majority – may be offended by an unconscionable contract, such idiosyncratic perspectives do not have the kind of public dimension that the doctrine of public policy engages.

[49] Moreover, it is important to note that, aside from the distinction between unconscionability and public policy considerations, the question of the purported unconscionability of the underlying contract, is not a matter for this Court to address – either before or after the arbitration process. I say this for two reasons. First, unconscionability is not among the statutory grounds, as set out in Article 36 of the International Law, for this Court to refuse recognition and enforcement of an *ICAA* arbitration award.

[50] The second reason, which is perhaps more significant, is that there is jurisprudence in Saskatchewan which holds that, in contracts governed by the *ICAA*, the question of unconscionability will almost always be a matter to be decided by the relevant arbitral tribunal. In this regard, I refer to the judgment of Currie J. in *Singer*. I will explain.

[51] In *Singer*, there was a grain sales contract involving the same purchaser as the applicant in the present case. The standardized terms of the contract were essentially identical to those in the present contract. They included incorporation of both the Grain Trade Rules and the Arbitration Rules. When the seller defaulted on its delivery obligations, the purchaser took steps to enforce the contract, including the initiation of arbitration proceedings. The seller responded by commencing an action, alleging unconscionability of the contract. In the meantime, it also sought an interlocutory injunction restraining the purchaser from pursuing arbitration. The purchaser responded with an application to stay the seller's action in favour of the arbitration stipulated in Clause 12. Resisting the stay application, the seller posited that the arbitration clause in the contract was itself unconscionable and that this matter could only be addressed by the Court. The purchaser, on the other hand, asserted that the question of unconscionability, related to any term in the contract, must be left to the arbitral tribunal.

[52] In his decision, Currie J. conducted a careful analysis of the contract, the ICAA and the International Law. Through his analysis, he rejected the seller’s argument that the arbitral tribunal could not rule on jurisdictional issues, including the purported unconscionability of the grain sales contract. More particularly, he concluded that: (1) the arbitration clause in the contract was not ambiguous (para. 21); (2) the clause could not be interpreted against the purchaser’s position based on the *contra proferentum* principle (para. 23); and (3) the arbitral tribunal was “empowered to rule on its own jurisdiction even when that issue touches on a matter of equity” (para. 34).

[53] Having said all this, perhaps the most important consideration in Currie J.’s analysis was the application of the so-called “competence-competence” principle. This principle, as described in *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34 at paras 84-85, [2007] 2 SCR 801, states that any challenge to an arbitrator’s jurisdiction must first be resolved by the arbitrator. The exception to this principle arises only where the jurisdictional challenge “is based solely on a question of law.” Applying this principle to the circumstances before him, Currie J. noted the two essential elements of an unconscionable contract – inequality of bargaining power and improvident bargain – and addressed whether they could be determined through a simple examination of the contract with only a cursory reference to the facts. In the end, he concluded, at paras. 58-61, that it required consideration of a meaningful factual matrix, which had to be left with the arbitral tribunal:

[58] The issue of whether the arbitration clause is unconscionable will be determined in part by a determination of whether, arising from an inequality of bargaining power, the arbitration clause constitutes an improvident bargain for Singer. As with the previous question, the question of improvident bargain is not one that will be determined with reference to the clause and the contracts *without* reference to any facts that would be specific to this case. Rather, the question will be determined with reference to — and, if Singer succeeds in its position, in reliance on — facts that are specific to this case.

[59] Determination of whether the arbitration clause constitutes an improvident bargain for Singer requires consideration of a meaningful factual matrix.

...

[60] Determining the unconscionability issue is not just a matter of interpreting a standard form provision. Rather, that issue must be determined with reference to the circumstances that are peculiar to this case. There is a meaningful factual matrix that must be considered.

[61] The question of the unconscionability of the arbitration clause, then, is one of mixed fact and law. It must be ruled on, in the first instance, not by the court but by the arbitral tribunal.

Conclusion

[54] In the end, I cannot conclude that the recognition and enforcement of the arbitration award is contrary to public policy.

[55] Accordingly, the Court directs that upon the reasonably timely filing of a certified copy of the agreement to arbitrate and a certified copy of the award, an order for its recognition and enforcement as a judgment of this Court may issue.

[56] The applicant shall have its costs of the application under Column 2.

“R.W. Elson J.

R.W. ELSON