

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2020 SKQB 348**

Date: **2020 12 31**
Docket: QBG 368 of 2020
Judicial Centre: Saskatoon

BETWEEN:

PARRISH & HEIMBECKER LTD.

PLAINTIFF

- and -

TSM WINNY AG LTD.

DEFENDANT

Counsel:

Nikita B. Rathwell
Terry J. Zakreski, Q.C.

for the plaintiff (applicant)
for the defendant (respondent)

FIAT
December 31, 2020

ELSON J.

Introduction

[1] In this application, the applicant, Parrish & Heimbecker Ltd. [P&H], applies for an order that this Court recognize and enforce an arbitration award made by the Appeals Committee of the National Grain and Feed Association [NGFA], headquartered in Arlington, Virginia. That award determined that the respondent, TSM Winny Ag Ltd. [TSM] owes P&H the sum of \$75,901.14 CAD.

[2] P&H asserts that the award was made within an arbitration framework

recognized and adopted by the Legislature in two statutes. These statutes are *The Enforcement of Foreign Arbitral Awards Act, 1996*, SS 1996, c E-9.12 [EFAA] and *The International Commercial Arbitration Act*, SS 1988-89, c I-10.2 [ICA]. As will be discussed later in this fiat, these two statutes respectively adopt an international convention and a codified “best practices” protocol for international commercial arbitration. The statutes form jurisdictional basis for P&H’s application.

[3] TSM resists the application on three grounds. First, it contends that there was no “agreement in writing” to submit the dispute between the parties to arbitration, as required by the applicable convention and protocol. Secondly, TSM contends that P&H failed to meet the procedural requirements for recognition and enforcement by not filing a certified or original copy of the arbitration agreement. Thirdly, TSM posits that the Appeals Committee arrived at its award in circumstances that exceeded the scope of the parties’ submission to arbitration, thereby depriving TSM of the opportunity to present its case on the matter which formed the basis of the award.

[4] For the reasons that follow, I am satisfied that P&H’s application must be adjourned in order to permit it to file certified copies of the Appeals Committee award and the document that constitutes the agreement for arbitration. In all other respects, I am satisfied that, but for the absence of the certified copies referenced above, the application should be allowed.

Framework for the Recognition and Enforcement of Foreign Commercial Arbitration

[5] Before narrating the history of this case, a discussion of the framework for the recognition and enforcement of foreign commercial arbitration is in order. Helpful sources of information for this discussion include one text resource and two authorities from the Saskatchewan Court of Appeal and the Supreme Court of Canada.

The text resource is J. Kenneth McEwan, Q.C. and Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, loose-leaf (2008) (Aurora: Canada Law Book, 2004). The two judicial decisions are *BWV Investments Ltd. v Saskferco Products Inc.* [1995] 2 WWR 1 (Sask CA) [BWV]; and *Yugraneft Corp. v Rexx Management Corp.*, 2010 SCC 19, [2010] 1 SCR 649 [Yugraneft].

[6] The framework discussion necessarily begins with respective decisions made by United Nations entities in 1958 and 1985. The first decision was made by the United Nations Conference on International Commercial Arbitration [Conference] at its 1958 meeting in New York. At that meeting, the Conference adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which became commonly known as the “New York Convention”. This decision was followed, 27 years later, by respective decisions of the United Nations Commission on International Trade Law [UNCITRAL] and the United Nations General Assembly to adopt the Model Law on International Commercial Arbitration [Model Law].

[7] The New York Convention is an international agreement, requiring state parties, described as Contracting States, to adopt and ratify its terms. Initially, it did not attract much attention or activity. Most of the state entities that eventually adopted and ratified the New York Convention did not act very quickly. Canada did not accede to it until 1986, then the 61st country to do so. Over time, the New York Convention gained more significance and impact. According to its website, 166 state parties had acceded to the New York Convention as of August 2020. (<www.newyorkconvention.org/countries> (31 December 2020))

[8] Following Canada’s accession, Saskatchewan was among the provinces to enact legislation to adopt and incorporate the terms of the New York Convention.

Initially, the Legislature did so by enacting *The Enforcement of Foreign Arbitral Awards Act*, SS 1986, c E-9.11 (since rep) [former *EFAA*]. The former *EFAA*, proclaimed in force on August 10, 1986, is the predecessor of the current statute, which replaced it in 1996. Under both the former and current *EFAA*, the Legislature stipulated that the New York Convention was to apply in Saskatchewan in accordance with its Article XII. Section 5 of both statutes contain limits on their application to the recognition and enforcement of awards in legal relationships that are considered as commercial pursuant to Saskatchewan law.

[9] Meanwhile, in 1988, the Legislature also enacted the *ICA*, proclaimed in force on June 15, 1988. The *ICA* recognizes the application of the Model Law to international commercial arbitration agreements and awards. More particularly, under s. 3 of the *ICA*, the Legislature recognizes, and directs that it shall apply to international commercial arbitration agreements and awards.

[10] It is important to note that, while they interact with each other and can both apply to the same arbitration proceeding, the New York Convention and the Model Law differ in their nature and character. As mentioned, the New York Convention is an international agreement that requires its Contracting States to ratify it. A description of its purpose and impact was referenced by the Supreme Court of Canada decision in *Yugraneft*. There, Rothstein J. wrote the following at para. 9:

9 The New York Convention was adopted in 1958 by the United Nations Conference on International Commercial Arbitration. The purpose of the Convention is to facilitate the cross-border recognition and enforcement of arbitral awards by establishing a single, uniform set of rules that apply worldwide. It requires each Contracting State to recognize and enforce arbitral awards made in the territory of another State, and that recognition and enforcement can only be refused on the limited grounds set out in art. V (see Appendix B). Pursuant to art. I, the obligation to recognize foreign awards applies not only to awards granted in other Contracting States, but also to those granted in all

States other than the one in which enforcement is being sought, regardless of whether or not they are party to the Convention.

[11] The Model Law, on the other hand, is not a treaty or an international agreement. Its purpose and character was also addressed in *Yugraneft* where Rothstein J. wrote the following at para. 11:

11 The Model Law was developed in 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). Unlike the New York Convention, which is a treaty, the Model Law is not an international agreement intended for ratification. Rather, it is a codification of international "best practices" intended to serve as an example for domestic legislation. The explanatory note of the UNCITRAL secretariat states that the Model Law

reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

(Model Law, Part Two, at para. 2)

The Model Law has been adopted, subject to some modifications, by every jurisdiction in Canada. Like the Convention, the Model Law limits the ability of national courts to interfere with international arbitration proceedings. Article 36 of the Model Law also limits the grounds on which enforcement of an international arbitral award may be refused (Appendix A). These grounds are essentially identical to those set out in art. V of the New York Convention.

[12] It is generally acknowledged that this framework for the recognition of international commercial arbitration awards, particularly reflected in the New York Convention, has been an unqualified success. The authors of *Commercial Arbitration in Canada*, at para. 1.30, describe the adoption of the New York Convention as "One of the most important events in the modern history of arbitration – if not *the* most important – ..." [Emphasis in the original]. The success was also acknowledged in *Yugraneft* at para 10, where Rothstein J. made the following observation:

10 The Convention is currently in force, having been ratified by over 140 countries, and is considered a great success. Lord Mustill, former judge of the Court of Appeal of England and Wales and member of the House of Lords, and former Vice-President of the International Court of Arbitration of the International Chamber of Commerce, has stated that the New York Convention

has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.

(M. J. Mustill, "Arbitration: History and Background" (1989), 6 *J. Int'l Arb.* 43, at p. 49)

[13] The provisions of the New York Convention which are particularly engaged in applications to recognize and enforce arbitration awards are Articles I, II, IV and V. These articles read as follows:

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "**arbitral awards**" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under Article X of this Convention, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them with

respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term **"agreement in writing"** shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter with respect to which the parties have made an agreement within the meaning of this article and at the request of one of the parties, shall refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article IV

1. To obtain the recognition and enforcement mentioned in Article III, the party applying for recognition and enforcement, at the time of the application, shall supply:

- a) The duly authenticated original award or a duly certified copy of the award;
- b) The original agreement referred to in Article II or a duly certified copy of the agreement.

2. If the said award or agreement is not made in an official language of the country in which the award is relied on, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[14] In Saskatchewan, the New York Convention and the Model Law have received judicial consideration and comment from both this Court and the Saskatchewan Court of Appeal. See *BWV; Schiff Food Products Inc. v Naber Seed & Grain Co. Ltd.* [1997] 1 WWR 124 (WL) (Sask QB) [*Schiff*]; *West Plains Co. v Northwest Organic Community Mills Co-operative Ltd.*, 2009 SKQB 162 and *Parrish & Heimbecker Ltd. v Bukurak*, 2017 SKQB 322, 18 CPC (8th) 194 [*Bukurak*].

[15] In *Bukurak* at para 11, Dawson J. identified six criteria that must be present to satisfy the New York Convention. These criteria, cross-referenced with the relevant article, where necessary, are as follows:

- (1) the arbitral award must derive from a commercial relationship (Article I, para. 3);

- (2) the arbitral award must have originated in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal (Article I, para. 1);
- (3) the parties in question must have agreed in writing to submit to the arbitration in question (Article II, paras. 1 and 2);
- (4) the arbitration agreement must be in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration (Article II, para. 1);
- (5) the parties seeking local enforcement of the arbitral award must file with the Court an original or certified copy of the arbitral award and a certified copy of the agreement to submit to arbitration (Article IV, paras. 1(a) and (b)); and
- (6) the Court asked to enforce the award must be satisfied that it should not refuse to do so on the basis of the circumstances outlined in Article V.

In this particular application, the dispute between the parties focuses the Court's attention on Article II and Article V of the New York Convention.

[16] The relevant articles of the Model Law in this dispute are: 1) Article 7, pertaining to the definition and form of an arbitration agreement; 2) Article 35, pertaining to the procedural requirements for recognition and enforcement of an award; and 3) Article 36(1)(a)(iii), pertaining to the scope of the submission to arbitration. These provisions read as follows:

Article 7 — Definition and form of arbitration agreement

(1) **"Arbitration agreement"** is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 35 — Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

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:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

...

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those

not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

[Emphasis added]

[17] A reading of Articles 35 and 36(1)(a)(iii) of the Model Law reveals two important observations. First, it is clear that, once the procedural requirements of Article 35 are met, the subject award “shall” be recognized and enforced. It follows that the burden of establishing the procedural requirements lies with the party seeking recognition and enforcement. Secondly, the opening words of Article 36 make it equally clear that, after presumptive recognition and enforcement is established, the responding party bears the burden of establishing one or more of the grounds for refusing recognition and enforcement in Article 36. Moreover, the use of the permissive word “may” supports the view that the Court may still allow the application even where one of the grounds for refusal is established. See *Schreter v Gasmac Inc.* (1992), 89 DLR (4th) 365 (WL) (Ont Ct J) at para 15; *Europcar Italia S.p.A. v Alba Tours International Inc.* 1997 CarswellOnt 91 (WL) (Ont Ct J) at para 12.

[18] Finally, it should be noted that the role of the NGFA in this framework is confined to providing an arbitration scheme for the resolution of disputes coming within the scope of its trade and arbitration rules. It has no direct role in the recognition and enforcement of a foreign arbitration award. As such, neither the parties or the Court should expect the NGFA arbitration panel or Appeals Committee to construe or apply provisions of either the New York Convention or the Model Law when considering the matters before them. It also follows that their consideration of the NGFA trade and arbitration rules cannot inform or assist the Court in its construction of the New York Convention and the Model Law. In this respect, their respective processes, while related, are substantially distinct.

Background

[19] Two affidavits were presented in respect of this application, one filed in support of the application and one in opposition. Surprisingly, the record of evidence considered in the arbitration was exhibited to the affidavit filed on behalf of TSM.

[20] The record begins with P&H's complaint, dated October 3, 2017. P&H appears to have filed two documents with the complaint. The first document is the purported contract between P&H and TSM, dated June 5, 2017. It consists of two pages, each signed by P&H's representative in Biggar, Saskatchewan, Annette Abrahamson. The first page is described as a "Purchase Confirmation", setting out the particulars of the transaction in the contract. As stated, it calls for the delivery, by TSM to P&H, of 2,042 metric tonnes of Grade 2 13.5 Canada Western Red Spring Wheat. The delivery date is specified as between October 1 and October 31, 2017. The second page of the purported contract sets out 18 clauses of terms and conditions. Of particular significance to this application is Clause 12, which calls for dispute resolution by arbitration through the NGFA. It 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 the 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>.

[21] Another clause that factored prominently in the award of the Appeals Committee is Clause 7. This contract term addresses circumstances where the seller of the grain – TSM in this case – cannot deliver it. 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. Seller shall pay to Buyer on demand the amount as may be determined under para 7(b) or (c), as may be applicable.

[22] The second document filed with the complaint is a document entitled the Contract Cancellation Invoice, dated June 28, 2017. This document purports to be the invoice charged by P&H to TSM arising from its alleged cancellation of the contract. The amount of the invoice is \$102,937.22 CAD.

[23] The arbitration record includes a "statement of facts", presumably prepared by P&H. For the most part, the statement consists of a chronology of events between June 2, 2017 and July 17, 2017. A brief summary of this chronology appears on the front page of the statement of facts and reads as follows:

On Friday, June 2 TSM Winny Ag Ltd agreed to enter into an Oct. delivery 2 cwsr 13.0 contract with P&H Hanover junction for 75,000 bushels with Annette Abrahamson via text message. On Monday June 5, Annette informed TSM Winny that the contract had been created on his behalf and confirmation was sent out via email on June 7. A string on conversations, emails and text messages ensued, with a total of 4 emails sent specifically requesting confirmation, and 3 text messages relating directing to the contract. During this time TSM Winny was hauling against his June cwsr contract, and received payment for his deliveries up until June 15. On June 23 P&H Hanover junction received the first indication via text from TSM Winny that he would not be signing the contract, and on June 28 the contract was cancelled.

[24] The chronology is more specific. It begins with an exchange of text messages on June 2, 2017 in which Ms. Abrahamson, on behalf of P&H, notified Trevor

Winny, the president of TSM, that P&H was prepared to pay \$6.90 per bushel for the grain in question. Mr. Winny's text message in reply said "OK can we do 75 000 bushels. Oct 6.90\$ for 13 protien [sic] 2 grade". After Ms. Abrahamson confirmed this arrangement by reply text and further confirmed that a contract had been created on June 5, she emailed the contract confirmation to Mr. Winny on June 7. On June 9, Ms. Abrahamson re-sent the email to Mr. Winny and advised that confirmation from TSM had not yet been received. In his reply email message, also on June 9, Mr. Winny wrote "Sorry love how the hell do i sign this thing." When no reply has been received by June 14 and June 21, Ms. Abrahamson sent respective email reminders to Mr. Winny.

[25] After Ms. Abrahamson's June 21 email message, the communication about the contract confirmation occurred through text messages. On June 23, Ms. Abrahamson inquired about the return and signing of the contract. Mr. Winny texted back "No you guys can buy all my grain when om done combining and i know whats in my bins. But til i know for sure no contracts without act of god [sic]". P&H treated the refusal to sign the contract as TSM's unwillingness to comply with it. On June 28, 2017, P&H sent its contract cancellation invoice.

[26] It should also be noted that some of the exhibited text messages pertained to grain deliveries made by TSM to P&H during the month of June. The grain was the same variety as that described in the contract. P&H paid for these deliveries up to June 15, 2017.

[27] In its answer to the complaint, TSM maintained that the alleged contract was never formed. Specifically, TSM asserted that Mr. Winny advised P&H, "at least 10 times" that TSM demanded two prerequisites before entering into a contract. One prerequisite was that the contract had to contain an "Act of God" clause and that the

drought conditions in place at the time needed to abate. That said, TSM did not deny or take issue with the chronology of events described by P&H.

[28] A panel of three arbitrators rendered the award, in first instance, on June 7, 2019. The panel's decision is set out in two parts. First, it decided that the parties had entered into a binding contract for the purchase and sale of grain. In arriving at this decision, the panel applied the NGFA rule pertaining to the confirmation of contracts. Essentially, it held that, because TSM had not notified P&H of its disagreement with the contract, "immediately" after it was sent, the contract had been confirmed. This part of the panel's award is captured in the following paragraph:

Award of the NGFA Arbitration Panel

Paragraph B of NGFA Grain Trade Rule 3 [Confirmation of Contracts] provides that if either the buyer or the seller fails to send a confirmation, the confirmation sent by the other party will be binding upon both parties, unless the confirming party has been immediately notified by the non-confirming party of any disagreement with the confirmation received. The evidence provided by the parties demonstrates that the parties discussed the terms of the GPO [Grain Purchase Order] on June 2, P&H sent the confirmation contract to TSM on June 7, and TSM replied on June 9 ("Sorry love, how the hell do I sign this thing."). Given the terms of NGFA Grain Trade Rule 3(B), the arbitrators concluded the contract was valid and binding.

[29] The second part of the panel's decision addressed the consequences of TSM's failure to deliver. In this respect, the panel decided that P&H was not entitled to any damages. It concluded that TSM's contractual obligation to deliver the grain remained in place until October 31, 2017, being the last delivery date. As such, the panel reasoned that P&H acted prematurely when it sent out the cancellation invoice on June 28, 2017. This part of the panel's award is captured in the following paragraphs:

NGFA Grain Trade Rule 28(A) [Seller's Non-Performance] provides if the seller fails to notify the buyer of his inability to complete the contract "the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has

defaulted.” Based on the evidence provided in this case, the arbitrators determined that at no point had TSM notified P&H of TSM’s inability to complete the contract. Given the lack of this notification from TSM and that delivery was not to occur until October 2017, the arbitrators concluded P&H acted outside of Rule 28(A) when it executed cancellation of the contract in June. TSM was aware of the contract and under the circumstances of this case, TSM retained the obligation and opportunity to perform under the contract despite the ambiguity and lack of responsiveness in the communications between the parties. Thus, P&H’s cancellation in June of the contract for delivery in October was prematurely and unnecessarily executed.

Based upon the information provided, by unanimous decision, the arbitrators denied the claims for monetary damages by P&H against TSM. The arbitrators also denied TSM’s request for legal expenses.

[30] In a notice of appeal, dated June 21, 2019, P&H appealed the panel’s award to the Appeals Committee of the NGFA. P&H asserted that the arbitration panel erred in its application of NGFA Grain Trade Rule 28 [Rule 28]. Specifically, P&H challenged the conclusion that TSM did not notify it of its inability to deliver. In P&H’s view, the panel missed the point and did not understand that TSM was actually “unwilling” to comply with a valid contract and its obligations thereunder.

[31] The Appeals Committee issued its award on January 10, 2020, unanimously allowing P&H’s appeal. As was the case with the arbitration panel’s award, the Appeals Committee’s award came in two parts. First, it agreed with the arbitration panel’s reasoning as to the existence of a valid and binding contract between P&H and TSM.

[32] In the second part of the Appeals Committee’s award, it disagreed with the panel that Rule 28 applied, at all. In this respect, it found that Clause 7 of the contract between the parties superseded operation of Rule 28. The Appeals Committee concluded that Clause 7 permitted P&H to determine when TSM had defaulted. The excerpt of the award that addressed this point reads as follows:

The appeals committee found that the contract language in P&H's Purchase Confirmation superseded NGFA Grain Trade Rule 28 regarding contract default. As shown below, P&H's contract clause permits the buyer to determine when the seller has defaulted. NGFA Grain Trade Rule 28 permits the liability of the seller to continue until the buyer, by the exercise of due diligence, can determine whether the seller has defaulted. Since TSM did not acknowledge or change any of the terms of the GPO, the following terms in P&H's original grain confirmation apply and determine this dispute: ...

[33] Further to the operation of Clause 7, the Appeals Committee concluded that Mr. Winny's text message of June 23, 2017 signified a default by TSM of the grain sale contract, thereby permitting P&H to act as it did. The excerpt of the award that set out this conclusion reads as follows:

The appeals committee also concluded that TSM defaulted on the contract on June 23, 2017, by way of their text to P&H which stated: *"No you guys can buy all my grain when om [sic] done combining and I know whats in my bins. But til I know for sure no contracts without act of god [sic]."* Hence, according to the contract terms, the default price should have been determined on the next business day which was Monday, June 26, 2017. MGEX December 2017 HRSW futures closed at \$6.664 per bushel (or \$244.89 per metric ton) on June 26.

[34] As mentioned in the Introduction to this fiat, the Appeals Committee awarded P&H the sum of \$75,901.14 CAD. The award consisted of monetary damages amounting to \$55,481.14 CAD and administration fees of \$20,420 CAD.

[35] In its application for recognition and enforcement, P&H separately filed a photocopy of the signed arbitration award. The contract was not filed separately. Rather, it was exhibited to the affidavit of P&H's representative. Although counsel's brief asserted that "certified" copies of these documents had been filed, there is no indication of any specific form of certification shown on either document.

Positions of the Parties

[36] P&H argues that there are no obstacles to this Court issuing the requested order to recognize and enforce the award as a judgment of the Court. It maintains that the issues raised by TSM have already been addressed in the arbitration before the Appeals Committee. P&H asserts that the Court should extend deference to the findings of the Appeals Committee in deciding whether to recognize and enforce the award.

[37] As earlier highlighted, TSM's resistance to this application is premised on three grounds. First, it posits that there was no "agreement in writing" to arbitrate disputes between the parties as required by the New York Convention and the Model Law. TSM contends that there was no signed written agreement between the parties and, as such, the arbitral clause in the contract did not meet the mandated requirements.

[38] The second ground of TSM's argument surrounds the observation that P&H did not file a certified or original copy of the agreement to submit to arbitration, as required by Article IV of the New York Convention.

[39] The third and final ground for TSM's opposition to this application pertains to the scope of the issue presented to the Appeals Committee. In this respect, TSM notes that the arguments presented to the Appeals Committee, by both parties, focused on the interpretation of Rule 28. Despite the focus of both parties' respective arguments, the Appeals Committee concluded that the terms of the contract superseded Rule 28, thereby permitting P&H to regard the contract as cancelled and to claim damages therefor. TSM contends that this was beyond the scope of the submissions received by it. The argument continues with the observation that TSM and its counsel did not have an opportunity to respond to such a position.

Law and Analysis

Agreement in Writing

[40] The issue whether there was an agreement in writing to submit this dispute to arbitration particularly focuses on the words in para. 2 of Article II of the New York Convention. As earlier recited, that provision stipulates that an “... ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”. TSM asserts that, before June 23, 2017, the only communication consisted of text and email messages in which P&H asked TSM to return a signed contract, which was never done.

[41] I am not persuaded by TSM’s argument on this point. First of all, having regard to the wording of both the New York Convention and the Model Law, I am satisfied that, while the wording requires the arbitration agreement to be an “agreement in writing”, there is no formal requirement that such an agreement be signed by both parties. In particular, I note that Article II’s definition of an “agreement in writing” is inclusive. Aside from signed agreements, the definition also applies to an exchange of letters or telegrams. Given the absence of text and email messages in 1958, when the New York Convention was created, I think it only logical for the Court to modernize these words and find that the reference to “telegrams” should include other similar forms of electronic communication, such as facsimile, text and email messages.

[42] Support for this view comes from the decision of this Court in *Schiff*, where Wedge J. applied a liberal construction to Article 7 of the Model Law. In *Schiff*, the applicant was a U.S. company seeking to purchase a quantity of oregano from the respondent, a Saskatchewan company. The applicant sent, apparently by facsimile, a written contract setting out the amount and price of the product to be purchased. The

contract included an arbitral clause. Although the contract was never signed, the respondent sent a sample of the product to the applicant, where it was approved. Ultimately, the respondent was not able to deliver. The matter went to arbitration, where the applicant received an award in its favour. The respondent refused to participate in the arbitration.

[43] When the applicant sought recognition and enforcement of the award, the respondent asserted that there was no “agreement in writing”, as required by Article 7 of the Model Law. Wedge J. rejected the assertion. After finding that the respondent’s provision of a sample pointed directly to the existence of a contract, she addressed the definition of an “agreement in writing” in paras. 13-16:

13 Although the precise wording is almost 40 years old and appears in comparable legislation in many countries, there is a paucity of consistent judicial interpretation of the words “agreement in writing.” Courts in some countries have interpreted the phrase narrowly, holding that the mere knowledge of the existence of a written document was not enough; the agreement to be bound by arbitration should be signed by both parties. Other courts giving the words “exchange of letters, telex etc.,” in the article their ordinary meaning, have given effect to arbitration clauses where one party has invoked the process and the other party is aware of the arbitration clause.

14 The above observations were gleaned from a commentary on the problem of divergent interpretations, in the *Yearbook of the United Nations Commission on International Trade Law*, 1979, Volume X, 104.

15 In para. 25, the author describes a fact situation similar to the one here.

25. A different problem arises in the rather common fact situation that the contract does not contain an arbitral clause as a result of express agreement but that the parties refer to general conditions, or use a standard form, containing an arbitral clause. Here, one could hesitate to recognize such a reference as a valid arbitration agreement in view of the purpose of the form requirement under article II. Most courts, however, have regarded the incorporation as sufficient, for example, with regard to general conditions, to standard forms of contract, and charter parties referred to in bills of lading.

16 In the absence of an express requirement for signatures in the statute (which does appear in the equivalent English legislation), I think in this age of electronic international business transactions, that a liberal interpretation should be given to this article. The incorporation of the arbitral cause in a standard form contract is valid.

[44] Aside from the interpretation of the phrase “agreement in writing”, I am persuaded that the comments in *Schiff*, about the respondent’s conduct pointing directly to the existence of a contract, also resonates in this application. In this regard, both the evidence and the findings on arbitration show that Mr. Winny, on behalf of TSM, had received the contract sent by Ms. Abrahamson. From this, he knew, or ought to have known, that P&H intended to contract with his company on the basis of the terms set out within the contract, including the submission to arbitration in Clause 12. If Mr. Winny disagreed with the terms, he was obliged to notify P&H before delivering any grain on the basis of that contract. I am satisfied that, by its conduct, TSM affirmed the contract which was presented to it in written form. See *Saint John Tug Boat Co. Ltd. v Irving Refining Ltd.*, [1964] SCR 614 at 621-2, also cited in *Schiff*.

Certified or Original Copy of Arbitration Agreement

[45] Parties who seek recognition and enforcement of an international arbitration award are required to file evidence of the award and the agreement to submit the matter to arbitration. More particularly, both the New York Convention and the Model Law require that this evidence is filed in a particular form. Article IV (1) of the New York Convention and Article 35(2) of the Model Law require the applicant to file: 1) the duly authenticated original award or a duly certified copy of the award; and 2) the original agreement by which the parties agreed to submit their dispute to arbitration or a duly certified copy of the agreement.

[46] In the present case, P&H asserted, in their counsel's brief, that certified copies of these documents had been filed. As mentioned in the narration of the background facts, copies of both the award and the contract can be found on the file. However, there is no indication of the documents being "certified" as such.

[47] Respectfully, I do not accept that either of the documents, as filed, are "certified" in a manner that this Court could accept for the purposes of this application. Although the phrase "certified" is not formally defined in either the New York Convention or the Model Law, there is consensus in the authorities on an applicable definition. That consensus suggests that a copy of a document or record is certified where the officer, to whose custody the original document or record is entrusted, signs and certifies a document as a true copy of the original. See *R v Tatomir*, 1989 ABCA 233, [1990] 1 WWR 470 at paras 10-12 and *Kanto Yakin Kogyo Kabushiki-Kaisha v Can-Eng Manufacturing Ltd.* (1992), 7 OR (3d) 779 (WL) (Ont Ct J) [*Can-Eng Manufacturing*] at paras 38-40. In the case of the Appeals Committee award, certification from an appropriate officer with the NGFA would have sufficed. With respect to the contract document, I am satisfied that it could be certified by the appropriate officer of P&H. In this respect, it would not have been necessary to certify anything more than the two page document containing the purchase confirmation and the terms, where Clause 12 is contained.

[48] Despite the absence of the required certified record, I do not believe it is appropriate for the Court simply to dismiss the application. This is not a case of creating documents that do not exist. While TSM questioned the validity of the contract document as something binding upon it, it does not question the existence of the document or the Appeals Committee award. All of this having been said, the procedural requirements are mandatory and must be respected. Under such circumstances, I think it more appropriate for the Court to adjourn the application and allow time for P&H to

file the necessary documents. This approach is not inconsistent with that followed in *Can-Eng Manufacturing*, where the applicant neglected to file certified copies of the arbitration agreement and award, but did so after the matter was argued.

Award is Beyond Scope of the Submission to Arbitration

[49] It is not disputed that, when the appeal was pursued before the Appeals Committee, both P&H and TSM pursued their respective arguments on the specific application of Rule 28. Neither party addressed the question whether the terms of the contract superseded Rule 28, a question that ultimately informed the Appeals Committee's analysis. TSM argues that, by doing so, the Appeals Committee exceeded the scope of the submission to arbitration. It further posits that it was prejudiced by the Appeals Committee's actions in this respect, and that the Court should decline to recognize and enforce the award.

[50] TSM's argument presents the Court with two questions. The first question pertains to whether, as worded in Article 36(1)(a)(iii) of the Model Law, the Appeals Committee dealt with the dispute not contemplated by the submission to arbitration, or not falling within it. The second question, which arises only after an affirmative answer to the first question, is whether the Court should exercise its discretion not to refuse recognition and enforcement despite the Appeals Committee having exceeded its jurisdiction.

[51] Turning to the first question, I am satisfied that it must be answered in the affirmative. Based on the material before the Court, there is little doubt that the Appeals Committee premised its analysis on a basis that was not part of either the notice of appeal or the respective arguments it received. Although one could reasonably argue that the dispute between the parties was confined to determining whether P&H was

entitled to damages for TSM's failure to perform, I am satisfied that the dispute was more nuanced than that. It is clear that the core features of each side's argument focused on Rule 28 – not the terms of the contract.

[52] I now turn to the second question. Despite the affirmative answer to the first question, I am satisfied that the Appeals Committee's excess does not justify a dismissal of this application. I accept that it was unfortunate for the Appeals Committee to have addressed the question in the manner it did, without giving the parties an opportunity to address the point. That said, the Appeals Committee clearly believed it was entitled to act as it did. More directly, there is no evidence of any action taken by TSM to pursue a judicial challenge of the award in the United States, or whether such a challenge was available to it.

[53] Secondly, there is no evidence before the Court, either by affidavit or through counsel's submissions, of a reasonably persuasive argument TSM could have advanced if it were aware of the reasoning the Appeals Committee eventually applied. In my view, unless TSM could demonstrate that such an argument was available to challenge the Appeals Committee's analysis, it could not assert any palpable prejudice.

[54] Overall, I am persuaded that the general purpose of the New York Convention and the Model Law, together with the legislation that incorporates them, favour resolution in arbitration proceedings similar to that conducted in this case. It follows that, after the procedural requirements are established, recognition and enforcement of an award should not be lightly refused. I am persuaded that provisions, such as Article 36(1)(a)(iii), should be narrowly construed and applied. Unless a responding party can demonstrate palpable and overriding prejudice, akin to a denial of natural justice, recognition and enforcement of an award should not be refused.

Conclusion

[55] In the result, and except for the absence of the necessary certified documentation, I do not find any merit in TSM's argument that the application for recognition and enforcement of the Appeals Committee award should be dismissed. Accordingly, the Court finds that, upon reasonably timely filing of a certified copy of the agreement to arbitrate and a certified copy of the Appeals Committee award, an order for the recognition and enforcement of the award may issue.

[56] While I am satisfied that P&H should have their costs of this application, I reserve my decision on the particular amount of those costs until after the relevant certified documents have been filed.

J.
R.W. ELSON