2023 CANADIAN COMMERCIAL ARBITRATION CASE LAW: A YEAR IN REVIEW

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I. INTRODUCTION

The year 2023 was characterized by a dearth of cases that significantly advanced or changed arbitration law in Canada. Generally, the most noteworthy cases in 2023 represent extensions of trends that were reported in last year's case law review.[1]

A standout exception was the Ontario Superior Court of Justice's decision in *Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al.*,[2] in which an international award was set aside on the basis of the arbitrator's breach of the duty to disclose and reasonable apprehension of bias. *Aroma* generated sustained interest and discussion because it was the first significant Canadian case addressing the thorny issue of multiple appointments. For many, the outcome was surprising because it did not follow logically from the facts and analysis in

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[1] Lisa C Munro, "A Year in Review of Canadian Commercial Arbitration Case Law (2022)", (2023) 3:2 Can J Comm Arb 181.

[2] 2023 ONSC 1827 (Comm List) [*Aroma*].

the leading United Kingdom case on multiple appointments, *Halliburton Company v Chubb Bermuda Insurance Ltd.*, which was cited in *Aroma*.[3]

In this 2023 case law review, we provide a snapshot of how Canadian courts have addressed arbitration issues that have emerged in prior years (such as the binding of non-signatories to arbitration and court review of preliminary jurisdictional rulings), as well as newer issues (such as apprehension of bias and the appointment of *amici curiae* to assist the court in interpreting arbitration law in a manner consistent with international standards.

II. BINDING NON-SIGNATORIES TO ARBITRATION

In *3-Sigma Consulting Inc. v Ostara Nutrient Recovery Technologies Inc.*, the British Columbia Supreme Court stayed the plaintiffs' claims in favour of arbitration although several parties to the proceeding were not signatories to the shareholder agreement containing an arbitration clause.[4]

The plaintiffs, minority shareholders of Ostara, commenced this action alleging that the defendants—Ostara and its majority shareholders, directors, and senior management—had deprived them of share value. The defendants sought an order staying the action, pursuant to s 7 of BC's *Arbitration Act*, based on a mandatory arbitration clause in the Ostara shareholders agreement.[5] The clause required that claims "arising from or in connection with the shareholder agreement" be submitted to arbitration.

The Court held that the defendants succeeded in making an "arguable case" that the parties and issues in dispute were

[3] [2020] UKSC 48 [*Halliburton*].

[4] *3-Sigma Consulting Inc. v Ostara Nutrient Recovery Technologies Inc.*, 2023 BCSC 100.

[5] *Arbitration Act*, SBC 2020, c 2, s 7.

subject to the arbitration agreement, and granted the stay. In particular:

a) In opposing a stay, the plaintiffs relied on the fact that most of the plaintiffs, and half of the defendants, were not parties to the shareholder agreement containing the arbitration clause. The defendants argued that, as long as the claims subject to the arbitration agreement were intertwined with the claims advanced by non-signatories, all claims should be stayed in favour of arbitration. The Court rejected the defendants' submission to this effect, but held there was an arguable case that the shareholder agreements captured all shareholders (signatories or not) and that this point could not be addressed through a superficial review of the record. It therefore should be addressed by the arbitral tribunal at first instance.

b) The Court held that the language of the arbitration clause was sufficiently broad to include claims arising under or in connection with the agreement, not only claims sounding in contract. Because there was a nexus between the agreement and the claims or defences, the action was stayed to allow the tribunal to address the matter of jurisdiction.

The B.C. Court specifically rejected the argument that intertwined claims by signatories and non-signatories is a basis to stay an action in favour of arbitration.

In Alberta, the Courts tackled the question of whether non-signatories to a contract should be bound by an arbitration clause through application of more traditional principles of contract interpretation. In *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc.*, for example, the Alberta Court of King's Bench considered whether a third party beneficiary of a construction contract was bound by the

arbitration clause contained in the contract.[6] The plaintiff was not a signatory, but had rights to enforce certain contractual warranties as a non-party. It commenced an action seeking to enforce them. The defendant, a signatory and party to the contract, sought a stay of proceedings in favour of arbitration. The Court held that this was a matter of interpreting the contract language. It noted that some dispute resolution provisions applied only to "parties", while other provisions referred more generally to all disputes arising under the contract and did not expressly apply only to "parties". The arbitration provisions broadly required arbitration of "all disputes" under the contract. The Court therefore held that the plaintiff was required to arbitrate its contract warranty claims, even though it was neither a signatory to the arbitration agreement nor a party to the contract, but its non-contract claim in negligence was not arbitrable.

Likewise, in *LAPP Corporation v Alberta*, the Alberta Court of King's Bench applied agency principles to bind a non-signatory principal to an arbitration agreement to which its agent was a signatory.[7] The arbitration agreement at issue was contained in an Investment Management Agreement between three Alberta public pension plans and Alberta Investment Management Corporation (AIMCo), a fully state-owned investment management services provider created by statute. The statute provides that AIMCo is an agent of the Crown in right of Alberta. The signatory pension plans commenced an arbitration against AIMCo for alleged investment losses, with Alberta as co-respondent. Alberta contested jurisdiction on the basis that it was not a signatory to the arbitration agreement. The arbitrator agreed and made a preliminary ruling that he had no jurisdiction over Alberta; however, the Court ruled that Alberta was a necessary and proper party to the arbitration, as disclosed

[6] *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc.*, 2023 ABKB 545.

[7] *LAPP Corporation v Alberta*, 2023 ABKB 566.

principal. AIMCo was an agent of the Crown "for all purposes" and had no power to act otherwise than on behalf of Alberta.

These cases highlight the difference in approach as compared to Québec, where there has been a rising trend over the last couple of years of bringing non-signatories to arbitration agreements into arbitration in circumstances where claims between signatories and non-signatories are intertwined.[8] This approach appears to be rooted in shareholder disputes where an arbitration clause is present in a shareholder agreement, to which corporate parties are bound by signatories who are officers, directors, and/or shareholders of the corporation. In such cases, courts in Québec have bound the individuals to the arbitration clause personally.[9] Québec is an outlier in approaching the non-signatories issue in this manner.

It will be interesting to follow subsequent case law on this issue across Canada, to see if one of these approaches to the issue of non-signatories prevails as the preferable one on a national basis. We expect that other provincial courts generally will prefer an approach grounded in known principles of contract interpretation and agency, rather than the "intertwined claims" approach currently used in Québec.

III. COURT REVIEW OF TRIBUNALS' PRELIMINARY RULINGS ON JURISDICTION

In recent years, there has been a lack of clarity in the case law as to the nature of applications in which, following a tribunal's ruling on jurisdiction "as a preliminary question", the

[8] See, for example, *Tessier v 2428-8516 Québec inc*., 2022 QCCS 3159; *Newtech Waste Solutions inc. v Asselin*, 2022 QCCS 3537; *10053686 Canada inc. v Tang*, 2021 QCCS 3467; *Cesario v Regnoux*, 2021 QCCS 3009.

[9] *Décarel inc. c Concordia Project Management Ltd*., 1996 CanLII 5747 (QCCA), is the leading case on this approach.

court is asked to "decide the matter".[10] The Ontario Divisional Court clarified this issue in 2021 in *Russian Federation v Luxtona Limited*, finding that challenges to such jurisdictional rulings proceed by way of a hearing *de novo*.[11] This decision, and its two contradictory lower court decisions, were reviewed in last year's case law review.[12] They were among the most-discussed arbitration cases in both 2021 and 2022.[13]

The Divisional Court's decision was appealed, and noteworthy in 2023 was the release of the Ontario Court of Appeal's decision. The Court dismissed the appeal, upholding the Divisional Court's decision.[14]

As a result, Ontario's highest court now has confirmed that a challenge to a jurisdictional determination decided "as a preliminary question" proceeds as a hearing *de novo*. This has significant implications for the evidence admissible on such a challenge, including that parties are entitled, as of right, to submit new evidence—although the Court cautioned parties that a failure to introduce evidence at the jurisdictional hearing before the arbitral tribunal may go to the weight of that evidence in a subsequent court challenge.

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[10] See, for example, UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006), art 16(3) [*Model Law*]; *Arbitration Act*, 1991, SO 1991, c 17, s 17(7)-(8) [*ON Arbitration Act*]; *Arbitration Act*, RSA 2000, c A-43, s 17(8)-(9).

[11] *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 (Div Ct).

[12] Lisa C Munro, "A Year in Review of Canadian Commercial Arbitration Case Law (2022)", (2023) 3:2 Can J Comm Arb 181 at 187-191.

[13] For further detail on the underlying facts and lower court decisions in *Russian Federation v Luxtona Limited*, see Lisa C Munro, "A Year in Review of Canadian Commercial Arbitration Case Law (2022)", (2023) 3:2 Can J Comm Arb 181, and Lisa C. Munro, "2021 Canadian Commercial Arbitration Case Law: A Year in Review", (2022) 2:2 Can J Comm Arb 71.

[14] *Russian Federation v Luxtona Limited*, 2023 ONCA 393 [*Luxtona*].

Luxtona (Divisional Court or Court of Appeal) has been followed and applied in all provinces that are home to Canada's most significant arbitral seats.[15]

Nevertheless, the future of the *de novo* review may not yet be finally settled.

In reaching their conclusions, the Ontario Divisional Court and Court of Appeal in *Luxtona* relied on the "uniformity principle"—the desire that Ontario's arbitration regime be coherent with those of other countries—and a "strong international consensus" in favour of a *de novo* hearing in these circumstances. The Ontario courts specifically cited *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*,[16] a 2010 decision of the UK Supreme Court, as the leading international case on this issue and representing a "strong international consensus".

However, in September 2023, the Law Commission of England & Wales issued a Final Report and draft bill in which it recommended reform of section 67 of England's *Arbitration Act 1996*; specifically, the provision governing court applications challenging an arbitral tribunal's substantive jurisdiction (which includes whether there is a valid arbitration agreement; whether the arbitral tribunal is properly constituted; and what matters have been submitted to arbitration in accordance with the arbitration agreement).[17] The Law Commission raised

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[15] See, for example, *Ontario (Minister of Northern Development, Mines, Natural Resources and Forestry) v HugoMB Contracting Inc.*, 2023 ONSC 3513 at para 11; *Hornepayne First Nation v Ontario First Nations (2008) Ltd.*, 2021 ONSC 5534; *lululemon athletica canada inc. v Industrial Color Productions Inc.*, 2021 BCCA 428 at para 43; *Hypertec Real Estate Inc. c Equinix Canada Ltd.*, 2023 QCCS 2103 at para 24; *Ong v Fedoruk*, 2022 ABQB 557 at para 37.

[16] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46.

[17] Law Commission, "Review of the Arbitration Act 1996: Final report and Bill", Law Com No 413 (6 September 2023) <https://s3-eu-west-

concerns with the current approach of requiring a "rehearing"; namely, the potential to cause delay and increase costs, and basic questions of fairness arising from the ability of a party to get a "second bite of the cherry". Rather, the Law Commission recommended that rules of court limit what evidence and grounds of objection can be put before the court on a jurisdictional challenge when the applicant already has made a similar challenge before the arbitral tribunal.[18] More specifically, the Law Commission's recommendation is that courts not entertain any new grounds of objection, or any new evidence, unless it could not have been put before the tribunal with reasonable diligence, and that evidence not be reheard unless such rehearing is required by the interests of justice.[19]

If the Law Commission's recommended reforms are adopted, the result may be to challenge the "strong international consensus" in favour of a *de novo* hearing that underlies *Luxtona*. This may be a good thing. The current approach undermines the principle of competence-competence by allowing a party to ask a court to "decide the matter" of jurisdiction already decided by the arbitrator. Courts considering jurisdictional challenges in the coming years will need to contend with the potential of this fundamental shift in the approach to jurisdictional challenges, even in *Model Law* states.

2.amazonaws.com/cloud-platform e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf>; Arbitration Act of 1996, 35 I.L.M. 155 (1996), ss 30(1)(a)-(c) [*English Arbitration Act*].

[18] Even if the Law Commission's proposals are enacted into law unchanged, it will be up to the Civil Procedure Rules Committee to promulgate procedural rules codifying the Law Commission's recommendations. Accordingly, although a bill was tabled on November 21, 2023 to enact the Law Commission report, it is not yet clear what the English approach to jurisdictional challenges will be.

[19] The Law Commission's recommendation to this effect appears to be generally consistent with the view expressed by Dunphy J. in *The Russian Federation v Luxtona Limited*, 2018 ONSC 2419 (Comm List).

IV. APPOINTMENT OF AMICI CURIAE IN COURT REVIEW OF TRIBUNALS' RULINGS ON JURISDICTION

Hypertec Real Estate c Equinix Canada Ltd. involved three case management decisions arising in the context of an application challenging an arbitral tribunal's jurisdiction to determine claims brought by the respondent by cross-demand in a commercial arbitration. This entry in that trilogy addresses a legal concept that has not been applied in Canada: the appointment of an *amicus curiae* to provide expertise on international arbitration law, and assist the court in its interpretation of arbitration legislation.[20]

Generally, in judicial proceedings, a court has inherent jurisdiction to appoint an *amicus curiae* – or a "friend of the court" – to assist the court with its decision-making, by ensuring all relevant evidence and arguments are presented. This role is filled by a non-party to the proceeding, and may be one of non-partisanship (e.g. when appointed to assist the court on a point of law) or partisanship (e.g. when appointed to provide legal assistance to a non-represented litigant). Historically, *amicus curiae* are appointed most frequently in criminal, constitutional, or other public interest related cases; however, there is no prohibition on their appointment in private matters.

In *Hypertec*, the Québec Superior Court appointed *amicus curiae* to provide impartial legal submissions in the context of the jurisdictional challenge. Though the arbitration was governed by Québec law, the Court appointed a law firm located in Paris, France, as *amicus curiae*, based on that firm's focus on international arbitration and its founder having been "universally regarded as one of the top practitioners worldwide and as a leading global authority in the field of commercial and investment treaty arbitration."

[20] *Hypertec Real Estate c Equinix Canada Ltd.*, 2023 QCCS 3061 [*Hypertec*].

In the Court's view, this appointment benefited not only the parties, but also the "development and growth of the law of arbitration in [Québec]", as it would assist with achieving the policy goal that the law of arbitration procedure and practice be globally uniform to the extent practicable. The Court noted that this policy goal underlies the *Model Law*, and that principles of international arbitration previously have been considered and applied to domestic arbitrations in Québec.

It is not surprising that a Québec court would look to international law for guidance when interpreting and applying principles of arbitration. More novel, however, is the Court's suggestion that *amicus curiae* from another jurisdiction would be required for that guidance when there is so much local expertise. The Court in *Hypertec* premised its decision to appoint an *amicus curiae* on an "absence of adequate resources", specifically: (i) the unavailability of "comprehensive national and international research capabilities" to the Court; (ii) the time and resources already expended by the parties in prosecuting the various issues between them; and (iii) the "thorny and important question-of-general-interest-and-application" of an arbitral tribunal's jurisdiction.[21] Also relevant was the fact that the *amicus curiae*'s work would be completed on a *pro bono* basis, and therefore result in no cost to the parties or the judicial system.[22]

V. MULTIPLE APPOINTMENTS AND ARBITRATOR BIAS

The parties in *Aroma* were a franchisor and franchisee. Each alleged as against the other various breaches of the Master Franchise Agreement. It contained an arbitration clause, which provided that:

> …The parties shall jointly select one (1) neutral arbitrator… The arbitrator must be…a

[21] *Hypertec, supra* note 20 at paras 27-28 and 39.

[22] *Ibid* at para 33.

> lawyer experienced in the practice of franchise law, who has no prior social, business or professional relationship with either party…

The sole arbitrator was appointed by agreement of the parties. The terms of the arbitration clause were known to the arbitrator. They did not prohibit the appointment of an arbitrator who had a business or professional relationship with *counsel* for either party.

While the Aroma arbitration was ongoing, the sole arbitrator accepted an appointment in an unrelated arbitration from the same lawyer who was counsel in the Aroma arbitration, without disclosing it. The Ontario Superior Court of Justice held that the arbitrator should have made disclosure, and set aside the award on the basis that the circumstances gave rise to a reasonable apprehension of bias.[23]

Aroma is of interest for several reasons. It is the first significant multiple appointments case in Canada. The result was unexpected when compared to the facts and outcome in the 2020 United Kingdom Supreme Court decision of *Halliburton*.[24] Finally, the Court's analysis of the applicable legal tests and the facts relied upon was flawed; however, this likely did not affect the outcome. The decision is under appeal.[25] It is hoped that it will be recognized that this decision demonstrates the need for greater predictability and consistency in arbitrator bias cases.

In *Aroma*, counsel for the franchisor learned of the second appointment when the arbitrator emailed counsel in the Aroma

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[23] The application was to set aside two awards, a final merits award and an award on costs and interest but for simplicity they are referred to here as "the award".

[24] *Halliburton*, supra note 3.

[25] As of the date of writing this article, the appeal has been heard by the Court of Appeal for Ontario – with several arbitral institutions having obtained leave to intervene. However, the outcome of the appeal is not yet known.

arbitration concerning the final award. He mistakenly copied a lawyer from the firm acting for the franchisee who was not involved in the Aroma arbitration, but who was involved in the second arbitration, and did not copy all counsel at that firm who were involved. At first, the arbitrator simply apologizd for a clerical error in copying the wrong lawyer, but he later disclosed the second appointment.

The arbitration was international and seated in Ontario. The franchisor apparently applied to the Court to set aside the award under section 34 of the *Model Law* on the basis of the arbitrator's reasonable apprehension of bias.[26] This is not a ground for set-aside. The Court found its jurisdiction in Art. 34(2)(a)(iv), which provides for set-aside if "the arbitral procedure was not in accordance with … [the Model] Law."[27] In particular, where there is a reasonable apprehension of bias, Art. 18 of the *Model Law* is violated. It requires that "[t]he parties shall be treated with equality and each party shall be given an opportunity of presenting his case."[28]

On the issue of the arbitrator's duty to disclose, the Court referred to the *IBA Guidelines on Conflicts of Interest in International Arbitration*,[29] which it accepted as "widely recognized as an authoritative source of information as to how the international arbitration community may regard particular

[26] The franchisor relied upon *Stuart Budd & Sons Ltd. v IFS Vehicle Distributors ULC*, 2016 ONCA 60, which had nothing to do with either a set-aside application or an arbitration.

[27] *Model Law, supra* note 10, art 34(2)(a)(iv).

[28] *Model Law, supra note 10*, art 18. The Court cited *Jacob Securities Inc. v Typhoon Capital B.V.*, 2016 ONSC 604 at para 33 [*Jacob Securities*]. This approach also is found in *Vento Motorcycles, Inc. v United Mexican States*, 2023 ONSC 5964 at paras 46-47 [*Vento*].

[29] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (23 October 2014) <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> [*IBA Guidelines*].

fact situations in reasonable apprehension of bias cases."[30] The "Orange List" is a non-exhaustive list of circumstances, which, "depending upon the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality and independence",[31] and therefore give rise to a duty of disclosure. While the circumstances in *Aroma* did not fall within any of the circumstances listed, the Court observed that the *IBA Guidelines* explicitly state that, wile circumstances not on the "Orange List" are generally *not* subject to disclosure, "an arbitrator must make this assessment on a case-by-case basis".[32] For example:

> …[a]n appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, may also have to be disclosed, depending on the circumstances.[33]

The Court considered the circumstances. A significant factor was pre-appointment correspondence between counsel that made it clear that only an arbitrator with no connection to either the parties or counsel would be acceptable, supported by the parties' evidence that they would expect disclosure of any such connection before appointment. Also a factor was that the arbitrator was a sole arbitrator and not a member of a tribunal. The franchisor argued that this was important because the sole arbitrator controlled the outcome.

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[30] Quoting *Jacob Securities*, *supra* note 28 at para 41. The *IBA Guidelines* use a traffic light system to analyze duty to disclose circumstances: "Red List" (duty to disclose, clear conflict of interest); "Green List" (no duty to disclose, no apparent or actual conflict); and "Orange List" (duty to disclose).

[31] *IBA Guidelines*, *supra* note 29 at Part II, para 3.

[32] *Ibid* at Part II, para 6.

[33] *Ibid* at Part II, para 6.

The Court then referred to case law, in particular *Halliburton*.[34] There, Halliburton sought the removal of the arbitrator, who had accepted multiple ongoing appointments without disclosure (including one in which Halliburton's opposing party had appointed him) arising out of the same event and involving the same subject matter and overlapping issues.[35] The UK Supreme Court found that the arbitrator breached the duty to disclose the subsequent appointments.[36] In *Aroma*, there were no significant overlapping issues, and indeed no relationship between the two arbitrations except that the same law firm was involved as counsel.[37]

Nonetheless, based upon all these circumstances, the Court concluded that the arbitrator ought to have disclosed the second appointment.

It then considered the case law and the *IBA Guidelines* to determine whether there was a "reasonable apprehension of bias" on the part of the arbitrator, which is an objective test.[38]

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[34] *Halliburton, supra* note 3.

[35] Halliburton sought to remove the arbitrator pursuant to s. 24(1)(a) of the *English Arbitration Act*, *supra* note 17, on the ground that "circumstances exist that give rise to justifiable doubts as to his impartiality". The test was, "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". This too is an objective disqualification test, which the Court observed is similar to the "justifiable doubts" test in the *Model Law, supra* note 10.

[36] *Halliburton, supra* note 3 at para 74, applying the *IBA Guidelines, supra* note 29, as best practices.

[37] *Aroma, supra* note 2 at para 54.

[38] Relying, in part, on the test in *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 S.C.R. 369 at p. 394 [*Committee for Justice and Liberty*]: "[W]hat would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude. Would he think it more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This is a fact-driven analysis.[39] Even though there was nothing in the terms of appointment that prevented the arbitrator from having a professional relationship with counsel, this degree of independence was important to the parties. The Court also was concerned about the lack of evidence about the circumstances concerning the second appointment, including who suggested the appointment of the arbitrator, "with all the other commercial arbitrators in Toronto", and how much the arbitrator was paid.[40]

The Court concluded that there was a reasonable apprehension of bias and that the award must be set aside.

However, the Court's analysis was flawed.

First, the applicable test was blurred. Having correctly recognized that this was an international arbitration to which the *Model Law* applied, the Court used the "reasonable apprehension of bias" test. This language is found in the Ontario *Arbitration Act, 1991*.[41] The *Model Law* uses the "justifiable doubts as to [the arbitrator's] impartiality or independence" test.[42] Both tests are objective and are treated as interchangeable, although without specific analysis.[43] However,

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[39] The Court accepted the following principles: the threshold for a finding of real or perceived bias is high; the presumption of impartiality is high; the inquiry is objective and requires a realistic and practical review of all the circumstances from the perspective of a reasonable person; there must be supporting evidence and mere suspicion is insufficient; and when considering bias, context matters.

[40] *Aroma*, *supra* note 2 at paras 84-87.

[41] *ON Arbitration Act*, *supra* note 10, s 13(1), which sets out the test for challenge of an arbitrator.

[42] *Model Law*, *supra* note 10, art 12(1), which sets out the test for challenge of an arbitrator.

[43] See *IBA Guidelines*, *supra* note 29 at Part I, Explanation to General Standard 2, para (b), and *Committee for Justice and Liberty*, *supra* note 38. See also J Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 4th ed

the Court failed to appreciate that the test for the duty to disclose under the *Model Law* is not the same; a breach of the duty to disclose does not necessarily meet the "justifiable doubts" test.[44] This likely did not affect the outcome, but the importance of a correct analytical approach in cases with such significant consequences cannot be overstated.

Second, the Court failed to address the fact that the *IBA Guidelines* place disclosure obligations on the parties, not just the arbitrator.[45] Some of the Court's criticisms of the circumstances surrounding the second appointment appear to be directed at counsel for the franchisee, but the Court did not explore the extent to which those duties applied to counsel and the potential consequences.[46]

Third, some of the Court's findings that led to its conclusion on duty to disclose are problematic. The arbitrator did not know of the pre-appointment correspondence between counsel, so it could not have formed any part of his disclosure decision. Also, having accepted the authority of the *IBA Guidelines*, the Court failed to reconcile its conclusion that it was a factor that the arbitrator was the sole arbitrator with the *IBA Guidelines*, which specifically state that the same duty applies to sole arbitrators and members of tribunals.[47]

Fifth, the Court did not consider whether counsel's pre-appointment correspondence constituted an amendment to the arbitration agreement and, if so, whether there was a breach of the arbitration agreement. That would engage *Model Law* Art.

(Huntington: JurisNet LLC, 2020) at 412, quoted in *Aroma*, *supra* note 2 at para 70.

[44] *IBA Guidelines*, *supra* note 29 at Part I, Explanation to General Standard 3, para (c).

[45] *IBA Guidelines*, *supra* note 29 at Part I, General Standard 7, and Part II, Practical Application of General Standard 3.3.

[46] See *Aroma*, *supra* note 2 at paras 84-87.

[47] *IBA Guidelines*, *supra* note 29, Part I, General Standard 5.

34(2)(a)(iv), which provides that an award may be set aside if "the composition of the arbitral tribunal … was not in accordance with the agreement of the parties…".[48]

Finally, the Court relied upon *Halliburton* only to support its conclusion that the arbitrator should have made disclosure, but it failed to address two essential facts. Unlike *Aroma*, *Halliburton* involved circumstances in which the two arbitrations had significant overlap. Also, while the UK Supreme Court found that the arbitrator had breached his duty to disclose, this did not result in his removal because: there was a lack of clarity on the duty to disclose; there was no suggestion that the arbitrator was deriving a "secret" financial benefit; and there was unlikely to be any overlap in legal or evidentiary submissions.[49] Those factors reasonably could have affected both the *Aroma* arbitrator's view of his duty to disclose and the outcome of *Aroma*.

This comparison demonstrates the unpredictable results that can arise because the analysis is entirely factually driven, determined on a "case-by-case basis".[50]

A more recent example of this is Vento Motorcycles v United Mexican States, in which the Ontario Superior Court made a finding that there was a reasonable apprehension of bias on the part of the arbitrator in an international arbitration case.51 Vento argued that the award should be set aside pursuant to Model Law Art. 34(2)(iv), on the ground that "the composition

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[48] *Model Law*, *supra* note 10, art 34(2)(a)(iv).

[49] *Halliburton*, *supra* note 3 at para 149.

[50] See *Jacob Securities*, *supra* note 28, an international arbitration case in which the Court found that the arbitrator had no duty to disclose (and no means to discover) that his former firm had a potential conflict of interest and determined that there was no "reasonable apprehension of bias". See also *Vento*, *supra* note 28, an international arbitration case where the Court did not undertake a duty to disclose analysis, but found that there was a "reasonable apprehension of bias" on the part of the arbitrator.

[51] *Vento*, *supra* note 28.

of the tribunal was not in accordance with the agreement of the parties…" because of justifiable doubts as to the arbitrator's impartiality and independence. During the arbitration, counsel for one of the parties contacted one of the arbitrators on a three-person tribunal several times to offer him a potentially lucrative appointment on an arbitrator roster. The communications were discovered by the opposing party only after the award was issued. The Court found that the arbitrator's conduct gave rise to a reasonable apprehension of bias. However, it exercised its discretion to not set aside the award.[52] The tribunal issued a unanimous award and there was a presumption of impartiality of the other two arbitrators, so any bias on the part of one arbitrator did not affect the outcome; there was therefore no unfairness and no denial of natural justice.

It is difficult to reconcile the outcomes in Halliburton, Aroma, and Vento. Even though the IBA Guidelines were referred to in all three cases, they are neither exhaustive nor prescriptive, and can never provide bright-line tests for disclosure or bias in all circumstances. However, courts should not limit their analysis to "case-by-case" fact findings without a coherent legal analytical framework and consideration of the policy considerations underlying the *IBA Guidelines*. After all, the *IBA Guidelines* are intended to promote greater certainty and uniformity.[53] *Aroma* presents an opportunity for the Court of Appeal to provide a principled framework for the analysis in future *Model Law* bias cases.

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[52] See *Vento*, *supra* note 28 at para 49 and *Model Law, supra* note 10, art 34(2), which provides that an arbitral award "may" be set aside by the Court. See also *Popac v Lipsyc*, 2016 ONCA 135 at para 45, referred to in *Aroma, supra* note 2 at para 24.

[53] *IBA Guidelines*, *supra* note 29 at Introduction, para 3.

VI. CONCLUSION

The decisions highlighted above shine a light on how Canadian courts view their role in the arbitration process. They are merely recent examples of much broader trends.

In some contexts, courts lean into their overarching supervisory role and adopt a less deferential approach to arbitration, such as calling for a *de novo* hearing when reviewing an arbitral tribunal's preliminary ruling on jurisdiction, and thereby undermining the fundamental principle of competence-competence. In other contexts, courts seek guidance in respect of arbitration issues that they perceive as beyond their own expertise, as shown by the Québec court's appointment of *amicus curiae* in a jurisdictional challenge. Both of these outcomes were premised on the court's acknowledgment of the importance of maintaining uniformity in international arbitration law, while the differing approaches across Canada to treatment of non-signatories highlight the need for uniformity to achieve certainty and consistency in the application of domestic and international arbitration law principles. Similarly, the Ontario approach to arbitrator bias, which is focused on a fact-driven, case-by-case analysis, fails to provide the guidance necessary for predictability on an issue that is fundamental to arbitration.