THE IMPLICATIONS OF REPEAT ARBITRAL APPOINTMENTS: *AROMA FRANCHISE COMPANY V AROMA ESPRESSO*

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In *Aroma Franchise Company Inc. et al v Aroma Espresso Bar Canada Inc. et al,* 2023 ONSC 1827 ("*Aroma*"), the Ontario Superior Court of Justice was asked to consider whether an arbitrator, after having been appointed as an arbitrator in one matter, must make a disclosure in that arbitration if they are subsequently appointed by the same counsel or firm in a second matter, and whether failure to disclose in such circumstances can be grounds for a reasonable apprehension of bias. The Court answered both questions in the affirmative.

While *Aroma* provides important guidance in an area of relatively limited case law, the Court's reasoning nevertheless raises a number of questions as to how *Aroma* fits within the broader context of international case law on the same issue, as well as how it aligns with the practicalities and policy objectives of arbitration legislation in Ontario and Canada. This comment on the *Aroma* decision proceeds in three parts: first, we review the factual background to the dispute; second, we summarize the Superior Court's decision to set aside the arbitrator's awards and order a new arbitration; and third, we analyze the questions raised by the Court's decision.

I. FACTUAL BACKGROUND

Aroma Espresso Bar Canada Inc. ("Aroma Canada") was the master Canadian franchisee of Aroma Franchise Company Inc.,

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which was an American corporation ("Aroma Franchisor"). A dispute arose between the parties regarding their master franchise agreement, which resulted in an arbitration before a sole arbitrator (the "First Arbitration") under the *International Commercial Arbitration Act, 2017* seated in Ontario. Aroma Canada was, for the most part, the successful party.[1]

However, while the First Arbitration was in progress, the arbitrator was retained by counsel for Aroma Canada as the sole arbitrator in another, unrelated dispute (the "Second Arbitration").[2] Neither Aroma Canada nor the Aroma Franchisor was a party to the Second Arbitration.

Prior to issuing his final award in the First Arbitration, the arbitrator emailed counsel for both parties. In his email, the arbitrator inadvertently copied a lawyer from the same firm as counsel for Aroma Canada who was not involved in the First Arbitration.[3] This inadvertent inclusion raised a concern in the mind of counsel for Aroma Franchisor.

In subsequent correspondence, the arbitrator disclosed that he had been retained as arbitrator in respect of the Second Arbitration some time into the First Arbitration. The arbitrator also expressed the view that there was no overlap in the issues presented by the two arbitrations, and that he was unaware of any connection between the parties in the two arbitrations.[4] Although not expressly stated in *Aroma*, the Court's analysis seems to suggest that the arbitrator did not realize that disclosure to the parties to the First Arbitration might be

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[1] *Aroma Franchise Company Inc. et al v Aroma Espresso Bar Canada Inc. et al.*, 2023 ONSC 1827 at paras 7-9 [*Aroma*].

[2] *Ibid* at para 10.

[3] *Ibid* at para 11.

[4] *Ibid* at paras 13-16.

necessary at the time of his appointment to the Second Arbitration.[5]

Aroma Franchisor applied to set aside the arbitrator's final award and costs awards on the basis of a reasonable apprehension of bias stemming from his engagement in (and non-disclosure of) the Second Arbitration.[6]

II. OVERVIEW OF THE SUPERIOR COURT'S DECISION

In reviewing the set-aside application, the Court canvassed several issues in arriving at its ultimate conclusion that the awards should be set aside and that a new arbitration should be conducted by a new arbitrator. For the purpose of this case comment, we summarize the Court's analysis under two headings: disclosure and apprehension of bias.

1. Disclosure of the Second Arbitration

First, the Court considered whether it was incumbent upon the arbitrator to disclose the Second Arbitration. Relying on Article 12 of the *Model Law* (as incorporated into the *International Commercial Arbitration Act, 2017*) as well as the *IBA Guidelines on Conflicts of Interest in International Arbitration*, the Court concluded that those authorities necessitated a careful consideration of the circumstances in order to determine whether disclosure was required.[7] (In other words, the answer was not immediately obvious based on a review of those authorities.) To that end, the Court considered a number of factors, including the following:

- *The expectations of the parties in the selection of the arbitrator*. A review of the parties' contemporaneous correspondence at the time of the arbitrator's selection

[5] *Ibid* at para 15.

[6] *Aroma*, *supra* note 1 at para 20.

[7] *Ibid at* paras 30-38.

revealed that the parties expected that, if a proposed arbitrator had previously been retained or engaged by either party, then that retainer or engagement needed to be disclosed at that time. On this point, the Court referred several times to the evidence of Aroma Franchisor's CEO, which indicated that if the arbitrator disclosed any other engagements with Aroma Canada's counsel, Aroma Franchisor would not have supported his appointment as arbitrator.[8]

- *The extent to which there were any overlapping issues as between the two arbitrations*. The Court observed that there were some overlapping issues (similar causes of action), which, based on the United Kingdom Supreme Court's (UKSC) decision in *Halliburton Company v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, might give rise to an appearance of bias. However, in this case, the substantive overlaps were limited, in that the Second Arbitration did not involve a franchise dispute and was in a different industry. Accordingly, the Court concluded that this ground did not assist Aroma Franchisor with respect to its position in respect of disclosure and apprehension of bias.[9]
- *The fact that the arbitrator was a sole arbitrator (and therefore controlled the outcomes) in both arbitrations*. The Court did not explore this issue in detail, although the balance of the Court's analysis suggests that the obligation to disclose was heightened by the fact that the arbitrator exerted greater control over the outcome than he might have done in the context of a three-member tribunal. [10]

The Court then reviewed the applicable institutional rules, including the *UNCITRAL Arbitration Rules* and the *ADRIC Code of*

[8] *Aroma*, *supra* note 1 at paras 40-48.

[9] *Ibid* at paras 49-54.

[10] *Ibid* at para 55.

Ethics, highlighting that those rules variously require disclosure in circumstances that "*could* reasonably give rise to justifiable doubts" (emphasis added) as to an arbitrator's impartiality or independence, and "*might* create an appearance of partiality or bias" (emphasis added).[11] Although not stated explicitly, the Court's analysis suggests that the bar for disclosure is lower than the balance of probabilities.

Finally, the Court discussed *Halliburton v Chubb ("Halliburton")*.[12] Although not identical to *Aroma*, *Halliburton* involved a somewhat similar – albeit arguably more egregious – scenario in certain relevant respects: an arbitrator accepted appointments from the same party in multiple, overlapping cases, arising out of the same incident, without disclosure. While the arbitrator disclosed his prior appointments at the time he was retained in the arbitration at issue, he then did not disclose the subsequent appointment. [13] Although the UKSC determined that the arbitrator should have disclosed the subsequent appointments,[14] it went on to find that his failure to disclose did not create a reasonable apprehension of bias.[15]

Based on the foregoing, the Court in *Aroma* determined that the arbitrator ought to have disclosed his appointment in the Second Arbitration to the parties in the First Arbitration.[16]

2. Reasonable Apprehension of Bias

Turning to whether there was a reasonable apprehension of bias, the Court observed that the test for identifying bias in

[11] *Aroma, supra* note 1 at paras 56-59.

[12] *Halliburton Company v. Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, 2 All ER 1175 [*Halliburton*].

[13] *Ibid* at paras 7-27.

[14] *Ibid* at para 145.

[15] *Ibid* at paras 149-150.

[16] *Aroma, supra* note 1 at para 63.

respect of a judge applies with equal force to an arbitrator, even though their functions differ in several respects: "[W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."[17] Concluding that any assessment is necessarily fact-specific, the Court mentioned a number of other contextual factors:

- The threshold for a finding of real or perceived bias is a high one, since it calls into question both the personal integrity of the adjudicator and the integrity of the administration of justice. The grounds must be substantial, and the onus is on the party seeking to disqualify to bring forward evidence to satisfy the test.[18]
- The presumption of impartiality is high.[19] Although not explicitly stated by the Court, the implication (in reviewing the cases upon which the Superior Court relied) suggests that the presumption dictates that a party claiming bias must meet a standard of proof beyond a mere *possibility* of bias, although it is unclear whether that standard rises to the balance of probabilities.
- The inquiry is objective and requires a realistic and practical review of all the circumstances from the perspective of a reasonable person. The courts will not

[17] *Aroma, supra* note 1 at para 66, citing *Committee for Justice and Liberty et al v National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394.

[18] *Ibid* at para 71, citing *A.T. Kearney Ltd. v Harrison*, [2003] OJ No 438 (Ont SCJ) at para 7.

[19] *Ibid* at para 71, citing *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 at para 59.

entertain the subjective views of the parties in making such a determination.[20]

- A challenge based on reasonable apprehension of bias will not be successful unless there is evidence to support the allegation beyond a mere suspicion that the hearing officer would not bring an impartial mind to bear. Mere suspicion without any supporting evidence is insufficient.[21]
- When considering bias, context matters. Any review of an arbitrator's conduct must be considered in context and not through the review of selected excerpts or specifically chosen terms, phrases, or questions posed.[22]

It is apparent from the Court's decision that a high bar must be met in order to support a finding of a reasonable apprehension of bias. Even so, that bar was found to have been met here. The Court highlighted a number of factors it considered relevant in reaching that conclusion, in particular:

- In respect of the Second Arbitration, Aroma Canada had not tendered evidence on several salient points, including how much the arbitrator was being paid, who had suggested the arbitrator's appointment, who had reached out to the arbitrator to retain him, and whether the parties to one arbitration were aware of the other arbitration;[23]
- The optics of Aroma Canada's lead counsel retaining the arbitrator in the Second Arbitration while the First

[20] *Ibid* at para 71, citing *Committee for Justice and Liberty et al. v National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 and *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485 at para 163 ["*Dufferin*"].

[21] *Aroma, supra* note 1 at para 71, citing *G.W.L. Properties Ltd. v W.R. Grace & Co. of Canada Ltd.*, 1992 CanLII 934 (BCCA), 74 BCLR (2d) 283 (BBCA) at para 13.

[22] *Ibid* at para 71, citing *Telesat Canada v Boeing Satellite Systems International, Inc.*, 2010 ONSC 4023, and *Dufferin*, *supra* note 20 at para 112.

[23] *Ibid* at paras 85-86.

Arbitration was underway.[24] Although not explicitly stated, the Court's observation on this point raises questions as to whether courts are or will be concerned with counsel retaining an arbitrator on multiple occasions and any related objectives of doing so. Aroma Franchisor argued that the mere proffering of money to the arbitrator via the Second Arbitration was itself fatal to the arbitrator's impartiality[25], an argument the Court did not expressly reject;

- The fact that the arbitrator was selected for the Second Arbitration despite Aroma Canada's counsel not having any prior experience with him as an arbitrator prior to the First Arbitration, and despite the availability of other competent arbitrators in Toronto[26]; and
- The parties' pre-appointment correspondence (discussed above), in which both parties emphasized the importance of selecting an arbitrator without a pre-existing relationship with either party or their counsel.[27]

Based on the foregoing, the Court determined that there was a reasonable apprehension of bias in breach of Article 18 of the Model Law, which qualified as grounds for set-aside pursuant to Article 34(2). The Court set aside the awards in the First Arbitration and directed that a new arbitration be conducted by a new arbitrator.[28]

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[24] *Ibid* at para 87.

[25] *Aroma*, *supra* note 1 at paras 74-75.

[26] *Ibid* at para 87.

[27] *Ibid* at para 89.

[28] *Ibid* at paras 91-92.

III. REVIEW OF THE DECISION AND QUESTIONS RAISED

Given the impact of the Court's decision to remit the matter back for an entirely new arbitration, *Aroma* raises several issues worthy of further consideration.

First, prior to *Aroma*, the *Halliburton* decision was, and still is, considered a persuasive authority in the international arbitration community. It therefore was (and is) considered instructive for Canadian arbitration practitioners although it was not a binding authority.

It bears noting that in *Halliburton*, the arbitrator engaged in conduct that would arguably give rise to an even greater apprehension of bias – there, the arbitrator had accepted appointments from the same party in multiple, overlapping matters, all arising out of the same incident (the Deepwater Horizon incident). Nevertheless, the UKSC found that an objective observer would not have concluded that the arbitrator was biased.

In this case, Aroma Franchisor argued – and the Court appears to have accepted – that *Halliburton* was distinguishable on the basis that (1) the applicable UK legislation set a higher threshold for removing an arbitrator or setting aside an award – namely, the applicant must show that a substantial injustice has been or will be caused – and (2) the UK legislation did not contain a statutory duty of disclosure, unlike the *Model Law*.

This may understate the relevance of the UKSC's findings in *Halliburton* insofar as (1) the test applied by the UKSC for bias was effectively the same as that applied in *Aroma*, yet the UKSC reached the opposite conclusion (i.e., that there was no bias), and (2) the UKSC found that there was a common law duty of disclosure functionally equivalent to the *Model Law*'s statutory duty (as expressed in the Ontario legislation). As to the "substantial injustice" requirement set out in *Halliburton*, it bears noting that the Court in *Aroma* similarly observed a

finding of real or perceived bias requires "substantial" grounds. In that regard, these thresholds are more similar than they might first appear.

As a result, in our view, *Halliburton* ought to have been considered by the Court as a more persuasive authority in *Aroma* against a finding of a reasonable apprehension of bias. Although the Court relied upon *Halliburton* in support of its finding that the arbitrator ought to have disclosed the Second Arbitration, the Court does not appear to have considered or relied upon *Halliburton* to a similar extent in relation to the issue of apprehension of bias. In our view, *Halliburton* ought to have played a more prominent role in respect of the Court's analysis on the latter issue, notwithstanding its provenance from a different jurisdiction.

Second, *Aroma*'s emphasis on the parties' expectations, as articulated in their pre-appointment correspondence, is potentially unfair to the arbitrator, insofar as the Court's analysis does not suggest that the arbitrator had any knowledge of that correspondence, including of the importance that the parties had placed on their chosen arbitrator having no business relationship with either party or their counsel.

This factor appears to have been the most important to the Court's ultimate determination. There is a tension between the Court's emphasis on the parties' expectations – particularly its reference to the hindsight evidence of Aroma Franchisor's CEO[29] – and the pre-existing case law establishing that courts will not entertain the subjective views of the parties in assessing a claim of bias. In any event, whereas greater awareness by the arbitrator of the parties' expectations may have led to a finding of apprehension of bias (i.e., knowing of the parties' wishes but acting against them), the opposite is equally true—a lack of such knowledge should lead *away* from such a finding.

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[29] *Aroma*, *supra* note 1 at paras 44-45.

Third, the Court's comments regarding the selection of the arbitrator for the Second Arbitration raise an interesting question as to the frequency with which an arbitrator may be appointed by the same counsel or parties. This question is particularly important in specialized practice areas, such as construction law, where there are a limited number of arbitrators with the subject matter expertise and experience to adjudicate such disputes.[30]

One the one hand, and as the Court observed, the *IBA Guidelines* identify three or more appointments by the same counsel within a period of three years as falling within the "orange list", as a problematic-but-not-disqualifying circumstance which *may* warrant recusal should either party object following disclosure; in other words, repeated use of an arbitrator may pose problems with respect to future appointments. On the other hand, however, the Court appeared to be critical of the fact that Aroma Canada's counsel had appointed the arbitrator a second time despite having had no experience with him as an arbitrator prior to the First Arbitration.[31]

These two propositions are in tension: it may be problematic to appoint an arbitrator whom counsel has already retained repeatedly, yet it may also be problematic to repeatedly appoint

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[30] Interestingly, this difficulty was recognized in the parties' correspondence, where Aroma Canada's counsel observed that his firm had used another arbitrator candidate several times as an arbitrator and mediator "because he is one of a handful of arbitrators with the experience in the area we practice in most": *ibid* at para 47. Aroma Franchisor rejected this candidate on the basis that Aroma Canada's counsel had a "business relationship" (as that term appeared in the master franchise agreement) with arbitrator's firm: *ibid* at para 41.

[31] Here, the Court's selection of the applicable test appears to have subordinated the fact that, under the *IBA Guidelines*, this situation fell into the Orange category and therefore arguably would <u>not</u> have warranted recusal. Arguably, this may be why *Aroma* appears inconsistent with the outcome in *Halliburton* despite their similar factual matrices.

an arbitrator whom counsel has not previously retained. Indeed, this is particularly problematic in circumstances involving a large firm with a significant disputes practice, insofar as large firms may have retained the same arbitrator on a number of occasions (particularly in a country such as Canada, with a relatively low number of arbitrators). It may be possible that an individual counsel has not previously appointed an arbitrator, while at the same time that counsel's firm has (collectively) appointed that same arbitrator several times. As a result, this appears to present a significant restriction on the repeated use – or even the *initial* use – of a given arbitrator.

Furthermore, given that some number of arbitrators were (and are) in the midst of multiple mandates in which they have received appointments from the same counsel prior to *Aroma*'s publication, *Aroma* therefore raises the risk of arbitrators recusing themselves from significantly-progressed matters in order to avoid proceeding under the shadow of a potential set-aside application.

Fourth, the Court's observations as to the optics of Aroma Canada's lead counsel retaining the arbitrator in the Second Arbitration after the First Arbitration was underway – what the Court referred to as a "bad look"[32] – raises an interesting question as to the presumption of an arbitrator's impartiality. As noted above, the Aroma Franchisor appears to have argued that the fact money was proffered to the arbitrator via the Second Arbitration was in itself fatal to his role in the First Arbitration, while the balance of the judgment suggests a concern regarding the optics of counsel's intentions and objectives in selecting the same arbitrator twice.

This raises questions for future decisions as to how the presumption of the arbitrator's impartiality will be considered as the Court did not explicitly confirm that the proffering of money is insufficient to ground a finding of bias. Absent specific

[32] *Aroma, supra* note 1 at para 87.

evidence to the contrary, it can and should be presumed that the arbitrator will continue to act impartially in such circumstances. Arbitration invariably involves remunerating arbitrators, and as such, the presence of remuneration should not in and of itself be disqualifying. Put differently, payment for services rendered by an arbitrator should not be considered the functional equivalent of an inducement.

Practically speaking, in specialized industries, it is common for a party to appoint an arbitrator while that same arbitrator is already arbitrating prior matters involving the same counsel and/or the same party. If the use of arbitrators on multiple construction matters were in itself to qualify as grounds for reasonable apprehension of bias, then the pool of available arbitrators would be narrowed even more drastically than it already is. This would be problematic not only for parties but also for the growth of arbitration in Canada, particularly as the judiciary continues to work through the backlog of cases created by the COVID-19 pandemic.

As well, and as recognized by the Court in *Aroma*, arbitrators are not judges, and are remunerated by parties rather than the state; as a result, in our view, precedents applicable to the judiciary are not fully transposable to the arbitral context. If the mere existence of arbitrator remuneration is itself grounds for scrutiny, then presumptively, every arbitration would proceed under a cloud of uncertainty. Although the Court highlighted the amount of money the arbitrator received in the Second Arbitration as an important missing piece of evidence, this is arguably a red herring. Finally, and as noted above, this case raises questions as to how courts should interpret the intent of counsel. It is plausible that rather than retaining an arbitrator a second time in order to curry favour, counsel might retain them on the basis that the arbitrator demonstrated a high level of proficiency in their role as arbitrator (competent case management, strong grasp of the issues, etc.). This is particularly true in view of the obverse proposition – namely, that parties might avoid using a less competent arbitrator on

future matters even where they were successful before that arbitrator in an initial dispute. Put simply, counsel may choose to re-use or avoid an arbitrator for any number of reasons. The simple fact of re-use of the same arbitrator should, in our respectful view, not in itself be grounds for suspicion.

IV. CONCLUSION

Aroma is a welcome addition to area of case law that has been canvassed in relatively limited detail in Ontario and Canada[33], despite its importance to the practice of arbitration. At a minimum, it is now clear that arbitrators should manage their practices with a strong emphasis on fulsome and continuous disclosure.

That said, *Aroma* fits uneasily within the broader context of international case law on the topic, particularly given that some jurisdictions (including the United Kingdom in *Halliburton*, and especially in the United States[34]) have reached different

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[33] See e.g., *Aquanta Group Inc. v Lightbox Enterprises Ltd*., 2022 ONSC 3036 at paras 16-23, where the Ontario Superior Court concluded that an arbitrator should not be appointed to a second arbitration involving the same parties and the same factual matrix, because there were no transcripts from the first arbitration and the arbitrator might therefore have to rely from his notes from the first arbitration, thus running afoul of the principle of deliberative secrecy; and *ICP v JCP*, 2018 ONSC 4075 at paras 42-46, where the Ontario Superior Court also concluded that an arbitrator should not be appointed to additional arbitrations involving the same parties (albeit in respect of an unrelated matter) given that he had already made adverse credibility findings against one of the parties, thus creating a reasonable apprehension of bias in two contexts: (1) in making any necessary credibility findings in the subsequent arbitrations; and (2) in his award(s), insofar as the earlier credibility findings might unconsciously influence his conclusions.

[34] In the United States (while not the focus of this case comment or the jurisdiction of the authors) , there is case law in support of the proposition that an arbitrator having presided over a prior, related arbitration does not in and of itself amount to bias, nor is knowledge of the matter at hand a disqualifying form of “interest”: *Trustmark Insurance Company v. John Hancock Life*, United States Court of Appeals, 7th Circuit, 1 March 2011, 631 F.3d 869 at 873.

conclusions[35] in similar cases,[36] while others have been arguably even more restrictive than *Aroma*.[37] Furthermore,

[35] This is also true of various ICSID decisions, where the tribunal determined that multiple appointments of an arbitrator by the same party and/or law firm was not sufficient in and of itself (on the circumstances of those particular cases) to ground a finding of bias: *Tidewater, Inc. et al. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator; *Universal Compression v Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/9, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern and Professor Guido S. Tawil, Arbitrators; and *OPIC Karimum v Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator.

[36] See also *Grupo Unidos por el Canal, SA, et al v Autoridad del Canal de Panama* ["*Grupo Unidos*"], United States District Court (Southern District of Florida), 18 November 2021, Civil Action 20-24867-Civ-Scola. In that case, the District Court confirmed an arbitral award of $240M USD in favour of the operator of the Panama Canal, rejecting a challenge based on the fact that the operator's appointed arbitrator – who had been appointed by the operator's counsel in another, unrelated arbitration (which fact he did not disclose), and had been appointed by the operator in at least two other arbitrations relating to the Panama Canal (which appointments he did disclose) – had helped the tribunal president secure another "lucrative" appointment as tribunal president on another, unrelated matter. On appeal to the Court of Appeals for the Eleventh Circuit, the appellant advanced a number of different arguments of bias based on undisclosed prior professional relationships between and amongst the arbitrators and counsel on different, unrelated matters. The Court of Appeals dismissed the appeal, noting (among other things) that because international construction arbitration law is a relatively small community, prior interactions or relationships is a less compelling basis for arguing partiality or bias than might otherwise be the case in non-specialized areas. Although *Grupo Unidos* is dissimilar to *Aroma* in certain respects—particularly given the central issue of that case being related to relationships *between* arbitrators rather than between arbitrators and counsel—it nevertheless demonstrates a judicial reluctance to set aside awards in circumstances where subsequent discovery of undisclosed facts gives rise to challenges on grounds of bias.

[37] As the Court in *Aroma* observed at para 78, the Cour de Cassation in *SA Auto Guadeloupe Investissements v Colombus Acquisitions Inc.*, Cour de Cassation, Civ. 1, 16 December 2015, N D14-16.279, annulled an award due to an arbitrator's "failure to disclose the fact that another office of his large,

Aroma is arguably inconsistent with some of the secondary authorities on the topic.[38] *Aroma* similarly raises questions as to how its holding(s) can be reconciled with the practicalities of arbitration in specialized industries with limited pools of qualified arbitrators, as well as the overarching policy objective of promoting Ontario and Canada as attractive forums for arbitration. In our view, these questions warrant careful scrutiny. Accordingly, we look forward to seeing how *Aroma* will be subsequently interpreted or applied.

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global law firm had an engagement involving one of the parties, of which the arbitrator was completely unaware, [which] was sufficient to cause doubt regarding the arbitrator's independence and impartiality". On the other hand, however, see *Fretal v ITM Enterprises*, Cour D'Appel de Paris, 28 October 1999, [2000] Rev. Arb. 299, where the Court of Appeal of Paris found that a franchisor's appointment of the same arbitrator in three arbitrations was not sufficient to ground a finding of bias or lack of independence.

[38] See e.g., Houchih Kuo, "The Issue of Repeat Arbitrators: Is It a Problem and How Should the Arbitration Institutions Respond?" (2011) 4:2 Contemp Asia Arb J 247 at 265-266, where the author concludes that although repeat appointments should be disclosed by arbitrators, it should not be grounds for removal of the arbitrator unless the moving party can demonstrate that: (i) the arbitrator has a financial or personal stake in the outcome; (ii) the arbitrator is financially dependent upon repeat appointments by the same law firm or party, or the arbitrator is the only arbitrator that a party or law firm will appoint over a significant period of time; or (iii) the arbitrator has a track record of ruling in favor of their appointer or repeatedly assisted their appointer through "indirect means".