MO' APPOINTMENTS MO' PROBLEMS? AROMA FRANCHISE V AROMA CANADA

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The decision of the Court of Appeal for Ontario in *Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al.* had been hotly anticipated by arbitration lawyers across Canada.[1] The decision of the application judge in Ontario Superior Court [2] had caused something of a sensation, setting aside two international awards based on a finding of reasonable apprehension of bias on the part of a well-known Toronto arbitrator, after the arbitrator failed to disclose a second appointment by the same law firm during an ongoing arbitration. The decision raised concern for arbitrators in Canada and other Model Law jurisdictions who accept multiple appointments from the same law firm, especially in niche fields of practice or smaller communities where the number of qualified arbitrators may be small.

While the outcome represents something of a return to normalcy after a surprising trial court decision, *Aroma* not only clarifies some key legal issues relating to arbitrator bias, both within Canada and for other Model Law jurisdictions, it also has great relevance for cases involving multiple appointments of an arbitrator by the same party or counsel.

I. BACKGROUND

Aroma Canada was the master Canadian franchisee of Aroma Franchise, a US coffee shop chain; it effectively acted as a middleman between the franchisor and individual coffee shop owners in Canada. Alleging various breaches of the master franchise agreement, Aroma Franchise took steps to terminate the contract and assume Aroma Canada's role with respect to the Canadian franchisees; Aroma Canada also alleged various breaches of the agreement by Aroma Franchise. The contract contained an arbitration clause calling for arbitration in

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[1] 2024 ONCA 839 ["*Aroma* ONCA"].

[2] 2023 ONSC 1827 ["*Aroma* ONSC"].

Toronto before a sole arbitrator, under the ADRIC Arbitration Rules, which themselves incorporate the UNCITRAL Rules for international arbitrations.[3]

The parties mutually agreed to appoint an experienced Toronto-based practitioner as the sole arbitrator, who ultimately held that Aroma Franchise had wrongfully terminated the contract and awarded damages to Aroma Canada. Aroma Franchise applied to set aside the award, leading to the Ontario court proceedings.

Unbeknownst to Aroma Franchise, most of the way through the proceedings, the firm representing Aroma Canada, Sotos LLP, appointed the same arbitrator in an unrelated case. Just prior to issuing his award, the arbitrator emailed the parties; mistakenly, he copied a Sotos LLP lawyer from the other case, and did not copy two of the three lawyers involved in *Aroma Franchise v Aroma Canada*. The other Sotos LLP lawyer, who was included on the email, was involved in both cases. When Aroma Franchise's counsel asked why not all of the lawyers involved were copied but this other lawyer was, the Sotos LLP lawyer who did receive the email replied only, "Thanks, Matt. Please continue to add Michelle." Neither he nor the arbitrator mentioned that they were also working together on the unrelated case.

When the arbitrator issued his final award, he again mistakenly copied the Sotos LLP lawyer from the unrelated case. When counsel for Aroma Franchise inquired about this, they put the matter bluntly: "...in light of [the lawyer's] inclusion in this email thread, our clients wish to have clarification as to why he was copied, including whether there is or has been any other relationship of any kind between Mr. Arbitrator and Sotos LLP, including any other appointments as arbitrator or mediator." The arbitrator replied the same day, stating only, "That was my mistake. [He]should not have been copied." This email did not answer the question posed. Four minutes later, the Arbitrator sent a further response stating: "Sotos has retained me as an arbitrator on another matter which is ongoing."

[3] This will no longer be the case under the new ADRIC Arbitration Rules, which take effect on January 2, 2025. The new rules have not yet been publicly released at time of writing.

When Aroma Franchise's counsel sent a further series of questions, the arbitrator replied, in part:

> The issues in that case do not involve franchise law but there are contract issues in an industry completely unrelated to the Aroma business and in a different contractual relationship. I believe the contract issues are not in any way related to the contract issues in the Aroma case. I don't believe there is any overlap in the issues between the two cases. I am not aware of any connection between the parties in that arbitration and the Aroma arbitration.

Aroma Franchise advised the arbitrator that they intended to apply to the Ontario courts to set aside the award on grounds of reasonable apprehension of bias. After the arbitrator issued a final award on interest and costs, Aroma Franchise proceeded with its set-aside application.

II. THE SUPERIOR COURT DECISION

At the Superior Court, application judge Steele J, applied Ontario's *International Commercial Arbitration Act*, which enacts the UNCITRAL Model Law. In finding that there was a reasonable apprehension of bias, the application judge focused on the issue of disclosure, citing in particular Art. 12(1) Model Law, which requires an arbitrator to "disclose any circumstances likely to give rise to justifiable doubts about his impartiality or independence".

The application judge also cited the *IBA Guidelines on Conflicts of Interest*[4] as "instructive", although she acknowledged that they were not binding. She emphasized General Standard 3(a) of the IBA Guidelines, which provides that arbitrators must disclose any relevant factors circumstances that "may, in the eyes of the parties" give rise to doubts as to the arbitrator's impartiality or independence, and noted that this obligation persists throughout the arbitral proceedings.

[4] 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"].

Although the judge acknowledged that two appointments by the same firm in quick succession does not match any relationship on the IBA Guidelines' Orange List (which requires a minimum of three appointments by the same firm), she affirmed the non-exhaustive nature of the IBA Guidelines' lists.

The application judge also made extensive reference to the UKSC's decision in *Halliburton v Chubb*.[5] She acknowledged that the cases were distinguishable, in particular because *Halliburton* involved multiple appointments by the same party in related cases, while *Aroma* involved two appointments by the same law firm in unrelated cases, and that *Halliburton* was decided under different legislation (the England & Wales *Arbitration Act 1996*, which includes an additional requirement to show substantial injustice not found in the Model Law, and which lacks an express statutory requirement of disclosure). Nevertheless, the application judge held that the sole arbitrator should have disclosed to the Aroma parties his second appointment by the Sotos law firm. The court concluded that "it is a bad look" that mid-way through the Aroma arbitration, lead counsel for one party retained the same arbitrator in another arbitration in which he was also lead counsel.[6]

The decision emphasizes context. First, and most important for the application judge, correspondence between counsel from before the arbitrator's appointment showed a particula0r concern about prior relationships between counsel and potential arbitrators, which the judge seems to have found created a heightened duty to disclose. Second, the arbitrator had not previously been appointed by Sotos LLP in any other arbitrations, so it could not be said that he was the firm's "go to arbitrator for franchise disputes". Third, there was 15 months of overlap between the two arbitrations without any disclosure of the second appointment. And Fourth, the revelation of the second appointment came only through inadvertent copying of the wrong lawyer on an email, and then the arbitrator (and the Sotos lawyers) did not immediately disclose the second appointment after that inadvertent revelation, but rather continued to decline to mention until a second inadvertent revelation and a series of pointed questions from counsel. Accordingly, the application judge found that there was a failure to disclose facts that should have been disclosed, leading to a

[5] [2020] UKSC 48 ["*Halliburton*"].
[6] *Aroma* ONSC, *supra* note 2 at para 87.

reasonable apprehension of bias, and that the arbitrator's awards therefore must be set aside and a new hearing ordered.

The general sense in the Canadian arbitration community was that, while the arbitrator should have "come clean" after the first inadvertent disclosure, the Superior Court decision created more problems than it resolved.[7] First, although the application judge relied on *Halliburton* for her findings on disclosure, she does not seem to have considered *Halliburton*'s holding as to apprehension of bias, in particular that the UKSC held that there was no apprehension of bias despite arbitrator conduct that was substantially more egregious than that the conduct involved in the *Aroma* case.[8] Second, in finding that disclosure of the second arbitration was required, the application judge referred to the parties' subjective expectations, relying on correspondence between the parties' counsel that the arbitrator could not have seen, and which accordingly should not have been held to create any heightened sensitivity to conflicts on the part of the arbitrator. Third, the application judge criticized the arbitrator for taking two overlapping appointments from the same firm while at the same time criticizing counsel for appointing the arbitrator twice despite having no previous experience with him. Did the Court really mean that *a lack of previous appointments* by the firm raises more concerns than a *long history* of appointments? Finally, and perhaps of greatest concern, counsel for Aroma Franchise argued that the proffering of money to the arbitrator by the Sotos firm for the second appointment was in itself fatal to the arbitrator's impartiality in respect of the first appointment; the application judge never explicitly held against this, but rather implied that the mere prospect of an additional appointment could be sufficient to ground a finding of bias due to the potential for profit inherent in the relationship between

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[7] Here I rely in particular on Bruce Reynolds, James Little, and Nicholas Reynolds, "The Implications of Repeat Arbitral Appointments: Aroma Franchise Company v Aroma Espresso" (2023) 4(1) Can J Comm Arb 60.

[8] There, the arbitrator in question was appointed in three arbitrations arising from the same factual background (the Deepwater Horizon incident). *Halliburton v Chubb* was the first. The arbitrator did not disclose to Halliburton that Chubb had appointed him in the second arbitration (in which Chubb was represented by the same firm of solicitors, Clyde & Co), and also failed to disclose his appointment in the third arbitration (which involved a different insurer, but the same insured as in the second arbitration). He described the nondisclosures as an "oversight". *Halliburton*, *supra* note 5 at paras 16-17.

arbitrators and counsel. If this logic is taken to its conclusion, no arbitrator could ever be considered impartial if they accept more than one appointment from the same party or firm. But even if one does not go that far, arbitrator impartiality may come under scrutiny although multiple appointments are practically unavoidable, such as in smaller markets or specialized fields with limited pools of qualified arbitrators. After all, there are only a few experienced arbitrators in Toronto who have significant expertise in franchise law.

III. THE DECISION ON APPEAL

The ONCA allowed the appeal, overturning the application judge's decision on the question of reasonable apprehension of bias. However, since Aroma Franchise had also raised other grounds for set-aside, which the application judge did not address because she found that the award should be set aside for apprehension of bias, The ONCA remanded the matter back to the Superior Court for consideration of those grounds.

First, the ONCA cleaned up a possible area of uncertainty by holding explicitly that the common law "reasonable apprehension of bias" standard[9] is equivalent to the Model Law's "justifiable doubts" standard.[10] Having concluded this early in its decision, the Court referred to the two tests interchangeably thereafter. I have never been able to discern a substantive difference between the two formulations, and cannot see any principled reason why the standard for challenge to an arbitrator or their award on grounds of bias should be different in domestic and international cases. I therefore welcome the explicit equation of the two tests.

The Court was writing for a Canadian audience, and there is value in reassuring that audience that the familiar test under domestic legislation and case law matches the test under the Model Law, which is less well-known in Canada. However, the Court ought to have started from Article 2A(1) of the Model Law, which provides that the Model Law should be interpreted in accordance with its international origin and the need to promote uniformity in its application. This provision requires courts to avoid interpreting the Model Law by reference to (potentially divergent) national laws, and to check their

[9] Codified in Arts 11 and 13 of the Ontario *Arbitration Act*, 1991, SO 1991, c 17.
[10] *Aroma* ONCA*, supra* note 1 at para 2.

interpretations against those reached by courts in other Model Law jurisdictions so as to promote uniform application of this uniform text. It was, therefore, improper for the Court to interpret the Model Law's "justifiable doubts" standard by reference to Canadian or English case law applying the "reasonable apprehension of bias" standard, even if the two appear to be functionally identical. In other words, the Court should have applied *only* the "justifiable doubts" test, noting along the way that the "apprehension of bias" test would lead to the same outcome, rather than conflating the two tests.

Since the application judge had based her finding of reasonable apprehension of bias on the arbitrator's failure to disclose the second arbitration, the ONCA turned next to the question of disclosure. It held that, since Art. 12(1) of the Model Law applies an objective test for disclosure (in contrast to the subjective "eyes of the parties" test in General Standard 3(a) of the IBA Guidelines), the application judge erred in considering subjective factors that the parties did not make known to the Arbitrator. The Court continued, "Under the objective test, the Arbitrator's failure to disclose his engagement in what the application judge herself termed a second unrelated arbitration – one which, vis-à-vis the ongoing MFA Arbitration, had no common party or overlapping issues of significance – was not a breach of the legal duty of disclosure."[11] The application judge's reference to *Chubb v Halliburton*, while a justifiable resort to precedent,[12] misstated the applicability of that precedent: "*Halliburton* found that disclosure was legally required 'where an arbitrator accepts appointments in multiple [arbitrations] concerning the same or overlapping subject matter with [a] common party'. Here, the application judge found that there were no significant overlapping issues and no common parties."[13]

Accordingly, the ONCA found that the application judge had not in fact applied the objective test for disclosure in Art. 12(1) of the Model Law, but rather a subjective test that took into account correspondence between the parties of which the arbitrator had no

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[11] *Ibid* at para 11.

[12] *Halliburton* involved different legislation, the English *Arbitration Act 1996,* so it is not directly apposite. However, the UKSC held in *Halliburton* that the English case law on an arbitrator's duty to disclose should develop consistently with the Model Law and other international comparators. *Halliburton*, *supra* note 5 at paras 112-115.

[13] *Aroma* ONCA, *supra* note 1 at para 81 (citation omitted).

knowledge—and of which a reasonable observer similarly would have been unaware: "On the question of whether the Arbitrator failed to make legally required disclosure of a matter that would likely raise a justifiable doubt about his impartiality, correspondence that the Arbitrator was not reasonably aware of cannot be germane."[14] While the IBA Guidelines are relevant, they are not the applicable law; applying the General Standard 3(a) test was therefore a legal error.

Next, applying the objective test for disclosure in Art. 12(1) Model Law, the Court found that the arbitrator had no legal duty to disclose that he had been engaged for the second arbitration, since there was no common party in two arbitrations and no overlapping issues. These circumstances also made the facts in *Aroma* sufficiently distinct from *Chubb v Halliburton* that a different outcome was warranted: "The concern that a party to an arbitration … would have the chance to address the same or related issues arising out of the same incident before the same arbitrator in a second arbitration, without the presence of the other party to the first arbitration … is completely absent in this case." (para. 100).

The Court also distinguished *Aroma* from a facially similar case, *Aiteo Eastern E&P Company Ltd v Shell Western Supply and Trading Ltd et al,* a recent decision of the England and Wales High Court (Commercial Court).[15] First, in *Aieto*, the arbitration was governed by the ICC Rules, which apply a subjective "eyes of the party" rule for arbitrator disclosure. Second, in *Aiteo*, the arbitrator accepted two additional engagements by the same law firm, for expert advice that amounted to a co-counsel arrangement with that firm. Accordingly, in *Aiteo* there were multiple failures to disclose, not just one, and the facts not disclosed amounted to a "different and far closer relationship" with counsel than existed in *Aroma*.[16]

The Court also addressed the relevance of the IBA Guidelines' "Orange List" relationships.[17] It observed that the Orange List does not

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[14] *Ibid* at para 89.

[15] [2024] EWHC 1993 (Comm) ["*Aiteo*"]. Since *Aiteo* was released after the appeal hearing in *Aroma*, the *Aroma* parties were given leave to make additional submissions on the case.

[16] *Aroma* ONCA, *supra* note 1 at para 106.

[17] As the IBA Guidelines describes the Orange List, it is a non-exhaustive list of situations that "may, depending on the facts of a given case, give rise to a

include an overlapping appointment by the same counsel as a circumstance where disclosure is "required". While the Orange List is not intended to be exhaustive, and the commentary mentions other circumstances where disclosure may be required based on a case-by-case-assessment, none of the circumstances mentioned in the commentary was apposite.

Characterizing these other circumstances where disclosure would be required, the Court reasoned that, "In my view, the very logic of the IBA Guidelines suggests that the circumstances that would require disclosure must go beyond an appointment by the 'same counsel appearing before an arbitrator, while the case is ongoing'. Were it otherwise, the situation would be included in the Orange List."[18] While circumstances such overlapping parties and issues (as in *Halliburton*), a close relationship with counsel (as in *Aiteo*), or an appointment that brings the total to the "critical mass" included in the Orange list could tilt toward a disclosure requirement, none of those circumstances was present in *Aroma*.

The Court then addressed the application judge's intimation that the mere existence of an income-producing arrangement for arbitration services can, in itself, impugn an arbitrator's neutrality. This was an aspect of the Superior Court decision that particularly concerned the arbitration bar, and the Court properly criticized the trial court decision. It reasoned,

> It is well understood that arbitrators are paid by the parties over whose arbitration they preside. … Yet arbitrators are expected to meet the same high standards of fairness and impartiality whether they are nominated by a party or chair a tribunal…. In other words, the law forbids partiality toward the party who nominated the arbitrator and who therefore was responsible for the arbitrator being able to earn

doubt in the eyes of the parties and must therefore be disclosed pursuant to General Standard 3." *IBA Guidelines*, *supra* note 4 at Introduction, para 3.

[18] *Aroma* ONCA, *supra* note 1 at para 110.

> fees. Instead, it requires, and presumes, impartiality.[19]

In short, while an ongoing profitable relationship between arbitrator and counsel could give rise to justifiable doubts, no such relationship existed here.

The Court next turned to the question of whether arbitrators are entitled to a presumption of neutrality. A long line of Canadian case law holds that judges have a "strong presumption" of neutrality,[20] a presumption that had also been applied to other adjudicators whose mandate comes from a statute.[21] In at least one case, *Jacob Securities*, an Ontario Court had held that this presumption to privately appointed arbitrators, "whose function is in the nature of judicial determination".[22] The ONCA expressly adopted this conclusion, in rather strident terms:

> The legislature allows parties to entrust their disputes to arbitration and restricts recourse to court when they have done so. It would undermine the integrity of this legislatively endorsed system of dispute resolution, as well as confidence in the finality of the results coming out of it, to hold there to be no presumption that those results were reached by an impartial decision-maker. This would place the entire arbitral scheme under an unwarranted cloud.[23]

Of course, this presumption can be overcome by evidence of arbitrator bias. The Court therefore turned next to the implications of its finding that the arbitrator had no duty to disclose the second appointment for

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[19] *Ibid* at para 115.
[20] *Ibid* at para 133, citing *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 76; *R. v S. (R.D.)*, [1997] 3 SCR 484 at para 49.
[21] *Aroma* ONCA, *supra* note 1 at para 134, citing *Ontario Provincial Police v MacDonald*, 2009 ONCA 805 at para 44; *Terceira v Labourers International Union of North America*, 2014 ONCA 839.
[22] *Jacob Securities Inc. v Typhoon Capital B.V.*, 2016 ONSC 604 at para 40. It is perhaps notable that the judge in *Jacob Securities*, Mew J, is himself an experienced arbitrator, especially in international sports disputes.
[23] *Aroma* ONCA, *supra* note 1 at para 137.

the question of bias. Explaining the legal context, the Court (correctly) observed that, under the Model Law, a failure to disclose information that should have been disclosed "is germane to, although not determinative of, whether an arbitral award should be set aside for reasonable apprehension of bias" [24]. The Court characterized the arbitrator's failure of disclosure relied on by the application judge as "a failure to meet the parties' expectations for disclosure of which he was never informed"; accordingly, it could not support a finding of reasonable apprehension of bias.

IV. COMMENTARY

The ONCA's decision in *Aroma* puts to rest much of the anxiety engendered by the Superior Court and reaffirms Canada as sitting firmly within the mainstream of Model Law jurisdictions. However, even some commentators who agree that there was no legal duty to disclose the second appointment might still conclude that the arbitrator's conduct in appearing to conceal that appointment after the initial inadvertent disclosure was grounds for justifiable doubts about his independence and impartiality. The case is not an entirely cut-and-dried one.

There are only two legally novel aspects of the judgment, both more relevant to an internal Canadian audience than to other Model Law jurisdictions. The first is the Court's express adoption of a presumption of neutrality for privately-appointed arbitrators and the second is the explicit equating of the "reasonable apprehension of bias" and "justifiable doubts" tests. It is also notable that the Court found that, on its own, a repeat appointment by the same party or counsel does not trigger a duty to disclose. There must be some additional circumstance, such as the overlapping parties and issues in *Halliburton*, the close collaborative relationship between arbitrators and counsel in *Aiteo*, or a "critical mass" of repeat appointments as described in the IBA Guidelines' Orange List.

The case is also helpful in shedding light on the nature of the "justifiable doubts" standard under Art. 12(1) of the Model Law. As the Court found, that test is entirely objective, in contrat to the subjective "eyes of the parties" test in General Standard 3a of the IBA Guidelines. Under the Model Law, arbitrators have a legal duty to disclose only those facts and circumstances that might, in the eyes of a reasonable

[24] *Ibid* at para 12.

observer, give rise to justifiable doubts about their independence and impartiality. In applying that standard, subjective concerns of the parties that were never communicated to the arbitrator are irrelevant. Arbitrators' duty to disclose cannot be affected by information to which they were never privy, unless the parties agree to import a subjective standard, such as by expressly adopting the IBA Guidelines.

This decision is particularly helpful in preserving the viability of arbitration in niche fields of practice, smaller arbitration markets, and other circumstances where there are not large numbers of arbitrators who possess the qualifications stipulated by the parties (although the ONCA did not expressly address this issue). Where counsel do not have many qualified options to choose from when appointing an arbitrator, and where arbitrators will of necessity see the same counsel frequently, they can rest easier in knowing that a mere repeat appointment should not attract successful challenges or set-aside applications.

Nevertheless, the case still serves as a warning to counsel and arbitrators, as the Court in *Aroma* acknowledged that circumstances exist where overlapping appointments by the same law firm or party will raise a reasonable apprehension of bias. Regardless of the outcome in *Aroma*, arbitrators should still hew to the principle of "when in doubt, disclose".