

Brian Kolenda
416-865-2897
bkolenda@litigate.com



Ravneet Minhas
416-865-2975
rminhas@litigate.com

November 22, 2024

Aroma of Controversy: Stirring Up Arbitrator Disclosure Duties

The Ontario Court of Appeal's decision in *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc* has reshaped the disclosure obligations of arbitrators, particularly in cases involving multiple appointments of an arbitrator by the same party or counsel. In reinstating an arbitral award that had been set aside, the Court clarified that the duty to disclose potential conflicts of interest under Article 12 of the *Model Law* is objective. It considers whether relevant circumstances would likely give rise to justifiable doubts about impartiality from the standpoint of a fair-minded and informed observer rather than through the eyes of the parties. At the same time, the Court's substantive decision, in some ways, goes against the trend in international arbitrations, and it will be important for parties considering international arbitration to assess potentially differing interpretations of the *Model Law* in any given jurisdiction.

The Underlying Decision

The arbitration at issue arose between the franchisor (the "Applicants") and franchisee (the "Respondents") who each alleged against the other breaches of the applicable Master Franchise Agreement ("MFA"). The MFA's arbitration clause specified that the "arbitrator must be either a retired judge, or a lawyer experienced in the practice of franchise law, who has *no prior social, business or professional relationship with either party.*"

In the correspondence between counsel when selecting arbitrators, both sides raised concerns about the relationships between arbitral candidates and counsel. One candidate was rejected because they were unilaterally contacted by counsel for the Respondents, and another was similarly rejected due to past engagements with that same counsel. After confirming there were no prior engagements, an Arbitrator was appointed.

Approximately 17 months into the arbitration, it came to light that the Arbitrator had been retained as the sole arbitrator in an unrelated arbitration by counsel for the Respondents, a fact that had not been disclosed to the Applicants.

Counsel for the Applicants learned of the second appointment upon receiving an email from the Arbitrator with regard to the

final award. A lawyer at the Respondents' law firm, who had not been involved in the arbitration, was copied on that email. After an inquiry by counsel for the Applicants, the Arbitrator disclosed that the Respondents' firm had engaged him as the sole arbitrator in another unrelated matter.

Following the rendering of the final award, the Applicants brought an application before the Ontario Superior Court of Justice to set aside the arbitral award, including on the basis of a reasonable apprehension of bias.

Justice Steele invoked two provisions of the *Model Law* in her decision: Article 34(2)(a)(iv), which permits a court to annul an award where "the composition of the tribunal...was not in accordance with the agreement of the parties," and Article 18, which mandates that "all parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." Justice Steele concluded that a breach of Article 18 constituted an adequate basis for the annulment of an award.

Justice Steele set aside the award, holding that the Arbitrator's failure to disclose that he had been appointed by counsel for one of the parties to serve as sole arbitrator on another matter gave rise to a reasonable apprehension of bias in all of the circumstances.

The ONCA Decision

The Court of Appeal for Ontario allowed the appeal and held that the Arbitrator's failure to disclose his involvement in the second arbitration did not create a reasonable apprehension of bias. The Court emphasized that the test for an arbitrator's duty to disclose under Article 12(1) of the *Model Law* is objective, focusing on whether a fair-minded observer would doubt impartiality. The application judge misapplied the objective test by referencing and relying on the subjective test in the IBA Guidelines, which were not a legal regime governing the arbitration. As such, the application judge's reliance on unshared correspondence between the parties, which outlined their subjective expectations about disclosure, constituted a reviewable error of law.

The Court further instructed that a finding that an arbitrator breached the legal duty to disclose is a relevant, but not determinative, factor in deciding whether a reasonable apprehension of bias has been shown. Under that objective test, an arbitrator's duty to disclose is based on the facts they are reasonably aware of, not the subjective expectations of parties that had not been communicated to them. The parties' failure to inform the Arbitrator about their subjective expectations could not alter the legal disclosure requirements under the *Model Law*.

Ontario Diverges from the International Trend in Disclosure of Potential Conflicts

The Court of Appeal for Ontario has previously emphasized that the *Model Law* is to be interpreted and applied in a manner that ensures international uniformity, thereby making decisions from other jurisdictions highly persuasive in Ontario.

Despite this, in *Aroma*, the Court was prepared to depart from decisions in other major arbitral jurisdictions, where repeated appointments or instructions by a party or firm, coupled with an arbitrator's failure to disclose these connections, have led Courts to set aside arbitral awards.

In England, the Commercial Court considered an arbitrator's duty of disclosure and apparent bias in *Aiteo Eastern E & P Company Ltd v Shell Western Supply and Trading Ltd & Ors*. Like the test under the *Model Law*, the test for apparent bias in the United Kingdom considers whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. The Commercial Court in *Aiteo Eastern* found apparent bias on the part of one of the arbitrators due to undisclosed professional engagements with counsel for the Defendants. As a result, the Court remitted the affected arbitral award for reconsideration.

Similarly, the Court of Appeal of Paris set aside an arbitral award due to the existence of facts likely to cause, in the minds of the parties, a reasonable doubt as to the presiding arbitrator's independence. The presiding arbitrator's law firm had ongoing business relations with Vivendi, a significant shareholder in Telecom Italia, which was a party to the arbitration. These ties were not disclosed during the arbitration. The Court found that the connections between Vivendi, a third party interested in the arbitration's outcome, and the presiding arbitrator's law firm did not undermine the arbitrator's integrity. However, these ties created an objective conflict of interest that could reasonably raise doubts about the arbitrator's independence in the minds of the parties. The Court thus set aside the award.

In another recent case, France's Court of Cassation—the apex court in the French judiciary for civil cases—upheld the annulment of an arbitral award rendered by a three-arbitrator tribunal based on doubts as to the impartiality of the presiding arbitrator. The annulment followed the arbitrator's failure to disclose personal ties with the lead counsel of one of the parties, revealed through a eulogy given by the presiding arbitrator at the lead counsel's funeral. The arbitrator's comments about their close, friendly relationship and the statement by the presiding arbitrator that he consulted that counsel "*before making any important decision*" raised doubts

about his independence, leading the Court to rule that the relationship should have been disclosed.

Disclosure Moving Forward

Anecdotally, Justice Steele's decision in *Aroma* has had a material impact on the conduct of arbitrators in Canada. Those aware of the decision had begun to proactively disclose parallel arbitrations involving counsel appearing before them. It remains to be seen whether the Court of Appeal's decision will reverse this trend. Practitioners, including ourselves, are keen to observe whether other Canadian courts will align with Ontario's highest court on similar issues. In the interim, parties concerned with having the level of disclosure reflected in Justice Steele's decision will do well to negotiate for that right in any arbitration agreement or terms of appointment.