CITATION: Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al., 2023 ONSC 1827
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ONTARIO

SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

BETWEEN:	
AROMA FRANCHISE COMPANY, INC., SHEFA FRANCHISES LTD., AROMA ESPRESSO BAR LTD., AROMA USA, INC., YARIV SHEFA, OSHRAT KATRI and AROMA GLOBAL LTD.	Matthew J. Latella and Ben Sakamoto, for the Applicants
Applicants	
– and –	
AROMA ESPRESSO BAR CANADA INC., HALVA INVESTMENTS LIMITED, 6605702 CANADA INC. and EARL GORMAN	Allan D.J. Dick and Daniel Hamson, for the Respondents
Respondents	
	HEARD: January 11, 12, and 13, 2023

J. STEELE J.

[1] This is an application to set aside two international arbitral awards. The applicants ask that the arbitration awards be set aside and the matters at issue in the arbitration be decided by a different arbitrator.

[2] The applicants assert that, among other things, there was a reasonable apprehension of bias, the Arbitrator exceeded his jurisdiction, and the Arbitrator gave inadequate reasons.

[3] Arbitrators, like judges, are expected to maintain high standards of impartiality. Further, it is presumed that arbitrators are impartial. However, circumstances can arise where an informed person would have doubts that the arbitrator, whether consciously or unconsciously, could decide

the matter fairly. This case is primarily about whether the arbitrator ought to have disclosed a subsequent retainer from the same lawyer while the case was ongoing, and whether, in the circumstances of this case, his failure to do so would give rise to a reasonable apprehension of bias.

[4] For the reasons set out below, I have determined that there was a reasonable apprehension of bias, and the arbitration awards shall be set aside. As highlighted below, in coming to this conclusion, context matters.

[5] As I have determined that the awards shall be set aside on the basis of reasonable apprehension of bias, I do not find it necessary to address all of the grounds raised by the applicants on this appeal. I highlight briefly below my views on certain of the other grounds raised.

Background

[6] Aroma Espresso Bar Canada Inc. ("AC") was the master Canadian franchisee of Aroma Franchise Company Inc. ("AF"). AC essentially acted as a middle person between AF and the individual coffee shop owners in Canada.

[7] The Master Franchise Agreement made in 2007 between Aroma USA, Inc. (subsequently assigned to Aroma Franchise Company Inc.) and Aroma Espresso Bar Canada Inc. (the "MFA") contained the following arbitration clause (article 17.4.1):

> Subject to Section 17.3 and upon written notice to all parties by either party, all controversies, disputes or claims arising between Franchisor, any of its affiliates or any of their respective officers, directors, agents, employees and attorneys and Master Franchisee, any of its affiliates or any of their respective Owners, arising out of or in connection with this Agreement or in respect of any legal relationship associated with or derived from this Agreement including its negotiation, validity, existence, breach, termination, construction or application, or the rights, duties or obligations of any party to this Agreement (the "Dispute") shall be settled by binding arbitration using the facilities and National Arbitration Rules then in force (the "Rules") of the ADR Institute of Canada ("ADR Institute") or its successor organization, at the office of the ADR Institute located in or nearest to Toronto, Ontario or at such other location as the parties may mutually agree. The parties shall jointly select one (1) neutral arbitrator from the panel of arbitrators maintained by the ADR Institute. 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. [...]

[8] A dispute arose regarding the cancellation by AC of supply orders from Aroma Israel, which had been the sole supplier of coffee for about 12 years. AF, the franchisor, took steps under the MFA to terminate the agreement and assume AC's role vis-à-vis the individual franchisees.

AC had also alleged various breaches of the MFA by AF prior to the delivery of the notice of default to AC by AF.

[9] The matter went to arbitration before P. David McCutcheon (the "Arbitrator"). The applicants and respondents advanced claims and counterclaims against one another in the arbitration. Among other things, the Arbitrator determined that AF had wrongfully terminated the MFA and ordered Aroma Franchise to pay Aroma Canada the sum of $10 million in damages. Aroma Franchise and Aroma USA, Inc., were also ordered to pay $200,000 in damages for breach of the statutory duty of fair dealing. AF was successful in its claim for certain unpaid royalties in the amount of $69,000.

[10] Unbeknownst to the applicants, approximately 17 months into the Aroma arbitration matter, the Arbitrator was retained as the sole arbitrator on another matter by Allan Dick, counsel for the respondent.

[11] On January 7, 2022, just prior to releasing his decision, the Arbitrator emailed the parties (through counsel) to advise that the Final Award was completed. He requested an additional payment before releasing the award. In his email, he copied Daniel Hamson, a lawyer from Sotos LLP, who had not been involved in the Aroma Arbitration at all prior to this point. The Sotos LLP team had previously included Allan Dick, Andy Seretis and Michelle Logasov, but neither Mr. Seretis nor Ms. Logasov were copied on the email from the Arbitrator. The applicants responded to inquire why Mr. Hamson was copied on the email but not the other lawyers who had been involved in the file. Mr. Dick replied stating: "Thanks, Matt. Please continue to add Michelle." There was no mention of the other matter that the Arbitrator was now working on with Mr. Dick and Mr. Hamson at Sotos.

[12] The Arbitrator delivered the Final Award, dated January 7, 2022 (the "Final Award"), by email on January 11, 2022, again copying Mr. Hamson. It is not clear whether the Arbitrator knew that Mr. Hamson was going to be involved in the Aroma matter going forward, and if so, how.

[13] On January 13, 2022, counsel for the applicants wrote again to the Arbitrator and Mr. Dick to inquire as to why Mr. Hamson had been copied on recent emails, stating:

> ...in light of [Mr. Hamson'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.

[14] The Arbitrator replied the same day stating: "That was my mistake. Mr. Hamson should not have been copied." That 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." This other matter is referred to herein as the "Other Sotos Engagement".

[15] On January 14, 2022, the applicants posed a series of questions to the Arbitrator regarding his involvement in the Other Sotos Engagement. The Arbitrator replied:

> In answer to your questions, Mr. Hamson has had day-to-day carriage on the file but Mr. Dick has had involvement from time to time. I was retained on October 16, 2020. I understood that the parties agreed on my appointment. Mr. Hamson signed the terms of appointment for his client and I understand that he has full authority to act. I don't think there is anyone else at Sotos who is acting for their client[.] I am the sole arbitrator. 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.

[16] On January 18, 2022, the applicants posed further questions to the Arbitrator regarding the Other Sotos Engagement, to which the Arbitrator replied.

[17] On January 20, 2022, the applicants advised the Arbitrator that they intended to apply to this Court to set aside the Final Award "including on the basis of reasonable apprehension of bias." The applicants indicated that this would "obviously impact on the appropriateness of any further steps in this arbitration."

[18] The Arbitrator invited submissions as to whether he should proceed with the award of interest and costs. He subsequently delivered an order on the sequence of submissions on costs and interest.

[19] The Arbitrator made a costs and interest award dated October 11, 2022 (the "First Costs Award") and a second, correcting costs and interest award on December 13, 2022 (the "Correcting Costs Award").

[20] On April 14, 2022, the applicants filed the application to set aside the Final Award.

Analysis

The Court's Jurisdiction on a Set Aside Application

[21] The applicants ask the Court to set aside the Arbitrator's awards. This was an Ontario seated arbitration.

[22] Under the *UNCITRAL Model Law on International Arbitration* (the "*Model Law*"), which is adopted in the *International Commercial Arbitration Act, 2017,* S.O. 2017, c. 2, Sched. 5 (the "ICAA"), an arbitral award may be set aside by the Court in limited circumstances. Section 34 of the *Model Law* provides:

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

a) The party making the application furnishes proof that:

i. [...]

ii. [...]

iii. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matter submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

iv. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

[...]

(3) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[23] Even where grounds may exist for the setting aside of an arbitrator's award, the Court may exercise its discretion to not set aside the order.

[24] As set out in *Popac v. Lipsyc*, 2016 ONCA 135, 129 OR (3d) 321, at para. 45, when considering whether a procedural error is such that article 34(2) of the *Model Law* is invoked, "the essential question remains the same – what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of the fairness of the process?"

[25] The respondents ask the Court to not exercise this discretion in the event the Court finds grounds sufficient to warrant the setting aside of the Arbitrator's award.

[26] The applicants submit that the use of this discretion to not set aside an award, is a safety net for where there have been procedural errors and the Court must weigh whether such procedural errors impacted the reliability of the result or the appearance of fairness of the process.

Reasonable Apprehension of Bias – the Court's Jurisdiction

[27] The applicants submit that the arbitral awards ought to be set aside. The applicants submit that the Court may do this based on reasonable apprehension of bias and/or on the cumulative effect of the alleged improprieties: *Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC*, 2016 ONCA 60, 129 OR (3d) 37.

[28] Under the *Model Law*, an arbitral award may be set aside where the arbitrator's conduct gives rise to a reasonable apprehension of bias. One of the grounds to set aside an arbitral award is if the arbitral procedure was not in accordance with the *Model Law*: article 34(2)(a)(iv).

[29] Article 18 of the *Model Law* requires that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." Where an arbitrator's conduct gives rise to a reasonable question of bias, article 18 of the *Model Law* is violated: *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604, at para 33, additional reasons at *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 1478. Accordingly, under article 34(2)(a)(iv) of the *Model Law* the violation of article 18 would be grounds for the Court to set aside the arbitral award.

Was the Arbitrator Required to Disclose the Other Sotos Arbitration?

[30] The starting point of the analysis on the reasonable apprehension of bias issue is the Arbitrator's failure to disclose the Other Sotos Arbitration to the applicants.

[31] Article 12 of the *Model Law* provides:

> (1) When a person is approached in connection with his possible appointment as an arbitrator, **he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.**
>
> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. [emphasis added]

[32] In addition to Article 12 of the *Model Law*, there are guidelines, principles and case law that are of assistance in considering whether the Arbitrator ought to have disclosed the Other Sotos Arbitration.

(a) The IBA Guidelines

[33] The applicants submit that the *IBA Guidelines on Conflicts of Interest in International Arbitration*, (London: International Bar Association, 2014) (the "*IBA Guidelines*") are instructive. The respondents state that the *IBA Guidelines* were not adopted by the parties. However, Mew J. in *Jacob Securities*, at para. 41, stated that the *IBA Guidelines* "are widely recognized as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases."

[34] The *IBA Guidelines* state, in para. 1, that arbitrators are often unsure about the scope of their disclosure obligations and note that "disclosure of any relationship, no matter how minor or serious, may lead to unwarranted or frivolous challenges." The guidelines further provide, in para. 1, that "it is important that more information be made available to the parties, so as to protect awards against challenges based upon alleged failures to disclose, and to promote a level playing field among parties and among counsel engaged in international arbitration."

[35] Part 1 of the *IBA Guidelines* sets out the general standards regarding impartiality, independence and disclosure. Article 3(a) provides:

> If facts or circumstances exist that *may, in the eyes of the parties*, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator *shall* disclose such facts or circumstances to the other parties, [...] prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them. [emphasis added]

[36] Part II of the *IBA Guidelines* sets out practical application of the general standards. The *IBA Guidelines* set up a stop-light type system for what ought to be disclosed by the arbitrator – red for no-go (subject to a potential waiver for items on the waivable red list), orange for potentially a problem and green for go. The orange list includes: "The arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm." This effectively recognizes that an arbitrator may be engaged more than once by the same counsel. It does not automatically fall on the orange list unless the appointment has been more than three times within the past three years. As discussed below, the orange list is non-exhaustive.

[37] Article 6 of the Practical Application of the General Standards regarding the *IBA Guidelines'* non-exhaustive Orange List provides:

> Situations not listed in the Orange List or falling outside the time limits used in some of the Orange List situations are generally not subject to disclosure. *However, an arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as*

> *to give rise to justifiable doubts as to his or her impartiality or independence.* Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, *depending on the circumstances*, may need to be disclosed by an arbitrator. Such may be the case, for example, in the event of repeat past appointment by the same party or the same counsel beyond the three-year period provided for in the Orange List, or when an arbitrator concurrently acts as counsel in an unrelated case in which similar issues of law are raised. **Likewise, an 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.** [emphasis added]

[38] The applicants argue that the circumstances here are such that the Other Sotos Engagement, which was taken on by the Arbitrator while the Aroma matter was ongoing, ought to have been disclosed. An arbitrator needs to assess on a case-by-case basis whether a given situation, even though not listed on the orange list, is nevertheless one that ought to be disclosed given the circumstances.

[39] The applicants submit that the circumstances are such that the Arbitrator ought to have disclosed the Other Sotos Engagement, which circumstances include: the expectations of the parties in the selection of the Arbitrator, the fact that the Arbitrator was the sole arbitrator in the Aroma arbitration and not part of a panel (and therefore controlled the outcome), the existence of overlapping issues between the Other Sotos Engagement and the Aroma arbitration, the terms of the MFA, and the correspondence between counsel regarding the sorts of things that would be a concern prior to the engagement of the Arbitrator.

(i) Selection of Arbitrator

[40] As noted above, the MFA required 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." This provision of the MFA was included in the letter to the Arbitrator when counsel for the parties reached out to enquire about his availability and interest to assist with the Aroma arbitration.

[41] Prior to counsel reaching out to the Arbitrator, there was significant correspondence between them regarding various proposed arbitrators for this matter. Initially a retired judge was put forward by Mr. Dick, counsel to the respondents, as a potential mediator/arbitrator. However, the applicants would not agree to this individual because Mr. Dick had reached out to the potential mediator/arbitrator prior to contacting counsel for the applicants, Mr. Latella. Mr. Latella expressed the view that the arbitrator had to be selected based on consultation and jointly approached by counsel. The emails between counsel as they were trying to select an arbitrator shed light on key concerns for the parties:

- Mr. Dick stated with regard to proposed arbitrator, Leslie Dizgun (email dated May 24, 2019 to Mr. Latella): "Matthew, I have no personal or social

relationship with Mr. Dizgun. He is only recently of his firm so I can't account for what the firm promotes or doesn't promote. I have used him on one (failed) mediation for a franchisor though I appreciated his expertise in the franchising area during that experience. [...] I suspect others in my firm may have used him as a neutral in the past but I would have to ask to be sure."

- Mr. Latella replied to Mr. Dick (email dated May 27, 2019): "Kindly provide the same level of disclosure for both Messrs. Dizgun and Richler, including any cases either of them have mediated or presided over as arbitrator involving your firm. Regarding Mr. Dizgun, you stated that you "suspect others in [your] firm may have used him as neutral in the past but [you] would have to ask to be sure." Have you made those inquiries and, if so, what were the results? Please distinguish between instances of using him as an arbitrator, as opposed to a mediator."

- Mr. Dick replied on May 28, 2019 stating that others in his office have used Mr. Dizgun 7-8 times as a mediator in franchise cases and as an arbitrator. Mr. Latella replied on May 30, 2019: "Can you please advise of the timeframe over which your firm has engaged Mr. Dizgun 7-8 times as a mediator? Are there any ongoing engagements involving your firm and Mr. Dizgun?" In this same email, Mr. Latella proposes Mr. McCutcheon and states that: "[He has] not spoken to David ... in over 10 years, but know[s] him by reputation to be one of the most respected international arbitrators in the city. [He and David] were once both involved in a ground lease arbitration as counsel, many years ago. [He does] not recall any other professional dealings with [David McCutcheon]."

- Mr. Dick replied on May 30, 2019 that his firm had an international arbitration with Mr. Dizgun that was ongoing. With regard to David McCutcheon, Mr. Dick confirmed that: "[He and David] were opposing counsel on a major piece of litigation at least a few years before [he] came [to his firm] in 2006."

- Mr. Dizgun was rejected by the applicants because of the business relationship he had with the respondents' counsel's firm.

- By letter, dated June 21, 2019, Mr. Dick informed Mr. Latella that his client was prepared to appoint David McCutcheon as arbitrator based on certain conditions, including: "you advise as to the source of the recommendation to you to appoint Mr. McCutcheon so we have a better understanding of the connection that you, your firm or your clients have with Mr. McCutcheon."

[42] That last letter illustrates that Mr. Dick also wanted to understand any connection that Mr. Latella, Mr. Latella's firm or clients had with any proposed arbitrator.

[43] Ultimately the Arbitrator was selected. Counsel for the applicants had never engaged him before as an arbitrator or mediator, nor had counsel for the respondents.

[44] The evidence of Dany Michel, the CEO of Aroma Espresso Bar Ltd. and Shefa Franchises Ltd., which I accept given the correspondence regarding the selection of an arbitrator, was that had the Arbitrator disclosed any other engagements with respondents' counsel, the applicants would not have supported his appointment as arbitrator.

[45] Mr. Michel's evidence was also that had he learned of the Other Sotos Engagement during the course of the Aroma arbitration, he would have objected to the Arbitrator continuing to act. I note that Mr. Michel's evidence is hindsight evidence. However, it is supported by the email correspondence that was engaged in by counsel regarding the selection of an arbitrator.

[46] In cross-examination, Ms. Logasov, a colleague of Mr. Dick's, in reference to the above correspondence, agreed that on the facts of this case it would be appropriate for the parties to make disclosure of past business relationships with arbitral candidates. Ms. Logasov was also asked whether the "Other Sotos Engagement" constitutes a professional relationship within the meaning of the MFA. She agreed that it was a professional relationship. Mr. Dick, however, agreed that the Other Sotos Engagement was a professional relationship but not under the MFA. Mr. Dick also agreed in cross examination that had the Other Sotos Engagement existed at the time the Arbitrator was being engaged in this matter, it "would have been an expected disclosure."

[47] Based on the correspondence, it is clear that the applicants were concerned that any appointed arbitrator did not have a prior relationship with counsel to the parties, and the respondents were aware of this concern. The respondents state that this was not a shared understanding. In a letter to Mr. Latella from Mr. Dick, dated July 12, 2019, Mr. Dick wrote:

> You rejected Mr. Dizgun for a so-called business relationship with our firm which is not the test under the MFA. Our firm is not a party to the arbitration. He is used by us, amongst a number of other arbitrators, because he is one of a handful of arbitrators with the experience in the area we practice in most.

The applicants' counsel did not respond to this email to correct the respondents' contrary view.

[48] However, from cross-examinations of Mr. Dick, he certainly expected that if an arbitrator was engaged by a party or counsel prior to, or at the time of, his or her engagement that would have been disclosed. The obvious rhetorical question flows from this – If it was necessary to disclose an engagement of an arbitrator prior to engaging him or her, why would it not be required to disclose an engagement of the arbitrator by the same lawyer on another matter while the arbitration is extant?

(ii) Overlapping Issues

[49] The applicants argue that there is significant overlap in the issues between the two arbitrations. The Arbitrator stated in his January14, 2022 email that he did not believe that there was overlap in the issues. Mr. Dick wrote in an email the same day that "there is no connection between our clients in the respective arbitrations."

[50] The details regarding the Other Sotos Engagement were contained in the pleadings, as the matter had commenced in Court before moving to arbitration. Ms. Logasov's evidence was that the Aroma arbitration and the Other Sotos Engagement "are completely unrelated." She stated: "Among other differences, the parties are not the same or related to the Parties to the Aroma Arbitration, the Unrelated Arbitration is not a franchise dispute, it is a domestic arbitration, it involves a manufacturing and distribution between the litigants and it does not relate to the same industry." The Other Sotos Arbitration is extant and is not proceeding to a hearing on the merits until sometime in 2023. However, the Other Sotos Arbitration was started in September 2020 with the expectation that it would conclude in 2020.

[51] The applicants argue that where there are overlapping issues there is a potential concern regarding fairness. Specifically, one party may have the advantage of seeing how an arbitrator deals with an issue in one arbitration and can use that knowledge in the other arbitration. The applicants submit that if the Other Sotos Arbitration had proceeded on schedule, the respondents would have had the benefit of seeing how the Arbitrator addressed any overlapping issues.

[52] In *Halliburton Company v. Chubb Bermuda Insurance Ltd.* [2020] UKSC 48, 2 All ER 1175, the U.K. Supreme Court (the "UKSC") noted, at para. 131, that where an arbitrator has appointments in multiple matters with the same or overlapping issues with one common party, "this may, depending on the relevant custom and practice, give rise to an appearance of bias."

[53] Although not significant, there are some overlapping issues between the two matters, including allegations of conspiracy to misappropriate the other side's intellectual property and allegations of engaging in secret meetings and communications/misuse of confidential information.

[54] However, given that the Other Sotos Arbitration did not involve a franchise dispute and was in a different industry, the fact that there may have been some overlapping contractual issues does not assist the applicants in their position regarding disclosure/reasonable apprehension of bias.

(iii) Arbitrator was Sole Arbitrator

[55] The applicants submit that the fact that the Arbitrator was the sole arbitrator, and not part of a panel is another factor weighing in favour of disclosure of the Other Sotos Arbitration. I agree that this is a factor.

(b) The UNCITRAL Arbitration Rules

[56] Article 17.4.1 of the MFA adopted the *ADR Institution of Canada Arbitration Rules* ("ADRIC Rules"). Under those rules, if the arbitration is international, the *United Nations Commission on International Trade Law Arbitration Rules* ("UNCITRAL Rules") govern: 1.3.2 of the ADRIC Rules.

[57] Article 11 of the UNCITRAL Rules provides:

> When a person is approached in connection with his or her possible appointment as an arbitrator, **he or she shall disclose any circumstances *likely* to give rise to justifiable doubts as to his or her impartiality or independence**. An arbitrator, **from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties** and the other arbitrators unless they have already been informed by him or her of these circumstances. [emphasis added]

[58] In *Halliburton*, the UKSC stated, at para. 113, that the word "likely" in article 11 of the UNCITRAL Rules "must be interpreted in the context of the Model Law itself, which appears to suggest that the obligation to disclose arises if the circumstances could reasonably give rise to justifiable doubts."

(c) ADR Institute of Canada Code of Ethics

[59] The applicants further point to the *ADR Institute of Canada Code of Ethics*. Section 6 of the code provides that "[a] Member shall disclose any interest or relationship likely to affect impartiality or *which might create an appearance of partiality or bias*" (emphasis added).

(d) Case Law

[60] *Halliburton* addressed a situation where an arbitrator accepted appointments in multiple, overlapping cases, arising out of the same incident, without disclosure. In *Halliburton*, the arbitrator was the chair of the arbitral panel and had been involved with prior arbitrations involving Chubb, including having been appointed by Chubb. The arbitrator's prior involvement with Chubb was disclosed prior to his appointment as chair of the panel. He then accepted subsequent appointments by Chubb, which were not disclosed.

[61] The U.K. Supreme Court determined, at para. 145, that the arbitrator had a "legal duty" under UK law to disclose his subsequent appointments because the arbitrations with one common party may overlap was a circumstance "which might reasonably give rise to the real possibility of bias." The UKSC noted, at para. 146, that the disclosure should have included the identity of the common party seeking the arbitrator's appointment on the second reference, whether the proposed appointment in the second reference was to be a party-appointment or a nomination for appointment by a court or third party, and a statement of fact that the second reference arose from

the same incident. However, taking into account the relevant facts and circumstances in that case, the UKSC determined that that there was not a reasonable apprehension of bias.

[62] The UKSC provides some helpful guidance regarding this issue. First, as noted above, the UKSC determined that there was a legal obligation of the arbitrator to disclose the other two new arbitrations on which he was engaged. Second, the UKSC made clear, at para. 118, that the failure to disclose may in some cases amount to apparent bias.

[63] In my view, taking into account the correspondence regarding the selection of the arbitrator, the provisions of the MFA, the *IBA Guidelines*, and the *Halliburton* case, it is clear that the Arbitrator ought to have disclosed the Other Sotos Engagement to the applicants.

Was there a reasonable apprehension of bias?

[64] The applicants submit that there was a reasonable apprehension of bias on the part of the Arbitrator. The applicants point to the undisclosed Other Sotos Engagement as giving rise to a reasonable apprehension of bias. As noted, the applicants did not learn of the Other Sotos Engagement until after the Final Award had been released.

[65] As a starting point, none of this is to say that an arbitrator can never have two ongoing arbitrations from the same lawyer or law firm at the same time. Of course, they can. The issue is whether the second engagement ought to have been disclosed in the circumstances of this case, which I have determined it ought to have been, and whether, in the circumstances of this case, there is a reasonable apprehension of bias.

[66] In *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at p. 394, the Supreme Court of Canada endorsed the following test for determining whether there was a reasonable apprehension of bias:

> [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.

[67] As set out in *Jacob Securities*, at para. 37, this test equally applies to an arbitrator acting in a judicial or quasi-judicial capacity. However, although the test may equally apply, as noted in *Halliburton*, at para. 55, there are "differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes." The UKSC in *Halliburton* discusses the differences at paras. 56-62. The differences include the fact that courts resolve civil disputes, which are generally open to the public, whereas arbitration is generally conducted in private. Arbitrators and the parties are often under a duty of privacy and confidentiality.

[68] The UKSC also notes that judges hold public office, whereas an arbitrator is appointed to act by the parties and is paid by the parties. The UKSC references an arbitrator's financial interest and states, at para. 59, that

> "[the arbitrator] is appointed only for the particular reference and, if arbitral work is a significant part of the arbitrator's professional practice, he or she has a financial interest in obtaining further appointments as arbitrator. Nomination as an arbitrator gives the arbitrator a financial benefit."

[69] In addition, the UKSC notes, at para. 61, that due to the private nature of most arbitrations, where the same arbitrator is a member of a tribunal of more than one case concerning the same or overlapping subject matter, the party that is not involved in the various arbitrations "has no means of informing itself of the evidence led before and legal submissions made to the tribunal (including the common arbitrator) or of that arbitrator's response to that evidence and those submissions in the arbitrations in which it is not a party."

[70] The test re reasonable apprehension of bias is described by J. Brian Casey on page 412 in *Arbitration Law of Canada: Practice and Procedures, 4th ed. (Huntington: JurisNet LLC 2022)* as follows:

> The test is, in the eyes of a neutral third party, is there a reasonable apprehension of bias or justifiable doubts as to a lack of impartiality or independence. There is no need to prove it actually exists.

[71] I agree with the respondents' submission at paragraph 36 of their factum that the elements necessary to find a reasonable apprehension of bias and the level of proof that is needed before an arbitral award is set aside, includes the following relevant principles:

- 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: *A.T. Kearney Ltd. v. Harrison*, [2003] O.J. No. 438 (Ont. S.C.J.), at para. 7

- The presumption of impartiality is high: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 SCR 259, at para. 59.

- The inquiry is objective and requires a realistic and practical review of all the circumstances from the perspective of a reasonable person: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369. The courts will not entertain the subjective views of the parties in making such determination: *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485, at para. 163.

- 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 is insufficient: *G.W.L. Properties Lt. v. W.R. Grace & Co. of Canada Ltd.*, 74 BCLR (2d) 283 (B.B.C.A.), at para. 13, cited in *Dufferin*, at para. 112.

- When considering bias, context matters: *Telesat Canada v. Boeing Satellite Systems International, Inc.*, 2010 ONSC 4023, cited in *Dufferin*, at para. 112. 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: *Dufferin*, at para. 114.

[72] The respondents argue that there has never been a case where an international commercial arbitration has been set aside for reasonable apprehension of bias where the arbitrator had accepted another mandate from the same lawyer while an arbitration was extant. However, as noted in *Dufferin*, context matters. It is the context here that is critical.

[73] The applicant submits that the outcome in *Halliburton* is distinguishable due to the differences in the applicable legislation. First, under the UK legislation, there is an additional hurdle, not present under the *Model Law*, that the applicant must show that substantial injustice has been or will be caused. In addition, there was no statutory disclosure requirement in the U.K. legislation similar to s. 12(1) of the *Model Law*.

[74] The applicants argue that based on *Conmee v. Canadian Pacific Railway Co.*, [1888] 16 O.R. 639, "the mere intimation of future financial award" offered to an arbitrator by a party during an extant arbitration may be fatal to the arbitrator's role in the arbitration. The applicants argue that this case lays out the fact that money talks. In *Conmee* the company involved in the arbitration offered a job to the arbitrator, while the arbitration was ongoing. The arbitrator accepted the job offer after the case was decided. *Conmee* is different from the instant case as it involved a lucrative job offer to the arbitrator by a party. That is not the case here. None of the parties engaged the Arbitrator in another ongoing engagement. The respondents' lawyer did.

[75] However, the applicants submit that the fact that the offer to the Arbitrator for another job came from the respondents' lawyer and not the party is not of consequence to them. There was a live dispute between the parties and there was a proffering of money (through another engagement) to the neutral party by counsel to one of the parties while the case was ongoing. As noted above, the UKSC in *Halliburton* identified the fact that an arbitrator has a financial interest in obtaining further arbitral appointments as one of the differences between arbitrators and judges. The applicants state that arbitral appointments, although made in consultation with the clients, are generally made by counsel.

[76] In *Szilard v. Szasz*, [1955] S.C.R. 3, at pp. 6-7, which is factually different from the instant case, the Supreme Court of Canada made the following statements regarding impartiality:

> These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables 'a party to an

> arbitration to challenge the tribunal set up. It is the probability or the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. *Each party, acting reasonably, is entitled to sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.* [emphasis added]

[77] *Jacob Securities* is a recent case from this Court regarding an application to set aside an arbitral award. In that case, the applicants had argued that the arbitrator should have known that his former law firm had acted for one of the parties. The Court determined that there was no reasonable apprehension of bias. In my view, *Jacob Securities* is factually distinguishable from this case. The fact that an arbitrator's former law firm had earned income from one of the parties is different. This would not be income to the arbitrator in any way. He was no longer working with the firm and did not have access to the firm's conflicts check system or client list when he accepted the role as arbitrator. By contrast, the Arbitrator accepted the Other Sotos Engagement, from which he would earn income, while this matter was ongoing. There was no evidence regarding the quantum of income the Arbitrator has earned from the Other Sotos Engagement.

[78] While it is a high bar to set aside an arbitral award, courts have made clear that the independence and neutrality of arbitrators is of utmost importance. In *SA Auto Guadeloupe Investissements v. Colombus Acquisitions Inc.*, Cour de Cassation, Civ. 1, 16 December 2015, N D14-16.279, which involved a Canadian arbitrator, France's highest court confirmed that an arbitrator's failure to disclose the fact that another office of his large, global law firm had an engagement involving one of the parties, of which the arbitrator was completely unaware, was sufficient to cause doubt regarding the arbitrator's independence and impartiality. The arbitrator's award was annulled, despite the time and effort that had been spent by the parties on the case. The Court in France confirmed the scope of disclosure obligations under French law, which includes a continuous obligation to disclose facts or circumstances that may give rise to issues regarding an arbitrator's impartiality throughout the proceedings. The party challenging the arbitrator in *Auto Guadeloupe* was the party who proposed the arbitrator in the first place, which the court determined did not matter.

[79] It is clear from the case law and the *IBA Guidelines* that the determination of whether a reasonable apprehension of bias exists is extremely fact specific.

[80] There was evidence from Mr. Michel on this set aside application that something did not "feel right in his guts" while the arbitration was ongoing. However, the evidence does not support that anything was awry. The arbitration was a long process over more than two years with about 7 motions, among other things. There was no complaint made along the way about the Arbitrator. The bias issue was not raised until after the Final Award was issued; however, it was not until then that the applicants learned of the existence of the Other Sotos Engagement, which had been ongoing for about 15 months. I note that the applicants enquired about why Mr. Hamson was copied on the email from the Arbitrator before the issuance of the Final Award (i.e., when the outcome was unknown).

[81] The heart of the applicants' complaint was that the Arbitrator was acting on the Other Sotos Arbitration and this was not disclosed to the applicants. Mr. Michel's evidence was:

> [He] was shocked and extremely disillusioned to have it confirmed that the arbitrator who [they] had selected had secretly taken another engagement from counsel for the Respondents, while [their] arbitration was ongoing, and chosen not to disclose that business relationship to [them]. It was very important to [them] to ensure that [they] were treated with equality and [they] took steps in this regard with the Respondents and their counsel. The existence of the [Other Sotos Engagement], especially it being kept secret from the Applicants and [their] counsel for approximately 15 months and only disclosed after the Final Award and under direct questioning by [their] counsel, fatally undermines the Applicants' confidence in the entire process of the Arbitration.

[82] The Arbitrator was not engaged by one of the parties to do the Other Sotos Arbitration. He was engaged by counsel to preside as an arbitrator on another unrelated arbitration. When the Arbitrator was engaged to act as arbitrator on the Aroma arbitration he was informed of the pertinent clause in the MFA, providing that the selected arbitrator must have "no prior social, business or professional relationship with either party." The letter did not specify that he could not act as an arbitrator on other matters with the same counsel or firms. In his engagement letter, when he accepts the retainer, the Arbitrator confirms that he has found no conflicts and sets out the terms of his engagement. Again, there is nothing in the engagement letter that specifically restricts the Arbitrator from accepting another engagement from counsel at either law firm.

[83] As set out above, the presumption of impartiality by an arbitrator is high. The fact that the Arbitrator accepted another unrelated arbitration from the same law firm that co-engaged him on this matter does not in and of itself give rise to a reasonable apprehension of bias.

[84] The respondents included an affidavit of Michelle Logasov, an associate at Sotos, in their materials. In her affidavit, Ms. Logasov confirms that neither Mr. Dick nor Andy Seretis, who acted as counsel to the respondents on the Aroma arbitration, had any communications with the Arbitrator *relating to the Aroma Arbitration* apart from the communications attached to her affidavit, which were not in the presence of the applicants' counsel. However, they did have communications with the Arbitrator relating to the Other Sotos Engagement. Ms. Logasov confirmed that "Mr. Dick and Mr. Hamson represent [their] clients in the [Other Sotos Engagement]" and that "Mr. Dick and Mr. Hamson [advised her] that at no time during the course of the [Other Sotos Engagement] was any mention ever made of the Aroma Arbitration with the Arbitrator." Ms. Logasov also states in her affidavit that "[her] firm, together with counsel to the opposing parties in the [Other Sotos Engagement], appointed the Arbitrator." There is a lot that is left unsaid regarding the circumstances of the Other Sotos Engagement.

[85] There was no evidence from AC on the issue of the Arbitrator having been retained on the Other Sotos Engagement. The pleadings in the other matter (as the matter started in Court) list

Mr. Dick as the only lawyer for the plaintiff. There was no evidence provided by the respondents on the following issues related to the Other Sotos Engagement:

- What was the quantum of money the Arbitrator received on the Other Sotos Engagement?
- Who suggested that the Arbitrator be retained on the Other Sotos Engagement?
- Who reached out to the Arbitrator to retain him on the Other Sotos Engagement?
- Was AC aware that the Arbitrator was retained on the Other Sotos Engagement?
- Were the parties in the Other Sotos Engagement aware of the ongoing Aroma arbitration?

[86] The lack of evidence on these points speaks volumes.

[87] With all the commercial arbitrators in Toronto, why was it necessary that this Arbitrator be retained on the Other Sotos Engagement while the Aroma arbitration was ongoing? It is not as though the Arbitrator was previously Sotos' go to arbitrator for franchise arbitration, or arbitration in general – quite the contrary in fact. As set out in Michelle Logasov's affidavit – Mr. Dick advised her "that neither he nor anyone at [Sotos] had any previous experience with the Arbitrator as an arbitrator" and that his "only previous experience with the Arbitrator was in practice, where he and the Arbitrator were on opposing sides of a bitterly contested dispute." It is a bad look that mid-way through the Aroma arbitration, where Mr. Dick is the lead partner, the Arbitrator is retained on another matter in respect of which Mr. Dick is the lead partner.

[88] The respondents noted that there were no checks for all of the worldwide offices of the applicants' counsel to determine whether any other lawyer in the international firm, outside the firm's Toronto office, had any relationship with the Arbitrator. In my view, it is abundantly clear that, when considering the question of whether there is a reasonable apprehension of bias, it is different if a lawyer in another office of an international law firm retains the same arbitrator on a different matter versus the same lawyer retaining the same arbitrator on another matter while a matter is ongoing without disclosing this. In fact, depending on the context, the same law office or even the same lawyer may engage the same arbitrator at the same time.

[89] It comes down to context. As set out in *Dufferin* at para. 112, citing *Telesat*: "when considering bias, whether actual or the appearance of bias, context matters." A significant factor in this matter is the emphasis that was placed, in the pre-appointment correspondence, on whether there had been any prior dealings with the chosen arbitrator by the parties, their lawyers or law firms. As set out in detail above, it was very important to both parties, but perhaps even more

important to the applicants, who are not based in this country, that the selected arbitrator not have a professional or personal relationship with either party or their counsel. After considerable correspondence and at least three proposed and rejected potential arbitrators, the parties ultimately selected an arbitrator that had not acted as a mediator or arbitrator previously for either party or their lawyers. The "neutral" status of the arbitrator was clearly important to the parties in selecting the arbitrator. It is not as though it would be less important while the arbitration was extant.

[90] The Other Sotos Engagement remained hidden from the applicants for about 15 months while the Aroma arbitration was ongoing. It was only discovered due to the inadvertent copying of Mr. Hamson on an email sent by the Arbitrator. As noted, Mr. Hamson, who is involved with the Other Sotos Engagement, did in fact become involved with the Aroma matter following this correspondence. It begs the question as to whether the Arbitrator was already aware of this.

[91] In my view, in all the circumstances of this matter, a reasonable person in the applicants' position would lose confidence in the fairness of the proceeding and, in particular, the equal treatment of the parties. I have determined that a fair-minded and informed person, considering the facts and circumstances of this matter, would conclude that circumstances exist that give rise to a reasonable apprehension of bias.

[92] Having determined that there was a reasonable apprehension of bias, in my view the Awards must be set aside and a new hearing ordered.

Other Grounds

[93] The applicants raised other grounds to set aside the Arbitration Awards, including allegations that the Arbitrator exceeded his jurisdiction and failed to provide a reasoned award. As I have determined that the Awards are set aside on the basis of reasonable apprehension of bias, I will only briefly highlight my views on certain other grounds raised.

[94] First, the applicants allege that the Arbitrator made jurisdictional errors in failing to follow the provisions of the MFA regarding the enforcement of the contract and in making an unexplained and incorrect "proper party" finding.

[95] With regard to the applicants' position that the Arbitrator effectively re-wrote the MFA, it is my view that the Arbitrator did not exceed his jurisdiction in this regard. The Arbitrator interpreted the MFA. The applicants may disagree with his interpretation, but this is not a reviewable error.

[96] The applicants argue the Arbitrator made an unexplained and incorrect proper party finding at paragraph 296 of the Final Award, with regard to Mr. Gorman. The Arbitrator stated that Mr. Gorman was not a proper party to the arbitration agreement in the MFA and the arbitration. The applicants state that the Arbitrator did not give the parties the opportunity to address this issue, and there was a breach of procedural fairness and natural justice contrary to article 34(2)(a)(ii) of the *Model Law*. I agree with the applicants that the statement that Mr. Gorman was not a proper party

was not addressed by the parties at the arbitration. In this regard, there was a breach of procedural fairness.

[97] The applicants also argue that the Arbitrator failed to provide a reasoned award, contrary to Article 31 of the *Model Law*. The applicants' position is that Arbitrator failed to address certain issues that were raised, and the Arbitrator failed to provide adequate reasons in respect of certain other issues. The respondents argue that arbitrators are required to seize the substance of the matter, dispose of the issues submitted, and address the relevant evidence and arguments. They are not required to refer to all the evidence they considered to arrive at their decision or address every argument advanced. I agree with the respondents. The Arbitrator did not fail to provide a reasoned award.

Disposition and Costs

[98] For the above reasons, I set aside the Arbitrator's awards. I direct a new arbitration be conducted by a new arbitrator.

[99] If the parties cannot agree on costs, by April 14, 2023, they shall notify my judicial assistant. In such case, they may file written submissions as follows: The applicants' written submissions (not to exceed 5 pages, plus Bill of Costs) shall be delivered by April 28, 2023. The respondents' written submissions (not to exceed 5 pages, plus Bill of Costs) shall be delivered by May 12, 2023. A copy of the submissions shall be sent by email to my judicial assistant.

J. Steele J.

Released: March 20, 2023

CITATION: Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al., 2023 ONSC 1827

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AROMA FRANCHISE COMPANY, INC., SHEFA FRANCHISES LTD., AROMA ESPRESSO BAR LTD., AROMA USA, INC., YARIV SHEFA, OSHRAT KATRI and AROMA GLOBAL LTD.

Applicants

– and –

AROMA ESPRESSO BAR CANADA INC., HALVA INVESTMENTS LIMITED, 6605702 CANADA INC. and EARL GORMAN

Respondents

REASONS FOR JUDGMENT

J. Steele J.

Released: March 20, 2023