COURT OF APPEAL FOR ONTARIO

CITATION: Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc., 2024 ONCA 839
DATE: 20241119
DOCKET: COA-23-CV-0455

Fairburn A.C.J.O., van Rensburg and Zarnett JJ.A.

BETWEEN

Aroma Franchise Company, Inc., Shefa Franchises Ltd., Aroma Espresso Bar Ltd., Yariv Shefa, Aroma USA, Inc., Oshrat Katri and Aroma Global Ltd.

Applicants
(Respondents on Appeal)

and

Aroma Espresso Bar Canada Inc., Halva Investments Limited, 6605702 Canada Inc. and Earl Gorman

Respondents
(Appellants on Appeal)

Alison FitzGerald, Allan D.J. Dick and Daniel Hamson, for the appellants

Matthew J. Latella and Praniet Chopra, for the respondents

Paul Michell and Philip Underwood, for the interveners, Toronto Commercial Arbitration Society and ADR Institute of Canada

Heard: December 6, 2023, with additional written submissions on August 19, 2024

On appeal from the judgment of Justice Jana Steele of the Superior Court of Justice, dated March 20, 2023, with reasons reported at 2023 ONSC 1827.

Zarnett J.A.:

OVERVIEW

[1] Arbitration is an important, statutorily sanctioned, mode of dispute resolution. Undergirding its acceptability is the core principle that an arbitrator must be impartial. An arbitrator must not actually be biased, nor can there be a reasonable apprehension that the arbitrator is biased.

[2] An international commercial arbitration seated in Ontario is governed by the *UNCITRAL Model Law on International Arbitration* (the "Model Law"), adopted in the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5. The Model Law contains provisions that promote the core principle of arbitral impartiality. Article 12(1) imposes a duty on an arbitrator to disclose – before appointment and as the arbitration proceeds – any circumstance likely to give rise to justifiable doubts about the arbitrator's impartiality. Article 12(2) permits a challenge to the arbitrator or the award that was made if circumstances exist that give rise to justifiable doubts about the arbitrator's impartiality, as long as the person making the challenge was unaware of the circumstances when they participated in the arbitrator's appointment. Justifiable doubts about impartiality is an equivalent phrase to reasonable apprehension of bias.

[3] Although the duty to disclose and the test for a successful challenge are easy to articulate, their interaction and application in differently nuanced cases can be more challenging.

[4] High stakes arbitrations often involve arbitrators who are in high demand, sophisticated parties, and experienced lawyers. This gives rise to the prospect that an arbitrator might have had prior engagements or be asked to undertake future ones, in which the parties or lawyers have some involvement. How the duty to disclose, and the right to successfully challenge an arbitral outcome, apply based on different versions of this potential scenario have recently been extensively canvassed by courts in the United Kingdom: *Halliburton Company v. Chubb Bermuda Insurance Ltd.*, [2020] UKSC 48, [2021] 2 All E.R. 1175, and *Aiteo Eastern E & P Company Ltd. v. Shell Western Supply and Trading Ltd. & Ors*, [2024] EWHC 1993 (Comm). This case requires those issues to be considered in yet another variation of this potential scenario.

[5] The appellants and respondents engaged in a lengthy international commercial arbitration (the "MFA Arbitration") before P. David McCutcheon (the "Arbitrator") addressing disputes that arose under a Master Franchise Agreement (the "MFA"). The MFA Arbitration was initiated by a request to arbitrate in May 2019. It culminated in a Final Award made in January 2022. In the Final Award, the Arbitrator found that the respondents had wrongfully terminated the MFA, under which the appellant, Aroma Espresso Bar Canada Inc. ("Aroma

Canada"), served as the master Canadian franchisee for Aroma cafes in Canada. He awarded substantial damages to Aroma Canada.[1]

[6] About 17 months after the MFA Arbitration had been commenced, but a full 15 months before the Final Award was released, the lead lawyer of the legal team acting in the MFA Arbitration for the appellants – members of the Sotos LLP law firm – asked the Arbitrator if he would serve as the arbitrator for another arbitration – one that concerned a dispute between another client of the Sotos firm and a third party (the "Sotos Arbitration"). The Sotos Arbitration did not involve any of the parties to the MFA Arbitration or any issues that significantly overlapped with those in the MFA Arbitration.

[7] The Arbitrator accepted the engagement for the Sotos Arbitration; he did so without disclosing to the respondents that he had been approached, or had agreed, to conduct the Sotos Arbitration. The MFA Arbitration continued for about 15 months, through to the Final Award, without the respondents being aware of the Sotos Arbitration or the involvement of the Arbitrator in it.

[8] After the Final Award in the MFA Arbitration, the respondents learned of the Arbitrator's involvement in the Sotos Arbitration. They submitted certain questions to the Arbitrator and discerned his position that he had been under no duty to disclose the Sotos Arbitration. The respondents brought an application to the

[1] The Arbitrator also made a small award against Aroma Canada for unpaid royalties.

Superior Court to set aside the Final Award, as well as ancillary awards of interest and costs the Arbitrator made in October 2022.

[9] The application judge granted the respondents' application to set aside the Arbitrator's awards. She directed that there be a new arbitration before a different arbitrator. In her view, the Arbitrator was required to disclose that he was being engaged for the Sotos Arbitration and his involvement in it without such disclosure gave rise to a reasonable apprehension of bias, fatally tainting the result of the MFA Arbitration. In reaching these conclusions, she placed substantial weight on the parties' expectations about disclosure of engagements, derived from correspondence their counsel had exchanged before the Arbitrator was approached and then appointed. In that correspondence, counsel explained their own relationships with potential arbitrators and asked certain questions about opposing counsel's relationships. That correspondence was never provided to the Arbitrator, nor was he ever made aware of the expectations said to flow from it.

[10] For the reasons that follow, I would allow the appeal.

[11] The Model Law's test that dictates when an arbitrator must make disclosure is an objective one. 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. The application judge erred in law in the way she articulated and applied the test for disclosure and

by taking into account subjective considerations that the parties did not make known to the Arbitrator. Her approach essentially converted the objective test into a subjective one. 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.

[12] A finding that there was a breach of the legal duty of disclosure is germane to, although not determinative of, whether an arbitral award should be set aside for reasonable apprehension of bias. A failure to make legally required disclosure may indicate a lack of concern about matters that likely raise justifiable doubts about impartiality in a way that confirms the existence of those justifiable doubts. But a failure of an arbitrator to disclose according to an expectation of the parties that was not shared with the arbitrator does not have a similar effect. The application judge erred in taking into account this kind of failure to disclose in her analysis of reasonable apprehension of bias.

[13] The test for a reasonable apprehension of bias on the part of an arbitrator is objective – like the legal test for disclosure, it considers the relevant circumstances from the standpoint of a fair-minded and informed observer, applied against the backdrop of a strong presumption that an arbitrator is impartial. The application judge erred in law in the way she applied that test, in effect changing the test to

one particularly attuned to unshared subjective views. The circumstances she considered to determine that a reasonable apprehension of bias was present went outside of those properly considered in applying the test objectively.

[14] Applying the standard of reasonable apprehension of bias objectively, the presumption of impartiality on the part of the Arbitrator was not displaced by his acceptance of a retainer to arbitrate a second matter that did not involve any of the parties to the MFA Arbitration nor any overlapping issues of significance.

[15] I would therefore allow the appeal and set aside the judgment of the application judge that quashed the Arbitrator's awards on the basis of a reasonable apprehension of bias. As the respondents raised other grounds to attack the awards, some of which the application judge did not fully address, I would return the matter to the Superior Court to address those grounds.

BACKGROUND AND PROCEDURAL CONTEXT

(1) The Dispute

[16] The MFA was entered into in 2007 between the respondent, Aroma USA, Inc., as franchisor, and the appellant, Aroma Canada, as master franchisee. Under the MFA, Aroma Canada was entitled to grant unit franchises to operate Aroma Espresso Bars across Canada. Between 2007 and 2019, Aroma Canada built a franchise network with approximately 45 unit franchisees.

[17] In May 2019 the respondent Aroma Franchise Company, Inc., the assignee of Aroma USA, sent a notice to Aroma Canada terminating the MFA. Aroma Franchise then essentially stepped into a direct relationship with the unit franchisees across Canada, and assigned its rights in relation to those franchisees to its subsidiary, the respondent Aroma Global Ltd.

[18] The appellants took the position that the termination was unlawful. The central dispute that underlay whether there was an entitlement to terminate concerned whether the parties had agreed that there be an exclusive supplier of coffee for Canadian Aroma Espresso Bars. The respondents took the position that there was an exclusive supply arrangement, and that Aroma Canada breached the MFA by not honouring it and instead choosing another coffee supplier, thus triggering a right to terminate.

(2) The MFA Arbitration Provisions

[19] The MFA provided for arbitration by a jointly selected single arbitrator, of disputes that arose between the parties or any of their affiliates or owners "under or in connection with" the MFA.

[20] Article 17.4.1 of the MFA directed that the arbitration use "the facilities and National Arbitration Rules … of the ADR Institute of Canada … or its successor organization". It further provided that the "parties shall jointly select one (1) neutral arbitrator from the panels 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."

(3) The Lead Up to the Selection of the Arbitrator

[21] Following the May 2019 delivery, by the appellants, of a notice of request to arbitrate, counsel for the parties engaged in dialogue about the identity of an arbitrator for their disputes.[2] Broadly speaking, the dialogue about potential arbitrators covered two topics – experience in the franchise area and "relationships".

[22] Counsel for the appellants (Mr. Dick) proposed Leslie Dizgun, and when he did so he indicated that he had "no personal or social relationship with [him]", had "used him on one (failed) mediation for a franchisor though I appreciated his expertise in the franchising area during that experience", and suspected that others in the Sotos firm had engaged him as well. Mr. Dick was asked, by counsel for the respondents (Mr. Latella), for details about other engagements by the Sotos firm. Mr. Dick responded that there had been 7-8 engagements of Mr. Dizgun by

[2] Prior to the delivery of the notice of termination, there was some discussion among the parties about mediation. Counsel for the appellants proposed a retired judge, but respondents' counsel would not agree because appellants' counsel had reached out to the proposed mediator prior to contacting counsel for the respondents to discuss that potential choice. Respondents' counsel wanted any approach to be joint.

members of the Sotos firm for mediations, and one international arbitration that was ongoing.

[23] Mr. Dizgun was rejected by the respondents on the stated premise that he had “a long-standing business relationship” with the Sotos firm. Mr. Dick objected to that characterization and basis for objection. He wrote to Mr. Latella, stating: “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.” There was no reply at the time.

[24] Mr. Latella suggested Joel Richler. When he did so, he indicated that he had been involved in one case against him, had seen him at arbitration related events, and that Mr. Richler’s arbitration practice was conducted out of the same chambers as that of one of his firm’s (Baker & McKenzie LLP) former partners. Mr. Latella asked for a similar level of disclosure about Mr. Richler from Mr. Dick.

[25] The appellants did not agree to the appointment of Mr. Richler, claiming he lacked the requisite franchise expertise. Although the respondents disagreed, the parties did not proceed with Mr. Richler.

[26] Mr. Latella then proposed Mr. McCutcheon. Mr. Latella’s correspondence to Mr. Dick doing so said he had not spoken to Mr. McCutcheon for over ten years,

and the only professional dealing he could recall was that he was known by reputation to be “one of the most respected international arbitrators in the city.” He recalled one professional dealing – they had both been involved in a ground lease arbitration as counsel “many years ago”. In a subsequent communication, he described Mr. McCutcheon as “one of Canada’s premier international arbitrator [*sic*] and has relevant experience in the franchise space as an arbitrator. He is more than qualified.”

[27] Although Mr. Latella’s correspondence did not expressly ask about appellants’ counsel’s history with Mr. McCutcheon, Mr. Dick advised that he and Mr. McCutcheon had been opposing counsel on a major piece of litigation prior to 2006 and that he had no experience with him as an arbitrator or mediator. The record does not disclose whether there were any other enquiries by respondents’ counsel at the time about Mr. McCutcheon’s relationship with or engagements by other members of the Sotos firm.

[28] Mr. Dick subsequently advised that the appellants would agree to appoint Mr. McCutcheon on certain conditions, including advice “as to the source of the recommendation to [Mr. Latella] to appoint Mr. McCutcheon so we have a better understanding of the connection that you, your firm or your clients have with [him]”. Mr. Latella replied that he remembered Mr. McCutcheon favourably from a past arbitration, knew him generally as someone frequently mentioned in the context of

leading figures in international arbitration in Toronto, and had discussed him as a candidate with a former colleague who agreed he would be a first-rate selection.

(4) The Appointment of the Arbitrator

[29] Counsel agreed that Mr. McCutcheon should be contacted by an agreed form of letter. Although Mr. Dick had suggested a pre-selection meeting with Mr. McCutcheon, that suggestion was rejected by the respondents. Mr. Latella wrote to Mr. Dick stating that there should not be any initial meeting with Mr. McCutcheon before he was appointed, as that would permit a party who formed misgivings to veto the appointment. Mr. Latella stated: "Rather, the process for appointment of an arbitrator is clearly established in the arbitration agreement and should be followed assiduously."

[30] Mr. McCutcheon was approached to act as arbitrator by a joint letter sent on behalf of both counsel on September 9, 2019. The letter quoted the portion of Article 17.4.1 of the MFA that set out the qualifications of the arbitrator ("[a] 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"). It attached the Notice of Request to Arbitrate, the response thereto and the counterclaim. It asked Mr. McCutcheon to advise "if [he was] of the view

that [he met] the qualifications required by the [MFA] and, if so, if [he was] interested in and available to act as arbitrator in this matter."

[31] Mr. McCutcheon was not provided with any of the back and forth between counsel about the considerations that had gone into who would be the arbitrator, the questions they asked each other, the information they had exchanged, or the basis on which other proposed arbitrators had been rejected. Other than what was contained in the joint letter, he was not told what the parties expected to be disclosed, either concerning subject-matter experience or about prior, ongoing or future relationships or engagements by counsel or their firms.

[32] Mr. McCutcheon responded on September 10, 2019, stating: "I believe I am qualified. I have experience in practice acting for franchisors and franchisees and I have heard franchise matters in my arbitration practice. I do not believe I have any conflicts".

[33] On September 23, 2019, Mr. McCutcheon sent a letter thanking counsel for choosing him as arbitrator and describing the terms of his engagement. Among other things, the letter stated: "I have found no conflicts".

(5) The Sotos Arbitration

[34] As noted above, the MFA Arbitration was initiated in 2019. It involved pleadings, amendments, documentary and oral discovery, four weeks of oral

testimony (consisting largely of cross-examinations on affidavits and expert reports), and written and oral closing arguments (in September 2021).

[35] In the fall of 2020, approximately 17 months after the MFA Arbitration commenced, and well before it was completed, Mr. Dick, on behalf of a different client who was not involved in the MFA Arbitration, took part in engaging Mr. McCutcheon for the Sotos Arbitration.

[36] The Sotos Arbitration did not involve any of the parties to the MFA Arbitration, or a franchise matter, or the same industry as the appellants and respondents participated in.

[37] Mr. McCutcheon accepted the engagement for the Sotos Arbitration.

[38] The result was that members of the Sotos firm continued to act as counsel for the appellants against the respondents in the MFA Arbitration, and also acted as counsel for a different client against another unrelated party in the Sotos Arbitration. Mr. McCutcheon was the arbitrator for both arbitrations.

[39] No disclosure was made to the respondents.

(6) The Respondents Learn of the Sotos Arbitration After the Final Award in the MFA Arbitration

[40] On January 7, 2022, the Arbitrator advised counsel by email that the Final Award in the MFA Arbitration was ready, and requested payment by both sides of their share of his outstanding fees and disbursements so the Final Award could be

released. In his email, he copied a lawyer at Sotos (Mr. Hamson) who had not been involved before that point in the MFA Arbitration.

[41] On January 11, 2022, the Final Award was released by email to counsel. Mr. Hamson was also copied on this email. It is common ground that in the Final Award, the Arbitrator granted the appellants a far greater measure of success than the respondents.

[42] On January 13, 2022, counsel for the respondents emailed the Arbitrator asking why Mr. Hamson had been copied on the recent emails. He sought clarification as to whether "there is or has been any other relationship of any kind between [the Arbitrator] and Sotos LLP, including any other appointments as arbitrator or mediator."

[43] In response, the Arbitrator initially advised that he had copied Mr. Hamson in error, but shortly thereafter advised that he had been engaged by the Sotos firm on another matter that was ongoing (the Sotos Arbitration).

[44] On January 14, 2022, the respondents posed questions to the Arbitrator regarding the Sotos Arbitration. The Arbitrator replied:

> In answer to your questions, Mr. Hamson has had day to day carriage on the other 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 [MFA Arbitration].

[45] On January 18, 2022, the respondents posed further questions to the Arbitrator. He answered "No", without elaboration, to the question: "Did you give any consideration to disclosing the existence of [the Sotos Arbitration] to my office or my clients, whether as a result of the IBA Guidelines on Conflicts of Interest in International Arbitration or any applicable case law?"

(7) The Respondents' Application and the Arbitrator's Further Awards

[46] On January 20, 2022, the respondents advised the Arbitrator that they intended to apply to the Superior Court to set aside the Final Award "including on the basis of reasonable apprehension of bias."

[47] On April 14, 2022, the respondents commenced their application to set aside the Final Award. They relied on Articles 12, 13 and 34 of the Model Law. Article 12 prescribes the duty to disclose and the right to challenge for justifiable doubts concerning impartiality. Article 13 specifies the procedure for such a challenge. Article 34 sets out grounds on which "recourse to a court against an arbitral award may be made".

[48] The Arbitrator made a costs and interest award dated October 11, 2022 and a second, corrected costs and interest award on December 13, 2022. It is common ground that those awards stand or fall with the Final Award.

THE APPLICATION JUDGE'S DECISION

[49] Although the respondents' application raised several other grounds, the application judge granted relief solely based on her finding of a reasonable apprehension of bias.

[50] She began by stating that the Arbitrator's failure to disclose the Sotos Arbitration was the starting point for a reasonable apprehension of bias analysis. She cited Article 12 of the Model Law which provides that an arbitrator shall disclose, before appointment, "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" and after the time of his appointment shall disclose without delay "any such circumstances to the parties unless they have already been informed of them by him."

[51] She then cited the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"), noting that the respondents cited them as "instructive". She quoted General Standard 3(a) about disclosure:

> 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 in original.]

[52] She then noted that the Guidelines set up a red/orange/green "stop-light" system. Situations on the "Red" list are, subject to waiver where possible, ones in which an arbitrator should not act. Situations on the "Green" list mean there is no problem.

[53] The "Orange" list is a non-exhaustive list of situations that are potentially a problem and should be disclosed. They include the arbitrator, within the past three years and on more than three occasions, having been appointed by the same counsel or law firm. The Guidelines note that situations not on the Orange List or that fall outside the time limits used in its situations are not generally subject to disclosure, but there are situations that need to be assessed for disclosure on a case-by-case basis against the standard of whether they give rise to justifiable doubts about the arbitrator's impartiality or independence. The Guidelines give examples – repeat appointments by the same counsel beyond the three-year period, the arbitrator acting as counsel in an unrelated case with similar issues, or "an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, [which] may also have to be disclosed, depending on the circumstances."

[54] The application judge then considered whether "the circumstances" required disclosure. She reviewed some of the correspondence between the parties'

counsel about the proposed appointments of Mr. Dizgun, Mr. Richler and Mr. McCutcheon. I emphasize some, because she did not refer to the joint letter of appointment, or to the correspondence objecting to any meeting with Mr. McCutcheon before his appointment and insisting that his appointment follow strictly the terms of the MFA. Nor did she refer to the fact that the correspondence that she reviewed was not provided to the Arbitrator.

[55] Given the correspondence she did refer to, the application judge accepted the evidence of the respondents' CEO that if the Arbitrator had disclosed any other engagements with the appellants' counsel, he would not have supported his appointment. She also noted his hindsight evidence that he would have objected to the Arbitrator continuing if he had been informed earlier of the Arbitrator's involvement in the Sotos Arbitration. She discerned from the correspondence, and from a cross-examination of one of the appellants' counsel, that the appellants were aware of the respondents' concern about an arbitrator not having a relationship with the appellants' counsel, and that they had an expectation of being informed of an engagement of the Arbitrator that existed before or at the time of his engagement for the MFA Arbitration.

[56] The application judge concluded that the circumstances required disclosure. She said, "[i]n 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 [Sotos Arbitration] to the [respondents]".

[57] The application judge then turned to the question of reasonable apprehension of bias. She acknowledged that the presumption of impartiality applies to arbitrators. She noted that "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." But she concluded the presumption was displaced and a reasonable apprehension of bias arose.

[58] The application judge referred to the affidavit of the respondents' CEO that the undisclosed engagement of the Arbitrator in the Sotos Arbitration had "fatally undermine[d] the [respondents'] confidence in the entire process of the [MFA] Arbitration."

[59] She also referred to the fact that the Arbitrator would earn income by being engaged in the Sotos Arbitration, and flagged the amount of that income as one of the matters on which there was a lack of evidence that "speaks volumes." But she also noted that this was not a case where a party to the MFA Arbitration was providing that income.

[60] In the end, the application judge's finding of a reasonable apprehension of bias was rooted in the same circumstances as she found gave rise to the duty to disclose. She stated:

> It comes down to context…. 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 [respondents], 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.
>
> The [Sotos Arbitration] remained hidden from the [respondents] for about 15 months while the [MFA 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 [Sotos Arbitration] 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.
>
> In my view, in all the circumstances of this matter, a reasonable person in [the respondents'] 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.

THE PARTIES' POSITIONS

[61] The appellants argue that for several reasons the application judge's finding that disclosure was required was erroneous. They submit that she was wrong to rely on correspondence exchanged before the Arbitrator's appointment that was never provided to the Arbitrator, as the most significant factor in her analysis, as it could not properly support or inform the Arbitrator's disclosure duty. They argue that none of the IBA Guidelines, nor the decisions in *Halliburton* or *Aiteo*, support the conclusion that disclosure was required.

[62] The appellants also argue that the application judge erred in finding a reasonable apprehension of bias by virtue of the Arbitrator's non-disclosure. Citing the objective nature of the test, they submit that the application judge erred in considering the respondents' affiant's subjective views, and the correspondence that was never provided to the Arbitrator. They argue that a second appointment does not, in and of itself, give rise to a reasonable apprehension of bias.

[63] Finally, the appellants submit that the application judge unreasonably failed to exercise her discretion not to set aside the Final Award even in light of her other conclusions.

[64] The respondents submit that the application judge made no error. She properly concluded that the Arbitrator had a duty to disclose the Sotos Arbitration, a conclusion they say is "firmly rooted in the governing statute and arbitral rules

and principles, but also the common law and common sense." They say that the application judge was right to rely on the evidence that she did, as it established the parties' shared understanding about disclosure.

[65] The respondents also argue that the application judge appropriately took into account the failure of disclosure in coming to the conclusion that a reasonable apprehension of bias was demonstrated, that she properly inferred a reasonable apprehension of bias from all the circumstances, and that setting aside the arbitral awards was the appropriate remedy.

[66] The interveners provided submissions on the standards for disclosure and impartiality under the Model Law and under guidance from arbitral associations, whether arbitrators should be bound by agreements between the parties about disclosure where the arbitrator is not aware of their terms, and the factors that ought to be considered in assessing disclosure obligations. They expressed no view on the merits of the appeal.

ANALYSIS

[67] The application judge did not draw a straight line from her finding of a failure on the part of the Arbitrator to make disclosure to her finding that there was a reasonable apprehension of bias. An arbitrator's duty of disclosure covers a wider array of matters than those which would justify disqualification for bias. Nevertheless the two issues are related, both conceptually and in the application

judge's analysis. Accordingly, as did the parties, I begin with the issue of whether the Arbitrator breached a duty to disclose, before turning to the reasonable apprehension of bias issue.

[68] Because of my conclusions on these issues, I do not reach the question of whether the application judge, had her findings on those issues been upheld, erred in failing to exercise her discretion not to set aside the awards.

(1) The Legal Duty of Disclosure

[69] What disclosure is required turns on the legal regime that governs the arbitration. The MFA Arbitration was governed by the Model Law. Article 12(1) of the Model Law sets out the legally mandated duty of disclosure of an arbitrator:

> 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.[3]

[70] In *Halliburton*, the Supreme Court of the United Kingdom endorsed the view that English common law on an arbitrator's duty to disclose should develop consistently with the Model Law: at paras. 113-15. *Halliburton* is therefore germane

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[3] The MFA also provided that the arbitration would follow the ADR Institute of Canada Arbitration Rules, which provide that for international arbitrations, the UNCITRAL Arbitration Rules apply. Article 11 of those rules is to the same effect as Article 12(1) of the Model Law.

to the interpretation of the legal requirement to make disclosure applicable in this case.

[71] Article 12(1) is best understood in relation to its purposes. The purposes of disclosure by an arbitrator are intertwined: disclosure allows the arbitrator to avoid the appearance of bias and the parties to consider disclosed matters and take steps if so advised. As Lord Hodge said in *Halliburton*, at para. 70:

> One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem [citations omitted].

[72] Article 12(1) is thus aimed at surfacing matters that could justify challenging the arbitrator for bias. Article 12(2) of the Model Law provides that an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality or independence". The key difference between the two subsections is that disclosure is required for a circumstance that is <u>likely</u> to give rise to justifiable doubts, while a challenge may be brought only where the circumstances give rise to justifiable doubts. The word "likely" means that the obligation to disclose arises if the "circumstances could reasonably give rise to justifiable doubts." Thus "the obligation to disclose extends … to matters which

may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality": *Halliburton*, at paras. 113, 117.

[73] As explained in *Halliburton*, at paras. 113-15, like the test for disclosure prescribed by the English common law, Article 12(1) of the Model Law sets out an objective test. Circumstances "likely to give rise to justifiable doubts as to [the proposed arbitrator's] impartiality or independence" are to be assessed from the standpoint of a fair-minded and informed observer.

[74] Unlike the Model Law, the IBA Guidelines are not a legal standard. As explained in *Halliburton*, the IBA Guidelines "set out good arbitral practice which is recognised internationally … [and] can assist the court in identifying … what matters may require disclosure…. But the IBA Guidelines do not of themselves give rise to legal obligations or override national law or the arbitral rules chosen by the parties": at para. 71. The parties could have, but did not, adopt the IBA Guidelines as the governing disclosure regime for their arbitration.[4]

[75] This distinction is especially important in this case, because the objective standard for disclosure in Article 12(1) of the Model Law differs from the IBA Guidelines which propose, in General Standard 3(a), a different rule for disclosure by an arbitrator. It provides that "If facts or circumstances exist that *may*, *in the eyes of the parties*, give rise to doubts as to the arbitrator's impartiality or

[4] See footnote 3, above.

independence, the arbitrator *shall* disclose such facts or circumstances to the parties … prior to accepting his or her appointment or, if thereafter, as soon as the arbitrator learns of them" (emphasis added).

[76] In other words, as *Halliburton* explained, the IBA Guidelines use a "subjective approach to the duty of disclosure … [that] addresses the perception of parties to an arbitration who are … involved in a stressful and often expensive dispute. English law, by contrast, adopts an objective test by looking to the judgement of the fair-minded and informed observer": at para. 72.

[77] At para. 116, the court in *Halliburton* reinforced this distinction:

> In summary, the arbitrator's legal obligation of disclosure imposes an objective test. This differs from the rules of many arbitral institutions which look to the perceptions of the parties to the particular arbitration and ask whether they might have justifiable doubts as to the arbitrator's impartiality.

[78] This does not mean that other parts of the IBA Guidelines, which provide practical guidance about disclosure, are not useful even when the legal requirement for disclosure is the objective test in the Model Law, rather than the subjective test in General Standard 3(a). The "Practical Application" guidance in Part II of the IBA Guidelines (the stop-light system and the commentary about it) can be used to "assist the court in identifying … what matters may require disclosure": *Halliburton*, at para. 71. They can be viewed as "an authoritative source of information as to how the international arbitration community may regard

particular fact situations in reasonable apprehension of bias cases": *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604, at para. 41. But care must always be taken to use that guidance through the lens of the legal requirement of disclosure that governs the arbitration, rather than changing the requirement.

(2) The Approach of the Application Judge

[79] The application judge concluded that "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 [Sotos Arbitration] to the [respondents]".

[80] Although the application judge referred to the decision in *Halliburton* and to the MFA in her conclusion about disclosure, I do not read her as saying either of those mandated disclosure on the facts of this case.

[81] *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": at para. 131. Here, the application judge found that there were no significant overlapping issues and no common parties.

[82] As for the MFA, although what it says clearly informs disclosure, it does not directly mandate disclosure. Moreover, the application judge made no finding of circumstances that are expressly identified by the MFA as disqualifying. She did

not find that an engagement of the Arbitrator by counsel on behalf of a different client for a different arbitration constituted a "social, business or professional relationship [of the Arbitrator] with either party [to the MFA]". Indeed, she stated that: "[t]he Arbitrator was not engaged by one of the parties [to the MFA Arbitration] to do the [Sotos] Arbitration. He was engaged by counsel to preside as an arbitrator on another unrelated arbitration." Nor did she say that the MFA required disclosure because its terms called for the Arbitrator to be "neutral". To the extent that this is what she meant, her conclusion is inseparable from what she drew from the IBA Guidelines and the parties' correspondence, which I consider below.

[83] Accordingly, I take the application judge's conclusion that there was a duty to disclose to rest primarily on the view she took of the IBA Guidelines and the correspondence between the parties. In my respectful view, this conclusion reflects legal errors such that the application judge's conclusion is not entitled to deference.

[84] First, although the application judge referred earlier in her reasons both to the legal standards of disclosure found in Article 12(1) of the Model Law, and to the IBA Guidelines, she did not ultimately say, in reaching her conclusion, that she was applying the Model Law. She did not apply its objective test. She never asked, or answered, what a fair-minded and objective person would consider as likely to give rise to justifiable doubts about the Arbitrator's impartiality or independence (or whether he was neutral). Rather, she said she was applying the IBA Guidelines without acknowledging the pivotal distinction between the rule about disclosure in

the IBA Guidelines – which uses a subjective test – and the legal obligation about disclosure in the Model Law – which uses an objective test.

[85] Indeed, the application judge's reference to the IBA Guidelines emphasized the aspect of General Standard 3(a) that is decidedly subjective. This is how she quoted it (the emphasis being hers): "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."

[86] The application judge's use of this part of the IBA Guidelines as though it were the relevant legal standard for disclosure is directly related to the heavy reliance she placed on some of the correspondence counsel exchanged before the appointment of the Arbitrator, and on the evidence of the respondents' CEO about what he expected "given the correspondence".

[87] The application judge's use of the correspondence and this evidence is perfectly understandable if the test is the subjective one in the IBA Guidelines. That evidence would be a window into whether a circumstance "may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence".

[88] But under the objective test, the use of that evidence amounts to legal error where, as the appellants stress, the correspondence said to reveal what was

important to the parties about who could and could not be, or continue as, the arbitrator, was never shared with the Arbitrator.

[89] 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. As this court asked rhetorically in *Rando Drugs Ltd. v. Scott*, 2007 ONCA 553, 86 O.R. (3d) 641, at para. 36, leave to appeal refused, [2007] S.C.C.A. No. 494, citing *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451, [2000] 1 All E.R. 65 (Eng. C.A.), at para. 55: "How can there be any real danger of bias, or any reasonable apprehension or likelihood of bias, if the judge does not know of the facts that … are relied on as giving rise to the conflict of interest?"

[90] The parties' decisions not to share this correspondence and not to have any pre-appointment meeting with the Arbitrator that would allow either side to form "misgivings" were not adverted to by the application judge. Nor was the joint letter that was actually provided to the Arbitrator. Any consideration of circumstances must include all the relevant circumstances. This would necessarily include what the parties actually communicated to the Arbitrator and what they chose not to communicate to him – the very person with the duty to make disclosure of circumstances "likely to give rise to justifiable doubts as to his impartiality or independence" viewed from the perspective of the fair-minded and informed

observer. There was no evidence that the parties' correspondence, or the view of the respondents' CEO given that correspondence, was ever shared with the Arbitrator before the Final Award.

[91] To be sure, by not providing that correspondence to the Arbitrator, the parties did not reduce their rights to disclosure from the Arbitrator below what the objective test required of him. The Arbitrator was always bound to make the disclosure required by the objective test, whether it was more or less than what the unshared correspondence may have revealed they expected. The point is that based on the legal regime they chose for the arbitration, the objective test determined what disclosure was necessary by the Arbitrator. The parties' decision not to select the IBA Guidelines as the legal regime for their arbitration, and not to share with the Arbitrator the correspondence that revealed their subjective disclosure expectations, could only be taken to mean that they could expect, from the Arbitrator, the disclosure legally required under the objective test – nothing less, but nothing more.

[92] The respondents offer two arguments to justify the application judge's reliance on the expectations about disclosure derived from the correspondence that was not provided to the Arbitrator.

[93] First, they submit that the disclosure expectations revealed by that correspondence were expectations that were shared by the parties. In this regard,

they rely on a statement made by Mr. Dick when another lawyer from Sotos was being cross-examined that: “I would have expected, at the time [that is, at or before the time the Arbitrator was being selected], that if an arbitrator or mediator was already engaged in the matter by that firm, or by the parties, that there would be disclosure of those engagements.” It follows, from an expectation about disclosure at the time of initial engagement, that there would be disclosure if there was an engagement while the arbitration was ongoing. As such, the respondents maintain, these shared expectations should be treated as an amendment or clarification of the MFA. The Arbitrator’s lack of disclosure must be assessed in light of them.

[94] This argument is unpersuasive. When the Arbitrator was approached, he was told of the terms of the MFA regarding the qualifications of an arbitrator, and asked, in light of those terms, whether he had the specified qualifications and was available and interested. He was not told of any clarifications or amendments, then or while the MFA Arbitration was ongoing. Even accepting the premise that the MFA could be “clarified” or “amended” by a combination of correspondence and a statement on cross-examination, the decision not to share the “clarification” or “amendment” with the Arbitrator fatally undercuts the proposition that he breached his duty to disclose by not taking it into account.

[95] Second, the respondents rely on General Standards 7(b) and (d) of the IBA Guidelines for the proposition that the appellants were under a duty to inform the Arbitrator of, and the Arbitrator was under a duty to make enquiries that would

reveal, the shared expectation about disclosure of engagements while the MFA Arbitration was ongoing. As noted above, these provisions of the IBA Guidelines are not the legal regime governing the MFA Arbitration. In any event, the question is whether the Arbitrator failed in his duty to disclose, not whether the appellants breached any duty they had. Given what the parties had agreed to provide the Arbitrator at the time of engaging him for the MFA Arbitration engagement, as well as what they did not give him, I see no basis to conclude that the Arbitrator failed in his duty of inquiry, even if he had one.

(3) Application of the Objective Test for Disclosure

[96] Applying the objective test, in my view the Arbitrator did not have a legal duty to disclose that he was being engaged in the Sotos Arbitration since, as the application judge found, it did not involve any party to the MFA Arbitration and there was no meaningful overlap of issues – it was, as the application judge described it, an unrelated arbitration. The fact that counsel for one of the parties to the Sotos Arbitration was also counsel for the appellants in the MFA Arbitration, and the reality that the Sotos Arbitration was an engagement for which the Arbitrator would be compensated, are insufficient to trigger the legal duty of the Arbitrator to disclose.

[97] This case is not only factually unlike *Halliburton*, but the analysis in that case supports the view that no duty to disclose under the objective test arose here.

[98] In *Halliburton*, the arbitrator was appointed in an arbitration between Halliburton and Chubb Insurance. While it was ongoing, without notice to Halliburton, he was appointed by Chubb to be arbitrator in two additional arbitrations (in one, he was Chubb's nominee to a three-person panel). All three arbitrations concerned the same form of insurance policies and the claims against Chubb arose from the same incident. The issues in the three arbitrations significantly overlapped, principally involving whether unreasonable settlements had been made that were outside Chubb's coverage obligations. The High Court found no duty to disclose and dismissed an application alleging a reasonable apprehension of bias concerning the arbitrator in the Halliburton arbitration. The Court of Appeal found that disclosure should have been made but still rejected the claim that there was a reasonable apprehension of bias. The Supreme Court of the United Kingdom affirmed the result reached in the Court of Appeal.

[99] In connection with the duty to disclose, the Supreme Court of the United Kingdom explained that it was the existence of multiple appointments concerning the same or overlapping subject matter with only one common party that raised the concern, "especially because the inequality of knowledge between the common party and the other party or parties has the potential to confer an unfair advantage of which the arbitrator ought to be aware": at para. 130. The arbitrator was under a legal duty to disclose to Halliburton (whose arbitration was ongoing) his appointment in the subsequent matter "because at the time of [the latter]

appointment the existence of potentially overlapping arbitrations with only one common party was a circumstance which might reasonably give rise to the real possibility of bias." The disclosure ought to have included, among other things, the identity of the common party seeking the appointment, and a statement of fact that the second arbitration arose out of the same incident. It could also have included a high-level statement that similar issues were likely to arise: at paras. 145-46.

[100] The concern that a party to an arbitration (i.e., Chubb) 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 (i.e., Halliburton) is completely absent in this case. There is no common party between the Sotos Arbitration and the MFA Arbitration. The Sotos Arbitration does not involve a franchise dispute. It does not arise out of the same incident as the MFA Arbitration. As the application judge found, there are no significant overlapping issues.

[101] Nor is this case like *Aiteo*, a recent decision of the England and Wales High Court (Commercial Court),[5] in which an arbitrator was found to have failed to make required disclosure and was disqualified for apparent bias. The respondents place heavy reliance on *Aiteo*, as the failure of disclosure and the finding of bias related

[5] The parties and the interveners were granted leave to make additional submissions on the impact of this decision.

to the relationships between the arbitrator and the firm of solicitors (Freshfields) representing one of the Aiteo's opponents in the arbitration. However, the standards governing disclosure were materially different than those applicable to the MFA Arbitration. Moreover, the facts were completely different.

[102] Unlike the MFA Arbitration, the arbitration in *Aiteo* was governed by the International Chamber of Commerce Rules of Arbitration ("ICC Rules"), which require a prospective arbitrator to disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality": see para. 67. As Jacobs J. noted, following *Halliburton*, the "reference to 'eyes of the parties' connotes … an element of subjectivity; it requires consideration of how the parties might view matters, not simply how a fair-minded observer might do so": at para. 71.

[103] Turning to the facts of *Aiteo*, when the arbitrator was appointed, she made disclosure of two prior appointments, as an arbitrator, by Freshfields, the solicitors acting for Aiteo's opponents. But she did not disclose a "relatively recent" engagement by Freshfields to give expert advice to a different client. Jacobs J. was of the view that that engagement should have been disclosed, as it was akin to a co-counsel arrangement. As he stated, at paras. 80-81:

> An advisory engagement of this kind … gives rise to a closer and different relationship to that which exists between arbitrator and the firm of solicitors which has appointed him or her. Thus in contrast to an arbitral appointment, an advisory engagement for a client requires the advisor … to consider the client's best interests and to advise and assist accordingly…. It is equivalent or at least very similar to a relationship, to use the words of the IBA Guidelines, of "co-counsel" between the [prospective arbitrator] and the law firm which has instructed him or her…. Against a background where this was a relatively recent engagement, and where the disclosure of the two arbitral appointments did not give a complete picture of the past and present professional relationships [between the prospective arbitrator and the lawyers], I see no force in an argument that this engagement did not require disclosure.

[104] And although Jacobs J. considered it not significant that the arbitrator was appointed, or served, in two additional arbitrations in which Freshfields became involved (see paras. 95, 106), what was significant was that, while the Aiteo arbitration was ongoing, the arbitrator accepted both a second and then a third engagement by Freshfields to provide expert opinions. She did not disclose the second at all, nor the third until after it was completed. These engagements, like the earlier one, were akin to a co-counsel arrangement with Freshfields. Accordingly, there were three separate failures to make disclosure: at paras. 98, 100, 108-112.

[105] After learning of the non-disclosures, Aiteo successfully applied to the ICC Court to challenge the awards. Although Jacobs J. held that its decision did not create a *res judicata*, he was of the view that a fair-minded and informed observer

would take it into account, as well as the non-disclosures of the multiple expert engagements against the backdrop of a significant number of appointments and proposed appointments by Freshfields of the arbitrator (which on their own were either disclosed or not significant), to conclude that there was a reasonable apprehension of bias. He said, at para. 170:

> However, there was no disclosure of the first two appointments, until [the arbitrator] responded to the questions asked in December 2023. And although there was disclosure of the third appointment, this occurred only after the assignment had been accepted and completed. The observer would in my view regard these non-disclosures as highly relevant to the question of real possibility of bias, and as adding to the cumulative picture of a significant number of arbitral appointments by Freshfields.

[106] There is no meaningful similarity between *Aiteo* and this case on the issue of disclosure. There is no similarity between counsel for a party to an arbitration retaining the arbitrator as an expert in another matter – a role Jacobs J. likened to a co-counsel arrangement between the arbitrator and counsel – and counsel engaging the arbitrator to serve in an unrelated arbitration. As Jacobs J. stated, an advisory retainer is a different and closer relationship than that which exists between counsel and a person engaged as arbitrator. The path toward a reasonable apprehension of bias that arose in *Aiteo* does not arise in this case.

[107] Nor does the Orange List of the IBA Guidelines, or the IBA Guidelines commentary about it, even when taken as an indication of what a fair-minded and

informed observer might expect in terms of disclosure, lead to the conclusion that disclosure was required here.[6] The Orange List "requires" disclosure if within the past three years and on more than three occasions, the proposed arbitrator has been appointed by the same law firm. In doing so, it recognizes that a certain critical mass of recent, repeat arbitral appointments is necessary before being suggestive of a potential problem requiring disclosure. The situation here – a single appointment of the Arbitrator by counsel for one party for a different, unrelated arbitration – is not included in the Orange List situations requiring disclosure. Situations not listed on the Orange List do not generally require disclosure.

[108] The IBA Guidelines also provide commentary about how to deal with situations not expressly falling in the non-exhaustive Orange List. Noting that those situations do not generally require disclosure, the commentary identifies some that require a case-by-case assessment for disclosure.[7] The commentary picks up the theme of a critical mass of appointments. It identifies situations such as "repeat past appointments" by the same counsel beyond the three-year period, or the arbitrator "having frequently served as counsel with, or as an arbitrator on, [arbitral tribunals] with another member of the [tribunal]" (emphasis added). To this, the

[6] The IBA Guidelines describe the Orange List as "a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence … with the consequence that the arbitrator has a duty to disclose such situations."
[7] Article 6, under Part II ("Practical Application of the General Standards") of the IBA Guidelines.

commentary adds another situation with a different factor – the arbitrator concurrently acting as counsel in an unrelated case raising similar issues (such a situation may put the arbitrator in the position of concurrently advocating for a particular disposition of an issue in one case while being charged with neutrally deciding the same issue in another). None of these situations is parallel to the case at bar.

[109] The one situation identified in the commentary that is parallel to this case is "an appointment made by the same party or the same counsel appearing before an arbitrator, while the case is ongoing, [which] may also have to be disclosed, depending on the circumstances."

[110] 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.

[111] Without being exhaustive, the circumstances that would tilt toward required disclosure could include an overlapping party and issues as in *Halliburton*. They could include the fact that the new appointment brings the total appointments to the critical mass included in the Orange List. They could involve the appointment being akin to a co-counsel arrangement, as in *Aiteo*. But when no such circumstances are present, the single appointment, by counsel for one party to an

ongoing arbitration, of the same arbitrator for an unrelated arbitration, does not require disclosure. It is simply the appointment of a person required, and presumed, to be impartial in the ongoing arbitration for an unrelated dispute in which they are also required, and presumed, to be impartial. Viewed objectively, that circumstance would not be likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence.

[112] Underlying the suggestion that justifiable doubts would likely arise even in this scenario are two concerns. One is that counsel appointing the arbitrator will have the benefit of additional time before the arbitrator (in the second, unrelated arbitration). The second is that by arranging, assisting or facilitating the appointment in the second arbitration, counsel is arranging for an income-producing engagement that would benefit the arbitrator.

[113] The first concern is baseless. As the United States Court of Appeals (Eleventh Circuit) stated in *Grupo Unidos por el Canal, S.A. v. Autoridad del Canal de Panama*, 78 F. (4th) 1252, at p. 1264 (11th Cir. 2023):

> For the fourth and final alleged conflict, Grupo Unidos [the party seeking to set aside the arbitral award] cites the fact that Gaitskell [one of the arbitrators] serves as an arbitrator in an unrelated case where McMullan, a member of Autoridad del Canal's [the successful party in the arbitration] counsel, represented a party. We're hard pressed to see how this in any way questions Gaitskell's impartiality. Related appearances establish only familiarity, and familiarity "does not indicate bias"….

[114] As for the financial aspect, the respondents cite *Conmee v. Canadian Pacific Railway Co.* (1888), 16 O.R. 639 (Q.B.), in which an offer by a party to an arbitration, while the arbitration was ongoing, to provide the arbitrator with a remunerative position as an employed solicitor when the arbitration concluded – an offer the arbitrator accepted – was held to give rise to a reasonable apprehension of bias. But that is not analogous to this case, which involves the Arbitrator earning income from the parties to a second, unrelated arbitration for fulfilling a neutral role, not from a party to the MFA Arbitration for fulfilling duties to that party.

[115] It is well understood that arbitrators are paid by the parties over whose arbitration they preside. "Nomination as an arbitrator gives the arbitrator a financial benefit": *Halliburton*, at para. 59. 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: *Halliburton*, at para. 63. 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 fees. Instead, it requires, and presumes, impartiality.[8]

[116] Of course, the presumption may be overcome. The IBA Guidelines' sensitivity to repeated recent appointments by the same party or counsel beyond

[8] See the discussion below, at paras. 133-37.

defined thresholds may in part be an attempt to delineate where the presumption starts to fray in light of the pull of economics (although repeat appointments beyond the threshold give rise to other concerns, not just those arising from the earning opportunity they afford to the arbitrator).

[117] But that is not the situation in this case. If the fact that counsel arranged the appointment of an arbitrator for a second, unrelated arbitration were, in and of itself, a circumstance likely to give rise to justifiable doubts about the arbitrator's impartiality in the ongoing arbitration, it would not have been necessary for the *Halliburton* court to find the existence of a common party and overlapping issues to ground the duty to disclose. Nor would the type of disclosure suggested by the Supreme Court of the United Kingdom in *Halliburton* as being sufficient have omitted mention of the remunerative aspects of the overlapping appointments. It would not have been necessary in *Aiteo* to delve into the nature of a co-counsel appointment or to focus on the number of them. Nor would it be necessary for the Orange List to include only situations of multiple recent appointments or for the commentary to say that appointment, by counsel for a party appearing before an arbitrator, of the same arbitrator while the case was ongoing required consideration of the circumstances (as the fact that the arbitrator would be paid in the second arbitration would be a given). The fact that none of these authorities considered the prospect of the arbitrator being paid as sufficient in and of itself to warrant

disclosure of an additional arbitral engagement tells heavily against the suggestion that it does.

[118] In my view, neither the familiarity concern nor the financial aspect of a second appointment is, on its own, objectively likely to give rise to justifiable doubts about impartiality.

[119] For all these reasons, I conclude that the application judge erred in finding a breach by the Arbitrator of his legal duty to disclose.

(4) Failure to Disclose and its Relationship to Reasonable Apprehension of Bias

[120] In coming to her conclusion that there was a reasonable apprehension of bias, the application judge did not simply rely on her finding of a failure to make disclosure. But it did play a part in her reasoning. She stressed, for example, the length of time the MFA Arbitration continued while the respondents were in the dark about the Sotos Arbitration. Even though I have concluded that there was no breach of the legal duty to disclose, it is useful to say something more about the relationship between failure to disclose and reasonable apprehension of bias.

[121] As discussed above, under the Model Law, the duty to disclose applies to matters likely to give rise to justifiable doubts about impartiality, while a challenge to the arbitrator must be based on circumstances that do give rise to justifiable doubts about impartiality: Articles 12(1) and (2). The legal duty to disclose covers

a wider array of circumstances than those that in the end will justify disqualification of the arbitrator or setting aside an award for reasonable apprehension of bias. But broadly speaking they focus on the same target – the legal duty to disclose is aimed at the same kind of circumstances that can form the basis of a challenge for reasonable apprehension of bias.

[122] Due to this relationship, a finding that the 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: *Halliburton*, at para. 117. Just as making required disclosure indicates an awareness of the possibility of unconscious bias, neglecting required disclosure may itself indicate a troubling non-awareness of that possibility and in fact accentuate its presence: *Aiteo*, at para. 172.

[123] The same may be true even where the parties have adopted a different standard for disclosure than that in the Model Law, as long as they have made the arbitrator aware of their standard and the arbitrator knows about the facts that would allow it to be applied. Depending on the standard for disclosure adopted by the parties, the relationship between a failure to disclose under that standard and bias may be more attenuated. Nevertheless, it may still be relevant to the question of bias that the arbitrator chose not to follow it.

[124] However where, as here, the failure of disclosure by the Arbitrator relied on by the application judge was a failure to meet the parties' expectations for disclosure of which he was never informed, the path from the Arbitrator's non-disclosure to a reasonable apprehension of bias on the part of the Arbitrator disappears. This is simply not a situation of the Arbitrator ignoring obligations to disclose imposed by the objective test, by which he was bound, or even ignoring the parties' desired level of disclosure, since they did not make him aware of those expectations. The failure to disclose by the Arbitrator in these circumstances is therefore not indicative of bias on his part.

(5) No Other Basis for Finding a Reasonable Apprehension of Bias

[125] In my view, the application judge erred in finding a reasonable apprehension of bias. My reasons for coming to this conclusion are largely presaged in my analysis above – if a circumstance (i.e., the appointment in the second arbitration) is not objectively likely to give rise to justifiable doubts about impartiality and independence so as to require disclosure, then it is hard to envisage how it could give rise to a reasonable apprehension of bias.

[126] I explain below the additional reasons why I conclude that the application judge ought not to have found a reasonable apprehension of bias.

(6) The Test for Reasonable Apprehension of Bias is Objective

[127] Unlike the situation with disclosure, where some regimes use a subjective standard while others (including the Model Law) use an objective standard, reasonable apprehension of bias in Canadian law is determined on an objective standard: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 67. It is that standard that is to be used in the context of arbitrations.

[128] In *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at p. 394, the test was described in objective terms:

> The proper test to be applied in a matter of this type was correctly expressed [as follows:]…. [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…. [The] test is "what 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." [Emphasis added.]

[129] In *Jacob Securities*, Mew J. reached the conclusion that the same test applies in a case governed by the Model Law, even though the Model Law does not expressly use the phrase reasonable apprehension of bias: at paras. 25-26, 33, 35-37.[9]

[9] For a domestic arbitration governed by the *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 46(1)8 of that statute specifically provides that an arbitral award may be set aside if "there is a reasonable apprehension of bias".

[130] The English common law test for a reasonable apprehension of bias is also objective: “the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”: *Porter v. Magill*, [2001] UKHL 67, [2002] 2 A.C. 357, at para. 103; see also *Halliburton*, at para. 52; *Aiteo*, at para. 45. As the court pointed out in *Halliburton*, at para. 54, that (English) “objective test of the appearance of bias is similar to the test of ‘justifiable doubts’ which is adopted in [Article 12(2) of the Model Law]”.[10]

[131] Even the IBA Guidelines on when an arbitrator must decline an appointment or refuse to continue to act, use an objective standard. They refer to the existence or emergence of “facts or circumstances … which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator’s impartiality or independence”, and refer to doubts being justifiable “if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors

[10] In *Jacob Securities*, Mew J. held that an application to the court alleging reasonable apprehension of bias after the Final Award had been released had to be made under Articles 34 and 36 of the Model Law, not Article 12(2): at paras. 31, 33. I interpret Mew J. to have been referring to the procedural route to be followed. I do not interpret him to suggest that the substance of Article 12(2) is not germane no matter when the application is brought.

other than the merits of the case as presented by the parties in reaching [his or her decision]": General Standard 2.

[132] There are several consequences that flow from or are related to this test and its objective nature.

(i) The Presumption of Impartiality Applies to Arbitrators

[133] The first consequence is that the objective test is to be applied against the backdrop of a strong presumption of impartiality: *Wewaykum*, at para. 76. In the case of a judge, a reasonable person, before concluding that a reasonable apprehension of bias existed, would require clear evidence that the judge was not approaching the matter with an open mind fair to all parties: *R. v. S. (R.D.*), [1997] 3 S.C.R. 484, at para. 49. The "presumption of impartiality carries considerable weight" because a judge's "authority depends upon that presumption": *Wewaykum*, at para. 59.

[134] This court has held that the strong presumption applies beyond judges to adjudicators whose mandate comes from a statute: *Ontario Provincial Police v. MacDonald*, 2009 ONCA 805, 255 O.A.C. 376, at para. 44 (adjudicator under the *Police Services Act*, R.S.O. 1990, c. P.15); *Terceira v. Labourers International Union of North America*, 2014 ONCA 839, 122 O.R. (3d) 521, at para. 27 (member of the Ontario Labour Relations Board serving as adjudicator).

[135] In *Jacob Securities*, a case dealing with a privately appointed arbitrator, Mew J., citing *Terceira,* stated that the strong presumption of impartiality "is equally applicable to arbitrators whose function is in the nature of judicial determination": at para. 40. The application judge also referred to the presumption. I agree with Mew J.'s conclusion.

[136] In oral argument, counsel for the respondents asserted that privately appointed arbitrators do not benefit from the presumption. I do not accept that argument.

[137] 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.

(ii) The Objective Test is Context Specific, but the Subjective Views of the Parties Are Not Relevant

[138] A second aspect of the objective nature of the test is that it is context sensitive and fact specific. "As a result, it cannot be addressed through peremptory rules … there are no 'textbook' instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a

party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts": *Wewaykum*, at para. 77.

[139] However, there is a limit to what comprises the entire context. The subjective views of the parties are not relevant: *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485, at para. 163. In other words, it must always be remembered that reasonable apprehension of bias is an objective standard. As stated in *Wewaykum*, at para. 74: "What would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude?"

[140] It is in this sense that the comment of the Supreme Court in *Szilard v. Szasz*, [1955] S.C.R. 3, at p. 7, relied on by the respondents, is to be understood. The comment – "[e]ach party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs" – does not mean that the test is subjective, focussed on the parties' own views. The test, as the Supreme Court has repeatedly emphasized after *Szilard* was decided, is an objective standard. The parties are entitled to confidence in the independence of mind of the arbitrator when the context is viewed through the eyes of an informed observer, not through their own eyes. That is why the comment adds the word: "acting reasonably".

[141] The respondents argue, however, that the subjective views of the parties are relevant, pointing to the statement of Cory J. in *R. v. S. (R.D.)*, at para. 94, that "[f]airness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer." Cory J.'s "subjectively present" reference is to the requirement that the decision-maker not be subjectively (as in actually) biased, which is not here alleged: see paras. 76, 142-44. A reasonable apprehension of bias is judged through the lens of an informed and reasonable observer.

(7) The Application Judge Articulated, but Did Not Apply, the Objective Test

[142] Although the application judge articulated the objective test, and cited the principle that the subjective views of the parties were not relevant, she took such a broad view of the context that she ended up treating the subjective views not only as relevant, but determinative. The result was to change the test. This is an error of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 27.

[143] As I have described above, the application judge's finding of a reasonable apprehension of bias was rooted in the same circumstances that she found gave rise to the duty to disclose, a conclusion I have found to have been flawed. She relied as a significant contextual factor upon "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", from which she drew an expectation that the respondents would be sensitive to any future appointment. But she failed to consider that the parties did not share this correspondence with the Arbitrator or otherwise make him aware of the claimed expectation or the source from which it could be drawn, and that they instead approached the Arbitrator based on an agreed letter limited to asking him about whether he met the MFA qualifications, without any statement concerning future appointments. That does not mean that it was "open season" for the Arbitrator to accept appointments that would objectively give rise to justifiable doubts about his impartiality. But the unshared correspondence and expectation could not form the basis for a reasonable apprehension of bias on his part that would not otherwise objectively arise.

[144] The application judge's conclusion 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" is rooted in circumstances that were incomplete and not objective. A fair-minded and informed person would consider the facts and circumstances objectively known – they would focus on what the Arbitrator was told. What the parties chose, vis-à-vis the Arbitrator, to keep to themselves falls into the category of subjective views.

CONCLUSION

[145] I would allow the appeal, set aside the judgment of the application judge, and reinstate the award of the Arbitrator, subject to the following.

[146] The respondents' application raised a number of grounds attacking the awards in addition to a reasonable apprehension of bias – excess of jurisdiction, an improper finding that the appellant Earl Gorman was not a proper party to the arbitration, failure to limit the award to compensatory damages, failure to decide a key issue, and inadequate reasons. The application judge addressed the other grounds only briefly, expressing agreement with the respondents that the way the Arbitrator addressed the Gorman issue involved a breach of procedural fairness, and disagreeing with the suggestion that the Arbitrator exceeded his jurisdiction or failed to deliver a reasoned award. She did not specify a consequence to the finding about the Gorman issue and left undecided the issues of failure to limit the award to compensatory damages and failure to decide a key issue. Although the respondents asked us to delve into those issues and uphold the setting aside of the Arbitrator's awards on these grounds, it would not be appropriate to do so. The argument was made in one brief paragraph of the respondents' factum, without detail.

[147] I would accordingly remit the matter to the Superior Court to determine the relief, if any, to which the respondents are entitled by reason of the Gorman issue and to decide any other issues the application judge did not adjudicate.

[148] I would award costs of the appeal to the appellants, payable by the respondents, in the amount of $40,000 inclusive of disbursements and applicable taxes. Costs of the application are remitted to the judge finally disposing of it. No costs are awarded for or against the interveners.

Released: November 19, 2024 “J.M.F.”

“B. Zarnett J.A.”
“I agree. Fairburn A.C.J.O.”
“I agree. K. van Rensburg J.A.”