Kluwer Arbitration Blog

An Arbitrator's Reasonable Apprehension of Bias: Business Relationships Do Not 'Always' Create One According to Ontario's SCJ

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On 11 April 2024, the Ontario Superior Court of Justice ("**Court**") issued its decision in ***Ballantry Construction Management Inc. v GR (CAN) Investment Co. Ltd.***, arising from an application to enforce two arbitration awards filed by Ballantry Construction Management (the "**Applicant**"). The Respondent in this application, Investment Co. Ltd, sought an order setting aside the awards on the grounds of a reasonable apprehension of bias on the part of the arbitrator. As explored in the following sections, a challenge to an arbitrator's neutrality and independence need not only be timely but must also have a concrete factual basis for it to be successful. More importantly, an arbitrator must promptly disclose any circumstance that give rise to justifiable doubts as to the arbitrator's impartiality or independence. In adopting a contextual investigation, the Court concluded that the record does not support any basis for the Respondent's application to set aside on the grounds of a reasonable apprehension of bias on the part of the arbitrator.

Background

The Respondent acquired a property in Niagara Falls, Ontario, comprising 484 acres (the "**Property**"). In September 2020, the president of the Respondent, Helen Zhiyung Chang ("**Chang**"), engaged the Applicant to be both the project manager and the construction manager. The Applicant and the Respondent ultimately signed three agreements (the "**Agreements**"), all of which gave rise to the arbitration in question.

The Arbitrator issued two awards: a Liability Award on November 24, 2023, and Costs Award on January 10, 2024, in the Applicant's favour (together the "**Award**"). The Respondent refused to honour said Award and sought to set it aside, invoking Arbitrator's bias based on the following reasons:

1. The Arbitrator was a shareholder and director of Firm Capital Mortgage Investment Corporation ("**Firm Capital**") at the time of the hearing of the arbitration.
2. Firm Capital Mortgage Fund Inc., a wholly owned subsidiary of Firm Capital was a joint lender to the Respondent together with Marshall Zehr Group Inc. ("**Marshall Zehr**") in respect of a loan made for the purpose of developing the Property (the "**Lenders**" and "**Loan**" respectively).

As a condition of the extension of the Loan to the Respondent, Marshall Zehr required that the Applicant guarantees half of the Loan, which the Applicant did.

The Terms of Reference contained a typical clause respecting conflicts of interest:

> *The Arbitrator is not aware of any circumstances that may give rise to a reasonable apprehension of bias or a conflict of interest. Each of the parties waive any right to challenge the independence or impartiality of the Arbitrator or the validity or enforceability of any award, order or ruling made by the Arbitrator in respect of this arbitration on any other circumstance known to the parties or their counsel prior to the execution of these Terms of Appointment.*

The Respondent claimed it was unaware of the relationship until Chang learned of the Arbitrator's directorship on December 3, 2023, when she received a copy of the Arbitrator's CV from Respondent's employee.

On the Timely Challenge of the Arbitrator

Pursuant to subsection 13(3) of the Ontario Arbitration Act as amended in 2017 (the "**Act**"), "a party who wishes to challenge an arbitrator shall send the arbitral tribunal a statement of the grounds for the challenge within fifteen days of becoming aware of them." In turn, ss. 46(4) provides that the court shall not set aside an award on grounds of reasonable apprehension of bias if "the party had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so, or if those grounds were the subject of an unsuccessful challenge."

Given Mrs Chang's lack of knowledge of the Arbitrator's "business relationship," the Court considered that the Respondent's obligation to challenge the Arbitrator did not arise until December 3, 2023. At best, therefore, ss. 46(4) could only apply in respect of the Liability Award. As for the Costs Award, given that the substantive issues of liability and the responsibility for costs had already been determined in the Liability Award, the Court did not find grounds upon which ss. 46(4) should prevent an application to set aside the Costs Award, let alone the Liability Award.

On the Relevance of the Arbitrator's 'Business Relationship' in Finding a Reasonable Apprehension of Bias

The Court considered that while a "business relationship" can create a reasonable apprehension of bias, it is necessary to demonstrate a more concrete basis for such an apprehension than the alleged relationship. The Court indicated that it does not see a basis for a reasonable apprehension of bias for two reasons:

First, there is nothing in the facts of the Loan itself that could give rise to a reasonable apprehension of bias. All dealings with the Respondent regarding the management and repayment of the Loan were conducted by Mashall Zehr. There is, therefore, no evidence of any relationship

between Firm Capital and the Respondent while the Loan was outstanding that would have influenced the Arbitrator. In addition, and in any event, the Loan was repaid prior to the arbitration hearing.

Second, there is no basis for a reasonable apprehension of bias based on any relationship between Firm Capital and the Applicant.

Based on the foregoing, the Court concluded that the record does not support any basis for the Respondent's application to set aside the Award on the grounds of a reasonable apprehension of bias on the part of the Arbitrator.

With regard to the test applied by the Court in determining bias, it is worth noting that the common law distinguishes between "actual" and "apparent" bias. Whilst courts will assess both tests from a factual lense, the determination of "apparent" bias requires a constructive approach for which two English law legal tests dominate the scene: the stringent "real danger of bias," originally laid down in ***R v Gough (Robert)***, and the more lenient "reasonable apprehension of bias," applied under ***Magill v Porter*** (for more discussion on 'actual' and 'apparent' bias see **here**). Like the UK Supreme Court decision in ***Halliburton v Chubb***, the Court reiterated the application of 'reasonable apprehension of bias' when dealing with "apparent" bias. In contrast to the position in Ontario, the stricter 'real danger of bias' test still finds its application in section 17(2) of the British Columbia Arbitration Act.

In March of last year, the Court issued its decision in ***Aroma Franchise Company v Aroma Espresso Bar Canada*** (discussed **here**), with regard to a challenge for setting aside two, this time international, awards. The Court also applied the test of 'reasonable apprehension of bias' to find that the awards should be set aside on the ground that the arbitrator has failed to comply with his disclosure obligations (s.12(1) of the UNCITRAL Model Law, Sch. 2 to the Ontario's International Arbitration Act) concerning a prior engagement by counsel in another separate and ongoing arbitration. As in *Ballantry*, 'context' was important to determine bias in *Aroma*. However, as discussed further below, in contrast to *Aroma*, compliance with an arbitrator's disclosure obligation does not seem to have been an issue for the Court in *Ballantry*.

Comments

It has often been said that the selection of the Tribunal is probably the most important aspect of the arbitration procedure, yet how this is done, and the benchmarks used for appointing an arbitrator, is not always clear, or at least streamlined across industries and legal systems. The reasons for the selection of the Arbitrator are not discussed in *Ballantry*, nor should they be. Such reasons constitute the subjective and objective standards based on which a party selects an arbitrator. The objective standards are the range of an arbitrator's skill set and geographic location, that a party deems relevant for the dispute. The subjective standards, real or notional, may not be publicly disclosed, but does it matter? Given that arbitration is consensual, parties should be given the freedom to appoint whomever they want, subject to certain limitations related to an arbitrator's neutrality and independence.

With regard to the timely challenge of the arbitrator, all things considered, the remedy set out in subsections 13(3) and 46(4) of the Act is here (1) for preventing 'retrospective' allegations of lack

of independence simply because a party is disappointed with the award, and (2) to take direct responsibility before the arbitrators to let them know of the reasons why they are deemed not independent and generate a timely discussion with the Tribunal on the same. As noted **here** in previous post, the essential question was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. In *Ballantry*, the Court decided that Mrs Chang's knowledge of the Arbitrator's business relationship is after the commencement of the arbitration and the rendering of the Liability Award. Despite the knowledge being prior to the rendering of the Costs Award, the Court qualified the ratios of both awards and decided that the responsibility for costs had already been determined, taking the Costs Award outside the realm of Mrs Chang's knowledge. Thus, refusing to prevent the application for setting aside.

As for the relevance of the Arbitrator's business relationship on the finding of reasonable apprehension of bias, the Court concluded that there is no such bias despite this relationship. Challenges to arbitrators are essentially fact specific. Of relevance is that not every financial, business, professional, or personal relationship raises a ground for challenge. The concern here is: (1) an arbitrator's duty not to be influenced by such past, present, or prospective relationship or the use of such position to advance any financial or personal interest; and (2) a duty to disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality. These form the widespread acceptance on conflict and an arbitrator's duty to disclose per General Standard 3 of the **IBA Guidelines on Conflicts of Interest 2024**, which rests on the premise that the parties must be fully informed of any facts or circumstances that may be relevant in their view in determining impartiality or independence. As per the explanatory note to General Standard 3, the duty of disclosure is not only ongoing, it is also purely dependent on the facts and circumstances, as opposed to the stage of the proceedings. Any doubt as to the arbitrator's independence or neutrality must be resolved in favour of disclosure. As noted above, it is unclear in the decision of the Court whether the Arbitrator has disclosed his prior relationship, but even if he has not done so, in the absence of a demonstrated direct interest in the outcome of the arbitration the likely outcome would have been similar to that reached by the Court. Irrespective of that, prompt disclosure under Ontario's legislative instruments is required for both domestic and international arbitrations.

Conclusion

The key takeaway points in *Ballantry* are twofold:

- A relationship between an arbitrator who is a shareholder and director of the parent of a lender that provides a loan to a party to the arbitration is too remote to establish a reasonable apprehension of bias on the part of the arbitrator.
- The timing of the loan and the identity of those that administered it were important factors in determining the absence of a reasonable apprehension of bias.

As seen historically in other cases referred to above, evaluating an arbitrator's independence and neutrality is a question of fact that requires a review of the circumstances leading to the appointment and the arbitrator's conduct thereafter. If doubt exists, it should be promptly raised with the tribunal.

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