Kluwer Arbitration Blog

2024 in Review: Arbitration in Canada—Are “Impartiality” and “Immunity” the Words of the Year?

Dina Prokic (Senior Assistant Editor) (Woods LLP) · Wednesday, February 19th, 2025

Another trip around the Sun has brought a wealth of notable developments. Courts across Canada have addressed a multitude of issues, including challenges to arbitrators due to reasonable apprehension of bias (as previously discussed on this blog) or due to excess of jurisdiction (*see* commentary here), the distinctions between “awards” and other “decisions”, as well as the impact of *Vavilov* on the standard of review of domestic arbitral awards. A lengthy saga in *Eurobank Ergasias S.A. v. Bombardier Inc.* which raised multiple questions, including the enforceability of tribunal-ordered interim measures, ended at the Supreme Court of Canada. Perhaps the most noteworthy themes have emanated from Ontario and Quebec courts, which grappled with notions of arbitrator impartiality and State immunity.

Changed Views on Impartiality and Disclosure from Ontario

Two cases that made waves in arbitration circles in 2023 (that had been highlighted in last year’s “year in review” post) continued to captivate attention in 2024.

In *Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc.* (“*Aroma*”), the Court of Appeal for Ontario (“ONCA”) overturned the first instance judgment which had set aside a $10 million international arbitral award on the basis of an undisclosed subsequent arbitral appointment. By way of reminder, the *Aroma* case concerns the wrongful termination of the *Master Franchise Agreement* by the respondents, Aroma Franchise Company Inc. and others. The arbitrator in that case had ordered the respondents to pay substantial damages to the appellants, Aroma Espresso Bar Canada Inc. (the “MFA Arbitration”). During the course of the MFA Arbitration, the appellant’s counsel (“Sotos”) appointed the same arbitrator in another arbitration—one that concerned a dispute between another Sotos client and a third party (the “Sotos Arbitration”). The Sotos Arbitration did not involve any of the parties to the MFA Arbitration, nor were there any issues that significantly overlapped with those in the MFA Arbitration. Yet, because one party only learned of this appointment by chance at the time it received the unfavourable final award, it launched a challenge. Though the first instance court agreed with the challengers, the ONCA allowed the appeal finding that the first instance judgment contained legal errors.

The ONCA disagreed with the view of the first instance judge that the arbitrator had breached his duty to disclose, a duty that the judge anchored primarily in the 2014 *IBA Guidelines on Conflicts of Interest in International Arbitration* ("IBA Guidelines") (which the parties had not even selected as applicable) and the parties' pre-appointment correspondence (of which the arbitrator was not aware). The ONCA also distinguished this case from the landmark judgment of the UK Supreme Court in *Halliburton* (*see* paras. 97-100), which was previously extensively covered on the blog (*see, e.g.*, here and here), and from the judgment of the English Commercial Court in *Aiteo* (*see* paras. 101-106), which was also previously discussed here.

According to the ONCA, in the circumstances where the parties have not agreed on the application of the IBA Guidelines as the governing disclosure regime for their arbitration (para. 74), it is Art. 12 of the UNCITRAL Model Law that governs. 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," was overlooked by the first instance judge (para. 84). Indeed, the distinction is striking: whereas Art. 12(1) of the UNCITRAL Model Law requires disclosure of "any circumstances likely to give rise to justifiable doubts as to [the arbitrator's] impartiality and independence," General standard 3(a) of the IBA Guidelines refers to "facts or circumstances […] that, *in the eyes of the parties*, give rise to doubts as to the arbitrator's impartiality or independence." In the ONCA's view, "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" (para. 91). Applying the objective test, the ONCA held that the arbitrator in the MFA Arbitration had no legal duty to disclose that he was being engaged in the Sotos Arbitration, since it neither involved the same parties, nor concerned overlapping issues as those in the MFA Arbitration (para. 96). The ONCA's disagreement with the first instance judge is all the more evident from the following passage:

> *[117] […] 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 engagemetn tells heavily against the suggestion that it does.*

In light of the above, the ONCA reinstated the award, albeit with a caveat. Considering that the

first instance judgment did not address or only briefly addressed other grounds attacking the award, the ONCA remitted the matter to the Superior Court to determine the relief, if any, to which the respondents may be entitled to by reason of one circumscribed issue and to decide any other issues that the first instance judge had not adjudicated.

Interestingly, two months before the ONCA would issue its judgment in *Aroma*, the Superior Court of Ontario analyzed a challenge for bias against the same arbitrator, only this time in the context of the Sotos Arbitration. Distancing themselves from the first instance judgment in *Aroma* and dismissing the challenge, the judge refused to perpetuate "the suggestion that a repeat arbitral retainer is inherently concerning" (para. 37).

The second noteworthy development from the ONCA concerns the *Vento Motorcycles, Inc. v. The United Mexican States* ("Mexico"). Though the judgment was rendered on 4 February 2025, the hearing on appeal took place in November 2024 and may be considered as a 2024 development. The ONCA allowed the appeal, concluding that the Superior Court's decision to exercise its discretion under Art. 34(2) of Ontario's equivalent of the UNCITRAL Model Law to dismiss the set aside application, despite finding that Mexico's appointee was subject to a reasonable apprehension of bias, was erroneous. This is because, among others, a finding of reasonable apprehension of bias (however it is understood) "undermines the integrity and legitimacy of the adjudicative process" and is "necessarily a major violation of procedural fairness" (para. 28). An applicant seeking relief need not "establish that the outcome of the relevant decision would—or event might—have been different but for the unfair hearing procedure" because "procedural fairness is 'an independent, unqualified right'" (para. 29).

Contrary to the Superior Court's finding that "the fact that there was a reasonable apprehension of bias with respect to one of the members of the panel does not necessarily 'taint' the Award and the entire panel," the ONCA held that it does. This is because "it is impossible to know whether—or to what extent—the participation of a biased member affected a panel's decision" and "it cannot be left to conjecture, nor can it be ignored by assuming that the presumed impartiality and independence of the other two members of the panel rendered it harmless" (para. 46).

Hence, the ONCA found there was no basis to discount the significance of a finding of reasonable apprehension of bias, or "to refuse to remedy it on the basis of cost or inconvenience" (para. 69).

Views on State Immunity from Quebec

As recently commented on the blog, in December 2024, the Quebec Court of Appeal confirmed India's waiver of immunity from enforcement and reinstated a pre-judgment attachment of State assets which a first instance decision had previously quashed. Airport Authority of India, on the other hand, was considered to enjoy State immunity as an "agency of a foreign state," as per the Superior Court's judgment from August 2024.

Another instance where State immunity arguments were raised is *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria* ("Nigeria"). In the context of recognition and enforcement proceedings, the defendant Nigeria sought to be relieved of default to file a timely answer, arguing it was prevented by reason of internal political matters and that, in any event, it

was immune under the *State Immunity Act*. The Superior Court of Quebec dismissed Nigeria's request, finding that it: (i) had failed to justify its default, and (ii) enjoyed no immunity. According to the Court, "any State party to the [New York Convention] that chooses to submit to arbitration recognizes and waives its immunity from jurisdiction in order to oppose recognitions of the award," which Nigeria has been since 3 March 1970 (para. 37).

Other Jurisprudential Trends

The supportive attitude towards arbitration continued in 2024. For example, courts have reaffirmed that recognition and enforcement may be denied only on limited grounds (*see, e.g.*, *Shanghai Investment Co. Ltd. v. Lu et al.*, paras. 18-21), and have refused to exercise the purported discretion to set aside awards when no grounds are present (*see, e.g.*, *Medivolve Inc. v. JSC Chukotka Mining and Geological Company*). In the presence of annulment proceedings at the seat of arbitration, Canadian courts have stayed recognition and enforcement proceedings before them (*see, e.g.*, *PMGSL Holdings v. Neptune Wellness Solutions inc.*, paras. 27-29).

Furthermore, courts have refused to stay a consensual arbitration noting that courts "must act with caution, reserve and circumspection before intervening in the course of a consensual arbitration," that the decision "whether or not to suspend rests primarily with the arbitrator" and that courts should order such a suspension only as a last resort and in exceptional situations (*McLaren Automotive Incorporated v. 9727272 Canada Inc.*, paras. 59, 61, 63). They have also referred parties to arbitration (*see, e.g.*, *Globeair Holding GmbH v. Pratt & Whitney Canada Corp.*).

A court proceeding may only be stayed, however, if the parties' agreement contains an arbitration clause. If the dispute resolution clause in question calls for expert determination, a stay is not warranted (*see, e.g.*, *ONE Lodging Holdings LLC v. American Hotel Income Properties REIT (GP) Inc.*). Neither is a stay of court proceeding warranted if a party has sought a judicial determination of a substantive, non-jurisdictional aspect of a dispute, because that amounts to a waiver of the right to arbitrate (*RH20 North America Inc. v. Bergmann*, para. 62).

The pro-arbitration attitude is less evident in matters where arbitration and insolvency worlds collide. Quebec courts have, for instance, disfavoured arbitration in the context of proceedings under the *Companies' Creditors Arrangement Act*. They have either relied on the need to centralize insolvency proceedings before one decision-maker, the 2022 Supreme Court of Canada judgment in *Peace River Hydro Partners v. Petrowest Corp.* (addressed on this blog), and the fact that a referral to arbitration would only add to delay and costs (*see Arrangement relative à Endoceutics inc.*, paras. 163-70), or have simply held that arbitration in another jurisdiction would only cause the restructuring procedure to be delayed (*see Syndic de Laboratoires COP inc.*).

Events and Other Initiatives

During the past year, members of the Canadian and international arbitration community had

multiple opportunities to gather and exchange views on a wide variety of topics at events across the country. The long-awaited Canadian Arbitration Report was also released in 2024. The Report profiles the practices of arbitrators, counsel and experts based in Canada over the 2020-2022 period. In addition to attesting to the continued rise of arbitration's popularity, in spite of pandemic-related challenges, as the first of its kind in Canada, the Report provides baseline data on important questions such as recommended arbitration clauses, preferred seats, differences between the use of domestic and international arbitration, the length of hearings, the frequency of settlements, gender and other forms of diversity, etc. The Co-Chairs of the Report were Prof Janet Walker, CM and Hon Barry Leon. The Survey was conducted, and the data analyzed, by FTI Consulting (led by Tara Singh, CPA, CBV, CFE, Natalie Quinn, and Ali Al-Ahmad with data analysis support from Soham J. Mehta.)

Conclusion

If last year is any indication, in 2025 arbitration enthusiasts can look forward to reading more pertinent judgments from courts across Canada. In the meantime, readers can note in their calendars a multitude of exciting events that are envisaged in the upcoming months: the WCCAS Conference in Calgary on 6 May 2025, CanArb Week in Montreal on 8-10 June 2025, the ICC Canada Conference in Ottawa on 9 October 2025, and the ADRIC Conference in Vancouver on 23-24 October 2025.

**The views expressed herein are those of the author and do not necessarily reflect the views of Woods LLP or its partners.*

Additional 2024 year in review posts are available here.

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