Cassels

Reasonable Apprehension of Bias – A Fatal Finding for Commercial Arbitrations

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Courts have limited authority to exercise their discretion and set aside arbitral awards. However, the Court of Appeal of Ontario in a recent decision – *Vento Motorcycles, Inc. v. Mexico, 2025 ONCA 82* (*Vento*) – explores circumstances, particularly reasonable apprehension of bias, where such a decision is required.

Following its decision in *Aroma Franchise Company Inc. v Aroma Espresso Bar Canada Inc.,* 2024 ONCA 839 in late 2024, in which it clarified that the test for a reasonable apprehension of bias is objective, in *Vento* the Court confirmed that the partiality of one arbitrator affects the impartiality of an entire panel.

This overturned the lower court's ruling, *Vento Motorcycles, Inc. v. Mexico, 2023 ONSC 5964*, wherein the application judge determined that a reasonable apprehension of bias regarding one panel member did not necessarily compromise the integrity of the award or the entire tribunal. The Court disagreed, asserting that *any* bias from a tribunal member mandates the annulment of the award, rendering it void. In the decision, Huscroff, J.A., for the unanimous Court, held that "parties to an arbitration are entitled to an independent and impartial tribunal, not just the ruling of a quorum of unbiased panel members."[1]

The UNCITRAL Model Law on International Commercial Arbitration (Model Law) governs international commercial arbitration proceedings and awards and has been formally adopted in all provinces in Canada.[2] Article 12(1) of the Model Law imposes a duty on an arbitrator to disclose any circumstances likely to give rise to justifiable doubts about the arbitrator's impartiality. Article 12(2) allows a party to challenge an award based on circumstances likely to give rise to justifiable doubts about the arbitrators' impartiality.

In an arbitration, the existence of a reasonable apprehension of bias is a fatal flaw, not a trivial procedural concern. Once any such apprehension is established, the applicant is not required to demonstrate that the outcome of the decision would have been different. The appropriate remedy is to remove that arbitrator and to aside the award.

Here, the Court ruled that bias from any one arbitrator on a three-member tribunal is enough to invalidate an arbitration award.

The Lower Court Decision

The arbitration concerned a trade dispute between a United States manufacturer, Vento Motorcycles, and the government of Mexico. Vento Motorcycles initiated an arbitral claim under Chapter 11 of NAFTA, seeking redress for what it alleged to be a breach of NAFTA (now CUSMA) by Mexico. A procedural order issued by the tribunal shows that the parties agreed to Toronto being the place of arbitration. A three-member panel dismissed Vento's claim.

Vento Motorcycles later learned of undisclosed communications between representatives of Mexico and the arbitrator appointed to the three-member tribunal by Mexico. These communications included the Mexico representatives inviting the arbitrator to submit his CV information for possible consideration for future CUSMA matters in Mexico. Vento Motorcycles then brought an application to set aside the arbitral award on the basis of reasonable apprehension of bias.

The application judge found the conduct gave rise to a reasonable apprehension of bias; however, she refused to set aside the award. Instead, the application judge found that the apprehension of bias did not undermine the reliability of the award, did not result in "real unfairness" or "practical injustice," and that the seriousness of the breach and potential prejudice from rehearing the arbitration supported the exercise of her discretion not to set aside the award.

Vento Motorcycles appealed this decision.

The Court of Appeal Decision

Mexico did not challenge the application judge's finding of reasonable apprehension of bias. Instead, it argued that the application judge properly exercised her discretion to decline to set aside the arbitral award.

In Canada, there is an objective standard for assessing bias in decision-makers: whether a reasonable observer, evaluating the circumstances pragmatically, would conclude that it is more likely than not that the decision-maker would not act fairly, either consciously or unconsciously.[3] Regardless of the source of the reasonable apprehension of bias, it does not constitute a "minor procedural defect."[4]

The Court found that reasonable apprehension of bias represents "a major violation of procedural fairness,"[5] and focused on what were suitable remedies for such a finding. The Court determined that, no matter the source, once reasonable apprehension of bias is found:

1. The adjudicator is disqualified; and,
2. If an arbitral decision has already been reached, that decision is void.

To underscore its finding, the Court held that "[t]he damage created by reasonable apprehension of bias cannot be remedied."[6]

Superior courts have the inherent authority to control their own processes and prevent them from abuse. They may refuse to entertain an allegation of bias against an arbitrator. However, there is no discretion to refuse to remedy a reasonable apprehension of bias finding.[7]

Notably, the application judge found that "ordering the parties to redo the arbitration would result in significant wasted time, resources, and fees, and would raise serious concerns regarding the impact of a considerable amount of time on witness' recollection."[8] In response to the application judge's concern, the Court of Appeal noted that a reasonable apprehension of bias "…is a finding that the integrity and legitimacy of an adjudicative process has been compromised irreparably [and] cannot be balanced on the basis that it would be inconvenient and costly to rehear the arbitration if the award were to be set aside."[9] Neither the risk of costs and time thrown away, nor the principle of judicial restraint in arbitration proceedings, undermine that fundamental principle.

Commercial arbitration is designed to operate outside the judicial system, and courts generally support the finality of arbitration decisions. However, generally courts will exercise their jurisdiction to intervene "only when it can be shown that a breach of fair hearing has affected the substantive fairness of the hearing."[10] In this case, the Court reaffirmed the law set out in *Popack v. Lipszyc,* 2016 ONCA 135, wherein the Court held that when considering whether to set aside an arbitral award, courts must perform a balancing exercise that considers both (i) the extent to which the breach impacts fairness of the arbitration; and (ii) the effect of the breach on the arbitral award.[11]

Here, the Court concluded that the bias of one panel member undermines the entire panel's decision. The Court emphasized that the decision to annul an award does not hinge on proving that the disqualified member influenced the result. Rather, the bias of any one member renders the entire tribunal unfair, as parties to an arbitration "are entitled to an independent and impartial tribunal, not merely the decision of an unbiased quorum of panel members."[12]

Conclusion

The Court concluded that the application judge erred by assuming that the impartiality of the other two tribunal members justified not setting aside the award. The impartiality of the remaining members was irrelevant to the application judge's consideration, and Vento Motorcycles was not required to establish that the majority of the tribunal was subject to reasonable apprehension of bias to secure a remedy for same. The mere apprehension of bias from one arbitrator was sufficient to necessitate the setting aside of the award.[13]

Key Takeaways

The decision in *Vento* is instructive as it emphasizes the significance of a finding of a reasonable apprehension of bias while also underscoring the importance of disclosure by arbitrators. The key takeaways from this decision are:

- Even "generic" communications between a party to the arbitration and the arbitrator can result in a finding of reasonable apprehension of bias.
- Once a finding of reasonable apprehension of bias is made, there is no discretion for the Court: the arbitrator must be disqualified, and any decision reached must be set aside.
- A reasonable apprehension of bias cannot be "balanced away" by surrounding circumstances, such as the seriousness of the bias or the inconvenience of restarting the arbitration.
- The finding of a reasonable apprehension of bias of one arbitrator fatally taints the impartiality of the entire tribunal.

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[1] *Vento Motorcycles, Inc. v. United Mexican States*, 2025 ONCA 82 (*Vento*) at para. 46.

[2] The Model Law has been adopted by provincial laws governing international commercial arbitration, including the *International Commercial Arbitration Act*, RSBC 1996, c 233 in British Columbia, the *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5 in Ontario, and the *International Commercial Arbitration Act*, RSA 2000, c I-5 in Alberta.

[3] *Vento* at para. 27.

[4] *Vento* at para. 28.

[5] *Vento* at para. 28.

[6] *Vento* at para. 31.

[7] *Vento* at para. 33.

[8] *Vento ONSC*, para 131.

[9] *Vento*, para 42.

[10] *Vento* at para. 39.

[11] *Vento* at para. 38; *Popack v. Lipszyc,* 2016 ONCA 135 at para. 31.

[12] *Vento* at para. 46.

[13] *Vento* at para. 64.
