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Safeguarding the Arbitration Process: Court deters frivolous claims of arbitrator bias

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Two benefits that are commonly cited in favour of arbitration are the ability to select the decision-maker and the finality of awards. Two recent decisions of the Ontario Superior Court of Justice have further emphasized these benefits by awarding substantial indemnity costs against parties who have tried to interfere with the arbitration process.

In both cases, the losing party claimed a reasonable apprehension of bias in relation to their respective arbitrators. In the first case, *Allied Track Services Inc. v. Jeffery Swift et al*, 2015 ONSC 5496 ("***Allied Track Services***"), the challenge occurred during the arbitrator selection process. In the second case, *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604 ("***Jacob Securities****")*, the losing party alleged arbitrator bias in order to set aside the arbitral award. As summarized below, both parties relied upon questionable grounds that the Court viewed as veiled attempts to upset the arbitration process, which should be deterred.

Allied Track Services Inc. v. Jeffrey Swift et al.

In *Allied Track Services,* the applicant moved to have an arbitrator appointed after the respondents refused to follow the Court's previous order that a partner from a large accounting firm serve as arbitrator to determine post-closing adjustments under a Share Purchase Agreement. The respondents refused to engage the accounting firm because the applicant's law firm had acted for the accounting firm in a recent, unrelated insolvency matter. The respondents' alleged that this gave rise to a reasonable apprehension of bias by any person employed at the accounting firm acting as arbitrator. In determining whether a reasonable apprehension of bias could be found, the Court examined whether it was reasonable to conclude that the accounting firm would have a disposition towards the law firm's client, or have a predisposition to decide in favour of that client, because it had retained the law firm on unrelated matters. In relying on Supreme Court of Canada case law addressing apprehension of bias, the Court could not find any basis for a reasonable and informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude that there was a reasonable apprehension of bias. The proposed partner at the accounting firm had never met or had any professional dealings with counsel and there was no evidence that the partner was in any way beholden to the applicant's law firm or that a reasonable and informed person viewing the matter realistically and practically would come to such a conclusion.

The Court noted that while there could be a case of a reasonable apprehension of bias involving an arbitrator from a large accounting firm or a lawyer from an experienced commercial law firm, the inquiry into each case must be fact-specific. In light of the

respondents' suspicions arising from a retainer from a large law firm by a large accounting firm in unrelated matters, the Court found the respondents' actions unjustified. The Court found that the respondents had, in bad faith, tried to derail the arbitration process and ordered costs on a substantial indemnity basis.

Jacob Securities Inc. v Typhoon Capital B.V.

In *Jacob Securities*, the losing party at arbitration commenced an application under Ontario's *International Commercial Arbitration Act*, RSO 1990, c. I.9, to set aside the arbitral award. The applicant had claimed compensation for introducing a third-party as a potential investor and participant in the respondent's offshore wind power project. Before the Court, the applicant alleged that the arbitrator should have known that his former law firm had acted for the underwriters of the project, and that the firm had acted for the third-party investor. The applicant claimed that a conflicts check at the arbitrator's former firm would have revealed these relationships, and that the arbitrator's failure to disclose them gives rise to a reasonable apprehension of bias.

The Court noted that an arbitrator who is a partner at, or works for, a law firm has a positive duty to investigate any potential conflicts of interest with his or her firm in order to meet disclosure obligations. However, the applicant was claiming that such disclosure obligations extend to an arbitrator's former firm. In dismissing the application, the Court found that requiring an arbitrator to search for unknown conflicts from the arbitrator's former firm would be a "burdensome exercise and wholly disproportionate response to the duty to disclose."

The Court concluded that a reasonable person would not conclude that there was a reasonable apprehension of bias on the part of the arbitrator. The connections between the arbitrator and his former firm were too remote, the arbitrator could not run conflict searches at his old firm, and even if the connections were sufficient to question his partiality, he was unaware of such connections.

In determining costs, the Court concluded that a similar approach as the taken in *Allied Track Services* of ordering substantial indemnity was warranted in order to "deter losing parties in international commercial arbitrations from launching baseless *ex post facto* challenges to an arbitrator's impartiality."

The Court's decisions should be welcomed and act as a deterrent to parties seeking to interfere with arbitration. Although arbitration presents several advantages, these cases also demonstrate the importance of the role of courts in safeguarding the arbitration process.

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