Commercial Arbitration

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OUR ARBITRATION EXPERTISE

Clients sometimes choose arbitration for cases involving complex or confidential matters that can be resolved more efficiently, expeditiously and predictably behind closed doors. In other cases, clients turn to arbitration for cross-border disputes or cases involving multiple jurisdictions, where the legal issues are typically complex and often involve competing jurisdictions and conflicting substantive law. In either case, our extensive and unrivalled trial experience makes us a top choice for arbitration clients.

"Arbitration cannot be extended to non-parties without their unequivocal agreement."

What was the most interesting development of 2024, and why?

Arbitrations are confidential and final processes, with limited scope for appeal and judicial oversight. It was therefore no surprise that the biggest cases in 2024 dealt with issues of arbitrator bias — an area where courts are often asked to intervene.

In *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*, Justice Steele overturned two arbitration awards because of a reasonable apprehension of bias stemming from the arbitrator's failure to disclose a subsequent appointment by the same counsel. Arbitrators promptly moved to disclose everything under the sun, rather than risk the same result in their cases.

In its Court of Appeal decision, the Court reinstated the arbitral awards and clarified that under the Model Law, the test for disclosure is objective, focusing on how an objective observer would view the situation. The Court also emphasized that repeat appointments alone do not trigger a disclosure obligation unless there is a stronger connection, such as overlapping issues or parties.

In *Vento Motorcycles Inc v United Mexican States*, Justice Vermette found a reasonable apprehension of bias after the respondent offered undisclosed opportunities to one of the arbitrators during the arbitration. Nonetheless, the Court exercised its discretion under Article 34(2) of the Model Law and declined to overturn the award on the basis that bias affecting one arbitrator does not necessarily "taint" the award if the remaining members of the panel are unbiased. This case is now under appeal and will be one to watch carefully in 2025.

What's the primary takeaway for businesses from the past year?

Building on *Peace River Hydro Partners v Petrowest Corp*, courts have considered if and how successors, assignees, and beneficiaries are made subject to arbitration agreements. Recent decisions suggest a reluctance to require non-signatories to arbitrate absent express acceptance of arbitral agreements.

In *Sociedad Concesionaria Metropolitana De Salud SA v Webuild SPA*, the Court stayed the enforcement of an arbitral award against a successor entity who was not a signatory to the arbitration agreement, holding that the "threshold issue" of whether the successor entity assumed liability through a restructuring process had to be determined first.

In *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc*, the Court of King's Bench of Alberta held that the third-party beneficiary under the warranty provisions of a subcontract was bound by an arbitration clause, despite being a non-signatory. The Alberta Court of Appeal disagreed and held that in the absence of explicit contractual language binding Husky Oil to arbitrate warranty claims, no obligation to do so could be imposed on a non-signatory. This decision underscores the principle that arbitration cannot be extended to non-parties without their unequivocal agreement.

What's one trend you are expecting in 2025?

Another way courts can intervene in the arbitral process is when interim injunctive relief is required. Justice Kimmel's recent decision in *NorthStar Earth & Space Inc v Spire Global Subsidiary Inc*, suggests that a more "relaxed" modified standard for injunctive relief should be applied in the context of international arbitrations.

NorthStar contracted with Spire to manufacture, launch, and bring satellites into commercial operation. However, due to performance issues with the satellites, NorthStar stated that it would commence arbitration. In the interim, NorthStar sought an urgent injunction to prevent the deorbiting or decommissioning of the failed satellites until their claims are resolved. The Court granted the injunction, holding that only a "reasonable possibility" of success was required in the arbitral context, rather than the usual requirement of a "strong *prima facie* case."

The decision in *NorthStar* departs from longstanding Ontario precedents that have consistently applied the RJR-MacDonald test for the issuance of interim measures in both domestic and international arbitrations. This case may mark the beginning of a new trend, providing a new and compelling reason to seek urgent relief through the courts, even when an arbitration agreement is in place.