Kluwer Arbitration Blog

Australian Arbitration Week Recap: Functus Officio in Arbitration

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On the final day of ACICA's Australian Arbitration Week 2021, Level Twenty Seven Chambers presented a seminar on "*Functus Officio in Arbitration*". The theme of the seminar was judicial intervention and *functus officio*, discussed by Shane Doyle QC (Barrister, Level Twenty Seven Chambers), Sarah Spottiswood (Barrister, Level Twenty Seven Chambers), and Chiann Bao (Arbitrator, Arbitration Chambers).

This article will address the discussion on whether a domestic court can intervene where a tribunal issues an award after becoming *functus officio*, in light of the recent decision of *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 ("***Chevron v CBI***").

Judicial Interference

Mr Doyle began the discussion by outlining the theme of judicial intervention in commercial arbitration. As Mr Doyle noted, the extent to which a domestic court may intervene in an arbitration is provided for by the relevant institutional rules. For arbitrations brought under the UNCITRAL Model Law, Art 5 restricts the extent to which a court can intervene to "where so provided in this Law". When the UNCITRAL Working Group considered Art 5 in 1983 (which was, at that point in drafting, Art 3), one view as to its appropriateness was that it "created the impression that court intervention was something negative and to be limited to the utmost". Today, while the relevance of the former epithet might remain open for debate, the latter has been all but embraced, in practice, if not in principle.

As Mr Doyle stated, the modern trend in arbitration is one of limited judicial intervention. This, as Singapore Chief Justice Sundaresh Menon stated in *AKN v ALC* [2015] SGCA 18 at [37], is "a mainstay of the Model Law". However, his Honour went on to observe (at [38]): "That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed".

Chevron v CBI

These limited grounds of judicial intervention were the subject of dispute in *Chevron v*

CBI. By way of a cursory summary, in 2011 Chevron contracted CBI and Kentz Pty Ltd ("**CKJV**") for the construction of an oil and gas project off the coast of Western Australia. A contractual dispute arose concerning the interpretation of provisions requiring Chevron to reimburse CKJV for their employment of labour.

The dispute was referred to arbitration and, on application, the tribunal bifurcated the hearing into two stages: a hearing on liability followed then by a hearing on quantum and quantification. Following the delivery of the first interim award on liability, CKJV was ordered to amend its pleadings on quantum. Upon receipt of CKJV's further pleadings, Chevron objected, submitting that the pleadings raised a new case and that the tribunal was *functus officio* having already decided all issues as to liability. The tribunal delivered its second interim award, in which a majority of the tribunal rejected Chevron's submissions as to jurisdiction. Chevron subsequently applied to the Supreme Court of Western Australia to set aside the award.

Functus Officio

The first issue raised in *Chevron v CBI* was whether the Court could set aside an interim award made by a tribunal after becoming *functus officio*.

As Mr Doyle outlined, given an arbitral tribunal draws its jurisdiction from the agreement of the parties, such agreement is "the source of the tribunal's authority, but also limits the authority". Put simply, once the tribunal decides a final award on a matter submitted to it by agreement of the parties, then the tribunal has performed its function, that matter is *res judicata*, and the tribunal is *functus officio*. Accordingly, the tribunal will not have the authority to alter an award, subject to certain exceptions: see, for example, Arts 33, 34 of the Model Law.

The natural question that arises is whether a court has jurisdiction to set aside an award that is made outside of jurisdiction because it is *functus officio*. The relevant power is contained in Art 34, of which Art 34(2)(a)(iii) relevantly provides that a court can set aside an arbitral award where "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration". Relevantly, Gary Born observed in *International Commercial Arbitration* (3rd ed, 2021) at [3582]:

> An arbitral tribunal may also exceed its authority if it makes an award after becoming *functus officio*. Thus, a few courts have held that the arbitral tribunal exceeded its mandate where, after issuing a final award, it reopened the case and issued another award (recalling or revising its earlier award).

In *Chevron v CBI*, Martin J held that such an award did engage the Western Australian statutory equivalent of Art 34(2)(a)(iii) of the Model Law. In so concluding, his Honour relied on the above observations of Gary Born, as well as the decision of *CRW Joint Operations v PT Perusahaan Gas* [2011] SGCA 33, in which the Singapore Court of Appeal held (at [31]) that Art 34(2)(a)(iii) "addresses the situation where the arbitral

tribunal exceeded (or failed to exercise) the authority that the parties granted to it."

Justice Martin concluded (at [97]) that a "multiple bites at the cherry" approach cannot be accepted as it "would violate a cardinal policy of finality, recognised as essential to a coherent process of arbitral and, indeed, to curial decision making."

Arbitrator's Jurisdiction

The second issue the Court had to decide in *Chevron v CBI* was the extent to which the Court should defer to the tribunal's views as to what it intended by its own procedures.

Ms Spottiswood outlined the process of an arbitrator's assessment of its own jurisdiction, the starting point of which is the principle of 'Kompetenz-Kompetenz': Art 16. The principle allows a tribunal to determine its jurisdiction without having to apply to a court for a ruling. Ms Spottiswood noted that the principle's rationale is that it "prevents an uncooperative party from halting the arbitral process by challenging an arbitrator's jurisdiction." Accordingly, where a party challenges a tribunal's jurisdiction on the basis of *functus officio*, it is for the tribunal to decide first whether it has jurisdiction, as was the case in *Chevron v CBI*.

Yet, to what extent will a court defer to such an assessment? In Australian courts, the tribunal's assessment of its own jurisdiction is taken to be of no moment: the court is to make its own objective assessment as to the tribunal's jurisdiction. Ms Spottiswood noted that the authority for this position in Australia can be traced to the decision of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 AC 763, in which Lord Mance JSC stated (at 813 [30]):

> The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority … This is so however full was the evidence before it and however carefully deliberated was its conclusion.

This passage was, most notably, cited with approval by the High Court of Australia in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (at 547–548 [12]).

Returning to *Chevron v CBI*, CKJV submitted that the Court ought to defer to the tribunal's stance on the issue of *functus officio*. Martin J held that it was open for Chevron to seek to have the Court examine afresh its arguments as to *functus officio* concerning the tribunal. In so reasoning, his Honour relied on the authority of *Maersk Crewing Australia Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 595, in which Colvin J stated (at [28]) that the view of the tribunal as to its jurisdiction "is not final and binding because arbitrators cannot by their own decisions create and extend their own authority".

Concluding Remarks

Mr Doyle concluded that the principle of *functus officio* engaging a court's power to set aside an award under Art 34(2)(a)(iii) needs to be borne in mind whenever one drafts procedural orders to bifurcate a hearing. As the decision of *Chevron v CBI* illustrates, there is a need "for precision about what is and what is not to be the subject of the first hearing".

More coverage from Australian Arbitration Week is available here.
