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What The Functus? Setting Aside Awards for Lack of Jurisdiction in Chevron Australia Pty Ltd v CBI Constructors Pty Ltd

Leon Firios (Quayside Chambers) and Kanaga Dharmananda (Quayside Chambers, Fountain Court Chambers) · Friday, August 5th, 2022

Winston Churchill said in 1942 that the war was not at the end, adding: “It is not even the beginning of the end. But it is, perhaps, the end of the beginning”. When it comes to international arbitration, the beginning is easy enough to discern from the notice of arbitration. Divining the end can be more difficult, especially if issues are split or the case is bifurcated.

The Supreme Court of Western Australia is grappling with a challenge to an arbitral award on grounds that the tribunal inadvertently rendered itself *functus officio* by a decision to bifurcate issues of liability and quantum. The case provides a cautionary tale for parties and tribunals about the need for care in formulating applications and orders for bifurcation; and lessons for reviewing courts called upon to second-guess the procedural course charted by arbitral tribunals.

Chevron Australia Pty Ltd v CBI Constructors Pty Ltd [2021] WASC 323 involved a dispute between Chevron and a joint-venture contractor engaged to perform certain work on Chevron’s Gorgon offshore gas project in northern Western Australia. In essence, the contractor was paid on a reimbursable basis, and the parties fell into dispute over the scope of the reimbursement entitlement and the sum owed.

The tribunal, comprised of Mr Phillip Greenham, the Hon Christopher Pullin QC, and Sir Robert Akenhead, made orders bifurcating liability and quantum. That seemed like a sensible idea. But the tribunal’s orders provided that “all issues of liability” would be the subject of a first hearing, followed by a second phase to address “all matters outstanding in issue between the parties including quantum and quantification issues”. The ambiguity in the orders prefigured the dilemma that later emerged: was the second phase limited strictly to quantum, or did it include quantum and any other residual issues, including residual liability issues?

The parties proceeded to exchange submissions and complete the first phase, leading to a partial award styled somewhat confusingly an “interim award”. The central liability issue in the first phase was, in simplified terms, whether the contractor was entitled to reimbursement on the basis of rates (the contractor’s position) or actual costs (Chevron’s position). The tribunal found broadly in Chevron’s favour.

The matter then proceeded to the second phase. Here the problem with the bifurcation orders

reared its head. The contractor sought to raise an issue about the meaning and scope of "actual costs" under the terms of the contract. Chevron objected on the basis that this was a liability issue that should have been addressed in the first phase. Chevron asserted that the tribunal was therefore estopped or alternatively *functus officio* on the issue.

The debate spilled over to the tribunal. The tribunal had to ask itself: what did we do when we bifurcated liability and quantum? The tribunal rendered a second partial award, again styled an interim award. But the tribunal was split 2:1. The majority held that the tribunal was only ever concerned with liability in the sense of the binary choice between rates and actual costs: the tribunal was not charting the metes and bounds of "actual costs", and the contractor's interpretation point remained live in phase two. The dissenting arbitrator took a different view. He concluded that the tribunal had resolved to decide "all issues of liability". In the dissentient's mind, those iron-clad words had the consequence, consciously or not, of excluding the contractor's argument about actual costs from phase two.

Chevron applied to the Supreme Court of Western Australia, at the seat of the arbitration, to set aside the second partial award. The question was, really, who had it right about the effect of the tribunal's orders: the majority arbitrators or the dissenting arbitrator?

The approach of the judge at first instance was to be "respectful" to the arbitrators, but to conduct a *de novo* review to decide the question for himself. There was no submissive deference to the tribunal, in the manner of the faithful at the altar of authority. This yielded a lengthy decision, exceeding 130 pages, analysing the procedural record of the arbitration. The judge's ultimate conclusion was to agree with the dissenting arbitrator and to disagree with the majority: he found that the tribunal was *functus officio* on all questions of liability following the first partial award, including the issue about the scope of actual costs.

The consequence is that the contractor's argument about the meaning of actual costs disappeared into the ether. It was not raised in the first phase and was not decided there, and it could not be raised and determined in the second phase. So much for the wisdom of bifurcation from the perspective of the contractor.

The judge's decision has since been taken on appeal. The decision of the appellate court remains pending at the time of writing.

Taking stock, this case contains lessons for all quarters.

- For courts, there is the question of who knows best about procedural decisions taken by arbitral tribunals: the tribunal itself, or a reviewing court? Like most construction cases, this particular case involved a massive procedural record spanning over 30 procedural orders, hundreds of pages of submissions and documents, and fractured interlocutory disputation. In the context of that quagmire, one wonders whether the tribunal is best placed to say what it meant to do, and did, when making orders for bifurcation in the interests of procedural economy and the management of the proceedings before it. It is a hard task for a reviewing court to wade in. Deference seems like an attractive position in most cases.
- For tribunals, arbitrators must be especially attentive to the consequences of bifurcation and the formulation of orders for bifurcation, or else they may accidentally make themselves *functus*. This was an example of loose language deployed in a procedural order for bifurcation, creating a later controversy about what had been achieved in fact. And, ultimately, the position here was

that the tribunal's procedural order had an effect contrary to what the majority of tribunal members had themselves understood.

- For parties and their representatives, the case is a reminder of the need for care when identifying and presenting all pertinent arguments at all stages, whether those arguments be primary, alternative, or contingent, and to make appropriate reservations to avoid an inadvertent waiver. Otherwise, the outcome may well be as here, where a potentially viable alternative argument is lost.

In the end, the starting point for any orders for bifurcation or the splitting of issues must be absolute clarity. Where such clarity seems unattainable, the best course may be just to start the hearing on all issues and finish at the end.

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