Kluwer Arbitration Blog

Just What the Tribunal Ordered – Or Was It? Western Australia Court of Appeal Upholds Finding That UNCITRAL Tribunal Rendered Itself Functus Officio

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In a recent decision, the Supreme Court of Western Australia ("WA") Court of Appeal confirmed that courts have the conclusive authority to determine the jurisdiction of arbitral tribunals. The *Commercial Arbitration Act 2012* (WA) (the "Act") confers competence upon arbitral tribunals to determine their own jurisdiction. However, courts retain authority to review questions of jurisdiction. This extends to the question of whether a tribunal is *functus officio*.

In *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2023] WASCA 1, the court departed from the majority of the tribunal's interpretation of its own procedural orders and upheld the lower court's decision to set aside the tribunal's interim award pursuant to section 34(2)(a)(iii) of the Act.

The Arbitration

The arbitration was conducted under the UNCITRAL Arbitration Rules and involved a contractual dispute between Chevron Australia Pty Ltd ("Chevron") and a joint venture between CBI Constructors Pty Ltd and Kent Projects Pty Ltd ("CKJV"). The dispute related to CKJV's claim for the payment for services provided to Chevron in relation to the Gorgon offshore gas project.

Bifurcation

On the application of CKJV, the tribunal made orders bifurcating liability and quantum. The tribunal's orders on bifurcation provided for a first hearing on "*all issues of liability in respect of* [CKJV's] *claim and* [Chevron's] *Counterclaim*" and a second hearing to address "*all matters outstanding in issue between the parties including all quantum quantification* [sic] *issues not dealt with in the First Hearing*".

The tribunal published an interim award following the first hearing, finding largely in Chevron's favour ("First Interim Award"). Following the First Interim Award, the tribunal made additional procedural orders in relation to quantum, including an order that CKJV replead parts of its case. Chevron objected to CKJV's amended pleading. Chevron contended that CKJV was estopped from

running what it submitted was effectively a fresh case on liability and that the tribunal – having made findings in the First Interim Award which were inconsistent with CKJV's amended case – was *functus officio.* In its second interim award, the tribunal dismissed, by a majority, Chevron's objections and concluded that the tribunal was not *functus officio*. Chevron subsequently commenced proceedings to set aside the second interim award.

Second Interim Award Is Set Aside – Section 34 of the Act

Chevron's application was brought pursuant to section 34(2)(a)(iii) of the Act, which is in identical terms to Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"). This section provides that an arbitral award may be set aside by the court if the party making the application furnishes proof that:

> "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration […]" (emphasis added).

At first instance, the trial judge accepted that section 34(2)(a)(iii) of the Act empowered a court to set aside an award on the basis that the tribunal was *functus officio*. That decision was the subject of an earlier blog post, available here.

CKJV appealed the first instance decision. There were four grounds of appeal. Grounds 1 and 2 related to whether a finding of *functus officio* could be made by a court where such a finding would effectively displace the tribunal's findings as to preclusionary estoppels. Ground 3 related to the trial judge's review of the tribunal's construction of the expression "*all issues of liability*" in its procedural orders. Ground 4 related to the trial judge's construction of the issues falling within the expression "*all issues of liability*". CKJV's appeal was dismissed and the trial judge's decision was upheld.

Correctness and Deference – Who Has the Power?

Consistent with the UNCITRAL Model Law, Australian commercial arbitration legislation acknowledges that tribunals are empowered to rule on their own jurisdiction (see for example, section 16 of the Act). The court in the present case accepted that, by submitting their claims to arbitration, the parties had conferred upon the tribunal authority to conclusively determine their claims. The court also accepted the general proposition that an award made by an arbitrator pursuant to that authority is final and conclusive. However, as the court observed, tribunals do not have *conclusive* authority to determine jurisdiction.

As the court in the present case made plain, a court's assessment of the objective meaning and effect of a procedural order will prevail over the tribunal's intention as to meaning and effect where such assessment is relevant to a court's review of questions of jurisdiction.

There is an inherent tension between judicial deference to tribunal decision-making and the standard of review. In the present case, the court accepted Chevron's submission that the standard

of its review was *correctness*. Despite this case being one in which the court's views with respect to jurisdiction departed from the tribunal's majority view, the court observed that it will consider the tribunal's reasoning and conclusions "*carefully and with interest*" and may be assisted by them insofar as they are cogent. In other words, whilst it is the court who ultimately has authority to determine matters of jurisdiction, the court will at least have regard to the tribunal's reasoning to the extent it can assist. That position is consistent with the proposition – recognised by Australian courts, most notably in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 – that by submitting their claims to arbitration, the parties confer upon the arbitrator the authority to conclusively determine those claims. Where an award is made other than pursuant to that authority, Australian commercial arbitration legislation permits the setting aside of awards.

Functus Officio and Estoppels – A Matter of Admissibility or Jurisdiction?

Distinct from preclusionary estoppels, which operate to prevent a party from raising arguments that have been determined in previous proceedings, the doctrine of *functus officio* operates to limit the tribunal's jurisdiction. As the court in the present case observed, preclusionary estoppels affect the rights of the parties whereas *functus officio* affects the jurisdiction of the tribunal.

Matters relating to preclusionary estoppels are within the tribunal's capacity to determine. By way of illustration, in *BTN v BTP* [2020] SCGA 105, the Singapore Court of Appeal held that determinations by a tribunal on *res judicata* (a form of preclusionary estoppel) were matters of admissibility and not jurisdiction, such that the court could not review those decisions on their merits. That case, and questions of jurisdiction and admissibility more generally, was considered in an earlier blog post, here.

In the present case, there was overlap between the issues relating to preclusionary estoppels (in particular *res judicata*, issue estoppel and *Anshun* estoppel) and the *functus officio* issue. That is, the tribunal's findings that there were no preclusionary estoppels "*were underpinned by the same findings from which it concluded that it was not functus officio*". The Court went further to observe that there is nothing unusual in a court intervening where findings have been made "*purporting to sustain jurisdiction when there is no jurisdiction properly analysed*" even if "*the findings pertain to a question of the finality of an earlier order or award*".

Conclusion and Key Takeaways

The 2021 International Arbitration Survey conducted by White & Case and Queen Mary University of London ("White & Case Survey") identified that "[r]*espondents stressed the importance of flexibility as a means to aid efficiency and reduce costs by tailoring proceedings to the needs of the dispute in question*". Flexibility as a means of aiding efficiency is, unsurprisingly, an important feature of arbitration for users. Whilst tribunals are empowered to adopt flexible procedural mechanisms – like bifurcation – such measures should be designed to enhance the efficiency of the overall proceeding. Of course, bifurcation is not a one-size-fits-all method of improving the efficiency of proceedings. Respondents to the White & Case Survey were "*less inclined to agree to exclude the possibly of bifurcation from the outset*", noting that the utility of bifurcation "*depends significantly on the specific circumstances of the case*".

While procedural orders are issued by tribunals, parties may have varying levels of involvement in the drafting of such orders. This case underscores the need to approach the crafting of procedural orders (particularly orders contemplating bifurcation) carefully to avoid placing tribunals in a position where they may inadvertently render themselves *functus officio*.

Norton Rose Fulbright (who acts for Chevron) confirmed that CKJV applied for special leave to appeal the Court of Appeal's decision to the High Court of Australia in February 2023. At the time of publication, the High Court's decision on that application is pending.

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