Kluwer Arbitration Blog

Bifurcators Beware: Australia's Highest Court Dismisses Appeal Against Decision to Set Aside Interim Award

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Can an arbitral tribunal revisit issues of liability after rendering an interim award in bifurcated proceedings? This was the question put to the High Court of Australia (the "Court") in *CBI Constructors Pty Ltd & Anor v Chevron Australia Pty Ltd* [2024] HCA 28. In a judgment considering the concepts of finality and *functus officio* in arbitration, the majority of the Court sent an unambiguous message to arbitrators: don't look back (in anger or otherwise) after an award is delivered.

The Court upheld a decision to set aside an interim award, issued under the UNCITRAL Arbitration Rules 2010 (the "Rules") dealing with an issue of liability under section 34(2)(a)(iii) of the Commercial Arbitration Act 2012 (WA) (the "Act") ("Second Interim Award"). This was because the tribunal was *functus officio* after issuing an earlier interim award deciding "all issues of liability" ("First Interim Award"). Section 34(2)(a)(iii) of the Act mirrors Article 34(2)(a)(iii)) of the UNCITRAL Model Law ("Model Law"). In this blogpost, we analyse the Court's consideration of the finality of awards, the distinction between matters of jurisdiction and admissibility, and the propriety of judicial intervention in arbitration. The decision serves as a timely reminder that while bifurcation can be a helpful procedural tool, users must be cautious not to truncate the authority of the tribunal inadvertently.

The Appeal

In decisions discussed in previous posts here and here, both the primary judge and the Court of Appeal of the Supreme Court of Western Australia (the "CoA") held that the First Interim Award determined "all issues of liability" and that the tribunal determined a new issue of liability in the Second Interim Award. Those findings were not challenged in the Court. Two grounds of appeal were advanced, that:

1. the CoA erred in holding that the primary judge had the power to set aside the Second Interim Award under Section 34(2)(a)(iii) of the Act and should instead have held that determination of whether the First Interim Award precluded advancement of the new liability case was within the exclusive authority of the tribunal.
2. the CoA made an error of law in finding that the primary judge conducted a *de novo* review of

the correctness of the tribunal's finding that it was not *functus officio*.

A majority of the Court, (constituted by five of seven justices) dismissed the appeal. The majority (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ) concluded that the primary judge had the power under Section 34(2)(a)(iii) of the Act to set aside the Second Interim Award because the tribunal's authority ceased when it issued the First Interim Award, and the tribunal was then *functus officio*. The majority confirmed that jurisdiction is to be reviewed *de novo,* and a court is not required to defer to the tribunal's determination. Jagot and Beech-Jones JJ dissented. Their Honours agreed with the majority on the applicable standard of review but would have allowed the first appeal ground.

The Majority's Reasons

Article 34(1) of the Rules, under which the tribunal issued both interim awards, expressly empowered the tribunal to make "separate awards on different issues at different times", and Article 34(2) states that "[a]ll awards shall be final and binding". By reference to the terms of the arbitration agreement and the Rules, the majority observed that the "final and binding" character of an award operates at three levels:

1. In respect of the tribunal, which cannot modify an award after it is rendered.
2. Regarding the parties against whom the award is binding and may be enforced by a competent court.
3. In respect of the courts, which do not entertain any recourse against the award, save in exceptional circumstances that justify its setting aside (as in Section 34 of the Act).

The Court ultimately concluded the First Interim Award was "final and binding", and proceeded to examine the issues that the First Interim Award actually resolved. As outlined above, it was accepted that the tribunal had, in making the First Interim Award, determined all issues of liability and that a new issue of liability was decided in the Second Interim Award.

An important distinction between the reasoning of the majority and the dissenting judges relates to the interpretation of the judgment of Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630* ("*Fidelitas*"). In that case, Diplock LJ distinguished between the effect of a final award on an arbitrator and its effect on the parties as an issue estoppel. Diplock LJ observed at page 644 that where an award is an interim award, it "creates an issue estoppel between the parties and the arbitrator is *functus officio* as respects the issues to which the interim award relates".

By reference to this observation, the majority reasoned that once an interim award is rendered, a tribunal no longer has jurisdiction regarding, and cannot later revisit, the issues determined in that award.

The appellant contended the primary judge was precluded from setting aside the Second Interim Award because the tribunal also dismissed Chevron's objections about the new case on liability on the grounds of the estoppels. However, the majority observed that there was a fundamental difference between Chevron's estoppel-based objections and its *functus officio* objections; namely, that the former were objections about an error *within* jurisdiction whereas the latter were objections that the tribunal *lacked* jurisdiction.

The majority observed that the tribunal's findings regarding whether the First Interim Award had preclusionary effect as an estoppel would be within jurisdiction and would not enliven the set-aside power. Importantly, however, the question of whether a tribunal has exhausted its authority precedes and is separate from any preclusion by way of estoppel. While the majority acknowledged that the concepts of estoppel and *functus officio* are "informed by the concept of finality, […] they address the concept substantively differently". More specifically, *functus officio* addresses the arbitral tribunal's capacity, or authority, to adjudicate a matter, while estoppel concerns the capacity of the parties to pursue a matter.

Ultimately, the majority concluded that the CoA's unchallenged finding that the tribunal was *functus officio* regarding the new case on liability compelled the conclusion that the primary judge was empowered to consider the set-aside application under Section 34(2)(a)(iii) of the Act. The majority observed that Articles 16 and 34 of the Model Law strike a balance between ensuring the integrity of the arbitral process and the policy of minimal curial intervention. While recognising the principle of *kompetenz-kompetenz* and the general proposition that courts are circumspect in considering whether a tribunal has exceeded its jurisdiction, the majority considered that curial intervention is sometimes necessary.

The Dissent

Justices Jagot and Beech-Jones would have allowed the appeal. The key departure from the majority lay in the interpretation of Diplock LJ's passage in *Fidelitas*. Justices Jagot and Beech-Jones considered that the CoA incorrectly characterised that passage as "distinguishing between the creation of an issue estoppel (ie, affecting the rights of the parties) and an arbitrator being *functus officio* (ie, exhausting the arbitrator's authority)". Their Honours observed that Diplock LJ had not treated issue estoppel and *functus officio* as separate and distinct concepts, but rather treated the latter as following from the former. Consequently, Jagot and Beech-Jones JJ considered that determinations that an issue estoppel had arisen, and its scope, were conclusions of law within jurisdiction. The statement in *Fidelitas* thus "concerned the admissibility of a claim, not the jurisdiction of a tribunal to determine" that claim. As such, their Honours considered that, even if incorrect, the tribunal's decision was not subject to review and set aside under Section 34(2) of the Act.

Justices Jagot and Beech-Jones also noted that the CoA's determination that Section 34(2)(a)(iii) of the Act applied was partly based on its conclusion that the parties agreed to resolve their disputes on the foundation that certain principles of finality would apply. Their Honours concluded, however, that for parties to agree that an award is "final" does not necessarily mean they intended that a court, not a tribunal, would determine and give effect to that finality. Ultimately, Jagot and Beech-Jones JJ concluded that there was not a "sufficiently clear intent to impose a procedural jurisdictional limitation" of the necessary character apparent in the arbitration agreement.

Key Takeaways

This decision is a significant contribution to arbitration jurisprudence in Australia. As a majority decision of Australia's highest court, it provides clarity on the manner and circumstances in which the power under Section 34(2)(a)(iii) of the Act, which has equivalents in each Australian State and

Territory, can be exercised. Significantly, all members of the Court agreed on the standard of review to be exercised where an issue of jurisdiction is properly raised. There can no longer be any doubt that courts may conduct a *de novo* review of jurisdiction without deferring to a tribunal's finding on that point.

While the majority concluded that curial intervention was required in this case, it emphasised the need for circumspection by courts. A supervisory court ensuring a tribunal does not exceed the jurisdiction conferred upon it by the parties upholds both party autonomy and the consensual basis of arbitration. The view adopted by the majority in this case could not fairly be understood as representing a departure from the long-standing policy of minimal curial intervention reflected in the Model Law and the Act. Indeed, the majority accepted that if a tribunal, otherwise acting within jurisdiction, made an incorrect finding that an earlier decision did not create an estoppel preventing one party from pursuing a certain claim, that would not be a ground for setting aside the decision. That observation is entirely consistent with the distinction between admissibility and jurisdiction.

The reference to Section 16 of the Act suggests an alternative means for addressing the estoppel and *functus officio* arguments in the present case. Noting the uncontroversial proposition that a tribunal cannot expand its jurisdiction, the majority observed that Section 16 addresses the question of whether a tribunal has exceeded its authority as a preliminary question and recognises that the tribunal may continue the proceedings and make an award while that matter is pending before the court.

Lastly, the decision serves as a timely reminder to parties and arbitrators in Australia and overseas that care must be taken in the bifurcation of arbitral proceedings. Bifurcation can be a useful procedural tool that promotes efficiency, but users must be careful not to unintentionally curtail their ability to conduct the proceeding as they intend.

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