Perils of bifurcated hearings

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By Justin Browne in Arbitration — Feb 6, 2023
WA Court of Appeal holds an arbitral tribunal was functus officio in respect of all liability issues. One party shut-out from raising further arguments at the quantum stage.

***CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2023] WASCA 1 (Quinlan CJ, Murphy JA and Bleby AJA, 17 January 2023)**

Key points

- The WA Court of Appeal has affirmed a Supreme Court decision that an arbitral tribunal's interim award had rendered it functus officio in respect of all questions of liability where the tribunal had made procedural orders bifurcating the arbitration between "all issues of liability" and "all matters outstanding in issue between the parties including quantum and quantification issues".
- While there are clear benefits in bifurcating hearings between liability and quantum issues, you need absolute clarity about the issues which are being determined at each stage – or else you may find yourself cut off from advancing an argument at the quantum stage if that is properly construed as an argument as to liability.
- Consider whether an alternative approach to a simple bifurcation may be preferable. For example, rather than taking an inclusive approach (e.g. "all issues regarding liability"), consider whether it would be more appropriate to identify specific issues or questions for determination at each stage.

Background

The respondent in this appeal, Chevron, had engaged a joint-venture contractor, CKJV (for which the appellant was a joint venturer), to perform certain work on Chevron's Gorgon oil and gas project, off-shore of northern Western Australia. An arbitration between the parties was commenced in 2017 and concerned how Chevron's liability to pay CKJV for the work it performed was to be calculated (as explained further below).

The tribunal, consisting of three members, made procedural orders bifurcating liability and quantum issues. Those orders provided that the Tribunal would first hear and determine "all issues of liability", before moving on to "all matters outstanding in issue between the parties including quantum and quantification issues".

The first phase of the arbitration duly proceeded and a first interim award was issued by the Tribunal in December 2018. The central issue in the first phase was whether CKJV was entitled to reimbursement on a "rates" basis (CKJV's position) or an "actual costs"

basis (Chevron's position). The Tribunal preferred Chevron's position.

As the arbitration proceeded to the second phase, CKJV was given the opportunity to re-plead its case on quantum. In its re-pleaded case, CKJV sought to raise an issue about the meaning of the "actual costs" basis on which it was to be paid by Chevron.

Chevron objected and said that this was actually a case on liability, not quantum. Accordingly: (1) it ought to have been raised in the first phase; and (2) a consequence of the Tribunal's procedural order was that Tribunal was estopped from hearing CKJV's further case and/or the Tribunal's jurisdiction to determine any issue of liability has been exhausted, i.e. the Tribunal was "functus officio".

By a 2-to-1 majority, the Tribunal rejected Chevron's objection. Accordingly, the Tribunal proceeded to determine, by way of a "second interim award", the quantum issues; and it did so in favour of CKJV's amended case. Chevron applied to the WA Supreme Court to set aside that second interim award.

At first instance, Kenneth Martin J found in favour of Chevron (at [193]–[194] of that judgment):

> *[T]he first interim award had unquestionably dealt with all issues of liability on CKJV's claim and upon Chevron's counterclaim. The first interim award had done that as a matter of law, whether or not specific liability issues had been expressly identified and raised for determination or not. Consequently, it was not then to the point only to identify the specific issues explicitly dealt with under the reasons underlying the first interim award.*
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> *Given that all issues of liability were resolved, it became too late to raise more liability issues later. That is simply the legal consequence of an engagement with the functus officio doctrine in this particular case. The circumstances could have been otherwise, if the parties had instead persuaded the Tribunal to direct the first phase of the arbitral hearing towards resolving only specifically isolated and identified issues – such as when a court determines a stated preliminary issue before the trial of an action. But that approach was not followed. Instead, all liability issues were resolved then.*

CKJV appealed that decision.

Relevant principles

The Court set out a useful and comprehensive review of the case law and legislative framework relevant to the issues for determination: see [72]–[96]. In particular, note (citations omitted):

[73] By submitting their claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. The arbitral award precludes recourse to the original rights the determination of which had been referred to arbitration. Any issue might be submitted to arbitration, and upon that issue, the award would be as conclusive upon the parties as an award upon the whole cause of action if that had been submitted. In short, the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties.

[74] The general rule is that an award made by an arbitrator pursuant to such authority is final and conclusive. The former rights of the parties are discharged by an accord and satisfaction. The accord is the agreement to submit disputes to arbitration; the satisfaction is the making of an award and fulfilment of the agreement to arbitrate. The purposes for which an arbitral award is recognised as binding include the giving rise to a res judicata or issue estoppel. [...]

[85] Whilst preclusionary estoppels operate on the parties (and their privies) to preclude the assertion of a right or obligation or the raising of an issue of fact or law, and must, generally speaking, be pleaded, the consequences of finality also directly impinge upon the authority or jurisdiction of the arbitrator. [...]

[86] The consequence of finality insofar as it affects the authority or jurisdiction of the arbitrator is expressed by the common law in the Latin phrase "functus officio". The term "functus officio" in this context is descriptive of the completion or exhaustion of the authority of the arbitrator to decide. As with any conclusion of functus officio, it is reached by close examination of the particular circumstances, and the nature of the power, function or duty in question. [...]

[88] In Fidelitas [*Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630]*, after referring to the distinction between final awards and interim awards and (in the statutory context then under consideration) the potential for the statement of a special case for decision by the court, Diplock LJ referred to the circumstances in which an arbitrator becomes functus, in the following terms* [at p 644]*: "Once his final award is made, whether or not stated in the form of a special case, the arbitrator himself becomes functus officio as respects all the issues between the parties unless his jurisdiction is revived by the court's exercise of its power to remit the award to him for his reconsideration. But this is merely the way in which the principle nemo debet bis vexari pro una et eadem causa affects the arbitrator's functions. He has decided the questions of fact as to which he is the exclusive tribunal; he has determined their legal consequences subject only to correction by the High Court on the stated questions of law. The parties cannot reopen the same matters again before him. Where his award is an interim award stated in the form of a special case, it determines the particular issue or issues to which it relates in alternative ways dependent upon the answer of the High Court to the question of law stated in the special case. It creates an issue estoppel or issue estoppels*

> *between the parties and the arbitrator is functus officio as respects the issues to which his interim award relates."*

Determination of the appeal

The Court agreed with the first instance judgment of Kenneth Martin J:

> *[121] In this case* [...] *the majority of the Tribunal appears, with respect, to have overlooked or mischaracterised the effect of many of the pleadings, particulars and submissions and the procedural orders leading up to the First Hearing.*

The correct construction of the relevant procedural orders and the pleadings, prior to CJKV's amendment to raise the new issues for hearing at the quantum phase, was that: (1) CJKV's amended case was a case on liability, not quantum; (2) all issues of liability were determined in the first phase; and (3) by making the first interim award, the Tribunal was functus officio in respect of all liability issues. Accordingly, the majority of the Tribunal had erred.

The Court said:

> *[118] The question before the judge was not simply whether the Tribunal erred in law in finding that preclusionary estoppels did not preclude CKJV from running its Contract Criteria Case* [i.e. its amended case] *after the issue of the First Award.*
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> *[119] The Tribunal's findings (by majority) that there were no preclusionary estoppels, and, in particular, no issue estoppel on the issue of liability, were underpinned by the same findings from which it concluded that it was not functus officio and had jurisdiction to hear the Contract Criteria Case.* [...] [T]*he Tribunal no doubt had authority to rule on its own jurisdiction under s 16(1) of the Act* [*Commercial Arbitration Act 2012* (WA)]*, but it had no conclusive authority to determine its jurisdiction and the court, in an application under s 34(2)(a)(iii) of the Act is required to review for itself the question of jurisdiction. The decision in* [*BTN v BTP* [2020] SGCA 105] *and the authorities relied on by CKJV do not assist it. There is nothing "highly unusual" in the court intervening where findings have been made purporting to sustain jurisdiction when there is no jurisdiction properly analysed, but not intervening where findings are made within jurisdiction, even if in each case the findings pertain to a question of the finality of an earlier order or award.*
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> *[120] As indicated earlier, the review by the court is a de novo review, it is not an appellate review in any sense, and the question is not whether error had been established. The court applies a correctness standard and the arbitral tribunal's own view of its jurisdiction is in the end irrelevant, although the court will consider the tribunal's reasoning and conclusions and may be assisted by them insofar as they are cogent.* [...]