Best Practice in International Arbitration in Australia: an Australian view on current issues affecting the arbitral mandate

Stewart Webster *MCIArb, Barrister*

Bianca Kabel *BCL (Oxon, Distinction), Barrister*

Jason Mitchenson *PhD (UNiGE, Summa Cum Laude), Barrister*

1. In theory the arbitral mandate is easily defined. It is conferred by the parties' arbitration agreement and terminates with the delivery of the final award. The arbitrator is then said to be *functus officio*. But in practice, things are often more complicated. In this paper, we consider three questions relating to the arbitral mandate and its effect on parties rights.[1]

QUESTION ONE

What is the effect on the arbitral mandate of "interim" or "partial" awards and the operation of *res judicata*?

2. It is estimated that interim or partial awards are issued in approximately one third of arbitrations.[2]

3. Whilst there are technical difference between "interim" and "partial" awards, for the purpose of this lecture, I intend to use the terms interchangeably to refer to an arbitral decision that finally disposes of some part of an arbitration but not all of it.

4. Breaking down cases into manageable pieces is commercially attractive but there are some hidden dangers for parties, their legal representatives and arbitrators that are often overlooked.

5. There is no internationally accepted definition of the term "award". Indeed, no definition is found in the main conventions dealing with arbitration, including the New York Convention and the Model Law upon which Australia's *International Arbitration Act* 1974 (Cth) is based.

6. It is commonly accepted however, that arbitral tribunals may issue interim or partial awards in the course of discharging their mandate. This power ordinarily derives from the arbitration agreement or the applicable law. Where the arbitration agreement incorporates institutional rules, these rules generally contain provisions for the making of such awards. The ICC Rules for example, define the term "award" to include "*an interim, partial or final award*".[3]

7. There are of course many ways to split a case.

8. Arbitrations may be split top-down with issues of jurisdiction, applicable law, liability and quantum all forming separate parts of a single arbitration with each subject to its own partial award. Where jurisdiction is contested, whether or not the arbitral tribunal has jurisdiction to determine the merits will ordinarily be determined first by way of a partial award. An arbitral tribunal that spent months hearing a dispute only to rule in its final award that it had no jurisdiction to begin with would – at best – be criticised as severely inefficient.

9. Arbitrations may also be split horizontally with sets of issues or claims to be determined in advance of one another. This is a particularly common feature of large construction case for example where multiple issues or claims may be put on various or alternate basis. These different issues or claims will form separate "tranches" which ultimately become the subject of different partial awards.

10. The defining feature of an award is that it is final and binding. The award has *res judicata* effect and, subject to limited exceptions, the delivery of an award renders the tribunal *functus officio*. In other words, the tribunal's mandate to decide the dispute between the parties ceases to exist.

11. Where the dispute between the parties is resolved by way of one final award, this poses little problem. The finality of arbitration is one of its recognised benefits. However, in the context of partial awards, the doctrine of *res judicata* and *functus officio* can have unintended consequences for parties and arbitrators alike.

12. This is because each partial award is binding in and of itself. The conclusive and preclusive effect of a partial award means that parties and tribunals may be precluded from revisiting arguments, claims or matters in later traches that have already been raised in prior tranches.

---

[1] This paper was first presented as part of a panel discussion during Australian Arbitration Week. The authors are grateful to Corrs Chambers Westgarth for hosting that event.

[2] Queen Mary University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, page 38.

[3] International Chamber of Commerce Rules of Arbitration, article 2(v).

13. It is open to parties in international arbitration to argue that:

(a) the opposing party is precluded from relitigating a particular claim in a later tranche that has already been decided in an earlier tranche – a plea of cause of action estoppel;

(b) the opposing party is precluded from relitigating a particular issue of fact or law that was previously contested in an earlier tranche and decided – a plea of issue estoppel or collateral estoppel;

(c) the opposing party is precluded from raising some argument, claim or issue in a later tranche that should have been raised in an earlier tranche – a plea of *Anshun* estoppel or an application of the rule in *Henderson v Henderson*;

(d) the arbitral tribunal itself is precluded from hearing a particular argument, claim or issue in a later tranche because it has already been decided and cannot now be revisited – an argument that the tribunal is *functus officio* with respect to those matters.

14. The combined effect of the doctrine of *res judicata* and *functus officio* then is that matters raised and decided, or matters that should have been raised and decided, in an earlier tranche are generally not capable of being relitigated in subsequent tranches.

15. But, when we speak of *res judicata* in the context of international arbitration, an additional layer of complexity arises that is not present in domestic litigation.

16. Whilst the doctrine of *res judicata* is commonly recognised in international arbitration, its application in individual cases is often uncertain. This is because it is unclear whether *res judicata* is a doctrine of procedural or substantive law. Jurists disagree because the doctrine has the effect of precluding a party from raising a matter whilst at the same time recognising and protecting private law rights. Arbitration scholars tell us that *res judicata* is a principle of transnational law so we can avoid this dispute altogether. But these open-textured principles often do not help us in concrete cases.

17. The problem is that in international arbitration, procedural law is ordinarily governed by the *lex arbitri* or the seat of the arbitration whilst substantive matters are governed by the applicable law. Often these two are different. Often, they conceive of the doctrine of *res judicata* very differently. And, often they will classify the doctrine along different procedural or substantive lines.

18. Parties who agree to seat their arbitration in Paris then may be shocked to find that the doctrine of res judicata as they known it in the common law may not apply to their arbitration. In France, article 1351 of the French Civil Code of Procedure provides that: [4]

> The authority of *res judicata* applies only to what was the object of a judgment. It is necessary that the thing claimed be the same; that the claim be based on the same cause; that the claim be between the same parties and brought by them and against them acting in the same capacities.

19. In France, the doctrine of *res judicata* only applies to the "*dispositif*". In English, only the matter that was decided by the judgment. The *dispositif* becomes *res judicata* only with respect to matters which were distinctly raised and determined. No *res judicata* effect attaches to matters that were not raised. Parties are thus free to relitigate issues and bring claims that that they did not previously litigate which would, in Australia or England, be precluded by *Anshun* estoppel or the rule in *Henderson v Henderson*. This applies equally to partial awards in the context of international arbitration.

20. Some final thoughts:

(a) Tranche arbitration is on the rise. The rise of mega-litigation has given birth to complex factual and legal disputes that lend themselves to being broken up into manageable pieces.

(b) But there are risks. Parties and arbitrators need to be aware of the preclusive effect of partial awards and their effect on the arbitrator's mandate to revisit matters raised in prior traches. If you would like to see a real-life close-to-home example, I suggest you read the decision of Applegarth J in *Discovery Beach Project v Northbuild Construction* [2011] QSC 306. In that case the parties attempted to split their arbitration into multiple tranches only to fight in court for years afterwards whether or not certain claims had been "decided" by a partial award and were therefore *res judicata*.

(c) Lastly, parties and arbitrators need to also be aware that in circumstances where the applicable law is different to the procedural law of the seat, complex choice of law issues will arise if the doctrine of *res judicata* becomes an issue.

QUESTION TWO

Is a purported award rendered without mandate "void", and can a party ever seek Court intervention to obtain a declaration to this effect?

---

21. The UNCITRAL Model Law, enshrined in Australia in the *Commercial Arbitration Acts* ("CAA") and *International Arbitration Act* makes quite specific prescriptions as to the degree of court intervention in challenging arbitral awards. There have been suggestions that, in doing so, the articles of the Model Law set up an "implied presumption of validity".

[4] Code Civil Français, article 1351: "*L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.*"

22. That is, once an award has been issued and is binding upon the parties (the latter being an issue on which itself the Model Law is also deliberately silent), it is immune from challenge so that one presumes that it is valid and remains so unless one party demonstrates the application of article 34 or 36 to either set aside the award, or to resist its enforcement.

23. The argument runs that if the Model Law provides for the circumstances in which a party may have "recourse against an award" under Article 34, and those circumstances include matters which would quite possibly go to the validity of an award (that is, an absence of mandate) then that subject matter is a "matter governed by [the] law", within the meaning of article 5, so that the court cannot intervene unless article 34 or 36 applies.

24. Consistent with the idea of an implied presumption of validity, it could be argued that any inherent jurisdiction to review arbitral awards has been removed by s 5 of the CAA and so places declarations outside the Court's jurisdiction. In Australia, some support for that argument appears in a decision of the New South Wales Supreme Court in *Ashjal Pty Ltd v Alfred Toepfer International (Aust) Pty Ltd* (2012) 82 NSWLR 93. However, the Court in that case did not consider the scope or operation of s 5 of the CAA, and the breadth of any removal of the inherent jurisdiction of the courts.

The example

25. A recent case, which was argued but not decided earlier this year in the Queensland Supreme Court, provides an illustration of why the present question can have practical implications.

26. In that case, simplifying the facts somewhat:

(a) a contractor sought to recover moneys owing under a construction contract for alleged delays caused by the principal, and sought to recover two categories of costs, "direct costs" and "indirect costs";

(b) in the course of the arbitration, there were amendments to the pleadings, including an amendment by which the contractor introduced an alternative basis for its delay claim, based on an alternative construction of the contract;

(c) the amendment to the pleading identified that the value of the alternative claim would be particularised by an expert report to be delivered;

(d) a further expert report was delivered that referred to an earlier report dealing with both direct and indirect costs but itself only quantified indirect costs;

(e) in closing submissions, the contractor did not make any particular submission about its alternative construction case or the costs associated with it – neither pressing it nor expressly abandoning it;

(f) the arbitral tribunal, in its final award, rejected the delay claim as a whole on the primary basis because it rejected the claimant's construction (but not its quantification), rejected the alternative claim in relation to indirect costs because it rejected causation and quantification, but said nothing of the alternative claim in relation to direct costs;

(g) the contractor applied under article 33(3) for an additional award in relation to its alternative claim for direct costs;

(h) the arbitral tribunal refused the application on the ground that article 33(3) applies only where an omission is inadvertent[5] and that the arbitral tribunal had consciously decided that no alternative claim for direct costs needed to be dealt with;

(i) undeterred, the contractor then applied for the arbitral tribunal to make a further award in relation to its alternative direct costs claim on the basis that the tribunal had not fully discharged its mandate by not determining all matters actually in dispute;[6] and

(j) the arbitral tribunal accepted that application and proceeded to determine the direct costs alternative claim in favour of the contractor, making a supplementary award for a significant sum.[7]

27. An unhappy Principal was dissatisfied with this outcome. It sought, among other things, a declaration from the Supreme Court of Queensland that the supplementary award was void and of no effect because the arbitral tribunal's mandate had been terminated by rendering the earlier final award, so that the arbitral tribunal was at the time of purporting to render the supplementary award, *functus officio*.

28. One reason for doing this was that the circumstances arguably did not fall within the grounds of challenge of art. 34. In particular, let it be assumed that:

(a) the Principal could not readily demonstrate that it was unable to present its case;

(b) the award dealt with a subject matter within the terms of the original submissions to arbitration (i.e. the delay claim); and

(c) the arbitral procedure itself was in accordance with the agreement of the parties.

29. So, in this example, is it correct that the Principal is limited to seeking recourse under the Model Law or does the Court retain some jurisdiction to give declaratory relief that a supplementary award, given after a final award, was void?

[5] Relying on *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* [2017] VSC 97 at [25].
[6] Again, relying on *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* [2017] VSC 97.
[7] For the present example, assume that the tribunal decided the application at the same time as rendering the supplementary award, so that no challenge to a "preliminary question" that the arbitration had jurisdiction could be brought under art 16(3).

Against a presumption of validity?

30. An argument in favour of the availability of declaratory relief runs along the lines that an award delivered entirely without mandate and after the tribunal is *functus officio* is no "award" at all.

31. Neither the term "award" nor the term "arbitral award" is defined in the Model Law (or usefully defined in either the IAA or the CAA). However, each of articles 31, 34 and 36 assumes the existence of an "award", capable of being set aside or enforced.

32. When the articles of the Model Law are examined more closely, it is apparent that an argument exists that an award without mandate is no award at all, and therefore there must be some continued availability of declaratory relief. For example:

    (a) article 31 includes the requirements of form for an award, without identifying the consequences of a failure to comply with those requirements. It would be odd if a party could not seek some kind of declaratory relief about the status of a "non-compliant award" (for instance, after the untimely passing of the arbitrator before the form requirements could be met), and was instead restricted to relief in articles 34 and 36;

    (b) article 16(3) contemplates an arbitrator making an "award" in circumstances in which the Court subsequently determines that the arbitrator had no jurisdiction to do so, and does not expressly identify the consequences which might follow (nor does article 34 obviously apply). It might be said, therefore, that article 16 supports a view that where a court determines that a purported award was made without jurisdiction, it is inaccurate to speak of it as an "arbitral award" and that the Court retains jurisdiction to make a declaration as to its status; and

    (c) article 5 is drafted in a way which appears to leave room for declarations in the circumstances of the Principal. By article 32, the Model Law expressly identifies the point at which both an arbitral proceeding, and the mandate of the arbitrator, terminate. Therefore, arguably declarations by a Court that a final award has been delivered and things purportedly done by the arbitrator after an award (but not done or purportedly done under article 33) are of no effect or invalid does not involve the Court "intervening" in a matter "governed by the Law". Instead, it involves the identification that an arbitrator has done something not governed by the Model Law.

33. In this connection, the idea that an award which is only a purported award is no award at all is not a new idea. Both judicial decisions and academic writings have referred to a further award made after the final award in terms such as a "nullity" and a "purported alteration", having no effect.[8]

34. This may be a slightly uncomfortable conclusion because of the highly preclusive effect which the arbitration community customarily assumes is given by art. 5. It may, on the other hand, be of comfort to a party in the position of the Principal.

Conclusion on example/application outside the narrow example

35. On (a fine) balance, the better view is that – at least in the example of the Principal in the case being considered - jurisdiction remains for the Court to determine the invalidity of a purported arbitral award, <u>at least in circumstances where an arbitrator purports to give a further award once *functus officio*.</u>

36. However, there is real difficulty in applying this reasoning outside the limited example of the Principal. Articles 34 and 36 include circumstances which might be described as including a lack of mandate leading to a void award. For example, why is an award delivered pursuant to an invalid arbitration agreement, or outside the scope of the submission to arbitration, to be "set aside" and not automatically void in the same way as a further award delivered after the final award?

37. This is the best point against construing the Model Law in the manner above; that is, because the reasoning is not naturally limited to the narrow example of the Principal, and when taken beyond that, seems to contradict the plain intent of the Model Law.

38. Nonetheless, importantly, on the argument run in favour of the Principal, the two options are mutually exclusive: either such an award is "an award" (so that article 34 applies), or it isn't (so that article 34 doesn't apply). Parties should be cognisant of the ambiguity in the position and if there is some doubt in a particular case, to fashion their relief accordingly.

QUESTION THREE

If in the course of rendering an award, an arbitral tribunal wrongly decides that a particular argument or claim has not been raised or pressed, is this an error within jurisdiction, or a failure by the arbitral tribunal to fully discharge its mandate?

---

39. This question, like the previous one, throws into sharp relief a tension in the Model Law between finality in the decision making of arbitrators, non-intervention by the courts, and the parties' right to have all the claims they present in the arbitration properly determined.

40. It has practical implications for a claimant who is disappointed that one of its claims, defences or arguments has been ignored, for the opposing party who one may assume is content with the outcome, and of course also for the arbitral tribunal itself.

[8] For example, *Woodbud Pty Ltd v Warea Pty Ltd* (1995) 125 FLR 346 at 354; 1 Russell on Arbitration (2015, 24th ed) at 6-016: "*[a]ny determination in a later award of an issue already disposed of in an earlier award is therefore outside the tribunal's jurisdiction and void*"; *Commercial Arbitration Law & Practice* (Thomson Reuters) commentary on s.16 of the CAA at [CA30.200] at subparagraph (g); Mustill & Boyd, *The Law of Commercial Arbitration in England* (2nd ed, 1989) at 405, 554; *Redfern & Hunter on International Arbitration* (2015, 6th ed) at 5.111.

41. To set up the particular question above, let us first consider two clearer cases.

42. First, consider a case in which the arbitral tribunal expressly identifies in reasons given with an award that although a particular dispute has been raised by the parties, the arbitral tribunal has not decided it. It seems reasonably clear that in such a case the award can only be considered an interim or partial award, in the sense discussed in relation to question 1 above. It follows that the arbitral tribunal's mandate has not been discharged and it retains jurisdiction to decide the outstanding matter (subject to questions of *res judicata* identified above). Such a situation occurred and was dealt with on this basis by the Victorian Supreme Court in *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* [2017] VSC 97 referred to above.

43. On the other hand, consider a case in which the arbitral tribunal's reasons accompanying an award are completely silent about a significant claim brought by the claimant, and the award does not deal with the claim.[9] If this omission is inadvertent, then the claimant should be able to rely on art.33(3) and seek a further award on that basis.

44. However, what if either in response to an art.33(3) application, or in the reasons accompanying the original award, the tribunal directly addresses the claim or argument in the sense of stating that the tribunal considers that the claim, defence or argument does not need to be considered because the tribunal considers that it was not pressed in the arbitration (see, e.g. Annexure A)?

45. Let it further be assumed that the conclusion that the claim, defence or argument was not pressed can be demonstrated to be wrong.

46. Assuming the party whose claim, defence or argument is disposed of in this way is not prepared to live with the outcome, what can it do?

47. The party may consider making a further approach to the arbitral tribunal, to invite further consideration of the claim, defence or argument. This approach is likely to have traction only if the party is the claimant, and it can reasonably argue that, in not deciding the merits of its particular claim, the tribunal has not fully discharged its mandate (and so is not *functus officio* in relation to that claim). In many cases, if the award already favours the claimant, then reapproaching the arbitral tribunal may be the only approach a claimant is willing to take (since a claimant who has already obtained an at least partially favourable award will rightly be hesitant to bring any application to set aside under art.34).

48. On the other hand, a respondent is unlikely to have any traction in re-approaching the arbitral tribunal. That is because the fact that a defence has not been considered on its merits does not affect the discharge of the arbitral mandate in the same way. If the tribunal has rendered an award on the claim to which the defence was directed, it will have decided that claim and will accordingly be *functus officio* in relation to deciding that claim, regardless of whether it properly considered all defences raised.

49. So a respondent is left with recourse in courts under arts. 34 and 36.

50. But what prospect does a respondent have of relying on one of those provisions?[10] Initial impressions are not promising. There is no express provision in the Model Law for the annulment of an award in the case of *infra petita.*[11] A similar view has been expressed in Hong Kong in *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd* [2009] HKCFI 94 at [56]:

> Failure to consider an issue is matter that goes to the substantive decision rather than a failure to follow the arbitral procedure agreed by the parties. Thus, the fact that the Tribunal failed to consider the Respondent's case properly is at most an error of law which cannot be a basis for this court to set aside the award.

51. But there are other views. Gary Born argues that an arbitral tribunal's failure to consider issues presented in the arbitration in fact amounts to an excess of authority (even if it appears to be the reverse) and therefore falls within art.34(2)(a)(iii).

52. Born's view was accepted by the Singapore Court of Appeal in the 2011 decision of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33. (**CRW**).

53. At [31], Rajah JA said that art.34(2)(a)(iii) applies:

> where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. In other words, 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.

(emphasis added)

54. Assuming this view to be correct, what is the threshold for demonstrating that an arbitral tribunal has failed to decide a matter submitted to it? Is a "*matter*" here a substantive claim? Or does it extend to an issue (or sub-issue)? Does it include a defence? What about an alternative argument based on, for example, an alternative construction of a contractual provision?

55. In CRW, the Court went on (at [32]) to say that the failure of an arbitral tribunal to deal with "every issue referred to it" will not ordinarily render the arbitral award liable to be set aside. Rather, the Court suggested that the "*crucial question*" is whether there has been "*real or actual prejudice to either (or both) of the parties*". In support of this threshold test, the Court referred to a passage from *Redfern & Hunter on International Arbitration* which in the present edition[12] appears at [10.48].

---

[9] There is authority that the omitted matter must be a claim rather than an issue or argument: *BLC v BLB* [2014] SGCA 40 at [108].
[10] See generally Jonathan Hill, 'Claims that an arbitral tribunal failed to deal with an issue: the setting aside of awards under the Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration' (2018) 34(3) *Arbitration International* 385-414.
[11] Gary B Born, *International Commercial Arbitration* (2nd ed, 2014) at 25.04[F](b) (p. 3293).

56. It is, however, not entirely clear how the test of "real or actual prejudice" is intended to derive from art.34(2)(a)(iii) or why, as a matter of principle, it should be the appropriate threshold test.

57. In Australia, CRW has been referred to with approval in *TCL Air Conditional (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 and in *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* [2017] VSC 97. The question being considered in *TCL* means that the reference in that case to CRW is not of significance for present purposes. However, in *Blanalko*, Croft J appears at [53] – [58] to have endorsed the "*real or actual prejudice*" test for setting aside an award under art.34(2)(a)(iii) for a failure by the arbitral tribunal to deal with an issue.

58. It follows that although there is no settled international view about whether a party can set aside an award for a failure to decide or deal with an issue, and if the party can, where the limits of that curial power lie, a disappointed party is likely to maximise its chance of success by arguing that such a power exists under art.34(2)(a)(iii) and by seeking demonstrate that it has suffered "*real or actual prejudice*" because of the tribunal's failure to consider an issue.

[12] (6th ed, 2015).

STEWART WEBSTER
T +61 7 3008 3930
E SJWEBSTER@QLDBAR.ASN.AU

Stewart's practice is focused on complex commercial disputes in Australian courts and in arbitral proceedings. He is regularly engaged by leading national and international law firms to advise and appear for multi-nationals, Australian public companies, external administrators and government entities. Stewart has particular expertise in large-scale disputes in the energy & resources, building & construction and IT sectors. He regularly acts in complicated contractual cases as well as matters involving commercial equity and trusts, corporations law, insolvency law and administrative law issues.

Stewart is ranked as a leading junior counsel for Dispute Resolution in Chambers & Partners Global and Asia-Pacific 2019 guides, is listed in the Financial Review's *Best Lawyers® 2020*, and is ranked in Doyle's Guide to the Legal Profession as recommended junior counsel for commercial disputes (Australia and Qld), insolvency matters (Qld) and building & construction disputes (Qld). He is a member of ClArb.

Stewart previously worked as a solicitor at Allens, as an associate in the Federal Court of Australia and for leading Japanese commercial law firm Nishimura & Asahi in Tokyo.

JASON MITCHENSON
T +61 7 3008 3965
E JMITCHENSON@QLDBAR.ASN.AU

Jason's broad civil practice focuses on contract, equity, construction and infrastructure, competition and consumer law and intellectual property. He is particularly experienced in arbitration.

Prior to joining the Bar, Jason worked as a foreign legal adviser at Bae, Kim & Lee in Seoul and as a solicitor at Corrs Chambers Westgarth. He also worked as a researcher at the Graduate Institute of International and Development Studies in Geneva, focusing on international dispute resolution.

Jason holds a Bachelor of Laws from Griffith University, a Master of Laws from Korea University and a Doctor of Philosophy in Law from the University of Geneva.

Jason is the co-author of a textbook on the conflict of laws to be published by Cambridge University Press and the assistant editor of the Oxford Handbook of International Arbitration to be published by Oxford University Press.

BIANCA KABEL
T +61 7 3008 3999
E BIANCA.KABEL@QLDBAR.ASN.AU

Bianca has a broad civil practice and is briefed often in commercial disputes, including insolvency, professional negligence, taxation, environment, construction and general contractual disputes. She appears regularly, both led and unled, in the trial and appellate divisions of the Supreme Court of Queensland, and unled in the District Court of Queensland and the Federal Court of Australia. Bianca also has experience appearing as junior counsel before the High Court of Australia. She is listed by Doyle's Guide as a "Recommended" junior counsel for Commercial Litigation & Dispute Resolution.

Before being called to the bar, Bianca was the Associate to the Honourable Justice David Jackson of the Supreme Court of Queensland and worked as a solicitor at an international firm. She holds a Bachelor of Laws with First Class Honours from the University of Queensland and a Bachelor of Civil Law with Distinction from the University of Oxford.

Bianca is also the Sub-Editor for the Incorporated Council of Law Reporting (Queensland) and is responsible for assisting the Editor with the publication of the weekly Queensland Law Reporter.

Annexure A - Amended extract from Art.33(3) determination[13]

"This was not a situation in which the claimant's alternative claim for direct costs was overlooked by the tribunal, in the sense of there being some inadvertence or accident. Rather, the tribunal consciously did not address an alternative claim for direct costs because the tribunal concluded on the materials and submissions that the tribunal was required only to determine the alternative claim on in respect of indirect costs.
That is, this was not an instance of the tribunal "mistakenly granting or withholding relief that the tribunal did not intend". The tribunal did not address the alternative case in the context of direct costs because such a case was not, in the tribunal's view, developed at any stage in the arbitration; rather, we judged that the alternative case presented was confined to indirect costs. In this regard, it was significant that the expert's supplementary report concerned only indirect costs. These conclusions were considered and intended, so that no claim or potential claim was overlooked or omitted."

[13] The wording which appears here has been altered from the original text of the arbitral tribunal's decision.

Annexure B - Key provisions of the Model Law

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proeceedings and make an award.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The madate of the arbitral tirbunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:
- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) 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, provided that, if the decisions on

matters submitted, only that part of the awards which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accorance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the disputes is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.