

LEVEL

TWENTY
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CHAMBERS



***Functus Officio* in Arbitration**

Shane Doyle QC, Sarah Spottiswood – Level Twenty Seven Chambers

Chiann Bao – Arbitration Chambers

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>> Introduction

What will we cover?

- When is an arbitrator *functus officio*?
- Assessing an arbitrator's jurisdiction
- Singapore and Hong Kong developments

>> Extent of court intervention

UNCITRAL Model Law, Article 5

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

A stack of several books is visible on the right side of the slide, slightly out of focus. The books are stacked vertically, with their spines and pages visible.

>> What is *functus officio*?

- > Arbitral Tribunal draws its jurisdiction from the agreement of the parties.
- > Once Tribunal has rendered a final award, it has performed its function.
- > Subject to certain exceptions, it cannot revisit the award or purport to re-perform its function.

>> Exceptions to the principle of *Functus Officio*

Slip Rule

- Article 33(1)(a) of the Model Law
- *ABB Service Pty Ltd v Pymont Light Rail Company Ltd* (2010) 77 NSWLR 321

Parties request additional award interpreting the award

- Article 33(1)(b) of the Model Law

Additional award on matters omitted from award

- Article 33(3) of the Model Law
- *Lysaght v Blanalko Pty Ltd* (2017) 52 VR 198

Remission to tribunal before court sets award aside

- Article 34(4) of the Model Law
- *Alvaro v Temple* [2009] WASC 205

>> Application to interim awards

*Fidelitas Shipping Co
Ltd v V/O Exportchleb*
[1966] 1 QB 630 at
[643]-[644]

*Discovery Beach Project
Pty Ltd v Northbuild
Construction Pty Ltd*
[2011] QSC 306 at [68]

>> ***Functus officio*** in relation to interim award

- **“issues to which his interim award relates”**: *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at [644] (Diplock LJ).
- **“issues dealt with in the interim award”**: *ABB Services v Pyront* (2010) 77 NSWLR 321 at [70] (Ward J).
- **“that part of the reference which was the subject of the interim award”**: *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2011] QSC 306 at [68] (Applegarth J).
- **“the subject matter of the award”**: *Emirates Trading Agency v Sociedale de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm) at [26] (Popplewell J).
- **“the issues decided in the award”**: *LW Infrastructure Pte Ltd v Chin San Contractors Pte Ltd* [2013] SGHC 264 at [32] (Belinda Ang Saw Ean J).
- **“matters dealt with in the interim award” but not “the matters left over”**: *Alvaro v Temple* [2009] WASC 205 at [67] (Murphy J); *APG Homes v Primary Creations Pty Ltd* [2009] WASC 227 at [73] (Murphy J).

>> Jurisdiction to set aside award

Article 34(2)(a)(iii) of the UNCITRAL Model Law

“(2) An arbitral award may be set aside by the court...only if:

(a) the party making the application furnishes proof that:

(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 to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.”

>> Jurisdiction to set aside award

Article 16(2) and (3) of the UNCITRAL Model Law

“(2) ...A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.”

“(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. ...”

>> ***Chevron Australia Pty Ltd v CBI Constructors Pty Ltd*** **[2021] WASC 323**

- > Chevron contracted with CBI and others for the construction of a large gas project off Western Australia.
- > Dispute referred to a panel of three arbitrators.
- > Procedural order bifurcating the hearing on “all issues of liability” excluding “quantum and quantification issues”.
- > CBI sought to raise new contractual construction issues after the first interim award on “all issues of liability”. Chevron argued that the Tribunal was *functus officio*.

>> ***Chevron Australia Pty Ltd v CBI Constructors Pty Ltd***
Procedural order

“There shall be heard first all issues of liability in respect of the Claimant's claim and the Respondent's Counterclaim (the First Hearing). Such issues, for the avoidance of doubt, shall exclude all quantum and quantification issues arising out of the Respondent's Counterclaim and the Set-Off issues raised in the Claimant's Defence to Counterclaim...”

>> ***Chevron Australia Pty Ltd v CBI Constructors Pty Ltd***
[2021] WASC 323 at [96] (Kenneth Martin J)

“a set aside application seeking to have a court address an authority or jurisdictional obstacle arising out of an asserted condition of *functus officio*, does engage the...s 34(2)(a)(iii) statutory parameters”

>> Next topic

- When is an arbitrator *functus officio*?
- Assessing an arbitrator's jurisdiction
- Singapore developments

>> **Assessing an arbitrator's jurisdiction**

Assessment
by
arbitrator

Assessment
by Court

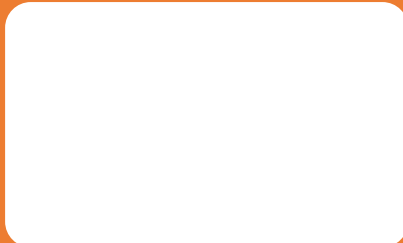
>> Assessment by arbitrator



Competence-competence



Article 16(1) of the Model Law: “The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement...”.



Example: *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323



**How much weight should a
Court give to a Tribunal's
decision on jurisdiction?**

>> Weight given to arbitrator's assessment by court

Court makes
own objective
assessment of
arbitrator's
jurisdiction

- *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533
- *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 202
- *Dallah Real Estate v Ministry of Religious Affairs, Government of Pakistan* [2011] AC 763

>> Weight given to arbitrator's assessment by court

> *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [12]
(French CJ and Gageler J):

“...an **objective question** to be determined by the ... court on the evidence and submissions before it, **unaffected** by the competence of an arbitral tribunal to rule on its own jurisdiction”.

>>

Weight given to arbitrator's assessment by court

> *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 202 at 270 (Hansen JA and Kyrrou AJA):

“...this Court can determine **for itself** not only whether the Tribunal made crucial findings of fact that enabled it to exercise jurisdiction...but also **whether the Tribunal had jurisdiction...**”.

See also *Maersk Crewing Australia Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2020] FCA 595 at [28] (Colvin J); *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287 [87] (Beach J).

>> **Weight given to arbitrator's assessment by court**

> *Dallah Real Estate v Ministry of Religious Affairs, Government of Pakistan*:¹

...The tribunal's own view of its jurisdiction has no legal or evidential value

...This is so however full was the evidence before it and however carefully deliberated was its conclusion”.

>> ***Chevron Australia Pty Ltd v CBI Constructors Pty Ltd***
[2021] WASC 323

“I conclude that it is open to Chevron on its present s 34(2)(a)(iii) ‘set aside application’ to seek to have this court examine afresh its arguments made as to *functus officio* concerning the Tribunal”.

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- *SC v OE1 and OE2* [2020] HKCFI 2065

Remission to tribunal before court sets award aside

- Article 34(4) of the Model Law
- *AKN and another v ALC and others* [2015] SGCA 63.
- *BLC and others v BLB and another* [2014] 4 SLR 79

>> Application to interim awards

*T Perusahaan Gas Negara
(Persero) TBK v CRW Joint
Operation (Indonesia)*
[2015] SGCA 30

>> Further observations

**Functus officio
and the
emergency
arbitrator**

**Interim
Measures
Arrangement
between Hong
Kong and
Mainland China**

Shane Doyle QC

T +61 7 3008 2990

E SDOYLE@LEVEL27CHAMBERS.COM.AU

Sarah Spottiswood

T +61 7 3008 3927

E SSPOTTISWOOD@LEVEL27CHAMBERS.COM.AU

Chiann Bao

T +852 2140 6555

E CHIANN.BAO@ARBCHAMBERS.COM

level27chambers.com.au