

Functus officio: A matter of law not consent

State of Western Australia v Mineralogy Pty Ltd [2020] WASC 58

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Abstract

When is an arbitrator functus officio: When the parties agree, the arbitrator so determines or the court decides? In this case, the same arbitrator had rendered two awards five years apart, in 2014 and 2019. The 1985 Commercial Arbitration Act referred to in the arbitration agreement had been repealed and replaced in 2012. The key issue was whether the savings and transitional provisions of the 2012 Act were engaged, which would allow a challenge of the 2012 Award under the more favourable 1985 Act. Whether the arbitrator continued to have jurisdiction throughout or was functus officio was determinative of the legislative regime applicable to the challenge.

Background

In 2013, Mineralogy Pty Ltd and International Minerals Pty Ltd (respondents) commenced arbitration against the State of Western Australia (State or appellant), alleging breaches of, an agreement with the State to develop an iron ore project in the Pilbara basin (State Agreement).¹ The State Agreement contained an arbitration clause, which referred to the *Commercial Arbitration Act 1985 (WA)* ('1985 Act').²

The arbitrator, the Hon Michael McHugh AC QC (McHugh or arbitrator), determined that the State's failure to consider a proposal made by the respondents was a breach of the State Agreement. No damages were assessed in that award, handed down in 2014, which was solely declaratory in nature. The State did not appeal the 2014 Award.

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¹ Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA).

² Ibid sch 1, cl 42(1).

Subsequently, what His Honour termed a ‘fresh’ dispute arose regarding, inter alia, whether the respondents’ right to recover damages had been determined under the 2014 Award.³ The dispute was referred to the same arbitrator in 2018. In his 2019 Award, in interpreting the legal implications of the 2014 Award, McHugh again ruled in the respondents’ favour.

The State sought to appeal or challenge the 2019 Award in proceeding GDA 13 of 2019 under s 38(2) of the 1985 Act,⁴ which had since been repealed and replaced by the *Commercial Arbitration Act 2012* (WA) (‘2012 Act’).

The grounds for the State’s appeal were that the arbitrator erred in law in determining that the appellant’s single breach of contract gave rise to two distinct causes of action and that the respondents were not foreclosed from pursuing damages for either or both of them.

It is important to note that the 1985 Act allowed for broader grounds for appeal than the subsequent 2012 Act.

The respondents then applied for summary dismissal of the proceeding, on the grounds that the State’s attempt to challenge the 2012 Award under the legislative regime of the 1985 Act was without merit.⁵

The application of the 1985 and 2012 Acts

The 1985 Act was replaced by the 2012 Act, effective 7 August 2013.⁶ While the arbitration clause in the State Agreement specifically refers to the 1985 Act,⁷ after 7 August 2013, the 2012 Act would apply, unless the savings and transitional provisions in s 43 of the 2012 Act are engaged.⁸

Relevantly, s 43(2) requires the arbitration to have been commenced prior to 2013 for the 1985 Act to apply.⁹ Commencement is defined as both the dispute having arisen and the tribunal having been constituted prior to that date.¹⁰

³*State of Western Australia v Mineralogy Pty Ltd* (n 1) [28]. ⁴*Ibid* [1].

⁵*Ibid* [2].

⁶*Ibid*, ss 1B, 44.

⁷State Agreement (n 3), sch 1, cl 42(1).

⁸*Commercial Arbitration Act 2012* (WA) s 43.

⁹*Ibid*, s 43(2).

¹⁰*Ibid*, ss 43(3)(a)-(b).

Justice Martin readily opined that the requirements of s 43(3) were met with respect to the 2014 Award, since that dispute had clearly arisen, and the arbitrator appointed, prior to 7 August 2013. Therefore, the law governing the 2014 arbitration was the 1985 Act.¹¹

However, to establish which of the two Acts was applicable to the 2019 Award, a temporal assessment was required.

On 20 December 2018, McHugh executed the directions proposed by the parties to determine if the 2014 Award prevented the respondents from pursuing their claims for damages. This was defined as the ‘Finality Issue’ in what McHugh termed a ‘further arbitration’.¹² Thus, the constituting event was in December 2018, well after the 7 August 2013 deadline.¹³

For Martin J, the Finality Issue was a ‘fresh interpretative dispute’¹⁴ of the dispositive section of the 2014 Award, and therefore could only have arisen after 7 August 2013. His Honour also underscored the terminology used by the arbitrator himself in describing the reference as a ‘further arbitration’ in more than one instance in the 2019 Award.¹⁵

Consequently, for the purposes of s 43(3)(a) and (b) this further arbitration was commenced long after the enactment of the 2012 Act in August 2013. Hence, it is the more recent Act that governs any challenge to the 2019 Award.¹⁶

When did McHugh become *functus officio*?

Once a tribunal has handed down its final award, it becomes *functus officio* and its jurisdiction comes to an end.

In the present case, the timing was important with respect to the State’s contention that the 1985 Act applied to the 2014 Award.

¹¹ *State of Western Australia v Mineralogy Pty Ltd* (n 1) [20]-[21].

¹² *Ibid.*, [60].

¹³ *Ibid.*, [19].

¹⁴ *Ibid.*, [58].

¹⁵ *Ibid.*, [35], [60], [76]-[77].

¹⁶ *Ibid.*, [58].

This was despite, as Martin J highlighted, citing the 2019 Award, the ‘specific, explicit and repeated acknowledgement of the inescapable legal conclusion that Mr McHugh was at then, *functus officio* as regards the first (2014) arbitration’,¹⁷ along with the fact that the parties had agreed that the arbitrator was *functus officio* in respect of the first arbitration that led to the 2014 Award.¹⁸

His Honour, however, emphasised that the parties’ agreement was ‘ultimately irrelevant’ as *functus officio* arises as a matter of law’, not by agreement.’¹⁹

Another point that corroborated the fact that the arbitrator no longer had jurisdiction in the 2014 arbitration was that prior to McHugh entering onto the reference, the respondents sought the appointment of the Honourable Ray Finkelstein AO QC for the damages claims.²⁰ Thus, the legal effects of the 2014 Award could have been determined by another arbitrator, in which case the issue of McHugh being *functus officio*, would not have arisen.

An arbitral tribunal can rule on its own jurisdiction, but not that of the court

An arbitrator’s jurisdiction arises out of the agreement to arbitrate. As a result, based on the universally accepted concept of *Kompetenz-Kompetenz*, an arbitral tribunal can rule on its own jurisdiction.²¹

However, what an arbitrator cannot determine is the jurisdiction of a court to review or set aside an award. Justice Martin drew a clear distinction between the curial challenge against the 2019 Award and the arbitrator's jurisdiction to hear and resolve the parties' dispute.²²

The jurisdictional question seems to have arisen due to confusion in paras 9 and 10 of the 2019 Award regarding McHugh's determination of his jurisdiction to resolve the Finality Issue and what was called the 'First Damages Claim' under the former 1985 Act.

¹⁷ Ibid, [72]; This also led to McHugh declining to rule on one of the other preliminary issues, the section 46 issue, since he had no continuing jurisdiction under the 2014 arbitration: Ibid, [40].

¹⁸ Ibid, [40].

¹⁹ Ibid, [76].

²⁰ Ibid, [52].

²¹ *Commercial Arbitration Act 2012* (WA) (n 10) s 16; United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006 (Vienna: United Nations, 2008), Art. 16(1).

²² *State of Western Australia v Mineralogy Pty Ltd* (n 1) [67].

This formed the basis of the State's contention that the 1985 Act was the applicable Act. Importantly, the State submitted that the Arbitrator's determinations as to his jurisdiction were conclusive and binding upon the court, and therefore the applicable law to its challenge of the 2019 Award should be the 1985 Act.

His Honour saw things differently and deemed that paras 9 and 10 of the Award referred merely to the laws applicable to the conduct of the arbitration and further stated, 'An appeal to a court is a creature of statute, not of the common law. Thus, it is only for the court, not for the arbitrator, to decide what is the applicable legislative regime, if any, conferring any appeal or review rights as against an arbitral award, as earlier made by an arbitrator'.²³

Conclusion

The court found in favour of the respondents and the State's application for leave to appeal and the 2012 Award under the 1985 Act was dismissed as being untenable. The State's only potential recourse was therefore under the regime of the less favourable 2012 Act.²⁴

While this decision differs from that of Croft J in a case where the arbitrator decided not to deal with all of the issues referred to arbitration - in that case costs, not damages - in which an award termed final by the arbitrator was not a final award for the purposes of the *Commercial Arbitration Act 2011* (Vic),²⁵ parties and tribunals should be mindful that awards that are solely declaratory in nature and do not deal with damages may be nonetheless final. This is particularly true in cases like this, where there are multiple references to the same arbitrator for related issues and successive awards. Further, if a challenge is deemed justified, it should be brought sooner rather than later to avoid being barred from an appeal or subject to a different legislative regime.

²³ Ibid, [68].

²⁴ This has not been pursued as the State has since passed the amendment act, which has caused a litany of proceedings including in the High Court and potentially through Investor State Dispute Settlement mechanisms. For a full description of these cases see: Donna Ross, 'Up in Smoke: Will Clive Palmer's Singapore company be denied standing in its ISDS arbitration against Australia as was Philip Morris Asia?' *Australian Dispute Resolution Bulletin*, vol. 6, no. 4.

²⁵ See *Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd* [2017] VSC 97.