ARBITRATION: WHEN A FINAL AWARD IS NOT FINAL

By Albert Monichino SC

Arbitrator rendered an award styled "Final Award" that failed to deal with an issue referred to arbitration. Aggrieved party applied to have the issue determined by the Supreme Court. Other party sought a stay relying on the parties' arbitration agreement. Held that the award was not a final award and that the arbitrator's mandate continued to resolve the remaining issue.

Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd [2017] VSC 97

Facts

In 2012, B commenced Supreme Court proceedings alleging L had breached a design and construct contract. A partial settlement was reached on 21 April 2016. Under the deed of settlement, the remaining issues were referred to arbitration. An arbitrator was appointed and delivered an interim award on 15 June 2016 resolving the majority of the remaining issues. However, the arbitrator did not, by his interim award, resolve the question of the costs of the Supreme Court proceeding. B sought all of those costs. The settlement deed envisaged that the parties could put on short evidence as to costs of the proceeding. The arbitrator gave the parties an opportunity to make written submissions, including a round of reply written submissions. There was no oral hearing. In its reply written submissions, L submitted that B had not provided the arbitral tribunal with an evidentiary basis on which to determine the claim for costs and accordingly the claim should be dismissed.

On 9 August 2016, the arbitrator rendered an award styled "Final Award". He declined to determine the issue of the Supreme Court costs on the basis that there was insufficient information for him to do so. The dispositive part of the final award provided that "*the issue of the payment of costs of the Supreme Court proceedings between the Claimant and the Respondent is not decided, without prejudice to the rights of the parties to apply for the costs in the Supreme Court of Victoria.*"

L contended that the arbitrator was *functus officio* as he had delivered a Final Award. B did not request the arbitrator to render an additional award under s 33(5) of the Commercial Arbitration Act 2011 (Vic) ('CAA') (reflecting Article 33(3) of the UNCITRAL Model Law) in respect of the remaining issue. Instead, on 4 November 2016, B applied by summons (in the earlier Supreme Court proceeding) to the Court to set aside the award under s 34 of the CAA (reflecting Article 34 of the Model Law) "*to the extent that the arbitrator had declined to determine the Supreme Court costs issue, or had sought to refer that issue to the Supreme Court for determination*". L applied to stay the summons pursuant to s 8 of the CAA (reflecting Article 8 of the Model Law).

Decision

The crux of B's complaint was that the arbitrator did not decide the Supreme Court costs claim, notwithstanding that it fell within the scope of the reference to arbitration.

According to Croft J, the arbitrator decided, expressly, not to determine the Supreme Court costs claim "at that time on the then available evidence" ([48]), but there was no indication that the arbitrator was not prepared to deal with the costs claim if and when the requisite evidence was provided: [26]. His Honour did not accept that the arbitrator attempted to direct the parties to apply to the Court to deal with the remaining issue, and thus did not

“...a decision not to make a decision is not a decision that may be set aside...”

delegate any part of his decision making duties to a third party: [48]. Clearly, the arbitrator did not have this power. While the arbitrator expressed a view in the award that the parties may find determination elsewhere, "the arbitrator's view inCroft J considered that the key to the resolution of the proceeding was the proper characterisation of the award: [59]. Under s 32 of the CAA, an arbitral tribunal is functus officio upon delivery of a final award, subject to s 33 (allowing for correction, interpretation and an additional award) and s 34 (which allows the Court to remit an award upon a setting aside application for the purposes of removing the ground for setting aside).

Notwithstanding that it was a styled a "Final Award", properly considered, it was not a final award for the purposes of the CAA because it didn't deal with all of the issues referred to arbitration. Croft J held that a deliberate and articulated decision by an arbitrator not to deal with all issues which are within the arbitral mandate does not produce a final award: [62].

Even if the award was a final award and the arbitrator was *functus officio*, s 33(5) of the CAA provided a mechanism for B to seek an additional award on the unresolved issue within 30 days. On an application under s 33 (5), an arbitrator may hear further evidence and take further submissions. Croft J considered that the power to grant an additional award under s 33(5) applies to inadvertent omissions by an arbitral tribunal. On the other hand, the conscious and deliberate decision by an arbitral tribunal not to deal with an issue (as in the present case) leaves the arbitral tribunal with an undischarged mandate which does not require the assistance of s 33(5): [24]. Thus, the fact that B had not availed itself of the mechanism in s 33(5), within the time limited by that sub-section, was of no consequence.

B sought to set aside part of the award under s 34(2)(a)(iii) of the CAA, which empowers the supervising court to set aside an award insofar as it contains decisions on matters beyond the scope of the submission to arbitration. Croft J noted that there was some confusion in B's submissions regarding the identity of the decision that it sought to set aside: [45]. Here, there was no relevant decision on matters beyond the scope of the submission to arbitration for the purposes of s 34(2)(a)(iii). The arbitrator had not gone beyond his mandate. Indeed, he did not discharge his whole mandate. As the award, properly characterised, was not a final award (and did not preclude determination of the remaining issue by arbitration), there was no basis for setting aside any part of the award on the grounds that the arbitrator had failed to determine a relevant claim: [58].

As an aside, Croft J noted that a decision not to make a decision is not a decision that may be set aside under s 34(2)(a)(iii) of the CAA, as that section applies to decisions that exceed the tribunal's jurisdiction, not decisions which do not: [49]. In that regard, Croft J compared Article 34 of the Model Law with s 68(2)(d) of the Arbitration Act 1996 (UK). The latter specifically empowers the supervising court to set aside an award in circumstances where a tribunal fails to deal with all the issues referred to it. No equivalent provision is to be found in the Model Law: [28].

Croft J noted that the fact that a party did not make a request under s 33(5) for an issue to be the subject of a further award may be relevant to the court's discretion in a setting aside application by that party under s 34. As s 33(5) had no application in the present case, this was not a relevant consideration. His Honour also noted that a party may request an additional award (under s 33(5)) and apply for an award to be set aside (under s 34) simultaneously.

Turning to L's stay application, Croft J observed that unless the Court found that the arbitration agreement was inoperative or incapable of being performed, it was obliged to stay B's application to the court for it to determine the remaining issue. His Honour noted that "inoperative or incapable of being performed", for the purposes of s 8, was a high bar to satisfy. Practical impossibility as opposed to mere inconvenience was required: [34]

Croft J rejected the submission that an arbitration agreement is inoperative when an arbitrator determines not to decide all of the matters contained in the reference to arbitration: [37]. Indeed, the fact that an arbitrator is rendered functus officio does not result in an arbitration agreement being inoperative or incapable of being performed: [14]. Thus, whether the arbitrator was functus officio was irrelevant for the purposes of L's stay application: [37].

Consequently, B's application to set aside part of the award failed, and L's application for a stay succeeded. The Court concluded that the arbitrator's mandate continued to determine the remaining issue, and that either party could apply to the arbitrator to re-engage the arbitral process to determine that issue.

Comment

Accepting for the moment that the arbitrator decided, expressly, not to decide the Supreme Court costs claim "at that time on the then available evidence", it is incongruous that he styled his award as a Final Award and made no directions for the later determination of the outstanding issue. Indeed, it is surprising that the arbitrator neither requested further evidence before delivering his Final Award nor decided the issue on the available evidence.

Nevertheless, the judgment is instructive in illuminating, amongst other things, what constitutes a final award and the operation of ss 33(5) and 34(2)(a)(iii) of the CAA.

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