

International Arbitration: Scope of Arbitrator's Jurisdiction "Functus Officio"

Commercial arbitration has become the dispute resolution method of choice for many commercial parties due to the advantages that arbitration may offer to those who find themselves involved in a dispute. Advantages to both domestic and international arbitration include efficiency, confidentiality, and the opportunity for the parties to arbitration to appoint a specialized arbitrator of their choice.

An arbitrator who is appointed to resolve a dispute has the authority to render a binding decision much like a judge in the court system. Once an arbitrator has issued his or her decision, the arbitrator's authority over the matter has concluded.

As a general rule, the circumstances in which an arbitrator is able to amend an original award or reverse a decision are extremely limited. There has been some debate in the courts recently regarding when these limited exceptions to the general rule will apply. Recent case law from British Columbia and foreign jurisdictions has served to clarify the situations in which an arbitrator is able to amend an original award or reverse a decision.

Functus Officio Principle

The term *functus officio* is used in the arbitration context to describe situations where an arbitrator's purpose has been fulfilled, and thereby the arbitrator's authority over the matter has ended.

The *functus officio* principle prevents arbitrators from issuing a new decision or amending the original award. However, the British Columbia *Commercial Arbitration Act* (Act) provides that there are certain limited circumstances in which an arbitrator may reconsider an issue after making a final order.

These exceptions are listed under section 27:

(1) On the application of a party or on the arbitrator's own initiative, an arbitrator may amend an award to correct

- (a) a clerical or typographical error,
- (b) an accidental error, slip, omission or other similar mistake, or
- (c) an arithmetical error made in a computation.

A similar provision exists in the *International Commercial Arbitration Act* and other arbitration statutes which apply to international disputes.

Recent Developments in British Columbia

Recently, the British Columbia Supreme Court considered the concept of *functus officio* and the exceptions to the principle set out in the Act in *Ford Motor Company of Canada Limited v. Sheriff*. In this case, an arbitrator had attempted to amend her decision after dismissing a claim brought against Ford Motor Company of Canada (Ford). The arbitrator had discovered new facts after rendering the original decision that caused her to change her mind about the outcome. The arbitrator sought to reverse her original decision and substitute an order that

Ford buy back a vehicle sold to the claimants. The arbitrator purported to rely on section 27(1) of the Act as giving her continuing jurisdiction over the issue as she believed that she had accidentally erred in her original conclusion based on her own failure to allow time to receive all evidence.

Ford successfully applied to the court to set aside the decision on the basis that the arbitrator did not have continuing jurisdiction over the matter, and was precluded from reversing her final decision.

The court considered the issues of when an arbitrator will become *functus officio*, as well as what constitutes an “accidental error” for the purposes of section 27 of the Act. In allowing Ford’s application to set aside the decision, the court concluded that issuing supplemental reasons for the arbitrator’s decision went beyond the flexibility of section 27. Justice N.H. Smith for the court relied on the earlier British Columbia Court of Appeal decision in [*Westnav Container Services v. Freeport Properties Ltd.*](#), wherein the Court of Appeal considered the scope of what could be considered an “accidental error” under the Act. In *Westnav*, an accidental error was defined as something which obstructs an arbitrator’s original intent. While an arbitrator is permitted to correct technical errors which affected their judgment, the arbitrator may not perform any new analysis after their decision is made.

Ultimately, Smith J. concluded that the actions of the arbitrator in the case before the Court could not count as accidental error. The arbitrator’s intent was to dismiss the claim, and the supplemental reasons issued effectively reversed that original intent after analysis of new evidence. The arbitrator’s conduct exceeded the arbitrator’s powers, and was not merely an error of a technical nature. Accordingly, the entire arbitration decision (both the original decision and supplemental reasons) was set aside and remitted back to the arbitrator for reconsideration.

International Discussion on Meaning of Functus Officio

British Columbia is not the only jurisdiction in which the question of an arbitrator’s continuing jurisdiction has recently been the subject of judicial discussion. For example, in England, the High Court in *Five Oceans Salvage Ltd. v. Wenzhou Timber Company* recently considered the meaning of *functus officio* after an application that originated in a salvage agreement between Five Oceans Salvage and the defendant, Wenzhou Timber.

In dismissing the application, the High Court provided a lengthy guide on the meaning of *functus officio*. The High Court stated that arbitrators should be allowed to remove ambiguity in final decisions since it is within an arbitrator’s power to deal with situations in which the effect of the award is unclear, and to do so should not require a decision to be rewritten or reconsidered. Additionally, if the award fails to deal with all matters submitted for arbitration, the award may be challenged, or a supplementary award may be issued.

However, the High Court also made it clear that the arbitrator does not continue to have jurisdiction in the reference. Rather, if there has been a breach of natural justice or some other irregularity in the course of arbitration, then the only recourse is for a party to the arbitration to apply to the courts under the applicable statutes to have the original award set aside.

Conclusion

These cases serve to clarify the situations in which an arbitrator in a domestic or international arbitration is able to amend an original award or reverse a decision. It appears that the scope as defined by the doctrine of the *functus officio* principle remains narrow.

As illustrated above, it is difficult for an arbitrator to make any amendments to an original decision that will fall within the exceptions to the general rule, even in cases where it subsequently comes to light that the arbitrator's original decision was mistaken in some manner. In the event an arbitrator has not considered all relevant evidence or if new developments call into question the result of a final arbitral decision, the parties may have no recourse other than to apply to the court to seek relief as the arbitrator will be unable to amend the decision.