II. RETAINING JURISDICTION: (2) THE CANADIAN PERSPECTIVE[1]

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Few concepts in labour arbitration are more frequently utilized and more infrequently discussed than the retention of jurisdiction. At arbitration, virtually all successful grievances are dealt with in two distinct parts. The first is the finding of a violation of the collective agreement or, in Canada, the possible violation of a statute that can be pursued through the grievance and arbitration process. The second aspect is the determination of the remedy that is appropriate in the circumstances. It is in this second area of jurisdiction that the retention of jurisdiction is most commonly resorted to by boards of arbitration.

Severing the remedial aspect of an arbitration award from the segment of the award that finds liability is a well-established rule fashioned to promote simplicity and efficiency. In cases involving the calculation of compensation, the governing rationale was well-articulated by Arbitrator D.A. Harris in *Re Inmet Mining Corporation and United Steelworkers of America, Local 4464*,[2] where the following comment appears at p. 185:

> It is the practice in labour relations matters, and one to be fostered, that issues of compensation be severed from the merits of the grievance. Following that practice streamlines the efficiency of the hearing of the grievance by obviating the need to lead evidence on matters of compensation pending the decision on whether the grievance is successful. In most cases the parties are able to agree on any amounts owing after the decision is made on liability. The routine practice in labour relations matters is first to hear the merits of the grievance and subsequently to rule on any issues of compensation.
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> It appears well settled that if an arbitrator retains jurisdiction to resolve disputes should the parties fail to agree, agreement by the parties on the substance of the outstanding issues will exhaust the arbitrator's jurisdiction (see, e.g., *Re Government of Province of Alberta and Alberta Union of Provincial Employees*, (1992), 29 L.A.C. (4th) 446 (Moreau)).

In the vast majority of cases the retention of jurisdiction works smoothly, and cases are not returned to the arbitrator for further

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[1]The editor took the liberty of "Americanizing" some of the Canadian terms. I left "labour" as labour, but changed "retainer" to retention and "grievor" to grievant.

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[2](1998), 78 L.A.C. (4th) 175 (Harris).

remedial directions. However, the arbitral jurisprudence in Canada does reflect a body of cases where difficulties have arisen. Those difficulties generally concern whether the original board of arbitration has fully expended its jurisdiction and is *functus officio*, or whether the board continues to have the necessary jurisdiction to make further orders or directions. A related issue is whether the making of further directions constitutes an amendment or variance of the original award, which is beyond the jurisdiction of the board of arbitration. Because jurisdiction is the touchstone of arbitral authority, an understanding of the principles governing the retention of jurisdiction and the doctrine of *functus officio* is of critical importance to arbitrators, as it is to the parties involved in the labour arbitration process.

The Evolution of Retention of Jurisdiction

A review of the jurisprudence confirms that the concept of the retention of jurisdiction and the operation of the doctrine of *functus officio* in labour arbitration has evolved considerably in Canada over the last 30 years. At one time it was believed that a board of arbitration having rendered an award became *functus officio* unless, and to the extent that, it expressly reserved jurisdiction to deal further with any given aspect of the dispute, such as remedy. That view of retained jurisdiction began to decline with the landmark award issued by the majority of a board of arbitration chaired by Arbitrator J.F.W. Weatherill in *Re Consumers' Gas Co. and International Chemical Workers' Union, Local 161*.[3] In that case, the majority issued an award in a discharge case directing the reinstatement of the grievant and expressly retaining jurisdiction to deal with the quantum of compensation. In fact the parties entered into a dispute with respect to the specifics of reinstatement because the grievant had commenced a business of his own during the period of his discharge. Because he had contractual obligations to fulfill, the union requested a postponement of his actual reinstatement for several months. The company refused that request. When the union sought further directions from the board of arbitration concerning the issue of delayed reinstatement, the company took the position that the board was *functus* as to that issue, and could deal with only questions of compensation.

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[3](1974), 6 L.A.C. (2d) 61 (Weatherill).

Upon a review of the arbitral jurisprudence and related court decisions, Arbitrator Weatherill concluded that the central question is not whether there has been an express reservation of jurisdiction concerning a particular matter, but whether the board of arbitration has in fact completed its job with respect to resolving the dispute. In concluding that the board did have jurisdiction to hear further submissions on the modalities of reinstatement, Arbitrator Weatherill reasoned, in part, as follows:

> The determination this board must now make is not, we think, doctrinal but is rather a question of fact: whether the board can be said to have made its final award on the reinstatement aspect of the case. We agree of course with the general proposition stated by Osler, J., in the *St. Joseph's Hospital* case, cited above. A final award cannot be altered except to correct a clerical mistake or error: Russell on Arbitration, 17th ed., p. 276. But an award "must be final, certain, consistent and possible [the reference is no doubt to the award itself, exclusive of the reasons therefore] and must decide the matters submitted, and no more than the matters submitted": id., p. 237. If an arbitrator omits to give the necessary directions to effectuate the objects for which he is appointed, the award is not final: id., p. 242. While only one final award may be made (in the absence of special authority), an interim award may be made, which may be final as to some claims "although it is perhaps more usual for such awards merely to determine certain of the issues arising upon a claim—for instance, to determine the issue of liability while leaving questions of amount to be dealt with later." Id., p. 239. On this latter point, it is clear that the award in this matter dated April 13, 1973, was an interim award, and that the matter of compensation was left to be dealt with later. What is not clear is whether the same should be said of the matter of reinstatement. . . .
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> In the instant case the award that the grievor "be reinstated" does not, in our view, constitute a final award on that issue, in that it lacks particularity, and does not sufficiently specify the incidents—notably the time—of such reinstatement. The matter, like the matter of compensation itself, had not been spoken to at the hearing, nor would that be expected in most cases. As the authorities referred to above indicate, final determination of an issue requires "unambiguous and enforceable language," and an award is not final where the arbitrator omits to give the necessary directions. One of the necessary directions for compliance with an order of reinstatement would be a date of reinstatement, and, as we have noted, the Labour Relations Act contemplates that a final award would set out, where appropriate, a date for compliance.
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> Having regard to all the foregoing, we conclude that it is our duty to complete the award in this matter on the issue of reinstatement as well as on the issue of compensation. The matter will, therefore, be put on for hearing at a date to be agreed upon. We would repeat the caution, above expressed, that this board has no jurisdiction in the matter of the enforcement of its award, nor to deal with any other grievances than

> the one before it. In our view, our jurisdiction is to complete our award having regard to the circumstances bearing on the matters of compensation and reinstatement, as of the time of the initial award.[4]

Labour boards and arbitrators have also married the statutory basis for the jurisdiction of board of labour arbitration in Canada in dealing with the issue of whether they are *functus officio* to the common law approach concerning arbitral jurisdiction articulated by Arbitrator Weatherill in *Re Consumers' Gas Co.* The leading statement respecting that approach was articulated by the British Columbia Labour Relations Board, four years after the Weatherill case, in *Gearmatic Co. and United Steelworkers of America, Local 6613*.[5] In that case the board was called upon to exercise its power of review over two arbitration awards of a single board of arbitration, the second award purporting to deal with the implementation of the first, dealing with the administration of the seniority provisions of the collective agreement. In its initial award the board of arbitration directed the payment of compensation to the grievant, expressly retaining jurisdiction to resolve any dispute with respect to quantum. It did not, however, order the grievant's reinstatement nor expressly retain jurisdiction in relation to that issue. When the parties were unable to agree as to the amount of compensation, the hearing was reconvened, and it then became evident that persons junior to the grievant might still be employed while he was laid off. In that circumstance the board of arbitration directed the reinstatement of the employee.

The labour board concluded that the board of arbitration was *functus* for the purposes of its second award, but confirmed that it nevertheless retained the authority to complete the first award which it issued. Significantly, it reasoned that, based on the provisions of the British Columbia Labour Code, which provide arbitration as a statutory alternative to mid-contract work stoppages [s. 92(2)] and provide for arbitration as the "final and conclusive" method of settling disputes [s. 98], the board found that the strict application of the doctrine of *functus officio* at common law should not apply to boards of arbitration, although there should be arbitral respect for finality in the resolution of collective agreement disputes. The labour board expressed itself as follows:

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[4] *Id.* at 65–67.
[5] [1978] 1 Can. L.R.B.R. 502.

> In summary, Sections 92 and 98 authorize an arbitration board to complete its award with respect to any issues raised by a grievance and not adequately disposed of by its initial award (and the arbitration board has that statutory authority whether or not it has explicitly reserved that for itself in its first award). However, the doctrine of functus officio continues to have some vitality in the industrial relations setting of grievance arbitration. It continues to operate to the extent of preventing an arbitration board from reversing the substance of an earlier decision or clearly altering the nature of an earlier decision (until and unless the legislature sees fit to give two grievance arbitration boards the power of reconsideration conferred on this Board by Section 36 of the Code).[6]

An award issue 14 years later that well exemplifies the statutory and labour relations policy approach to the issue of continuing jurisdiction is the award of Arbitrator Kevin M. Burkett in *Re Canada Post Corp. and Canadian Union of Postal Workers.*[7] Interestingly, in that case, the collective agreement expressly addressed the issue of the arbitrator's retention of jurisdiction. Article 9.37 of the collective agreement thereunder consideration provided, in part:

> The arbitrator may render any interim or preliminary decision that he considers appropriate. He may also, when rendering a decision, remain seized of the grievance to determine the quantum of compensation payable, if any, if the parties fail to agree, or to correct clerical mistakes or errors arising from accidental slips or omissions, upon the request of either party.

Additionally, Article 9.39 of the agreement provided, in part:

> It is understood that the arbitrator shall be vested with all powers conferred upon him by the Canada Labour Code.

In the *Canada Post* case, Arbitrator Burkett had issued an initial award finding that the corporation had breached a provision of the collective agreement when it discontinued the medical remuneration supplement provided therein. He then directed the corporation to reimburse the employees affected by the company's actions. Arbitrator Burkett did not, however, expressly reserve jurisdiction to determine specifically which employees were entitled to such compensation or the quantum of compensation. When the corporation moved to review the award judicially, the union sought a supplementary decision from the arbitrator to deal with the specific identification of the employees entitled to compensation and

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[6] *Id.* at 512–13.
[7] (1992), 28 L.A.C. (4th) 228 (Burkett).

the amount of that compensation. The corporation took the position that, not having expressly reserved jurisdiction, the arbitrator was *functus officio* in respect of those issues.

Arbitrator Burkett rejected the position of the corporation that the collective agreement contemplated that the arbitrator must expressly reserve jurisdiction. Following the analysis of the British Columbia Labour Relations Board in *Gearmatic*, Arbitrator Burkett found that, as with the British Columbia Code, the scheme of the Canada Labour Code clearly contemplated the final resolution of labour disputes by arbitration. In that regard, he commented, in part, as follows:

> The Canada Labour Code, the statute that governs the labour relations between these parties, provides for the sanctioned and protected organization of employees by trade unions and, as the corner-stone of the labour relations system, for the negotiation of collective agreements to govern the day-to-day relations between employers and employees. Section 57 of the Canada Labour Code stipulates that disputes between the parties with respect to the interpretation, application or administration of a collective agreement, during its term, are to be submitted to arbitration for final and binding resolution. Furthermore, the statutory draftsmen understood that where binding arbitration is substituted for the right to strike during the term of a collective agreement, the power of an arbitrator to grant full and effective remedies is necessary to ensure the integrity and viability of any collective agreement and concomitantly the integrity and viability of the collective bargaining system. Notwithstanding the general application of the statutory scheme, these parties have expressly provided in art. 9.39 that "[t]he arbitrator shall be vested with all the powers that are necessary for the complete resolution of the dispute" and further that ". . . the arbitrator shall be vested with all of the powers conferred upon him by the Canada Labour Code." The important point to be made is that under both the statute and the collective agreement, for the policy reasons that I have referred to, I have ". . . all the powers that are necessary for the complete resolution of the dispute."[8]

Arbitrator Burkett rejected the position of the corporation with respect to the meaning of the provision in the collective agreement governing the retention of jurisdiction. In that regard he essentially found that the Canada Labour Code would trump the collective agreement or, more specifically, that under the Code, the statutory obligation of an arbitrator to fully dispose of the issues in dispute must take precedence over any collective agreement

[8] *Id.* at 235.

provision, or the lack of any such provision. In that regard Arbitrator Burkett made the following observations:

> . . . As I have observed, these parties, for whatever reason, have incorporated into art. 9.39 powers that I already have under the Code. Even if art. 9.39 were to be omitted from the collective agreement I would still have the powers under the Code to complete an award so that it would be final, binding and enforceable. Similarly, I read art. 9.37 as also incorporating into the collective agreement a power that I have by reason of the Code and a power that I could exercise regardless of art. 9.37. It is in my view clear on a reading of the *Consumer's Gas* and *Gearmatic* decisions, supra, and the other decisions referred to, that regardless of whether or not an express reservation of jurisdiction is made where the governing statute requires a final and binding result an arbitrator has the jurisdiction to complete (as distinct from amend or vary) an award. An arbitrator has the authority to specify the basis upon which compensation is to be calculated, the amounts owed and when such amounts are to be paid. It follows, therefore, that I do not read art. 9.37 as somehow requiring me to make an express reservation of jurisdiction failing which I become functus in respect of all matters and, on the rationale of *Berarducci and Canadian Pacific Ltd.*, *supra*, unable to provide an enforceable remedy. I read art. 9.37, as I read art. 9.39, as incorporating into the collective agreement powers that I already have under the Code; that is a power to remain seized of the grievance to determine the quantum of compensation payable. There is no requirement in art. 9.37 to do so expressly nor is there any caution that failure to do so somehow leaves an arbitrator without jurisdiction to complete his/her award.[9]

The Doctrine of *Functus Officio*

If, as labour boards and boards of arbitration have recognized, the doctrine of *functus officio* does have a role to play in labour arbitration, it becomes important to have an appreciation of the precise meaning and scope of that doctrine. The leading authority in Canada is the decision of the Supreme Court of Canada in *Chandler v. Alberta Association of Architects.*[10] That decision concerned a judicial review of a decision rendered by the Practice Review Board of the Alberta Association of Architects. The Review Board made findings of unprofessional conduct against an architect's firm and six of its partners, levying fines, imposing suspensions, and ordering the payment of costs. The Alberta Court

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[9] *Id.*
[10] [1989] 2 S.C.R. 848.

of Queen's Bench found that the Review Board had no authority to impose such sanctions, an authority vested solely in the Complaint Review Committee of the Association. With its decision quashed, the Practice Review Board gave notice to the parties of its intention to continue the original hearing to consider whether it would recommend consideration of its report by the Council of the Association and whether the matter should be referred to the Complaint Review Committee.

Upon a second application, the Court of Queen's Bench issued an order of prohibition against the Practice Review Board, finding that it had fulfilled its function and was therefore *functus officio*. That order of prohibition was vacated by the Alberta Court of Appeal, which concluded that the Practice Review Board had not, in fact, exhausted its jurisdiction, as it was required to consider whether to make recommendations to the Council or to the Complaint Review Committee.

The Supreme Court of Canada upheld the decision of the Alberta Court of Appeal. The Court found that while it may have been true that the Board acted *ultra vires* and made errors of jurisdiction in the manner in which it proceeded, it clearly did not exhaust its jurisdiction as it did not consider making recommendations, as it was required to do by the governing regulations and statute. As the purported final disposition made by the Board was in fact a nullity, the Board remained entitled to continue the original proceedings and dispose of the matter before it on a proper basis.

In dealing with the issue before it, the majority of the Supreme Court of Canada traced the doctrine of *functus officio* to a 19th century decision of the English Court of Appeal. Sopinka J., for the majority, wrote, in part, as follows:

> The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
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> 1. where there had been a slip in drawing it up, and,
> 2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186.[11]

[11] *Id.* at 861.

Sopinka J. went on to find that the doctrine of *functus officio* has its proper application in relation to administrative tribunals. In that regard he commented, in part, as follows:

> . . . Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*
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> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason, I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief, which would otherwise be available on appeal.
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> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.[12]

There appears to be some confusion in the arbitral jurisprudence with respect to the scope of the doctrine of *functus officio*. Some arbitrators appear to view the doctrine as permitting a board of arbitration to revisit its award only where there has been a typographical error or omission in the text, essentially taking the view that the only exception to the doctrine is the ability of a board of arbitration to execute a rectification where there has been a technical error in the drafting of the award. An example of that approach is reflected in the decision of the arbitrator in *Lake Ontario Steel Co. and U.S.W.A., Local 6571.*[13] The arbitrator expresses the view that, "Once an Arbitrator has recorded a final decision on a matter, she is without authority to act further except to correct clerical errors, errors arising from accidental omissions or errors of a technical nature."[14]

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[12] *Id.* at 861–62.
[13] (1992), 24 L.A.C. (4th) 355 (Mikus).
[14] *Id.* at 359.

The foregoing passage was relied upon by the Canadian Broadcasting Corporation in *Re Canadian Broadcasting Corporation and Joyce*.[15] when it sought judicial review of a decision of Arbitrator Robert Joyce. In the arbitration award, which involved the CBC and the Canadian Media Guild, Arbitrator Joyce issued an interim award that contained clear words to the effect that the grievant had been terminated for "proper cause," and for "just and sufficient cause" within the meaning of the collective agreement. He nevertheless ordered the payment of compensation in lieu of reinstatement, finding that the job assigned to the grievant was impossible to perform and that the employer was 75 percent at fault. In the final award, Arbitrator Joyce recognized that the interim award ". . . contained a serious contradiction which requires clarification." He then commented that although he referred to the grievant's termination of employment as being for just and proper cause, he added that on a reading of his award it was clear that ". . . one could not arrive at a determination that the dismissal was for proper or just cause."

Relying, in part, on the above passage from the award of Arbitrator Mikus, counsel for the CBC argued that Arbitrator Joyce was *functus*, and that what he was attempting to do did not involve a clerical or technical error or omission. The Ontario Divisional Court rejected this position. Brockenshire J., for the Court, commented:

> With the greatest of respect, in my view, Arbitrator Mikus, in making that statement did not fully express the second exception, adopted and confirmed by the Supreme Court, [in *Chandler*].[16]

The Divisional Court expressly applied the second exception noted by the Supreme Court of Canada in *Chandler*, namely that a board of arbitration can issue a correcting decision where the first award contains an error in expressing the adjudicator's manifest intention. In dealing with this aspect of the dispute the learned judge commented as follows:

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[15](1997) 34 O.R. (3d) 493 (Div. Ct.)
[16]*Id.* at 497.

> In his final award, Arbitrator Joyce concluded that the employer was 75 percent at fault and the employee 25 per cent at fault and at p. 35 thereof says:
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> > . . . I was wrong in my having fallen into the trap of neatly categorizing the dismissal in terms commonly employed when an employee is unable to perform a job in a satisfactory manner.
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> I accept that statement of Arbitrator Joyce and conclude that the words relied on by the C.B.C. constituted an error in expressing the manifest intention of Arbitrator Joyce. His manifest intention was to see Mr. Rist compensated for something that was largely not his fault. That is made quite clear in his words both before and after the fateful passage, in his interim conclusion, that Mr. Rist should not be reinstated, but should be compensated if he had jurisdiction to do so, and in the fact findings throughout the interim award which led him to that conclusion.[17]

Bearing in mind that boards of labour arbitration are creatures of statute in Canada, is there a case for legislated clarification of the jurisdiction of arbitrators to retain jurisdiction and complete their awards? Arguably, there is no need to do so as the existing jurisprudence adequately incorporates both the common law principles of *functus officio* and the statutory basis for the exceptions to that doctrine, given the well-recognized authority of boards of arbitration to complete their awards so as to deal with the real substance of the dispute before them and provide a final and binding determination of all matters in dispute. There are, however, some examples of legislative intervention. In the words of section 121(4) of the Manitoba Labour Relations Act, C.C.S.M. c. L10:

> The jurisdiction of an arbitrator or arbitration board with respect to a matter continues until the arbitrator or arbitration board has determined every aspect of the matter, notwithstanding that
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> (a) the arbitrator or arbitration board has not expressly retained jurisdiction in any interim or other decision in the matter, or
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> (b) one or more of the parties to the arbitration do not agree that the arbitrator or arbitration board retains jurisdiction.

What the foregoing provision does, essentially, is to codify the jurisprudence reflected in such arbitration awards and decisions

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[17] *Id.* at 498.

such as *Consumers' Gas*, *Gearmatic Co.*, *Canada Post*, and *CBC*, reviewed above. It may nevertheless be a useful instrument of clarification, to the extent that it would avoid confusion and clearly eliminate the view that a board of arbitration may only reopen an award if there has been a clerical or technical error or omission. The legislative provision does help both the parties and arbitrators to focus on the real question, which is whether the board of arbitration has truly and properly completed its task.

Correction of Errors Only?

It is in that context that a second example of legislative intervention becomes arguably troublesome. The Quebec Labour Code, R.S.Q. c. C-27 contains a provision in s. 91.1 that gives a board of interest arbitration the ability to make a corrective order. It provides that:

> The arbitrator may at any time correct an award containing a mistake in writing or calculation or any other clerical error.

Similarly, s. 100.12 (e) of the Code gives the same jurisdiction to a grievance arbitrator. It empowers a board of grievance arbitration to:

> . . . correct at any time a decision in which there is an error in writing or calculation or any other clerical error.

The question that obviously arises in the context of the Quebec provisions is whether the Legislature of that province has effectively codified the more limited view of the exceptions to the doctrine of *functus officio* expressed in the *Lake Ontario Steel* award. If a court sitting in judicial review of a board of arbitration's purported attempt to correct an erroneous misstatement, as occurred in the *CBC* case, takes a narrow interpretive view of article 100.12 (e) of the Code, that court might well conclude that a board of arbitration is without jurisdiction to make such a correction to the extent that it is beyond the scope of a "clerical error." Conversely, it may be that a more liberally inclined court would interpret the phrase "an error in writing" as sufficiently broad to encompass the second exception to the doctrine of *functus officio* expressed in *Chandler*, namely that where there was an error in expressing the manifest intention of the board of arbitration, the doctrine of *functus officio* is not an impediment to a correcting award.

The Aftermath of the Award

A review of the jurisprudence suggests that certain recurring problems have emerged with respect to the operation of the doctrine of *functus officio*. One area involves the jurisdictional aftermath of arbitral awards of reinstatement that are made subject to conditions. When an arbitrator disposes of a discharge grievance by reinstating an employee subject to certain conditions and remains seized for the purposes of the implementation of the award, is it that same arbitrator or another arbitrator who takes proper jurisdiction of a subsequent discharge of the employee for allegedly failing to meet the terms of an ongoing condition following his or her reinstatement? It would appear that that question can be answered by only close scrutiny of the decision of the original arbitrator.

In *Re Canada Post Corp. and Canadian Union of Postal Workers*[18] dealt with the discharge of an employee who had been subject to an order of reinstatement some 8 ½ months previous. The reinstatement was ordered by Arbitrator Jack London, and concluded stating that: "This truly is Mr. Young's last chance to discipline himself and to bring his attitude and behaviour under control"; and, "I will remain seized for any matters of interpretation or consequence arising as a result of this award."

Some 8 ½ months after that award the grievant was again involved in a workplace altercation as a result of which he was terminated. Following the normal rotation system governing the appointment of arbitrators under the collective agreement, Arbitrator Jolliffe was appointed to hear the second discharge grievance. The employer objected to Arbitrator Jolliffe's jurisdiction, taking the position that Arbitrator London remained seized of the grievant's "last chance" and should properly be the one to hear the grievance. The union argued that Arbitrator London was *functus officio*. Arbitrator Jolliffe concluded that there was no compelling basis to find that Arbitrator London intended to retain jurisdiction for the purposes of any future discipline. In that regard, he concluded, in part, that:

> In the circumstances presented at hearing, having read the London award and in particular those portions dealing with retention of

[18](1997), 63 L.A.C. (4th) 278 (T. Jolliffe)

> jurisdiction, I cannot find expressed therein any intention that the learned arbitrator sought to maintain his jurisdiction in some open-ended fashion over the grievor's future employment, including the possibility of a dismissal occurring some 8 ½ months down the road through an act of alleged misconduct.
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> Notably there was no imposition of conditional reinstatement in the usual sense setting a time frame within which an employee must meet certain performance, behaviour or attendance criteria to be reviewed by the arbitrator on referral. In my view, it would be a stretch of faith to conclude that through the use of the word "consequence" the arbitrator meant to retain jurisdiction over a termination happening as long as 8 ½ months into the future.
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> I consider that the retention of jurisdiction language would have to be much more certain in its meaning to deny the employee the right to grieve his discharge and access the arbitration process in the usual way. The uncertainty of meaning requires me to conclude that the Corporation has not met the onus of demonstrating that there was any reservation of jurisdiction applicable to the current circumstances.[19]

It would therefore appear that when an arbitrator establishes conditions for reinstatement whereby the grievant must meet certain standards of compliance over a fixed period of time, a statement by the arbitrator to the effect that he or she retains jurisdiction for the purposes of the interpretation or implementation of the award may well mean that any dispute over an alleged failure of the conditions during the time period established properly remains within the jurisdiction of the arbitrator who established the conditions. Conversely, where a board of arbitration makes an order of reinstatement and expresses a general retaining of jurisdiction for the purposes of implementation of the reinstatement, the better view appears to be that such a jurisdiction does not extend beyond the completion of the mechanics of the original reinstatement exercise. An arbitrator does not, in other words, retain jurisdiction over an individual's ongoing employment, perhaps for years to come.

That was precisely the issue before Arbitrator A.P. Aggarwal in *Re Ontario Library Services–North and Canadian Union of Public Employees, Local 2855*.[20] In an award dated May 14, 1994, Arbitrator Aggarwal found that the employer was estopped from laying off the grievant. Having so declared, he retained jurisdiction ". . . in the event that a dispute arises over the implementation of this award."

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[19] *Id.* at 288.
[20] (2002), 114 L.A.C. (4th) 322 (Aggarwal).

Some 8 ½ years later, as a result of a reorganization, the grievant again faced a layoff. In the circumstances, the parties made a joint written submission to Arbitrator Aggarwal asking whether, by reason of his award in 1994, he continued to have jurisdiction in respect of the liability of the grievant to lay off.

In approaching the problem, Arbitrator Aggarwal made the following general observations:

> Arbitral jurisprudence has substantially developed regarding the purpose and scope of retention of jurisdiction. The basic purpose for retaining jurisdiction has been to complete the award and/or to see that the terms and contents of the award are properly understood and implemented by the parties. In this respect the arbitrator has a limited role to clarify and/or explain the terms and contents of the award.
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> The jurisdiction of an arbitrator after the issuance of the award is very narrow. Therefore an arbitrator cannot, after issuance of an award, decide matters which were not submitted at the hearing, cannot add to expand the award, but merely complete the award, if necessary, by direction what is lacking to effectuate the remedy.[21]

With respect to the merits of the case before him, it was clear to Arbitrator Aggarwal that he could exercise no jurisdiction in respect of the fresh layoff of the grievant. In that regard, he concluded, in part, as follows:

> The retention of jurisdiction was intended simply to ensure that the award was properly implemented. It was intended that the arbitrator intervene and resolve only if any difficulty or dispute arose in the implementation of the award. It was not intended that the arbitrator intervene and resolve any dispute that may arise subsequent to the implementation of the award. Once the award is implemented, the arbitrator's authority exhausts. The arbitrator becomes functus officio.
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> It is obvious that no dispute arose over the implementation of the 1994 award for over eight years. Thus, my jurisdiction was exhausted.[22]

The arbitrator in the 1994 award had neither retained nor could have retained jurisdiction to deal with any subsequent disputes relating to the employment of the grievant.

A good example of a board of arbitration retaining jurisdiction over the stated period of reinstatement conditions is to be found in the award of Arbitrator D.K.L. Starkman in *Re Eddy Specialty Papers and Communications, Energy and Paper Workers Union, Local 74*.[23] In October 1998, Arbitrator Starkman reinstated the grievant

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[21] *Id.* at 331–32.
[22] *Id.* at 336.
[23] (2000), 88 L.A.C. (4th) 306 (Starkman).

to employment subject to certain conditions that attached for a period of two years. In his initial award, Arbitrator Starkman stated:

> The terms of the reinstatement are that, if at any time within two years of the date of this award, the grievor should be disciplined, up to and including discharge, for any of the matters referred to in article 31 of the collective agreement, he shall not be entitled to challenge the severity of the penalty, and any grievance, including any arbitration hearing shall be restricted to inquiring as to whether the events as alleged by the Employer occurred. If such events are found to have occurred, then the penalty imposed by the Employer shall not be varied. . . . I will remain seized should there be any difficulties in the implementation of this award.

In December 1999, within the two-year period, the grievant was again terminated, for an alleged violation of the rules of conduct contained in article 31 of the collective agreement. With respect to the arbitration of the subsequent discharge, the union argued that Mr. Starkman was *functus officio*, while the employer maintained that the dispute at hand consisted of the completion of his original award. In Arbitrator Starkman's view the dispute being brought back to him was, in effect, a continuation of the original dispute to the extent that the conditional reinstatement that he had ordered essentially kept open the suitability of the grievant for continued employment. That is reflected in the conclusions of the award in which Arbitrator Starkman states, in part:

> The implementation of an order of conditional reinstatement of this sort raises has the potential to give rise to many disagreements between the parties. For example, there may be disagreement as to whether the apology was delivered in a timely fashion, whether it was genuine, whether the Employer reinstated the grievant in a timely fashion, or whether the reinstatement was to a suitable position. An inquiry into any of these questions involves examining and determining facts about events or circumstances that transpired after the reinstatement order has been made, and for the most part, the initial arbitration boards have assumed jurisdiction over these matters because they are matters that need to be determined to complete the award and provide a final and binding settlement to the parties.
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> . . . Similarly, an inquiry into whether there has been a violation of article 31 is most properly made by the initial hearing panel, which can then complete the initial award based on findings of fact disclosed by subsequent events. This is consistent with the provisions of the Labour Relations Act, which require a board of arbitration to render a final and binding settlement of the differences between the parties, which in this case is the suitableness of the grievor for continued employment. It also avoids the difficulty of the grievor seeking to rely on s. 48(17) and the just cause provision of the collective agreement before a subsequent

arbitration board by arguing that the decision of the initial board is not legally binding on the subsequent board.[24]

A similar approach to the compliance with conditions coupled with a defined period is reflected in the decision of the board of arbitration in *Re Victoria Hospital Corp. and London & District Service Workers' Union, Local 220*,[25] although a contrary approach can be found in *Re Overwaitea Ltd. and Retail Clerks Union, Local 1518*.[26]

Functus Officio and Make Whole

Both the parties to collective agreements and arbitrators are well advised to consider carefully the intersection of the doctrine of *functus officio* with the generally accepted "make whole" principle of remedial jurisdiction. As a general rule arbitration proceeds on the basis that, should a grievance succeed, the board of arbitration will exercise that remedial jurisdiction necessary to place the grieving party in the position it would have been in but for the violation of the collective agreement. In the garden variety discipline or discharge case that is typically done when an arbitrator directs the removal of the discipline or the reinstatement of the employee, frequently using a phrase such as: "with compensation for all wages and benefits lost." Difficulties may arise to the extent that some "benefits," notably pension calculations, are more obscure than others, and may come to the fore only well after the implementation of the remedial award. Such difficulties can also arise when, because of the parties' inability to resolve the issue of quantum, a board of arbitration takes charge of the process of calculation in a process in which the parties themselves might overlook an important dimension.

That problem is to some degree reflected in the decision of Arbitrator Felicity D. Briggs in *Re Thunder Bay Regional Hospital and International Union of Operating Engineers, Local 856* (2002).[27] In that case the arbitrator found that the employer had improperly laid off operating engineers and assigned their work to non-bargaining unit employees. She directed, in part, that the employer reinstate

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[24]*Id.* at 316–17.
[25](1985), 22 L.A.C. (3d) 10 (M.G. Picher).
[26](1980), 25 L.A.C. (2d) 289 (G. M. Somjen).
[27]108 L.A.C. (4th) 184 (Briggs).

the grievant, who was a full-time operating engineer "with full compensation and benefits." When the parties found themselves unable to work out the compensation issues, a supplementary hearing was conducted that considered evidence such as the grievant's efforts at mitigating his losses, and the amount of wages owing, with interest. The arbitrator rendered a supplemental award which was obviously final in its form, directing the payment of a specific sum by way of wages lost, with interest, as well as an additional sum attributed to "monies owing due to benefits lost." In so awarding, the arbitrator stated, in part: "I reject the Union's various other claims."

Subsequently it became evident that the parties could not agree on the formula for the reinstatement of the grievant's pension. The union took the position that the issue of the pension could obviously not have been addressed until there was a clear determination of the wages to which he was entitled. With the wages defined in the supplemental award, the union then sought to engage the arbitrator's jurisdiction to make a determination as to the grievant's pension standing. The employer argued that the arbitrator had fully entertained all submissions with respect to the make whole aspect, had rejected all other claims of the union, and had effectively completed her award, rendering herself *functus officio*. After a careful and thoughtful review of the jurisprudence, Arbitrator Briggs agreed with the Hospital, finding that she had indeed exhausted her jurisdiction. She did not base her conclusion on the fact that she had not expressly reserved her jurisdiction any further, noting the Canadian authorities which well establish that such an express reservation of jurisdiction is not necessary. More fundamentally, she found that she had given both parties the fullest opportunity to make their submissions on the scope of the remedy to be issued, and that ". . . I have completed the task that was put before me. . . . In my supplemental decision, I provided a very specific and detailed itemized list of monies owing and expressly rejected what was not included in that list." Arbitrator Briggs noted that the documents placed before her did contain some reference to the employer's contribution to pension, without any monetary amount attached, so that the issue of pension was part of what was in dispute from the union's viewpoint at the time the issue of quantum was being adjudicated. Having rejected "the Union's various other claims," she found herself to be without jurisdiction to proceed further on the issue of pension contribution.

If there is moral to the story of the *Thunder Bay Regional Hospital* award, it is that parties who find themselves returning before an arbitrator to deal with issues of quantum should be extremely careful to articulate thoroughly the various heads of claim completely that are being made and, or conversely, to urge the arbitrator to continue to retain jurisdiction in respect of any legitimate heads of compensation that might yet be identified. As wise and all-seeing as arbitrators may be, they do not have the benefit of a crystal ball.

If another note of caution needs to be sounded, it is that boards of arbitration and parties should be wary of entanglement with the courts, institutions not generally noted for their deep understanding of labour relations realities. The issue of the reservation of jurisdiction can be twisted strangely in the hands of judges more accustomed to the strict interpretation of commercial contracts. A particularly troubling example is the decision of the Supreme Court of Newfoundland in *Newfoundland (Treasury Board) v. N.A.P.E.*[28]

In that case a board of arbitration was presented with a grievance concerning the discharge of an employee. At the outset of the arbitration the parties agreed that the board should retain jurisdiction for 90 days from the date of its award for the purposes of interpretation. A preliminary issue arose concerning whether the company had made a fatal error in the procedure followed, failing to give the employee the written notice required under article 13.05 of the collective agreement. It was common ground between the parties that if article 13.05 applied and the employer had failed to comply with it, the discharge would be a nullity from the outset. The majority ruled that the article did apply and allowed the grievance on that basis. It did not, therefore, deal with the substance of just cause, which would have been the next course of inquiry if the majority had rejected the union's position on the application of article 13.05.

The employer took the arbitration award on judicial review and succeeded in having the award quashed. In effect, the Court ruled that the board of arbitration exceeded its jurisdiction in its interpretation and application of article 13.05 in the circumstances. With its ruling on the preliminary issue quashed, the board reconvened to proceed to hear the merits of the discharge on the issue of just cause. The employer again moved for judicial review,

[28][1989] N.J. No. 168.

seeking a declaration that the board of arbitration was *functus officio*.

Cameron J. of the Supreme Court of Newfoundland ruled that the board had exhausted its jurisdiction. In a judgment that raises enormous concern about the consequences of boards of arbitration disposing of grievances on the basis of preliminary objections, Cameron J. focused on the board's agreed retention of jurisdiction for the period of 90 days to interpret its award and concluded that, in the circumstances, the board had made "a final decision" and could not purport to continue in the exercise of its jurisdiction concerning the alleged wrongful dismissal of the employee. Citing a judicial precedent from 1885, Cameron J. ruled, in part: ". . . If a final decision was made on the essential matter referred and if an issue can be determined on one ground, there is no requirement that the board come to a conclusion on every possible ground."[29] In a process of reasoning that entirely departs from the very concept of preliminary issues being distinguished from the merits of a dispute, he ruled that there was a conclusive and final determination as to the issue of wrongful dismissal and that the board was therefore *functus officio*.

Fortunately the decision of Cameron J. in *Newfoundland (Treasury Board) v. N.A.P.E.* appears to be exceptional, and not consistent with the general stream of court jurisprudence that does appear to reflect a better understanding of the workings of labour arbitration and the critical stakes dealt with by parties and arbitrators in that specialized forum. If the approach of Cameron J. should become the rule, it is obvious that boards of arbitration would virtually never dispose of cases on the basis of preliminary objections, and that reserving on such objections would become the general rule, thereby unnecessarily extending the length and cost of labour arbitration proceedings generally.

The Award of Interest

It is well settled that boards of labour arbitration in Canada have the jurisdiction to award interest as part of compensation. The simple principle is that money wrongfully held in the hands of the employer over time is money which, on a proper make whole order, should be remitted into the hands of the employee who was

[29] *Id.*

entitled to it in the first place.[30] Not surprisingly, therefore, the issue of whether a board of arbitration has retained jurisdiction to deal with questions of interest is one that can arise. In *City of Toronto and C.U.P.E., Local 416*,[31] the arbitrator found that an employee had been wrongfully deprived of long-term disability benefits for a period of two years. The board declared that he was entitled to such benefits and remained seized, ". . . should there be any difficulties in the implementation of this award." Subsequently the union claimed that the grievant should be entitled to interest on the monies that had been withheld. The employer argued that the arbitrator was *functus officio* with respect to any such determination. Arbitrator Starkman concluded that the completion of the award did involve consideration of the payment of interest, noting that the issue of interest had been raised in the initial grievance and had been briefly addressed in the submissions at the original hearing. He commented, in part, as follows:

> In this matter, the issue of interest was raised in the initial grievance and was also briefly addressed in oral submissions at the hearing. The issue for determination is whether this arbitration board has addressed the issue of interest entitlement in the initial decision so that it is now functus officio. The Employer pointed to the language in the body of the initial decision indicating that the issue being determined was the grievant's entitlement to long-term disability benefits under the terms of the policy of insurance, and submitted that since there is no provision for interest in the policy of insurance, the matter of the grievor's entitlement to interest in the award was denied.
>
> I must respectfully disagree with this conclusion. It is relatively rare, when an insurer is involved, for an employee's entitlement to long-term disability benefits to be adjudicated under the provisions of a collective agreement as such matters are normatively dealt with by the civil courts. Because of the wording of this particular collective agreement however, and the prior arbitral jurisprudence between the parties, there was no objection taken to having Mr. Doble's entitlement to long-term disability benefits pursuant to a policy of insurance being adjudicated under the grievance and arbitration provisions of the collective agreement. The purpose of referring to the policy of insurance in the initial award was to make it clear that the question of the grievor's entitlement to benefits and the question of what, if any, moneys might be owing to him were to be determined by reference to the insurance policy, and not to the wage grid or other entitlement provisions set out in the collective agreement.

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[30] *See Air Canada* (1981), 29 L.A.C. (2d) 142 (P.C. Picher).
[31] (2002), 113 L.A.C. (4th) 282 (Starkman).

> I appreciate that there is a strong interest in having finality to proceedings, and that parties, following the release of an award, should not be permitted to bring forth further issues, or further evidence and arguments on issues that were previously adjudicated.
>
> The issue of interest however was clearly raised in the initial hearing, but was not ruled on, in the initial award. In the normal course, boards of arbitration that issue awards which find a grievor entitled to compensation, leave the initial calculation of such compensation to the parties, and retain jurisdiction to resolve any difficulties that might arise, including allowing the parties to discuss whether interest will be paid, and if so, how it is to be calculated.[32]

That is the process that was followed in this case.

Suppose the Parties Settle

What is the result when, during the course of an arbitration, the parties settle their dispute? The accepted rule appears to be that the arbitrator is deemed to have exhausted his or her jurisdiction concerning the matter in dispute, subject only to the parties themselves agreeing that the arbitrator is to retain jurisdiction for the purposes of enforcing that settlement.[33]

It also seems to be generally accepted that an alleged violation of terms of settlement reached in a prior grievance can be dealt with in a subsequent grievance and properly heard by a freshly constituted board of arbitration, the view being that such a dispute is a difference arising from the interpretation or application of the collective agreement itself.[34] There have been arbitral awards in Canada that take the view that the enforcement of a settlement is not arbitrable and does not constitute a difference in relation to a collective agreement. An example of that is to be found in *Re Alberta (Government) and A.U.P.E.*[35]

One interesting Canadian arbitration award has, however, taken a different approach to the issue of the enforcement of settlements. Section 48(15) of the Ontario Labour Relations Act, 1995, provides that: "an arbitrator . . . may enforce the written settlement of a grievance." In *Re Community Lifecare Inc. and Canadian Healthcare Workers*,[36] Arbitrator Ellis was confronted with a conflict between

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[32]*Id.* at 287–88.

[33]*See generally Re British Columbia and B.C.J.E.U.* (1995), 51 L.A.C. (4th) 315 (R. B. Bird); *Re Stelco Inc. and U.S.W.A., Local 1005* (1998), 75 L.A.C. (4th) 346 (W. A. Marcotte).

[34]*See, e.g., Re Brewers' Warehousing Co. and United Brewers' Warehousing Workers' Provincial Board* (1992) 25 L.A.C. (4th) 12 (Collier).

[35](1983), 10 L.A.C. (3d) 71 (Larson).

[36](2000), 86 L.A.C. (4th) 39 (Ellis).

the parties regarding his jurisdiction to enforce the terms of a settlement that had been reached during the course of an arbitration before him. He was seized of a discharge grievance that the parties settled during the course of the arbitration, apparently agreeing on terms other than the reinstatement of the employee. Their agreement, which did not reserve any enforcement jurisdiction to Arbitrator Ellis, apparently provided for the employer to provide a reference letter in favour of the terminated employee. When the union subsequently complained that the employer failed to comply with that requirement, it sought to have Arbitrator Ellis exert a remedial jurisdiction to enforce it. To protect its interest, it also filed a separate grievance, which led the Minister of Labour to appoint a second arbitrator to deal with the same enforcement issue. The second arbitrator adjourned her proceedings *sine die* pending a determination by Arbitrator Ellis as to his own jurisdiction, and the objection of the employer to the effect that he no longer retained any jurisdiction in respect of the dispute.

Arbitrator Ellis ruled that both the original arbitrator, in that case himself, and the subsequent enforcement arbitrator had proper jurisdiction to deal with the case. He concluded, based on the use of the word "may" in article 48 (15) of the Act, that his jurisdiction to enforce the settlement was discretionary. After reviewing a number of considerations as to why an original arbitrator whose jurisdiction has not been expressly retained by the parties in the making of a settlement should arguably not seize jurisdiction of enforcement proceedings, he ultimately ruled that he would not exercise his discretion to do so in the case before him, conditional on the matter being fully disposed of by the enforcement arbitrator whose proceedings were then adjourned. The outcome fashioned by Arbitrator Ellis was obviously one that would not have prompted either party to seek judicial review. However, it remains at least arguable whether, in law, a board of arbitration in Ontario retains jurisdiction to enforce a settlement made by the parties when they do not expressly reserve an enforcement jurisdiction to that arbitrator, or whether, as the employer contended, such settlements can be enforced only by the processing of a subsequent grievance and the appointment of another arbitrator to deal specifically with that grievance. With respect, what the award of Arbitrator Ellis does not address is the potential mischief that might arise should two arbitrators with concurrent jurisdiction over the same matter each decline to defer to the other, with the possible consequence of conflicting awards.

Summary and Conclusions

A review of the jurisprudence confirms that there has been some considerable evolution of the doctrine of *functus officio* and the related principles that govern the retention of jurisdiction by labour arbitrators in Canada. The fundamental principles, stemming from the decision of the Supreme Court of Canada in *Chandler*, would appear to be that a board of arbitration does inherently retain the jurisdiction, firstly to correct any clerical or technical errors that might appear in its decision. Secondly, boards of arbitration also retain the jurisdiction to issue a correcting award if there was clearly an error in expressing the manifest intention of the tribunal. Finally, the overarching principle is that a board of labour arbitration in Canada, being statutorily bound to render a final and binding decision resolving disputes between the parties to a collective agreement, continues to retain jurisdiction to make all necessary rulings and determinations until such time as its task is truly completed. The retaining of jurisdiction does not depend on whether the board of arbitration expressly reserved jurisdiction in the text of the original award. That remedial jurisdiction to compete an award does not, however, extend to a board of labour arbitration reconsidering a matter it has decided and disposed of or effectively reopening its proceedings at the request of either party to bring new and additional evidence or to raise new or different issues beyond those of which the board was originally seized. As is evident from the jurisprudence reviewed, it is clearly incumbent on both the parties to the arbitration process and upon arbitrators themselves to be alert to the scope of an arbitrator's retained jurisdiction and the principles by which the exhaustion of jurisdiction will be determined.