HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	P22/2023
File Title:	CBI Constructors Pty Ltd & Anor v. Chevron Australia Pty Ltc
Registry:	Perth
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	16 Feb 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY P22/2023

BETWEEN:

CBI CONSTRUCTORS PTY LTD
First Appellant
KENT PROJECTS PTY LTD
Second Appellant

10 and

CHEVRON AUSTRALIA PTY LTD
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Internet publication

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. Issue One: Where it has been established, by the unchallenged finding of the courts below, that the arbitral tribunal's first interim award decided all issues of liability between the parties, is the court precluded from exercising the power under s 34(2)(a)(iii) of the CAA[1] to set aside a second interim award which purported to decide a new issue of liability (the Contract Criteria Case) by reason of the circumstance that the tribunal had also concluded that no estoppel arose which prevented the Appellants from being entitled to advance the Contract Criteria Case?

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3. The Respondent accepts the Appellants' statement of Issue Two.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

4. No notices are required to be given under s 78B of the *Judiciary Act 1903* (Cth).

[1] *Commercial Arbitration Act 2012* (WA). Unless otherwise stated, these submissions adopt the terms defined in the Appellants' Submissions (***AS***).

Part IV: Material facts

5. The Respondent would point to the following relevant material facts in addition to those in AS Part V.

6. The Court of Appeal made the following findings, with findings to like effect having been made by the Primary Judge:

   (a) The meaning and effect of the procedural orders by which the tribunal bifurcated the arbitral proceedings was that:

      (i) At the November Hearing all issues of liability would be heard in respect of the Respondent's liability to the Appellants arising under the Contract, including in respect of payment of Staff, and any liability on the part of the Appellants to repay any overpayment they received beyond that to which they were contractually entitled as alleged by the Respondent (i.e. costs actually incurred).[2]

      (ii) There was no residual issue for determination at the Second Hearing as to whether the Appellants had any further alternative contractual claim for charging the Respondent for Staff (or resisting the Respondent's counterclaim in respect of the claimed overpayments for Staff).[3]

      (iii) The tribunal would issue an award arising from the November Hearing (i.e. arising from the determination of all issues of liability).[4]

   (b) At the November Hearing there were relevant admissions of liability made by the Appellants in respect of the Respondent's counterclaims (but not their quantification) to recover sums paid to the Appellants in excess of the sums they had paid or were liable to pay their Staff.[5]

   (c) There was no indication prior to or at the time of the First Interim Award that the Appellants were contending that Staff costs were to be determined by

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2 CA [103]-[104], [113] (Core Appeal Book (***CAB***) 198, 200).
3 CA [114] (CAB 200).
4 CA [109] (CAB 199).
5 CA [100] (CAB 197); CA Appendix [80] (CAB 241). See also PJ [167]-[168] (CAB 67), PJ [202] (CAB 76).

reference to the Contract Criteria Case, which was a new case on liability pleaded by the Appellants for the first time in May 2019.[6]

(d) (Contrary to AS [11]) the amended particulars of counterclaim (some three months before the November Hearing) was not the first time the Respondent set out the methodology behind its claim but rather represented a development of the methodology for its quantification only (nor is there any finding that it was being then advanced for the first time).[7]

7. There is no appeal to the High Court from any of these findings.

8. The Respondent objected to the Tribunal's jurisdiction in respect of the Tribunal's power to reconsider the matters determined in the First Interim Award.[8] The Primary Judge set aside the whole of the Second Interim Award (not simply the tribunal's conclusion on the merits of the Contract Criteria Case or its conclusion that it had jurisdiction to decide the Contract Criteria Case).[9]

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Part V: Argument

9. As to Issue One: The Primary Judge and the Court of Appeal correctly applied an orthodox approach on the facts as they found them. The parties had identified their issues of liability in pleadings and particulars. There was an order (on the Appellants' application) that, relevantly, the first hearing be to determine "*all issues of liability*". The Appellants made an admission of liability which necessarily was inconsistent with the later advanced Contract Criteria Case. The Tribunal heard the issues of liability in dispute and decided them in its First Interim Award. Having done so, the Tribunal was *functus officio* in respect of all issues of liability, including the Contract Criteria Case. Consequently, the courts below set aside the Second Interim Award under s 34(2)(a)(iii) of the CAA (and in doing so disposed of the Tribunal majority's conclusions, including on the lack of any preclusionary estoppel).

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10. As to Issue Two: The Primary Judge and the Court of Appeal applied the correct test when considering Chevron's application under s 34(2)(a)(iii) and rightly concluded

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6 CA [25] (CAB 155-156), [125(1)], [126] (CAB 203). See also PJ [209]-[212] (CAB 78-78).

7 CA Appendix [21], [25], [26], [46] (CAB 210, 212, 219-220). See also CA [98] (CAB 196-197), PJ [207] (CAB 77).

8 CA [28]-[30] (CAB 156-157).

9 PJ [220] (CAB 80-81); PJ orders at CAB 140.

(after careful consideration of the majority's reasoning) that the Tribunal's majority decision was wrong, having "*overlooked or mischaracterised the effect of many of the pleadings, particulars and submissions and the procedural orders leading up to the First Hearing*".[10]

Issue One arising from the Notice of Appeal

11. Arbitral tribunals derive their authority from the agreement of the parties. In many arbitration agreements that jurisdiction extends to deciding a wide range of disputes. But it is a jurisdiction to decide the disputes finally and only once. Having made a final award, the tribunal cannot reopen or revisit the dispute. This is the orthodox and well-established position,[11] and captured conveniently by the expression often used to describe the tribunal as being *functus officio*.

12. An award can be final for these purposes even if it is an interim (partial) award.[12] Mustill & Boyd in *The Law and Practice of Commercial Arbitration in England* state:[13]

> When an arbitrator makes a valid award his authority as an arbitrator comes to an end and with it his powers and duties in the reference: he is then said to be *functus officio*. This at least is the general rule, although it needs qualification in two respects:
>
> First, if the award is merely an interim award, the arbitrator still has authority to deal with the matters left over, although he is *functus officio* as regards matters dealt with in the award…" (emphasis added, footnotes omitted).

13. In this matter, the arbitration agreement in the Contract provides that *any* award (contemplating that there may be more than one award) shall be final and binding,[14] and adopts the UNCITRAL Arbitration Rules 2010.[15] Those Rules in turn provide that the

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10 CA [121] (CAB 202).

11 See PJ [75]-[83] and the cases there cited (CAB 27-29); and also CA [85]-[91] (CAB 186-188).

12 See ***Fidelitas** Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 644; ***Discovery Beach** Project Pty Ltd v Northbuild Construction Pty Ltd* [2011] QSC 306 at [68]; *Alvaro v Temple* [2009] WASC 205 at [67]; *APG Homes Pty Ltd v Primary Creations Pty Ltd* [2009] WASC 227 at [73]; *ABB Service Pty Ltd v Pyrmont Light Rail Company Ltd* (2010) 77 NSWLR 321 at [70]; *Emirates Trading Agency Llc v Sociedade De Fomento Industrial Private Ltd* [2016] 1 All ER Comm 517; [2015] EWHC 1452 (Comm) at [26]; ***L W Infrastructure** Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] SGHC 264 at [32]. In these cases the tribunal was said to be *functus officio* to the extent (variously expressed) of the matters the subject of the interim award.

13 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd ed, 1989) at 404-405. See PJ [89]-[91] (CAB 30-31).

14 Clause 21.2.7 (Appellants' Book of Further Materials (***AFM***) 15).

15 Clause 21.2.2 (AFM 14). The parties proceeded under the 2010 version of the Rules: see PJ [224] citing First Interim Award at [12] (CAB 87).

tribunal may make separate awards on different issues at different times, and that all awards shall be final.[16]

14. If the tribunal seeks to reopen a dispute covered by its earlier final interim award and makes a second award, that second award is an award falling within the scope of the language of s 34(2)(a)(iii) of the CAA. This is because there has been no submission to *again* arbitrate that dispute and it will accordingly contain decisions on matters beyond the scope of the submission to arbitration. The Primary Judge held that an application to set aside an award on the basis that the tribunal was *functus officio*, in that its authority to resolve the parties' dispute or an aspect of it had come to an earlier end, arises under s 34(2)(a)(iii) as being beyond the scope of the submission to arbitration.[17] There was no appeal from the determination that s 34(2)(a)(iii) operated in that circumstance. This much was conceded by the Appellants before the Court of Appeal when they accepted that *functus officio* can fall within that provision.[18] The High Court of Singapore has recently expressed the same view of the ambit of art 34(2)(a)(iii) of the Model Law.[19]

15. It is, of course, a well-established part of this country's jurisprudence (and indeed more broadly) that generally a tribunal can make a decision on the issue as to the existence or scope of its jurisdiction should that arise. The *competence-competence* principle, enacted in s 16 of the CAA, recognises a tribunal's power to decide whether it has jurisdiction.[20] But it is best understood as a rule of chronological priority and not as empowering arbitrators to be the sole judge of their jurisdiction.[21] And a tribunal cannot confer on itself an authority which it does not rightly have by an erroneous decision as to authority: see ***United Mexican States v Cargill**, Inc.* (2011) 341 DLR (4th) 249; [2011] ONCA 622 at [41].[22]

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16 Article 34(1) and (2).

17 PJ [96]-[97] (CAB 32).

18 Transcript of proceedings before the Supreme Court of Western Australia Court of Appeal (CACV 95 of 2021) dated 8 September 2022 at p. 65 (Respondent's Book of Further Material (***RFM***) p. 5).

19 *ONGC Petro additions Ltd v DL E&C Co, Ltd* [2023] SGHC 197 at [32]-[33].

20 *Rinehart v Hancock* (2019) 267 CLR 514 at [13]; Blackaby et. al., *Redfern and Hunter: Law and Practice of International Commercial Arbitration* (Thomson Reuters, 7th ed, 2022) at [10.36] and [5.117]; Emmanuel Gaillard and John Savage, *Fouchard Galliard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at 401.

21 *The Russian Federation v Luxtona Limited* [2023] ONCA 393 at [34]; Emmanuel Gaillard and John Savage, *Fouchard Galliard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) paras 659-660.

22 Where the court stated "*The tribunal therefore had to be correct in the sense that the decision it made had to be within the scope of the submission and the NAFTA provisions. ... It has no authority to expand its jurisdiction by incorrectly interpreting the submission or the NAFTA, even if its interpretation could be*

16. The Primary Judge and the Court of Appeal fully examined the pleadings, particulars, and submissions made, as well as the admissions made on behalf of the Appellants. Having done so the Court of Appeal (affirming the Primary Judge's findings) concluded that the majority of the Tribunal had "*overlooked or mischaracterised the effect of many of the pleadings, particulars and submissions and the procedural orders leading up to the First Hearing*".[23] The Respondent had at all times pleaded its case that it had overpaid the Appellants because it had paid them more than the Appellants had paid or were obliged to pay their staff.[24] The only relevant answer pleaded by the Appellants was to rely on their contentions (the **Conversion to Rates Contentions**) that there had been some amendment to the Contract (or an estoppel arose to like effect) which converted their entitlement for payment in respect of their Staff to a Rates[25] entitlement (not merely their actual costs).[26] And indeed, in writing and in oral submissions, the Appellants admitted their liability for the Respondent's counterclaim (but not its quantification) if they failed in their case on the Conversion to Rates Contentions.[27]

17. Thus, the Primary Judge and the Court of Appeal concluded that when the Tribunal conducted the November Hearing and made the First Interim Award there was an admission by the Appellants of liability to the Respondent in the event that the Conversion to Rates Contentions failed (which they did) and that the First Interim Award dealt with and decided all issues of liability.[28]

18. The orthodox conclusion then drawn was that the Tribunal was *functus officio* in respect of all issues of liability. The Primary Judge and the Court of Appeal also held that the Contract Criteria Case is an issue of liability and accordingly the Tribunal did not have jurisdiction to make the Second Interim Award.[29]

19. However, the Appellants' case in this Court on "Issue One" (as defined in AS [2]) requires that there be a different approach: (i) where many of the same facts which give

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viewed as a reasonable one." See also ***TCL** Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [12].

[23] CA [121] (CAB 202).

[24] CA [98] (CAB 196-197); CA Appendix [21] (CAB 210); CA Appendix [46] (CAB 219-220).

[25] As defined in the Contract. See CA [10] (CAB 152).

[26] CA [99] (CAB 197).

[27] CA [100] (CAB 197), CA Appendix [77], [80] (CAB 238-241). PJ [167]-[168], [178], [202] (CAB 67, 71, 76).

[28] PJ [193] (CAB 74); PJ [206]-[207] (CAB 77-78); CA [113]-[115] (CAB 200-201); CA Appendix [80] (CAB 241).

[29] PJ [198], [215], [218] (CAB 75, 79-80); CA [9], [121(1)], [124], [125(1)], [127] (CAB 151, 202-204).

rise to the conclusion that the Tribunal is *functus officio* also bear upon the issue of whether an estoppel would arise precluding a party from agitating the Contract Criteria Case; or (ii) because the Tribunal's reasoning turned, in part, on its view of the ambit of its procedural orders.

20. The Appellants' "Issue One" is wider in scope than Ground One of the Notice of Appeal, on which they were granted special leave. Ground One is limited to the admissibility versus jurisdiction dichotomy in respect of the Tribunal's underlying findings. The Appellants' stated Issue One, and their submissions, extend well beyond this and should to that extent not be entertained by the Court.

10 *The No Estoppel Findings*

21. The Appellants misstate the content and effect of the Respondent's June 2019 objection and of the facts: see AS [22]. If a tribunal, otherwise acting within jurisdiction, makes an erroneous finding that an earlier adjudicative decision (by it or any other tribunal or court) did not give rise to an estoppel precluding a party from bringing a particular claim, that would not be a ground for setting aside the Second Interim Award relying on s 34(2)(a)(iii) of the CAA. Preclusionary estoppels, if pleaded, operate inter partes and prevent the maintenance of a claim or the advancement of an issue.[30]

22. But contrary to the Appellants' submission, that does not carry with it a concession that a CAA s 34(2)(a)(iii) "*review is not available as regards the finding that the First*

20 *Interim Award was not a final determination of the Contract Criteria Case*": see AS [22]. The Respondent's submissions below made plain that it did contend that s 34(2)(a)(iii) afforded a basis to set aside the Second Interim Award where the Tribunal was *functus officio* because of the majority of the Tribunal's erroneous view of the scope of the effect of the First Interim Award.[31]

23. Further, it was not the Respondent's case at any point that the Tribunal's findings as to the want of any estoppel were correct. Quite the opposite.

24. The Appellants contend that the conclusions relating to estoppel and *functus officio* "*cannot contradict each other*": see AS [23]. Often they will co-exist and be consistent

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30 *BTN v BTP* [2021] SLR 276, [2020] SGCA 105 at [71]; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [22].

31 PJ [64]-[65] (CAB 24).

(as was the case in *Fidelitas* and *Discovery Beach*). It is the Respondent's case that the Tribunal fell into error as to both conclusions. However, whatever the limits on the ability to apply to set aside an award on the basis of an error concerning the non-establishment of the estoppels, s 34(2)(a)(iii) of the CAA confers on the court the power to set aside the Second Interim Award if the Tribunal was *functus officio*. That power is not excluded where a challenge to the tribunal's conclusion, based on its erroneous view of the same underlying facts, as to the non-existence of an estoppel would not of itself be open under s 34(2)(a)(iii). Indeed, the section explicitly contemplates that the Second Interim Award may contain decisions on matters within jurisdiction which cannot be
10 separated from those made outside jurisdiction but nonetheless empowers the court to set aside the award as a whole. The language of s 34(2)(a)(iii) cannot be read down in the way the Appellants seek.

25. It is an inversion to contend, as the Appellants do,[32] that because a particular decision if made within jurisdiction cannot be challenged, it is therefore not possible to ask and the court to answer the question whether it was made within jurisdiction in the first place. No case supports that contention.

(a) Contrary to AS [24], Diplock LJ in *Fidelitas* treated the exhaustion of the tribunal's authority as separate from the creation of an estoppel.[33]

(b) Contrary to AS [25]-[26], the Singapore Court of Appeal's decision in ***PT***
20 ***Asuransi** v Dexia Bank*[34] does not assist the Appellants. There were two successive arbitrations, and the tribunal in the later arbitration decided that it did not have "jurisdiction"[35] to deal with a party's claim on the basis that the party could and should have brought the claim in the earlier arbitration. The case did not (and could not) involve any question of *functus officio* of a tribunal.

26. The two awkward results for which the Appellants contend either do not arise or do not support their conclusion.

27. *First*, it is said (at AS [27]) that the Contract Criteria Case must be capable of being advanced somewhere. That contention is not likely to be correct (as we shall return to).

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32 See AS [22]-[26].
33 [1966] 1 QB 630 at 644. See also CA [89] (CAB 187).
34 [2007] 1 SLR(R) 597.
35 In *PT Asuransi* the word "jurisdiction" was used incorrectly: see *BTN v BTP* [2019] SGHC 212 at [76].

But even if it was correct, it is no answer to the conclusion that the Tribunal was no longer authorised to determine that issue. The conclusion that a tribunal is *functus officio* does not depend on the further conclusion as to whether the claim can or cannot be advanced in some other forum.

28. The premise however is not correct. The whole of the Second Interim Award has been set aside and this included the Tribunal's findings and conclusions as to the want of an estoppel. The power to do so is expressly conferred by s 34(2)(a)(iii) and was exercised by the Primary Judge. The Appellants did not raise any ground of appeal contesting the exercise of that power to set aside the whole of the Second Interim Award (other than
10 the more general contention that no power arises to set aside any part of it).

29. Further, given the (unchallenged) findings of the Primary Judge and the Court of Appeal in this case there seems little likelihood that it is correct to contend that the Contract Criteria Case remains capable of being advanced by the Appellants anywhere. The Appellants would be estopped from doing so. Certainly there is nothing in the now set aside findings and reasoning of the majority members of the Tribunal that could be relied on to establish that the Contract Criteria Case could be advanced in another tribunal or court.

30. *Second*, it is submitted (at AS [28]) that it is an awkward consequence that the result must be different if the Tribunal had been considering the preclusionary effect of the
20 decision of another tribunal and that this difference is unprincipled.

31. To the contrary, the difference is essential and reflects the core principle that the scope of the jurisdiction of the tribunal is set by the parties' agreement. Indeed, it would be odd if there was no difference. Only where the tribunal itself makes the earlier decision will the issue of it being *functus officio* arise; and it is only in that situation that the tribunal, when it makes the second award, can be said to be making a decision on matters *beyond* the scope of the submission to it. In the case where the earlier decision is by another tribunal or a court, the dispute the subject of the later submission to arbitration would be likely to include the tribunal having to decide whether the claim or an issue is one which a litigant can or cannot advance. In such a situation no issue of the tribunal
30 being *functus officio* will be involved at all. That was the case in *BTN v BTP*[36] and *PT*

[36] [2021] SLR 276.

Asuransi.[37] But even then the tribunal could not decide the claim or issue and then change its mind and seek to revisit its decision.

32. The four additional matters relied on by the Appellants (commencing at AS [29]) can also be put aside.

33. *First*, it is contended (commencing at AS [30]) that the courts below misunderstood the concept of *functus officio*. It may be accepted that the expression *functus officio* is a description of the tribunal having performed (as to the whole dispute or as to part) its function. It has been employed in that way to describe the effect of interim awards on the jurisdiction of the tribunal in this country, England, and Singapore, and in texts on arbitration generally.[38] The Court of Appeal (at [86]) correctly confirmed the jurisdictional nature of *functus officio* as descriptive of the completion or exhaustion of the authority of the arbitrator to decide.

34. It seems to be submitted that such a description cannot be applied to an award unless it is a final award by which a tribunal's mandate is terminated within the meaning of s 32(3) of the CAA. This can be rejected.

(a) It is not a point previously urged by the Appellants before the courts below.

(b) To the contrary, it is inconsistent with the submissions made by the Appellants before the Tribunal and the courts below.[39] Before the Tribunal, the Appellants admitted that the Tribunal was *functus officio* in relation to the issues decided as part of the November Hearing (i.e. in the First Interim Award),[40] and that the First Interim Award was final and binding on the parties.[41] In their written submissions before the Primary Judge, the Appellants submitted that the principle of *functus officio* is "*longstanding and uncontroversial*",[42] and that a

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37 [2007] 1 SLR(R) 597. See paragraph 25(b) above.

38 See again the references at footnotes 11 to 13.

39 The Appellants are bound by the conduct of their case below, and should not be permitted to raise new or inconsistent arguments at this stage: *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481, 483; *Coulton v Holcombe* (1986) 162 CLR 1, 7-8 and 11.

40 See the Claimant's Reply to Respondent's First Response to the Claimant's Amended Case on Quantum Issues (in the arbitration) dated 9 July 2019 at [2.45.6] (RFM p. 8). The admission is also cited in Arbitrator Pullin's dissent in the Second Interim Award at [16.41], as cited in PJ [163] (CAB 63).

41 See the Claimant's Reply to Respondent's First Response to the Claimant's Amended Case on Quantum Issues (in the arbitration) dated 9 July 2019 at [2.45.4] (RFM p. 8).

42 Defendants' Amended Submissions filed in the Supreme Court of Western Australia (ARB 8 of 2020 and ARB 9 of 2020) dated 9 June 2021 at [88] (RFM p. 10).

tribunal may become *functus* following either a final award or an interim award.[43] In oral submissions before the Court of Appeal, the Appellants' Senior Counsel accepted the proposition that if an award has the character of finality from which an estoppel operates, then the same character of finality leads to the conclusion that a tribunal is *functus*.[44]

(c) Section 32 deals with the termination of a tribunal's mandate as a whole. It tells us nothing as to the scope of the matters which a tribunal is competent to deal with before that mandate terminates.

(d) If the Appellants' contention was accepted, every interim award would be merely provisional. It would, on this contention, always be open for the tribunal (on application or of its own motion) to review and change the interim award. Such a conclusion would: (i) be inconsistent with the terms of the arbitration agreement here (incorporating the UNCITRAL Rules which, as mentioned above, contemplate separate awards at different times on different issues each of which shall be final); and (ii) mean that the careful limitations on the tribunal correcting or interpreting an award could not apply to an interim award.

(e) But more fundamentally, s 34(2)(a)(iii) contains an express power to set aside the Second Interim Award in this case. It is that power which was exercised – not by reference to the expression *functus officio*, but because there has been no submission to again arbitrate a dispute as to an issue of liability, and the Second Interim Award accordingly contains decisions on matters beyond the scope of the submission to arbitration.

(f) The fact (AS [34]) that tribunals may have to deal with questions as to whether interim awards are final so as to preclude further consideration of a question or claim may be accepted. But while any tribunal may have to decide whether it has jurisdiction, that does not mean it can enlarge its own authority (so as to become entitled to reopen an earlier determination) by an erroneous conclusion

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43 Defendants' Amended Submissions filed in the Supreme Court of Western Australia (ARB 8 of 2020 and ARB 9 of 2020) dated 9 June 2021 at [89]-[93] (RFM pp. 10-12).

44 Transcript of proceedings before the Supreme Court of Western Australia Court of Appeal (CACV 95 of 2021) dated 8 September 2022 at p. 81 (RFM p. 6).

on this issue and that the court cannot exercise its power under s 34(2)(a)(iii) to set aside the resultant award made outside the tribunal's authority.[45]

35. The supporting submissions made at AS [35]-[36] do not assist the Appellants. That the CAA contains limited rights of review, and limits the court's intervention to where it is expressly provided for in the CAA, does not afford a basis for failing to give full effect to the basis of judicial intervention explicitly provided for in s 34(2)(a)(iii).[46] The ends of fairness and finality in this case, enshrined in the paramount object in s 1C(1) of the CAA, are fully served by adopting the course taken by the Primary Judge and the Court of Appeal. The Appellants' approach is, with respect to final interim awards, the antithesis of finality.

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36. The cases relied upon at AS [35] do not assist the Appellants. They turn on the proper construction of materially different statutory regimes and have no bearing on the interim awards of private tribunals.

37. *Secondly*, it is said (at AS [37]) that the tribunal is the *exclusive arbiter* of the extent of finality of its interim awards. But the extent of the tribunal's jurisdiction is to determine finally and only once the disputes that are submitted to it. If a tribunal were the exclusive arbiter of whether it had finally determined an award, it would have the last say on the extent of its jurisdiction. Such a proposition is contrary to ss 16(9) and 34(2)(a)(iii) of the CAA and Article V(1)(c) of the New York Convention. This question is addressed more fully in relation to Issue Two below.

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38. The Appellants address a different and new point in AS [38]-[39]. There it is submitted that the "*dispute as to finality of* [the First Interim Award]" is within jurisdiction because it falls within the scope of the term "Dispute" in the arbitration agreement. The premise of the contention is that the parties conferred jurisdiction on the Tribunal conclusively to determine its own jurisdiction. It is a radical proposition not grounded in the text of the arbitration clause, or the Respondent's objection to the Tribunal's jurisdiction. This submission should be rejected for several reasons.

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45 See the references in PJ [101]-[106] (CAB 33-34).

46 As confirmed in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 205 at [25]-[27] in relation to the Model Law as applied in Singapore.

(a) It is a contention not previously urged by the Appellants before the courts below (or indeed the Tribunal). Rather than advancing this contention earlier and invoking the procedures in clause 21.2.1 of the Contract[47] (or insisting on the Respondent doing so), the Appellants, like the Respondent, rightly dealt with the Respondent's application as an objection to the Tribunal dealing with the Contract Criteria Case. And the parties continued to deal with it as such in the arbitration, and then in the courts, by the Respondent's application to the Primary Judge under s 34(2)(a)(iii) of the CAA and the Appellants' appeal to the Court of Appeal.

10 (b) It is outside the scope of the grounds of appeal in respect of which special leave has been granted.

(c) An objection to the Tribunal's jurisdiction on the basis that it is *functus officio* is not a "Dispute" within the language of the Contract. It is a challenge to the Tribunal's jurisdiction arising from the Tribunal having made the First Interim Award. It is not, in that sense, the same as any other dispute or controversy "*arising out of* [the] *Agreement*".[48] The parties cannot have intended by that expression to refer to the Tribunal, for it to finally and exclusively decide, an objection of this kind. The Contract does not do so expressly and construing it in the way urged by the Appellants would produce potentially absurd outcomes.

20 A dispute about any procedural order, or any step taken in arbitral proceedings, would then be subject to the dispute resolution process provided for in the Contract (calling for negotiation and mediation, before arbitration).[49] Such an outcome would also be inconsistent with the objective, apparent from the arbitration clause read as a whole, of resolving disputes by arbitration as quickly as possible.[50]

(d) The Appellants' approach is also inconsistent with the parties' plain intention, that any award would be final and binding. The Appellants' construction would permit any dispute about an interim award's scope, meaning or effect to be

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[47] AFM 14.
[48] Contract clauses 1.26 and 21.2 (AFM 8, 14-15).
[49] Adopting the language of Ball J in *Construcciones y Auxiliar de Ferrocarriles SA v CPB Contractors Pty Ltd* [2022] NSWSC 1264 at [42], leading to an "*infinite regress of Disputes*".
[50] See Contract clauses 21.2.5 and 21.2.6 in particular (AFM 14-15).

decided again by the tribunal. The UNCITRAL Rules, adopted by the parties to govern the arbitration, are also inconsistent with the Appellants' construction.[51]

(e) The language used to describe the Dispute does not confer on the Tribunal the power conclusively to decide its jurisdiction and to the exclusion of the court's review under the CAA. To do so would be tantamount to construing the arbitration clause as purporting to give a tribunal the last word on its own jurisdiction so as to seek to displace the curial review provided for by s 16(9) and s 34(2)(a)(iii) of an award containing a decision on its own jurisdiction.[52]

39. *Thirdly*, it is submitted (at AS [40]) that *procedural orders* fall within the exclusive domain of the tribunal. In doing so the Appellants rely on *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [52]. In that case the Singapore High Court held that art 34(2)(a)(iv) of the Model Law (which is the same as s 34(2)(a)(iv) of the CAA) is not engaged if the challenge is against the tribunal's procedural orders or directions, which "*fall within the exclusive domain of the arbitral tribunal*".

40. The present case, however, is not concerned with a challenge to procedural orders and is clearly not concerned merely with the scope and effect of procedural orders, but with the scope and effect of the First Interim Award. The context for that award required consideration of the pleadings, particulars, procedural orders, submissions, and admissions made, as well as examining the award itself in detail.

41. The procedural flexibility given to the tribunal by art 17 of the UNCITRAL Rules is identical to that which would apply under s 19(2) CAA absent such agreement: i.e. the tribunal may conduct the arbitration in such manner as it considers appropriate. But the parties' agreement that the tribunal is to have that procedural flexibility cannot be construed as meaning that they have agreed that the tribunal is to be the final arbiter of

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[51] Contract clause 21.2.7. (AFM 15); UNCITRAL Arbitration Rules 2010, arts 23(3), 34(2).

[52] *TCL* at [12], [76]. See also *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 at [108]; *lululemon athletica Canada inc v Industrial Color Productions Inc* [2021] BCSC 15 at [52]-[54]. At the very least express words, not employed here, would be needed to confer jurisdiction on the tribunal to conclusively decide its jurisdiction: see *LG Caltex Gas Co v China National Petroleum Co* [2001] EWCA Civ 788 at [63]-[64], [67]-[68]; and see Gary Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, Vol 1, 2021) at § 7.03[A](3). The test in the United States of America is whether it is shown by "clear and unmistakeable" evidence that the parties intended to confer on the tribunal itself the role of deciding conclusively its jurisdiction: *First Options of Chicago Inc v Kaplan*, 514 US 938 (1995) at 944.

its own jurisdiction (or that the court is precluded from examining the tribunal's view on an application under s 34(2)(a)(iii)).

42. Further, allowing a tribunal, under the guise of procedural flexibility, to be the final arbiter of when it can reopen its awards would be contrary to the policy embodied in the paramount object of the CAA. Far from facilitating the final resolution of the dispute by the tribunal, it would undermine that finality by allowing the tribunal to reopen and revisit matters it resolved in its award, potentially endlessly (or at least subject to s 32 CAA).

43. *Fourthly*, contrary to the Appellants' submission (at AS [42]), the distinction sometimes drawn between admissibility and jurisdiction supports the conclusions reached below. To describe a tribunal as *functus officio* is a description of its lack of continuing authority because it has already performed the function. This goes to the tribunal's jurisdiction. The tribunal did not have jurisdiction to hear the Contract Criteria Case.[53]

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(a) The editors of *Redfern and Hunter on International Arbitration*[54] state that "*the delivery of a final award renders the arbitral tribunal functus officio: it ceases to have any further jurisdiction in respect of the dispute*" (emphasis added).

(b) The editors of *Russell on Arbitration* say:[55]

> … once an award is made, the tribunal becomes "functus officio" with regard to that part of the reference, and if it is a final award its authority to act ceases and the reference terminates. At this point therefore the tribunal has exhausted or concluded all that it had jurisdiction to deal with so far as the matters covered by the award are concerned. (emphasis added, footnotes omitted)

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(c) As Ribeiro PJ said in ***C v D***,[56] an objection under art 34(2)(a)(iii) of the Model Law,[57] that the content of an award goes beyond what was agreed to be referred to arbitration, is an objection "*that the relevant party has not agreed to the tribunal exercising authority to conduct the arbitration in the circumstances*

53 See *Fidelitas* at 644; *Discovery Beach* at [68].
54 Blackaby et al, *Redfern and Hunter on International Arbitration* (OUP, 6th ed, 2015) at [9.18].
55 Sutton, Gill and Gearing, *Russell on Arbitration* (Sweet & Maxwell, 24th ed, 2015) at [6-166].
56 [2023] HKCFA 16.
57 As applied by s 81 of the *Arbitration Ordinance* of Hong Kong (Cap. 609).

specified. The objection is to the tribunal and not just to the claim. It goes to jurisdiction and not admissibility." (emphasis added)[58]

(d) In *L W Infrastructure Pte Ltd*,[59] Belinda Ang Saw Ean J spoke in terms of "*capacity to act*":

> Historically, an arbitral tribunal lost its capacity to act after it had rendered its final award. In the terminology used in common law jurisdictions, the tribunal became "functus officio" – it had completed its mandate by making an award with res judicata effect. The functus officio doctrine is a time-honoured one, and is one of the methods by which the law gives practical effect to the principle
10 of finality. (emphasis added)

44. The dichotomy between admissibility and jurisdiction raised by Ground One in the Notice of Appeal does not assist the Appellants, and nor is there any merit in the arguments that the Appellants have raised for the first time in the AS (even if they are permitted to run them).

Issue Two (as identified in the Special Leave Application and the Notice of Appeal)

45. Issue Two represents a narrowing of Ground Two in the Notice of Appeal. The latter identifies that the Court of Appeal erred in not affording "*absolute, or alternatively substantial, deference*" to the decision of the majority of the Tribunal, rather than determine for itself the correctness of that decision. The currently stated Issue Two
20 refers only to substantial deference. Despite that, submissions are made by the Appellants which refer to absolute deference. Both formulations concern the *standard* to be applied on an application under s 34(2)(a)(iii). Neither should be accepted.

46. *First*, the language of s 34(2)(a) gives no support to either approach. What it calls for is the applicant to furnish proof of something, which enlivens the court's discretion. There is no requirement to overcome an elevated threshold other than proof of the conclusion. A standard of affording absolute deference would entirely cut across the power conferred by the section. Even if an applicant furnished the required proof to the court, the discretion to set aside the award would not arise. Such a construction of the section is untenable.

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58 *C v D* at [53].
59 At [29].

47. *Second*, the Primary Judge adopted a *de novo* review of the correctness of the majority of the Tribunal's conclusion as the standard of the supervisory court's review pursuant to s 34(2)(a)(iii).[60] There was no ground of appeal to the Court of Appeal which challenged that approach.

48. *Third*, the standard which the courts below found was to be applied was for the court itself to decide if the tribunal had acted outside its jurisdiction. This has been widely accepted as the correct standard. That standard has been applied:

(a) In this Court in relation to an application made under art 36 of the Model Law, for enforcement of an award, in *TCL* at [12]. While the present case is not one for enforcement of an award, the statutory language in art 36[61] is materially identical to that in s 34(2). There is no reason to give different meaning to the same words in these two provisions of the respective federal and state Acts.

(b) In the United Kingdom Supreme Court, also in relation to an application made under the *Arbitration Act 1996* (Eng) equivalent of art 36 (for enforcement of an award),[62] in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] AC 763 at 813 [30].

(c) In respect of art 34(2)(a)(iii) of the Model Law (which is the same as s 34(2)(a)(iii)), in the Ontario Court of Appeal in *United Mexican States v Cargill* at [42] and [46].

(d) Also, in respect of the equivalent of s 34(2)(a)(iii),[63] in the British Columbia Court of Appeal in *lululemon athletica Canada inc v Industrial Color Productions Inc* [2021] BCCA 428 at [38], [41], [43] and [47].

(e) In respect of art 34(2)(a)(iii) of the Model Law, in the Singapore Court of Appeal in *BTN v BTP* [2021] SLR 276; [2020] SGCA 105 at [68] (following *BBA v BAZ* [2020] SLR 453; [2020] SGCA 53 at [73]).

(f) Explicitly by the Chief Justice in the Hong Kong Court of Final Appeal in *C v D* (at [6]) – another application of art 34(2)(a)(iii).

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60 PJ [68], [112] (CAB 25, 35).

61 Schedule 2 to the *International Arbitration Act 1974* (Cth).

62 Section 103 of the *Arbitration Act 1996* (Eng).

63 Section 34(2)(a)(iv) of the *International Commercial Arbitration Act* (BC) (R.S.B.C. 1996, c. 233).

49. *Fourthly*, it was accepted by the Appellants below, as recorded by the Court of Appeal,[64] that "*once due allowance had been made to the* [reasoning of the] *Tribunal, if the court nevertheless concluded that the Tribunal erred in finding it had jurisdiction, the court would have to set aside the erroneous exercise of jurisdiction*".

50. The Appellants address different possible meanings of the term "submission to arbitration" (commencing at AS [53]) as a foundation for submissions as to the absolute or substantial deference to be given to the tribunal majority's conclusions. The submissions can be rejected for several reasons.

    (a) *First*, no part of the course of reasoning in those submissions is found in the majority's reasoning, and giving deference to what they reasoned does not bear upon the three possible meanings urged now by the Appellants.

    (b) *Second*, the submissions were not made at first instance or in the Court of Appeal.

    (c) *Third*, the Appellants do not suggest that the first and second meanings of the term "submission to arbitration" for which they contend are the only ways a submission can be founded, and nor could they given the ample authority for regard to be had to the pleadings, particulars, and submissions (the third meaning for which they contend).[65] Both the Primary Judge and the Court of Appeal did this and concluded that the Tribunal's determinations about the effect of those materials was wrong. This has never been challenged on appeal. While the Appellants submit (at AS [53(c)]) that the courts below extended the scope of the expression to include consideration of procedural orders it is not submitted that doing so was in error. Such a contention would be outside the grant of special leave and the grounds of appeal. Ground Two of the Notice of Appeal is premised on the scope of the parties' submission to arbitration including the tribunal's procedural orders.

    (d) *Fourth*, the Tribunal itself had regard to the pleadings, particulars, and submissions, and its procedural orders. Paying deference to the Tribunal's

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[64] CA [120] (CAB 202).
[65] *CDM v CDP* [2021] 2 SLR 235; [2021] SGCA 45 at [18]; *Discovery Beach* at [71].

reasoning (or even reading the Second Interim Award to understand the Tribunal's reasons) requires consideration of the procedural orders.

(e) *Fifth*, in any event, the task for the Tribunal and for the courts was not to assess in a vacuum whether a liability claim would be within the submission to arbitration, but whether in light of the First Interim Award such an issue remained as something this tribunal had jurisdiction to adjudicate upon. Whatever sense the expression "submission to arbitrate" may have (be it by reference to the terms of the agreement to arbitrate, the referral to the arbitrators, or the pleadings, particulars, submissions, admissions, and procedural orders), it does not contemplate the Tribunal having a right to reopen an issue which is within the submission to arbitration once that issue has been the subject of the First Interim Award.

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51. The Appellants misstate (at AS [47]-[49]) the effect of ***Oxford Health Plans*** *LLC v Sutter*, 569 US 564 (2013), a case which not only is clearly distinguishable from this one but also supports the conclusions of the Primary Judge and the Court of Appeal.

(a) The decision relates to the power under § 10(a)(4) *Federal Arbitration Act* (US) (**FAA**) of the supervisory court to vacate an arbitral award "*where the arbitrators exceeded their powers*". This wording is substantially different to art 34(2)(a)(iii) of the CAA.

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(b) In *Oxford Health Plans*, a court had referred a case to arbitration and an issue arose as to whether, as a matter of construction, the arbitration provision in the parties' contract permitted class arbitration. By agreement of the parties this issue was submitted to the arbitrator for decision.

(c) That is what the US Supreme Court referred to when noting that "*the parties bargained for the arbitrator's construction of their agreement*", and that as a result the arbitrator's decision "*must stand, regardless of a court's view of its (de)merits*". The issue of construction of the agreement was plainly within the scope of the parties' submission to arbitration, and so the correctness or otherwise of the arbitrator's decision on that issue could not be challenged.

(d) In footnote 2 at 569, the US Supreme Court noted that it would in fact have applied a *de novo* review if Oxford had argued below that the availability of class action was a question of "arbitrability" – a term which in US law encompasses jurisdiction as opposed to admissibility[66] – which question is "*presumptively for courts to decide*".

(e) That is the position in this case. A question of "arbitrability" was raised by the Respondent through its objection, and was decided upon in the Second Interim Award.

(f) Even under the FAA, with its different wording noted above, this question would have been for the court to decide finally.

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52. *Finally*, the Primary Judge and the Court of Appeal gave careful consideration – at length – to the tribunal majority's reasons. Ultimately it was concluded that the majority had "*overlooked or mischaracterised the effect of many of the pleadings, particulars and submissions and the procedural orders leading up to the First Hearing*".[67]

53. Whatever deference was due had been afforded.

Part VI: Argument on notice of contention or notice of cross-appeal

54. Not applicable.

Part VII: Estimate of Time Required

55. The Respondent estimates that it will need one and a half hours to present its oral argument.

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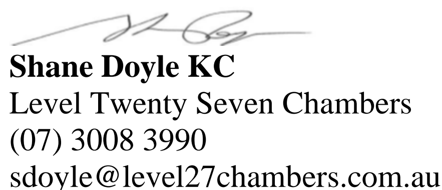
Dated: 16 February 2024



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[66] In American parlance, "arbitrability" includes *inter alia* whether there is a valid arbitration agreement and, if so, whether the scope of the agreement covers the parties' dispute: Fabien Gélinas and Leyla Bahmany, *Arbitrability: Fundamentals and Major Approaches* (Kluwer Law International, 2023), at p. 5 para 10.

[67] CA [121] (CAB 202).

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY P22/2023

BETWEEN:

CBI CONSTRUCTORS PTY LTD
First Appellant
KENT PROJECTS PTY LTD
Second Appellant

10 and

CHEVRON AUSTRALIA PTY LTD
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the Respondent sets out below a list of the particular statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provision
Statutes			
1.	*Commercial Arbitration Act 2012* (WA)	Version as at 1 July 2022 (version 00-d0-00)	ss 1C, 16, 19, 32 and 34
2.	*Arbitration Act 1996* (Eng)	Version as at 12 April 2010 (1996 c. 23)	s 103
3.	*Arbitration Ordinance (Cap. 609)* (HK)	Version as at 16 December 2022 (Cap. 609)	s 81
4.	*International Commercial Arbitration Act* (BC)	Version as at 1 September 2020 (R.S.B.C. 1996, c. 233)	s 34
5.	*Federal Arbitration Act* (USA)	9 U.S.C. 1, as amended by Pub. L. 107–169, §1, May 7, 2002, 116 Stat. 132.	§ 10(a)(4)

Model Law			
6.	UNCITRAL Model Law on International Commercial Arbitration, 1985	With amendments as adopted in 2006	Articles 34 and 36
Treaty			
7.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (New York Convention)	10 June 1958	Article V
Arbitration Rules			
8.	UNCITRAL Arbitration Rules, 1976	As revised in 2010	Articles 17, 23 and 34