

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

CBI CONSTRUCTORS PTY LTD & ANOR APPELLANTS

AND

CHEVRON AUSTRALIA PTY LTD RESPONDENT

CBI Constructors Pty Ltd v Chevron Australia Pty Ltd

[2024] HCA 28

Date of Hearing: 16 April 2024

Date of Judgment: 14 August 2024

P22/2023

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation

J C Sheahan KC with B Yin for the appellants (instructed by Clayton Utz)

S L Doyle KC with S J Davis and D C McKimmie for the respondent
(instructed by Norton Rose Fulbright)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

CBI Constructors Pty Ltd v Chevron Australia Pty Ltd

Arbitration – Award – Application to set aside arbitral award – Where arbitration proceedings arose from dispute concerning contract to provide staff – Where tribunal issued first interim award on issues of liability – Where appellants repleaded their case on quantum ("Contract Criteria Case") – Where respondent objected to Contract Criteria Case on basis of *res judicata*, issue estoppel, *Anshun* estoppel and that tribunal was *functus officio* – Where tribunal rejected respondent's objections and issued second interim award – Where respondent applied to set aside second interim award under s 34(2)(a)(iii) of *Commercial Arbitration Act 2012* (WA) – Where primary judge set aside second interim award and held tribunal was *functus officio* – Where Court of Appeal of Supreme Court of Western Australia dismissed appeal – Whether Court of Appeal erred in holding Supreme Court had power to set aside second interim award under s 34(2)(a)(iii) of *Commercial Arbitration Act* – Whether Court of Appeal erred in finding standard of review to be applied by Supreme Court is *de novo* review.

Words and phrases – "beyond the scope of the submission to arbitration", "correctness standard", "*de novo* review", "estoppel", "final and binding", "*functus officio*", "jurisdiction", "principle of competence-competence", "*res judicata*", "want of authority".

Commercial Arbitration Act 2012 (WA), ss 16, 34.

UNCITRAL Arbitration Rules (2010), Art 34.

UNCITRAL Model Law on International Commercial Arbitration (1985), Arts 16, 34.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND GLEESON JJ.
An arbitral tribunal in Western Australia, in a domestic commercial arbitration governed by the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law")¹ and the UNCITRAL Arbitration Rules ("the UNCITRAL Rules"),² issued an award that decided all issues of liability. The arbitral tribunal then issued a subsequent award in which the tribunal decided a new issue of liability. This appeal concerns whether the Supreme Court of Western Australia had the power under s 34(2)(a)(iii) of the *Commercial Arbitration Act 2012* (WA) ("the Arbitration Act") to set aside that subsequent award on the grounds that the tribunal's authority ceased when it issued the earlier award, and the tribunal was then *functus officio*. And if the Supreme Court had that power, by what standard was the Supreme Court to exercise it?

2 For the reasons that follow, the Supreme Court had power under s 34(2)(a)(iii) of the Arbitration Act to set aside the subsequent award if the Supreme Court determined *de novo* that the tribunal was *functus officio*.

Background

3 The arbitration arose from a dispute concerning a Contract in relation to an offshore oil and gas project conducted by the respondent ("Chevron"), known as the Gorgon Project. The governing law of the Contract was that of Western Australia.³ Under the Contract, the appellants (collectively, "CKJV") provided staff to work at certain construction sites and Chevron reimbursed CKJV for the cost of the staff ("Staff Costs"). CKJV contended that Chevron had underpaid it for Staff Costs. Chevron alleged (by counterclaim) that it had been overcharged by, and had overpaid, CKJV.

1 UNCITRAL Model Law on International Commercial Arbitration (1985) as amended by the United Nations Commission on International Trade Law on 7 July 2006, given force of law in Australia by the *International Arbitration Act 1974* (Cth) and, relevantly, applying to domestic commercial arbitrations as modified by the *Commercial Arbitration Act 2012* (WA).

2 Arbitration Rules of the United Nations Commission on International Trade Law, initially adopted in 1976 (General Assembly resolution 31/98) and revised in 2010 (General Assembly resolution 65/22).

3 Subject to some express exclusions which are not relevant to the resolution of the appeal.

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4 The Contract provided that "any dispute or controversy arising out of" the Contract, including "any dispute or controversy regarding the existence, construction, validity, interpretation, enforceability or breach" of the Contract, would "be exclusively and finally settled" by arbitration, that the arbitration would be administered using the UNCITRAL Rules, and that any award would "be final and binding". The Contract had the effect that the terms of the arbitration agreement were enforceable under the Arbitration Act, that any disputes relating to, or in connection with, the enforceability of the arbitration agreement would only be brought in the Supreme Court of Western Australia, and that CKJV and Chevron consented to the exclusive jurisdiction of that Court for that purpose.

5 CKJV commenced arbitration proceedings against Chevron in February 2017. In general terms, CKJV contended, on a number of bases, that it was entitled to recover Staff Costs on the basis of contractual "rates", rather than actual costs, whereas Chevron contended (by way of its counterclaim) that it had overpaid CKJV for amounts beyond what was contractually agreed based on actual costs. In May 2017, the arbitral tribunal fixed the substantive hearing for November 2018. About three months before the November hearing, Chevron provided amended particulars of its counterclaim, which included a methodology for calculating the alleged overpayment. In order to allow CKJV an opportunity to respond to the particulars, and to preserve the November hearing, the arbitral tribunal issued a series of procedural orders bifurcating the proceedings between issues of liability and issues of quantum.

6 The November hearing dealt with "all issues of liability" under the Contract in respect of CKJV's claimed entitlement to reimbursement of Staff Costs and Chevron's liability for reimbursing CKJV for those costs, as well as Chevron's counterclaim in respect of its alleged overpayment. The November hearing, relevantly, excluded "all quantum and quantification issues arising out of [Chevron's] Counterclaim".

7 In December 2018, the arbitral tribunal issued an interim award ("the First Interim Award"). CKJV failed in its primary case that it was entitled, on the proper construction and operation of the Contract, to recover Staff Costs by reference to contractual rates. The First Interim Award relevantly held that there was no binding agreement between the parties to convert the price for staff from actual costs to rates and there was no estoppel to that effect. In substance, the First Interim Award held that "CKJV's entitlement was to be paid actual costs". The arbitral tribunal also held, in response to Chevron's counterclaim, that CKJV was entitled to bring to account amounts for costs actually incurred but for which it had not billed Chevron.

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8 On 24 May 2019, the arbitral tribunal ordered CKJV to replead its case on quantum. In its repleaded case, CKJV claimed that its entitlement to Staff Costs in accordance with the Contract was to be calculated by applying the "Staff Costs Contract Criteria" to actual costs or, alternatively, to approved salaries and hours (the "Contract Criteria Case").

9 By reason of the First Interim Award, Chevron objected to the arbitral tribunal considering the Contract Criteria Case on two bases: firstly, that CKJV was precluded from advancing it by reason of *res judicata*, issue estoppel or *Anshun* estoppel (collectively, "the Estoppels"); and, secondly, that the tribunal was *functus officio* in respect of the Contract Criteria Case. The arbitral tribunal fixed a hearing for August 2020 to hear Chevron's objections to, and the merits of, CKJV's Contract Criteria Case together.

10 Following the second hearing in August 2020, the arbitral tribunal issued a further award ("the Second Interim Award"). By majority, the arbitral tribunal rejected each of Chevron's objections. The arbitral tribunal declared that CKJV was not prevented from advancing, maintaining or contending, whether in whole or in part, the Contract Criteria Case by reason of any of the Estoppels and that the tribunal was not *functus officio* in respect of the Contract Criteria Case.

11 Chevron applied to the Supreme Court of Western Australia under s 34(2)(a)(iii) of the Arbitration Act to set aside the Second Interim Award (the "set aside application") on the basis that the Second Interim Award dealt with a dispute not contemplated by or falling within the terms of the submission to arbitration, or contained decisions on matters beyond the scope of the submission to arbitration. The primary judge held that it was open to Chevron on its set aside application to seek to have the Court examine afresh its objections to the arbitral tribunal considering the Contract Criteria Case and held that the tribunal was *functus officio*.

12 CKJV's appeal to the Court of Appeal of the Supreme Court of Western Australia was dismissed. The Court of Appeal found that the majority of the arbitral tribunal overlooked the meaning, or mischaracterised the effect, of many of the pleadings, particulars, submissions and procedural orders prior to the November hearing and that, having found that the Contract Criteria Case only emerged after the delivery of the First Interim Award, the majority of the tribunal made a number of erroneous findings.

13 The Court of Appeal then made the following four findings, not challenged in this Court: (1) the meaning and effect of the procedural orders by which the arbitral tribunal bifurcated the arbitration proceedings was that, at the November

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hearing, "all issues of liability" would be heard in respect of Chevron's liability to CKJV arising under the Contract, including in respect of payment of staff, and any liability on the part of CKJV to repay any overpayment it received beyond that to which it was contractually entitled as alleged by Chevron, being costs actually incurred; (2) the First Interim Award was the determination of all issues of liability; (3) the Contract Criteria Case was a case on liability, not a case on quantum; and (4) there was no residual issue for determination at the second hearing as to whether CKJV had any further or alternative contractual claim for charging Chevron for staff or any grounds for resisting Chevron's counterclaim in respect of the alleged overpayments. Given those findings, the Court of Appeal upheld the primary judge's conclusion that the arbitral tribunal was *functus officio* when it purportedly determined the Contract Criteria Case in the Second Interim Award and that that award should be set aside under s 34(2)(a)(iii) of the Arbitration Act.

14 CKJV appealed to this Court on two grounds. Firstly, it submitted that the Court of Appeal erred in holding that the Supreme Court had power to set aside the Second Interim Award under s 34(2)(a)(iii) of the Arbitration Act and should instead have held that determination of whether the First Interim Award precluded advancement of the Contract Criteria Case was within the exclusive authority of the arbitral tribunal. Secondly, it submitted that the Court of Appeal erred in law in finding that the standard of the Supreme Court's review of the scope of the parties' submission to arbitration in an application to set aside an arbitral award under s 34(2)(a)(iii) of the Arbitration Act is a *de novo* review in which the Supreme Court applies a "correctness" standard of intervention. Those submissions are rejected.

Framework

15 In a domestic commercial arbitration governed by the Model Law,⁴ the principle of party autonomy is foundational.⁵ The jurisdiction of the arbitral tribunal is based on the parties' agreement and, subject to jurisdiction conferred by statute, depends on the content and extent of the parties' voluntary consent and

4 See [1] above.

5 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24 at [19]-[29], [87], [147], [157]-[162], [230], [273].

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agreement to submit their commercial dispute to arbitration (Art 7 of the Model Law; cf s 7 of the Arbitration Act).⁶

16 The paramount object of the Arbitration Act, consistent with the Model Law,⁷ is "to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense".⁸ The Arbitration Act aims to achieve that paramount object, as far as practicable, in part by enabling parties to agree *how* their commercial disputes are to be resolved through arbitration, subject to such safeguards as are necessary in the public interest.⁹ That is, not only do arbitral tribunals derive their authority or jurisdiction from the voluntary agreement of the parties to submit to arbitration a particular dispute that has arisen between them and apply any rules of law chosen by the parties as applicable to the substance of the dispute, but the parties also can, and often do, choose the rules of procedure to be followed by the arbitral tribunal, which includes the making of an award (Art 19 of the Model Law; cf s 19 of the Arbitration Act).

17 In the domestic commercial arbitration in issue in this appeal, party autonomy is significant because CKJV and Chevron agreed that the arbitral tribunal would use the UNCITRAL Rules in conducting the arbitration and those Rules directly address the making of an award by a tribunal. The word "award" is not defined in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Model Law, the *International Arbitration Act 1974* (Cth) or the Arbitration Act. Article 34(1) of the UNCITRAL Rules, however, expressly empowers an arbitral tribunal to "make separate awards on different issues at different times".¹⁰ The Working Group on Arbitration and

6 *C v D* (2023) 26 HKCFAR 216 at 226-227 [7]. See also *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 554 [29].

7 *UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006* (2008) at vii, viii.

8 Arbitration Act, s 1C(1).

9 Arbitration Act, s 1C(2)(a) and (3).

10 See Croft, Kee and Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (2013) at 380-381 [34.6]-[34.7]. See also Report of the Working Group on Arbitration and

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Conciliation described this rule as a simplification of the pre-existing rule so that rather than listing and distinguishing between possible types of awards (such as interim, interlocutory, or final awards), all those various awards would have the same status and effect as any other award made by the arbitral tribunal.¹¹ Article 34(2) then states that "[a]ll awards ... shall be *final and binding*".¹² The implication in Art 34 is that multiple awards would not be made on the same issue.

18 An award can be "final" in a number of ways or senses, as explained by the High Court of Singapore in *ONGC Petro additions Ltd v DL E&C Co Ltd*:¹³ first, "if it resolves a claim or matter in an arbitration with preclusive effect (*ie*, the same claim or matter in an arbitration cannot be re-litigated)"; second, if it "has achieved a sufficient degree of finality in the arbitral seat"; or third, if it is "the last award made in an arbitration which disposes of all remaining claims".

19 The arbitration agreement in this appeal provided that any dispute would "be exclusively and finally settled" by arbitration, that *any* award would "be final and binding", and that the arbitration would be administered using the UNCITRAL Rules. As already noted,¹⁴ the UNCITRAL Rules, in terms, empowered the arbitral tribunal to make separate awards on different issues at different times, and provided that all such awards would be final and binding, with the implication that multiple awards would not be made on the same issue.¹⁵ In sum, by the express terms of the arbitration agreement, and by reason of the UNCITRAL Rules,

Conciliation on the work of its forty-seventh session, UN Doc A/CN.9/641 (2007) at 16 [80].

11 Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session, UN Doc A/CN.9/641 (2007) at 16 [78]-[80].

12 UNCITRAL Rules, Art 34(2) (emphasis added). See also Croft, Kee and Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (2013) at 381-382 [34.8]-[34.9].

13 [2023] SGHC 197 at [34], citing *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at 386 [51]-[53].

14 See [17] above.

15 UNCITRAL Rules, Art 34(1) and (2). See [17] above.

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the First Interim Award was to be a final and binding determination of the issues with which it dealt.¹⁶

20 The express terms of the arbitration agreement applying the UNCITRAL Rules to the arbitration are antithetical to CKJV's submission that the arbitral tribunal was not *functus officio* with respect to CKJV's Contract Criteria Case until the arbitration was terminated in accordance with a "final" award as used in the third of the three senses described above¹⁷ – that is, a "last award made in an arbitration which disposes of all remaining claims", thereby terminating the arbitration in accordance with s 32 of the Arbitration Act (cf Art 32 of the Model Law).

21 The "final and binding" character of an award then operates at three levels: in respect of the arbitral tribunal, which cannot modify the award after it is rendered; in respect of the parties, who are bound by the findings of the award; and in respect of the courts, which do not entertain any recourse against the award except in exceptional circumstances that justify the setting aside of the award.¹⁸

22 Unless otherwise agreed by the parties,¹⁹ an arbitral tribunal has authority or jurisdiction to decide the dispute submitted to it by the parties finally and only once.²⁰ When an award is rendered, the arbitral tribunal is not empowered to revisit the award that it has made. As was said in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*, "[t]o conclude that a particular arbitral award is final and conclusive does no more than reflect the consequences of the parties having agreed to submit a dispute of the relevant kind to arbitration. ... [O]ne of those consequences is that the parties' rights and liabilities under an agreement which gives rise to an arbitration can be, and are, discharged and

16 cf *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2011] QSC 306 at [76], [78]; Croft, Stamboulakis and Warren, *International and Australian Commercial Arbitration* (2022) at 458-460 [8.7]-[8.10].

17 See [18] above.

18 See also Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session, UN Doc A/CN.9/641 (2007) at 17 [81].

19 cf UNCITRAL Rules, Art 34.

20 *TCL* (2013) 251 CLR 533 at 568 [81], citing Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 439; see also 556 [37], 567 [78].

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replaced by the new obligations that are created by an arbitral award."²¹ The existence and scope of the authority or competence of the arbitral tribunal to make an award is founded on the agreement of the parties and, once an award is rendered, the tribunal no longer has the necessary agreement of the parties to revisit the issues that have been determined. As CKJV admitted before the arbitral tribunal in July 2019, the tribunal was "*functus officio* in relation to the issues decided as part of the [November] hearing" following the delivery of the First Interim Award.

23 At the level of the parties, an arbitral award is binding on them by force of Art 35 of the Model Law (cf s 35 of the Arbitration Act) and, where relevant, an arbitral award may be enforced by a competent court on application under Art 35 of the Model Law (cf s 35 of the Arbitration Act). An arbitral award is recognised by Art 35 of the Model Law (cf s 35 of the Arbitration Act) as binding on the parties from the time it is made.²² CKJV admitted before the arbitral tribunal in July 2019 that the First Interim Award was final and binding on the parties.

24 At the level of the courts, s 34 of the Arbitration Act, drawn from Art 34 of the Model Law, provides that recourse to a court against an arbitral award may only be made by an application for setting aside an award in limited circumstances.²³ The first set of circumstances is where the party making the application "furnishes proof" of one of the following:

- (1) a party to the arbitration agreement was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication in it, under the law of Western Australia (s 34(2)(a)(i));
- (2) the party making the application was not given proper notice of the appointment of an arbitral tribunal or of the arbitral proceedings or was otherwise unable to present the party's case (s 34(2)(a)(ii));
- (3) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters

21 (2013) 251 CLR 533 at 575 [108]; see also 567 [78].

22 *TCL* (2013) 251 CLR 533 at 555 [31].

23 Or by an appeal on a question of law: Arbitration Act, s 34A. See also Model Law, Art 5 (cf Arbitration Act, s 5).

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beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside (s 34(2)(a)(iii)); or

- (4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Arbitration Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with that Act (s 34(2)(a)(iv)).

The second set of circumstances is where the court finds that: (1) the subject matter of the dispute is not capable of settlement by arbitration under the law of Western Australia (s 34(2)(b)(i)); or (2) the award is in conflict with the public policy of Western Australia (s 34(2)(b)(ii)).

Ground 1 – Chevron's application to set aside the Second Interim Award under s 34(2)(a)(iii) of the Arbitration Act

25 As has just been explained, the First Interim Award was final and binding. But what did it resolve? Determining the scope of the issues that an arbitral tribunal resolved finally and conclusively is answered by primarily focusing on what the tribunal said and concluded in the award.²⁴ The Court of Appeal undertook that analysis²⁵ and found that, by the First Interim Award, the arbitral tribunal determined all issues of liability and that the Contract Criteria Case determined in the Second Interim Award was a case on liability. As already noted, those findings were not challenged in this Court.²⁶

26 In *Fidelitas Shipping Co Ltd v V/O Exportchleb*,²⁷ Diplock LJ distinguished the effect of a "final award" on an arbitrator from its effect as an issue estoppel on the parties. Diplock LJ said that "the arbitrator himself becomes functus officio as respects all the issues between the parties" and that the effect of an "interim award" was that "the arbitrator is functus officio as respects the issues to which his interim

24 See, eg, *ONGC* [2023] SGHC 197 at [35].

25 See [12]-[13] above.

26 See [13] above.

27 [1966] 1 QB 630 at 644.

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award relates".²⁸ Diplock LJ thus considered that where the award is an interim award, such an award "creates an issue estoppel or issue estoppels between the parties and the arbitrator is *functus officio* as respects the issues to which his interim award relates".²⁹ While *Fidelitas* was decided under the *Arbitration Act 1950* (UK) in the procedural context of an interim award having been made in the form of a case stated, a procedure which has no equivalent under the Model Law, the reasoning of Diplock LJ in the respect above has been accepted in Australian and English courts.³⁰ It has been adopted by leading commentaries as authority for the general proposition that if an award is 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".³¹ And the Court of Appeals of New York has held that "partial determinations may be treated as final awards where the parties expressly agree both that certain issues submitted to the arbitrators should be decided in separate partial awards and that such awards will be considered to be final" with the result that the arbitral tribunal lacks "authority to reconsider the resulting partial final award".³² This international treatment confirms the approach of Diplock LJ described above and informs the intended meaning of Art 34(2) of the UNCITRAL Rules.

27

On handing down a final and binding award, the position of the arbitral tribunal has been variously described as the tribunal then ceasing to have authority, jurisdiction or capacity, or being *functus officio*, in relation to the issues addressed

28 [1966] 1 QB 630 at 644.

29 [1966] 1 QB 630 at 644.

30 *ABB Service Pty Ltd v Pyrmont Light Rail Company Ltd* (2010) 77 NSWLR 321 at 337 [70], 341-342 [93]-[97]; *Discovery Beach* [2011] QSC 306 at [68]; *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2016] 1 All ER (Comm) 517 at 526 [26], 527-528 [33], [35]-[36]. See also *Alvaro v Temple* [2009] WASC 205 at [67].

31 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 405. See also Sutton, Gill and Gearing, *Russell on Arbitration*, 24th ed (2015) at 297 [6-016], 352 [6-166].

32 *American International Specialty Lines Insurance Company v Allied Capital Corporation* (2020) 149 NE 3d 33 at 38.

in the award. As explained by Mustill and Boyd in *The Law and Practice of Commercial Arbitration in England*:³³

"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*.

Second, if the award is remitted to the arbitrator by the Court for reconsideration he has authority to deal with the matters on which the award has been remitted and to make a fresh award."

28 As has been explained, once a final and binding award is made, an arbitral tribunal has no authority to reconsider, or further consider, the subject matter of that award.³⁴ That is, the tribunal no longer has jurisdiction in relation to the issues determined by it in an earlier award and will act "in excess of jurisdiction where it revisits an issue it has already dealt with in an earlier award".³⁵

29 When a tribunal *exceeds* its authority or jurisdiction in the making of an award, that award is then liable to be set aside under s 34(2)(a)(iii) of the Arbitration Act (cf Art 34(2)(a)(iii) of the Model Law).³⁶ The party making the application to the court to set aside the award for want of authority or jurisdiction must furnish proof that it "deals with a dispute not contemplated by or not falling

33 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 404-405 (emphasis added, footnotes omitted).

34 See, eg, *Fidelitas* [1966] 1 QB 630 at 644; *Alvaro* [2009] WASC 205 at [67]; *APG Homes Pty Ltd v Primary Creations Pty Ltd* [2009] WASC 227 at [73]; *ABB* (2010) 77 NSWLR 321 at 336 [63]-[64], 337 [70]; *Discovery Beach* [2011] QSC 306 at [68]; *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2014] 1 SLR 1221 at 1234 [32]; *Emirates Trading* [2016] 1 All ER (Comm) 517 at 526 [26]. See also Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 404-405.

35 *ONGC* [2023] SGHC 197 at [33].

36 See, eg, *ONGC* [2023] SGHC 197 at [32].

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within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration". What is not capable of being challenged under s 34(2)(a)(iii) of the Arbitration Act (cf Art 34(2)(a)(iii) of the Model Law) is an error made by the arbitral tribunal *within* jurisdiction.³⁷

30 The distinction drawn between an issue being "*beyond* the scope of the submission to arbitration" (that is, beyond the authority or jurisdiction of the arbitral tribunal), on the one hand, and an issue arising for determination by the tribunal *within* jurisdiction, on the other, has been described in various ways by the courts in Australia³⁸ and overseas.³⁹ Regardless of the language or terminology adopted, the question for the purposes of s 34(2)(a)(iii) is whether, in the particular circumstances of the arbitration, the challenge that is made goes to the authority of the arbitral tribunal. If it does, then s 34(2)(a)(iii) of the Arbitration Act (cf Art 34(2)(a)(iii) of the Model Law) permits a court to consider an application to set aside an award on the grounds that it was made beyond the authority of the arbitral tribunal.⁴⁰

31 The source of the arbitral tribunal's jurisdiction to resolve a dispute, and its mandate, competence or authority to act, is the arbitration agreement. It is well-established that an arbitral tribunal has authority to rule upon its own jurisdiction, even where the jurisdiction is contested by one or more parties. The authority for an arbitral tribunal to rule upon its own authority is described as the principle of competence-competence (or "kompetenz-kompetenz"),⁴¹ which is embodied in

37 See, eg, *C v D* (2023) 26 HKCFAR 216 at 244 [52(b)]. See also *BBA v BAZ* [2020] 2 SLR 453 at 481-482 [76]-[79]; *BTN v BTP* [2021] 1 SLR 276 at 299-300 [68]-[69].

38 See, eg, *The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* (2021) 395 ALR 720 at 749 [132].

39 See, eg, *BBA* [2020] 2 SLR 453 at 480-482 [73]-[79]; *Republic of Sierra Leone v SL Mining Ltd* [2021] Bus LR 704 at 709-712 [11]-[18]; *BTN* [2021] 1 SLR 276 at 299-301 [68]-[71]; *C v D* (2023) 26 HKCFAR 216 at 226 [6], 228 [14], 255 [90], 257 [97], 259-260 [111], cf 274 [159].

40 *ONGC* [2023] SGHC 197 at [32].

41 *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at 526 [13]. See also Croft, Stamboulakis and Warren, *International and Australian Commercial Arbitration* (2022) at 233-234 [5.1].

Art 16 of the Model Law (cf s 16 of the Arbitration Act) and is reflected in Art 23(1) of the UNCITRAL Rules.

32 Despite differences in language between Art 16(1) of the Model Law and Art 23(1) of the UNCITRAL Rules,⁴² each recognises the principle of competence-competence⁴³ – that "[t]he arbitral tribunal may rule on its own jurisdiction" – as important for the functioning of arbitration. While competence-competence grants the arbitral tribunal the competence to determine its own jurisdiction, that is not unfettered. An arbitral tribunal cannot confer on itself an authority which it does not rightly have if it makes an erroneous decision as to its authority.⁴⁴ That is, an arbitral tribunal cannot by its own decision create, expand or extend its own authority.

33 The primary judge and the Court of Appeal held that the First Interim Award dealt with and decided all issues of liability, that the Contract Criteria Case was a case on liability, and thus that the arbitral tribunal did not have jurisdiction to make the Second Interim Award. As the Courts below found, the arbitral tribunal was *functus officio* in relation to the Contract Criteria Case.

34 The issue then raised in this appeal is whether the Supreme Court was nevertheless precluded from setting aside the Second Interim Award because the arbitral tribunal also dismissed Chevron's objections in relation to the Contract Criteria Case on the grounds of the Estoppels. It is not in dispute that, in at least some respects, the arbitral tribunal's findings in relation to Chevron's objections to the Contract Criteria Case on the grounds that the tribunal was not *functus officio*, also underpinned the tribunal's findings in rejecting Chevron's objections on the

42 Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1994) at 479-480. See also Croft, Stamboulakis and Warren, *International and Australian Commercial Arbitration* (2022) at 236 [5.5].

43 *Rinehart* (2019) 267 CLR 514 at 526 [13]; Blackaby, Partasides and Redfern, *Redfern and Hunter on International Arbitration*, 7th ed (2022) at 314 [5.110], 537-538 [10.36]; Gaillard and Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) at 401 [660].

44 See, eg, *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at 810 [24]; *United Mexican States v Cargill Inc* (2011) 107 OR (3d) 528 at 543 [41]; *TCL* (2013) 251 CLR 533 at 547-548 [12].

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grounds of the Estoppels. But there is a basic difference between Chevron's objections on the grounds of the Estoppels and Chevron's objections on the grounds that the tribunal was *functus officio*. The former were objections about an error within jurisdiction. The latter were objections that the tribunal lacked jurisdiction.

35 It may be accepted that if a tribunal, otherwise acting within jurisdiction, makes an erroneous finding that an earlier 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 that finding under s 34(2)(a)(iii) of the Arbitration Act. As Chevron submitted, preclusionary estoppels, if pleaded, operate *inter partes* and prevent the maintenance of a claim or the advancement of an issue.⁴⁵

36 However, the arbitral tribunal's findings concerning the Estoppels did not preclude the Court considering Chevron's application to set aside the Second Interim Award. Whether an arbitral tribunal has exhausted its authority precedes, and is separate from, any preclusion by way of an estoppel. Given the structure of the Arbitration Act and, in particular, s 16 (cf Art 16 of the Model Law),⁴⁶ the arbitral tribunal could have addressed the question of its authority being exhausted and ruled on its own jurisdiction as a preliminary question. Section 16(9) of the Arbitration Act then provides that, within 30 days of the ruling by the arbitral tribunal on that preliminary question, any party can request "the Court to decide the matter". Significantly, s 16(11) provides that while a s 16(9) request is pending, the arbitral tribunal may continue the proceedings and make an award.

37 Sections 16 and 34(2)(a)(iii) are directed to the same question – whether an arbitral tribunal has exceeded its authority. Section 16 addresses it as a preliminary question and recognises that an arbitral tribunal may continue the proceedings and make an award while that preliminary question is before the courts.⁴⁷ Section 34(2)(a)(iii) addresses the question after a binding award (whether it be

45 See, eg, *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290 at 303; [1926] AC 155 at 170; *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597-598, 602-603; *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 517-518 [22]; *BTN* [2021] 1 SLR 276 at 300-301 [71].

46 See [32] above.

47 See also *C v D* (2023) 26 HKCFAR 216 at 258 [103].

interim or final) has been made. The fact that, in the face of an objection to the jurisdiction of the arbitral tribunal, the tribunal continues the arbitral proceedings under s 16 or determines the substantive issues as part of a final award subject to a set aside application under s 34(2)(a)(iii) cannot alter the fundamental proposition that an arbitral tribunal cannot expand its own jurisdiction. The order in which the challenge to the jurisdiction of an arbitral tribunal is considered and determined by the tribunal – whether as a preliminary question or as part of a substantive hearing which considers the substance of the issue as part of an award – cannot be used by the tribunal to expand its own jurisdiction.

38 Similarly, if an arbitral tribunal determines to deal with both grounds of objections at the same time – jurisdiction and estoppel – and the tribunal makes an error within jurisdiction in relation to estoppel which cannot be challenged under s 34(2)(a)(iii) of the Arbitration Act, that finding cannot preclude the courts addressing the prior question of whether the finding made was made within or beyond jurisdiction. An arbitral tribunal cannot expand its own jurisdiction in any manner, including by making findings that would be unchallengeable if made within jurisdiction.

39 As we have seen, a distinction is drawn between something that is jurisdictional and something within jurisdiction that goes to the capacity of a litigant to advance a claim. Estoppel, in the latter category, is concerned with whether a person is precluded from arguing something or asserting a right that contradicts what that person previously said or agreed to. It may be accepted that both concepts – *functus officio* and estoppel – are informed by the concept of finality. However, they address the concept substantively differently. *Functus officio* addresses the capacity, or authority, of the arbitral tribunal to adjudicate a matter. Estoppel addresses the capacity of the litigants to litigate a matter in any tribunal.

40 In the present appeal, the unchallenged findings of the Court of Appeal⁴⁸ in relation to the arbitral tribunal being *functus officio* with respect to the Contract Criteria Case compel the conclusion that the Supreme Court was empowered to consider Chevron's application under s 34(2)(a)(iii) of the Arbitration Act to set aside the Second Interim Award.

41 Articles 16 and 34 of the Model Law strike an appropriate balance between ensuring the integrity of the arbitral process and the policy of "minimal curial intervention", which is commonly accepted in international practice and underlies

48 See [13] above.

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the Model Law.⁴⁹ Courts are circumspect in their approach to determining whether an error alleged under Art 34(2)(a)(iii) falls within the scope of that provision.⁵⁰ The question is whether an arbitral tribunal has exceeded its jurisdiction or, put another way, has travelled beyond the parties' submission to arbitration.⁵¹ That question is narrow. And when an issue of jurisdiction is identified, courts "carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal".⁵² Curial intervention is, however, sometimes necessary.⁵³ This is one of those cases.

Ground 2 – the applicable standard of review

42 The second issue that therefore arises concerns the standard of review to be applied by a court on an application for the setting aside of an award under s 34(2)(a)(iii) of the Arbitration Act.

43 In determining Chevron's set aside application, the primary judge adopted a *de novo* review of the correctness of the arbitral tribunal's finding that it was not *functus officio*. Although that finding was not challenged in the Court of Appeal, CKJV contended in this Court that the Court of Appeal erred in not affording absolute or, alternatively, substantial deference to the decision of the arbitral tribunal that it was not *functus officio*. That contention should be rejected. The standard of review to be applied is a *de novo* review of the decision of the arbitral tribunal as to its jurisdiction.

44 First, the text of Art 34(2)(a)(iii) of the Model Law (cf s 34(2)(a)(iii) of the Arbitration Act) requires a party seeking to set aside an award to "furnish proof" of one of the matters listed in para (a). The language of the paragraph does not

49 *CBX v CBZ* [2022] 1 SLR 47 at 56 [12], citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at 119 [65(c)], [65(d)].

50 See also Model Law, Art 5 (cf Arbitration Act, s 5).

51 See also Ren, "The dichotomy between jurisdiction and admissibility in international arbitration" (2024) 73 *International & Comparative Law Quarterly* 417 at 445.

52 *United Mexican States* (2011) 107 OR (3d) 528 at 544 [47].

53 See, eg, *SA Coppée Lavalin NV v Ken-Ren Chemicals and Fertilizers Ltd* [1995] 1 AC 38 at 53.

refer to, or provide for, a standard of absolute or substantial deference to the arbitral tribunal.

45 Second, the Model Law itself requires in its interpretation that regard be had "to its international origin and to the need to promote uniformity in its application and the observance of good faith".⁵⁴ In deciding whether an arbitral tribunal has acted outside its authority or jurisdiction, the correctness standard has been adopted by the Ontario Court of Appeal in *United Mexican States v Cargill Inc*,⁵⁵ by the British Columbia Court of Appeal in *lululemon athletica canada inc v Industrial Color Productions Inc*,⁵⁶ by the Singapore Court of Appeal in *BTN v BTP*,⁵⁷ *CBX v CBZ*,⁵⁸ and *CKH v CKG*,⁵⁹ and by the Hong Kong Court of Final Appeal in *C v D*.⁶⁰

46 Third, *de novo* is the standard adopted in relation to an application made under Art 36 of the Model Law (cf s 36 of the Arbitration Act) for enforcement of an award.⁶¹ Although Arts 34 and 36 are directed to different ends – seeking to set aside an award as distinct from seeking to enforce an award – the language in the Model Law is materially identical. Not only is there nothing in the text, context or purpose of the Model Law that would enable a different meaning to be given to the same words in the two Articles, but the use of the same words was deliberate.

54 Model Law, Art 2A(1) (cf Arbitration Act, s 2A). See also *TCL* (2013) 251 CLR 533 at 545 [7].

55 (2011) 107 OR (3d) 528 at 543-544 [42], [46].

56 (2021) 65 BCLR (6th) 90 at 103 [38], [41], 104 [43], 105 [47].

57 [2021] 1 SLR 276 at 299 [68], following *BBA* [2020] 2 SLR 453 at 480 [73].

58 [2022] 1 SLR 47 at 55 [11].

59 [2022] 2 SLR 1 at 7-8 [11].

60 (2023) 26 HKCFAR 216 at 226 [6], 231 [21(a)], 241 [45], 258 [101], 264-266 [128]-[129].

61 *TCL* (2013) 251 CLR 533 at 547-548 [12]. See also *Dallah* [2011] 1 AC 763 at 813 [30].

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The drafters of the Model Law considered it important to align the grounds.⁶² As the Analytical Commentary on the Model Law stated in relation to Art 34 of the Model Law (cf s 34 of the Arbitration Act):⁶³

"[C]onformity with article 36(1) is regarded as desirable in view of the policy of the model law to reduce the impact of the place of arbitration. It recognizes the fact that both provisions with their different purposes (in one case reasons for setting aside and in the other case grounds for refusing recognition or enforcement) form part of the alternative defence system which provides a party with the option of attacking the award or invoking the grounds when recognition or enforcement is sought. It also recognizes the fact that these provisions do not operate in isolation."

47

In support of its contention that the court should at least "afford substantial deference to the tribunal's interpretation of the meaning and effect of its own orders and processes", CKJV referred this Court to the "numerous authorities" cited by Born as authority for the proposition that "a considerable measure of judicial deference is accorded to the arbitrators' interpretation of the *scope of their mandate under the parties' submissions*".⁶⁴ That passage appears under the heading "Recurrent Grounds for Excess of Authority Claims", where the learned author addresses one of the recurrent grounds for claiming that an arbitral tribunal has exceeded its authority, namely where the award rules on matters outside the scope of the parties' submissions. A legal question of whether the tribunal denied the parties procedural fairness, like the legal question of whether the tribunal was *functus officio*, is a matter upon which there is only one correct answer. As Ribeiro PJ said in *C v D*, an objection under Art 34(2)(a)(iii) of the Model Law

⁶² Croft, Stamboulakis and Warren, *International and Australian Commercial Arbitration* (2022) at 552-553 [10.9], quoting Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration – Report of the Secretary-General, UN Doc A/CN.9/264 (1985) at 72-74.

⁶³ Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration – Report of the Secretary-General, UN Doc A/CN.9/264 (1985) at 72.

⁶⁴ Born, *International Commercial Arbitration*, 3rd ed (2021), vol 1 at 3581 §25.04[F][4][a] (emphasis added), citing, among others, *Wiregrass Metal Trades Council AFL-CIO v Shaw Environmental & Infrastructure Inc* (2016) 837 F 3d 1083 (11th Cir) at 1087-1088, *Schoendube Corporation v Lucent Technologies Inc* (2006) 442 F 3d 727 (9th Cir) at 733 and *ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1.

is an objection that the applicant party has not agreed to the arbitral tribunal exercising authority to conduct the arbitration in the circumstances specified.⁶⁵

48 Similarly, CKJV referred the Court to *Oxford Health Plans LLC v Sutter*⁶⁶ as support for the proposition that judicial deference is accorded to the arbitrators' interpretation of the scope of the arbitration agreement. That decision concerned a differently worded provision and the construction of the arbitration agreement. The case concerned the power of a supervisory court under §10(a)(4) of the *Federal Arbitration Act* to vacate an arbitral award "where the arbitrators exceeded their powers". In *Oxford Health Plans*, a court had referred a case to arbitration and a question arose as to whether, as a matter of construction, the arbitration provision in the parties' contract permitted class arbitration. As the judgment of the Supreme Court of the United States records,⁶⁷ the parties agreed to submit that question to the arbitrator for decision with the result that the arbitrator's decision was to stand "regardless of a court's view of its (de)merits".

49 Significantly, the Court recorded in a footnote⁶⁸ that it would face a "different issue" if other "gateway matters", such as whether the parties had a valid arbitration agreement at all, were in issue because they were "presumptively for courts to decide" such that "[a] court may ... review an arbitrator's determination of such a matter *de novo* absent 'clear[] and unmistakabl[e]' evidence that the parties wanted an arbitrator to resolve the dispute".

Conclusion

50 For those reasons, the appeal should be dismissed with costs.

65 *C v D* (2023) 26 HKCFAR 216 at 245 [53].

66 (2013) 569 US 564.

67 (2013) 569 US 564 at 569.

68 (2013) 569 US 564 at 569, fn 2.

51 JAGOT AND BEECH-JONES JJ. The appeal should be allowed. Whether or not the First Interim Award precluded the arbitral tribunal from entertaining and upholding the appellants' repleaded case in the Second Interim Award was a matter within that tribunal's jurisdiction to decide. It was not a matter to be considered by a court hearing an application to set aside the Second Interim Award under the statutory equivalent of Art 34 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law").⁶⁹

Background

52 The appellants, CBI Constructors Pty Ltd and Kent Projects Pty Ltd ("CKJV"), entered into a contract with the respondent, Chevron Australia Pty Ltd ("Chevron"), to supply construction and other services for Chevron's offshore oil and gas project on Barrow Island. The parties agreed that the law of Western Australia governed their contract and relationship. They agreed to submit any dispute regarding the contract's enforcement or breach to be "exclusively and finally settled" by direct negotiations, and if that failed, by mediation, and if that failed, by "binding arbitration". The parties agreed to arbitration using the UNCITRAL Arbitration Rules ("the UNCITRAL Rules")⁷⁰ and agreed that "any award shall be final and binding". The UNCITRAL Rules expressly empower an arbitral tribunal to "make separate awards on different issues at different times".⁷¹ The parties also agreed that any disputes relating to or in connection with the enforceability of their "arbitration contract" were to be "brought only" in the Supreme Court of Western Australia.

53 A dispute arose in relation to CKJV's entitlement to the reimbursement of its costs of supplying staff and other services to Chevron under the contract. The dispute was referred to arbitration. Arbitral proceedings commenced in February 2017 before a three-person arbitral tribunal. CKJV claimed that it had been underpaid because it was entitled to recover costs on the basis of contractual rates that had been agreed or which Chevron was estopped from denying. Chevron counterclaimed that CKJV was only entitled to recover staff costs that it had actually incurred. Chevron sought to recover what it contended was an

69 UNCITRAL Model Law on International Commercial Arbitration (1985), as amended by the United Nations Commission on International Trade Law on 7 July 2006 ("Model Law"); *Commercial Arbitration Act 2012* (WA) ("Arbitration Act"), s 34.

70 Arbitration Rules of the United Nations Commission on International Trade Law, initially adopted in 1976 (General Assembly resolution 31/98) and revised in 2010 (General Assembly resolution 65/22) ("UNCITRAL Rules").

71 UNCITRAL Rules, Art 34(1).

overpayment, being amounts paid in excess of the costs actually incurred by CKJV. In response to Chevron's counterclaim, CKJV contended that it was entitled to set off the actual costs CKJV had incurred but not yet invoiced to Chevron against the amount claimed by Chevron. Chevron contended that such a set-off was precluded by a separate agreement between the parties.

54 On 29 July 2018, the arbitral tribunal made Procedural Order 14, by which it determined to hear at the first hearing (to be held in November 2018) "all issues of liability in respect of [CKJV's] claim and [Chevron's] [c]ounterclaim" excluding "all quantum and quantification issues". On 21 August 2018, the arbitral tribunal made Procedural Order 15, which was to the effect that the first hearing would "concern all issues of liability only" but not issues of "quantum and quantification or calculation" of CKJV's claim, Chevron's counterclaim or CKJV's set-off in response to the counterclaim.

55 On 14 December 2018, the arbitral tribunal made the First Interim Award. The arbitral tribunal rejected CKJV's principal claim but, in response to Chevron's counterclaim, allowed CKJV to set off amounts of actual costs incurred but not yet billed. On 24 May 2019, CKJV was ordered to replead its case to better respond to Chevron's counterclaim. In its amended pleading, CKJV contended that it could recover costs determined by reference to certain contractual criteria referred to in an attachment to the contract (the "Contract Criteria Case"). Chevron objected to CKJV's amended pleading on the basis that such a case was precluded by any or all of a *res judicata*, an issue estoppel, or an "*Anshun* estoppel"⁷² arising out of the First Interim Award and that, so far as CKJV's Contract Criteria Case was concerned, the arbitral tribunal was *functus officio*.

56 On 4 September 2020, the arbitral tribunal made the Second Interim Award, which upheld CKJV's Contract Criteria Case and rejected Chevron's estoppel and *functus officio* claims. A majority of the arbitral tribunal reasoned that the First Interim Award did not decide how the "actual cost" of staff was to be ascertained under the contract.

57 Chevron successfully applied to the Supreme Court of Western Australia to set aside the Second Interim Award on the grounds set out in s 34(2)(a)(iii) of the *Commercial Arbitration Act 2012* (WA) ("the Arbitration Act"). The primary judge (Kenneth Martin J) held that a contention that an arbitral tribunal was *functus officio* engages s 34(2)(a)(iii) and thus it was open to the Court to "examine afresh [Chevron's] arguments ... as to *functus officio* concerning the [arbitral tribunal] – arising out of the suggested force and effect of [Procedural Order 14]

72 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

and the [F]irst [I]nterim [A]ward".⁷³ The primary judge analysed the effect of the arbitral tribunal's procedural orders and concluded that CKJV's Contract Criteria Case concerned an issue of liability, not quantum or quantification, and thus the arbitral tribunal was *functus officio*.⁷⁴ His Honour disagreed with the conclusion of the majority of the arbitral tribunal that the First Interim Award left unresolved issues in relation to the ascertainment of "actual costs".⁷⁵

58

CKJV appealed to the Court of Appeal of the Supreme Court of Western Australia. The Court of Appeal (Quinlan CJ, Murphy JA and Bleby A-JA) upheld the primary judge's decision.⁷⁶ The Court concluded that, on a proper construction of the contract, the parties agreed to resolve disputes on the basis that various principles of "finality" would apply to "a final award, or to an interim award which determined the, or an, issue of liability".⁷⁷ The Court considered that the consequence of "finality", insofar as it affected the authority or jurisdiction of the arbitral tribunal, was expressed in the phrase "functus officio".⁷⁸ Like the primary judge, the Court of Appeal conducted an exhaustive review of the course of the arbitral proceedings, including the procedural orders, to determine the scope of the First Interim Award.⁷⁹ The Court found that CKJV's Contract Criteria Case was a (new) case on liability, not quantum,⁸⁰ and that after the First Interim Award was made, there was "no residual issue for determination" as to whether CKJV had any further contractual basis for charging Chevron for staff and no further contractual defence or basis for set-off in resisting Chevron's counterclaim.⁸¹

73 *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 at [86]-[87], [107].

74 *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 at [187], [209]-[210], [215].

75 *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 at [199].

76 *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2023] WASCA 1 ("*CBI Constructors*").

77 *CBI Constructors* [2023] WASCA 1 at [97].

78 *CBI Constructors* [2023] WASCA 1 at [86].

79 *CBI Constructors* [2023] WASCA 1 at [101]-[114], see also the Appendix.

80 *CBI Constructors* [2023] WASCA 1 at [121(1)], [125(1)].

81 *CBI Constructors* [2023] WASCA 1 at [114].

59 On 17 November 2023, CKJV was granted special leave to appeal from the Court of Appeal's judgment to this Court. CKJV raised two grounds of appeal. First, CKJV contended that the Court of Appeal erred in concluding that the arbitral tribunal was *functus officio* with respect to CKJV's Contract Criteria Case. In effect, CKJV contended that ascertaining the scope and effect of the First Interim Award only went to the "admissibility" (ie, permissibility) of its Contract Criteria Case and not the jurisdiction of the arbitral tribunal to deal with it in the Second Interim Award. Second, CKJV contended, in the alternative, that, if ascertaining the scope and effect of the First Interim Award determined the jurisdiction of the arbitral tribunal, the Court of Appeal erred in undertaking a *de novo* review of the arbitral tribunal's procedural orders to determine whether the Second Interim Award should be set aside under s 34(2)(a)(iii) of the Arbitration Act. CKJV contended that the Court of Appeal should have instead deferred to the arbitral tribunal's assessment of the effect of its own procedural orders and the scope of the First Interim Award. For the reasons that follow, the first ground of appeal should be allowed and the second ground of appeal should be dismissed.

Curial intervention in arbitral proceedings

60 The Arbitration Act has two interpretative provisions. The first interpretative provision provides that the Arbitration Act must be interpreted (and the functions of an arbitral tribunal must be exercised) to ensure, so far as practicable, that the "paramount object" of the Act is achieved,⁸² namely the facilitation of the "fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense".⁸³ This object is sought to be achieved by "enabling parties to agree about how their commercial disputes are to be resolved"⁸⁴ and "providing arbitration procedures that enable commercial disputes to be resolved in a cost effective manner, informally and quickly".⁸⁵

61 The second interpretative provision seeks to ensure that the Arbitration Act is interpreted consistently with the Model Law.⁸⁶ Section 2A(1) provides that, subject to giving effect to the paramount object, in interpreting the Arbitration Act "regard is to be had to the need to promote so far as practicable" uniformity between the application of the Act to domestic commercial arbitrations and the

82 Arbitration Act, s 1C(3).

83 Arbitration Act, s 1C(1).

84 Arbitration Act, s 1C(2)(a).

85 Arbitration Act, s 1C(2)(b).

86 Arbitration Act, s 2A(1).

application of the provisions of the Model Law to international commercial arbitrations, and the observance of "good faith".

62 Through both these interpretative rules and the balance of the provisions of the Arbitration Act, effect is given to the Model Law's intended operation of "arbitration based on voluntary agreement of the parties".⁸⁷ The objective of the statutory scheme is to produce an arbitral award which, along with arbitral awards of other States and Territories, is made "binding" by s 35(1) of the Arbitration Act and, on application to the Supreme Court,⁸⁸ is capable of being enforced.

63 Consistent with the assumption that parties have consented to having their dispute resolved by an arbitral tribunal and not by a court, both the Model Law and the Arbitration Act provide for only a limited basis for curial intervention in the arbitral process. Section 5 of the Arbitration Act provides that "[i]n matters governed by this Act, no court must intervene except where so provided by this Act".⁸⁹ Various provisions of the Arbitration Act confer powers on a designated court, specifically the Supreme Court,⁹⁰ but many of those powers do not involve any curial "interven[tion]" in the arbitral process in any real sense. Instead, those provisions contemplate various curial powers being exercised to facilitate the arbitral process. Thus, the Court is expressly empowered to: resolve deadlocks about the appointment of arbitrators,⁹¹ challenges to their appointments⁹² and disputes about their capacity to perform their functions;⁹³ recognise and enforce interim measures⁹⁴ and orders and directions given by an arbitral tribunal;⁹⁵ and

87 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, UN Doc A/CN.9/264 (1985), Art 1 [15], cited in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 ("*TCL Air Conditioner*") at 547 [11].

88 See s 2(1) of the Arbitration Act.

89 Section 5 of the Arbitration Act corresponds with Art 5 of the Model Law.

90 Arbitration Act, s 6(1).

91 Arbitration Act, s 11(3)-(4).

92 Arbitration Act, s 13(4).

93 Arbitration Act, s 14(2).

94 Arbitration Act, ss 17H-17J.

95 Arbitration Act, s 19(6).

make orders to assist in collecting evidence,⁹⁶ preserving the confidentiality of the arbitral process⁹⁷ and in relation to the costs of aborted arbitrations.⁹⁸

64 So far as curial intervention is concerned, s 16(1) of the Arbitration Act confirms that an arbitral tribunal may rule on its own "jurisdiction", either as a preliminary question or in an award on the merits.⁹⁹ If an arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request the Court to decide the matter.¹⁰⁰ Section 16 of the Arbitration Act corresponds with Art 16 of the Model Law.

65 Consistent with the admonition against unauthorised curial intervention in s 5 of the Arbitration Act, s 34(1) provides that "[r]ecourse to the Court against an arbitral award may be made only by an application for setting aside [the award] in accordance with" the grounds specified in s 34(2)-(3) "or by an appeal under section 34A". Section 34(2) has two categories of grounds for intervention. The first category is in s 34(2)(a), in respect of which the party applying to set aside the award must furnish proof. The second category is in s 34(2)(b), namely where the Court finds that the dispute concerns a "subject matter ... not capable of settlement by arbitration" or that the award "is in conflict with the public policy" of the State of Western Australia. Other than the reference to s 34A, s 34 of the Arbitration Act corresponds with Art 34 of the Model Law.

66 As mentioned, the purported ground for intervention in this case was s 34(2)(a)(iii) of the Arbitration Act, which is established where there is proof that an award "deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration". The former concerns an award addressing a "dispute" that was not within the terms of the parties' agreement to submit to arbitration, whereas the latter concerns an arbitral tribunal dealing with a dispute that was submitted to arbitration but making an award that addresses matters beyond the scope of the dispute.¹⁰¹ Section 34(2)(a)(iii) of the Arbitration Act is

96 Arbitration Act, ss 27-27B.

97 Arbitration Act, ss 27H-27I.

98 Arbitration Act, s 33D.

99 Arbitration Act, s 16(8).

100 Arbitration Act, s 16(9).

101 Bantekas et al, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) at 882, cited in *C v D* (2023) 26 HKCFAR 216 at 266 [130].

not a basis for reviewing an arbitrator's assessment of the merits of a dispute,¹⁰² nor is it a basis for reviewing supposedly erroneous answers to questions of law arising in the course of arbitral proceedings.

67 Two further matters should be noted about these provisions.

68 The first matter concerns the interrelationship between s 16 and the grounds for setting aside an award in s 34 of the Arbitration Act. Section 16 uses the phrase "jurisdiction" but s 34 does not. The phrases "jurisdiction" and "jurisdictional" have a developed understanding in this country.¹⁰³ However, given the interpretative provisions referred to earlier, the phrase "jurisdiction" may not carry the same richness of meaning when used in s 16 of the Arbitration Act and other Australian legislation that gives effect to the Model Law.

69 In *C v D*,¹⁰⁴ the Hong Kong Court of Final Appeal considered that the Hong Kong equivalent provisions to Arts 16¹⁰⁵ and 34¹⁰⁶ of the Model Law operate together,¹⁰⁷ although the reasons of the members of the Court were expressed in slightly different terms. Cheung CJ considered that there was substantial overlap between the two provisions such that Art 34 must "cover an award made by the tribunal without 'jurisdiction' in the [Art 16] sense".¹⁰⁸ Ribeiro PJ referred to the two provisions as operating "in tandem"¹⁰⁹ such that the matters specified in Art 34 go to the jurisdiction of an arbitral tribunal.¹¹⁰ Gummow NPJ expressed a preference for a construction in which the scope of curial intervention in Art 34 is "epexegetical" (ie, explanatory) of Art 16(1).¹¹¹ For present purposes, it suffices to

102 *C v D* (2023) 26 HKCFAR 216 at 268 [134].

103 See, generally, Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020).

104 (2023) 26 HKCFAR 216.

105 *Arbitration Ordinance* (HK), s 34.

106 *Arbitration Ordinance* (HK), s 81.

107 *C v D* (2023) 26 HKCFAR 216 at 226 [3]-[5], 232 [22].

108 *C v D* (2023) 26 HKCFAR 216 at 226 [4].

109 *C v D* (2023) 26 HKCFAR 216 at 232 [22].

110 *C v D* (2023) 26 HKCFAR 216 at 234 [24]; see also at 258 [102] per Lam PJ.

111 *C v D* (2023) 26 HKCFAR 216 at 274 [157].

treat the grounds for setting aside an award in s 34 of the Arbitration Act as matters going to an arbitral tribunal's jurisdiction without expressing any final view on the degree of overlap between ss 16 and 34 of the Arbitration Act.

70 The second matter concerns ss 27J and 34A of the Arbitration Act. Section 27J(1) confers on the Court jurisdiction to determine any question of law arising during the course of the arbitration following an application by any of the parties, but only with the leave of the Court and the consent of either the arbitrator or all the other parties.¹¹² Similarly, s 34A enables an appeal to the Court on any question of law arising out of an award, but only if the parties agree and the Court grants leave.¹¹³ The arbitration statutes of the other States and Territories have similar provisions.¹¹⁴ There is no equivalent to either provision in the Model Law. These provisions represent a (modest) extension of the power of curial intervention contemplated by the Model Law. However, they also serve to confirm that neither s 16 nor s 34 of the Arbitration Act is engaged merely because an arbitral tribunal has given a wrong answer to a question of law.

***Functus officio* and the arbitral tribunal's mandate**

71 Both the primary judge and the Court of Appeal reasoned from a finding that the arbitral tribunal was *functus officio* in respect of the matters the subject matter of the First Interim Award to conclude that the Second Interim Award should be set aside under s 34(2)(a)(iii) of the Arbitration Act on the basis that it dealt with such subject matters. The critical step in that reasoning was the conclusion that the arbitral tribunal was *functus officio* in relation to the subject matter of the First Interim Award.

72 *Functus officio* is not a substantive legal doctrine or theory. Instead, it simply "describes a conclusion [about] the legal authority of a person" to the effect that "an exercise of power, or a performance of a function or duty, is complete and

112 Arbitration Act, s 27J(2).

113 Arbitration Act, s 34A(1).

114 *Commercial Arbitration Act 2010* (NSW), ss 27J, 34A; *Commercial Arbitration Act 2011* (Vic), ss 27J, 34A; *Commercial Arbitration Act 2011* (SA), ss 27J, 34A; *Commercial Arbitration Act 2011* (Tas), ss 27J, 34A; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), ss 27J, 34A; *Commercial Arbitration Act 2013* (Qld), ss 27J, 34A; *Commercial Arbitration Act 2017* (ACT), ss 27J, 34A.

the person has no power left to exercise, or no function or duty left to perform".¹¹⁵ A conclusion that a body is *functus officio* must be justified, rather than asserted. Such a conclusion can only be "reached by close examination of the particular circumstances, and the nature of the power, function or duty in question".¹¹⁶ This is so regardless of whether a public¹¹⁷ or private¹¹⁸ power or duty is exercised or performed and, in cases of public power, regardless of whether a court¹¹⁹ or other body¹²⁰ exercises that power or performs that duty. The same applies to an arbitral tribunal operating under the Arbitration Act, which derives its jurisdiction from the consent of the parties but has its determinations given the force of law by statute and enforced by curial order.

73

The Arbitration Act specifies at least one circumstance when the mandate of an arbitral tribunal is exhausted such that a court could accurately describe the arbitral tribunal as *functus officio*. Section 32(1) provides that arbitral proceedings are terminated by a "final award" or an order of an arbitral tribunal made in accordance with s 32(2), namely where there has been: (a) a withdrawal of a claim; (b) an agreement on the termination of the proceedings; (c) a finding that the continuation of the proceedings has, for any other reason, become "unnecessary or impossible"; or (d) an award dismissing the claim for delay. Subject to an arbitral tribunal making a correction or interpretation of an award under s 33 or the Court making an order for the resumption of the arbitral proceedings under s 34(4), the

115 *Minister for Indigenous Affairs v MJD Foundation Ltd* (2017) 250 FCR 31 at 67 [155].

116 *Minister for Indigenous Affairs v MJD Foundation Ltd* (2017) 250 FCR 31 at 67 [155]; see also *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 603 [5]-[6].

117 See, for example, *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 76 FCR 301 at 311, 317; *Kabourakis v Medical Practitioners Board of Victoria* (2006) 25 VAR 449 at 472 [80], 474 [89].

118 See, for example, *Barry v Heider* (1914) 19 CLR 197 at 220-221; *Kirby v Duke of Marlborough* (1813) 2 M & S 18 at 22 [105 ER 289 at 291].

119 See, for example, *NH v Director of Public Prosecutions (SA)* (2016) 260 CLR 546 at 588 [95]; *Jovanovic v The Queen* (1999) 92 FCR 580 at 586 [32]; *Director of Public Prosecutions v Edwards* (2012) 44 VR 114 at 161-162 [230], [235]-[237].

120 See, for example, *R v Moodie; Ex parte Mithen* (1977) 17 ALR 219 at 225; *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 312, 324-326; *Kabourakis v Medical Practitioners Board of Victoria* (2006) 25 VAR 449 at 472 [80], 474 [89]; *Independent Liquor & Gaming Authority v 4 Boys (NSW) Pty Ltd* (2023) 112 NSWLR 196 at 221-222 [110], [113].

Arbitration Act provides that "[t]he mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings".¹²¹

74 In this case, there has not been any "final award" and there is no basis to conclude that the mandate of the arbitral tribunal has been exhausted under these provisions. Instead, the primary judge and the Court of Appeal's conclusion that the arbitral tribunal was *functus officio* in relation to the First Interim Award was said to follow from the principles of finality applicable to interim awards, as enunciated by Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb*,¹²² the scope of the parties' agreement to submit to arbitration, or both.¹²³ Each will be addressed in turn.

The jurisdiction/admissibility distinction and *Fidelitas*

75 In *C v D*, four members of the Hong Kong Court of Final Appeal endorsed the application of the so-called "jurisdiction/admissibility" distinction to the Hong Kong equivalent provisions of Arts 16 and 34¹²⁴ of the Model Law.¹²⁵ Applying this distinction, a court exercising a review function under the equivalents of Arts 16 and 34 of the Model Law may review an arbitral tribunal's ruling on jurisdiction and determine that issue *de novo* but may not review a challenge to the admissibility of the claim itself, which is a matter exclusively for the arbitral tribunal.¹²⁶ The fifth member of the Hong Kong Court of Final Appeal, Gummow NPJ, rejected the "jurisdiction/admissibility" distinction as an "unnecessary distraction"¹²⁷ from the inquiry into whether any of the grounds for curial intervention in Art 34 had been made out.¹²⁸

121 Arbitration Act, s 32(3).

122 [1966] 1 QB 630 ("*Fidelitas*"); see below at [77].

123 See *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 at [97]; *CBI Constructors* [2023] WASCA 1 at [88]-[91], [97].

124 *Arbitration Ordinance* (HK), ss 34, 81.

125 *C v D* (2023) 26 HKCFAR 216 at 226 [6], 237 [29], 257 [97], 259 [111].

126 *C v D* (2023) 26 HKCFAR 216 at 226 [6], 231 [21(a)], 237-238 [29]-[32], 258 [101]; see also *BTN v BTP* [2021] 1 SLR 276 at 298-299 [66], [68].

127 *C v D* (2023) 26 HKCFAR 216 at 271-273 [147]-[152], 274 [159].

128 *C v D* (2023) 26 HKCFAR 216 at 272-273 [152].

76 The "jurisdiction/admissibility" distinction has been consistently applied by the Court of Appeal of the Supreme Court of Singapore.¹²⁹ Thus, in *BBA v BAZ*, that Court held that a contention that a claim is time barred only affects the admissibility of a claim, not the jurisdiction of the arbitral tribunal to determine it.¹³⁰ Similarly, in *BTN v BTP*, that Court held that an objection based on *res judicata* arising from a previous court decision only affects the admissibility of a claim, not the jurisdiction of an arbitral tribunal to determine it.¹³¹

77 In this case, the Court of Appeal distinguished *BTN v BTP* on the basis that it concerned an objection to a claim that arose from a previous court decision and not from an interim award in the same arbitral proceedings.¹³² Thus, the Court of Appeal concluded that *BTN v BTP* "was not concerned with the question of whether the arbitrator was functus officio by reason of having delivered an award which exhausted the arbitrator's function".¹³³ The Court of Appeal cited various authorities for the proposition that "[w]here a valid award is an interim award, the arbitrator is only functus officio with respect to the issues dealt with in that interim award, and retains the authority to deal with the matters left over".¹³⁴ Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England*, which was cited by the primary judge,¹³⁵ states the same proposition.¹³⁶ However, all of the authorities cited by the Court of Appeal,¹³⁷ as well as the passage in *The Law and*

129 See, eg, *BBA v BAZ* [2020] 2 SLR 453 at 481 [76]-[77]; *BTN v BTP* [2021] 1 SLR 276 at 300-301 [71]-[73].

130 [2020] 2 SLR 453 at 480 [73], 482-483 [80]-[82].

131 [2021] 1 SLR 276 at 299-301 [68], [71].

132 *CBI Constructors* [2023] WASCA 1 at [93], [96].

133 *CBI Constructors* [2023] WASCA 1 at [96].

134 See *CBI Constructors* [2023] WASCA 1 at [91] fn 118.

135 *Chevron Australia Pty Ltd v CBI Constructors Pty Ltd* [2021] WASC 323 at [81].

136 Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989) at 404-405.

137 *Alvaro v Temple* [2009] WASC 205 at [67]; *ABB Service Pty Ltd v Pymont Light Rail Company Ltd* (2010) 77 NSWLR 321 at 337 [70], 341-342 [93]-[97]; *Discovery Beach Project Pty Ltd v Northbuild Construction Pty Ltd* [2011] QSC 306 at [68]; *SL Sethia Liners Ltd v Naviagro Maritime Corporation (The "Kostas Melas")* [1981] 1 Lloyd's Rep 18 at 26.

Practice of Commercial Arbitration in England, ultimately lead back to the following passage from the judgment of Diplock LJ in *Fidelitas*:¹³⁸

"Where [an arbitrator's] award is an interim award stated in the form of a special case, it determines the particular issue or issues to which it relates in alternative ways dependent upon the answer of the High Court to the question of law stated in the special case. It creates an issue estoppel or issue estoppels between the parties and the arbitrator is *functus officio* as respects the issues to which his interim award relates." (emphasis added)

78 This statement from *Fidelitas* concerns the circumstance where an arbitral tribunal is rendered *functus officio* in respect of an issue because of the effect of an issue estoppel. However, at most a determination that an issue estoppel has arisen and its scope are only conclusions of law within jurisdiction. To use current parlance, this passage from *Fidelitas* only concerned the admissibility of a claim, not the jurisdiction of an arbitral tribunal to determine it.

79 Further, *Fidelitas* involved an arbitration conducted under the *Arbitration Act 1950* (UK). Section 14 of that Act empowered an arbitrator to make an interim award as well as a final award.¹³⁹ An award, including an interim award, stated in the form of a special case was subject to review by the High Court with respect to, inter alia, a question of law arising in the course of the reference to arbitration.¹⁴⁰ Hence, Diplock LJ described an arbitrator's determination of the legal consequences of the facts found in the arbitration as "subject to correction by the High Court", with the consequence that the arbitrator is "not the exclusive tribunal to determine all the issues relevant to the dispute referred to him".¹⁴¹ It was in this context that Diplock LJ treated a finding that an issue estoppel arose as having the necessary consequence that the arbitral tribunal was *functus officio* with respect to that issue.

80 The Court of Appeal incorrectly characterised the above passage from *Fidelitas* as distinguishing between the creation of an issue estoppel (ie, affecting the rights of the parties) and an arbitrator being *functus officio* (ie, exhausting the arbitrator's authority). Thus, the Court of Appeal described this passage as treating an issue estoppel and *functus officio* as "separate and distinct".¹⁴² To the contrary,

138 [1966] 1 QB 630 at 644.

139 *Fidelitas* [1966] 1 QB 630 at 644.

140 *Fidelitas* [1966] 1 QB 630 at 644.

141 *Fidelitas* [1966] 1 QB 630 at 643.

142 *CBI Constructors* [2023] WASCA 1 at [89].

Fidelitas treats one (ie, the arbitrator being *functus officio*) as following from the other (ie, the issue estoppel).

81 In this case, the principle articulated in *Fidelitas* would have been engaged if Chevron had either invoked s 27J (which would have required the consent of the arbitrator or CKJV) to have the Court determine a question of law about the scope of the First Interim Award or (again with the required consent of CKJV and having obtained the leave of the Court) appealed to the Court under s 34A on a question of law arising out of the Second Interim Award concerning the scope of the First Interim Award. As noted, those provisions have no counterpart in the Model Law. However, this appeal concerns proceedings brought by Chevron under s 34 of the Arbitration Act, which is relevantly identical to Art 34 of the Model Law. In proceedings under s 34, unlike the arbitrator in *Fidelitas*, an arbitral tribunal is to be treated as though it is "the exclusive tribunal to determine all the issues relevant to the dispute referred to [it]",¹⁴³ save only where the limited grounds for curial intervention specified in s 34(2) are established. Unlike the procedure for a special case discussed in the above passage from *Fidelitas*, none of the grounds in s 34(2) justify curial intervention on the basis that an arbitrator has concluded, wrongly, that they were not prevented from determining an issue or cause of action because of a *res judicata*, an issue estoppel or an *Anshun* estoppel said to arise out of an earlier decision of the arbitral tribunal. It follows that to uphold the Court of Appeal's conclusion, a different basis must be found to justify a finding by a court that the arbitral tribunal was *functus officio* in relation to the issues dealt with by the First Interim Award.

***Functus officio* and imputing agreement to the parties**

82 As noted, the Court of Appeal's conclusion that s 34(2)(a)(iii) of the Arbitration Act was engaged was in part predicated on its conclusion that the parties agreed to resolve their disputes on the basis that certain "principles of finality ... would apply to a final award, or to an interim award which determined the, or an, issue of liability".¹⁴⁴ The principles of finality to which the Court referred were general statements to the effect that: the foundation of arbitration is the determination of the parties' rights by an arbitrator pursuant to the authority given to them by the parties;¹⁴⁵ an award made by an arbitrator pursuant to that

¹⁴³ *Fidelitas* [1966] 1 QB 630 at 643.

¹⁴⁴ *CBI Constructors* [2023] WASCA 1 at [97].

¹⁴⁵ *CBI Constructors* [2023] WASCA 1 at [73], citing *TCL Air Conditioner* (2013) 251 CLR 533 at 545-546 [9], 555 [31].

authority is final and conclusive;¹⁴⁶ issues determined separately bind the parties;¹⁴⁷ and an interim award renders an arbitral tribunal *functus officio* with respect to the issues decided, a principle supposedly derived from *Fidelitas*.¹⁴⁸ The Court's erroneous reliance on *Fidelitas* has already been addressed.

83 The principles of finality the Court of Appeal imputed to the parties' agreement did not extend to *res judicata*, issue estoppel or *Anshun* estoppel.¹⁴⁹ The omission is telling because they are also principles of finality but they clearly operate within the jurisdiction of an arbitral tribunal. This exposes that the real issue is not whether the parties agreed to the application of the principles of finality to the arbitral proceedings or whether they were otherwise applicable, but rather which body (ie, the court or the arbitral tribunal) determines what has been finally decided by an interim award. The answer to that question turns on the provisions of the Arbitration Act and the scope of the parties' agreement to submit to arbitration. The former have been addressed, and none have been of assistance to Chevron. What follows concerns the latter; ie, the scope of the parties' agreement.

84 As noted, in *C v D*, the Hong Kong Court of Final Appeal rejected a challenge under the Hong Kong equivalent provision to Art 34(2)(a)(iii) of the Model Law¹⁵⁰ which sought to have that Court determine *de novo* whether the parties had complied with a condition committing the parties to "good faith negotiations" prior to arbitration.¹⁵¹ Ribeiro PJ noted that while it was open to the parties to expressly agree that such non-compliance was amenable to review by the courts, agreements to that effect would not be inferred lightly:¹⁵²

"[T]he court will require unequivocally clear language to arrive at that conclusion. That is because it would be contrary to all normal expectations to find that such was the parties' intention. They have opted to submit their disputes to an arbitral tribunal rather than a court for resolution. It would be

146 *CBI Constructors* [2023] WASCA 1 at [74], citing *TCL Air Conditioner* (2013) 251 CLR 533 at 552 [23]; see also at 568 [82]-[83].

147 *CBI Constructors* [2023] WASCA 1 at [82]-[84].

148 *CBI Constructors* [2023] WASCA 1 at [85]-[91], citing *Fidelitas* [1966] 1 QB 630 at 644.

149 *CBI Constructors* [2023] WASCA 1 at [97], see also at [75]-[81].

150 *Arbitration Ordinance* (HK), s 81.

151 *C v D* (2023) 26 HKCFAR 216 at 241 [45].

152 *C v D* (2023) 26 HKCFAR 216 at 242 [47], see also at 227 [8], [11].

surprising to discover that they intend to have a court involved and to undergo two rounds of decision-making to determine whether a pre-arbitration condition has been met."

85 Gummow NPJ did not accept that the parties could expressly designate a particular dispute as "jurisdictional"¹⁵³ or agree that an arbitral tribunal's decision could be the subject of court review,¹⁵⁴ although his Honour accepted that the availability of curial intervention was, at least at one level, dependent on the proper construction of the parties' agreement and Art 34 of the Model Law.¹⁵⁵

86 Ribeiro PJ's statement is the operative interpretative principle to be applied in circumstances where it is contended that there is a jurisdictional limitation on the parties' submission to arbitration arising from their agreement. In this case, the alleged jurisdictional limit did not concern the scope of the substantive dispute contemplated by the parties to be arbitrated. The substantive dispute in this case concerned staffing costs, and the arbitral tribunal did not address anything other than staffing costs. Instead, it is (or must be) contended that there is a procedural jurisdictional limitation on the parties' submission to arbitration to the effect that, prior to the conclusion of the arbitral proceedings, an award cannot deal with a dispute that a court considers was already determined by an interim award in the same arbitral proceedings.

87 Similar to *C v D*, it is especially difficult to impute to the parties such an intention to impose a procedural jurisdictional limitation of that kind on their submission to arbitration. Generally, the parties can be taken to have intended to leave such matters to the arbitral tribunal to determine. Subject to one matter, there is nothing in CKJV's and Chevron's agreement to suggest that they intended that a court might closely inspect the entrails of the pleadings, the particulars, and the arbitral tribunal's procedural orders to determine whether, in making the Second Interim Award, the arbitral tribunal revisited an issue that should have been raised prior to the making of the First Interim Award. The parties agreed to submit their dispute to arbitration, not to a court, much less to that level of scrutiny by a court.

88 The one matter of possible exception is the parties' agreement to adopt the UNCITRAL Rules that enabled the making of an interim award and their agreement that any award, including an interim award, is "final".¹⁵⁶ However, for

153 *C v D* (2023) 26 HKCFAR 216 at 273 [153]-[156].

154 *C v D* (2023) 26 HKCFAR 216 at 273 [156].

155 *C v D* (2023) 26 HKCFAR 216 at 273 [156].

156 See above at [58].

the reasons already explained, for the parties to agree that an award is "final" does not necessarily mean that they intended that a court, not an arbitral tribunal, would determine and give effect to the relevant principle of finality. In this case, the parties' contract provided that the dispute was to be "exclusively and finally settled" by "binding" arbitration. In those circumstances, a sufficiently clear intent to impose a procedural jurisdictional limitation of the requisite kind on the parties' submission to arbitration is not manifest.

89 Two further matters should be noted. First, in this context, discussions in Singapore decisions concerning the effect of arbitral awards being rendered "final" should be treated with caution because in that jurisdiction the relevant statute has been amended¹⁵⁷ to make any award, including an interim award, "final and binding"¹⁵⁸ and to also make it clear that such finality does embody a jurisdictional limit on an arbitral tribunal.¹⁵⁹

90 Second, much was sought to be made in this appeal of the fact that CKJV did not "challenge" the Court of Appeal's findings to the effect that CKJV's Contract Criteria Case was not a case on quantum but was a new case on liability and that the effect of the arbitral tribunal's procedural orders was that all such liability issues were determined by the First Interim Award. It is correct that CKJV did not seek to contend that those findings were "wrong", in the sense that this Court should make findings to the contrary. Instead, CKJV contended that those findings should not have been made in that, as those findings did not go to the jurisdiction of the arbitral tribunal, exclusive authority to make them was vested in the arbitral tribunal and not the Court. In that respect, CKJV was correct.

91 It follows that the first ground of appeal should be allowed.

Deference

92 Although the second ground of appeal does not strictly arise given the success of the first ground of appeal, it raises a question of principle that can be dealt with briefly. A premise of the above reasoning is that the standard of review

157 With effect from 1 November 2001 by the *International Arbitration (Amendment) Act 2001* (SG), s 14.

158 *International Arbitration Act 1994* (SG), s 19B(1).

159 *International Arbitration Act 1994* (SG), s 19B(2). See *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at 419-420 [137]-[139]; see also *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at 620 [54]-[55]; *ONGC Petro additions Ltd v DL E&C Co Ltd* [2023] SGHC 197 at [33]-[35].

to be applied, where a jurisdictional issue is properly raised, is the correctness standard; such reviews are to be conducted *de novo*. There is no justification for the adoption of something akin to "*Chevron* deference"¹⁶⁰ to facts found by arbitrators in considering challenges to their jurisdiction.¹⁶¹ The real issue in cases such as this is the proper identification of the precise matter that goes to an arbitral tribunal's jurisdiction. The fact that an inquiry into the arbitral tribunal's jurisdiction led the Courts below into a journey through the minutiae of the arbitral tribunal's procedural orders is an indicator that the jurisdictional issue was not properly identified. The second ground of appeal should be dismissed.

Conclusion

93 The end result is that the search for a justification for a conclusion by a court that the First Interim Award rendered the arbitral tribunal *functus officio* with respect to the matters the subject of that award fails. It follows that the Second Interim Award was not liable to be set aside under s 34(2)(a)(iii) of the Arbitration Act.

94 The appeal should be allowed, the orders of the Court of Appeal and the primary judge should be set aside and, in lieu thereof, Chevron's application to the Supreme Court of Western Australia to set aside the Second Interim Award should be dismissed.

160 *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837.

161 See *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 151-154 [39]-[44].

