HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Apr 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P22/2023
File Title:	CBI Constructors Pty Ltd & Anor v. Chevron Australia Pty Ltc
Registry:	Perth
Document filed:	Form 27F - Appellants' Outline of oral argument
Filing party:	Appellants
Date filed:	16 Apr 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN: CBI CONSTRUCTORS PTY LTD
First Appellant

KENT PROJECTS PTY LTD
Second Appellant

and

CHEVRON AUSTRALIA PTY LTD
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the Internet.

Part II: Outline of propositions that the Appellants intend to advance orally

2. The first question is this: where an arbitral tribunal decides that its earlier Interim Award has not finally determined a claim or issue, does the court have power to set aside a subsequent award under s 34(2)(a)(iii) of the *Commercial Arbitration Act 2012* (WA) (**CAA**) on the ground that the finality conclusion was wrong in law: **AS [2]**, **Rep [6]**. This depends on the proper construction of s 34(2)(a)(iii).

3. **Scope of submission to arbitration**: The language of s 34(2)(a)(iii) does not support the existence of such a power. It operates where a tribunal exceeds its authority by deciding matters beyond its ambit reference: *C v D* [2023] HKFCA 16 at [128], [129] (**JBA4, 364-365**). The finality conclusion was within, and not beyond, the scope of the parties' submission to arbitration, whether contained in

the arbitration agreement or inherent in the referral to arbitration: **AS [22], [34], [37]-[39]**. The bifurcation by an arbitral tribunal of an arbitration into separate phases does not limit the scope of the parties' submission to arbitration: **Rep [7]**.

4. This conclusion is supported by (a) the recognised distinction between matters going to admissibility and those going to jurisdiction ("claim vs tribunal"); (b) the manner in which s 32 deals with exhaustion of the Tribunal's power (**AS [32]-[33], Rep [8]-[9]**); (c) the wider statutory context (CAA ss 1C, 5 and 19(2) (**JBA1, 18, 25, 42**), **AS [31]-[32], [40]**); and (d) legitimate assumptions as to the parties' intent (*C v D* at [48], [49] (**JBA4, 336-337)**).

5. As to (a), a question of finality has more far-reaching consequences than which tribunal may hear a claim. That is a matter that is aimed at whether a claim can be advanced at all, and not at a particular tribunal's power to decide that issue, as sourced ultimately from the consent of the parties: **AS [42]-[44]**.

6. The arbitral tribunal's finality conclusion, so far as it informed preclusionary estoppels, is conceded by the Respondent as within jurisdiction, and not reviewable under CAA s 34(2)(a)(iii). It was the very same finding that underpinned its conclusion that it had not exhausted its power to decide and was not functus officio: **AS [23]-[26]**, **Rep [4]**. The latter was merely the corollary of the former.

7. The concept of "functus officio" is a distraction: **AS [30]-[36]**, **Rep [12]**. It is not a legal principle or doctrine. It describes an end-state, being the exhaustion of power or authority to decide. Res judicata, issue estoppel, Anshun estoppel and functus officio all serve the interest of finality.

8. The parties' agreement to the UNCITRAL Rules 2010, including as to the finality of an interim award in Art 34, does not answer the question whether the court or tribunal is to decide what issues have finally been determined in an interim award: cf. **RS [13], [34(d)]**. Nor can it expand the scope of s 34(2)(a)(iii).

9. **Standard of review is not correctness**: If, contrary to the above, the ground for setting aside under CAA s 34(2)(a)(iii) may encompass review of a finality conclusion as to an interim award, it is in that respect qualitatively different from the other grounds for set aside under s 34(2)(a): **AS [47]-[49], Rep [13]-[14]**.

That is because that question is not one that clearly engages the principle of consent that otherwise unites the grounds (*C v D* at [51] (**JBA4, 338**); and contrast *Dallah Real Estate v Ministry of Religious Affairs* [2011] 1 AC 763 at [24], [31] (**JBA5, 531, 534**)): **AS [51]-[52], [56]-[60], Rep [13]-[15]**.

10. That justifies a supervisory court according at least substantial deference to an arbitral tribunal's finality conclusion. This is a fortiori when the finality conclusion turns wholly or substantially on the construction of procedural orders issued by the arbitral tribunal itself: **AS [62]-[63]**. It is for the arbitral tribunal to interpret its own procedural orders taking into account the relevant procedural context: **Rep [14]**.

11. This is supported by the statutory framework (CAA ss 1C, 5 and 19 (**JBA1, 18, 25, 42**)), and authority: *Oxford Health Plans LLC v Sutter* 569 US 564 (2013) at 569 (**JBA6, 952**), **AS [47]-[49]**, **Rep [15]**.

Dated: 15 April 2024

John Sheahan
Banco Chambers
(02) 8239 0211
john.sheahan@banco.net.au

Boxun Yin
Banco Chambers
(02) 8239 0205
boxun.yin@banco.net.au