HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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Form 27A – Appellants' submissions

Note: see rule 44.02.2.

IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

BETWEEN:

CBI CONSTRUCTORS PTY LTD
(ACN 000 612 411)
First Appellant

KENT PROJECTS PTY LTD
(ACN 107 699 221)
Second Appellant

and

CHEVRON AUSTRALIA PTY LTD
(ACN 086 197 757)
Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues

2. **Issue One**: In an arbitration governed by the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) as given effect by the *Commercial Arbitration Act 2012* (WA) (**CAA**), where the arbitral tribunal determines that, on a proper understanding of its own prior orders and procedures, its interim award did not finally dispose of a claim or issue (for example, so as not to give rise to an issue estoppel), is that determination

within the exclusive authority of the tribunal, or rather, is it subject to review by the Court under CAA s 34 (2)(a)(iii)?

3. **Issue Two**: If the latter, on a review under CAA s 34 (2)(a)(iii), is the Court bound to accord substantial deference to the determination and reasons of the arbitral tribunal?

Part III: Section 78B Notices

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

Part IV: Reasons for judgment below

5. The reasons of the Court of Appeal (Quinlan CJ, Murphy JA and Bleby AJA) are *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2023] WASCA 1 (**CA**).[1]

6. The reasons of the primary judge (Kenneth Martin J) are *Chevron Australia v CBI Constructors Pty Ltd* [2021] WASC 323 (**J**).[2]

Part V: Facts

7. The arbitration arose from a contract in relation to an offshore oil and gas project known as the Gorgon Project (**Contract**). Under the Contract, the appellants (together, **CKJV**) were required to provide Staff to carry out work at certain construction sites, and the respondent (**Chevron**) was required to reimburse CKJV for the costs of providing Staff.

8. CKJV (as claimant) commenced arbitration proceedings against Chevron (as respondent) in February 2017. The Contract provided that:[3]

   (a) "*[a]ny Dispute shall be exclusively and finally settled*" pursuant to arbitration administered by the Institute of Arbitrators and Mediators, Western Australian Chapter, using the UNCITRAL Rules, and seated in Perth;

   (b) "*Dispute*" means "*any dispute or controversy arising out of this Agreement or the performance of the Work, including a Claim and*

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[1] Core Appeal Book (**CAB**) 143-247.
[2] CAB 4-139.
[3] Articles 1.26, 21.1 and 21.2: Appellants' Book of Further Materials (**AFM**) 8, 14, 14-15.

any dispute or controversy regarding the existence, construction, validity, interpretation, enforceability or breach of this Agreement";

(c) "*any award shall be final and binding*";

(d) the substantive governing law of the Contract was that of Western Australia;

(e) "*the terms of this arbitration contract are enforceable under the Commercial Arbitration Act 1985 (WA).*[4] *The parties further agree that any disputes relating to or in connection with the enforceability of this arbitration contract shall be brought only in the Supreme Court of Western Australia and each of [the parties] consent to the exclusive jurisdiction of the Supreme Court of Western Australia for that purpose*."

9. Broadly, CKJV contended that Chevron owed it more money than Chevron had paid, while Chevron contended, by way of counterclaim, that it had overpaid CKJV.

10. On 9 May 2017, in Procedural Order No. 1, the tribunal fixed 5-23 November 2018 for the final, substantive hearing in the arbitration (**November Hearing**).[5]

11. Just over three months before the November Hearing, Chevron provided amended particulars of its counterclaim in which it set out, for the first time, the methodology behind its claim for overpayment.[6] In order to allow CKJV a proper opportunity to respond, and so as to preserve the November hearing dates, the tribunal issued a series of procedural orders bifurcating the proceedings principally on the basis that the November hearing would deal with "*all issues of liability*" and that "*[s]uch issues, for the avoidance of doubt, shall exclude all quantum and quantification issues arising out of the*

[4] By CAA s 43(1), a reference in an arbitration agreement to the *Commercial Arbitration Act 1985* (WA) is to be construed as a reference to the CAA.
[5] Procedural Order 1 (dated 9 May 2017): see J [224]([13]) (CAB 87).
[6] Amended Full Particulars of Counterclaim dated 25 July 2018 (see CA Appendix [46] (CAB 219-220)).

Respondent's Counterclaim and the Set-Off issues raised in the Claimant's Defence to Counterclaim ...".[7]

12. Following the November Hearing, by an award issued in December 2018 (**First Interim Award**), the tribunal held, relevantly, that: 1) there was no agreement whereby the parties had agreed that any "Cost" items would be converted into higher "Rate"[8] items; 2) nor was there any estoppel to that effect; 3) CKJV may bring into account by way of defence the amounts particularised in its Defence "*and any other amounts of cost which it seeks to prove have not yet been accounted for in what it has been paid to it*".[9]

10 13. On 24 May 2019, the tribunal then ordered the parties to replead their cases on quantum.[10] In its repleaded case, CKJV included a pleading to the effect that its entitlement to "Staff Costs" in accordance with the Contract was to be calculated by applying the "Staff Costs Contract Criteria" to actual or alternatively approved salaries and hours (the **Contract Criteria Case**).[11]

14. Chevron objected to the Contract Criteria Case on the following bases:

(a) that CKJV was precluded from advancing it by reason of *res judicata*, issue estoppel or *Anshun* estoppel arising out of the matters determined in the First Interim Award (together, the **Estoppels**);

(b) that the tribunal was functus officio in respect of the Contract Criteria
20 Case as the tribunal was said to have determined, by the First Interim Award, that "*CKJV's entitlement was to be paid actual costs*".[12]

15. Chevron's objection, and the merits of CKJV's Contract Criteria Case, were then set down to be heard together in August 2020.[13]

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[7] Procedural Orders 14 (dated 29 July 2018), 15 (dated 21 August 2018), 15A (dated 10 September 2018) and 17 (dated 3 October 2018) (see CA Appendix [48]-[49], [55]-[57], [59], [66]-[67] (CAB 221-224, 226-228, 229, 234-235)).

[8] Essentially, a changed basis of remuneration that the parties were entitled to agree under the Contract which CKJV had contended would have led to a higher amount (clause 1.2.8 of Attachment C - Pricing Schedule): see J [203] (CAB 76-77).

[9] CA Appendix [89] (CAB 246); J [125] (CAB 39-40).

[10] CA [26] (CAB 156); J [140] (CAB 44).

[11] CA [27] (CAB 156); J, [141]-[144] (CAB 17-18, 44-45).

[12] CA [28] (CAB 156); J [31]-[34], [145]-[146] (CAB 17-18, 45-46).

[13] CA [30] (CAB 157); J [37] (CAB 18).

16. Following that hearing, the tribunal issued a further award (the **Second Interim Award**). By majority (Sir Robert Akenhead and Mr Phillip Greenham, the Hon. Christopher Pullin KC dissenting), the tribunal rejected each of Chevron's objections and declared that CKJV was not precluded from advancing the Contract Criteria Case by any of the Estoppels and that the tribunal was not functus officio in respect of the Contract Criteria Case. The majority found[14] that:

(a) in the First Interim Award, the tribunal:

(i) had not determined that "*CKJV's entitlement was to be paid actual costs*"; rather, it had determined whether there was an "*agreement or concomitant estoppel whereby there was a conversion from the Cost basis of entitlement to the Rate basis*": Second Interim Award at [4.6]-[4.8], [8.16]; and

(ii) had not determined that "*actual cost*" meant anything in particular other than that it was not a Rate: Second Interim Award at [8.17];

(b) the Contract Criteria Case "*in context, fell into the category of quantum, quantification and calculation issues which were to be deferred*": Second Interim Award at [9.12(b)];

(c) the Contract Criteria Case did not give rise to the same question as any question raised in the First Interim Award, and therefore was not precluded by issue estoppel: Second Interim Award at [10.5];

(d) if an issue raised after an award has not been decided in an earlier award, then the tribunal is not functus officio; thus, in practice, functus officio substantially overlaps with res judicata and issue estoppel, and that in this arbitration there is "*in practice no material difference*": Second Interim Award at [11.7];

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[14] The majority's dispositive findings are set out at CA [31] and [33], CAB 157-158; extracts from the majority's reasons are set out at J [155], [159], [169], [171], [173], [175], [177], [179], [181], [183], [192], [200], [201] (CAB 47-49, 49-51, 67, 68-70, 70, 70-71, 71, 71-72, 72, 72, 74).

(e) since the tribunal had not addressed, let alone decided, the Contract Criteria Case in the First Interim Award, it was not functus officio in respect of that case: Second Interim Award at [11.7]-[11.8]. The tribunal then went on to consider the substantive merits of the Contract Criteria Case, ultimately finding in favour of CKJV.

17. Chevron then applied to set aside the Second Interim Award, relying on the ground that that award was beyond the scope of the parties' submission to arbitration within the meaning of CAA s 34(2)(a)(iii).

18. Chevron's set aside application was successful. CKJV's appeal to the Court of Appeal was dismissed. CKJV now appeals to this Court by special leave.

Part VI: Summary of argument

A. Principles of interpretation

19. The CAA forms part of an integrated statutory framework for international and domestic commercial arbitration.[15] It is to be interpreted in a way that gives effect to the Model Law, having regard to its international origin and to the need to promote uniformity in its application and the observance of good faith.[16] Relevantly, that includes the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (**New York Convention**), from which key provisions of the Model Law are derived.[17] As it seeks to give effect to matters of international law, it should be interpreted, so far as possible, consistently with international law.[18] It is not to be construed by reference to "*any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles*".[19] Nonetheless, the Model Law proceeds on a conception of arbitration as a

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[15] *Rinehart v Hancock Prospecting* (2019) 267 CLR 514 at [13] (Kiefel CJ, Gageler, Nettle and Gordon JJ).
[16] ***TCL** Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [6] (French CJ and Gageler J); CAA s 2A.
[17] *TCL* at [7]-[8] (French CJ and Gageler J).
[18] *Kingdom of Spain v Infrastructure Services Luxembourg SARL* (2023) 275 CLR 292 at [16] (the Court).
[19] *TCL* at [8] (French CJ and Gageler J).

manifestation of party choice, and the authority of the tribunal as being founded on party choice.[20]

20. Additionally, CAA s 5 provides that in matters governed by the CAA, "*no court must intervene except where so provided*" by the CAA itself. That principle of minimal curial intervention recognises the autonomy and finality of the arbitral process and which the parties to an arbitration are taken to have accepted.[21]

21. CAA s 34(2) provides for six grounds on which the supervisory court may set aside an award.[22] It is the ambit of one of those grounds – the "beyond scope" ground in CAA s 34(2)(a)(iii) – that is in issue. Relevantly it applies where:

> 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 beyond the scope of the submission to arbitration…

B. Issue One

22. It is clear that the Contract Criteria Case was within the scope of the submission to arbitration. The dispute as to whether it had been determined by the First Interim Award was the very matter submitted by Chevron to the tribunal in its objection dated 18 June 2019.[23] It is also clear that the tribunal's determination that the First Interim Award[24] was not a final determination of the Contract Criteria Case was made within jurisdiction for the purposes of the res judicata and issue estoppel contentions. That was, rightly, conceded: J [63] (CAB 23-24). That concession carries with it that CAA s 34(2)(a)(iii) review is not available as regards the finding that the First Interim Award was not a final determination of the Contract Criteria Case. That is, review of *that finding* as to (non-)finality was not authorised by CAA s 34(2)(a)(iii). Rather, the finding that there had not been a final determination of the Contract

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[20] See *TCL* at [6]-[12] (French CJ and Gageler J).
[21] *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86 at [65(c)].
[22] Neither the CAA nor the Model Law defines an "arbitral award". It is, however, accepted that the Second Interim Award is an award for the purpose of CAA s 34.
[23] J [31]-[34] (CAB 17-18).
[24] Those findings were contained in the Second Interim Award, and summarised at CA [31] (CAB 157-158).

Criteria Case was a determination on a mixed question of fact and law which was part of a Dispute within the meaning of the arbitration agreement and which fell within the scope of the matters submitted to arbitration.

23. The consequential questions – was there res judicata/issue estoppel, and was the tribunal functus officio – were both to be answered taking that determination as conclusive. Further, the tribunal's dual conclusions (a) that CKJV was not precluded by virtue of the Estoppels from advancing its Contract Criteria Case, and (b) that it was not functus officio to hear the Contract Criteria Case, "*effectively all dovetailed*",[25] since they were "*underpinned by the same findings*".[26] The conclusions that follow relating to estoppel and functus officio cannot contradict each other.

24. Authority supports this. In ***Fidelitas*** *Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630, Diplock LJ treated a finding as to functus officio as a corollary of a finding as to issue estoppel. He said (at 649E-F):

> In these circumstances the principle approved and applied in *Hoystead's* case applies to this case too. [The owners] are estopped from reopening this issue … The umpire for his part is precluded from further considering that question.[27]

25. This is also consistent with the decision of the Singapore Court of Appeal in *PT Asuransi v Dexia Bank* [2007] SLR(R) 597. In that case a tribunal had upheld an issue estoppel argument arising from the decision of an earlier arbitration ("the third critical finding"), and held as a consequence that it had no jurisdiction to entertain the claim. The appellant sought to challenge the finding of issue estoppel and the conclusion of want of jurisdiction, relying on Art. 34(2)(a)(iii) of the Model Law. The Court of Appeal held at [50] that the challenge failed, since the decision on issue estoppel was within the authority of the second tribunal to determine:

> [T]he third critical finding stems from an issue which a tribunal, in determining its own jurisdiction, is entitled to determine. For that

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[25] J [44] (CAB 20).
[26] CA [119] (CAB 201).
[27] See also 644E, 648D-E.

reason, the third critical finding that led the Second Tribunal to find that it had no jurisdiction to decide the substantive issues referred to it for determination cannot be set aside under Art. 34(2)(a)(iii) of the Model Law.

26. In the same way, a conclusion that no estoppel arises because an issue *had not* been finally determined precludes a separate conclusion that the tribunal is functus officio on the theory that the issue *had been* finally determined.

27. The conclusion of the courts below gives rise to two awkward results. One is that the consequence of a finding that no estoppels arise is that the Contract Criteria Case must be capable of being advanced somewhere. The tribunal's conclusion that it was not functus officio simply recognised that it could then hear that case. The CA's conclusion, however, was that that case cannot be advanced before the tribunal in this arbitration because the tribunal had already decided that question. But there is no reason to distinguish the position of this tribunal and any other in this regard. This highlights the inconsistency between the findings made by the tribunal, within the authority conferred on it by the consent of the parties, that it had not determined the Contract Criteria Case, and the Court's finding of functus officio.

28. The second awkward consequence is that the result in this case must have been different if the tribunal had been considering, not the preclusionary effect of its own Interim Award, but the preclusionary effect of an award of a different tribunal.[28] That distinction reflects no principled difference between the two situations, and is contrary to the principles of efficiency and finality the Model Law seeks to promote.

29. That the courts below were in error is further supported by the following matters.

30. *First*, the reliance of the courts below on the notion that the tribunal was "functus officio" proceeds on a misunderstanding of that concept. It is neither a term of art[29] nor a doctrine with substantive legal content. It is simply a description or label that has been used to express a conclusion as to why a

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[28] As demonstrated by *PT Asuransi v Dexia Bank* [2007] SLR(R) 597.
[29] *Dawes v Treasure & Son Ltd* [2011] 2 All ER (Comm) 569 at [27] (Akenhead J).

power, function or duty could not be exercised or performed again.[30] It will be an appropriate conclusion in circumstances which vary depending on the context.

31. The starting point for any examination of the appropriateness of a conclusion that a body is functus officio is a consideration of the instrument that conferred such power. In the administrative law context, the question whether an administrative tribunal is functus officio depends on the enabling statute.[31] In an arbitration, the instrument conferring authority on the tribunal is the arbitration agreement, being the manifestation of party choice and reflective of party autonomy,[32] read in light of the statutory regime established by the CAA[33] and which, by s 5, confines curial intervention to the matters set out in the CAA itself.

32. In the context of arbitration under the CAA, the concept of functus officio is given effect by s 32, and the exceptions in ss 33 and 34(4). As Born says, the Model Law "*sets forth a comprehensive and well-structured set of rules regarding the termination of the arbitrators' mandate*".[34] Those provisions describe the point at which a tribunal has exhausted its jurisdiction,[35] namely, by the final award or the making of an order under s 32(2). In either circumstance, "*the mandate of the arbitral tribunal terminates*": CAA s 32(3).

33. In the present case, there has been neither a final award nor an order under CAA s 32(3). It follows that in this context the notion of functus officio strictly speaking has no application.

34. This is not a surprising conclusion. Tribunals may have to deal with questions as to whether interim awards are final so as to preclude further consideration of a question or claim. The significance of a conclusion that there is no strict functus officio issue in such circumstances is merely that the tribunal's

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[30] *Minister for Indigenous Affairs v MJD Foundation* (2017) 250 FCR 31 at [147], [155].
[31] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [3] (Gleeson CJ).
[32] *TCL* at [9]-[12], [15] (French CJ and Gageler J).
[33] *Westport Insurance Corporation v Gordian Runoff* (2011) 244 CLR 239 at [20] (French CJ, Gummow, Crennan and Bell JJ).
[34] Born, *International Commercial Arbitration*, (2021, 3rd ed), §24.02[B][1], p. 3372.
[35] Cf. *Dawes v Treasure & Son Ltd* [2011] 2 All ER (Comm) 569 at [27] (Akenhead J).

decision on such an issue (res judicata or issue estoppel) is within its jurisdiction and not liable to be set aside under CAA s 34(2)(a)(iii). It does not involve the tribunal extending its own powers or authority, since, *ex hypothesi*, the issues are within the scope of the arbitration agreement and the disputes submitted for arbitration, and the tribunal's authority has not been exhausted.

35. Functus officio is not in any event a characterisation dependent on strict or immutable rules. "*[C]ircumstances can arise where a rigid approach to the principle of functus officio is inconsistent with good administration and fairness*": *Minister for Immigration and Multicultural Affairs v* ***Bhardwaj*** (2002) 209 CLR 597 at [8] per Gleeson CJ. One such circumstance is that functus officio, being a principle of finality, should be applied more flexibly and less formalistically in respect of tribunals with limited as opposed to full rights of appeal: *Bhardwaj* at [52]-[53] (Gaudron and Gummow JJ).[36] Even a court is not functus officio "*whilst there remains any judicial function which may be performed in relation to a proceeding, even if it be only that of ensuring that the final order correctly records the meaning of the court*".[37]

36. In the present context – where authority is conferred on a tribunal by party consent, with strictly circumscribed rights of review, where the tribunal's mandate has not been terminated in the sense required by CAA s 32, and where the question was, effectively, one of interpretation of the First Interim Award and the tribunal's procedural orders and processes leading up to it – it is appropriate that any conclusion by the tribunal that power has or has not been exhausted for particular purposes or on particular issues should not be subject to review on the merits.

37. *Secondly*, the conclusion that the tribunal is the exclusive arbiter of the extent of finality of its interim awards is consistent with the analysis of Gummow NPJ in *C v D* [2023] HKFCA 16. In his Honour's view, Art. 34(2)(a)(iii) of the Model Law is only concerned with the "*the ambit of submission to*

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[36] Citing with approval *Chandler v Alberta Association of Architects* (1989) 2 SCR 848 at 861-862 (Sopinka J, with whom Dickson CJ and Wilson J agreed); see also *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at [60] (Kiefel CJ, Gageler and Nettle JJ).

[37] *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 289 (Gaudron J).

arbitration", consistently with the equivalent provision of the New York Convention which is concerned "*with whether an award has gone beyond the scope of the subject matter the parties intended to submit to arbitration*" (at [131]).

38. The arbitration agreement giving rise to the present arbitration is worded broadly, encompassing "*any Dispute*" (in turn defined broadly) which "*shall be exclusively and finally settled ... [by] binding arbitration*".[38] A dispute as to scope of finality of an interim award plainly falls within the scope of that agreement (even more plainly than the question whether pre-arbitral steps provided for by the arbitration agreement itself are within that scope, as Gummow NPJ, affirming the Court of Appeal, held they were: at [133]-[134]). As the Court of Appeal had said in *C v D*,[39] there is no reason to confine the scope of arbitrable disputes under a clause similar to the clause in this case "*to substantive disputes arising out of or in relation to the Agreement*".

39. It could not be suggested that a dispute as to finality of the interim award falls outside what was submitted to the tribunal to decide, since that was the very matter submitted by Chevron to the tribunal in its objection dated 18 June 2019.[40] And, by submitting the claims to arbitration, the parties conferred on the tribunal the authority conclusively to determine them.[41] No question as to the scope of this submission arises, and therefore the tribunal's decision as to finality is not one that can be substituted by a court under CAA s 34.

40. *Thirdly*, according to the courts below the tribunal's power was said to have been exhausted through an "*objective*" construction[42] of procedural orders issued by the tribunal itself in light of the procedural context. That does not give full effect to the principle that procedural orders fall within the tribunal's "*exclusive domain*".[43] That is so:

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[38] Articles 1.26 and 21.2 of the Contract: AFM 8, 14, 14-15.
[39] [2022] 3 HKLRD 116 at [61], cited with approval in [2023] HKFCA 16 at [133] (Gummow NPJ).
[40] J [31]-[34] (CAB 17-18).
[41] *TCL* at [77] (Hayne, Crennan, Kiefel and Bell JJ).
[42] CA [111], [113]-[115], [124] (CAB 199-201, 203); J [187]-[215] (CAB 73-80).
[43] *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [52].

(a) primarily as a matter of the parties' express agreement, through (i) their arbitration agreement, by which they agreed that any disputes are to be settled by arbitration, and (ii) their choice of the UNCITRAL Rules as the applicable procedural law,[44] by which they agreed to give the tribunal "*wide and flexible procedural powers*";[45] and

(b) as a matter of policy, as embodied in the paramount object of the CAA "*facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals*" (s 1C) and in the policy of minimal curial intervention (as discussed at [20] above).

10 41. It follows that the courts below should have deferred to the tribunal's decision on matters dependent on the interpretation and evaluation of the tribunal's own orders and processes. Such matters should be taken to be within the mandate given by the parties to the tribunal.

42. *Fourthly*, that the courts below were in error is supported by application of the distinction between admissibility and jurisdiction, as tested by whether the contention goes to whether the claim may be advanced at all (in any tribunal), or only as to the authority of the particular tribunal to deal with it. In the former case the contention goes to the admissibility of the claim, but not to jurisdiction.

20 43. The "tribunal versus claim" test has been accepted by the apex courts of Singapore[46] and Hong Kong.[47] As a consent-based analysis, it is at least a useful tool that assists in the proper identification of jurisdictional questions in the arbitral process. But as Ribeiro PJ affirmed in *C v D*, the distinction is a "*concept rooted in the nature of arbitration itself*" and is "*underpinned by a consent-based analysis*": at [39].

44. Here the underlying issue as to whether the Contract Criteria Case has already been determined does not raise any question about a defect in or omission to

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[44] Article 21.2.2 of the Contract, extracted at CA [14]([21.2.2]) (CAB 153); AFM 14.
[45] *ADG v ADI* [2014] 3 SLR 481 at [108], [114]. See esp Art 17 of the UNCITRAL Arbitration Rules 2013 ("*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate*").
[46] *BTN v BTP* [2021] SLR 276 at [71]; *BBA v BAZ* [2020] 2 SLR 453 at [76]-[79].
[47] *C v D* [2023] HKCFA 16 at [1]-[6] (Cheung CJ), [39]-[44], [51]-[53] (Ribeiro PJ), [97] (Fok PJ), [105]-[111] (Lam PJ).

consent to arbitration, and is not targeted at the tribunal. Instead, it is targeted at that claim itself. It raises the question as to whether that case can be advanced in *any* forum. Chevron's objection plainly reflected a desire to prevent the claim from being litigated in any forum, not a desire to resolve the claim in another forum.[48] It did not reflect a desire simply to preclude this tribunal from hearing the claim. Nor was it an objection "*denying consent to the tribunal's authority*".[49]

C. Issue Two

45. The considerations addressed above at least call for the Court to afford substantial deference to the tribunal's interpretation of the meaning and effect of its own orders and processes.

46. That such deference is appropriate is supported by numerous authorities referred to by Born at §25.04[f][4](a) at footnote 867.[50] As he says – "*a considerable measure of judicial deference is accorded to the arbitrators' interpretation of the scope of their mandate under the parties' submissions*".

47. The unique place of the "beyond scope" ground was recognised by the US Supreme Court in ***Oxford Health Plans*** *LLC v Sutter* (2013) 569 US 564. There, § 10(a)(4) of the *Federal Arbitration Act* (US) empowered the supervisory court to vacate an arbitral award "*where the arbitrators exceeded their powers*". Kagan J, delivering the opinion of the Court, said at 569 (internal quotation marks omitted, emphasis added):

> *A party seeking relief under that provision bears a heavy burden. 'It is not enough ... to show that the [arbitrator] committed an error – or even a serious error.' Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits. Only if 'the arbitrator act[s] outside the scope of his contractually delegated authority' – issuing an award that 'simply reflect[s] [his] own notions of*

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[48] *BTN v BTP* [2021] SLR 276 at [71].
[49] *C v D* [2023] HKCFA 16 at [66] (Ribeiro PJ).
[50] Born, *International Commercial Arbitration*, (2021, 3rd ed), p. 3581.

> *[economic] justice' rather than 'draw[ing] its essence from the contract' – may a court overturn his determination. So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.*

48. Her Honour expressly considered and distinguished the formulation in *First Options of Chicago v Kaplan*[51] (which adopted a correctness standard) on the following basis (at 569, footnote 2):[52]

> *We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability'. Those questions – which 'include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy' – are presumptively for courts to decide. A court may therefore review an arbitrator's determination of such a matter* de novo *absent 'clear and unmistakable' evidence that the parties wanted an arbitrator to resolve the dispute.*

49. The test for excess of powers, therefore, was whether the tribunal "*was arguably construing the contract*"; if so, "*[t]he arbitrator's construction holds, however good, bad, or ugly*": at 572-573.

50. The courts below instead adopted a "correctness" standard of review, by way of de novo review: CA [120], CAB 202. This was said to be justified by reference to what French CJ and Gageler J had said in *TCL* at [12], in turn relying on ***Dallah*** *Real Estate v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 at [20]-[30], and in particular [24]: CA [92], CAB 188-9.

51. However *Dallah* was not concerned with Art. 34(2)(a)(iii) of the Model Law or its equivalents, but rather with Art V(1)(a) of the New York Convention and s 103(2)(b) of the *Arbitration Act* 1996 (E, W, NI), both of which dealt with the court's power to refuse recognition or enforcement of awards where

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[51] A formulation which had been cited in *Dallah* at [24].
[52] A distinction later recognised and apparently accepted by Breyer J in *BG Group Plc v Republic of Argentina* (2014) 572 US 25 at 33.

the arbitration agreement was not valid (equivalent of CAA s 34(2)(a)(i)). As to such a question there is no doubt: arbitration is grounded in consent; absent express authority arbitrators cannot by their own decision create or extend the authority conferred on them (at [24]), and the court must make an independent determination of the agreement's validity (at [25]).

52. The present was not such a case. It was concerned with the scope of the parties' submission to arbitration on the assumption that there was a valid and binding arbitration agreement: CAA s 34(2)(a)(iii).

53. One should distinguish between three different possible meanings of the term "submission to arbitration" in CAA s 34(2)(a)(iii).

(a) The **first** is that the submission to arbitration is founded in the arbitration agreement. That is submission in the broadest sense, since that is the instrument by which the parties have agreed to submit disputes to arbitration. Questions of scope can arise where the arbitration agreement seeks to delimit the types of disputes that the parties have agreed to arbitrate, for example by reference to subject matter, monetary value[53] or time period.

(b) The **second** is that the submission to arbitration is founded in the document commencing or constituting the arbitration (eg the notice of arbitration[54]) or in an agreed document (eg the terms of reference[55]). Questions of scope are then resolved by construing that document.

(c) The **third** is that the submission to arbitration is founded in the materials submitted in the course of the arbitration, including the pleadings, particulars and submissions.[56] The courts below extended this to procedural orders.

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[53] Art 21.2.3 of the Contract is an example of this: J [224]([9]) (CAB 85), AFM 14.
[54] See, eg, *PT Asuransi v Dexia Bank* [2007] SLR(R) 597 at [15].
[55] See, eg, *CRW v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305.
[56] See, eg, *Prometheus Marine Pte Ltd v King* [2018] 1 SLR 1 at [58]-[63]; *CDM v CDP* [2021] 2 SLR 235 at [18]; *CBX v CBZ* [2022] 1 SLR 47 at [14]-[46]; *CJA v CIZ* [2022] 2 SLR 557 at [57]-[64]; *CKH v CKG* [2022] 2 SLR 1 at [16].

54. **Submission in the first sense**: As noted above, submission in this sense centrally raises the question of jurisdiction, since it is by the arbitration agreement that the parties have manifested their consent to arbitrate.

55. *United Mexican States v Cargill* (2011) 107 OR (3d) 528 is an example of submission in this first sense. In that case, the "*submission to arbitration*" relied upon was (a) the agreement of the parties; (b) the wording of the investment treaty giving rise to the standing offer to arbitrate; and (c) any interpretation of that wording subsequently agreed to by the signatories to the treaty (at [32]). As an investment treaty arbitration, these matters equate to the arbitration agreement between the investor and the host State.[57] Unsurprisingly, therefore, the Ontario Court of Appeal held that the standard of intervention was that of "correctness" (at [42]).

56. *C v D* is another example. There, the appellant's argument proceeded on the basis that the question of compliance with a pre-arbitration condition as contained in the arbitration agreement raised a question of scope of submission to arbitration under the Hong Kong equivalent of s 34(2)(a)(iii).[58] Lam PJ at [109] considered that "*for present purposes, the terms of the submission to arbitration are to be determined by the common intention of the parties as set out in the arbitration agreement*". In rejecting the proposition that any question of scope arose, Ribeiro PJ held at [66] that the objection *did not deny consent* to the tribunal's authority.

57. As explained above, the arbitration agreement giving rise to the present arbitration encompasses "*any Dispute*" which "*shall be exclusively and finally settled ... [by] binding arbitration*".[59] There has therefore been a submission in the first sense. It has not been, nor could it be, suggested that the Contract Criteria Case falls outside the scope of that agreement, and therefore no question arises as to scope in this sense.

58. **Submission in the second sense**: The traditional way in which a submission to arbitration has been understood is in the second sense. The language of

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[57] *Republic of Ecuador v Occidental Exploration and Production* [2005] 2 All ER (Comm) 689 at [32]-[33].
[58] *C v D* [2023] HKCFA 16 at [64]-[65], [109].
[59] CA [14]([21.2]) (CAB 152); Article 21.2.1 of the Contract, AFM 14.

CAA s 34(2)(a)(iii) "*is designed to accommodate the gradation of disputes submitted to arbitration*".[60] As stated in the commentary to art V(1)(c) in the UNCITRAL Secretariat Guide on the New York Convention (2016 ed), at p. 183:

> Where article V(1)(a) concerns the existence of a valid arbitration agreement which is binding on all the parties addressed by an award, article V(1)(c) assumes the existence of a valid arbitration agreement between the parties and is concerned instead with whether an award has gone beyond the scope of the subject matter the parties intended to submit to arbitration.[61] (emphasis added)

59. In ***CRW*** *v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, the Court recognised at [31] that:

> Art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it .... In other words, Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal exceeded ... the authority that the parties granted to it.

60. In *PT Asuransi v Dexia Bank* [2007] SLR(R) 597, the submission was identified from the face of the award and from the notice of arbitration (see [5] and [15]), and in *CRW*, the submission was located in terms of reference signed by both parties (at [43]).

61. Here, the submission to arbitration is located in the notice of arbitration dated 10 February 2017.[62] Relevantly, the "*matters*" in respect of which CKJV initiated the arbitration included "*the non-payment by [Chevron] of outstanding amounts due to [CKJV] in breach of the Contract*". For reasons

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[60] *C v D* [2023] HKCFA 16 at [130] (Gummow NPJ).

[61] The distinction between jurisdiction and the tribunal exceeding the scope of its authority was drawn in *Uttam Galva Steels Ltd v Gunvor Singapore Pte Ltd* [2019] 1 All ER (Comm) 68 at [28] and [40], citing with approval *Gulf Import & Export Co v Bunge SA* [2008] 2 All ER (Comm) 161 at [40]. Note, however, the English authorities must be read with care as the *Arbitration Act 1996* (UK) is not a statute based on the Model Law: compare s 30(1)(c), s 67, s 68(2)(b) and the definition of "substantive jurisdiction" in s 82(1) with s 103(2)(d).

[62] Extracted at CA [15] (CAB 153).

given in relation to Issue One, there is no basis for concluding that there is an issue as to scope in this sense, and the tribunal's views should be the subject of absolute deference.

62. But if this is wrong, and some wider inquiry as to the procedures and rulings of the tribunal is appropriate (submission in the third sense) it follows that at least substantial deference to the tribunal's conclusions is warranted. Neither *Dallah* nor *TCL* stands in the way of that conclusion.

63. Here, the parties had, through the arbitration agreement, bargained for the tribunal's construction of the scope of their subsequent submission to arbitration, and to its decisions as to practice and procedure for the resolution of the dispute. Substantial deference (at least) to the tribunal's decision in this case was required.

Part VII: Orders

64. CKJV seeks the orders contained in its Notice of Appeal.

Part VIII: Estimate of time required

65. CKJV estimates that it will need two hours to present its oral argument in chief, with 30 minutes in reply.

Dated: 19 January 2024

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ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Appellants set out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in these submissions.

Legislation	Provisions	Version
Arbitration Act 1996 (E, W, NI)	s 30(1)(c), s 67, s 68(2)(b), s 82(1), s 103	1996 c. 23, 31/01/1997 - 27/09/2012.
Commercial Arbitration Act 2012 (WA)	s 1C, s 2A, s 5, s 32, s 33, s 34, s 43	As at 01 July 2022, Version 00-d0-00.
Federal Arbitration Act (US)	§ 10(a)(4)	Pub. L. 107–169, §1, May 7, 2002, 116 Stat. 132.
Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (New York Convention)	Article V	10 June 1958
UNCITRAL Arbitration Rules, 2013	Article 17	2013
UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006)	Article 34	2006