THE HIGH COURT OF AUSTRALIA AND ARBITRATION IN 2024: KEY INSIGHTS FROM *CARMICHAEL*, *TESSERACT* AND *CHEVRON*

Summary

The High Court of Australia's decisions in *Carmichael*, *Tesseract* and *Chevron* show that the principle of minimal curial intervention in arbitration in Australia remains contentious. Minimal curial intervention is an important principle in Australian arbitration law as it is based on the UNCITRAL Model Law. Consistent with the principle of party autonomy, it recognises that the parties have decided to resolve disputes through arbitration, in preference to and the (partial) exclusion of the courts.

In *Carmichael*, the High Court recognised its obligation to enforce binding arbitration agreements despite any purported burden or inconvenience for the parties. Whereas *Tesseract* and *Chevron* show that there is no uniform practice in curial intervention under Article 34 of the Model Law. This lack of a unified approach raises important questions about the future direction of arbitration jurisprudence in Australia.

Below, we answer:

- what 'minimal' curial intervention in arbitration means
- when does the High Court of Australia think curial intervention is warranted
- what is the 'state of arbitration' in Australia.

Introduction

In 2024, the High Court of Australia handed down judgments in three cases concerning arbitration:

- *Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co KG & Anor* [2024] HCA 4 (***Carmichael***), decided on 14 February 2024, which dismissed an appeal from the Full Federal Court of Australia
- *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24 (***Tesseract***), decided on 7 August 2024, which allowed an appeal but affirmed the decision of the Court of Appeal of South Australia
- *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2024]* HCA 28 (***Chevron***), decided on 14 August 2024, which dismissed an appeal from the Court of Appeal of the Supreme Court of Western Australia.

These decisions provide guidance on arbitration law and practice in Australia[1] and shed light on the relationship between courts and arbitration, particularly the extent and limits of judicial intervention. A close review of the decisions demonstrates the High Court's recognition of its critical role in upholding the binding nature of arbitration agreements under section 7 of the **International Arbitration Act** 1974 (Cth) (similar to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) [2] and section 8 of the state Commercial Arbitration Acts),[3] while simultaneously revealing a diversity in its approach to intervening in ongoing arbitrations through Article 34 of the Model Law.

Curial intervention in arbitration

Minimal court intervention in arbitration is critical to modern arbitration practice and law as:

- limiting domestic curial intervention is necessary to maintain the Model Law's uniformity with general international arbitration practice
- minimal curial intervention is an essential aspect of the principle of 'party autonomy', which itself is an essential basis for the drafting of the Model law.

Maintaining international uniformity through minimal curial intervention

The Model Law is a codification of contemporary international arbitration practice. It *"reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world"*.[4] Its codification was intended to resolve the disparities in national arbitration laws that created unsuitable circumstances to resolve international commercial disputes.[5] In Australia, the International Arbitration Act gives effect to the Model Law[6] and the various Arbitration Acts are based on it. So, the Model Law is critical in both domestic and international arbitration.

The Model Law maintains its international uniformity by restricting *"unpredictable or disruptive court interference"*.[7] If domestic courts were allowed to apply the Model Law or Arbitration Acts solely in accordance with domestic statutory dictates or domestic norms of a particular state,[8] they could potentially fragment the Model Law and remove its ability to be a codification of a general international practice.[9] In general, to the extent that the courts have powers under the Model Law, they are limited to providing assistance and supervision for the arbitration,[10] or as enforcers of arbitral awards.[11]

The Model Law minimises curial intervention and the involvement of the courts in several ways, including:

- Article 2A of the Model Law, which is intended to prevent domestic courts from solely interpreting the Model Law by applying peculiar domestic principles.[12] It requires that the Model Law be interpreted to "*promote uniformity in its application*" and *"conformity with the general principles on which [the Model Law] is based"*.
- Article 8 of the Model Law, which restricts the ability of a court to hear a matter which is the subject of an arbitration agreement. It states:

  > *"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
  >
  > *(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."*

  A similar provision is found in section 8 of the state Commercial Arbitration Acts. In addition and similarly, section 7 of the International Arbitration Act sets out as follows:

  > *"(2) Subject to this Part, where:*
  >
  > *(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and*
  >
  > *(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;*

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

...

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed."

- Article 16 of the Model Law, which empowers the tribunal to determine its own jurisdiction (a codification of the competence-competence principal).
- Article 34 of the Model Law, which describes the limit of Court intervention in an arbitration. Judicial review of an arbitral award is permitted only if it breaches one of the specific grounds outlined in Article 34. Outside of those grounds, courts lack authority under the Model Law to interfere with or review the arbitral award. This ensures that the principle of minimal curial intervention is maintained, with courts playing a supervisory role as delimited by the Model Law. Article 34 states as follows (with appropriate alterations made in the Arbitration Acts to reflect the local context):[13]

"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iii) or 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, 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; or

(iv) 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 this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request

> *had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.*
>
> *(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."*

In *Carmichael*, the High Court of Australia considered section 7 of the International Arbitration Act (Article 8 of Model Law). In *Tesseract*, reference was made to Article 34(2)(b), while in *Chevron*, the decision concerned the application of Article 34(2)(a)(iii).

Upholding party autonomy through minimal curial intervention

An essential principal of modern arbitration is the notion of 'party autonomy' – in fact, it is perhaps 'the most important principle' on which the Model Law and the Arbitration Acts are based.[14] As described by Gageler J (as he then was) and French CJ in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5,[15] party autonomy refers to:

> *"satisfaction pursuant to the [parties'] prior accord of the causes of action…thereby precluding the recourse to the original rights the determination of which has been referred to arbitration…the foundation of arbitration is the determination of the parties' rights by the agreed arbitrators pursuant to the authority given to them by the parties.[16]"*

In conducting any review of arbitral awards or agreement, a court must give weight to the principal of party autonomy.[17] Party autonomy is given effect under the Model Law by various provisions, including Art 8 and Art 34:[18]

- Article 8 – the fact of choosing to arbitrate a dispute (and reflecting that intention through an arbitration agreement) is a manifestation of party autonomy, i.e. by exercising their autonomy, the parties have chosen to submit their dispute to arbitration, thereby foregoing their right to have it resolved by a court. Consequently, party autonomy can only be fully respected when a binding arbitration agreement is given its full effect. This aspect of party autonomy is best reflected in Art 8 of the Model Law (and section 7 of the International Arbitration Act) which make it necessary for the Court to give effect to a binding arbitration agreement by staying any court proceedings that have been commenced in conflict with the agreement. The principle of party autonomy is closely related to the principle of minimal curial intervention in arbitration
- Article 34 – as the International Arbitration Act recognises, the Model Law and the Act are intended to facilitate the use of arbitration agreements in international trade,[19] because arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes and arbitral awards are intended to provide certainty and finality.[20] To give effect to the arbitration agreement and party autonomy, the Model Law expressly restrains the involvement of the courts to the limited grounds of review under Article 34. Intervention by courts in arbitrations, whether purportedly to give effect to party autonomy or not, would be contrary to party autonomy that existed at the time when the parties agreed to resolve their dispute outside of the court system.

In promoting certainty by upholding party autonomy, these provisions also restrain curial intervention in arbitration practice. For Article 8, the parties' preference for the arbitral tribunal as the primary determiner of the dispute demands a limited role of the courts in their dispute. Article 34 expressly limits court review of arbitral awards. The close relation between party autonomy and minimal curial intervention means that curial intervention must be limited to give full effect to party autonomy such that minimal curial intervention itself becomes an essential principle of modern arbitration practice.

Carmichael

Summary of *Carmichael*

Carmichael is a joint judgment of the High Court of Australia. The dispute arose when steel rails owned by Carmichael Rail Network Pty Ltd were damaged during transit from Whyalla, South Australia, to Mackay, Queensland by German company BBC Chartering Carriers GmbH & Co as the carrier of the goods.

A clause in the bill of lading issued by BBC to Carmichael stipulated that any dispute be referred to arbitration in London under English law. BBC initiated arbitration proceedings in London, prompting Carmichael to seek a Federal Court injunction to restrain arbitration. BBC countered with an application to stay the Federal Court proceedings in favour of arbitration. The Full Court of the Federal Court ruled in favour of BBC, relying on an undertaking by BBC to apply the Carriage of Goods by Sea Act 1991 (Cth) Sch 1A (**Australian Hague-Visby Rules**) in arbitration.

Carmichael's appeal to the High Court challenged the validity of the arbitration clause in the bill of lading because there was a risk that arbitration might relieve BBC of liability under the Australian Hague-Visby Rules – Article 3(8) of the Australian Hague-Visby Rules invalidates contractual terms that relieve or lessen the carrier's liability beyond the scope permitted by the Australian Hague-Visby Rules. While 2 of the risks advanced by Carmichael concerned the liability arising from the interpretation of Australian Hague-Visby Rules by the arbitrator, Carmichael also alleged that the burden, expense and practical difficulty of requiring them to pursue its claim against BBC through arbitration in London (instead of court proceedings in Australia) was a ground for voiding the arbitration agreement.

Section 7 and curial intervention in *Carmichael*

The High Court's analysis in *Carmichael* centred on section 7 of the International Arbitration Act. Section 7(2) mandates that courts stay proceedings and refer disputes to arbitration if a valid arbitration agreement applies. However, section 7(5) provides that courts must not order a stay if the arbitration agreement is "*null and void, inoperative or incapable of being performed*". If Carmichael could prove that the arbitration clause was inoperative because it conflicted with Art 3(8) of the Australian Hague-Visby Rules, then the High Court was not required to stay the court proceedings in favour of the arbitration.

In its joint decision, the High Court found that Carmichael did not establish that the arbitration would lessen BBC's liability under the Australian Hague-Visby Rules. As a result, section 7(5) of the International Arbitration Act was not triggered and so, in accordance with section 7(2), the court proceedings would be stayed as ordered by the Federal Court in favour of the London arbitration as intended under the arbitration agreement.

While the Court's consideration of arbitration principles is brief, the decision in ***Carmichael*** underscores the restraints applicable to a court when dealing with a binding arbitration agreement. For example, the Court noted that 'shall' in section 7(2) is a mandatory obligation of the Court to stay the proceedings or part of it in the face of a binding arbitration agreement.[21] The Court does not have a discretionary power to continue court proceedings where there is a binding arbitration agreement, unless the exclusion in section 7(5) is met. In light of this, the Court also found that the costs of arbitration,[22] or the risk of a 'rogue' arbitral tribunal acting contrary to the agreement of the parties,[23] are not a serious consideration to triggering section 7(5) or Art 3(8). This is reflective of the fact that the Model Law and the Arbitration Acts do not envision that a court is granted the power to determine the merits of resolving the dispute through arbitration – rather, the court must give effect to the terms of parties' arbitration agreement. The Court expressly rejected the 'insular distrust' against arbitration,[24] implicitly asserting that modern arbitration law requires judicial restraint. It stressed that arbitration agreements should be upheld unless compelling evidence demonstrates their invalidity.

In addition, the Court found that section 7(5) is not satisfied by mere speculation that the arbitration clause is inoperative. Rather, the Court held at [25] that:

> *"For an Australian court to "find" an arbitration agreement null and void under section 7(5) of the International Arbitration Act, it must be able to do so as a matter of law based on agreed, admitted or proved facts…facts are ordinarily to be proved in a civil proceeding on the balance of probabilities… The interlocutory nature of an order under section 7(2) of the International Arbitration Act provides no reason for adopting a lesser standard of proof in making a finding under section 7(5). "*

The Court quoted with approval at [26] the Supreme Court of Canada's statement that *"…where there is doubt, the interpreter should opt for the solution that tends to ensure that the arbitration agreements are binding"*. This suggests that the Court may make presumptions in favour of a binding arbitration agreement where it is not proved on balance of probabilities that the agreement is inoperative.

Overall, *Carmichael* shows that the High Court of Australia recognises that modern arbitration law and practice requires Courts to intervene in arbitration with restraint. The Court is not quick to set aside arbitration agreements and unless proven on balance of probabilities, will enforce those agreements despite the costs or 'practical burden'[25] of an arbitration.

Tesseract

Summary of *Tesseract*

Tesseract was an appeal from the decision of the Court of Appeal of South Australia. The proceedings relate to a dispute regarding the provision of services by Tesseract International Pty Ltd (the Claimant before the High Court) for a project owned by Pascale Construction Pty Ltd (the Respondent before the High Court). The parties were required to arbitrate their dispute and Pascale Construction duly commenced an arbitration. In its defence in the arbitration, Tesseract International denied liability and argued that another party, Mr. Penhall, was partially responsible for Pascale's losses. So, it argued, any damages payable to Pascale Construction should be reduced based on the contributory negligence and the proportionate liability regimes in Part 3 of the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) and/or Part VIA of the Competition and Consumer Act 2010 (Cth). Pascale Construction argued that the proportionate liability laws did not apply in arbitration because Pascale Construction was not entitled to join any other alleged concurrent wrongdoer to the arbitration who might otherwise be found partially responsible for Pascale Construction's losses in accordance with those laws. Pascale Construction accepted that it could bring separate proceedings to recover losses from a concurrent wrongdoer but contended that the opportunity for a claimant to recover all its losses in a single proceeding was integral to the proportionate liability laws.

In short, the conundrum in *Tesseract* was either the finding would burden Pascale Construction by now requiring it to commence court proceedings against Mr Penhall, or it would burden Tesseract International in finding that it could be entirely liable for Pascale Construction's loss without apportionment to Mr Penhall.

To resolve the question of the applicability of the proportionate liability laws, the arbitral Tribunal ordered Tesseract International to apply to the Supreme Court of South Australia, pursuant to section 27J of the Commercial Arbitration Act 2011 (SA), for leave to obtain a determination by the Court of the following question of law: *"Does Part 3 of the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) and Part VIA of the Competition and Consumer Act 2010 (Cth) apply to this commercial arbitration proceeding conducted pursuant to the legislation and the [Arbitration Act]?"*

The Court of Appeal of the Supreme Court of South Australia granted Tesseract International leave and answered the question of law in the negative. The Court of Appeal found that, while the key operative provisions in the proportionate liability laws would be capable of operating in arbitration proceedings, the arbitral Tribunal was not able to apply the proportionate liability laws to the resolution of the dispute between the parties. In reaching that conclusion, the Court of Appeal found that both regimes contemplate that a plaintiff will have the opportunity to join all wrongdoers in the one set of proceeding which could not be done in arbitration except by consent. So, the Court of Appeal concluded that the proportionate liability laws were not amenable to arbitration because the Tribunal could not apply the laws except in a manner that would differ materially from the regimes intended by the relevant legislatures.

Tesseract International appealed to the High Court of Australia. On a practical level, as the High Court acknowledged in oral submissions, the issue in *Tesseract* would be avoidable if the arbitration agreement specifically noted that the proportionate liability regimes would apply to the arbitration or if Tesseract International had contracted with Mr Penhall on back-to-back terms that included an arbitration agreement or Mr Penhall had simply consented to participate in the arbitration. Regardless, the enquiry in *Tesseract* required the High Court to consider whether an arbitral Tribunal could apply the proportionate liability regime. With a 5:2 plurality (involving three separate judgments in the majority), the High Court found that the proportionate liability regimes did apply to commercial arbitration conducted pursuant to the relevant Arbitration Act.

Article 34 and curial intervention in Tesseract

Generally, the High Court's judgments commence by considering whether the proportionate liability regime form part of the law of the dispute, i.e 'the law of the land'.[26] Gageler CJ,[27] Gordon and Gleeson JJ (in their combined judgment),[28] and Jagot and Beech-Jones JJ (Jagot & Beech-Jones JJ) (in their combined judgment)[29] found that the regimes were part of the law applicable to the substance of the dispute, being South Australian law. Edelman J,[30] and Steward J[31] (in separate judgments and in dissent) differed fundamentally, finding that the regimes were not part of the law governing the dispute.

As part of the enquiry of considering whether the proportionate liability regimes were part of the law of land, all judgments except Jagot & Beech-Jones JJ's judgment in *Tesseract* consider whether the regimes can be applied by an arbitral tribunal in the same manner that the provision can be applied by a court. Gageler CJ found that there was no controversy between the parties that, at least, the key provisions of the regimes can be applied and exercised in arbitration.[32] Gordon and Gleeson JJ considered whether the language of the proportionate liability legislation can be translated or adapted to the arbitration contract without being so altered that they *"can no longer be described as part of the substantive laws"*.[33] They found that the parties had already agreed that the key provisions can apply in arbitration[34] and found, on their own enquiry, that an arbitral tribunal would be capable of applying the relevant provisions.[35]

For Edelman J, the law of the land does not include the proportional liability regime given that it involves both substantive and procedural rules which could not be adapted so as 'to be followed by the arbitral tribunal'.[36] Steward J also found that the proportionate liability regime could not be adapted to apply to an arbitration and so should not be applied in an arbitration.[37] Instead, his Honour considered that the courts are the more appropriate forum for dealing with issues of proportionate liability, stating at [267] that *"It cannot now be doubted that each regime must have been drafted on the clear assumption that claims for proportionate liability would necessarily be addressed in a court"* and stating lastly (and perhaps tellingly) at [283] that *"The result in this appeal highlights the limitation of arbitration. The fashionable trumpeting of the arbitral resolution of disputes may have overstated its virtue. Some disputes are better resolved in a court of law"*.

Once it was accepted that the proportionate liability regimes were part of the law of the land, the majority found that the regimes did not contravene Article 34. Since the only way a court could review or intervene in an arbitral award is by reference to Article 34, then the only way the arbitrator's decision could be juris-

dictionally incorrect was if it did not comply with Article 34. So, it was necessary for the Court to consider Article 34.[38] For Jagot & Beech-Jones JJ, Article 34 was 'the only limit' that was applicable to party autonomy[39] - the grounds under Article 34(2)(b) of arbitrability and public policy trump party autonomy.[40] If an Article 34 ground was not triggered, the Courts must give effect to the autonomy of the parties as is, which meant allowing the selected law to apply to the dispute as is. The joint judgment of Gordon and Gleeson JJ did not disagree with Gageler CJ or Jagot & Beech-Jones JJ's approach – their Honours found that the parties had already accepted that the grounds under Article 34 are not made out, so its applicability did not need to be considered.[41]

In contrast, the separate dissenting judgments of Edelman J and Steward J do not frame their enquiry by reference to Article 34 (in fact, Edelman J explicitly says that *Tesseract* is not about Article 34).[42] Instead, Edelman J departs from the Article 34 enquiry by focusing on the arbitral award being 'final'.[43] At various times, His Honour relies on the award of an arbitral tribunal applying the proportionate liability regime not being 'final' as the reason for his view that the regime should not be applied by the tribunal. For example, his Honour suggests at [153] that the reasoning of the plurality is incorrect because it would *"detract from a paramount object of arbitration in facilitating final resolution of commercial disputes"*. Similarly, he observes at [179] that:

> *"If some of the laws of that legal system operate in a manner that militates against the paramount object of arbitration to facilitate final resolution of the parties' disputes, then the natural implication may be that those rules of law would not be included within the scope of the implied choice."*

Additionally, across paragraphs [220] – [223], his Honour focuses on how the finality of the award and the paramount object of the Model Law could only be achieved by non-apportioned liability (solidary liability).

Steward J's judgment also did not consider Article 34. His Honour found that Article 34 was not relevant, stating at [274] that *"Nor is this a case where the parties have contended that their dispute, whether in whole or part, is not capable of being arbitrated, when on public policy grounds or otherwise"*. His Honour also found the notion of party autonomy to be 'largely irrelevant' to the case.[44]

The judgments in *Tesseract* show that there is no clear unified approach in the High Court regarding the application of Article 34. For Jagot & Beech-Jones JJ, the primary enquiry before the Court was framed in terms of Article 34(2)(b) and whether the law makes the subject matter non-arbitrable or is against public policy. In contrast, as noted above, Edelman and Steward JJ do not consider Article 34 to be relevant at all.

The judgments also explore (to a greater and lesser extent) how the statutory language in the proportionate liability legislation can be adapted to apply to arbitration and what the appropriate test is when considering adaptability. Whether the 'law of the land' can be moulded for arbitration is not a test that appears in Article 34 (or generally, the Model Law or the Arbitration Acts). So, Jagot & Beech-Jones' judgment does not consider this issue. If the test is relevant and applicable, it remains unclear what the exact enquiry under the test is – for example, Gageler CJ proposed the test differently than Gordon and Gleeson JJ – or what factors may be considered in adapting the statute for arbitration – for example, is it merely a test of replacing the word 'court' with 'arbitration' within the statute and seeing if the statute is suitable for arbitration. Edelman J's judgment and Steward J's judgment suggest that their Honours consider other factors such as finality of decision, satisfying the object of the statute or satisfying the intention of the drafters of the statute as relevant enquiries falling within the test.

Chevron

Summary of *Chevron*

The dispute in *Chevron* concerned the Gorgon Project, a massive offshore oil and gas venture. The appellants (collectively '**CKJV**') were contracted to provide staff to work at Chevron Australia's construction sites, and a dispute arose as to the calculation of these staff costs. As per the contract between the parties, CKJV commenced arbitration in 2017 to resolve the dispute, seeking reimbursement based on contract rates. In defence, Chevron Australia claimed that CKJV was only entitled to actual costs.

The arbitral Tribunal determined that the proceedings should be split between liability, and then quantum.

In November 2018, the Tribunal issued a First Interim Award dealing with liability, rejecting CKJV's argument for payment based on contractual rates and holding that CKJV was only entitled to actual costs.

When it came to pleading its 'quantum' case, CKJV sought to argue that the staff costs should be calculated using an alternative specific contractual criterion (which became known as the Contract Criteria Case, or **CCC**). CKJV had not raised the CCC issue previously (i.e prior to the First Interim Award) so the First Interim Award had not addressed or determined the CCC. There was also no suggestion that CKJV was unable to raise the CCC as part of its liability case prior to the First Interim Award – in fact, it appeared that CKJV raised this issue only after the First Interim Award was made against its primary argument. Chevron Australia objected, arguing that CKJV's repleaded case was precluded by res judicata, issue estoppel, and that the tribunal was functus officio (meaning that having already decided, the tribunal no longer had authority to decide) so far as all issues on liability were concerned, even those not determined in the First Interim Award.

A majority of the arbitral Tribunal rejected Chevron Australia's objections in a Second Interim Award, finding that CKJV had not pleaded its alternative cases as part of the liability hearing prior to the First Interim Award and it was *"commercially unrealistic to have required parties faced with the hearing on liability to raise every point that might … be made by them' and that 'it might reasonably be inferred [that CKJV] had not had time to ascertain … whether the [CCC] (if it had thought about it) would make any real difference financially one way or the other'"*.[45] The majority of the Tribunal also found that these new arguments could be characterised as quantum and so would not have been addressed in the First Interim Award.[46]

Chevron Australia applied to the Supreme Court of Western Australia to set aside the Second Interim Award, arguing that it dealt with matters beyond the scope of the original submission to arbitration. The Supreme Court agreed, finding that the Tribunal was functus officio as regards liability, and set aside the Second Interim Award. CKJV's appeal to the Court of Appeal was dismissed, with the court agreeing that the Tribunal had improperly re-opened issues of liability which had been determined 'in globo' in the First Interim Award.

CKJV then appealed to the High Court of Australia, challenging the Court of Appeal's findings. The High Court in a 5:2 majority rejected CKJV's submissions, upholding the decision to set aside the Second Interim Award. The High Court of Australia (with Jagot & Beech-Jones JJ) also determined that the Court will undertake a *de novo* review of the arbitrator's decision when there is an application for setting aside an award under Article 34(2)(a)(iii).

Article 34 and curial intervention in *Chevron*

The majority judgment (comprised of all but Jagot & Beech-Jones JJ) first found that, upon rendering the First Interim Award on liability, the Tribunal was functus officio in relation to that subject matter.[47] So, at the time of making the Second Interim Award, the Tribunal did not have authority to make that award.[48] For the majority, the CCC argument concerned the issue of liability and not quantum. Given the Second Interim Award was a decision not made within jurisdiction,[49] the order could be set aside under Article

34(2)(a)(iii) given that the Tribunal had exceeded its authority.[50] The majority made these findings despite recognising an error within jurisdiction does not trigger Article 34 because it does not exceed the authority of the arbitrator.[51]

In making these findings, the majority had to consider whether the Tribunal was entitled to determine, on its own, whether an award had exceeded its authority under Article 16. The majority found that Article 16 and Article 34 are directed to similar queries about the authority of the Tribunal.[52] However, the current matter of the Tribunal being functus officio was something that the courts had jurisdiction over under Article 34 since it is a 'jurisdictional' issue and therefore the Court was not precluded from finding that Article 34 prevented the Tribunal from making the Second Interim Award.[53] The majority remarked as follows at [41] (citations excluded):

> *"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 the Model Law. Courts are circumspect in their approach to determining whether an error alleged under Article 34(2)(a)(iii) falls within the scope of that provision. The question is whether an arbitral tribunal has exceeded its jurisdiction or, put another way, has travelled beyond the parties' submission to arbitration. 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". Curial intervention is, however, sometimes necessary. This is one of those cases."*

The dissenting joint judgment by Jagot & Beech-Jones JJ took a different view. For their Honours, uniformity in the application of the Model Law is a key interpretive provision and the *'limited basis for curial intervention'*(i.e. Article 34) is consistent with this notion.[54] For their Honours, Article 34(2)(a)(iii) cannot be used to circumvent the limited grounds for curial intervention, even in circumstances where there are *"erroneous answers to questions of law arising in the course of arbitral proceedings"*,[55] i.e an error of law does not justify intervention under Article 34.[56] Implicit in Jagot & Beech-Jones JJ's' judgment is the suggestion that Chevron should not have relied on Article 34 to bring its dispute and instead should have brought it under section 27J(1) of the Arbitration Act, which allows an unsatisfied party to confer jurisdiction on the Court to determine a question of law, with the leave of the Court and consent of either the arbitrator or all the other parties.[57] For their Honours, this provision (and section 34A of the Arbitration Act) *"represent a (modest) extension of the power of curial intervention contemplated by the Model Law"*.[58]

Jagot & Beech-Jones JJ also found that there had not been a final award and so the Tribunal was not functus officio.[59] Whether the Tribunal was functus officio was a conclusion derived from a claim of issue estoppel. The claim of issue estoppel is a matter the Tribunal can determine for itself under Article 16.[60] Issue estoppel (or res judicata or Anshun estoppel) do not 'justify curial intervention' under Article 34[61] - even if they deal with the 'finality' of an award.[62] Jagot & Beech-Jones JJ found that there was nothing to support curial intervention in the parties' agreement either, stating *"the parties agreed to submit their dispute to arbitration, not to a court, much less to that level of scrutiny by a court"*.[63]

The majority and dissent judgments in *Chevron* show there is no uniform view about at least 2 matters:

1. the appropriate test for determining whether an issue falls within the jurisdiction of the arbitrator
2. the interrelationship between Article 16 and Article 34.

In relation to the first matter, the majority describe their enquiry under Article 34(2)(a)(iii) as concerning whether an issue or error is 'within jurisdiction' or 'beyond the authority or jurisdiction'.[64] In another place, the majority describe the test as whether the error is within jurisdiction or 'that the tribunal lacked jurisdiction'.[65] The majority note that this test has been described in various ways in Australia and overseas, but the specific language or terminology adopted is largely irrelevant.[66] In saying that, the majority cite various cases that suggest the test is about whether the issue goes to the consent to the arbitrator's jurisdiction

(a consent-focused enquiry) or to the claim before the arbitral tribunal [67] or alternatively whether the issue is of jurisdiction or of admissibility.[68] For Jagot & Beech-Jones JJ , the applicable test is only the distinction between jurisdiction and admissibility ('jurisdiction/admissibility' distinction).[69] In applying this test to find that issue estoppel and functus officio were issues of admissibility, Jagot & Beech-Jones also found that "*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]'*".[70] Jagot & Beech-Jones JJ referred to various authorities in support that the relevant inquiry is *"which body (ie. the court or the arbitral tribunal) determines what has been finally decided by an interim award"*.[71] One such authority is *Ribeiro PJ's judgment in C v D* [2023] HKCFA 16 which expressed that there must be unequivocally clear language that the parties intended a court to review an issue of the arbitrator's jurisdiction.[72] The majority's judgment is silent as to this issue.

In relation to the second issue, the majority found that, based on the language of the provision and structure of the Model Law, Article 16 addresses jurisdiction issues 'as a preliminary question' whereas Article 34 addresses jurisdiction issues when a binding interim or final award has issued.[73] It was open to the Tribunal to make a determination about its authority being functus officio as a preliminary question under Article 16.[74] However, the Tribunal cannot make an erroneous decision as to its authority under either provision because that will mean that the Tribunal is creating or expanding its own authority.[75] For Jagot & Beech-Jones JJ, Article 16 allows a Tribunal to rule on its own jurisdiction *"either as a preliminary question or in an award on the merits"*.[76] That is, for Jagot & Beech-Jones JJ, Article 16 is not limited to preliminary jurisdictional questions only and they do not adopt the majority's distinction between Article 16 and Article 34. For Jagot & Beech-Jones JJ, Article 16 and Article 34 are overlapping but they did wish to express *"any final view on the degree of overlap between ss 16 and 34 of the Arbitration Act"*.[77]

Despite the above, both the majority and Jagot & Beech-Jones JJ reached a similar view regarding the second ground of appeal – that de novo is the standard of review to be applied by a court when there is an application for setting aside an award under Article 34(2)(a)(iii). Before the High Court, CKJV argued that absolute or substantial deference should have been afforded to the decision of the Tribunal that it was not functus officio. In finding against CKJV (and finding that the primary judge was correct to adopt a de novo review),[78] the majority found that the Article 34 does not explicitly provide for deference (absolute or substantial) to a Tribunal's decision,[79] a de novo review was adopted as the standard of review in other jurisdictions,[80]and de novo review is applied for enforcement applications under Article 36 which has 'materially identical' language to Article 34.[81] For Jagot & Beech-Jones JJ, a premise of their finding that Article 34 was not invoked is the fact that 'such reviews are to be conducted de novo'.[82] For their Honours, there is 'no justification' for adopting any deference to the Tribunal's findings regarding a challenge to its jurisdiction.[83] On the one hand, this finding by the Court may appear not to align with the principle of minimal curial intervention – if the parties intended the arbitral tribunal to determine all facts and issues instead of a court, and Article 34 is only a 'modest expansion' of curial intervention (as found by Jagot & Beech-Jones), then the standard of review by the Court should be circumscribed by the tribunal's findings as the true determiner of facts. However, Article 34(2)(a) requires a court to consider the proof furnished by the claimant in support of its review application and Jagot & Beech-Jones JJ held that the Court would have difficulty in identifying the claim through the proof if the Court is forced into 'a journey through the minutiae of the arbitral tribunal's' findings and conduct.[84]

What *Carmichael*, *Tesseract* and *Chevron* tell us about the state of arbitration in Australia

While the High Court took a unanimous approach in *Carmichael*, the decisions in *Tesseract* and *Chevron* reflect a diversity of opinion on the High Court in relation to modern arbitration practice and the approach to the rules governing curial intervention in arbitration. In *Carmichael*, the High Court unanimously gave effect to an arbitration agreement, limiting curial intervention in arbitration process to give effect to party autonomy. In *Tesseract*, the High Court differed on the importance of Article 34 to the issue before the Court. The majority judgments found that Article 34 was a primary (or even sole consideration) while the

dissenting judgments found that Article 34 was not relevant at all. Even within the majority judgments, there were different approaches to the issue including in relation to whether and how to adapt a law to the arbitration context. In *Chevron*, the majority and dissenting judgments differed on whether Article 34 is triggered by a tribunal being functus officio or not. The majority and dissenting judgments also differed on the interrelationship between Article 16 and Article 34.

The judgments also highlight several outstanding issues in relation to modern arbitration law, including:

- is there arguably a presumption in favour of an arbitration agreement being binding under the Model Law?
- is it necessary for the Court to enquire whether a law can be moulded or applied to the arbitration context? If so, what is the exact enquiry that the Court should undertake and what factors can the Court consider? Should the Court consider whether finality of decision is reached by the law or whether the intention of the drafter of the law is achieved after moulding the law?
- is Article 34(2)(b) the only ground under which the Court may reject that a selected law or regime is not applicable to the dispute?
- is the jurisdiction/admissibility distinction the most correct test for determining whether a matter exceeds the jurisdiction of the arbitrator? If not, what is the correct test
- is there an operative interpretive principal that the parties intended an arbitrator to determine all jurisdiction issues (instead of a court), unless there is clear language to the contrary?
- do Article 16 and Article 34 overlap or is there a distinction? can Article 16 be relied on by an arbitrator to give a binding award on its jurisdiction or does it only allow an arbitrator to make a preliminary finding?

In relation to the principle of curial intervention, it appears that some judges may view this principle as more important than others. Jagot & Beech-Jones JJ's judgments in *Tesseract* and *Chevron* show that they are proponents of limited curial intervention by reference to Article 34. For their Honours, Article 34 of the Model Law is the only provision that trumps party autonomy and justifies court intervention in the arbitral process. In addition, their Honours' judgment in *Chevron* suggests a broad application of Article 34 (together with Article 16), finding that issues should be carefully framed to not intervene where the issue can be dealt with by the arbitrator themselves. In alignment with this, they found in *Chevron* that there is an *'operative interpretive principal'* that jurisdiction issues are to be determined by the arbitral tribunal unless there is express language to the contrary. In contrast, Edelman J and Steward J's judgments in *Tesseract* show an inherently differing view about the application of Article 34 than Jagot & Beech-Jones' judgments as neither Edelman J nor Steward J consider Article 34 relevant or applicable in *Tesseract* and instead considered factors not stated in Article 34.

If minimal curial intervention is an important principle to modern arbitration practice, then there is some benefit in the remainder of the High Court adopting the broad view of Jagot & Beech-Jones JJ in relation to Article 34. The Model Law restricts the Court's enquiry to the grounds under Article 34 to restrict a court's intervention into the arbitral process as autonomously chosen by the parties. So, framing the enquiry beyond the terms of Article 34 appears to conflict with the notion of minimal curial intervention under the Model Law. In alignment with Jagot & Beech-Jones JJ's judgments, it is arguable that the test for adapting the proportionate liability regime should also be framed in terms of Article 34, i.e can the proportionate liability regime be moulded in a way that would mean that the arbitrator's decision made under it is not ultra vires under Article 34. This provides a cohesive and uniform test that is consistent with the principle of minimal curial intervention as it prevents unnecessary peculiar domestic principles of interpretation.

Overall, the Court should aim to adopt a uniform practice about modern arbitration law and the principle of minimal curial intervention. Without uniformity, there is a fear of the Australian practice straying from the international practice. It also creates an instability for a party involved in an arbitration as it creates doubt about how the High Court may consider the appeal.

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Endnotes

1 Together, the judgments may serve as authorities for various principles governing arbitrations including principles that relate to the interpretation of arbitration agreements in cargo damage claims, stay of foreign arbitration for domestic court proceedings, the applicability of proportional liability regimes in arbitrations, the meaning of "law of the land", the manner of adapting or altering the substantive law of the land to fit an arbitration context, the "final and binding" character of awards, the status of an arbitrator after a final arbitral award, the 'jurisdiction/admissibility distinction', and the Court's standard of review in relation to arbitral awards. The judgments also provide important guidance on multiple aspects of arbitration practice and procedure, including the drafting of arbitration agreements, the conduct of legal representatives in arbitration, the role of arbitrators in determining disputes, and the conduct of domestic and international parties engaged in an arbitration.
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3 See, eg, section 8 of the Commercial Arbitration Act 2010 (NSW).
4 United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006' <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.
5 Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2024] HCA 24 (Tesseract) [33].
6 International Arbitration Act 1974 (Cth) s 16.
7 See, Tesseract [333].
8 Mitsibushi Motors Corp v Soler Chrysler-Plymouth Inc, SCOTUS, (1985) 473 US 614 at 636.
9 Similar to the Model Law, the High Court in Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers GmbH & Co KG & Anor [2024] HCA 4 (Carmichael) also recognised at [29] the importance of interpreting the international Hague-Visby Rules without applying domestic precedents that ignore the international context: "it is "desirable in the interests of uniformity that their interpretation should not be controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principle of general acceptation"".
10 Model Law art 6.
11 Model Law art 35.
12 See, CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2024] HCA 28 (Chevron) [41] and [65].
13 Note: Article 34's application may be influenced by domestic practice, particularly regarding the concept of "public policy" which can vary from country to country. This flexibility does not undermine the Model Law's goal of promoting international uniformity, as reliance on unique domestic interpretations under Article 34 is anticipated and does not threaten the overall consistency of the Model Law's application.
14 Tesseract [157].
15 Tesseract [19].
16 Citing Dobbs v National Bank of Australasia Ltd (1935) 53 CLR and Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] 1 WLR 1041, [9].
17 Chevron [15] and [17]; Tesseract [56], [87], [147] and [216].
18 Other examples of party autonomy include the ability of the parties under the Model Law to choose the substantive law of dispute, the arbitral procedure and the curial law that governs their dispute: Tesseract [28] and [158].
19 International Arbitration Act 1974 (Cth) s 2D.
20 International Arbitration Act 1974 (Cth) s 39(2).
21 Carmichael [18].
22 Carmichael [68] and [69].
23 Carmichael [57].
24 Carmichael [57].
25 Carmichael [69].
26 See, e.g. Tesseract [10], [85], [151] and [231].
27 Tesseract [12].
28 Tesseract [138].
29 See, Tesseract [293].
30 Tesseract [210] and [213].
31 Tesseract [263].
32 Tesseract [57] – [60].
33 Tesseract [100], [109].
34 Tesseract [110].
35 Tesseract [116].

36 Tesseract [185]
37 Tesseract [263].
38 Tesseract [11]
39 Tesseract [345].
40 Tesseract [290].
41 Tesseract [85], [106] – [107]; [139] – [140].
42 Tesseract [154] – [156].
43 Tesseract [218].
44 Tesseract [274].
45 CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2023] WASCA 1 [31].
46 Ibid.
47 Chevron [27] and [28].
48 Chevron [33].
49 Chevron [30].
50 Chevron [40].
51 Chevron [35].
52 Chevron [37].
53 Chevron [38] – [40].
54 Chevron [61] – [63]
55 Chevron [66].
56 Chevron [70]: "...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."
57 Chevron [81].
58 Chevron [70].
59 Chevron [74].
60 Chevron [78].
61 Chevron [81].
62 Chevron [83].
63 Chevron [87].
64 Chevron [30].
65 Chevron [34].
66 See, Chevron [30].
67 The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd (2021) 395 ALR 720 [132]; BBA v Baz [2020] SGCA 53[74] – [77]
68 BBA v Baz [2020] SGCA 53 [73]; Republic of Sierra Leone v SL Mining Ltd [2021] Bus LR 704 at 709-712 [11]-[18]; C v D (2023) 26 HKCFAR 216
69 Chevron [75] citing C v D (2023) 26 HKCFAR 216.
70 Chevron [81].
71 Chevron [83].
72 Chevron [84] – [86] citing C v D (2023) 26 HKCFAR 216.
73 Chevron [36] – [37].
74 Chevron [36].
75 Chevron [32].
76 Chevron [64].
77 Chevron [69].
78 Chevron [43].
79 Chevron [44].
80 Chevron [45].
81 Chevron [46].
82 Chevron [92].
83 Chevron [93].
84 Chevron [92].