Shane Doyle QC (SD): Welcome everyone to this seminar on 'Functus Officio in Arbitration'. In the way of things these days, we are coming to you from around the world, from London, Brisbane and Hong Kong, to various places in Australia at least.

I start with the introduction of the other speakers. First is Chiann Bao who is in Hong Kong. She is an independent arbitrator with extensive working experience in Singapore, Hong Kong, New York, London, and others. She currently serves as the Vice President of the ICC Court of Arbitration, and the Chair of the ICC Commission Taskforce on Arbitration and ADR, and she is the Vice Chair of the International Bar Association's International Arbitration Committee.

The other speaker today is Sarah Spottiswood, a barrister at Level Twenty Seven Chambers. She has worked on investment treaty arbitration, international commercial arbitration and World Trade Organisation litigation proceedings. From 2017 to 2019 Sarah represented the United Kingdom at the UNCITRAL Working Group on investor state dispute settlement. While she is relatively new to the Bar, she has already shown himself to be an exceptional talent.

Between us, we have divided the session into three topics. The first is, when is an arbitrator *functus officio*, which I will address. The second is assessing an arbitrator's jurisdiction. That is, what approach the courts take to reconsidering a decision by a tribunal that it has jurisdiction, Sarah will cover that issue. Thirdly, Chiann will deal with developments in Singapore and Hong Kong.

TREND OF LIMITED COURT INTERVERTION IN ARBITRATION

SD: [Slide 4] The modern trend in arbitration is for limited judicial intervention. In particular, very limited scope for setting aside awards once they have been made. That trend of limited judicial intervention is provided for in the Model Law and has been enacted in our various national and domestic legislation. Article 5, which is on the screen, which is entitled 'extent of court intervention' obviously does not encourage much court intervention.

I am not today concerned with the court's intervention in aid of arbitration and at interlocutory stage or in aid of enforcement of awards. I am concerned with the circumstances, limited as they may be, in which a court will interfere with service to set aside an apparently final award, including a partial or interim award, once it has been made.

Under the Model Law there is no right of appeal against an award on merits, on law, or facts. Provided the tribunal keeps within its jurisdiction its awards are both final and partial final.

Judges have been vocal in condemning attempts to dress up merits challenges as if they raised jurisdictional issues. Earlier this year, one Justice of the Supreme Court of Western Australia in the decision of *Venetian Nominees v Weatherford* said that where a backdoor

strategy is unsuccessfully deployed in future, that is to introduce a merits review as if it were a jurisdictional one, His Honour said it should be met with punitive cost sanctions. That seems to reflect certainly his view, but the view of many other judges.

Despite all that, there remains some avenues for setting aside awards. The topic I am to deal with today concerns one of those that is the circumstance where the tribunal is *functus officio*. I propose breaking it up into three issues. The first is to deal with what is meant by the tribunal being *functus officio*.

WHAT IS MEANT BY THE TERM *FUNCTUS OFFICIO*?

SD: [Slide 5] The arbitral tribunal draws its jurisdiction from the agreement of the parties and the scope of the dispute referred to it by the parties. It is both the source of the tribunal's authority, but also limits the authority. Once the tribunal has decided an irrelevantly final award, that which the parties have submitted to it to decide, it has performed its office and it cannot perform it in a different way, try to explain it or amend it in any way. The law then recognises the tribunal is *functus officio*.

In fact, to describe a tribunal as *functus officio* is to assert that it has performed its function subject to some very limited exceptions explicitly provided for in the Model Law. A tribunal cannot revisit its award in any way. There are, I have put up on the screen four exceptions, which I will leave you to read.

The first is the slip rule. The next is where the party is requesting an additional award interpreting the primary award. Another one is a limited circumstance available, I think for sixty days to seek an additional award on matters truly omitted from an award. The final one, which really is not an exception to the *functus officio* rule, concerns where someone applies to set aside an award and the court before deciding that application remits the matter to the tribunal to enable it to overcome the cause of it proceeding outside the terms of the submission. It is not really relevant to the contention about a tribunal being *functus* because the tribunal cannot cure that it has performed its function and no longer has jurisdiction. This exception really is perhaps more suited to a challenge based upon a party not being afforded an opportunity to present its case. These exceptions should be noted but I propose not saying anything further about them today.

The concept of *functus officio* is important because it promotes finality in arbitration and gives effect to, or respects, the foundation of the tribunal's authority as being limited to what the parties agree to give it. The tribunal cannot interpret or alter the award or consider matters further without a further agreement from the parties. It is a notion that has similarities to the principles of *res judicata* and issue estoppel which operate to preclude a litigant from reagitating in any forum something that has already been decided by curial proceedings

between them, but unlike estoppels which operate only between the parties, the notion of *functus officio* is directed to the tribunal itself and to its jurisdiction.

[Slide 6] The principle of a tribunal being *functus officio* has been applied both to final awards and, at least in most jurisdictions, to interim or partial but final awards, such as awards to separate issues of liability and quantum and the like. We have put up on the slide examples of two cases, one in the United Kingdom, perhaps the most famous of them is *Fidelitas Shipping Co ltd v V/O Exportchelb* in the Court of Appeal there, and a Queensland case of *Discovery Beach Project v Northbuild Construction*. They represent two good examples of the principle at work, though in each case the application of the principle of *functus officio* was obiter.

Time does not permit me to go through the facts of either case. I will leave you with the citations to them because they do represent two examples of a non-narrow view being taken of the circumstances in which the tribunal really, in the first case in *Fidelitas*, is almost unwittingly being held to be *functus officio* because it delivered an award without adjudicating upon a particular contention that reliance on a clause had been waived but having expressed it in a final form was not able to revisit that question of waiver subsequently. As I say, time does not permit me to deal with the facts of those cases here.

WHAT IS THE TEST OF *FUNCTUS OFFICIO*?

SD: [Slide 8] Can I move quickly then to the next question of, what is the test of when a tribunal is *functus officio*? The starting point is that the award must be final, even if it is an interim final award. For what I have for convenience described as non-partial final awards, that is truly final awards, the operation of the principle of *functus officio* is relatively easy. Once a tribunal delivers its award on all the issues, even if it gets it wrong about what those issues are, and leave some out, then subject to the limited statutory exemptions provided for in the Model Law to which I referred, it is *functus officio*.

A difficulty which arises in connection with the interim awards is identifying what function has been performed by the tribunal in which it is said to have been exhausted by the interim award, and more importantly, what functions remain open for it to decide. The authorities and academic writers have used a variety of expressions to identify the test. I have chosen a selection of them which appear on the slide. Possibly the broadest of them is the one in *Fidelitas* itself. The tribunal is *functus officio* in respect of issues to which the interim award relates. Normally we would say the expression relates, casts the net very broadly, is the connection between the subject matter and the object. That was certainly the case in *Fideltitas*, as I said, because almost unwillingly in that case the tribunal was held to be *functus*.

A similar test was adopted by Justice Peter Applegarth in the *Discovery Beach* decision, which is the third on that list. That part of the reference which was the subject of the interim award.

The other extracts that are identified are either vaguer or perhaps narrower. What precisely is the law is unclear in Australia.

Those differing formulations of the test make it difficult to state categorically what is the test to be applied. That of itself makes the application of the principle of *functus officio* sufficiently difficult to apply to interim awards. But if for example, as often is the case, a tribunal bifurcates its hearing so as to decide all issues of liability at the first hearing, reserving only for a second hearing if necessary all remaining issues, then a partial or interim award dealing with liability will, subject to those Model Law exceptions, render the tribunal *functus officio* as to liability, and it cannot thereafter seek to hear and decide any issue of liability.

Now, all of that seems pretty straightforward, except of course in practice. For example, the issue arises, does the expression "all issues of liability" mean all issues as then pleaded? Or does it extend to any issues which might have been raised within the scope of the dispute, a kind of Anshun extension? Or does it extend to even unthought of issues of liability? Now, I have my own view about those things, but that is where the differences arise. More often than not, not only does a tribunal state what the issues are to be decided but also will say what issues are not to be decided. That can often arise in cases where the suffering of loss is an element of the cause of action but can of course arise in other situations. In doing so, often ambiguity is then treated as to what it is said to be, the issues to which the interim award relates, and the matters left over to adopt the tests from those cases on the screen.

Once the first award is made, however, the tribunal is *functus officio*. But unless precision is used in identifying the subject matter of the first hearing, then there will remain debate about the scope of the issues to which the interim award relates and the scope of things which are left over, whatever test is to be employed. The task for practitioners on both sides of the tribunal's desk must therefore be to be very precise when formulating the procedural orders to make it clear what is and what is not to be decided in any interim award.

Whatever the scope of the issue is to which the tribunal is *functus officio* an award made by the tribunal is to that extent outside its jurisdiction. That really gives rise to the third of the questions I am going to address, jurisdiction to set aside.

JURISDICTION TO SET ASIDE AN ARBITRAL AWARD

SD: [Slide 9] The core provision which applies is in Article 34(2)(a)(iii) of the Model Law, which is on the screen. An arbitral award may be set aside by the court only if the party making the application furnishes proof that, and the key words are "…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." I will leave the rest out.

[Slide 10] There is an analogue power in Article 16 which deals with preliminary determinations of jurisdiction which you should note but I will not travel to discuss it today.

Returning then if we can to Article 34. Its language is perhaps a little inelegant when we are considering a contention that a tribunal has performed its function because the article talks in terms of the award dealing with a dispute not contemplated by or not falling within the terms of the submission to arbitration or containing a decision on matters beyond the scope of the submission. The submission to the arbitrator in each of the cases which are referred to, *Fidelitas* and *Discovery Beach*, would have included the arbitrator's decision on the ultimate matters that it was held the arbitrator was *functus officio* in respect of. It is hard to adapt the language of this article of the Model Law to an award which is said to be made outside jurisdiction because it is *functus officio*.

[Slide 11] The question that really arises is, is there a power to set aside such an award? That question was the subject of a recent decision in the Western Australian Supreme Court in *Chevron Australia v CBI Constructors* which was decided very helpfully only a couple of weeks ago. The decision has been made the subject of an appeal so there is likely to be more to come about this case.

The facts I will state relatively briefly, but in a highly simplified and necessarily therefore insufficient form, but it is enough for present purposes. Chevron had contracted with CBI and others for the construction of a large gas project in and off Western Australia. There was a dispute about whether or not CBI had been underpaid or overpaid. That dispute was referred to arbitration by a tribunal of three members. There was a procedural order made bifurcating the hearing of the issues with the first hearing to be of all issues of liability but not certain issues identified as essentially being quantum and quantification. In fact, the form of the procedural order was more complex than that but the description I have given is sufficient for present purposes.

[Slide 11] That is the form of the order which was in fact made and indeed it was modified from time to time, but the substance of it is as appears on the slide presently.

The core issue between the parties was whether, as a matter of construction of the contract, as Chevron contended, it had overpaid CBI by paying it more than its actual costs. Or as CBI contended that there had been an agreement or an estoppel arising entitling it to be paid not simply its actual costs but its agreed higher rates.

The tribunal delivered its first interim award dealing with the issues of construction, deciding largely in Chevron's favour. Subsequently, and more than subsequently, CBI amended its statement of claim to raise a new argument to the effect that properly construed the contract

defined its entitlement to actual costs in a way which entitled it to more than its expenses, entitling it in fact to a markup or some adjustment above expenses. That contention had not been squarely raised by CBI in its earlier pleadings. Chevron objected on the basis that that was a new case and the tribunal was *functus officio* having decided already all issues of liability. The tribunal disagreed and said a new case is not caught by the earlier procedural orders description of "all issues of liability" but rather was intended to be captured by the carve out of an issue of quantum, qualification or calculation. The tribunal ruled therefore it had jurisdiction and went on to deliver a second interim award which decided the new issue of construction, and again largely in favour in this case of CBI. There remains in the arbitration the need to have a hearing on quantum but at this stage, at the stage of the chronology at least, the quantum would be quantum in accordance with the new successful CBI issue of construction. Chevron applied to have that second interim award set aside on the basis the tribunal was *functus officio* to "all issues of liability".

[Slide 13] Justice Kenneth Martin in the Western Australian Supreme Court held the tribunal should have found that the first interim award related to all issues of liability and so concluded the new contractual construction issues which CBI had raised were included within the description of "all issues of liability" with the consequence His Honour found that the tribunal on publication of the first interim award became *functus officio* of "all issues of liability", not simply those pleaded but those as yet unpleaded, and indeed arguably those at the time unanticipated.

In coming to that conclusion His Honour had to deal with an argument that the tribunal really should be the final arbiter of its own procedures, or at least that the court should defer to the tribunal's views as to what it intended by its procedures, really it knowing best – that is the topic which Sarah will address shortly.

For my purposes, one other thing which Justice Martin had to decide was whether the Western Australian equivalent of Article 34 of the Model Law permitted setting aside an award if the tribunal was *functus officio.* His Honour held that it did empower the court to set aside the second award where a tribunal has finally decided something in the first award, in this case "all issues of liability". There was no submission to it to decide any issue of liability existing, there is no power, no submission to have it decide an issue of liability a second time. The only submission to it had been performed and there was no new submission to it to decide of further issues to liability. In that way, His Honour was able to bring a contention of *functus officio* within the scope of the language of Article 34 of the Model Law.

In summary, despite the limited scope of judicial intervention in arbitrations and the very limited scope to set aside awards, an award, including an interim one, can be set aside if made by a tribunal which was at the time it made it *functus officio*. The principal needs to be

borne in mind whenever one drafts procedural orders to bifurcate a hearing or to decide issues in stages because of the need for precision about what is and what is not to be the subject of the first hearing. The normal division of liability and quantum, or like formulations, is such as will make it likely a tribunal becomes *functus officio* all issues of liability once an award is issued even if one party, and perhaps subject to what Sarah tells you, even if the tribunal did not have that in mind. The relevance of the tribunal's intentions is something Sarah will now deal with. Thank you.

THE ROLE OF ARBITRATORS AND COURTS IN ASSESSING WHETHER A TRIBUNAL IS FUNCTUS OFFICIO

Sarah Spottiswood (SS): [Slide 14] Hello, everyone. I am going to talk about the role of arbitrators and the role of courts in assessing whether a tribunal is *functus officio*.

[Slide 15] Starting with the arbitrator's assessment of its jurisdiction.

[Slide 16] The starting point in international arbitration is the principle of competence-competence. That provides the tribunal has competence to decide upon its own jurisdiction. Rationale for that principle is that it prevents an uncooperative party from halting the arbitral process by challenging an arbitrator's jurisdiction. That principle is found in Article 16 of the Model Law and in most arbitration rules.

By way of example, in the *Chevron v CBI Constructors* case that Shane mentioned earlier, when Chevron challenged the tribunal's jurisdiction about whether it could hear a further argument on liability, it was for the tribunal to first assess whether it had jurisdiction. In that particular case, two arbitrators decided that it did.

Whether a party is able to challenge both a positive and negative ruling on jurisdiction by an arbitrator will ultimately depend on the country's arbitration laws. In countries such as Australia that have adopted the exact terms of the Model Law on the relevant provisions it is usually only possible to challenge an arbitrator's finding that he or she *has* jurisdiction.

HOW MUCH WEIGHT SHOULD A COURT GIVE A TRIBUNAL'S DECISION ON JURISDICTION?

SS: [Slide 17] When an aggrieved party who considers a tribunal has issued an award, when they are *functus officio*, can seek to have that award set aside or resist enforcement of that award on the basis that an arbitrator has exceeded its jurisdiction.

Now that raises the question, how much weight should a court give to a tribunal's assessment of whether or not it has jurisdiction? There are three possible options:

First of all, as Shane alluded to, should the court defer entirely to the arbitrator's reason for finding it has jurisdiction? After all, courts in Australia are pro arbitration and ordinarily seek not to intervene except in limited circumstances.

The second possible option is perhaps the court could give some weight to the arbitrator's finding of jurisdiction. The rationale for that could be that often arbitral panels have very experienced lawyers on them and they have often extensively deliberated the question of their jurisdiction.

The third possible option is that the court could completely disregard the arbitrator's reasons for finding he or she has jurisdiction and the court can make up its own mind.

[Slide 18] Australian courts have held that whether an arbitrator has jurisdiction is an objective question for the court. That is, a court disregards the arbitrator's view for finding it has jurisdiction of whether or not it is *functus officio*. I am going to discuss three cases where courts have adopted that particular position.

[Slide 19] First of all, in the *TCL Air Conditioners* case, Chief Justice French and Justice Gageler observed that the grounds upon which the court can refuse to enforce an award was an objective question to be determined by the court, unaffected by the competence of an arbitral tribunal to rule on its own jurisdiction.

[Slide 20] That position was adopted also by the Victorian Court of Appeal in *IMC Aviation Solutions*. There, Justices Hanson and Kyrou, held that the court can determine for itself whether the tribunal had jurisdiction.

There are also a number of other single Justice Australian decisions that have held to the same effect.

[Slide 21] Most of the Australian decisions referred to a decision of the Supreme Court of the United Kingdom in *Dallah Real Estate v Ministry of Religious Affairs, Pakistan*. That case concerned whether there was a valid arbitration agreement. Lord Mance said the tribunal's own view of its jurisdiction has no legal or evidential value. That is so however full the evidence was before it, and however carefully deliberated was its conclusion.

That observation is particularly pertinent in that case where one of the arbitrators on the tribunal was Lord Mustill, a former Law Lord. The Court basically found that they will consider his jurisdiction without reference to his reasons, his carefully deliberated reasons.

Also in that case, Lord Mance gave us some idea of the rationale why the court is able to disregard an arbitrator's findings in relation to its jurisdiction. That is that the arbitrator cannot by its own decision create or extend the authority conferred on them. In other words, if an arbitrator of the court were to defer completely to an arbitrator's decision on jurisdiction, the arbitrator could effectively rule itself into jurisdiction, which may be contrary to the arbitration agreement between the parties.

[Slide 22] By way of an example, using the *Chevron* case, in that particular case CBI Constructors argued that there ought to be a level of deference granted to the reasons why the arbitral tribunal found it was not *functus officio*. Justice Kenneth Martin held that Chevron was entitled to have its *functus officio* argument heard afresh without regard to the tribunal's finding. In that case, the court ultimately found that the tribunal was in fact *functus officio*.

In conclusion, there are two key takeaways. First of all, when a party raises a *functus officio* argument in arbitration proceedings, the arbitrator must first decide whether it has jurisdiction. But then on a setting aside or enforcement application, it is for the court to consider afresh whether the arbitrator has jurisdiction without regard to the arbitrator's reasons.

I will now pass on to Chiann Bao.

SINGAPORE & HONG KONG DEVELOPMENTS

Chiann Bao (CB): Thank you very much Sarah and Shane. Thank you for inviting me to join your session today. I am pleased to have the opportunity to build upon the foundation that Shane and Sarah have established and discuss the developments in Singapore and to some extent also in Hong Kong in relation to the issue of *functus officio*.

Over the past few years, a number of interesting questions have arisen in the Singapore courts in regard to the concept of *functus officio*. These questions relate to *functus officio* in the context of interim awards and then also carve out or create exceptions or deal with the exceptions that Shane had mentioned in relation to this concept.

[Slide 24] The next slide builds on Shane's comments as to some of the exceptions that you might find in this concept of *functus officio* and I thought I would categorise the case law based on these various exceptions, because as Shane has mentioned, much of the case law that is derived from *functus officio* in the courts *is* an issue as to whether there is a setting aside and therefore there are issues as to whether or not the tribunal is *functus* under certain circumstances.

HONG KONG JURISPRUDENCE

CB: Moving along from left to right, we start with the slip rule, as earlier discussed. This particular example comes from the Court of First Instance, a recent decision in 2020, in the Hong Kong courts, *SC v OE1 and OE2*, whereby the respondent sought a correction from the tribunal on the basis that the tribunal had not addressed all of the alleged breaches. The finding rendered an addendum confirming that the tribunal had made a clerical error, since it had made findings and conclusions of SC's breaches in the body of the award. The tribunal also then confirmed that it was a mistaken admission in not setting out the declaration in summary findings in the dispositive section of the award. SC then applied to the court under Section 81 of the Hong Kong Arbitration Ordinance to set aside the relevant parts of the addendum. SC alleged the tribunal was *functus* when issuing the addendum and that the addendum was not in accordance with the party's agreement or the Model Law. SC also relied on the grounds of public policy. In response, OE applied to the court for enforcement of the arbitration award as corrected by the addendum and also those amended sections of the award which SC did not challenge.

The Court of First Instance in Hong Kong held that the errors and omissions which the tribunal sought to correct in the addendum did not fall within the scope of 33(1)(a) in that arbitral award and found that the arbitral awards should be final and free from continuing dispute. Since there are strong policy reasons against alterations of an award after it has been made, circumstances in which corrections or interpretations can be made should be narrowly circumscribed due to policy reasons. The only errors which can be amended under Article 33(1) must stem from a mental lapse or a slip of the pen, not from an error of judgment. Errors affected are mainly flagrant mathematical errors or typing errors which would otherwise complicate the execution of the award. The court went on further to say that Article 33(1)(a) does not give the tribunal a wider power to correct mistakes that are accidental slips or emissions. Therefore, a distinction must be drawn between a clerical mistake and an accidental mistake. Mistakes in the latter category cannot be corrected under Hong Kong law.

The tribunal's admission to grant the license and injunctive relief were clearly not errors in computation or typographical errors. They were also not clerical errors which should not involve any mistake or admission in thought process or analysis. Ultimately, this Court held that the tribunal was entitled under Article 33(3) to make the additional award to deal with OE's claims for the license and injunction as relief.

Reading the award and its proper context, the court then found that the objective and intent was not to dismiss or reject these claims but that the tribunal had not dealt with these claims. The court reasoned that OE 's claims were properly presented as issues in the arbitration, so the

question was whether the tribunal had already dealt with these claims when it purported to reject all other claims and relief sought by the parties in the dispositive section of the award.

In determining whether these claims were dealt with, the award had to be read in its proper context. A claim is dealt with in an award if it has been finally determined, the whole of the award must be considered with the dispositive parts to be considered in the context of the written reasons. The license was automatic and self-executing and should be granted due to the SC's breach of the agreement and by operation of the relevant clause. Since the award did not in any way deal with OE's claims for the license and injunctive relief, the rejection of all other claims and relief sought by the parties was not the true objective intent of the earlier sections of the award. It follows, the court said, that the claims had obviously slipped the minds of the arbitrators and had not been dealt with by the tribunal. Consequently, the tribunal was entitled to make the additional award under Article 33(3) to deal with these claims.

Conversely, how the tribunal dealt with these claims, whether its manner of disposal was right or wrong in law or the facts, and whether the claims had been properly analysed and reasoned are not open to review of the court. Accordingly, the Court dismissed the SC's setting aside application with costs to OE on an indemnity basis. The Court granted leave to enforce the award as amended by the addendum.

SINGAPORE JURISPRUDENCE

CB: Now moving slightly to the right of this chart, we turn to Singapore jurisprudence on the same exception of Article 33(3). You will see that the Hong Kong court dealt with two different exceptions, one under the slip rule and the other one under, as I had mentioned in my analysis, Article 33(3).

In Singapore courts, Article 33(3) has also been dealt with in *BLC and others v BLB and another*. Here, rather than defining the scope of 33(3), the Singapore Court of Appeal clarifies the relationship between 33(3) and 34(4) of the Model Law which deals, of course, with the remission of tribunal before the court sets aside the award. While applying to the tribunal for an additional award on matters omitted from the award under Article 33(3) does not preclude the party from seeking to have the entire award set aside under Article 34 on the admission, the court in Singapore found that, nonetheless, the reasons for failing to invoke Article 33(3) may impact the outcome of the setting aside application under Article 34(4) of the Model Law. The message by the court was in effect that the parties would do better by first seeking the assistance from the tribunal before resorting to the courts.

Further, the court considered the issue as to whether the power to remit the tribunal under Article 34(4) was allowed. It found and made two interesting findings in relation to Article 33(3) and Article 34(4) of the Model Law. The first was the ability for a party to apply to the tribunal

for an additional award on matters omitted from the award does not necessarily prevent the private party from seeking to have the entirety of the award set aside under Article 34 based on its admission. However, a party applying to have the award set aside on that basis runs the risk that the court will remit the matter to the tribunal under 34(4) before deciding whether to set it aside.

The court also considered whether the power to remit to the tribunal under Article 34(4) allowed the court to remit the matter to a newly constituted tribunal rather than the original tribunal and the court ultimately found in this instance that the Article 34(4) only really authorises remittal to the original tribunal.

In another Article 34(4) case from the Singapore Court of Appeal, *AKN and another v ALC and another*, the Court considered the status of an arbitral tribunal once the award has been set aside. The Court here observed that the Singaporean equivalent of 34(4) of the Model Law does not permit a court at the seat of the arbitration to remit a matter to the tribunal after the setting aside of the award. The Court also held that although the effect of setting aside an award is that the award ceases to have legal effect at the seat of arbitration, that is a different question from the tribunal status under the arbitration agreement. If the Court has set aside an award on the basis that the tribunal does not have jurisdictions, for example, there is no valid arbitration agreement, then the parties may not commence a fresh arbitration proceeding. If the Court has set aside the award in circumstances where the arbitration award remains binding, for example, if there had been a denial of procedural fairness, then the parties may commence fresh proceedings subject to the doctrine of *res judicata* and issue estoppel. It is likely that a newly constituted tribunal will be required because it may be possible to challenge a previously appointed arbitrator on impartiality grounds.

[Slide 25] The next issue that I wish to raise is in relation to what Shane had also identified as *functus officio* in the context of interim awards. The Singapore courts have also dealt with this issue in this context, as well. In this case, the Singapore courts have drawn a distinction between interim awards and provisional awards. Shane's comments earlier as to defining exactly the terms of the interim award through the precision of the submissions made by the parties and the orders ultimately decided in terms of the procedural framework and as well as the submissions has been a distinction that has been somewhat dealt with by this particular case *T Perusahaan Gas Negara (Persero) TBV v CRW Joint Operations (Indonesia)*.

While interim awards may attract the operation of *functus officio* as they do in Australia, preliminary orders or provisional awards may also be issued by tribunals. However, the tribunals that issue these types of orders or awards are not *functus*. In this case, the majority of the Singapore Court of Appeal pointed out this distinction between these types of awards and said "Much of the confusion in this case seems to us to stem from a failure to differentiate on

one hand interim or partial awards, which entail a final determination of the party's substantive rights, and a final determination of preliminary issues relevant to the resolution of the parties claims. On the other hand, provisional awards which neither entail nor aid in the final determination of the party's substantive rights. Provisional awards are described as, and the court said it is evidence that the provision of that provisional awards does not definitively or finally dispose of either a preliminary issue or a claim in an arbitration. Examples of provisional awards include those:

a) maintaining status quo;
b) preserving assets;
c) preserving evidence for providing inspection of property;
d) preventing aggravation or a party's dispute;
e) ordering the provision of security or underlying claims;
f) ordering the provision of security for costs; and,
g) ordering compliance with confidentiality obligations.

Such orders are inherently capable of being buried in due course, they do not give rise to a finding on or a determination of substantive rights of the parties and therefore are provisional in nature. Article 12 of the International Arbitration Act (IAA), the Singapore legislation on arbitration, expressly permits an arbitral tribunal to make several such orders or directions in the course of the arbitration. However, s 2 of the IAA provides that such orders or directions are not to be regarded as awards for the purposes of the IAA.

In this case, the interim award involved a final determination of this party's substantive rights, it was not a provisional award. The Court held that if a subsequent partial award purported to vary or revise an interim award, it would offend 19(b) of the International Arbitration Act which provides that an award is final and binding.

[Slide 25] This differentiation is in fact one that is of interest for those who have engaged in emergency arbitrator applications. This leads me to one of the miscellaneous topics that I wish to just point out, not necessarily have answers to but raises potential issues but also do fall under the category of *functus* or may raise issues in regard to the concept of *functus*.

As you know, emergency arbitrators are derived from institutional rules. All major arbitration institutions now have this type of player within the context of the arbitration proceedings. Most of the rules do specifically indicate that an emergency arbitrator is *functus* when the tribunal was constituted. ICC Rules Appendix C articles 868 expressly says that the EA may modify, terminate or null the award granting similar kind of powers post award or EA order to the emergency arbitrator to the extent to these limited exceptions, similar to those exceptions as earlier discussed. The point of raising this, *functus* is not necessarily just limited to the arbitral

tribunal itself, but rather does expand to other players as well, including the emergency arbitrator. This is a frequently seen issue in Singapore, in Hong Kong, where the emergency arbitrator application has become quite popular in dealing with issues that arise before the constitution of the tribunal.

One of the issues within the context of emergency arbitrators is the fact there can be an issue as to exactly the point at which the emergency arbitrator is *functus*. Despite the fact that the rules expressly provide that the emergency arbitrator is *functus* at the time the tribunal was constituted, there may be a long lag between the rendering of the emergency arbitrator award or order and the time the tribunal is constituted. What we have seen in institutions is that during this period there may be other work for the emergency arbitrator to do that would lead to the continuation of its powers until the tribunal is constituted and this may raise issues as to *functus* being based on the type and the nature, or order, or award that was rendered within that general fourteen day time frame of the emergency arbitrator during the emergency arbitrator proceedings. I raised this in the context because it is something that has not been acknowledged as an issue that has risen to the level of the courts but certainly, as we see in practice, there are practicalities that must be dealt with during this period of time between the emergency arbitrator award and the tribunal's constitution that may lead to the grey area as to whether the EA is actually *functus* or not.

I know that we want to leave time for questions. So I am happy to pass the floor back to Sarah and Shane and answer any questions that may arise. Thank you very much.

Q & A

IF RES JUDICATA IS A MATTER OF ADMISSIBILITY (AS RECENTLY HELD BY THE SINGAPORE COURT OF APPEAL IN BTN [2020] AND AS ACKNOWLEDGED IN CBI, THE DOCTRINE OF RES JUDICATA AND FUNCTUS OFFICIO TO SOME EXTENT CONCEPTUALLY OVERLAP, WHY SHOULDN'T FUNCTUS ALSO BE TREATED AS GOING TO ADMISSIBILITY, AND NOT JURISDICTION, PARTICULARLY IN THE CONTEXT OF AN INTERMIN AWARD?

SD: The reason why *res judicata* and issue estoppel are matters of going to admissibility is because, ultimately, courts have jurisdiction to determine disputes. Once the first court determines something it does not deprive the second court of the jurisdiction to hear the dispute but rather will rule that it is not open to the parties to reaggitate something which has already been decided in litigation between them in some earlier forum. But the effect of such an estoppel is not to affect the jurisdiction of the second court. The concept of *functus* is fundamentally different in that respect because the only jurisdiction the tribunal has is to decide in accordance with the agreement between the parties. To simplify, the tribunal in an interim award, having decided the question of liability in one way, there is no submission by the parties to that tribunal to have a second bite of the cherry. It is the different nature of the

origin, and of the extent of the jurisdiction of the two, that differentiates the approach. A tribunal can exhaust its jurisdiction. Whereas, at least for superior courts, they cannot.

ANY COMMENTS ON JUSTICE MARTIN'S DECISION IN STATE OF WESTERN AUSTRALIA AND MINERALOGY [2020] WSCA 8?

SD: I have no real comment on Martin's decision in *the State of Western Australian v Mineralogy*. His Honour, if I am remembering it correctly, had occasion there to be considering the two final awards. There was a final award, the final award by Mr McHugh, the subsequent award made also by Mr McHugh and the question arose on the extent of correctness that Mr McHugh his authority being terminated in respect of the dispute, which was the subject of the first award, which required there to be a second submission, which in fact there was which gave rise to the second award. In that case, factually, because Mr McHugh was *functus* after delivering his first award there was a second reference, as I record. If I am wrong about that, someone else can let me know.

APART FROM THE QUESTION OF THE EXTENT OF DEFERENCE FROM COURTS TOWARDS A TRIBUNAL'S DECISION OVER JURISDICTION, THERE IS A QUESTION WHETHER UNDER THE MODEL LAW THE COURT MUST ALWAYS LET A TRIBUNAL BE CONSTITUTED AND RULE FIRST. DIFFERENT STATES HAVE DIFFERENT VIEWS. AREN'T THE TWO ISSUES LINKED?

SD: I am going to pass the buck to you Sarah. This seems to invite the question of why tribunals are given competence to make their own decisions rather than to go straight to a court.

SS: I briefly touched on that, that is just the rationale for the competence-competence idea. That is, basically, not to hold up the arbitral process by unmeritorious challenges to jurisdiction. The questioner is correct that the different arbitration laws have taken different views. I would agree that the two issues are to some extent linked.

Chiann, I don't know if you want to respond to any of the questions asked in the chat function.

CB: Yes, in respect to the latest question, I think one issue that kind of comes to mind which does not necessarily, I think this question is more of a comment, but in relation to some jurisdictions that actually deal with a negative finding on jurisdiction, and whether that is a final decision, whether the competence of the tribunal can be maintained when it finds that it does not have jurisdiction. This is a deviation of course from the UNCITRAL Model Law. Some jurisdictions have taken the approach where the court can really look at that particular issue of a not negative finding on jurisdiction, which I think muddies the water even more in terms of this question as to a tribunal's jurisdiction and whether courts can review it.

SS: I think that is probably all we have time for and I think we have exhausted the questions in any event. Thank you very much for coming out. I will hand over to Shane.

SD: Thank you for attending our seminar. We hope to have provided at least some food for thought. I also would like to thank both Sarah Spottiswood and Chiann Bao particularly for making themselves available to contribute to the seminar. Thank you very much.