



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

OIL BASINS LTD

Appellant

and

ESSO AUSTRALIA RESOURCES PTY LTD (ACN 091 829 819) & ORS

Respondents

APPELLANT'S SUBMISSIONS

I. CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II. ISSUES

2. The appellant (**OBL**) commenced proceedings in the Supreme Court of Victoria seeking declarations that certain claims by the first to third respondents (**Producers**) fell outside the scope of the parties' arbitration agreement and are prohibited from being arbitrated. The Producers sought a stay under s 7(2) of the *International Arbitration Act 1974* (Cth) (**IAA**). OBL opposed the stay, relevantly on the basis that: (i) under s 7(2) of the IAA, the Court must construe the arbitration agreement to decide whether the court proceedings involve a matter that falls within the scope of the arbitration agreement and so is, in pursuance of that agreement, capable of settlement by arbitration; (ii) the arbitration agreement in the present case was to be construed in accordance with its proper law, which is the law of New York; (iii) on their proper construction, the terms of the arbitration agreement in this case prohibited the Producers' claims being arbitrated, or there were substantial arguments to that effect; (iv) accordingly under New York law, the arbitration agreement did not provide for arbitration of disputes about the scope of the arbitration agreement (**scope disputes**)—rather, applying New York law, the parties had agreed that scope disputes would be decided by a court; and (v) the dispute in the Supreme Court was whether the Producers' claims are prohibited from being arbitrated (a scope dispute), so the proceedings did not involve a matter capable of settlement by arbitration in pursuance of the arbitration agreement, and s 7(2)(b) was not satisfied.
3. The stay was granted and upheld on appeal. The ultimate issue in this appeal is whether the condition in s 7(2)(b) of the IAA was satisfied or whether the stay should have been refused because the proceedings did not involve a matter that is capable of settlement by arbitration pursuant to the parties' arbitration agreement. Determination of that ultimate issue raises: (i) whether the court needed to construe the agreement, as opposed to forming a "general view", without construing it, that the matters in the proceeding were capable of settlement by arbitration, when the agreement in terms prohibits specified categories of dispute from being arbitrated (ground 1); (ii) whether the proper law of the agreement is New York law (ground 2); (iii) whether the arbitration agreement when properly construed in accordance with New York law meant that the parties efficaciously agreed that scope disputes would be decided by a court rather than arbitrators (ground 3).

III. SECTION 78B NOTICE

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

IV. CITATION OF DECISIONS BELOW

5. The decisions of the primary judge are *Oil Basins Ltd v Esso Australia Resources Pty Ltd* (2025) 78 VR 388 (**J**) and *Oil Basins Ltd v Esso Australia Resources Pty Ltd (No 2)* [2025] VSC 257. The decision of the Court of Appeal is *Oil Basins Ltd v Esso Australia Resources Pty Ltd* [2026] VSCA 6 (**CA**).

V. BACKGROUND

Contractual framework

- 10 6. OBL and the Producers are parties to a **Royalty Agreement [ABFM1/1/5-10]** pursuant to which OBL is entitled to a royalty of 2.5% of the gross value of hydrocarbons produced and recovered within a designated area of Bass Strait: CA [5]. Over the course of an arbitration commenced in 1984, it was relevantly established that: (i) royalty is payable quarterly on the gross value of hydrocarbons at the place of production; and (ii) because there is no market for hydrocarbons at the place of production, the hydrocarbons are to be valued each quarter using a “netback” method under which certain costs incurred downstream of the place of production are deducted from the gross proceeds of sale of marketable products: First Interim Award at [79], [115], [159], [219] [**ABFM1/2/87-88, 118, 145, 183**]. A special referee was appointed to calculate the royalty. He produced two
- 20 reports, the latter modified and adopted by the Final Award [**ABFM3/8/921-971**], setting out a methodology for the royalty calculation that gave effect to the netback method determined by the arbitrators.
7. After the first arbitration, further disputes arose between the parties. On 17 March 1994, the parties entered into a **Settlement Agreement [ABFM3/9/972-1042]**, the construction of which is in issue in this appeal. The Settlement Agreement picks up and applies the netback valuation method from the previous arbitration (referred to as the “Special Referee’s methodology”), which gave effect to the arbitrators’ construction of the Royalty Agreement, subject to modifications in the Settlement Agreement. As so modified, the methodology is defined as the “Special Referee’s modified methodology” (**SRMM**). The
- 30 Settlement Agreement was amended in 1997 and 2018.
8. Clause 3 reaffirms the operation of the Royalty Agreement and its netback valuation

method. Clause 5(a) provides that the gross value of hydrocarbons and the royalty payable in respect thereof “shall be determined in accordance with” the SRMM [ABFM3/9/991]. Clause 5(c) provides, expressly subject to cl 5(b), for further modification of the SRMM by arbitration “[i]n the event that the [SRMM] or any part thereof does not accommodate, is not applicable to or [is not] appropriate for any item which may affect the gross value of hydrocarbons”. Clause 5(b) provides that “[n]o further modification may be made by arbitration under [the Settlement Agreement] to, or which is inconsistent with, the modifications to the [SRMM] referred to in any of” identified clauses. These include cl 6B(f), which deals with deductions for cost of capital.

10 9. Clause 18 of the Settlement Agreement, on governing law, provides: “Except as otherwise required by the law of the place where the hydrocarbons are produced or as otherwise herein provided this Agreement shall be interpreted and applied in accordance with the law of the State of New York, United States of America.” Clause 19 then provides for arbitration, subject to the cl 5(b) prohibition [ABFM3/9/1024-1025], as follows:

- (a) Any dispute (other than a dispute required to be determined under clause 12^[1]) in any way arising out of or related to or connected with this Agreement shall be determined by arbitration in Melbourne, Victoria, Australia in accordance with the Commercial Arbitration Act 1984 (Vic).
- (b) For the purposes of clause 19(a) and subject to clause 5(b), a dispute means a dispute, difference or question in any way arising out of or related to or connected with this Agreement, including as to:
 - (i) its termination or breach; and
 - (ii) any further modification of the [SRMM].

Genesis of the present dispute

10. On 5 September 2023, OBL served a notice of dispute in relation to the treatment of GST in the royalty calculation: J [19]. On 8 and 9 October 2023, the Producers served notices of dispute on OBL: (i) raising disputes in relation to the treatment of GST in the royalty calculation; and (ii) seeking further modifications of the SRMM to increase deductions for depreciation in the netback calculation and to introduce new deductions for future decommissioning costs (**D&D Claims**): J [3], [11]. OBL objected to the competency of the Producers’ notice, insofar as it concerned the D&D Claims, including on the basis that the proposed modifications are inconsistent with cl 6B(f), are precluded from being made by cl 5(b), and therefore fall outside the definition of “dispute” in cl 19(b): see J [3].

¹ Clause 12 provides for certain lower-value disputes to be determined by a “Referee” (as defined).

11. On 12 March 2024, the parties executed an agreement (**Appointment Agreement**) [ABFM3/10/1043-1081], by which they appointed arbitrators, relevantly, to decide the GST disputes. Recital E recorded OBL's position that the D&D Claims were not "amenable to arbitration under the Settlement Agreement or otherwise". Clause 1(c) then stated: "*Subject to the resolution of the objections to the competency of the Producers' Notices of Dispute ... the [D&D Claims] are to be heard and determined by the Arbitral Panel*" (emphasis added). Clause 8(a) provided that the IAA will apply to the arbitration.
12. On 22 April 2024, OBL commenced proceedings in the Supreme Court of Victoria seeking declarations that the D&D Claims do not raise a dispute that is capable of being
10 arbitrated under the Settlement Agreement and injunctive relief. The Supreme Court claim raises *only* whether the D&D claims are within the tribunal's jurisdiction.

Stay application before Croft J

13. The Producers sought a stay of the proceedings under s 7(2) of the IAA, which provides:

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.

14. OBL resisted the stay, relevantly on the basis stated in [2] above. The primary judge failed to engage with this argument, as the Court of Appeal held: CA [55], [61]. Purportedly applying *Hancock Prospecting Pty Ltd v Rinehart*,² Croft J held that, because arbitrators are capable of ruling on their own jurisdiction under Art 16 of the Model Law, s 7(2) calls for a "light touch" approach that involves "forming a general view that the differences between the parties fall within the scope of the arbitration agreement, ... [without] embarking on construction of the arbitration agreement": J [63]; see also [64], [68]. His
20 Honour granted a stay while saying that "nothing in [his] reasons [was] to be taken as expressing *any view or views* ... as to the scope or proper construction of the arbitration agreement": J [68] (emphasis added). As the Court of Appeal held, Croft J "omi[tted] to
30 construe the agreement in accordance with cl 18", the choice of law clause: CA [61].

² (2017) 257 FCR 442 at [141]–[145].

Court of Appeal's decision

15. The Court of Appeal dismissed the appeal. It endorsed the “light touch” approach, holding that, although “some construction” of the arbitration agreement may sometimes be necessary, a stay could be granted without construing the agreement or deciding whether the dispute fell within its scope: CA [53], [56]–[57], [59], [61]. It further held that parties subject to the IAA cannot agree that a court, rather than arbitrators, will decide scope disputes, because that would infringe Art 16 of the Model Law (CA [77], [79], [83]), and that s 7(2)(b) is in any event satisfied where the underlying substantive dispute appears, on a “general view”, to be capable of settlement by arbitration: CA [56]–[57], [76].
- 10 16. As to proper law, the Court held that the governing law clause “does not provide that [New York law] governs the agreement or the arbitration” but only that the agreement is to be “interpreted and applied in accordance with” New York law, and that, the seat being Melbourne, it “would not be correct ... to find that the proper law of the Settlement Agreement, or more particularly the separable arbitration agreement in cl 19, is the law of New York”: CA [96]–[97].

VI. ARGUMENT

Ground 1

17. Ground 1 of the amended notice of appeal concerns whether it was open to grant a stay under s 7(2) based on a “general view” as to the connection between the parties’ dispute and the arbitration agreement, while explicitly not considering or expressing any view as to its proper construction. It was not. Croft J was required to construe the arbitration agreement in accordance with its proper law and determine whether the proceedings before the court involved a matter falling within the scope of the arbitration agreement. That task could not be avoided here, where OBL’s case was that cll 3, 5(b) and 19(b) prohibit the D&D Claims from being arbitrated: see [27] and [68]–[73] below.
- 20

Construction of s 7(2)

18. **(Text)** The starting point for ground 1 is the text of s 7(2). It has two conditions, which are both necessary for the grant of a stay. The first condition, in s 7(2)(a), is not in dispute. The second condition, in s 7(2)(b), is that “the proceedings involve the determination of a matter that, *in pursuance of the* [arbitration] *agreement*, is capable of settlement by arbitration”. That condition is critical.
- 30
19. The first task under s 7(2)(b) is to identify the “matter” whose determination the

proceedings involve, by reference to the proceeding as filed and the relief it seeks. Often a party will sue on the entire substance of a dispute that may be the subject of arbitration, and the “matter” is that substantive controversy; so in each of the decisions relied on below, the claimant had brought the entire dispute to court.³ This proceeding is not of that kind. OBL sought no relief on the substance of the D&D Claims, but only declarations that those claims fall outside the scope of the agreement and are prohibited from being arbitrated.

20. The Court of Appeal held otherwise, treating the “matter” as the underlying substantive dispute and a scope disagreement as merely a question of “who decides”: CA [73]–[76].
 10 That was an error. It fixed on a substantive controversy that OBL did not bring and that was not before the Court, contrary to s 7(2)(b)’s direction to the “matter” that “the proceedings involve”. A claim that, under the proper construction of the arbitration agreement in accordance with its proper law, particular claims are not arbitrable and that this scope question is to be decided by a court is a contractual right, capable of settlement as a discrete controversy.⁴ Identifying the matter this way requires no decision on the merits of the D&D Claims, only construction of the arbitration agreement—the task s 7(2)(b) demands. Whether that matter is “capable of settlement by arbitration in pursuance of the agreement” is the core issue raised by the appeal.

21. The ordinary meaning of s 7(2)(b) indicates that a court hearing a stay application needs
 20 to construe the arbitration agreement. Otherwise, the court cannot be satisfied that the proceedings involve the determination of a matter that *is*—not might or may arguably be—capable of settlement by arbitration *in pursuance of* that agreement: in other words, falling within the scope of that agreement.⁵ That is confirmed by the concluding words of s 7(2), which provide that, where the conditions in s 7(2)(a) and (b) are satisfied, the court shall “stay the proceedings *or so much of the proceedings* as involves the determination of that matter”. Thus, in an application under s 7(2), the court may find that some but not all of the matters in the proceedings fall within the arbitration agreement. That necessarily

³ See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [235]; *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 at [10], [45]; *Casaceli v Natuzzi SpA* (2012) 292 ALR 143 at [38]–[44].

⁴ *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332 at 351–352. As to the vindication of the negative right that a dispute not be arbitrated, see *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2012] 1 WLR 920 at [98].

⁵ *Tanning* (1990) 169 CLR 332 at 351. See also *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [162]–[245]; *Tianqi Lithium Kwinana Pty Ltd v MSP Engineering Pty Ltd (No 2)* (2020) 56 WAR 169 at [88]–[147]; *Great Union Pty Ltd v Sportsgirl Pty Ltd* [2021] VSCA 299 at [28]; *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [26]–[49], [66]–[80].

implies that the court must construe the arbitration agreement to determine its scope, and decide whether each matter in the court proceedings falls within that scope.

22. **(Context)** That meaning of s 7(2) is supported by two contextual considerations.
23. *First*, s 7(5) provides that a court shall *not* grant a stay under s 7(2) “if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed”. This indicates that the court must be positively satisfied that there is a valid agreement that extends over some or all of the matters in the court proceedings. It also indicates that the Court’s task under s 7 is to “find”, that is, to apply its ordinary approach to decision.

24. *Second*, s 7(2) implements Art II(3) of the New York Convention,⁶ which provides:

10 The court of a Contracting State, when seized of an action *in a matter in respect of which the parties have made an agreement within the meaning of this article*, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. [emphasis added]

25. The text of Art II(3) makes clear that States must require parties to arbitrate disputes that are the subject of a valid arbitration agreement—in other words, disputes that fall within the scope of a valid arbitration agreement. Leading commentary states that Art II(3) “implicitly requires the court to determine the ... scope of an arbitration agreement”, with the result that “courts may have to grapple with the language of some arbitration agreements that may seem to cover only a certain type of claims”.⁷

- 20 26. **(Purpose)** The objective purpose of s 7(2) is to uphold arbitration agreements by denying access to the courts where parties have agreed to arbitrate *but not otherwise*. Underlying this purpose is the fundamental principle that arbitration is a matter of party autonomy and consent.⁸ It is contrary to that fundamental principle and the objective purpose of s 7(2) for parties to be denied access to the courts and forced to arbitrate disputes unless they have agreed to do so. The critical question is and must be: did the parties agree to arbitrate this dispute? The only way a court can answer that question is by construing the arbitration agreement relied on by the stay applicant and determining whether the proceedings involve the determination of a matter that falls within its scope.

27. That task is not an empty one here. The observations in *Hancock* relied on below arose

⁶ *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 3)* (1998) 86 FCR 374 at 393; see also 385.

⁷ International Council for Commercial Arbitration, *ICCA’s Guide to the Interpretation of the 1958 New York Convention* (2nd ed, 2024) at 41, 60.

⁸ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at [11], [81], [101], [106], [109]; *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* (2024) 283 CLR 172 at [15]. See also *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* (2020) 55 WAR 435 at [250]; *Tianqi Lithium Kwinana Pty Ltd v MSP Engineering Pty Ltd (No 2)* (2020) 56 WAR 169 at [76].

in a very different setting: the question there was whether the notified disputes fell within the relational phrase “any dispute under this deed”, which the Full Court characterised as flexible, elastic and general.⁹ Here, by contrast, cl 19(b) is expressly “subject to clause 5(b)”, and cl 5(b) precludes modifications of, or inconsistent with, cl 6B(f). The modifications are also prohibited because they are fundamentally inconsistent with the nature of the netback valuation method required by the Royalty Agreement and implemented by the SRMM. Where an arbitration agreement in terms prohibits specified categories of dispute from being arbitrated, the court asked to grant a stay is obliged to construe and apply that prohibition in accordance with its governing law; only by doing so can it determine whether the preconditions in s 7(2)(b) and (5) are satisfied. OBL’s case is that the modifications the Producers seek are prohibited: see [68]–[73] below. The Court need not finally decide that question to allow the appeal on this ground; neither of the lower courts embarked on the proper construction of the arbitration agreement, and in those circumstances error is demonstrated by showing that the prohibition was engaged or arguably engaged but never construed.

Court of Appeal’s error

28. The Court of Appeal’s errors lay in treating Art 16 of the Model Law as the controlling provision and misconstruing the article: see [15] above. The Court of Appeal reasoned that, because Art 16 provides that arbitrators *may* rule on their own jurisdiction, it follows that courts must not, including on an application under s 7(2). *Hancock* does not support that approach: it requires the Court to construe the agreement at least so far as to be positively satisfied that the disputes are, or are not, its subject, holding only that the Court does not go on to weigh the strength of the underlying claim.¹⁰ That is a requirement to construe scope, not a warrant to grant a stay without construing the agreement at all or to do so by relying on a vague, “light touch” impression. If *Hancock* is to be read as supporting the Court of Appeal’s approach, it is wrong. OBL makes four points in amplification.

29. *First*, the starting point in an application for a stay under s 7(2) must be the text of s 7(2). The section states that a stay shall be granted where a matter *is*, not *may be*, capable of settlement by arbitration in pursuance of the parties’ agreement.

30. *Second*, a construction of s 7(2) that gives priority to the possibility of a later arbitral

⁹ *Hancock* (2017) 257 FCR 442 at [167], [201].

¹⁰ (2017) 257 FCR 442 at [146], [149].

ruling on jurisdiction, and treats it as ousting the jurisdiction of the courts over contractual disputes, mistakes both the language and the legal effect of Art 16(1) of the Model Law. The language of Art 16(1) is clear; it merely confers a power on arbitrators to rule on their own jurisdiction if the occasion arises and the controlling court has not otherwise done so. Even then, ultimate control over the contractual jurisdiction of arbitrators rests with the court under Arts 16(3), 34(2)(a)(iii) and 36(1)(a)(iii). Section 7(2) preserves the Court's ability to determine jurisdictional issues itself, or to stay its proceedings in favour of arbitration where the preconditions in s 7(2) have been satisfied.

- 10 31. The foregoing analysis is supported by the fact that s 7(2) has been in substantially the same terms since the IAA was first enacted in 1974,¹¹ well before the Model Law was given force of law in Australia. Even now, Art 16 only applies by force of statute if the relevant arbitration is in Australia,¹² whereas s 7(2) applies to proceedings in an Australian court whether the relevant arbitration agreement provides for arbitration in Australia or elsewhere, Model Law jurisdiction or otherwise. Further, for reasons given in respect of Ground 3, parties may agree to limit or exclude the authority of arbitrators to rule on their own jurisdiction. It follows that s 7(2) needs to be capable of operating where arbitrators are *not* empowered to rule on their own jurisdiction. Its meaning, and the task for the court in applying it, logically cannot depend on that vicissitude.
- 20 32. *Third*, even where arbitrators do have power, it does not follow, and nothing in s 7(2) suggests or permits, that arbitrators must be the first to rule. Article 16 provides that arbitrators *may* rule on their jurisdiction, not that they *must*, nor that courts *must not*.¹³ While some jurisdictions have discerned from the conferral of arbitral competence-competence an implied limit on the authority of courts,¹⁴ that reflects *a priori* assumptions about the desirable relationship between curial and arbitral proceedings. As a matter of construction, Art 16 does not support any such limit.¹⁵ Indeed, the very

¹¹ The only difference is that “Subject to this Part” (as it now stands) originally read “Subject to this Act”.

¹² Model Law, Art 1(2).

¹³ Article 5 forbids curial intervention only “except where so provided in this Law”: Art 8(1) so provides, Art 8(2) contemplates arbitration continuing “while the issue is pending before the court”, and Art 16(3) provides for curial review of a ruling on jurisdiction. In any event, whether s 7(2)(b) is satisfied is governed by the IAA, not the Model Law.

¹⁴ *Dell Computer Corporation v Union des consommateurs* [2007] 2 SCR 801 at [84]; *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [67]. See generally Barceló III, “The Competence-Competence Principle’s Negative Effect” in Kröll, Bjorklund and Ferrari, *Cambridge Compendium of International Commercial and Investment Arbitration* (2023) 807.

¹⁵ See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [84] (“it does not follow [from competence-competence] that the tribunal has the exclusive power to determine its jurisdiction, nor does it follow that the court of the seat may not determine whether the tribunal has jurisdiction before the tribunal has ruled on it”).

existence of s 7(2) confirms the parallel authority of the courts to rule on jurisdiction.¹⁶

33. *Fourth*, even where courts have (wrongly) discerned an implied limit on the authority of courts that is extraneous to the text of Art 16, it has never been suggested that a stay might be granted without embarking on the construction of the arbitration agreement at all. On the contrary, in *Hancock*, the Court construed the arbitration clauses in detail.¹⁷
34. For these reasons, this Court should find that the Court of Appeal erred in endorsing the primary judge’s decision to grant a stay without construing the arbitration agreement.

Ground 2

35. Ground 2 raises two issues. *First*, what rules determine the proper law of an arbitration agreement? *Second*, what is the proper law of the instant arbitration agreement?

Issue 1: What rules determine the proper law of an arbitration agreement?

36. **(Starting point: identifying party choice)** There does not appear to be any dispute that the proper law of an arbitration agreement is determined by applying the forum’s choice-of-law rules, here, the common law of Australia. Australian conflicts principles, which for this purpose include rules on contract construction, permit parties to choose the system of law that governs their contractual relations; accordingly, to determine the proper law of a contract, a court asks whether the parties objectively intended their contract to be governed by a particular system of law and, if so, what system of law.¹⁸
37. **(Application to arbitration agreements)** Applying that basic principle to arbitration agreements, the long-standing Australian approach has been that, where an arbitration agreement forms part of a contract that selects a governing law, the parties intended that choice to govern the whole contract, including the arbitration agreement, absent some contrary indication.¹⁹ That the parties selected a different curial law (for example, by choosing a seat in a different jurisdiction) does not indicate that the curial law, rather than the law of the main contract, governs the arbitration agreement.
38. **(Decision in *Enka*)** This approach is consistent with *Enka Insaat ve Sanayi AS v OOO “Insurance Co Chubb”*,²⁰ where the UK Supreme Court held that, where a contract contains a governing law clause and an arbitration clause, “it is natural to interpret [the]

¹⁶ cf Bantekas et al, *UNCITRAL Model Law on International Commercial Arbitration* (2020) at 154.

¹⁷ *Hancock* (2017) 257 FCR 442 at [141]–[145], [153]–[268].

¹⁸ *Akai Pty Ltd v People’s Insurance Co Ltd* (1996) 188 CLR 418 at 441–442.

¹⁹ *Recyclers* (2000) 100 FCR 420 at [22]; *Comandate* (2006) 157 FCR 45 at [163]; *Casaceli* (2012) 292 ALR 143 at [38]. See also *Nygh’s Conflict of Laws in Australia* (11th ed, 2026) at [39.2].

²⁰ [2020] 1 WLR 4117 at [43]; see also [255], [266]. *Enka* concerned common law principles, as the Rome I Regulation (Council Regulation (EC) No 593/2008) does not apply to arbitration agreements: see at [25].

governing law clause, in the absence of good reason to the contrary, as applying to the arbitration clause”, and that a choice of a different seat does not negate that inference.²¹ That aspect of the decision was unanimous and correct. *Enka*’s qualification—that the inference may yield where applying the chosen law would render the arbitration agreement invalid or ineffective—does not assist the Producers: New York law leaves the arbitration agreement valid and effective; it simply gives effect to what the parties agreed as to which disputes were submitted. This Court should confirm that the Australian position is the same as that reflected in *Enka*.²²

Issue 2: What is the proper law of the instant arbitration agreement?

- 10 39. **(Parties’ choice of New York law)** Applying the conflicts rules reflected in Australian case law and confirmed in *Enka*, the law of the arbitration agreement is New York law. As set out above, cl 18 of the Settlement Agreement is an unambiguous choice of New York law for the contract, subject to two opening exceptions, neither of which applies. The first—“as otherwise required by the law of the place where the hydrocarbons are produced”—is engaged only so far as Australian law mandatorily requires a departure from New York law; whether it does, because the Model Law is said to override the parties’ choice, is a question raised by Ground 3, and it does not convert cl 18 into a choice of Victorian law for interpreting the agreement. There is no express choice of a different law for the arbitration agreement. The choice of a Victorian seat and curial law
20 in cl 19 does not displace the parties’ intention that their choice of New York law govern the whole Settlement Agreement, including the arbitration agreement.²³
40. **(Court of Appeal’s error)** The Court of Appeal’s short reasons on the proper law of the

²¹ *Enka* [2020] 1 WLR 4117 at [170(v)]. See also, in Singapore, *BCY v BCZ* [2016] 2 Lloyd’s Rep 583 at [65]; *BNA v BNB* [2020] 1 Lloyd’s Rep 55 at [47]. See generally Blackaby, Partasides and Redfern, *Redfern and Hunter on International Arbitration* (7th ed, 2022) at [3.09].

²² For completeness, the common law rules in *Enka* have been reversed by statute in England and Wales: *Arbitration Act 2025* (UK) s 1, inserting s 6A into *Arbitration Act 1996* (UK). The new statutory position is that: (i) if parties choose a governing law for the arbitration agreement specifically, it is governed by that law; (ii) for that purpose, a choice of law for the main contract is not sufficient; and (iii) if the parties have not chosen a governing law for the arbitration agreement specifically, the applicable law is the law of the seat. This is not presently relevant. The Law Commission report preceding the amendment indicates that the new default rule sought to promote London’s desirability for international arbitration by simplification and making it more likely that England’s “generous rules on arbitrability and scope” apply: Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill* (2023) at [12.72], [12.74]. Proponents, including Lord Hoffmann, acknowledge that the decision in *Enka* was consistent with common law conflicts jurisprudence and the change was “one of legislative policy”: Lord Hoffmann et al, “An Important Realignment and an Opportunity Missed?” (2025) 41 *Arbitration International* 465 at 471–472.

²³ This is supported by the interrelationship of cll 12 (referee determination), 19 (arbitration, subject to a cl 12 carve-out) and 20 (confidentiality in disputes under both): on any view cll 12 and 20 are governed by New York law, and the parties are unlikely to have intended a different law for cl 19.

arbitration agreement fail to give effect to the clear choice of the parties for New York law and confuse the governing law of the arbitration agreement (the law that applies to the interpretation and application of the arbitration agreement) and the curial law or *lex arbitri* (the law that applies to arbitration conducted under the arbitration agreement).²⁴

41. As to the former, the Court of Appeal suggested a distinction exists between the proper law of the contract and cl 18's choice, treating cl 18 as choosing New York law "in a limited way", only for "interpretation and application": CA [97]. That is untenable. Clause 18 is a common form of governing-law clause. A materially identical clause in the sibling Royalty Agreement—that it be "interpreted and applied in accordance with the laws of the State of New York"—was held to identify New York law as the governing law, and applied "even though the contract had no connection with New York".²⁵

42. As to the latter, it was and is not in dispute that the curial law of any arbitration under the arbitration agreement is Victorian law. Nor that, by force of IAA ss 16(1) and 21(1), the curial law includes the Model Law. *Contra* CA [96]–[97], that does not negate or displace the parties' choice of New York law to govern the interpretation and application of the arbitration agreement. There is no doubt parties can make distinct choices as to the governing law of an arbitration agreement and the curial law applicable to any arbitration under that agreement.²⁶ Indeed, Art 28 of the Model Law *requires* effect to be given to a choice of the substantive law *and* to the parties' contract.

20 Ground 3

43. Ground 3 raises two issues. The *first* is a question of law: can parties to an arbitration agreement subject to the Model Law under the IAA agree that a court rather than arbitrators will decide scope disputes, or does Art 16 preclude them from doing so? The *second* is a question of fact: did the parties to this arbitration agreement agree that a court rather than arbitrators would decide scope disputes? The Producers' notice of contention concerns the second issue and is addressed below. As explained at [19]–[20] above, the only matter the court proceeding involves is the question of scope. In the context of Ground 3, it follows that if the parties agreed that a court would decide such questions, s 7(2)(b) is not satisfied. The Court of Appeal held otherwise only by treating the substantive dispute in the arbitration as the "matter": CA [76].

²⁴ On this basic distinction, see generally Mustill and Boyd, *Commercial Arbitration* (2nd ed, 1989) 60–68; Dicey, Morris & Collins: *The Conflict of Laws* (16th ed, 2022) at [16R–001].

²⁵ *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 at 747.

²⁶ *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 282 CLR 512 at [28], [311].

Issue 1: Can parties agree that a court will decide scope disputes?

44. This Court should find that parties to an arbitration agreement that is subject to the IAA and Model Law can efficaciously agree that a court, rather than arbitrators, will decide scope questions. Article 16 does not preclude them from doing so.

45. **(Interpretative principles)** The Model Law is a schedule to an Act of the Commonwealth Parliament and is to be construed as such, subject to: (i) s 17(1) of the IAA, which provides that reference may be made to UNCITRAL documents and the *travaux préparatoires* relating to the Model Law; and: (ii) the special interpretative rule in Art 2A of the Model Law, which provides:

10 (1) In the interpretation of this Law, regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith.

 (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

46. **(Cornerstone of the Model Law: party autonomy and consent)** There do not appear to be any foreign or Australian decisions deciding whether parties to an arbitration agreement subject to the Model Law may agree that a court rather than arbitrators will decide scope disputes. The question is not expressly settled in the Model Law. It is necessary to have regard to the general principles on which the Model Law is based.

20 47. The most fundamental principle, frequently recognised by this Court²⁷ and described by the UNCITRAL as one of the Model Law's "philosophical cornerstones",²⁸ is party autonomy. The Court of Appeal's decision transgresses this. Its effect is that parties are forced to arbitrate scope disputes even where they agree a court will decide such disputes or, put the other way around, that parties to arbitrations in Australia cannot decide that a court rather than arbitrators will decide such questions.

 48. International commentary recognises the centrality of party autonomy in this context. One expert retained by UNCITRAL for its *Digest of Case Law on the Model Law* states that "there is no reasonable justification to limit the parties' autonomy" to decide who determines scope disputes.²⁹ Another international arbitration scholar states that, "[g]iven that party autonomy is the central touchstone of international arbitration, it is hard to see why parties should not be free to decide for themselves whether to privilege courts or

²⁷ See, eg, *TCL Air Conditioner* (2013) 251 CLR 533 at [11], [81], [101], [106], [109].

²⁸ United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) (**UNCITRAL Digest**) at 34 [6].

²⁹ Kröll, "Party Autonomy in Relation to Competence-Competence" (2020) 9(1) *European International Arbitration Review* 155 at 164.

arbitrators as first-instance decision-makers on jurisdiction”.³⁰

49. Party autonomy is also reflected in Art 28(1) and (4) of the Model Law, which respectively require the tribunal to decide in accordance with the substantive law the parties have chosen and “[i]n all cases ... in accordance with the terms of the contract”.

50. **(No contrary provision)** Having regard to the Model Law’s fundamental concern with party autonomy, strong words would be needed for Art 16(1) to compel parties to arbitrate scope disputes even if, by their contract, they agree otherwise. No such words exist. As Born states: “It is beyond dispute that parties could deny an arbitral tribunal’s competence-competence under Article 16(1)”; “there is no adequate justification for denying the parties’ autonomy with regard to fundamental aspects of the arbitral process (i.e., disposition of jurisdictional disputes) absent clear statutory language”; and “[t]he silence of [Art 16] provides no such language”.³¹ This is plainly right on Art 16(1)’s text, which confers power (“may rule”) but does not compel its exercise: see [30] above.

51. That the parties cannot “opt out” of the Model Law or deny it force of law does not meet the point. Article 16(1) confers a power; it does not oblige parties to submit scope questions to arbitration. Giving effect to an agreement that a court decide those questions therefore takes nothing from Art 16(1): neither its force of law nor its field of operation.

52. **(Court of Appeal’s approach is incongruous)** This view is consistent with other, settled features of arbitration under the Model Law; conversely, the Court of Appeal’s denial of party autonomy is incongruous with those features. *First*, there is no doubt that parties may make arbitration conditional on prior mediation.³² *Second*, it is well established, and a commonplace occurrence, that parties can exclude specified issues from the scope of their arbitration agreement, or limit it to specified issues. Indeed, cll 5(b) and 12 of the Settlement Agreement illustrate the former point and *Great Union Pty Ltd v Sportsgirl Pty Ltd*³³ illustrates the latter point. And, depending on the particular context, it may be that if an issue is excluded from arbitration in either way, the parties are implicitly agreeing that it is an issue for the courts if it ever arises. *Third*, there is equally no doubt that parties may waive any entitlement to arbitration.³⁴ *Fourth*, there is Model Law authority, cited in the UNCITRAL Digest, that parties may agree to limit the operation of

³⁰ Barceló III (n 14) 846.

³¹ Born, *International Commercial Arbitration* (3rd ed, 2021) at 1189.

³² *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC 169 at [47]–[48]; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* (2013) 298 ALR 666 at [119].

³³ [2021] VSCA 299 at [5].

³⁴ *Dialogue Consulting Pty Ltd v Instagram Inc* (2020) 291 FCR 155 at [465].

Art 16(3), which provides that parties may seek interim judicial review of an arbitrator's decision on jurisdiction.³⁵ There is no reason in principle or in the text or context of Art 16 why parties may qualify an arbitrator's mandate in those ways but are precluded from agreeing that scope disputes will be decided by a court.

53. **(Model Law should not make award futile)** Further support is given for this view by Arts 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law, which provide for an arbitral award to be set aside or refused enforcement if it deals with “matters beyond the scope of the submission to arbitration”, reflecting Art V(I)(c) of the New York Convention. If a tribunal purports to determine a scope question where the parties have agreed that a court will decide such questions, the tribunal's award will be liable to be set aside and refused enforcement *whatever answer is given*. The Model Law should not be construed so as to compel such a futile exercise.³⁶ Such a construction runs counter to the general principles on which the Model Law is based, the express objects in IAA s 2D, and the legislated facts in s 39(2)(b), which include that arbitration is “efficient” and “enforceable” and “awards are intended to provide certainty and finality”.

54. **(*Travaux préparatoires*)** The *travaux* to the Model Law do not lead to a different conclusion. In early commentary on the Model Law, Holtzmann and Neuhaus expressed the view that the *travaux* showed an intention to preclude parties from agreeing that a court rather than arbitrators will decide scope questions, because a proposed amendment to add the words “unless otherwise agreed by the parties” was not adopted.³⁷ The better view, supported by more recent commentary,³⁸ is that the *travaux* are ambiguous, and the working group may simply have considered the proposed amendment unnecessary, on the basis that, as drafted, Art 16 permitted parties to agree that a court would decide scope disputes.³⁹ In any event, consistently with Art 2A, the interpretation urged by OBL better serves the Model Law's “ultimate objective”—namely, promoting party autonomy,

³⁵ *Compagnie Nationale Air France v Libyan Arab Airlines* (Quebec Court of Appeal, Rothman, Mailhot and Chamberland JJA, 31 March 2003) at [25], cited in UNCITRAL Digest at 82 [26].

³⁶ cf *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 282 CLR 512 at [45].

³⁷ Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) at 480.

³⁸ Kröll and Keller, “The Competence-Competence Principle's Positive Effect” in Kröll, Bjorklund and Ferrari, *Cambridge Compendium of International Commercial and Investment Arbitration* (2023) 771, 789.

³⁹ The Chairman suggested the Commission might indicate “that parties could contract out of the provision”: UN Doc A/CN.9.SR.315 (1985) at [25], indicating Art 16 was understood to permit such agreement. The report added it was “ultimately for each State ... to decide whether it wished to accept the principle [sc competence-competence] and, if so, possibly to express in the text that parties could exclude or limit that power”: UN Doc A/40/17 (1985) at [151].

ensuring that the Model Law is “responsive to the users’ needs”,⁴⁰ giving a harmonious operation to all of its provisions, and ensuring that awards are enforceable and certain.

Issue 2: Did the parties agree that a court would decide scope disputes?

55. This Court should find that the parties to this arbitration agreement *did* agree that a court, not arbitrators, would decide scope disputes. This is a matter of construing the arbitration agreement under its proper law, as explained in Ground 2, that of New York.

56. **(Principles of New York law)** Expert evidence of New York law was adduced before the primary judge. OBL filed expert two reports by Clayton Gillette, a professor of law at New York University, and the Producers filed an expert report by James McGuire, a former judge of the Appellate Division of the Supreme Court of New York. Mr McGuire was cross-examined. Professor Gillette was not.

57. The evidence establishes that, under New York law, parties to an arbitration agreement are presumed to agree that a court, not arbitrators, decides whether a dispute is within the scope of their agreement, unless there is “clear and unmistakable” evidence of intention to the contrary.⁴¹ This is an “interpretive rule” that is “based on assumptions about the parties’ expectations”.⁴² In other words, it is a principle of interpretation, and not a procedural or statutory rule, a choice of law rule or an allocation of court jurisdiction.

58. Clear and unmistakable evidence may exist where, for example, there is express language that arbitrators are to decide questions of jurisdiction, or the parties adopt arbitral rules that provide for arbitrators to decide their own jurisdiction *and* the arbitration clause is broad and unqualified.⁴³ Where by contrast an arbitration clause is subject to an exclusion that arguably applies, there is no clear and unmistakable evidence, *even if* the parties have adopted arbitral rules that provide for arbitrators to decide their own jurisdiction.⁴⁴ Following cross-examination of Mr McGuire, there was no dispute on these principles.⁴⁵

⁴⁰ Bachand, “Judicial Internationalism and the Interpretation of the Model Law” in Bachand and Gélinas (eds), *The UNCITRAL Model Law after Twenty-Five Years* (2013) 231 at 250–251.

⁴¹ Expert Report of Clayton Gillette dated 13 November 2024 (**Gillette**) [32] [ABFM3/15/1216]; Expert Report of James M McGuire dated 21 November 2024 (**McGuire**) [20] [ABFM5/18/2111]. See *First Options of Chicago Inc v Kaplan*, 514 US 938, 944 (1995) [ABFM4/16/1659].

⁴² Gillette [33] [ABFM3/15/1216], quoting *Rent-A-Centre West Inc v Jackson*, 561 US 63, 69 fn 1 (2010) [ABFM4/16/1771]; McGuire [20] [ABFM5/18/2111].

⁴³ Gillette [44]–[45] [ABFM3/15/1222–1224].

⁴⁴ Gillette [40]–[45] [ABFM3/15/1219–1224]. See *NASDAQ*, 770 F 3d 1010, 1016, 1018–1019, 1031–1032 (2d Cir 2014) [ABFM5/17/1910, 1916, 1918–1919, 1931–1932]; *DDK Hotels LLC*, 6 F 4th 308, 318–319 (2d Cir 2021) [ABFM5/17/1998–1999]; *Katz*, 290 F 3d 95, 96–97 (2d Cir 2022) [ABFM4/16/1705–1706]; *Zachariou*, 68 AD 3d 539, 539–540 (1st Dep 2009) [ABFM3/15/1412–1413].

⁴⁵ In particular, Mr McGuire accepted that the cases cited in fn 44 above are correct and up-to-date statements of the law: T121:30–143:4 [ABFM5/20/2249–2271].

59. **(Notice of contention—grounds 1(a) and 1(b))** Grounds 1(a) and 1(b) of the notice of contention appear to take issue with these principles. Both should be rejected.
60. By ground 1(a), the Producers contend that cl 18 of the Settlement Agreement “does not import New York law’s allocation of power as between courts and arbitrators”. This should be rejected for two reasons.
61. *First*, while the point is unclear, it appears to be a new point that OBL could have met by evidence and cross-examination before the primary judge.⁴⁶ This is the first time the Producers have characterised the rules as anything other than principles of contractual construction. OBL did not lead evidence addressing the issue or cross-examine Mr McGuire on it because Mr McGuire characterised the principles, consistently with Professor Gillette, as “discerning the parties’ contractual intent—ie, the text of their arbitration agreement—to understand whether the parties delegated the issue of arbitrability to the arbitrator”.⁴⁷ The Producers should not be permitted to make some new argument, contrary to their own evidence below, for the first time in this Court.
62. *Second*, if the Producers are permitted to make the new submission, it should be rejected. The Producers rely on *Mastrobuono v Shearson Lehman Hutton Inc*,⁴⁸ but that case is not on point. *Mastrobuono* concerned whether parties intended to confer on arbitrators the power to award punitive damages, notwithstanding that: (i) the parties chose New York law to govern their contract; and (ii) under New York law, only courts could award punitive damages. The US Supreme Court held that the parties did intend to confer that power on the arbitrators. But the Court expressly stated that it was not necessary to deal with issues concerning arbitral authority to decide scope disputes,⁴⁹ noting instead that those issues would be addressed in then-reserved *First Options of Chicago Inc v Kaplan*.⁵⁰ It was *First Options* that established that parties are presumed to agree that a court, not arbitrators, will decide scope disputes absent contrary clear and unmistakable evidence.
63. By ground 1(b), the Producers say the *First Options* presumption is not a negative covenant barring the arbitrators but a rule enforcing a delegation shown by clear and unmistakable evidence. This too is a new argument, contrary to the Producers’ own evidence below (see [61] above). Nothing turns on the label: on either view the result is

⁴⁶ *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

⁴⁷ McGuire [20] [ABFM5/18/2111]. Further, T102:15–104:12 [ABFM5/20/2230–2232], including Mr McGuire’s evidence that “this is contract interpretation, and we are guided by what the parties intended”.

⁴⁸ 514 US 52 (1995).

⁴⁹ 514 US 52, 55 fn 1 (1995).

⁵⁰ 514 US 938, 944 (1995) [ABFM4/16/1659].

the same—absent such evidence the court decides, and, for the reasons below, there is none here. *First Options* is clear that arbitration resolves “those disputes—but only those disputes—that the parties have agreed to submit”,⁵¹ so the question is whether the parties agreed to submit scope disputes to arbitration.

64. **(Application of principles)** Applying these principles, the correct construction of the arbitration agreement in cl 19 of the Settlement Agreement is that the parties agreed that a court, not arbitrators, would decide whether a dispute falls within the scope of the clause. There is no clear and unmistakable evidence of any other intent.
65. *First*, cl 19 contains no express words that arbitrators can decide their jurisdiction (or similar), nor is anything of that kind incorporated by reference.
66. *Second*, the express choice of the *Commercial Arbitration Act 1984* (Vic) to govern arbitrations, which did *not* provide for arbitrators to determine their jurisdiction, was, when the Settlement Agreement was made in 1994, an express choice to opt out of the Model Law (which *did* so provide).⁵² As mentioned, it is not in dispute that, as at the date of the primary judge’s decision, the Model Law did apply, by force of IAA ss 16(1) and 21(1). But the parties’ intention is determined as at the date of their agreement.⁵³ It follows that, far from there being an intention to adopt rules providing for arbitral determination of scope disputes, the express terms of the arbitration agreement are consistent with the presumption that the parties intended such disputes to be determined by a court.
67. *Third*, even if it were thought, *quod non*, that the parties’ choice of Victorian curial law amounts to a selection by the parties of rules empowering arbitrators to decide their jurisdiction, that does not amount to clear and unmistakable evidence also because there is an (at least) arguably applicable exception to the arbitration agreement.
68. The text of the agreement is set out at [9] above. The words “subject to clause 5(b)” in cl 19(b) are critical. Under New York law, those words must be given work.⁵⁴ Clause 5(b) expressly precludes modifications of, or which are inconsistent with, cl 6B(f). Clause 6B(f)(i) provides that “[t]he deduction for cost of capital of eligible post LVO assets to which commitment to investment was made on or after 1 July 1990 shall be calculated in accordance with the Special Referee’s methodology applying the applicable

⁵¹ 514 US 938, 943 (1995) [ABFM4/16/1658]. See also *Rent-A-Centre West Inc*, 561 US 63, 70 (2010) [ABFM4/16/1772].

⁵² Until 6 July 2010, parties could opt out of the Model Law by choosing a different arbitral law.

⁵³ Gillette [21] [ABFM3/15/1211].

⁵⁴ Gillette [14] [ABFM3/15/1208]; McGuire [11] [ABFM5/18/2108].

cost of capital rate provided in sub-clause (f)(ii)".

69. Clause 6B(f)(iii) then provides that the "time at which" a deduction is made "shall continue to be determined in accordance with the Special Referee's methodology". The Special Referee's methodology covers calculation of deductions for cost of capital. Thus, cl 6B(f)(i) requires the application of that methodology, including as to timing of deductions, applying the rates in cl 6B(f)(ii). Specifically, under that methodology: depreciation and cost-of-capital allowances are permitted only on committed and commissioned capital assets, from the date of their commissioning; depreciation is calculated on a 30-year straight-line basis, at the midpoint of each quarter; cost-of-capital rates are applied to depreciated asset values based on 30-year straight-line depreciation at the midpoint of each quarter; and there can be no carrying forward of costs that exceed the revenue in a quarter.⁵⁵ The combined effect of cll 3, 5(b), 6B(f) and 19 is to exclude from arbitration a request for modification of the SRMM that changes or is inconsistent with the foregoing calculation of the cost-of-capital allowance.

70. On the evidence before the primary judge, the Producers seek modifications to the SRMM which involve: capitalising estimated and uncertain future decommissioning costs to establish a notional "Asset Retirement Cost Asset" (**ARC Asset**) and applying cost-of-capital rates to the notional asset each quarter; changing 30-year straight-line depreciation to, instead, 200% declining balance depreciation or alternatively straight-line depreciation with an end date of 1 January 2033; and calculating and deducting depreciation on post-2003 capital assets and on the notional asset at that new rate.⁵⁶

71. These proposed modifications are either modifications of, or inconsistent with, cl 6B(f), because that clause establishes a methodology that does not permit an allowance for cost of capital on costs not actually incurred in the quarter or other than on 30-year straight-line depreciated costs. The modifications are also repugnant to the netback valuation method that the SRMM is intended to implement.

72. It is sufficient under New York law for this Court to conclude that there is an *arguably applicable* exception to the arbitration agreement to negative any inference (which is not accepted, as explained) from the adoption of Victorian curial law that arbitrators decide scope disputes. On the correct construction of the Settlement Agreement, the parties

⁵⁵ Special Referee's Final Report 94–95 [6.52]–[6.53], 98 [7.1]–[7.2], 99 [7.10] [ABFM2/7/846-847, 850-851]; Final Award [54] [ABFM3/8/951-952].

⁵⁶ Arbitration Points of Claim [63]–[69], [70]–[77] [ABFM3/13/1133-1138].

agreed that the court, not arbitrators, will decide scope disputes.

73. **(Notice of contention—ground 1(c))** By ground 1(c) of the notice of contention, the Producers contend that the parties’ entry into the Appointment Agreement demonstrates “clear and unmistakable” evidence that they intended the arbitrators to decide scope questions. That should be rejected for three reasons. *First*, as is clear from cl 1(a) and (c) of the Appointment Agreement, that agreement provided for the appointment of arbitrators to arbitrate certain disputes *under cl 19 of the Settlement Agreement*. Accordingly, it is cl 19 of the Settlement Agreement that determines what the parties did and did not submit to arbitration. *Second*, as is clear from Recital E and the qualifications in cl 1(c), 2 and 3, the appointment of the arbitrators was expressly subject to resolution of OBL’s jurisdictional objection, and the parties did *not* state that that objection was to be determined by the arbitrators. *Third*, in any event, adopting the IAA (and with it Art 16) is at most the incorporation of rules empowering the arbitrators to rule on jurisdiction, which, under New York law, does not amount to clear and unmistakable evidence where the arbitration clause is subject to an arguably applicable exclusion.⁵⁷
74. If the Court is not persuaded that it should determine whether the parties agreed that a court would decide scope disputes, the appropriate course is to allow the appeal, resolve the question of principle raised by Ground 3, and remit the matter. What should not occur is that the decisions below escape scrutiny because, proceeding on an erroneous principle, the courts below failed to make findings they ought to have made.

VII. ORDERS SOUGHT

74. OBL seeks the orders in the amended notice of appeal [CAB 150].

VIII. TIME REQUIRED FOR PRESENTATION OF ARGUMENT

75. OBL estimates that it requires 2.5 hours for the presentation of oral argument.

Dated: 30 July 2026



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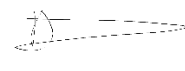
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⁵⁷ *DDK Hotels LLC*, 6 F 4th 308, 319 (2d Cir 2021) [ABFM5/17/1999]; *Zachariou*, 68 AD 3d 539 (1st Dep 2009) [ABFM3/15/1412].

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1.	<i>Arbitration (Foreign Awards and Agreements) Act 1974</i> (Cth)	As made	Section 7	Relevant to construction (this is the <i>International Arbitration Act 1974</i> (Cth) as enacted)	9 December 1974 to 14 May 1979
2.	<i>International Arbitration Act 1974</i> (Cth)	Current version	Sections 2D, 7, 17, 39; Sch 2, Arts 1, 2A, 16, 28, 34, 36	Act in force on date of primary judge's decision	18 February 2022 to present
3.	<i>International Arbitration Act 1974</i> (Cth)	Unnumbered compilation (7 December 2009 to 5 July 2010)	Section 21	Illustrative purposes	7 December 2009 to 5 July 2010

SCHEDULE OF PARTIES

WOODSIDE ENERGY (BASS STRAIT) PTY LTD (ACN 004 228 004)

Second Respondent

WOODSIDE ENERGY (NORTH WEST SHELF) PTY LTD (ACN 004 514 489)

Third Respondent

BHP GROUP LTD (ACN 004 028 077)

Fourth Respondent