



HIGH COURT OF AUSTRALIA

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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 REPLY

I. CERTIFICATION

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

II. REPLY

Overview

2. The Producers' submissions obfuscate by (i) ignoring some issues, and otherwise confusing the issues under each ground, (ii) ignoring relevant conflicts principles and (iii) eliding the proper law of the arbitration agreement with the curial law of the arbitration.
3. Contrary to RS [2], the appeal does not reduce to a single contention based on New York law. OBL has always contended, separately, that the Court should have construed the arbitration agreement and, had it done so, it would have been satisfied that the conditions in s 7(2)(b) and (5) for the grant of a stay were not met.
4. As to the New York law related arguments, the Producers contend, contrary to their own evidence before Croft J, that the principles of New York law in AS [57]–[58] are matters of “New York curial law” rather than contractual interpretation principles. For the reasons in AS [56]–[63] and [18] below, that is wrong. The Producers offer no opposition to ground 2 (cf RS [44]), save to contend, untenably, that the IAA abrogates Australian conflicts principles for arbitration agreements: cf RS [40]–[41].

Ground 1

5. RS [17] accepts that s 7(2)(b) requires the court to construe the agreement “to the point of being satisfied that the differences forming the matter that the proceedings involve are, or are not, its subject”. They do not identify any principled basis on which this is different from any other decision of a court when construing an agreement, and it is not. The question is whether Croft J did so. He did not. Nor did the Court of Appeal.
6. Contrary to RS [14] and [15], Croft J eschewed any attempt to examine the rival construction arguments or to embark on construction of the arbitration agreement: J [63]. He said that construction “was a matter within the jurisdiction of the arbitrators and not the court” and that “nothing in [his] reasons [was] to be taken as expressing *any* view ... as to the scope or proper construction of the arbitration agreement”: J [68]. The Court of Appeal endorsed this approach: CA [56], [59]. Identifying “the *potential* need to construe the arbitration agreement” (CA [56]) is not construction: cf RS [16]. Nor does the formulation of “a general view” without in any way examining or assessing the rival construction arguments satisfy the requirements of s 7.

7. OBL has not contended, and does not contend, that the court must always “finally” and “conclusively” construe the scope of the arbitration agreement before it can grant a stay: cf RS [14]. What gloss these words add is unclear. Below, OBL relied on cases where courts undertook a careful and detailed construction, including cases which (as here) concerned contractual limitations or exclusions affecting the scope of the arbitration agreement, or foreign governing law: see AS [19] fn 3, [21] fn 5, [37] fn 19.
8. As the Producers acknowledge at RS [23], OBL’s case is that the definition of “dispute” in the arbitration agreement is explicitly confined by cl 5(b); and that contrary to cl 5 the modifications claimed by the Producers are fundamentally inconsistent with the netback valuation method determined in the first arbitration.¹ There is no substance to the Producers’ rival construction at RS [24] that cl 5(b) only conditions the arbitrators’ ability to grant relief and does not limit what can be arbitrated. That is not what cll 5 and 19 say.
9. *Contra* RS [21], requiring the court to construe the agreement does not “usurp the role of arbitrators”: the argument is circular, as it begs the question whether the legal effect of Art 16 is that the parties have agreed that arbitrators must be the first to rule on any jurisdictional issue. Nor does it undermine the “practical and effective operation” of s 7(2). It gives its terms effect. How s 7(2) is intended to operate must be determined through ordinary processes of construction and the foundational principle of party consent, not *a priori* assumptions about the desirable role of courts in supervising arbitration. This is not making s 7(2) “dependent on ... consent”: cf RS [26], CA [71].
10. The Producers’ appeal to the complexity of the instant agreement (cf RS [24]–[25]) is misconceived. So too the suggestion that OBL’s approach requires decision on the merits. The construction arguments are narrow; they raise questions of law that do not depend on any disputed facts. OBL’s case based on New York law was the subject of expert evidence, but after cross-examination the New York law principles of interpretation of arbitration agreements were agreed. Under both parts of OBL’s case, it was necessary to consider the proper construction of the arbitration agreement for the purpose of deciding whether there was an exclusion, or under New York law an arguably applicable exclusion, from the arbitration agreement: AS [58], [67]–[72]. Croft J made no attempt to do so.
11. The Producers’ call for uniformity in the approach to stay applications (cf RS [18.3], [34]) is misplaced. The UNCITRAL Digest evidences a diversity of views as to whether a court hearing a stay application should review an arbitration agreement “fully or merely on a

¹ See AS [69] fn 55; Second Interim Award [460] [ABFM1/401]; Fourth Interim Award [108] [ABFM2/726].

prima facie standard”.² There is no uniform international practice. This Court must decide the proper construction of s 7(2) having regard to its text, context and purpose.

Ground 2

12. Despite urging the Court of Appeal to find that the arbitration agreement is governed by Victorian law, the Producers offer no support for that erroneous conclusion now: RS [39], [44]. There is no contest that, in line with *Enka*, cl 18 chooses New York law for the arbitration agreement. Indeed, RS [39]–[44] ignore the arbitration agreement altogether.
13. The Producers instead say the issue does not arise because the New York law principles are “New York curial law”. That is both a misnomer and a misconception, because no
 10 “curial law” exists other than for a given arbitration. More fundamentally, the Producers’ own evidence was that the New York law principles were substantive principles of contract interpretation: see AS [56]–[63] and [19] below. Those principles apply under Australian conflicts rules.³ Those principles are not displaced by the IAA or Model Law, *contra* the untethered assertions in RS [39] and [41].

Ground 3

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

14. The Producers’ submissions on issue 1 *assume* that Art 16 prevents parties agreeing that the court will rule on scope disputes: RS [45]. Having made that assumption, they submit that parties “cannot remove” the force of Art 16. But it is the assumption that is in issue.
 20 OBL does not submit that parties can remove the force of Art 16; its submission is that, not least in light of Arts 7(1) and 28, Art 16 does not force parties to arbitrate scope disputes if they have agreed such disputes are to be decided by a court: AS [51].
15. *Contra* RS [46] and [49], the absence of reference to contrary agreement in Art 16 is not determinative: AS [48]. Every provision of the Model Law which carries such language is a default rule for the conduct of the arbitration.⁴ Article 16 is not a default rule of that kind. What fixes the boundary of arbitral disputes is Art 7(1), under which an arbitration

² United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) at 44 [29]. While it is ultimately a matter for this Court, it is notable that the Digest identifies Australia as a “full review” jurisdiction: at 44 [30].

³ See, eg, *Goldsbrough Mort & Co Ltd v Hall* [1948] VLR 145 at 151; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 225, 259–261. As federal jurisdiction is being exercised, common law conflicts principles apply under s 80 of the *Judiciary Act 1903* (Cth): *Blunden v Commonwealth* (2003) 218 CLR 330 at [18]. See AS [37] fn 19.

⁴ “Unless otherwise agreed by the parties” or “the parties are free to agree”: Arts 3, 10, 11, 13, 17, 17B, 20, 21, 22, 23, 25, 26, 29 and 33. Neither example given in RS [46] is such a provision: Art 9 contains no such language, and Art 28(1) gives effect to a party choice rather than permitting departure from the Law.

agreement is an agreement to submit “all *or certain* disputes” to arbitration. And the closing words of s 7(2)(b) confirm that a court applying it can properly hold that certain matters are outside the scope of the arbitration agreement.

16. The Producers accept that parties may make arbitration subject to a condition precedent: RS [50]. In substance, an agreement to submit scope disputes to a court makes arbitration conditional on prior court determination that the dispute is within the arbitration agreement. This is not “anathema to the objects of the IAA”: cf RS [52]. There are various reasons why parties might agree to submit scope disputes to a court, including procedural efficiency⁵ and the avoidance of multiple hearings. RS [50.2] accepts that the exclusion of issues from the scope of an arbitration agreement is commonplace. That answers RS [51]: Art 16 operates upon the agreement whose boundary the parties have fixed.
17. RS [53] and [55] beg the question by assuming that Art 16 requires arbitrators to be the first to rule on jurisdiction. But it does not say that and contains nothing to prevent a jurisdictional question arising for decision on a stay application, as they commonly have.
18. Lastly, as to the ambiguity of the *travaux*, at no point did the Working Group state that parties were precluded from agreeing that a court would decide scope disputes: cf RS [54]–[55]. As noted in AS [54], recent commentary, ignored by the Producers, supports OBL’s position, as do context and the fundamental principle of consent.

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

19. The Producers’ main answer on issue 2 is to repeat the misconception that the principles in AS [57]–[58] are matters of “New York curial law” rather than contractual interpretation. In any case, as AS [61] states, the Producers’ own expert gave evidence before Croft J that the relevant principles are a matter of “contract interpretation” and “discerning the parties’ contractual intent”.⁶ It is unsurprising that the issue whether parties agreed to arbitrate scope disputes arises in the context of stay, review or enforcement applications, but that does not mean that the interpretative principles are inapplicable under Australian conflicts rules: cf RS [57]–[62] and see [13] above.
20. On notice of contention ground 1(a), the Producers acknowledge they make a new point: RS [66]. The issue is not merely that the experts did not address it; except for *Sacharow* and *Shaw*, the cases in RS [66] fn 59 were not in evidence before Croft J. Foreign law

⁵ Barceló III, “The Competence-Competence Principle’s Negative Effect” in Kröll, Bjorklund and Ferrari, *Cambridge Compendium of International Commercial Investment Arbitration* (2023) 807 at 809.

⁶ McGuire [20] [ABFM5/18/2111]; T102:15–104:12 [ABFM5/20/2230-2232].

cannot be proved simply by citing a case and including it in a bundle of authorities, not least for the first time on appeal. This is a matter of basic fairness. Without the discipline of ordinary evidentiary practices, a party cannot reasonably be expected to respond for the first time in reply submissions in this Court to allegedly relevant foreign cases, which could have been raised before the primary judge.⁷ OBL otherwise relies on AS [62]–[63].

21. On ground 1(b) of the notice of contention, OBL relies on AS [63].

22. On ground 1(c) of the notice of contention and on the application of New York law, the Producers' response hangs on OBL's letter of 22 April 2024 and the Appointment Agreement: RS [75]–[78]. The letter of 22 April 2024 is irrelevant: cf RS [11], [57], [75].
 10 *First*, the letter merely acknowledges the existence of Art 16. *Second*, it has been clear since before the hearing before Croft J that OBL's position is that the parties agreed that a court and not arbitrators would decide scope disputes, and that question turns on construction of the arbitration agreement. *Third*, the Producers expressly eschewed reliance on the letter as having any relevance to whether the parties had agreed that a court rather than arbitrators would decide scope questions.⁸ Nor does the Appointment Agreement give up OBL's objection: see AS [73].

III. APPLICATION FOR SPECIAL LEAVE TO CROSS-APPEAL

22. The application for special leave to cross-appeal invites adoption of *A v B* to create a special costs rule for s 7(2) applications: RS [79]–[82]. This should be rejected for the
 20 reasons in *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*⁹ and CA [119]. The submission that OBL persisted in a hopeless case is untenable, having regard to the novel questions on the appeal: cf RS [83]–[85]. The application should be dismissed with costs.

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⁷ See *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at [1], [17].

⁸ Hearing before Croft J on 29 November 2024 at T248:3-4 (Mr Walker: "I'm not using it as an admission of what might be a complex question of law").

⁹ (2011) 38 VR 303 at [335]–[336].