



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

INTERVENER’S SUBMISSIONS

**SUBMISSIONS OF THE AUSTRALIAN CENTRE FOR INTERNATIONAL
COMMERCIAL ARBITRATION (‘ACICA’)**

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Australian Centre for International Commercial Arbitration (**ACICA**) seeks leave to be heard as *amicus curiae*. In doing so, ACICA does not take any position on the ultimate resolution of the particular dispute, but confines its submissions to certain important matters of principle raised by the appeal that will transcend the immediate resolution of the parties' dispute and likely attract international attention.

PART III: WHY LEAVE SHOULD BE GRANTED

3. *First*, past practice and the importance of the questions of arbitral principle raised by the appeal justify a grant of leave to intervene. ACICA has been granted leave to appear by this Court on several occasions where important questions of arbitral principle were raised by the appeal.¹ The questions of principle raised by this appeal are at least as important as those raised in past cases where ACICA has been granted leave to intervene.
4. The practical and doctrinal significance of the issues raised in this appeal are fundamental to the effective operation of the integrated statutory framework for domestic and international arbitrations in Australia. The proper approach to a stay application under s 7(2)(b) of the *International Arbitration Act 1974* (Cth) (**IAA**) is central to the operation of the integrated statutory framework.² It is a matter of recurring practical application. It engages core principles of international arbitral law. The principles for determining the proper law of the arbitration agreement are no less significant. There are often significant practical consequences flowing from the law governing the arbitration agreement.
5. *Second*, ACICA's proposed submissions are different from the submissions made by the parties. In this respect ACICA's submissions are focused on presenting the Court with a "*larger view of the matter*"³ and to assist the Court "*to reach a correct determination*".⁴ This is particularly important as to Ground 2—the principles for determining the law governing the arbitration agreement—because the Court is being invited by the appellant to adopt as the common law of Australia the position of the Supreme Court of the United Kingdom in *Enka*⁵ in circumstances where this critical issue of principle was not dealt with below and is

¹ *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court* (2013) 251 CLR 533; *Rinehart v Hancock Prospecting* (2019) 267 CLR 514; *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 282 CLR 512.

² Its significance extends to cognate provisions in the Commercial Arbitration Acts of the States and Territories within the integrated statutory framework.

³ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312.

⁴ *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37 at [6].

⁵ *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] 1 WLR 4117; [2021] 2 All ER 1.

not addressed substantively by the respondents. It is respectfully submitted that the exposition and development of the common law, or the proper interpretation of the IAA, depends upon a proper adversarial contest,⁶ especially when the question is whether a decision of the Supreme Court of the United Kingdom should be followed. ACICA's submissions on Ground 2 are akin to those of a contradictor and thereby fill that void.

PART IV: SUBMISSIONS

A. Grounds 1 and 3 (issue (i)) – Competence-competence

6. The doctrine of competence-competence (or *kompetenz-kompetenz*) refers to the authority or “competence” of a tribunal to determine its own jurisdiction.⁷ It is a rule of chronological priority which allows the tribunal to determine its jurisdiction prior to any court.⁸ It is given effect in Art 16(1) of the UNCITRAL **Model Law** on International Commercial Arbitration, which has force of law in Australia by s 16 of the IAA. The doctrine is widely adopted in arbitral rules (including the 2021 ACICA Arbitration Rules)⁹ and is applied as a fundamental principle¹⁰ in the practice of international courts and tribunals.¹¹
7. Ground 1 concerns the extent to which a court should make its own assessment of the tribunal's jurisdiction under s 7(2) of the IAA in light of the competence-competence principle.¹² Ground 3 issue (i) concerns whether the parties can contract out of a tribunal's competence-competence jurisdiction.¹³

Ground 1—The applicable test under s 7(2) of the IAA

8. The Courts below (J[56]-[68]; COA [56]) construed s 7(2) IAA as requiring only a “light touch” examination of whether a matter was within the scope of an arbitration agreement in light of the competence-competence principle. ACICA's position is that this Court should adopt the “prima facie” test adopted in Singapore and other leading Model Law jurisdictions

⁶ *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at [19].

⁷ *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* (2024) 283 CLR 172 at [31]-[32].

⁸ Gaillard & Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), 401 [660].

⁹ ACICA Arbitration Rules (2021) r 32(1); UNCITRAL Arbitration Rules (2021) art 23(1); ICC Arbitration Rules (2026) art 7(4); London Court of International Arbitration Rules (2020) art 23.1.

¹⁰ Gaillard & Savage, above n 8, 395 [650]; Born, *International Commercial Arbitration* (3rd ed, Kluwer Law International, 2021) 1139; van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XXIVa (Kluwer Law International, 1999), 84.

¹¹ *Nottebohm (Liechtenstein v Guatemala) (Preliminary Objections)* [1953] ICJ Rep 111, 119-120; *Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53, 69; *Pac Rim Cayman LLC v El Salvador* (ICSID Case No ARB/09/12, Award of 14 October 2016), [5.33].

¹² This is the “negative” aspect of the competence-competence doctrine: Gaillard & Savage, above n 8, 401 [660]; Barceló, “The Competence-Competence Principle's Negative Effect” in Kröll et al, *Cambridge Compendium of International Commercial and Investment Arbitration* (CUP, 2023) 807.

¹³ This is the “positive” aspect of the doctrine: Gaillard & Savage, above n 8, 401 [660]; Kröll & Keller, “The Competence-Competence Principle's Positive Effect” in Kröll et al, above n 12, 771.

as the relevant threshold under s 7(2) of the IAA when addressing the existence and scope of the arbitration agreement.¹⁴

9. Section 7(2) is to be construed in line with ordinary statutory principles. The construction must take into account Australia's statutory arbitration framework and its objects.¹⁵ The Court can have regard to the *travaux préparatoires* and the Court ought to construe the Model Law so far as possible to create international harmony,¹⁶ with emphasis on a harmonised approach to the Model Law among the common law countries in the region.¹⁷
10. Section 7(2) is in Part II of the IAA, which was enacted in 1974, and implements Australia's obligations under the 1958 New York **Convention** on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁸ Section 7(2) specifically gives effect to Australia's obligations under Art II(3) of the Convention.¹⁹ Although Art II(3) requires courts to refer the parties to arbitration if the matter is subject to an arbitration agreement (unless it finds the agreement is null and void, inoperative or incapable of being performed), neither that provision, nor the *travaux préparatoires*, address the competence-competence principle or the level of satisfaction that is required for a court to form those views. A widely held view is that Art II(3) is silent or equivocal as to that question,²⁰ while some argue that Art II(3) should take into account the competence-competence principle.²¹
11. Notwithstanding that the Model Law was enacted subsequently to s 7(2), it is relevant to construction under ordinary principles of statutory interpretation as to subsequent legislative amendments²² and under s 39 of the IAA. The Model Law establishes a framework whereby the arbitral tribunal *first* determines its jurisdiction under Art 16(1), subject to later review of that question by the supervisory courts: Arts 16(3), 34(2)(a)(iii) and 36(1)(a)(iii). One of the most contentious issues in the debates on Art 16 was whether a court could or should

¹⁴ The language of "light touch" is best avoided but ACICA agrees with the respondents (RS [21]) as to how the use of the phrase should be understood.

¹⁵ IAA s 2D; see also IAA s 39(1); *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH* (2024) 281 CLR 171 at [18].

¹⁶ Ibid; IAA s 17; Model Law Art 2A; *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at 381-382 [75].

¹⁷ Ibid at 383-384 [75].

¹⁸ Opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959); see *CCDM Holdings LLC v The Republic of India* (2026) 100 ALJR 530 at [1].

¹⁹ It was introduced in the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth), since renamed the IAA. See also Explanatory Memorandum, *Arbitration (Foreign Awards and Agreements) Bill 1974*, 5.

²⁰ Gaillard & Savage, above n 8, 397 [654]; see authorities at *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] SLR 373 at [42]-[43].

²¹ Gaillard & Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in Gaillard & Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008), 257.

²² *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463, 479; see also *Acts Interpretation Act 1901* (Cth) s 11B.

determine the tribunal's jurisdiction during the arbitral proceedings.²³ The UNCITRAL Working Group rejected two proposals for Art 16 which empowered supervisory courts to concurrently rule on the tribunal's jurisdiction.²⁴ However, it retained Art 8, which reflected Art II(3) of the Convention, and permitted the court and tribunal to determine concurrently whether an arbitration agreement was null and void, inoperative or incapable of being performed.²⁵ The Working Group otherwise precluded supervisory courts from intervening, save as expressly provided for under Article 5 of the Model Law.

12. Having regard to the adoption of competence-competence by the IAA s 7(2) ought to be read as requiring the court to be satisfied on a *prima facie* basis that (i) there is an arbitration agreement; and (ii) the dispute involves the determination of a matter within the scope of the arbitration agreement.²⁶ Subject to s 7(5) of the IAA (addressed below), and provided the matter cannot be disposed of summarily (e.g., a pure question of law including as to subject-matter arbitrability), any further questions as to scope ought to be left to the tribunal to resolve *in the first instance*. As a general principle, permitting parties to litigate the scope of jurisdiction of the arbitral tribunal in the courts, especially where detailed factual evidence and findings of fact are involved, prior to the tribunal first determining that question, would fundamentally undermine the Model Law framework as to the sequence of the allocation and exercise of power and jurisdiction between the courts and the arbitral tribunal (including by rendering the Art 16(3) process, which involves a later *de novo* review,²⁷ nugatory).
13. That construction is consistent with the statutory text. The use of the word “may” in Art 16(1) is not to the contrary. It is language *empowering* the tribunal to rule on its jurisdiction (and otherwise accommodates that the supervisory court may also rule on jurisdiction under Art 16(3)). The drafters interpreted Art 16(1) as embracing competence-competence. It is to be construed harmoniously with the imperative “shall” language of s 7(2) of the IAA mandating a stay and the consequential referral of any serious debate about as to the existence and scope of the arbitration agreement to the arbitral tribunal in the first instance.

²³ Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) at 484-487.

²⁴ Holtzmann & Neuhaus, above n 23, 485.

²⁵ Holtzmann & Neuhaus, above n 23, 303; Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International, 1990) at 42-50.

²⁶ The meaning of “matter” in s 7(2) was addressed in a recent important decision of Bell CJ (*Clough Projects Australia Pty Ltd v Elecnor Australia Pty Ltd* [2026] NSWCA 111 at [52]-[55], [61]; see also for an important international overview, *Mozambique v Prinivest Shipbuilding SAL* [2023] 2 Lloyd's Rep 564 at [57]-[68]; *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp* [2023] 2 Lloyd's Rep 529 at [71]-[80].

²⁷ *Lin Tiger Plastering Pty Ltd v Platinum Construction* (2018) 57 VR 576 at [24]-[40]; *Z v A* [2015] HKCFI 228 at [21]; *Insignia Technology Ltd v Alstom Technology Ltd* [2009] SLR 23 at [21] aff'd [2009] 3 SLR(R) 936.

14. Importantly, the *prima facie* standard was endorsed by Singapore’s apex court, the Court of Appeal, in **Tomolugen Holdings Limited v Silca Investors Ltd** [2016] 1 SLR 373. That standard of review (at [63]-[70]) was regarded as consistent with the intention to adopt competence-competence. Menon CJ, giving the judgment of the Court, concluded that a full merits approach could significantly hollow the principle of its practical effect and “*has the potential to reduce an arbitral tribunal’s kompetenz-kompetenz to a contingency dependent on the strategic choices of the claimant.*” The Court did not construe the word “satisfied” in the Singaporean statute as requiring a full merits review. Hong Kong adopts a similar approach.²⁸ Canada adopts the position (subject to few exceptions) that competence-competence requires the tribunal first to determine its jurisdiction.²⁹ On the other hand, the so-called “*full merits*” approach has been adopted in England & Wales,³⁰ which is not a Model Law jurisdiction. That approach has been strongly criticised³¹ and was rejected in *Tomolugen* (see [65]-[69]).
15. In **Hancock Prospecting Pty Ltd v Rinehart** (2017) 257 FCR 442, the Full Court recognised the importance of competence-competence and the attraction of the “*prima facie*” approach; finding that it was consonant with the Model Law (at [145]). However, it concluded (at [146]-[149]) that it was required to “*form a view*” as to the meaning of the arbitration agreement “*at least to the point of being satisfied that the disputes forming the matter are the subject of the agreement.*” The Full Court recognised that not every legal question about the rights and obligations of parties needs to be, or should be, decided by the Court, otherwise the practical operation of the Model Law would be undermined.
16. Whilst it is not suggested that the approach in *Hancock* is wrong in principle, ACICA submits that greater clarity in the law would be achieved by bringing Australia into line with the position adopted by all leading Model Law jurisdictions (Singapore, Hong Kong and Canada). It would also align Australian law more satisfactorily with the competence-competence principle. Given the *prima facie* standard is well understood and regularly applied in this jurisdiction, and is consistent with the objects of the IAA, the *Tomolugen*

²⁸ *PCCW Global Ltd v Interactive Communications Service Ltd* [2006] HKCA 434 at [60]; *Li Wenjun v Chen Chunhui & Anor* [2023] HKCFI 405 at [17]; *Soremi Investments Ltd v China National Gold Group Hong Kong Limited & Anor* [2025] HKCFI 4514 at [27]-[28].

²⁹ *Union des consommateurs v Dell Computer Corp* [2007] 2 SCR 801 at [84]-[86]; *Uber Technologies Inc v Heller* [2020] SCC 16 at [38]; *Peace River Hydro Partners v. Petrowest Corp* [2022] SCC 41 at [39]-[42].

³⁰ See *Joint Stock Company “Aeroflot Russian Airlines” v Berezovsky* [2013] 2 Lloyd’s Rep 242 at [73]-[79] affirmed in *Soleymani v Competition and Markets Authority* [2023] 1 WLR 436 at [115]-[117].

³¹ See Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2010, 2nd ed), 347; Lord Hoffman et al, “An important realignment and an opportunity missed? The law applicable to the arbitration agreement, jurisdictional re-hearings, stays to court proceedings, and the Arbitration Act 2025” (2025) 41(3) *Arbitration International* 465 at 478-481.

approach should be adopted as the general test under s 7(2) of the IAA.

17. However, the third limb of the *Tomolugen* approach (at [63](c)), which involves the party seeking a stay establishing that there is a *prima facie* case that the arbitration agreement “is not null and void, inoperative or incapable of being performed”, should not be adopted. The party seeking a stay should not be required to establish a negative. Rather, as this Court recently held in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH* (2024) 281 CLR 171 under the proviso in s 7(5) of the IAA, it is the party alleging that the arbitration agreement is “null and void, inoperative or incapable of being performed” that bears the onus of proving so much to the usual civil standard of proof on the balance of probabilities.³² The *Carmichael Rail* approach to s 7(5) is consistent with the *travaux préparatoires* and the structure of Art 8 of the Model Law³³ and departure from *Tomolugen* is otherwise justifiable due to textual differences in the Australian and Singaporean statutes.³⁴
18. The approach in *Carmichael Rail* does not govern the threshold question under s 7(2) as it does not require the Court to “find” that the matters in dispute are within the scope of the arbitration agreement (cf *Carmichael Rail* at [24]-[26]). Nor does s 7(5) give rise to an implication 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 (cf AS [23]). The pro-arbitration internal logic of s 7 is clear.³⁵ Within the constraints of what should typically be a relatively confined interlocutory hearing, and having regard to competence-competence,³⁶ it sets a low bar (sub-section 2) for the applicant seeking a stay and referring the matter to arbitration and a higher bar (sub-section 5) for the party resisting the stay on the basis of the arbitration agreement is null and void, inoperative or incapable of being performed. This Court noted in *Carmichael Rail*, by reference to Canadian authority (at [26]),³⁷ that a lesser standard under s 7(5) would reverse the Convention’s goal to ensure arbitration agreements are enforced. Consistently with competence-competence, whether the court should conduct any proviso hearing under s 7(5), or refer the issues to arbitration for determination first by the arbitral tribunal, will in turn depend on nature of the attack and all the relevant circumstances (*Hancock* at [377]).

³² *Carmichael Rail* (2024) 281 CLR 171 at [26].

³³ Holtzmann & Neuhaus, above n 23, 303; Broches, above n 25, 42-50.

³⁴ Section 6(2) of the *International Arbitration Act 1994* (Singapore) requires the Court only to be “satisfied”; whereas s 7(5) of the IAA requires the Court to make a “finding” to that effect.

³⁵ See *Carmichael Rail* (2024) 281 CLR 171 at [18], noting the importance of the mandatory “shall” in promoting international trade and commerce and the objects and purposes of the IAA: as reflected in IAA ss 2D and 39.

³⁶ Which has relevance in the context of s 7(5): *Hancock* (2017) 257 FCR 442 at [367]-[380]; *Fiona Trust and Holdings Corp v Privalov* [2007] 2 Lloyd’s Rep 267 at [34].

³⁷ Citing *GreCon Dimter Inc v JR Normand Inc* [2005] 2 SCR 401 at 424 [43].

Ground 3 (issue (i)) – can the parties contract out of competence-competence

19. Ground 3 (issue (i)) raises the related question of whether Art 16(1) of the Model Law is a mandatory provision or whether the parties can contract out of competence-competence. ACICA’s submission is that it is a mandatory provision.
20. When the Model Law was enacted in Australia, the parties could opt out of the application of the Model Law.³⁸ However, the IAA was amended in 2010 to remove the capacity of parties to opt out of the Model Law as a whole.³⁹ While parties have autonomy to determine the procedure of the arbitration under Art 19(1) of the Model Law,⁴⁰ there are limits on party autonomy,⁴¹ such that the parties may only opt out of *some* provisions of the Model Law.⁴²
21. The question of whether a provision is mandatory is one of construction in light of the history, purpose and context of the Model Law. The UNCITRAL Working Group decided against specifically listing all mandatory articles in the Model Law, instead indicating in some articles that parties could “otherwise agree”, with the caveat that this designation was not necessarily exhaustive.⁴³ An intermediate court has approached the question on the basis that any provision that did not permit the parties to “otherwise agree” was mandatory.⁴⁴
22. In *TCL*, French CJ and Gageler J accepted that Art 18 (requiring that parties be treated with equality and given a full opportunity to be heard),⁴⁵ Art 31 (formal requirements for the validity of an award) and Art 33(2) (the slip rule) of the Model Law were mandatory.⁴⁶ Their Honours identified Arts 10(2), 11(3), 13(2), 17, 17B, 19(2), 20(1), 21, 22(1), 23, 24(1), 25, 26, 28(2) and 29 of the Model Law as non-mandatory.
23. ACICA has not identified any authorities which address the question of whether Art 16(1) is a mandatory provision. It submits that it is mandatory for four reasons. *First*, the text of

³⁸ *International Arbitration Amendment Act 1989* (Cth) s 7 (“Settlement of dispute otherwise than in accordance with Model Law”); see eg *Cargill International SA v Peabody Australia Mining Ltd* (2010) 78 NSWLR 533 at 546-566 [33]-[111].

³⁹ *International Arbitration Amendment Act 2010* (Cth) sch 1 s 16. The explanatory memorandum provided that “The Bill repeals section 21, removing the ability of parties to an arbitration agreement to nominate an alternative arbitral law”: Explanatory Memorandum, International Arbitration Amendment Bill 2009, p 2.

⁴⁰ *Tesseract* (2024) 282 CLR 512 at [157]-[162].

⁴¹ *Cargill* (2010) 78 NSWLR 533 at 557 [75]-[76].

⁴² *TCL* (2013) 251 CLR 533 at 547 [11]; Barraclough and Waincymmer, ‘Mandatory Rules of Law in International Commercial Arbitration’ (2005) 6 *Melbourne Journal of International Law* 205, 224-225.

⁴³ Broches, above n 25, p 97; Cuniberti, *The UNCITRAL Model Law on International Commercial Arbitration* (Elgar, 2022), 56-57; eg Model Law Arts 10(1), 11(1), (2); 13(1), 17(1), 17B(1), 20-26, 28(2) and 29.

⁴⁴ *Wagners Nouvelle Calédonie Sarl v Vale Inco Nouvelle Calédonie SAS* [2010] QCA 219 at [39]; see also *Cargill* (2010) 78 NSWLR 533 at 546-566 [63].

⁴⁵ Art 18 is modified by s 18C of the IAA which designates that a party will be given a full opportunity to be heard if the party is given a reasonable opportunity to present its case.

⁴⁶ *TCL* (2013) 251 CLR 533 at 547 [11].

Art 16(1) does not permit the parties to opt out of it;⁴⁷ *second*, Art 16 of the Model Law implements the competence-competence principle, which is of fundamental importance in international arbitration; *third*, the *travaux préparatoires* do not suggest that the parties could opt out of the provision; and *fourth*, considerations of party autonomy do not supersede the textual and structural features identified above (cf AS[48]). Provisions (including Art 16) dealing with the relationship between the arbitral tribunal and courts, and allocation of power and jurisdiction between them, are critical design elements of the Model Law. It may be contrasted with matters directed to the procedure of the arbitration which are not mandatory.

B. Ground 2—The Proper Law of the Arbitration Agreement

24. Ground 2 concerns the identity of the law governing the arbitration agreement. The governing law of an arbitration agreement is of fundamental importance as it governs both the validity and the scope of the parties' agreement to arbitrate. Neither this Court, nor any Australian intermediate appellate court, has considered and properly addressed this important question. The question is important at various stages of the arbitral process, including a stay application under s 7 of the IAA or anti-suit injunctive relief in respect of proceedings commenced in a foreign court.
25. An arbitration clause has a different subject matter and purpose from the rest of the contract in which it is usually contained or incorporated by reference. It is not concerned with establishing the substantive rights and obligations of the parties, but rather it provides a mechanism by which a dispute about such rights and obligations will be resolved. The arbitration agreement is also governed by another cardinal principle of arbitration law, codified in the IAA (by Model Law Art 16(1)), the principle of separability (i.e., it is a distinct and separate agreement from the main agreement for the purposes of validity).⁴⁸ It is rare for the law governing an arbitration agreement to be separately specified, either in the arbitration clause or in the main agreement.
26. The correct approach for determining the law governing an arbitration agreement was not considered at first instance or by the Court of Appeal. The appellant contends that: (i) the identity of the law governing an arbitration agreement is determined by applying the choice of law rules of the forum, being Australian common law conflicts principles regarding the proper law of contracts: AS[36]; and (ii) the Court should confirm that the Australian approach to determining the law governing an arbitration agreement is the same as that reflected in *Enka*: AS[38]. The effect of *Enka* is that, where a contract containing an

⁴⁷ Compare s 30 of the *Arbitration Act 1996* (UK), which expressly permits the parties to “otherwise agree”.

⁴⁸ See *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [219]-[224]; *Hancock* (2017) 257 FCR 442 at [341]-[360].

arbitration agreement provides that the contract is governed by the law of a particular jurisdiction (here, New York) but the parties have chosen that the arbitration is to be seated in a different jurisdiction (here, Victoria), in general, they will be taken to have impliedly chosen the law of the first jurisdiction as the law governing their arbitration agreement.

27. The parties' respective positions, with respect, leave the issue of principle unripe for definitive determination by this Court. In the case of the appellant, the suggestion that there is a long-standing position under Australian law adopting the same position as in *Enka* does not withstand scrutiny and no submissions are otherwise made as to why this Court should follow and adopt *Enka*: AS[37]-[38]. In the case of the respondents, their submissions eschew engaging with *Enka* at all and submit that the issue does not arise: RS[44]. The respondents appear to contend that the Court need not address the appellant's submissions because the issue raised by Ground 3 is resolved by reference to the law of the seat (also referred to as the *lex arbitri* or the curial law), rather than the law governing the arbitration agreement: RS[40], [44]. Their submissions (at [39]-[43]) are difficult to follow insofar as it is submitted that the common law choice of law principles have been displaced by the IAA in a similar express fashion to the new s 6A of the *Arbitration Act 1996* (Eng, W & NI) (**UK 1996 Act**). The respondents' submissions appear to conflate the law of the seat with the separate question of the proper law of the arbitration agreement. Nor is Art 28 of the Model Law directly relevant to the question of the proper law of the arbitration agreement; it is directed to the law governing the "*substance of the dispute*".⁴⁹
28. If and insofar as it is necessary for the Court to expound the principles governing the determination of the governing law of the arbitration agreement and whether to follow *Enka*,⁵⁰ ACICA respectfully submits that the Court should not follow the approach in *Enka*. *First*, *Enka* has now been reversed by statute in England, Wales and Northern Ireland on cogent grounds of principle and policy. *Second*, *Enka* has not been the subject of detailed consideration in any prior Australian judgment. *Third*, it would not be correct as a matter of principle to adopt the *Enka* approach in Australia in its different statutory context. ACICA does not say *Enka* was plainly wrong or that it is not a decision to be afforded the highest

⁴⁹ To frame the issue properly, it also should be observed that the appellant's submission (at [41]) is correct that the Court of Appeal erred in its characterisation of clause 18 of the Settlement Agreement. This does not necessarily mean that New York law is also the proper law of the arbitration agreement where the parties have chosen Australia as the seat and not specified a governing law in the arbitration agreement.

⁵⁰ Ground 2 would not arise if the Court were first to address Ground 3 and were to find that the parties to an arbitration agreement subject to the Model Law under the IAA cannot agree that a court, rather than the tribunal, will decide disputes as to the scope of the arbitration agreement: see AS[43]. Alternatively, if the Court were to address Ground 2 first and were to find that the law governing the arbitration agreement is not New York law (but, rather, is Victorian law), Ground 3 would not arise: see AS[3].

respect. There is evident force in its reasoning. Rather, ACICA's position is that various considerations justify this Court adopting a different rule in the Australian context.

29. The preferred approach is that an arbitration agreement is governed by the law of the place designated as the seat, unless there is an *express* choice of a different governing law for the arbitration agreement. This is also the approach reflected in the ACICA Arbitration Rules. Rule 27.4 of the ACICA Arbitration Rules provides that: "*The law of the seat shall be the governing law of the arbitration agreement, unless the parties have expressly agreed otherwise and that agreement is not prohibited by an applicable law*".⁵¹ The preferred approach is principally based on the choice of law rule contained in the Convention, as implemented into Australian law by the IAA. That is, s 7 of the IAA is to be interpreted as containing an implied statutory choice of law rule consistent with the choice of law rule embodied in the Convention. Alternatively, if the question of the correct choice of law rule for an arbitration agreement is governed by the common law, this Court should establish a common law rule that is informed by and consistent with the Convention, as the international origin and centrepiece of the integrated statutory framework.⁵²

The approach in Enka

30. In *Enka*, the Supreme Court applied English common law choice of law rules, as the law of the forum, to determine the law governing the arbitration agreement: at [34]. The Court explained that those rules are that a contract (or relevant part of it) is governed by: (i) the law expressly or impliedly chosen by the parties; or (ii) in the absence of such choice, the law with which it is most closely connected: at [27] and [170] (Lord Hamblen, Lord Leggatt and Lord Kerr), [193(iv)] (Lord Burrows), [265] (Lord Sales).
31. The Court indicated that, where the parties to a contract have not expressly chosen the law governing the arbitration agreement, but have expressly chosen the law governing the contract (which was not the case in *Enka*: see [155]), "*in the absence of good reason to the contrary*", the parties will be taken to have impliedly chosen that the arbitration agreement is governed by the law governing the contract: at [43]. The fact that the contract specifies that arbitrations are to be seated in a different jurisdiction is not a "*good reason to the contrary*" and cannot "*by itself be construed as an implied choice of the law applicable to the arbitration agreement*": at [117]. The majority held that, where the parties have not expressly chosen the law governing the arbitration agreement or the law governing the contract (such that there is no implied choice of law governing the arbitration agreement),

⁵¹ See also London Court of International Arbitration Rules (2020) Art 16.4.

⁵² *TCL* (2013) 251 CLR 533 at [6]-[12].

as a general rule, the law with which the arbitration agreement is most closely connected will be the law of the seat: at [119]. In other words, *Enka* establishes a common law rule with two distinct stages. Stage 1 considers whether the parties have agreed on the law governing the arbitration agreement (expressly or impliedly). If they have not, Stage 2 considers which system of law is most closely connected to the arbitration agreement.⁵³

32. In terms of Stage 2, the majority in *Enka* relied on a number of considerations in concluding that the system of law with which the arbitration agreement is most closely connected is the law of the seat. *First*, the seat is the place of performance of the arbitration agreement (at [121]-[124]). *Second*, applying the law of the seat is likely to uphold the reasonable expectations of contracting parties who have chosen to settle their disputes by arbitration in a specified place (at [142]-[143]). *Third*, there are benefits of legal certainty in easily identifying the system of law governing the arbitration agreement (at [144]).
33. Finally, and most significantly, the majority (at [125]-[141]) considered that a compelling reason for treating an arbitration agreement as most closely connected to the law of the seat is that such a rule accords with international law embodied in the Convention, as well as English law giving effect to the Convention in the UK 1996 Act. The majority in *Enka* recognised the illogicality if the law governing the validity and scope of the arbitration agreement were to differ depending on whether the question of validity is raised before or after an award has been made. Internal coherence, as well as harmony with international law and practice, is achieved by treating the law of the seat as the applicable law for the arbitration agreement at all times.
34. In other words, in determining the default common law, in the absence of choice by the parties, the majority regarded the content of the common law rule as strongly informed by the Convention. However, the majority treated this consideration as only applicable to Stage 2 of the analysis, if that Stage is reached. As explained below, ACICA's position is that the majority in *Enka* understated the wider significance of the Convention to Stage 1 of the analysis in determining the proper interaction between party choice and the system of law otherwise governing the arbitration agreement.
35. It is important to recognise that *Enka* was decided in a different statutory context to the integrated statutory framework for arbitration in Australia. The United Kingdom is not a Model Law jurisdiction. Its statutory framework for arbitration is different in many material respects from Australia's integrated statutory framework. Significantly, the UK 1996 Act

⁵³ Foxton et al (eds), *Mustill & Boyd: Commercial and Investor State Arbitration* (3rd ed, LexisNexis, 2024), [4.197]-[4.198].

does not adopt Art 34 of the Model Law, a provision deliberately based on Art V of the Convention. Under Australia's integrated statutory framework the Convention assumes a greater overall prominence as the centrepiece, in conjunction with the Model Law. More particularly, the position adopted in *Enka* was dictated by s 4(5) of the UK 1996 Act which has no equivalent counterpart in the IAA. Section 4(5) was regarded by the majority (at [73]-[75]) as decisive to its conclusion that the close relationship between the law of the seat and the arbitration agreement did not justify the conclusion that the choice of an English seat of arbitration is an implied choice that the arbitration agreement will be governed by English law.⁵⁴ The effect of s 4(5) of the UK 1996 Act is that, where a foreign law is applicable to an arbitration agreement (whether by choice or as determined in the absence of choice by the closest connection test), that fact alone is enough to disapply any non-mandatory provision of the UK 1996 Act insofar as it would otherwise affect a matter governed by the law applicable to the arbitration agreement. The significance of s 4(5) is twofold. *First*, it positively embraces for the purposes of the applicable law of the arbitration agreement, the concept of "*implied choice*". *Second*, by the mere selection of foreign law as an implied choice, it severs the degree of connection (or overlap) between the law of the seat and the arbitration agreement. The IAA contains no provision with such a wide-ranging effect.

The current position in England, Wales and Northern Ireland

36. Tellingly, the position taken in *Enka* was reversed in 2025, by the insertion of s 6A into the UK 1996 Act. The position is now that arbitration agreements are governed by the law of the seat, unless the parties *expressly* agree otherwise:⁵⁵

- “(1) *The law applicable to an arbitration agreement is—*
- (a) *the law that the parties expressly agree applies to the arbitration agreement, or*
 - (b) *where no such agreement is made, the law of the seat of the arbitration in question.*
- (2) *For the purposes of subsection (1), agreement between the parties that a particular law applies to an agreement of which the arbitration agreement forms a part does not constitute express agreement that that law also applies to the arbitration agreement.”*

37. In making the recommendation that led to this legislative amendment, the Law Commission of England and Wales noted, among other reasons, that this would: (i) preserve party autonomy, as parties could expressly choose that the arbitration agreement was governed by a particular law; (ii) avoid potential disputes in arbitrations seated in England about the

⁵⁴ See also *UniCredit Bank GmbH v RusChemAlliance LLC* [2025] AC 1177 at 1202 [42].

⁵⁵ *Arbitration Act 1996* (UK) s 6A, inserted by *Arbitration Act 2025* (UK) s 1(2).

approach under a foreign law to questions of validity, scope and interpretation of the arbitration agreement, and the arbitrability of the dispute; and (iii) avoid the potential complexity of the position as expressed in *Enka*.⁵⁶ In *Enka*, the majority (at [53]) referred to considerations of certainty and consistency in support of their taxonomy. In fact, the consensus from leading arbitration practitioners is that *Enka* had the opposite effect.⁵⁷ The presumption of implied choice, when applied to arbitration agreements, is regarded as giving rise to significant uncertainty and difficulty in application.

Enka has not to date been the subject of any detailed consideration in Australia

38. The appellant submits that “*the long-standing Australian approach*” is “*consistent with Enka*” and invites the Court to “*confirm that the Australian position is the same as that reflected in Enka*”: AS[37]-[38]. It would be surprising if the Australian approach exhibited a long-standing consistency with the ruling in *Enka*, since the judges in *Enka* acknowledged the central issue on the appeal—which system of national law governs the validity and scope of the arbitration agreement when the law applicable to the contract containing it differs from the law of the seat of the arbitration—“*has long divided courts and commentators, both in this country and internationally*”.⁵⁸
39. None of the three cases cited by the appellant (at AS[37] fn 19) suggests that the Australian position is consistent with *Enka*. None of them sheds light on how the governing law of an arbitration agreement is to be determined when the governing law of the contract in which the arbitration agreement is located and the law of the seat are different: in *Recyclers*, the governing law of the contract and the law of the seat were both Iowa law;⁵⁹ in *Comandate*, the governing law of the contract and the law of the seat were both English law;⁶⁰ and in *Casaceli*, the governing law of the contract was Italian law and no seat was designated.⁶¹
40. As far as ACICA is aware, *Enka* has been referred to in four Australian judgments to date (in addition to the primary judgment in the present case). None of those judgments contain detailed consideration of the *Enka* approach or involve any resolution of the difficulty that arises where the law of the main contract differs from the law of the seat:
41. In *Hub Street*⁶² at [45], Stewart J (Allsop CJ and Middleton J agreeing) merely cited *Enka*

⁵⁶ Law Commission of England and Wales, *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023), 147-148 [12.72]-[12.78].

⁵⁷ See Lord Hoffman et al, above n 31, 467-470.

⁵⁸ *Enka* [2020] 1 WLR 4117; [2021] 2 All ER 1 at [3]. See also the minority at [187]: “*we are presented with an intriguing question of law which courts and commentators have been grappling with for many years*”.

⁵⁹ *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 at [5], [22].

⁶⁰ *Comandate* (2006) 157 FCR 45 at [15], [163].

⁶¹ *Casaceli v Natuzzi S.p.A.* (2012) 292 ALR 143 at [28], [38].

⁶² *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* (2021) 290 FCR 298.

on the distinction between “*the law governing the substance of the dispute, the agreement to arbitrate and the arbitration process*”. The *Enka* approach to determining the law governing an arbitration agreement was not relevant because the governing law of the contract and the law of the seat were both Qatari law: at [24].

42. In *Mineralogy*⁶³ at [163] fn 164, Edelman J cited *Enka* as the “*usual way*” for determining the law governing an arbitration agreement. His Honour noted that it was appropriate to proceed on the *assumption* that Western Australian law was the law governing the arbitration agreement in circumstances where the governing law of the contract and the law of the seat were both Western Australian law: at [163]. The case did not involve a difference in the law governing the contract and the seat, and so did not require or involve application of the *Enka* approach or argument of consideration by the parties of whether it should be followed.
43. In *Devas*⁶⁴ at [30], Jackman J referred in passing to the choice of law rule applied in *Enka* but did not address the application of that rule to the situation where the law of the main contract and the law of the seat diverge.
44. In *Tesseract* at [173], [176] and [192]-[193], Edelman J endorsed certain statements from *Enka* but the other members of the Court did not address *Enka* as the question was not in issue or the subject of contested submissions because the case did not involve a difference in the law governing the contract and the law of the seat.

The correct approach to determining the law governing an arbitration agreement

45. The correct approach, therefore, needs to recognise the following considerations:
 - (a) *Enka* was decided in a markedly different statutory context to the IAA and the integrated statutory framework for arbitrations in Australia;
 - (b) the Convention is at the conceptual core of Australia’s statutory framework;
 - (c) in respect of arbitration agreements, there is no established common law choice of law rule in Australia and the issue can properly be regarded by this Court as *res integra*;
 - (d) the approach in *Enka* has been legislatively reversed because it is productive of considerable uncertainty; and
 - (e) the approach in *Enka* is at odds with the principal institutional rules used for international arbitrations in Australia (the ACICA Rules).
46. **The Convention:** Critically, the Convention specifies the choice of law rule for determining the law governing an arbitration agreement. Pursuant to the Convention, an arbitration

⁶³ *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219.

⁶⁴ *CC/Devas (Mauritius) Ltd. v Republic of India (No 2)* [2023] FCA 527.

agreement is governed by “*the law to which the parties have subjected it*” or, if no such law is “*indicat[ed]*”, “*the law of the country where the award was made*” (i.e., the seat).

47. Article V(1)(a) of the Convention provides that recognition and enforcement of awards may be refused where “*the agreement referred to in article II [that is, the arbitration agreement] ... is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*”. As explained by van den Berg, “[t]his can be deemed to constitute uniform rules of conflict of laws which prevail over any other conflict rules, in particular those of the forum, for determining the law applicable to the arbitration agreement”.⁶⁵
48. In contrast to Art V(1)(a), dealing with the enforcement of awards, Art II(3) of the Convention dealing with the enforcement of arbitration agreements,⁶⁶ does not specify the choice of law rule to be applied in determining the validity of an arbitration agreement in the context of an application for a stay of court proceedings in favour of arbitration. However, as in *Enka* at [130]: “[t]here is ... a strong and widely accepted argument that the Convention is to be interpreted as requiring the same conflict rules to be applied in relation to article II(3) as are specifically required at the stage of enforcement by article V(1)(a)”;⁶⁷ and see also Born, *International Commercial Arbitration* (3rd ed, 2021) vol 1 pp 528-540.⁶⁸ The rationale for applying the same choice of law rule in both contexts is obvious. If it were otherwise, “[i]t could lead to the undesirable situation of the same arbitration agreement being held to be governed by two different laws: one law determined according to the conflict rules of the forum at the time of the enforcement of the agreement, and the other determined according to Article V(1)(a) at the time of enforcement of the award”.⁶⁹ As explained in *Enka* at [136]: “[t]o ensure consistency and coherence in the law, the same law should be applied

⁶⁵ Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981), 126.

⁶⁶ New York Convention, Art II(3): “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”.

⁶⁷ See also van den Berg, above n 65, 126: “A systematic interpretation of the Convention, in principle, permits the application by analogy of the conflict rules of Article V(1)(a) to the enforcement of the agreement. It would appear inconsistent at the time of the enforcement of the award to apply the Convention's uniform conflict rules and at the time of the enforcement of the agreement to apply possibly different conflict rules of the forum”.

⁶⁸ Born, above n 10, vol 1 529: “the better view of the New York Convention is that the same choice-of-law rules apply under both Articles II and V; this result is required to avoid application of different legal rules at different stages of the arbitral process and to ensure a systematic interpretation of the Convention. Under this interpretation, Article II's uniform international rules of substantive validity apply in award recognition proceedings under Article V, just as they apply in proceedings to enforce arbitration agreements under Articles II(1) and II(3). At the same time, the national law selected by Article V(1)(a)'s choice-of-law rule also applies, subject to Article II's uniform international rules, in proceedings under Article II to enforce the arbitration agreement”; and see further Born, above n 10, at 531-534 (footnotes omitted).

⁶⁹ van den Berg, above n 65, 126.

to answer the question in either case”.⁷⁰

49. While Art V(1)(a) concerns the law governing the validity of arbitration agreements specifically, it evidently affects the law governing the *scope* of arbitration agreements; both are governed by the same law. As explained in *Enka* at [138]:

“The general approach in the conflict of laws, adopted by both the common law and the Rome I Regulation, is to treat the validity and scope of a contract (as well as other issues such as the consequences of breach and ways of extinguishing obligations) as governed by the same applicable law. This makes good sense, not least because the boundary between issues of validity and scope is not always clear. Thus, it is logical to apply the law identified by the conflict rules prescribed by article V(1)(a) of the New York Convention and section 103(2)(b) of the 1996 Act to questions about the scope or interpretation of the arbitration agreement as well as disputes about its validity.”

50. There are different views internationally as to whether, under the Convention choice of law rule, the law of the seat will be displaced *only* by an express choice of law governing the arbitration agreement or whether it can *also* be displaced by an implied choice of law.⁷¹ The former view should be preferred. Born explains: *“it is elementary that the arbitration agreement is a separable agreement, distinct from the parties’ underlying commercial contract ... When parties do not include a choice-of-law provision in their arbitration clause, and instead only include a general choice-of-law provision in their underlying contract, there is no reason to extend that provision to the separable arbitration agreement.”*⁷²

⁷⁰ See also Born, above n 10, vol 1 528-540; Berger, “Re-examining the Arbitration Agreement: Applicable Law - Consensus or Confusion?”, in van den Berg (ed), (2006) *ICCA Congress Series Vol 13*, 301, 316-317.]

⁷¹ See, e.g., van den Berg, above n 65, 293: *“authors are divided on the question whether, besides the express choice (e.g., ‘this arbitration agreement is governed by the arbitration law of country X’), the choice can also be implied ... The problem stems from the wording of Article V(1)(a) that the subsidiary conflict rule applies ‘failing any indication’ on the law to which the parties have subjected the arbitration agreement. It is submitted that, despite this somewhat ambiguous wording, the second opinion represents the better view. The main contract and the arbitral clause have different objects: the main contract concerns the relationship between the parties as to the substance; the arbitral clause is concerned with the procedure for settling disputes arising out of the main contract. If the parties provide a general choice of law clause, they intend to give a directive to the arbitrator as to which law he has to apply to the substance. The distinction between substance and procedure would then preclude that the directive given to the arbitrator would also be an ‘indication’ of a choice of the law governing the arbitration. It would therefore seem that the latter can be achieved only by a distinct express agreement”.*

⁷² Born, above n 10, vol 1 535. See also 527: *“the better choice-of-law approach for international arbitration agreements is the default rule prescribed by Article V(1)(a) of the New York Convention (and Article 34(2)(a)(i) of the UNCITRAL Model Law), which calls for application of the law of the arbitral seat (and not the law selected by a general choice-of-law provision in the underlying contract). The presumptive application of the law of the arbitral seat can be rebutted but doing so should require a clear and specific choice of law applicable to the arbitration agreement itself. This presumptive choice-of-law rule is consistent with, and required by, the intentions of most commercial parties, the character and objectives of international arbitration agreements and the default rules prescribed by the New York Convention and UNCITRAL Model Law”* (emphasis added). Article 34(2)(a)(i) adopts the New York Convention choice of law rule. See also Holtzmann & Neuhaus, above n 23, 999-1000, as to Article 34 of the Model Law adopting the same “sound” rule.

51. Regardless of that international difference of views, as implemented in *Australian law*, the Convention choice of law rule *only* provides for displacement of the law of the seat where there is an *express* choice of law governing the arbitration agreement:
52. Article V(1)(a) of the Convention is implemented in s 8(5)(b) of the IAA. Section 8(5)(b) provides that enforcement of an award may be refused where:

“the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made”.
53. As is clear from s 8(5)(b), the validity of an arbitration agreement is to be determined under the “*law of the country where the award was made*”—that is, the law of the seat—unless some other “*law [is] expressed in the agreement*”—that is, in the arbitration agreement itself—“*to be applicable to it*”.
54. This is the preferred approach for determining the law governing an arbitration agreement: an arbitration agreement is presumptively governed by the law of the place designated as the seat, unless there is an express choice of a different governing law *in* the arbitration agreement. It can be observed that the choice of law rule under the Convention and the rule in *Enka* both recognise party autonomy and the significance of the seat, but balance the interaction differently. The Convention starts from the premise that the seat is determinative unless there is a clear choice of another system of law by the parties in the arbitration clause. *Enka* starts with a search for parties implied choice in the main contract as presumptively determinative and defaults to the law of the seat only if no implied choice can be objectively discerned in all the circumstances.
55. There may be room to debate as to what is express (or “*expressed in the agreement*”) and what is sufficiently clear by implication from the actual words chosen.⁷³ However, wherever that line is to be drawn, it is a narrower concept than the notion of implied choice under common law conflicts rules generally, as adopted in *Enka*. The narrower focus under s 8 and the Convention is understood as confined to any clear implication derived from the actual words used “in” the arbitration itself, as opposed to wider notions of implied choice by silence or conduct.⁷⁴
56. **Methodology:** In formulating the applicable choice of law rule for the arbitration agreement, ACICA’s submission is that it is open to this Court to adopt one of two approaches.
57. *First*, construing the IAA as a whole in accordance with orthodox principles of statutory

⁷³ *Kingdom of Spain v Infrastructure Services Luxembourg Sarl* (2023) 275 CLR 292 at [23]-[26].

⁷⁴ *Cf Tesseract* (2024) 282 CLR 512 at [171]-[172], [192].

construction, for the purposes of s 7 of the IAA, there is an implied statutory choice of law rule in favour of an arbitration agreement governed by the law of the place designated as the seat, unless there is an express choice of a different governing law in the arbitration agreement. This rule is derived as a matter of statutory implication from the text and structure of the IAA; in particular, its explicit adoption of the Convention as a central feature of the statutory scheme and its adoption of the Convention's choice of law rule in s 8 of the IAA.⁷⁵ It would be incoherent to postulate a choice of law rule for s 7 that is different from s 8, especially where s 7 itself implements Art II(3) of the Convention. The IAA does not implement the Convention partially or selectively. Just as it is incoherent and illogical to regard Art II(3) as having a different choice of law rule to Art V(1)(a), it would be equally incoherent and illogical to treat another part of the IAA as adopting a different choice of law rule to s 8 of the IAA and Arts 34 and 36 of the Model Law (as adopted by s 16 of the IAA).

58. *Second*, alternatively, if the question of the correct choice of law rule is to be treated as identifying a common law rule, this Court should adopt a common law rule that is consistent with international law and that is strongly informed by the applicable statutory context.⁷⁶ This is what the majority in *Enka* did in supplying the content of the English common law position (albeit at Stage 2 of their analysis). The relevant difference is that ACICA submits that the considerations that led the majority in *Enka* to the common law position on Stage 2 of their choice of law analytical framework, in principle justify a different Stage 1 analysis given the different statutory context in Australia. This gives rise to no distortion of established common law principle governing the applicable law for arbitration agreements, since there is no established Australian common law position, unless the view is taken that arbitration agreements exhibit no features making them relevantly different to ordinary commercial contracts. As submitted above, ACICA's position is that separability, the juridical and practical significance of the place of performance and supervision at the seat and the wider international context under the Convention are points of differentiation.
59. In the development of common law principles of private international law, this Court has recognised the role of statutory influence. For example, in developing the "proper law of the tort" and the shift away from the purely common law *Phillips v Eyre* double actionability

⁷⁵ By analogy, this choice of law rule is implied from "a close examination of the terms, scope and purpose of the relevant statutory regime". See *Electricity Networks Corporation v Herridge Parties* (2022) 276 CLR 271 at [20].

⁷⁶ As to common law development in light of statute, see *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 at 59-63 [18]-[28]; Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 *Law Quarterly Review* 247 at 264-265, referred to in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [132].

rule in *John Pfeiffer Pty Ltd v Rogerson*,⁷⁷ this Court's reasoning was substantially shaped by the surrounding statutory and constitutional context. In particular, the existence of the *Service and Execution of Process Act 1992* (Cth) framework and other Commonwealth statutory schemes for interstate legal cooperation, which reflected a legislative assumption that Australian states should be treated as parts of an integrated legal system, not discrete "foreign" jurisdictions in the private international law sense. The surrounding statutory architecture, including ss 79-80 of the *Judiciary Act 1903* (Cth), made the traditional common law rule doctrinally incoherent. The position is analogous here. A common law rule for determining the governing law of the arbitration agreement at odds with the principal international instrument upon which the statutory scheme is constructed is doctrinally incoherent. As in other fields of the common law, this is merely to observe that the common law and statute are in a symbiotic relationship in furtherance of coherence of the law.⁷⁸

60. **Other considerations:** An approach consistent with the Convention's choice of law rule is also supported by other considerations of principle and policy.⁷⁹ *First*, certainty and predictability are of paramount importance in this branch of the law.⁸⁰ The *Enka* approach is productive of acute uncertainty because of the conceptual and practical difficulties inherent in discerning an implied choice, as revealed by the facts of *Enka* and subsequent decisions.
61. *Second*, the line between implied or inferred choice, objectively ascertained, and considering all relevant facts to identify the law with the closest and most real connection with the agreement, is often hard to discern and frequently merges together.⁸¹ That line is particularly blurred when the task is undertaken in respect of an arbitration agreement because of the uniquely powerful juridical connection of the arbitration to the law of the seat.
62. *Third*, there is good reason for not applying notions of "implied choice" as the primary rule to determine the choice of law applicable for arbitration agreements. The arbitration agreement is of a very different character to the main contract. It is not concerned with the parties' substantive rights and obligations, but where, how and by whom disputes regarding those rights and obligations are to be determined. Its overriding nexus is to the place of the arbitration. The arbitration proceedings are anchored to the seat. The courts at the seat have

⁷⁷ (2000) 203 CLR 503.

⁷⁸ Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" (2013) 36(3) *UNSW Law Journal* 1002.

⁷⁹ It is notable that arbitration agreements were excluded from the Rome Convention because the rules of the Convention were deemed sufficient and because of the unique legal character of arbitration agreements. See *Enka* [2020] 1 WLR 4117 at [133].

⁸⁰ *Regie Nationale v Zhang* (2002) 210 CLR 491 at [66]; *Nielson v Overseas Project Corporation* (2005) 223 CLR 331 at 364 [92]-[93].

⁸¹ *Tesseract* (2024) 282 CLR 512 at [181].

primary responsibility for deciding questions about the validity and scope of the arbitration agreement. It is natural to expect those questions be decided by the same familiar system of law routinely applied by the courts at the seat rather than a foreign system of law that may be very different.

63. In any event, even if one is to analyse the matter through the prism of an implied choice, there is much to be said for the view that, where parties contract within the setting of a known legislative framework that adopts the Convention, absent clear indication to the contrary, it is to be presumed that they expected the same choice of law rule to govern their arbitration agreement for all purposes relating to the arbitration and the resulting award.

PART V: ESTIMATED TIME FOR ORAL ARGUMENT

64. ACICA respectfully considers that it could, if permitted, assist the Court further by oral argument of not more than 25-30 minutes. ACICA acknowledges that, in the past, leave has usually been confined to written submissions. ACICA respectfully submits that the importance of the issues raised, and the absence of any effective contradictor as to Ground 2, means that this Court might take the view it would be assisted by affording ACICA the opportunity to make brief oral submissions and answer any questions from the bench in light of the course of argument (especially where it can be expected the appellant will make detailed submissions in reply as to Ground 2 to which ACICA would otherwise be unable to respond).

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ANNEXURE TO INTERVENER'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)
Commonwealth statutes					
1.	<i>International Arbitration Act 1974</i> (Cth)	Currently in force: 18 February 2022 – present	Sections 2D, 3, 7, 7(2), 7(2)(b), 7(5), 8, 8(5)(b), 16, 17, 18C, 39, 39(1), sch 2 (UNCITRAL Model Law) Arts 2A, 5, 8, 10(1), 10(2), 11(1), 11(2), 11(3), 13(1), 13(2), 16(1), 16(3), 17, 17(1), 17B, 18, 19(1), 19(2), 20, 20(1), 21, 22, 22(1), 23, 24, 24(1), 25, 26, 28, 28(2), 29, 31, 33(2), 34, 34(2)(a)(i), 34(2)(a)(iii), 36, 36(1)(a)(iii)	Act in force on the date of the primary judge's decision and on the date of the appeal judgment	13 February 2025: date of primary judgment 9 February 2026: date of appeal judgment
2.	<i>Arbitration (Foreign Awards and Agreements) Act 1974</i> (Cth)	As enacted	Section 7(2)	For illustrative purposes only	11 June 1989: last day before UNCITRAL Model Law adopted in Australia
3.	<i>International Arbitration Amendment Act 1989</i> (Cth)	As enacted	Section 7	Act implementing UNCITRAL Model Law in Australia	12 June 1989: date UNCITRAL Model Law adopted in Australia
4.	<i>International Arbitration Act 1974</i> (Cth)	In force 12 June 1989 – 31 May 1991	Section 21	Act in force after UNCITRAL Model Law adopted in Australia	12 June 1989: date UNCITRAL Model Law adopted in Australia
5.	<i>International Arbitration Amendment Act 2010</i> (Cth)	As enacted	Schedule 1 s 16	Act implementing amendments preventing parties from opting out of Model Law	6 July 2010: date s 21 repealed from <i>IAA 1974</i> (Cth)
6.	<i>Service and Execution of Process Act 1992</i> (Cth)	In force 1 July 1998 – 1 July 2000	Whole Act	Act in force when <i>John Pfeiffer Pty Ltd v Rogerson</i> (2000) 203 CLR 503 was handed down	21 June 2000: date of <i>John Pfeiffer</i> decision

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
7.	<i>Judiciary Act 1903</i> (Cth)	In force 30 May 2000 – 30 June 2000	Sections 79 and 80	Act in force when <i>John Pfeiffer Pty Ltd v Rogerson</i> (2000) 203 CLR 503 was handed down	21 June 2000: date of <i>John Pfeiffer</i> decision
8.	<i>Acts Interpretation Act 1901</i> (Cth)	Currently in force: 28 March 2026 – present	Section 11B	Act currently in force	Act currently in force as at date of submissions
Foreign statutes					
9.	<i>Arbitration Act 1996</i> (Eng, W & NI)	Currently in force: 25 June 2026 – present	Sections 6A and 30	Act currently in force following 2025 amendments	Act currently in force as at date of submissions
10.	<i>Arbitration Act 1996</i> (Eng, W & NI)	As at 9 October 2020	Sections 4(5) and 103(2)(b)	Act in force as at the time of <i>Enka</i> [2020] 1 WLR 4117 decision	9 October 2020: date of <i>Enka</i> UKSC decision
11.	<i>Arbitration Act 2025</i> (Eng, W & NI)	As enacted	Section 1(2)	Act amending <i>Arbitration Act 1996</i> (Eng, W & NI) to reverse <i>Enka</i>	All relevant times
12.	<i>International Arbitration Act 1994</i> (Singapore)	Currently in force: 31 December 2021 – present	Section 6(2)	Act currently in force	Act currently in force as at date of submissions
Treaties					
13.	<i>Convention on the Recognition and Enforcement of Foreign Arbitral Awards</i> , opened for signature on 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959)	As entered into force	Arts II(1), II(3), V and V(1)(a)	Convention as currently in force	All relevant times

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Arbitration Rules					
14.	ACICA Arbitration Rules (2021)	Currently in force: 1 April 2021 – present	Rules 27.4 and 32(1)	For illustrative purposes only	All relevant times
15.	International Chamber of Commerce Arbitration Rules (2026)	Currently in force: 1 June 2026 – present	Art 7(4)	For illustrative purposes only	All relevant times
16.	London Court of International Arbitration Rules (2020)	Currently in force: 1 October 2020 – present	Arts 16.4 and 23.1	For illustrative purposes only	All relevant times
17.	UNCITRAL Arbitration Rules (2021)	Currently in force: 19 September 2021 – present	Art 23(1)	For illustrative purposes only	All relevant times