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 OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

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

PART II: OUTLINE OF PROPOSITIONS FOR ORAL ARGUMENT

Ground 2—The law of the arbitration agreement

2. In the Australian context, the preferred approach is that an arbitration agreement in general is governed by the law of the seat, absent a direct and explicit choice of a different system of law applicable to the arbitration agreement specifically. This Court may adopt that approach as a matter of statutory interpretation and/or as the common law choice of law rule, informed by the statutory and international context and the particular characteristics of arbitration agreements.

3. ***Enka** Insaat v Sanayi AS v OOO "Insurance Co Chubb"* [2020] 1 WLR 4117 (**Vol 6, Tab 52**) was decided in a different statutory context: ACICA's Submissions (**IS**) [35]. The UK is not a Model Law jurisdiction; the *International Arbitration Act 1974* (Cth) (**IAA**) (**Vol 1, Tab 3**) has a stronger connection to the **Convention** on the Recognition and Enforcement of Foreign Arbitral Awards (**Vol 2, Tab 21**); and the IAA has no equivalent of s 4(5) of the *Arbitration Act 1996* (UK) (**UK Act**) (**Vol 2, Tab 17**). Those differences affect the weight to be given to the Convention's choice of law rule and its interaction with notions of implied choice.

4. *Enka* has been criticised and, at least in part, legislatively reversed because of the uncertainty it produced: IS [37], [60]; **Born** (2021), pp 568, 572-573 (**Vol 11, Tab 88**).

5. **The Convention and the IAA**: The Convention is the centerpiece of Australia's statutory framework. Art V(1)(a) contains a uniform choice of law rule favouring the law of the seat absent a direct and explicit choice of another system of law applicable to the arbitration agreement: Born, p 527 (**Vol 11, Tab 88**); **van den Berg** (1981), p 293 (**Vol 15, Tab 111**). The Singaporean courts did not consider this point: *BCY v BCZ* [2016] 2 Lloyd's Rep 583 at [40] (**Vol 5, Tab 40**); *BNA v BNB* [2020] 1 Lloyd's Rep 55 at [40] (**Vol 5, Tab 44**).

6. A general choice of law clause in the main contract is not an "*indication*" of the law governing the separate arbitration agreement: van den Berg, p 293 (**Vol 15, Tab 111**); Born, pp 605-608 (**Vol 11, Tab 88**). "*Thereon*" in "*failing any indication thereon*" refers back to the arbitration agreement ("*it*"), not the main contract; *Enka* at [129] is wrong. Art V(1)(a) does not invite a search for an implied choice through the law of the main contract; *a fortiori* where that law is itself only impliedly chosen.

7. Section 8(5)(b) reflects that preferred international view: IS [54]-[55]. The contention that the statutory expression embraces a general choice of law clause in the substantive contract (Appellant's Submissions in Response to the Intervener (**ARR**) [7]) is wrong. Nothing in the definition of "*arbitration agreement*" in s 3(1) of the IAA supports it. The statutory expression is focused on language specifically directed to the choice of law applicable to the separate arbitration agreement itself: IS [55]; see also Convention, Art II(2); Model Law, Art 7.

8. Statutory coherence points to a single choice of law rule. Sections 7(2) and 8(5)(b) derive from

the Convention, and it is "*widely accepted*" that the same conflict rule applies under Arts II(3) and V(1)(c) as under Art V(1)(a): IS, [47]-[49]; *Enka* at [130], [136], [138] (**Vol 6, Tab 52**); van den Berg, p 126 (**Vol 15, Tab 111**); Born, p 529 (**Vol 11, Tab 88**); *Redfern and Hunter* (2022), [3.07] (**Vol 11, Tab 87**). Section 8(5)(b) should not be read as departing from the Convention's widely held meaning: like Art V(1)(a) ("*the law to which the parties have subjected [the arbitration agreement]*"), its words "*the law expressed in the agreement to be applicable to it*" are directed to the arbitration agreement itself: Born, pp 527, 536-538 (**Vol 11, Tab 88**).

9. **Australian Authorities**: Neither this Court nor any intermediate appellate court has authoritatively determined the question of the law governing the arbitration agreement. There is no "*long-standing Australian approach*": IS [38]-[44].

10. Contrary to ARR [5], ***Trina Solar** (US) Inc v Jasmin Solar Pty Ltd* (2017) 247 FCR 1 (**Vol 8, Tab 77**) is no obstacle. Beach J's *obiter* observations at [182] were not embraced by the other members of the Full Court, and Greenwood J at [82]-[84] adopted a position consistent with ACICA's. Beach J's reasons are either inapplicable (they concern *formation*) or unpersuasive: they overstate the "*two different contexts*" and treat the silence in s 7(2) inconsistently with Art II of the Convention, whose silence is read as adopting the Art V(1)(a) rule. A different rule under s 7(2) would require a positive textual indication to that effect.

11. Even if s 7(2) leaves the matter to the forum's common law choice of law rules, that rule should be formulated by reference to the Convention, given the IAA's international origins (IAA, s 2D).

12. **The Common Law and Implied Choice**: Separability is a fundamental principle of arbitral law. To say the arbitration agreement is distinct only for the purposes of validity (ARR [9]) understates the significance of separability and is inaccurate: Born, p 606 (**Vol 11, Tab 88**). The arbitration agreement concerns not the parties' substantive rights, but where, how and by whom they are determined; matters powerfully connected to the seat: IS [62]; *Enka* [121]-[124]. These matters should inform the common law rule.

13. The fundamental reason for the rejection in *Enka* (at [73]-[75]) (**Vol 6, Tab 52**) of the seat's relevance to implied choice (s 4(5) of the UK Act) has no Australian equivalent: IS [35].

14. In the Australian context as concerns the objective ascertainment of the law governing the arbitration agreement, implied choice and closest and most real connection tend to converge: *Tesseract International Ltd v Pascale Construction Pty Ltd* (2024) 282 CLR 512 at [181] (**Vol 2, Tab 26**); Born, p 553 (**Vol 11, Tab 88**). The strongest indication of implied choice is the law of the seat (van den Berg, p 293 (**Vol 15, Tab 111**)), consistent with the IAA framework into which the parties entered, here by subsequent agreement: IS [63]. Alternatively, where the law of the main contract differs from the law of the seat there are competing indications resulting in no choice, and in the absence of choice, the closest and most real connection is, on the *Enka* analysis, the seat.

15. This position is not heterodox. It gives proper regard to the international context and to the *sui generis* nature and function of the distinct arbitration agreement.

Ground 1—Applicable standard of review for stay applications under s 7(2) IAA

16. **Interpretation:** Section 7(2) is to be interpreted in accordance with ordinary principles of statutory construction, having regard to Australia's integrated framework for arbitration, its objects, and the international instruments to which the IAA gives legislative effect: IS [9]-[10], and to later amendments, notably the implementation of the Model Law and the competence-competence principle in Art 16: IS [11], *Acts Interpretation Act 1901* (Cth), s 11B (**Vol 2, Tab 4**).

17. **Prima facie satisfaction as to existence and scope**: A *prima facie* test balances the competence-competence principle with the role of the supervisory courts under the Model Law: IS [12]-[13]. The approach in ***Hancock** Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, at [145] (**Vol 7, Tab 57**), of "forming a view" is not wrong in principle, but adopting the *prima facie* approach gives greater clarity in the law (IS [8]) and accords with leading Model Law jurisdictions; e.g., ***Tomolugen** Holdings Ltd v Silica Investors* [2016] 1 SLR 373 at [63] (**Vol 8, Tab 75**); IS [14]. This is subject to an exception recognised by the Supreme Court of Canada in *Union des consommateurs v **Dell** Computer Corp* [2007] 2 SCR 801, at [84]-[85] (**Vol 9, Tab 79**) accepted in *Tomolugen* at [53]-[54] and endorsed in *Hancock* at [145]—the Court may decide jurisdiction if it turns purely on a matter of law, or a question of mixed law and fact which requires only superficial consideration of the material: IS [12].

18. The third limb of the *Tomolugen* test at [63(c)] (**Vol 8, Tab 75**) should not be adopted. Section 7(5) is determined on the balance of probabilities standard: *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH* (2024) 281 CLR 171, at [26] (**Vol 3, Tab 28**). That more onerous standard is justified because the s 7(5) proviso enables the Court to determine that the arbitration shall not proceed.

19. The "full merits" approach is inconsistent with the Model Law and Art 16, and out of step with leading Model Law jurisdictions. While it has been embraced in England and Wales, competence-competence is not mandatory there: UK Act, s 30 (**Vol 2, Tab 16**).

Ground 3 (issue (i))—Competence-competence

20. Art 16(1) of the Model Law is mandatory (COA [82]-[83]). That parties to an arbitration agreement may have agreed that certain matters are not to be arbitrated does not deprive the arbitral tribunal of its competence-competence.

21. Whether Art 16 is mandatory is a matter of construction: IS [6], [19]-[22]. Art 16(1) is a critical design feature of the Model Law's allocation of power and jurisdiction between the arbitral tribunal and the supervisory courts: IS [23]; Arts 16, 5, 8, 34. Australian courts which have considered the non-mandatory provisions of the Model Law have not identified Art 16(1): e.g., *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 547, [11] (**Vol 3, Tab 35**).

12 November 2026

Jonathon Redwood **Chester Brown** **Callista Harris** **Brendan Hord**

SCHEDULE OF PARTIES

OIL BASINS LTD
Appellant

and

ESSO AUSTRALIA RESOURCES PTY LTD (ACN 091 829 819)
First Respondent

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