



Australian Courts Continue their Light Touch Approach to Arbitration

Insights, 19 February 2026

KEY POINTS

- The Victorian Court of Appeal has delivered an important judgment for Australian international arbitration users (*Oil Basins v Esso Australia Resources* [2026] VSCA 6).
- The Court has emphasised the “light touch” approach courts should take when considering whether a dispute falls within the scope of an arbitration agreement and should be determined in arbitration instead of court litigation.
- Under Australian law, arbitrators always retain the power to determine the scope of their jurisdiction. As the Victorian Court of Appeal has confirmed, courts cannot assume this power and parties cannot override it.
- If a party violates an arbitration agreement and commences court litigation, when faced with an objection ordinarily Australian courts should pause the proceedings.

INTRODUCTION

Typically, parties agree to submit a dispute to arbitration by including an arbitration agreement in a contract. The scope of the arbitration agreement identifies which disputes are subject to arbitration. A broad scope is often included to capture all disputes between the parties. Common language is that any dispute arising out of, relating to or in connection with the contract shall be resolved by arbitration.

Occasionally, a party might commence court litigation in violation of an arbitration agreement. When an objection to this is raised, Australian law requires the court to stay (i.e. pause) proceedings and to refer the parties to arbitration (as provided in section 7(2) of the International Arbitration Act 1974 (Cth) (**IAA**)). Before doing so, the court will need to be satisfied that the dispute may fall within the scope of the arbitration agreement.

In *Oil Basins v Esso Australia Resources* [2026] VSCA 6, the Victorian Court of Appeal considered the appropriate approach for this assessment. The Court concluded that judges should not pre-empt for arbitrators whether a dispute falls within the scope of an arbitration



agreement. Where parties have agreed to arbitration, they have also agreed for arbitrators to decide for themselves whether they have jurisdiction to determine a dispute.

The Court's decision should encourage parties to follow their contractually-agreed dispute resolution processes and to dissuade them from bringing to court disputes that belong in arbitration.

BACKGROUND TO THE DISPUTE

The case involved a consortium of petroleum producers operating in Bass Strait (which has already provided fertile ground over the years for several important Australian arbitration decisions). They had agreed to pay royalties in respect of hydrocarbons produced and recovered within a designated area. A dispute arose regarding the calculation methodology for royalty payments. The relevant agreement contained an arbitration clause. Following the commencement of proceedings in the Supreme Court of Victoria, the Court issued orders staying the court proceedings in favour of arbitration. The Victorian Court of Appeal agreed with this decision and in the process highlighted several key issues relevant for Australian international arbitration users.

LEGAL FRAMEWORK

The IAA governs international arbitration in Australia. It incorporates the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by over 80 countries. The IAA does not stipulate how a court should assess whether a matter brought before the court is capable of settlement by arbitration. The IAA does however stipulate that arbitral tribunals are competent to determine their own jurisdiction (**Competence Principle**). This includes deciding questions concerning the scope of the arbitration agreement.

THE ROLE OF COURTS AND ARBITRAL TRIBUNALS

The Court of Appeal provided guidance as to the appropriate level of scrutiny to be applied in deciding whether a matter should be referred to arbitration. The Court held that:

- it is for the arbitrators to decide whether a matter falls within the scope of the arbitration agreement;
- courts should not pre-empt this decision;
- instead, courts should take a "light touch" approach to satisfy themselves that a dispute has the requisite connection with the arbitration agreement; and
- in so doing, courts do not need to determine whether the dispute falls within the scope of the arbitration agreement.

A notable aspect of the Court of Appeal's judgment is the emphasis on the primacy of the IAA. The Court highlighted that parties are unable, even by agreement, to exclude the operation of the Competence Principle. In all cases, arbitrators retain the power to determine the scope of their jurisdiction. The Court did not consider this undermined the fundamental nature of consent as the foundation of arbitration and instead merely illustrated the consequences of



consenting to arbitration under the IAA. This is because the application of the Competence Principle is a statutory requirement. Its application is not simply the outcome of the parties' arbitration agreement.

DIFFERENT APPLICABLE LAWS

Different laws are often relevant to international arbitration proceedings. In some cases, different laws will govern substantive rights, procedural rights, and the arbitration agreement itself. The law governing the arbitration agreement can impact the rights of parties, particularly as regards whether the arbitration agreement may bind non-signatories. This arises most frequently in the context of assignment and novation of contractual rights, agency relationships, and third-party beneficiaries.

The parties presented competing views on the law governing the arbitration agreement. One view was that where the arbitration agreement is in a contract which nominates a governing law, that choice applies to the arbitration agreement. The contrary view was that the law of the place of arbitration applies, even where this law differs from the governing law.

In this case, the Court of Appeal did not need to determine which law governed the arbitration agreement. However, the Court observed that whilst the relevant agreement contained a New York governing law provision, this did not mean that New York law governed the arbitration agreement or the arbitration, which remained governed by Australian law.

In recent years, there have been several high-profile decisions concerning the law governing arbitration agreements (most prominently the UK Supreme Court's decision in *Enka v Chubb* [2020] UKSC 38). This is precisely the sort of collateral litigation which arbitration users generally wish to avoid in selecting arbitration as a dispute resolution mechanism. Where the governing law of the contract is not the same as the seat of arbitration, it may be necessary to specify the governing law of the arbitration and the arbitration agreement to ensure compatibility with the governing law of the contract.

CONCLUSION

Where parties have agreed to arbitration of disputes, under Australian law they will be held to their bargain. Arbitration is an alternative to court litigation to resolve a dispute. It is a formal dispute resolution procedure in which a tribunal considers claims and defences and issues a binding decision. Where it is clear that a dispute is subject to arbitration, parties should be cautious about attempting to pursue proceedings in court litigation instead. This is likely to have adverse time and cost consequences with a party ending up back at square one.

Where the scope of an arbitration agreement is ambiguous, parties face additional time, cost, and uncertainty. If it is unclear whether a dispute falls within the scope of the arbitration agreement, there may be an additional dispute about this issue. A clearly defined scope should always extend to disputes about the validity of the arbitration agreement and potential complications arising from different governing laws may require consideration (see further our [Guide to Arbitration Agreements](#)).



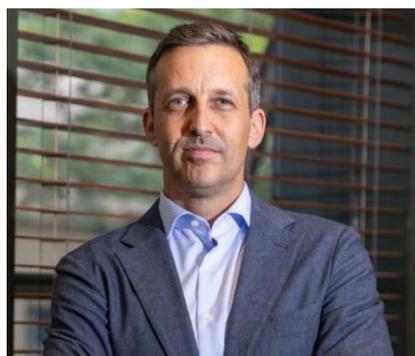
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ABOUT PETER & KIM

Peter & Kim is a specialist arbitration firm with offices in Geneva, Zurich, Sydney, Seoul, Perth and Singapore. We support clients globally through a cohesive cross-border team structure offering a depth of common and civil law expertise that is grounded in decades of combined experience at partner level in international arbitration proceedings (including ISDS cases) and in advising and representing commercial and government clients in arbitration-related proceedings before State Courts.

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