THIRD PARTIES AND INTERNATIONAL COMMERCIAL ARBITRATION: REFRAMING THE DEBATE

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Third parties represent one of the most contentious and challenging issues in international commercial arbitration, with the fundamentally contractual nature of arbitration struggling to accommodate such persons. This article examines the issue of third parties through the lens of the relationship between courts and arbitrators in the context of applications to restrain litigation in favour of arbitration and anti-arbitration injunctions. The article demonstrates how courts have sought to reconcile two competing goals: holding parties to their bargain on dispute resolution yet avoiding multiple actions by joining third parties to a single proceeding where possible. While the High Court decision in Rinehart v Hancock Prospecting Pty Ltd *makes a key contribution to the debate, the differing positions of consenting and non-consenting third parties need to be appreciated.*

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I Introduction

Third parties present one of the most contentious and challenging issues in international commercial arbitration. At first glance, the presence of such persons seems incompatible with an essentially contractual system of dispute resolution. Yet, as multi-party disputes become standard in international business transactions and the use of arbitration clauses becomes widespread, the problem of accommodating third parties is increasingly confronted.

While there has been much written on the topic, this article aims to take a different approach and examine the question of third parties and arbitration primarily from the perspective of the relationship between courts and arbitrators. As the contours of this relationship have shifted over time, so too has the treatment of third parties. While concepts such as consent, sanctity of contracts and avoidance of multiple and fragmented proceedings have been regularly referred to in the decisions and literature on third parties, the relevance of the issue in the wider context of judicial-arbitral relations has been underexplored. Since both federal and state arbitration legislation in Australia directs courts 'to facilitate' the use of arbitration,[1] a key question to consider will be whether the judicial treatment of third parties satisfies this objective. Primary focus in this article will therefore be on court decisions in Australia and other common law

[1] *International Arbitration Act 1974* (Cth) ss 2D(a)–(c) ('*IAA*'); *Commercial Arbitration Act 2017* (ACT) s 1C(1); *Commercial Arbitration Act 2010* (NSW) s 1C(1); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 1C(1); *Commercial Arbitration Act 2013* (Qld) s 1AC(1); *Commercial Arbitration Act 2011* (SA) s 1C(1); *Commercial Arbitration Act 2011* (Tas) s 1C(1); *Commercial Arbitration Act 2011* (Vic) s 1AC(1); *Commercial Arbitration Act 2012* (WA) s 1C(1).

countries concerning pre-arbitration applications to restrain litigation in favour of arbitration.[2]

For the purpose of analysis, a distinction will be drawn in this article between two situations involving third parties. The first involves a third party who is a non-signatory to an arbitration clause but who consents to arbitration by seeking a stay of court proceedings brought against it. The second involves a non-signatory third party who commences court proceedings against a signatory but has in no way consented to arbitration.

In the first case, the non-signatory third party is joined to an arbitration clause by its own voluntary act while in the second, the third party has been effectively coerced into arbitration by having its own court proceedings restrained.[3]

The distinction between these two circumstances of joinder has been insufficiently recognised in the literature and court decisions, at least outside the United States. A key contention in this article will be that any proposed regime for binding third parties to arbitration agreements must take account of whether such persons are seeking to join the arbitration voluntarily or having the process imposed upon them. If consent to arbitrate is the key criterion for determining whether a third party is bound to an arbitration clause, then the differing positions of voluntary and coerced non-signatories must be considered.[4]

The issue of third parties in arbitration will be examined through a historical study of stay applications to compel arbitration in common law courts. This

[2] The question of joinder of third parties can also arise during the arbitration itself and at the stage of enforcement of, or challenge to, the award. Australian courts have not yet addressed the issue in these contexts. An example of a case where an award was refused enforcement on the basis that a third party had been improperly joined to the arbitration is *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, 786–7 [61] (Moore-Bick LJ, Rix LJ agreeing at 787 [64], Ward LJ agreeing at 799 [92]) (Court of Appeal), affd 827 [70] (Lord Mance JSC), 827 [71] (Lord Collins JSC), 849 [149] (Lord Hope), 851 [162] (Lord Saville JSC), 851 [163] (Lord Clarke JSC) (Supreme Court) ('*Dallah*').

[3] Note, however, that a court's decision to stay court proceedings and refer a third party to arbitration does not automatically mean that the arbitral tribunal will be bound to admit the third party in the arbitration. Resolution of this question will depend on the procedural rules of the arbitration, the *lex arbitri* (law governing the arbitration) and the operation of doctrines such as issue estoppel.

[4] Consent is 'the fundamental feature distinguishing the position of third parties in arbitration from third parties in litigation': James M Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' (2004) 4(3) *Pepperdine Dispute Resolution Law Journal* 469, 476.

article will also consider the competing goals confronting courts: between holding parties to arbitration agreements on the one hand, and achieving efficiency of dispute resolution, by joining all persons to the one proceeding, on the other. The issue has arisen in the context of disputes concerning whether a third party is 'claiming through or under a party' to an arbitration agreement under Australian legislation.[5] Attempts by third parties to restrain arbitral proceedings by a court-ordered injunction will also be considered. Such a study further reveals the changing judicial attitudes to arbitration clauses.

II First Phase: Discretionary Referral to Arbitration

The first phase of study covers the period prior to the adoption of the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*')[6] and the 1985 *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*').[7] In Australia, the *New York Convention* was enacted in 1974,[8] and the *Model Law* was implemented in 1989 for international commercial arbitrations[9] and from 2010 for domestic arbitrations.[10]

Prior to the adoption of the *New York Convention* and the *Model Law*, common law courts only had a *discretion* to stay proceedings brought in breach of an arbitration clause in a contract, with the position being identical to that where a foreign exclusive jurisdiction or choice of court clause was relied upon as a basis for a stay.

Consider a claimant C, who sued both D1 and D2 in an Australian court, with a London arbitration clause existing between C and D1 but not C and D2. If D1 sought a stay and referral to arbitration, the claimant would normally have had to show strong reasons or 'good cause' why the matter between C and D1 should not be stayed. While in theory such a test created a presumption in favour of enforcing the arbitration clause, in practice, courts often chose to retain jurisdiction and refuse a stay out of a concern to keep all proceedings

[5] See, eg, *IAA* (n 1) s 7(4).

[6] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) ('*New York Convention*').

[7] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17 (21 June 1985) annex I ('*Model Law*').

[8] *IAA* (n 1) sch 1.

[9] Ibid sch 2, as inserted by *International Arbitration Amendment Act 1989* (Cth) s 8.

[10] See, eg, *Commercial Arbitration Act 2010* (NSW) pt 1A; *Commercial Arbitration Act 2011* (Vic) pt 1A.

(C v D1 and C v D2) together in the one forum. The alternative would be to require the C v D1 claim to be determined by a London arbitrator with the C v D2 claim remaining in court.

The policy dilemma in this case was well articulated by Bell P of the New South Wales Court of Appeal in *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd*.[11] His Honour saw 'two very powerful policy considerations' in play, namely the 'importance of holding commercial parties to their bargain' and 'ensur[ing] that all aspects of a dispute between all parties (including, relevantly, non-contracting parties) be resolved in one place at the one time'.[12]

Protecting the parties' bargain is justified not only by principles of contract law but also because the parties' choice of arbitration is often a tool of jurisdictional risk management and planning where parties seek to avoid undesirable forums of adjudication in advance by appropriate drafting.[13] Consequently, if parties make an informed and voluntary choice to arbitrate at the time of transacting, then the needs of both party autonomy and certainty in international commerce demand that such a preference should be respected.

Yet, there are also strong policy factors pointing in the other direction: most significantly, the need to avoid multiple, fragmented dispute resolution involving the same subject matter and parties. Hence, in the example above, if a stay of court proceedings was ordered by an Australian court, the action between C and D1 would proceed to arbitration in London but the C v D2 matter would remain in the Australian court. If both claims involved similar subject matter and related parties, they would have to be determined in separate, parallel proceedings. Not only is such an outcome untidy and inefficient in that it exposes parties to substantial extra costs and duplication, but more significantly, there is a great risk of the different tribunals reaching different conclusions on the same legal and factual questions. Such a consequence is 'apt to undermine confidence in the rule of law'.[14]

Hence, the desire for efficiency and consolidation of proceedings meant that in many cases Australian and other common law courts refused to stay the proceeding when a third person was a party to the action who was not bound by the arbitration clause. Indeed, a claimant wishing to avoid arbitration could

[11] (2019) 99 NSWLR 419 ('*Australian Health & Nutrition*').

[12] Ibid 439 [81].

[13] *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496, 505–6 [45] (Allsop J) ('*Incitec*').

[14] *Australian Health & Nutrition* (n 11) 439 [81] (Bell P). See also ibid 508 [62].

strategically join a second defendant to the proceeding, confident that a court would be loath to enforce the arbitration clause, and so produce the dreaded fragmented outcome. It was also possible that in the period before the adoption of the *New York Convention* and the *Model Law*, Australian and other common law courts were perhaps less trusting and respectful of arbitration as a dispute resolution mechanism and felt that justice would be better done in any event through local litigation.

The leading English case illustrating the above tendency was *Taunton-Collins v Cromie*.[15] In the context of a suit involving a third party not bound by an arbitration clause, the Court of Appeal considered the need to avoid multiple proceedings and the risk of inconsistent findings as weightier than the concern to hold parties to their arbitration agreement.[16] As recently as 2001, the Queensland Court of Appeal in *Mulgrave Central Mill Co Ltd v Hagglunds Drives Pty Ltd* took an identical approach with concerns again expressed about multiplicity of proceedings and inconsistent findings,[17] as well as '[q]uestions of costs, convenience and finality of outcome'.[18]

Hence, arbitration had almost become optional once a third party was brought into a court proceeding, due to the strong antipathy of courts for parallel proceedings. The problem principally arose from the fact that courts only had a discretion in relation to enforcement of an arbitration clause and more often chose to prioritise procedural efficiency over the parties' bargain. The potential for arbitration to become a leading method of commercial dispute resolution was therefore compromised by this position.

This trend has continued in the context of contemporary stay applications to enforce foreign exclusive jurisdiction clauses,[19] although the possible

[15] [1964] 1 WLR 633.

[16] Ibid 635–6 (Lord Denning MR), 637–8 (Pearson LJ), 638 (Salmon LJ).

[17] [2002] 2 Qd R 514, 530 [25] (McPherson JA), 538–9 [58] (Thomas JA), 541 [74] (Jones J).

[18] Ibid 541 [74] (Jones J). See also *Thomas v Star Maid International Pty Ltd* [1999] FCA 911, [10] (Weinberg J).

[19] See, eg, *Incitec* (n 13) 508–9 [62]–[67] (Allsop J); *A Nelson & Co Ltd v Martin & Pleasance Pty Ltd* [2021] FCA 754, [11]–[12], [24]–[25] (Perram J); *Aratra Potato Co Ltd v Egyptian Navigation Co* [1981] 2 Lloyd's Rep 119, 128 (Brandon LJ, Rees J agreeing at 129, Stephenson LJ agreeing at 129). An anti-suit injunction to enforce a local exclusive jurisdiction clause was refused in *Donohue v Armco Inc* [2002] 1 All ER 749, 760–1 [27], 766 [39] (Lord Bingham, Lord Mackay agreeing at 766 [40], Lord Nicholls agreeing at 766 [41], Lord Hobhouse agreeing at 767 [42]), 774–5 [75] (Lord Scott). Conversely, a stay was ordered due to the low risk of conflicting outcomes between courts in *Carnival plc v Karpik* (2022) 404 ALR 386, 486 [378], 492 [397] (Derrington J, Allsop CJ agreeing at 397–8 [36]–[37]).

adoption in Australia of the 2005 *Convention on Choice of Court Agreements* ('*Convention*')[20] may alter this position. Article 6 of the *Convention* likely precludes a court from relying on factors of convenience, including the presence of third parties to the dispute, as a basis for not enforcing a foreign exclusive jurisdiction clause.[21] A position closer to that which exists under the *New York Convention* for arbitration agreements should emerge.

III Second Phase: Mandatory Referral to Arbitration

After the implementation of the *New York Convention* and the *Model Law* in many common law countries, the picture in relation to third parties and international arbitration agreements changed dramatically. The critical element was the introduction of a mandatory stay and referral to arbitration procedure introduced in art II(3) of the *New York Convention* and art 8(1) of the *Model Law*.

Article II(3) was implemented in Australia in s 7(2) of the *International Arbitration Act 1974* (Cth) ('*IAA*'), which provides that where 'proceedings instituted by a party to an arbitration agreement … against another party to the agreement are pending in a court' and 'involve the determination of a matter that … is capable of settlement by arbitration', on an application by a party to the agreement 'the court shall … stay the proceedings … and refer the parties to arbitration in respect of that matter'.

Article 8(1) of the *Model Law* is in similar but not identical terms, requiring a 'court before which an action is brought in a matter which is the subject of an arbitration agreement' to, 'if a party so requests[,] … refer the parties to arbitration'.

Note that under both provisions a court *must* decline jurisdiction and refer the parties to arbitration where a relevant and valid arbitration agreement exists. The traditional common law discretion to stay proceedings no longer applies. No doubt, part of the reason for introduction of the mandatory referral procedure was to avoid the easy circumvention of arbitration agreements that had previously occurred, such as where non-signatory defendants had been strategically joined to court proceedings by claimants. If, however, arbitration

[20] *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015) ('*Convention*'). The *Convention* has been implemented in the United Kingdom and Singapore: *Civil Jurisdiction and Judgments Act 1982* (UK) s 3D; *Choice of Court Agreements Act 2016* (Singapore).

[21] Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements* (Explanatory Report, 2013) 59 [143].

was to be encouraged and supported as a method of dispute resolution in international commerce, with equal status to litigation, then agreements must be enforced wherever possible.

The effect on applications in Australian courts to stay proceedings in favour of foreign arbitration was palpable. In a series of decisions from the 1990s, courts found themselves compelled to order stays of proceedings, even where third-party non-signatories to the arbitration agreement had also been sued in the same proceedings. The possibility of split or multiple proceedings in respect of the same subject matter therefore became inevitable, a fact acknowledged by Brennan and Dawson JJ (Toohey J agreeing) in *Tanning Research Laboratories Inc v O'Brien* ('*Tanning Research Laboratories*').[22]

Some Australian judges found the removal of their discretionary powers painful and openly lamented the fragmentation of proceedings that ensued from the mandatory stay order when third parties were involved. For example, in *Abigroup Contractors Pty Ltd v Transfield Pty Ltd* the Court saw this as an undesirable result in terms of the administration of justice because the claims were 'inextricably bound up' with each other.[23] Granting a stay would be 'unpractical … [and] likely to lead to multiplicity of proceedings with attendant increases in legal costs and the real risk of inconsistent findings' between tribunals.[24]

Other judges were more sanguine, acknowledging the inconvenience of multiple proceedings but accepting it as a necessary price to be paid for enhanced enforcement of arbitration agreements. For example, in *Hodgetts v The Shipowners' Mutual Protection & Indemnity Association (Luxembourg)*, Fitzgerald P noted that a mandatory stay plays an important role in protecting defendant parties to arbitration agreements from having their rights to arbitrate undermined by a claimant adding a speculative and colourable claim against a non-signatory defendant.[25]

A third response to the multiple proceedings dilemma was to seek to join third parties to a single proceeding by alternative and creative means. So, in *Aerospatiale Holdings Australia Pty Ltd v Elspan International Ltd*, the Court

[22] (1990) 169 CLR 332, 345 (Brennan and Dawson JJ, Toohey J agreeing at 354) ('*Tanning Research Laboratories*').

[23] (1998) 217 ALR 435, 450 [167] (Gillard J).

[24] Ibid 451 [173]. The inconvenience of split proceedings was also acknowledged in *John Kaldor Fabricmaker Pty Ltd v Mitchell Cotts Freight (Australia) Pty Ltd* (1989) 18 NSWLR 172, 191 (Brownie J).

[25] [1999] 2 Qd R 58, 65.

ordered that a person appointed as arbitrator of the dispute between the signatory parties be also appointed referee under the *Supreme Court Rules 1970* (NSW) to hear the remaining claims involving the non-signatory parties.[26] The result would be that all matters could be resolved by the one person at the same time.

Such a strategy may be criticised on the basis that the non-signatories to the arbitration agreement never agreed to a referee procedure and, even more disturbingly, the grounds for judicial review of an arbitral award are narrower than those in respect of a referee's decision.[27] Hence, in such a situation, the risk of inconsistent outcomes remains. In any event, such a consolidation procedure is not available in the case of foreign-seated arbitrations and so its utility and employment has been limited.

Consequently, at least as far as foreign-seated arbitrations were concerned, Australian courts were now required to stay proceedings and refer parties to arbitration, regardless of the existence of any claims by or against third parties. The result was an approach that strongly supported arbitration but at the expense of creating multiple proceedings in respect of related subject matter.

IV Third Phase: Binding Third Parties to Arbitration Agreements

A *The Pre-*Rinehart *Position*

While Australian and other common law courts accepted the logic of the mandatory referral regime introduced by the *New York Convention* and the *Model Law*, the concern for procedural efficiency and avoiding multiple proceedings persisted. A further strategy to address this issue was to seek to bind third-party non-signatories to arbitration agreements, whether such persons were claimants or defendants in litigation.

In common law countries, the scope for holding third parties bound by arbitration clauses has always been limited because of the pervasive influence of privity of contract. Since at least 1857, however, Australian courts have had the power to stay proceedings brought by or against 'any person or persons *claiming through or under*' a party to an arbitration agreement.[28] This provision

[26] (1992) 28 NSWLR 321, 328 (Cole J) ('*Aerospatiale Holdings*'), citing *Supreme Court Rules 1970* (NSW) pt 72 r 3, later replaced by *Uniform Civil Procedure Rules 2005* (NSW) r 20.15.

[27] *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, [212], [240] (Austin J).

[28] *Common Law Procedure Act 1857* (NSW) s 2 (emphasis added).

is an express extension of arbitration agreements to third parties which is not found in either the *New York Convention* or the *Model Law*. While some common law countries such as Australia and England have retained variations of this provision in their current arbitration legislation,[29] others such as Singapore,[30] Hong Kong,[31] New Zealand[32] and Canada[33] (except for British Columbia)[34] have not done so.

Until recently, however, the 'claiming through or under' provision had not dramatically expanded the circumstances in which third parties could invoke or be held subject to arbitration agreements. Both English and Australian courts generally adopted a restrictive approach to determining when a third party was claiming through or under a party, requiring the claim or the defence of the third person to be 'derived' from a party to the agreement.[35] The key element here is that the third person must stand in the shoes of the original party and be able to invoke exactly the same causes of action or grounds of defence that could have been exercised by that party. The third person must be agitating the rights of the party and not its own independent rights.

Perhaps the clearest case of a third person deriving rights or obligations from a party is novation, where the rights and duties of a contract are transferred from one party to a successor entity and a new contract is created. In such a case the third party has entirely replaced the original party.[36] Other third persons that were found to claim through or under were assignees of a

[29] See, eg, *IAA* (n 1) s 7(4); *Commercial Arbitration Act 2010* (NSW) s 2(1) (definition of 'party'); *Arbitration Act 1996* (UK) s 82(2).

[30] *International Arbitration Act 1994* (Singapore) s 2(1). The provision does, however, apply in determining the effect of an award: at s 19B(1).

[31] *Arbitration Ordinance* (Hong Kong) cap 609, s 2(1). Again, the provision does, however, apply in determining the effect of an award: at s 73(1)(b).

[32] *Arbitration Act 1996* (NZ) s 2(1).

[33] See, eg, *International Commercial Arbitration Act*, RSA 2000, c I-5; *International Commercial Arbitration Act*, SO 2017, c 2.

[34] *International Commercial Arbitration Act*, RSBC 1996, c 233, s 2; *Wittman v Blackbaud Inc* [2021] BCSC 2025, [25], [122] (Ahmad J).

[35] *Tanning Research Laboratories* (n 22) 342 (Brennan and Dawson JJ, Toohey J agreeing at 354).

[36] Doug Jones and Janet Walker, *Commercial Arbitration in Australia: Under the Model Law* (Lawbook, 3rd ed, 2022) 103–4 [4.330]; *Smith v Pearl Assurance Co Ltd* [1939] 1 All ER 95, 96–7 (Slesser LJ, Clauson LJ agreeing at 97, du Parcq LJ agreeing at 98).

contract[37] or assignees of a debt arising under a contract,[38] a liquidator of a company (where it resists a claim made by a creditor on the same ground as would have been available to the company),[39] a principal (where an agent, acting within the scope of its authority, has concluded an arbitration agreement on behalf of the principal)[40] and an insurer exercising its rights of subrogation.[41]

Assignment provides a useful illustration of derived rights and obligations. In the English decision *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines*, a third-person non-signatory who received an assignment of a party's earnings in a contract that contained an arbitration clause was held to be bound by the clause when it sought to sue the counterparty in respect of amounts owing under the contract.[42]

Interestingly, the 'claiming through or under' formulation has also been given a type of analogous or 'reflexive' effect[43] in English cases where a third-party non-signatory has commenced a foreign court proceeding in breach of a local arbitration clause and a signatory seeks to restrain the action by an anti-suit injunction. In *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH*, an insurer made payments to a voyage charterer under a policy and then exercised its right to subrogation to sue the time charterer in Brazil under the original voyage charterparty.[44] The Court of Appeal of England and Wales restrained the foreign proceeding based on a London arbitration clause in the charter, finding in effect that the insurer was a person 'claiming

[37] *Shayler v Woolf* [1946] 1 Ch 320, 322–3 (Lord Greene MR, Morton LJ agreeing at 323–4, Somervell LJ agreeing at 324), citing *Arbitration Act 1889*, 52 & 53 Vict, c 49, s 4.

[38] *Rumput (Panama) SA v Islamic Republic of Iran Shipping Lines* [1984] 2 Lloyd's Rep 259, 261–2 (Bingham J) ('*The Leage*').

[39] *Tanning Research Laboratories* (n 22) 341–2 (Brennan and Dawson JJ, Toohey J agreeing at 354), 353 (Deane and Gaudron JJ). A trustee in bankruptcy asserting the rights of a bankrupt estate is also included: *Piercy v Young* (1879) 14 Ch D 200, 207–9 (Jessel MR, Baggallay LJ agreeing at 209–10, Thesiger LJ agreeing at 211).

[40] *Filatona Trading Ltd v Navigator Equities Ltd* [2020] 2 All ER (Comm) 851, 871 [101]–[102] (Simon LJ, Males LJ agreeing at 874 [121], Lewison LJ agreeing at 875 [127]); *Pyxis Special Shipping Co Ltd v Dritsas & Kaglis Bros Ltd* [1978] 2 Lloyd's Rep 380, 384 (Mocatta J).

[41] *Tensioned Concrete Pty Ltd v Munich Re* [2020] WASC 431, [70]–[71] (Martin J).

[42] *The Leage* (n 38) 260–2 (Bingham J).

[43] For the use of this concept in the context of jurisdiction, see *Ferrexpo AG v Gilson Investments Ltd* [2012] 1 Lloyd's Rep 588, 613–25 [128]–[187] (Smith J).

[44] [1997] 2 Lloyd's Rep 279, 283–4 (Hobhouse LJ) ('*The Jay Bola*'). See also *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA* [2005] 2 All ER (Comm) 240, 245–8 [15]–[31] (Colman J).

through or under' the voyage charterer.[45] The insurer had derived its rights and obligations from that party.[46] A similar approach was taken in the context of assignment of rights under a time charter.[47]

Hence, the derived rights and obligations principle has been applied to both stays of local proceedings and injunctions to restrain foreign proceedings. The narrowness of the principle must however be appreciated: it is closely aligned to privity of contract in requiring that the third person be capable of enforcing the same rights or obligations of the original party to the arbitration clause. Hence, 'a common central issue in dispute' is insufficient to constitute a third person as claiming through or under a party under the derived rights test.[48]

Two examples illustrate the point. In *BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd*, a non-signatory defendant shipbroker sought a stay of proceedings based on an arbitration clause contained in a charterparty between a shipowner and charterer.[49] The shipowner claimed that it had been induced by misleading conduct of the broker to enter into the charter.[50] The Court, however, found that the broker was not a person claiming through or under the charterer as it derived no defence from that party.[51] Similarly, in *Mount Cook (Northland) v Swedish Motors Ltd*, a claim by a non-signatory against a signatory to an arbitration agreement was not referred to arbitration where the claim was found to be wholly independent of, and unrelated to, the principal contract in which the arbitration clause was contained.[52] The non-signatory was therefore not relying upon, or deriving any rights from, an original party to the

[45] *The Jay Bola* (n 44) 285–6, 290 (Hobhouse LJ, Morritt LJ agreeing at 291, Scott V-C agreeing at 291).

[46] Ibid 290 (Hobhouse LJ, Morritt LJ agreeing at 291, Scott V-C agreeing at 291).

[47] *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep 99, 100–1 [9]–[11] (Flaux J).

[48] *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 554 [96] (Edelman J) ('*Rinehart*'), citing *Grupo Torras SA v Al-Sabah* [1995] 1 Lloyd's Rep 374, 450–1 (Mance J). A 'mere connection' between the non-signatory and party is insufficient: *City of London v Sancheti* [2009] Bus LR 996, 1003 [30] (Collins LJ, Richards LJ agreeing at 1005 [40], Laws LJ agreeing at 1005 [41]).

[49] (2008) 168 FCR 169, 172–4 [1]–[7] (Finkelstein J).

[50] Ibid 172 [1].

[51] Ibid 177–9 [15]–[27]. The Court also found that that there was insufficient 'proximity' between the third-party broker and the original party to the agreement for the third party to be allowed to enforce the agreement: at 179 [27].

[52] [1986] 1 NZLR 720, 725 (Tompkins J) ('*Mount Cook*').

agreement.[53] More recently, the High Court of England and Wales refused to stay the claim of a non-signatory claimant which was based on duties owed to it directly and individually by the defendant, despite the claim being similar in nature to the parallel cause of action pleaded by the signatory claimant.[54]

It follows equally from the above analysis that a non-signatory parent company guarantor does not generally claim through or under a subsidiary debtor who was a party to the principal loan contract containing an arbitration clause. While there will often be an overlap between the obligations owed to the creditor by debtor and guarantor, with the issues in dispute being the same, the duties remain distinct and independent as a matter of law.[55]

Hence, it was difficult both for a signatory defendant to compel a non-signatory claimant to join an arbitration by staying the claimant's court proceeding and for a non-signatory defendant to obtain the benefit of such a clause by staying a proceeding brought by a signatory. Privity of contract remained a formidable obstacle and fragmentation of proceedings was again accepted as a necessary, if sometimes undesirable, consequence of the mandatory stay procedure.[56]

B *The* Rinehart *Decision*

The derived rights and obligations analysis was, however, emphatically rejected in 2019 by a majority of the High Court of Australia in *Rinehart v Hancock Prospecting Pty Ltd* ('*Rinehart*'), which brought to the fore once again the judicial concern for efficiency and consolidation of dispute resolution proceedings.[57]

[53] Ibid. See also *Heller Financial Services Ltd v Thiess Contractors Pty Ltd* [2000] FCA 802 [13]–[14] (Heerey J) ('*Heller Financial Services*') where a non-signatory's 'independent causes of action' were not stayed.

[54] *Naibu Global International Co plc v Daniel Stewart & Co plc* [2020] EWHC 2719 (Ch), [62]–[65] (Bacon J) ('*Naibu Global International*').

[55] *KNM Process Systems Sdn Bhd v Mission NewEnergy Ltd* [2014] WASC 437, [49] (Martin CJ); *Bruns v Colocotronis* [1979] 2 Lloyd's Rep 412, 418–19 (Goff J); *Rinehart* (n 48) 556–7 [103] (Edelman J); Robert Merkin and Louis Flannery, *Merkin and Flannery on the Arbitration Act 1996* (Informa Law, 6th ed, 2020) 74–5 [§ 6.1.9.2].

[56] While in other jurisdictions, alternative bases of joinder of third parties such as implied consent, group of companies, third-party beneficiary contracts and equitable estoppel have been proposed, such doctrines have not yet been considered by Australian courts: see below nn 162–5 and accompanying text.

[57] *Rinehart* (n 48).

The *Rinehart* case involved a dispute between a trustee and beneficiaries concerning title to mining tenements, which had been settled in a series of deeds of release from liability that each contained an arbitration clause.[58] The third-party companies were not parties to the deeds but had received an assignment of the mining tenements from the trustee.[59] The beneficiaries sued both the trustee and the third-party companies in the Federal Court and both the trustee and the third-party companies applied for a stay of proceedings in favour of arbitration under s 8 of the *Commercial Arbitration Act 2010* (NSW) (implementing art 8 of the *Model Law*).[60] As noted earlier, both a party and a person 'claiming through or under a party' are entitled to a stay to enforce the arbitration agreement.

The majority of the High Court held that the critical question was not whether the third party's defence was derived from the original party to the arbitration agreement, but 'whether an essential element of the defence was or is vested in or exercisable by the party to the arbitration agreement'.[61] In *Rinehart*, it was held that a third party, as an alleged knowing recipient of property in breach of trust or fiduciary duty, was bound by an arbitration clause entered into by the allegedly defaulting trustee on the basis that the defences of both persons shared an 'essential element'.[62] Specifically, there was no breach of trust because the trustee was beneficially entitled to the subject property which it had assigned to the third parties.[63] Further, even if there was a breach of trust, the trustee had obtained releases from liability under the deed and so claimed to be absolved of responsibility for such a breach.[64] Because the third parties also claimed the benefit of such releases as assignees of the subject property in their defence, this was another 'essential element' shared with that of the trustee.[65]

Consequently, given the existence of the arbitration clause between claimant and assignor/trustee, and the legal identity between the defences of assignor and third parties, there was 'no good reason' why the claim against the third

[58] Ibid 523 [1], 524 [3], 525–6 [8]–[11] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[59] Ibid 536–7 [56]–[58].

[60] Ibid 524 [2]–[4], 525 [6]–[7], 536 [56].

[61] Ibid 540 [66].

[62] Ibid.

[63] Ibid 543–4 [73].

[64] Ibid 537 [58].

[65] Ibid 542 [70]–[71].

parties should not be determined in the same forum as the dispute with the assignor.[66] The majority's position was predicated on a policy of resolving claims that share a highly similar legal and factual basis in a single dispute resolution process, to prevent duplicative proceedings with potentially inconsistent results.[67]

Justice Edelman dissented, reasserting the traditional view that for a third person to claim through or under a party, the person must stand in the same position as the party to the arbitration agreement and claim a defence or cause of action available to the original party.[68] According to Edelman J, in the circumstances of *Rinehart*, a third-party knowing recipient of trust property asserted a right that was related to, but strictly independent of, any defence of the trustee.[69] Such a third person did not derive or assert the rights of the original party.[70] His Honour considered that concerns for efficiency and convenience in dispute resolution cannot override the fundamentally contractual and consensual nature of arbitration.[71]

By contrast, the majority in *Rinehart* saw the goal of avoiding multiple and fragmented proceedings as paramount.[72] While in the first phase of judicial decisions considered earlier,[73] common law courts also used consolidation and efficiency reasoning to *retain jurisdiction* despite the presence of an arbitration clause, the High Court in *Rinehart* relied on the same principle to *expand* the scope of arbitration. The majority therefore has achieved a reconciliation of what were previously considered opposing goals: efficiency of dispute resolution *and* extension of the scope of arbitration.

Yet, if the *Rinehart* principle is to remain part of Australian law, two qualifications are suggested. The first is that the 'essential element' test must be rigorously applied to demand that the defences of a third-party non-signatory share an overlapping and significant *legal* element with those pleaded, or likely to be pleaded, by the original party. In that way, a clearly defined connection between

66 Ibid 544 [73].

67 Ibid.

68 Ibid 550 [87], 552–3 [92]–[93], 555–6 [96].

69 Ibid 556 [102].

70 Ibid.

71 Ibid 549–50 [86]–[87]. For a supportive view, see: Clyde Croft, Drossos Stamboulakis and Marilyn Warren, *International and Australian Commercial Arbitration* (LexisNexis, 2022) 157–8 [3.61].

72 *Rinehart* (n 48) 544 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

73 See above Part II.

the rights of the non-signatory and the original party is retained, which maintains some fidelity with the contractual nature of arbitration. So, for example, in *Rinehart* the third parties were relying, as alleged knowing recipients, on the fact that no breach of trust had occurred and, as assignees of property, on the releases in the deed entered into by the assignor-party.[74] The common legal element in the defences of the non-signatory and the party is clear. By contrast, a test based on mere *factual* similarity of defences is too indeterminate and excessively blurs the boundary between the non-signatory and original party. It is of course acknowledged that, in a given case, similarity of both facts and legal defences can be present but the key element is the overlap in legal rights.

The second qualification recalls the point made earlier that a distinction should be drawn between the case of a non-signatory defendant who seeks a stay of a signatory's court proceeding to join an arbitration and the case where a non-signatory's own proceeding is restrained in favour of arbitration. While the *Rinehart* decision can be applauded for increasing the opportunities for willing defendant non-signatories to join arbitrations, it also has the flipside effect of forcing claimants to forgo their right to litigate. A significant access to justice question is raised where a claimant is precluded from suing in its chosen forum due to the operation of an arbitration agreement to which it was not a party and of which it may never have been aware. In the current momentum to extend the reach of arbitration and arrest fragmentation of proceedings, the position of non-signatory claimants should not be ignored.

This consideration is magnified where the claimant may not only be forced to arbitrate but to do so in a foreign location and at substantially greater expense than in a local court. In practice, the effect of a defendant signatory obtaining a stay of a non-signatory court action may be to prevent the complaint being heard in *any* tribunal, given the practical obstacles to arbitrating in a foreign country. Such an observation is even more pertinent where the claimant's cause of action may not be available in a foreign arbitration but could be heard by an Australian court. For example, where parties have chosen foreign law to govern their contract as well as a foreign arbitration clause, the arbitrator may refuse to admit a claim for misleading and deceptive conduct under s 18 of the *Australian Consumer Law*, set out in sch 2 of the *Competition and Consumer Act 2010* (Cth).[75]

[74] *Rinehart* (n 48) 543–4 [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[75] *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45, 108 [241] (Allsop J, Finn J agreeing at 52 [6]–[8], Finkelstein J agreeing at 52 [9]) ('*Comandate*'); *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175, [73] (Hollingworth J).

Hence, while the policy of procedural efficiency and consolidation of dispute resolution is important, it should not be a barrier to justice for third-party claimants. Consequently, the *Rinehart* 'essential element' test should be confined to the case of *non-signatory defendants* who seek to join arbitrations. Since such persons have given their consent to arbitrate through bringing a stay application, a lower threshold for their admission to arbitration is justified. Yet, it is important to note that the existing parties to the arbitration agreement did not consent to arbitrate *with the specific non-signatory*. They only consented to arbitrate *in general*. Hence, despite the non-signatory's willingness to arbitrate, some restriction on joinder should still apply in this case. The *Rinehart* 'essential element' test appropriately reflects this concern.

By contrast, where a non-signatory claimant has commenced court proceedings against a signatory defendant, the consent deficit is much more pronounced. Accordingly, the pre-*Rinehart* position should be preserved in such a case: that is, the claimant should only be considered to claim through or under a party where their claim is derived or inherited from that of an original party. The fully non-consenting status of the claimant must be recognised in a stricter test for joinder. Hence, the non-signatory claimant must be an assignee, liquidator, subrogee, principal or successor in title of the original party for a stay to be granted.[76] Such a model appropriately balances the need for efficiency and centralisation of proceedings with the requirement of consent to arbitration.

C *Distinguishing Claimant and Defendant Non-Signatories*

1 *Other Common Law Jurisdictions*

There is some support in other common law jurisdictions for the application of a different standard of joinder depending upon the status of the non-signatory.

In the United States, for example, the doctrine of equitable estoppel is applied to determine whether third parties may be joined to an arbitration agreement.[77] Estoppel generally takes two forms, depending upon whether the non-signatory is a claimant or defendant.[78] In the first type of estoppel, a claimant

[76] See above nn 37–41 and accompanying text. The decisions referred to above in which non-signatory claimants' actions were not stayed would therefore remain valid under the proposed approach: see, eg, *Mount Cook* (n 52); *Naibu Global International* (n 54); *Heller Financial Services* (n 53).

[77] See generally Andrijana Mišović, 'Binding Non-Signatories to Arbitrate: The United States Approach' (2021) 37(3) *Arbitration International* 749.

[78] *Thomson-CSF SA v American Arbitration Association*, 64 F 3d 773, 779 [12] (Altimari J for the Court) (2nd Cir, 1995).

non-signatory may be compelled to arbitrate where they have knowingly exploited, or directly received a benefit from, an agreement containing an arbitration clause.[79] In such a case, the non-signatory cannot accept the benefit of the contract without the burden of arbitration. The right of the claimant non-signatory to choose its forum and its lack of consent to arbitrate should be given less weight when the third party has benefited from the contract which contains the arbitration clause.

Under the second category of estoppel, a defendant non-signatory is entitled to arbitrate where the issues that it wishes to resolve in arbitration are 'intertwined' with the contract containing the arbitration clause and the non-signatory has close contractual or corporate links with the signatory.[80] This 'intertwined' test bears some resemblance to the 'essential element' formulation in *Rinehart*[81] although, unlike the earlier suggested interpretation of the High Court test,[82] it is less precise and more fact-specific. Such a test has proven generally easier to satisfy than the first version of estoppel, which is appropriate given that in the second version, it is the non-signatory who is seeking to arbitrate.

The point here, however, is not to advocate for the importation of United States estoppel principles into Australian law but rather to show that a leading legal system can draw a principled distinction between consenting and involuntary non-signatories in the context of joinder to arbitration.

Singaporean courts have also shown a concern with involuntary joinder. In *PT First Media TBK v Astro Nusantara International BV* ('*PT First Media*'), the Court of Appeal of Singapore noted that

[79] *American Bureau of Shipping v Tencara Shipyard SPA*, 170 F 3d 349, 353 [5]–[6] (Calabresi J for the Court) (2nd Cir, 1999); *EI DuPont de Nemours & Co v Rhone Poulenc Fiber & Resin Intermediaries SAS*, 269 F 3d 187, 200 [16] (Barry J for the Court) (3rd Cir, 2001).

[80] *Sunkist Soft Drinks Inc v Sunkist Growers Inc*, 10 F 3d 753, 757–8 [4] (Morgan SJ for the Court) (11th Cir, 1993) ('*Sunkist*'), quoting *McBro Planning and Development Co v Triangle Electrical Construction Co Inc*, 741 F 2d 342, 344 [2] (Smith J for the Court) (11th Cir, 1984), quoting *Hughes Masonry Co Inc v Greater Clark County School Building Co*, 659 F 2d 836, 841 [2] n 9 (Cudahy J for the Court) (7th Cir, 1981); *Grigson v Creative Artists Agency LLC*, 210 F 3d 524, 527–8 [4, 5] (Barksdale J for the Court) (5th Cir, 2000); *Choctaw Generation Limited Partnership v American Home Assurance Co*, 271 F 3d 403, 406 (Jacobs J for the Court) (2nd Cir, 2001) ('*Choctaw*').

[81] Vicky Priskich, 'Binding Non-Signatories to Arbitration Agreements: Who Are Persons "Claiming through or under" a Party?' (2019) 35(3) *Arbitration International* 375, 382–4.

[82] See above Part IV(B).

> '[t]he forced joinder of non-parties is … a major derogation from the principle of party autonomy, which is of foundational importance because all arbitrations must proceed *in limine* from an agreement to arbitrate'.[83]

The distinction between forced and consensual joinder was also recognised in *The Titan Unity*:

> Consent is the very foundation of arbitration, without which an arbitral tribunal's authority to hear and determine the dispute is non-existent. If a court orders a joinder notwithstanding the lack of consent, it would force a party to bring its dispute to be adjudicated by a forum which has no jurisdiction to decide the matter from which no enforceable award could be rendered. More fundamentally, the non-consenting party *would be denied its right to access the courts* when it has not waived its right to do so in the form of an arbitration agreement.[84]

The key point again is that involuntary joinder, such as where a non-signatory is compelled by an arbitral tribunal to arbitrate or where a court stays a proceeding brought by a non-signatory claimant in favour of arbitration, engages more serious party autonomy concerns than when a non-signatory party requests arbitration. For in the latter case, the non-signatory has itself given consent to arbitrate and the resistance to arbitration comes from a party already bound by the clause, which logically is less defensible.

A claimant non-signatory's right of access to the courts should not be abrogated lightly. Access by a person to a court of their choice for 'a fair and public hearing' and for the declaration of rights is a key civil right and is recognised in instruments such as the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*.[85] It should not be assumed that a private and confidential arbitral process, particularly when conducted in a distant and expensive location, is the preferred choice of all disputants, particularly one who had no knowledge of the clause until after the dispute arose.

The High Court of Singapore in *The Titan Unity* also suggested an alternative approach to the third-party issue, relying on the '*Kompetenz–Kompetenz*' principle in art 16 of the *Model Law*.[86] In Singapore, this provision confers on

[83] [2014] 1 SLR 372, 438 [188] (Sundaresh Menon CJ for the Court) ('*PT First Media*').

[84] [2014] SGHCR 4, [24] (Shaun Leong Li Shiong AR) (emphasis added) ('*The Titan Unity*').

[85] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1) ('*ECHR*').

[86] *The Titan Unity* (n 84) [39] (Shaun Leong Li Shiong AR).

an arbitral tribunal the power to 'rule on its own jurisdiction', with a right of appeal to the High Court of Singapore if a positive or negative conclusion is reached.[87] The Court suggested that the question of whether a third party is bound by an arbitration clause should first be determined by the arbitral tribunal, rather than the court, under the prima facie test for stay applications.[88] This test provides that if the court finds, on a prima facie basis, that a valid arbitration agreement exists that covers the issues in dispute, then the court should refer the matter to arbitration including any challenges to the scope, validity or existence of the arbitration agreement.[89]

While the prima facie principle now applies in Australian law in respect of applications to enforce both Australian[90] and foreign-seated[91] arbitration agreements, it is not recommended for non-signatory claimant cases. The claimant's right of access to a court dictates that the court, not the arbitral tribunal, resolves this question, particularly since a foreign arbitral tribunal may apply a more expansive law to the joinder question than an Australian court to the prejudice of the claimant.[92] A third-party non-signatory is entitled to have the court in which it has commenced proceedings resolve the question of whether it is bound by an arbitration agreement.

2 *Commentary*

Scholarly commentary is divided on the question of differential treatment of consenting and involuntary non-signatories. Park, for example, supports the above analysis, stating that greater 'scrutiny and … evidence' should be required to force, rather than permit, joinder,[93] given the clear evidence of

[87] In Singapore, the effect of art 16(3) of the *Model Law* has been amended by s 10 of the *International Arbitration Act 1994* (Singapore). Note that in Australian law, the unamended art 16(3) still applies which only allows court appeals from a positive determination of jurisdiction by the arbitral tribunal: *IAA* (n 1) s 16(1).

[88] *The Titan Unity* (n 84) [39]–[40] (Shaun Leong Li Shiong AR).

[89] *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442, 480 [141] (Allsop CJ, Besanko and O'Callaghan JJ) ('*Hancock Prospecting*').

[90] Ibid 480 [141], 481 [145].

[91] *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649, [64]–[69] (O'Callaghan J); *Dialogue Consulting Pty Ltd v Instagram Inc* (2020) 291 FCR 155, 176 [155], 180–1 [188]–[196] (Beach J); *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172, [92]–[94] (Moshinsky J) ('*Freedom Foods*').

[92] Applicable law issues in relation to joinder are later considered: see below Part VII.

[93] William W Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' in Permanent Court of Arbitration (ed), *Multiple Party Actions in International Arbitration* (Oxford University Press, 2009) 3, 23–4 [1.75]–[1.79].

consent to arbitrate in the latter case.[94] While Strong does not expressly distinguish between categories of non-signatory in recommending a liberalising of grounds for third-party joinder, the examples provided show that the author's main concern is to protect voluntary third parties from being excluded from arbitration.[95] Such persons should be allowed to participate in arbitration to vindicate their rights which may be negatively affected if the arbitration proceeds only between signatories.

Objections to the suggested approach have taken two forms. The first view asserts that both types of non-signatory should be treated alike for the purposes of joinder since, even in the case of a voluntary non-signatory, there is a lack of consent. The problem lies in the fact that the signatory to the arbitration clause who is resisting joinder of the non-signatory did not consent to arbitrate with that specific person. It only provided consent to arbitrate with fellow signatories to the agreement.[96] This argument was noted earlier but its flaw is that it unreasonably equates these forms of consent. In principle, it is less objectionable for a person who has already agreed to arbitrate with certain persons to be required to arbitrate with a willing third party, than for a third party to be compelled to arbitrate in circumstances where it gave no consent at all. In any event, as argued earlier, the retention of the *Rinehart* 'essential element' test for non-signatory defendant stay applications assuages this concern regarding consent.

The second objection also suggests that consenting and involuntary non-signatories be treated alike, but in this case with the aim of expanding, not restricting, the scope of joinder.[97] The argument is that the current principles of

[94] Keechang Kim and Jason Mitchenson, 'Voluntary Third-Party Intervention in International Arbitration for Construction Disputes: A Contextual Approach to Jurisdictional Issues' (2013) 30(4) *Journal of International Arbitration* 407, 422–3.

[95] SI Strong, 'Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?' (1998) 31(4) *Vanderbilt Journal of Transnational Law* 915, 981.

[96] See, eg, Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012) 159 [9.59], discussing *Choctaw* (n 80); Hosking (n 4) 534, discussing *Sunkist* (n 80).

[97] See generally Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories' (2017) 8(4) *Journal of International Dispute Settlement* 610 ('Rethinking Consent in International Commercial Arbitration'); Pedro J Martinez-Fraga, 'The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy while Accommodating Economic Globalization a Bridge to Nowhere?' (2013) 46(2) *Cornell International Law Journal* 291; Andrea Lista, 'International Commercial Contracts, Bills of Lading, and Third Parties: In Search of a New Legal Paradigm for Extending the Effects of Arbitration Agreements to Non-Signatories' [2019] (1) *Journal of Business Law* 21.

joinder of third parties to arbitration agreements have excessively focused on consent and privity of contract when instead the aim should be to join all relevant persons who are 'inextricably implicated' in a dispute.[98] Such analysis is similar to the United States' 'intertwined' estoppel doctrine but, unlike the American view, is intended to be applied to both consenting and involuntary non-signatories.[99]

Yet, the fact that an involuntary non-signatory may have been involved in the negotiation or performance of the commercial transaction and may even have been aware of the arbitration agreement, does not overcome the consent deficit. Indeed, for a known third person *not* to have been made subject to an arbitration clause at the time of drafting may suggest that it was consciously excluded. This approach would also dramatically widen the circumstances where an involuntary non-signatory could be bound by an arbitration clause at the expense of the access to justice concerns mentioned earlier.

Those proposing a single test for non-signatories further suggest that such an approach is more consistent with the global trend of supporting arbitration and has the virtue of treating signatories and non-signatories equally.[100] Such a view, however, makes the false equation between binding increasing numbers of third parties to arbitration and enhancement of arbitration as a dispute resolution method. Since arbitration is built on contractual consent, its legitimacy as a dispute resolution tool will be weakened if courts approach joinder in the same way as they approach litigation. The distinctiveness and success of arbitration lies in its recognition of party autonomy at all stages of the process, a quality that would be sacrificed by an excessively expansive approach to third-party joinder. Hence, an approach in stay applications that relaxes the joinder rules for consenting non-signatories but maintains a strict, contract-based model for involuntary non-signatories is preferred.

In the next section, the Australian decisions that have applied *Rinehart* will be examined to assess their consistency with the proposed approach.

[98] Brekoulakis, 'Rethinking Consent in International Commercial Arbitration' (n 97) 612; Martinez-Fraga (n 97) 294.

[99] See above n 80.

[100] Martinez-Fraga (n 97) 306, 315, 317; Brekoulakis, 'Rethinking Consent in International Commercial Arbitration' (n 97) 626. Brekoulakis contends that maintaining narrow arbitral joinder rules is commercially unrealistic and will diminish the attractiveness of international commercial arbitration.

D Rinehart *Applications*

1 Rinehart *Applications: Non-Signatory Defendants*

The first category of cases applying the *Rinehart* principle concerns claims by signatory claimants against non-signatory defendants, with the latter persons seeking a stay in favour of arbitration.

The *Rinehart* decision was applied by the Supreme Court of Queensland in *Bulkbuild Pty Ltd v Fortuna Well Pty Ltd* ('*Bulkbuild*').[101] *Bulkbuild* involved a construction project and claims by a contractor against the principal and the superintendents who had been appointed by the principal to oversee the work and certify payment.[102] The contractor's claim against the principal was for failure to pay for work performed and against the superintendents for negligence in relation to payment certificates.[103] The Court held that both sets of claims should be referred to arbitration under the dispute resolution clause in the contract between the contractor and the principal.[104] The superintendents were persons claiming 'through or under' a party because the claims against them and the principal were 'closely related, and depend[ed] upon findings about the same factual matters'.[105] If the claimant could not succeed against the principal, then it would also fail against the superintendents: it was 'essentially the same case against all parties'.[106] Hence, the overlap between the claims meant that it was 'likely [that] an essential element of the [superintendents'] defence … [would] rely upon the rights vested in the [principal] under the contract'.[107]

As *Bulkbuild* involved a non-signatory defendant seeking a stay of a signatory action, it is consistent with the view advocated above. The essential element test too was properly applied since the defences of both signatory and non-signatory defendant relied upon the same legal rights; there was not simply a factual connection. The same result would also follow if a non-signatory were sued for inducing breach of a contract containing an arbitration clause.[108] Here, the

[101] [2019] QSC 173, [27]–[30] (Bowskill J).

[102] Ibid [1].

[103] Ibid.

[104] Ibid [18], [30].

[105] Ibid [29]–[30].

[106] Ibid [29].

[107] Ibid [30].

[108] See Justice AS Bell, 'Private International Law in Practice across the Divisions: Some Recent Developments and Case Law' (Speech, Supreme Court Judges' Conference, 23

essential element in the non-signatory's defence, which would be shared with the original party to the contract sued for breach, would be that there was no breach of contract.[109] The same shared essential element can be detected in a pre-*Rinehart* case, *AED Oil Ltd v Puffin FPSO Ltd [No 2]*, where a parent company non-signatory, who was a guarantor of its subsidiary's contractual obligations, was entitled to enforce the arbitration clause entered into by its subsidiary, where identical claims were brought against both defendants.[110]

2 Rinehart *Applications: Non-Signatory Claimants*

The next category of applications of the *Rinehart* principle concerns claims by non-signatory claimants against signatory defendants.

The Victorian Court of Appeal decision in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* ('*Flint Ink*') involved a claimant, Lion-Dairy, suing a company, Huhtamaki Australia, for losses to products caused by defective packaging supplied to it by Huhtamaki Australia.[111] The packaging had been manufactured in New Zealand by Huhtamaki New Zealand using inks supplied to it by New Zealand company Flint Ink.[112] Huhtamaki Australia joined Flint Ink as a third-party defendant and Flint Ink sought a stay based on a New Zealand arbitration clause entered into between it and Huhtamaki New Zealand.[113] Hence, a

August 2019) 16 [46] <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell_20190823.pdf>, archived at <https://perma.cc/H4YD-TZTK>.

109 See, eg, *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd* (2018) 130 IPR 527, 543 [87]–[90] (Bathurst CJ, Beazley P agreeing at 544 [93], Emmett AJA agreeing at 546 [104]). See also *King River Digital Assets Opportunities SPC v Salerno* [2023] NSWSC 510 ('*King River*') where a non-signatory was bound by an arbitration clause when sued for aiding and abetting a breach by a signatory of s 18 of the *Australian Consumer Law 2010* (Cth) as set out in sch 2 of the *Competition and Consumer Act 2010* (Cth): *King River* (n 109) [32] (Rees J).

110 [2009] VSC 534, [74] (Judd J). Note that the Supreme Court of Western Australia confirmed that the *Rinehart* (n 48) test contains no requirement of 'proximity' between the third person and the original party to the arbitration agreement: *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [No 13]* [2021] WASC 214, [114]–[115] (Le Miere J), affd *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2022] WASCA 97, [111]–[112] (Quinlan CJ and Beech JA, Vaughan JA agreeing at [305]).

111 (2014) 44 VR 64, 66 [2] (Warren CJ) ('*Flint Ink*'). While this decision pre-dates *Rinehart* (n 48), it employs the same reasoning as the majority in that case: *Flint Ink* (n 111) 69–72 [15]–[29] (Warren CJ), 82–4 [70]–[83] (Nettle JA). This similarity may be explained by the fact that Nettle JA was a member of both Courts.

112 *Flint Ink* (n 111) 66 [2] (Warren CJ).

113 Ibid 92–3 [119] (Mandie JA).

signatory was seeking to restrain a proceeding brought by a non-signatory. Flint Ink argued that Huhtamaki Australia was bound by the arbitration clause as a person 'claiming through or under' Huhtamaki New Zealand.[114] The Victorian Court of Appeal agreed, finding the essential elements of Huhtamaki Australia's causes of action against Flint Ink were the breaches of duties owed by Flint Ink to Huhtamaki New Zealand.[115] The liability of Flint Ink to Huhtamaki Australia was therefore entirely dependent on the facts pleaded in relation to Huhtamaki New Zealand.[116] Applying the *Rinehart* principle, it was not necessary that the cause of action be wholly derived from the original party such as by assignment. All that was required was that the cause of action of the non-signatory and party to the agreement share an essential element.

Respectfully, the stay should not have been granted in *Flint Ink*. First, the claimant was a non-signatory who may have had no knowledge of, or involvement in, the drafting of the arbitration clause, which had been entered into by a related company in another country. Secondly, the non-signatory's action against the third-party defendant was essentially a defensive response to a primary claim being brought against it by Lion-Dairy. The forcible joinder of Huhtamaki Australia to arbitration would therefore cause substantial injustice as the non-signatory would have to contest a closely related dispute in two distinct forums: an Australian court and a New Zealand arbitration tribunal. The cost and inconvenience of these split proceedings is a deterrent to justice. *Flint Ink* was therefore a case where the *Rinehart* dual objective of enhancing arbitration *and* avoiding multiple proceedings was not accomplished. The pre-*Rinehart* derivative test should have been applied to refuse a stay.

A recent decision involving a non-signatory claimant is more borderline. In *Freedom Foods Pty Ltd v Blue Diamond Growers*, claims were brought by members of the Freedom Foods Group Ltd ('FFG') with Freedom Foods Pty Ltd ('FFPL') as signatory to an arbitration clause, and the remaining FFG companies as non-signatories.[117] The FFG claimants sought declarations in court alleging invalidity and breaches of the principal agreement in which the arbitration clause was contained, and that the defendant had engaged in misleading and deceptive conduct.[118] The Court stayed all the proceedings brought by the

[114] Ibid 68 [13] (Warren CJ).

[115] Ibid 71–2 [26]–[28] (Warren CJ), 83 [75] (Nettle JA), 110–12 [148]–[149] (Mandie JA).

[116] Ibid 84 [77] (Warren CJ), 87 [92] (Nettle JA), 111 [149] (Mandie JA).

[117] *Freedom Foods* (n 91) [1]–[5] (Moshinsky J).

[118] Ibid [8].

FFG claimants, finding that the non-signatory FFG companies were claiming through or under FFPL, since all claims and relief sought were 'substantially the same'.[119]

This is a difficult case because, unlike *Flint Ink*, the court proceeding involved both signatory *and* non-signatory claimants who were all part of the same corporate group and whose claims against the defendant were effectively identical. On balance and exceptionally, the stay was properly granted, even though the non-signatory claimants did not strictly 'derive' their claims from a party to the arbitration agreement.

V Fourth Phase: Wide Construction of Clauses and Case Management Stays

A *Wide Construction of Clauses*

In common law countries, including Australia, the trend in recent years has been for courts to provide wide and flexible interpretations of arbitration agreements, with the aim of referring as many of the claimant's claims as possible to arbitration. Narrow constructions of arbitration agreements can again lead to disputes being fragmented between courts and arbitral tribunals: an outcome which is not only inconvenient but may lead to inconsistent outcomes. Courts assume that commercial people who instruct their advisers to draft arbitration agreements desire 'one-stop adjudication' of their disputes. Consequently, in stay applications before Australian courts, both contractual and statutory claims are now routinely construed to fall within the scope of the submission to arbitration.[120] A similar, but perhaps even more generous, approach to the interpretation of arbitration agreements exists in English law after the *Fiona Trust & Holding Corporation v Privalov* decision.[121]

This approach to interpretation has also had an impact on stay applications where third parties are involved. Inspired by the above directive to refer as much subject matter as possible to arbitration, Australian courts have clearly stated that the fact that a matter which is arbitrable may have an effect on non-

[119] Ibid [88].

[120] See, eg, *Comandate* (n 75) 52 [6]–[8] (Finn J), 90–1 [176], 93 [186]–[187] (Allsop J, Finkelstein J agreeing at 52 [9]).

[121] [2007] 4 All ER 951, 957 [8], 958–9 [13]–[15], 960 [21] (Lord Hoffmann, Lord Hope agreeing at 960 [22], Lord Scott agreeing at 964 [36], Lord Walker agreeing at 964 [37], Lord Brown agreeing at 964 [38]), 962–3 [31]–[32], [35] (Lord Hope, Lord Brown agreeing at 964 [38]).

parties to the arbitration agreement is irrelevant to the question of whether a stay should be granted.

In *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd*, a claimant sued two defendants for breach of contract and negligence.[122] The contracts with both defendants contained arbitration clauses but the claimant sought to avoid referral to arbitration in each case on the basis that the interests and rights of third parties may be affected by the arbitration.[123] The Court rejected the argument, finding that where a dispute exists between parties A and B, both bound by an arbitration clause, the only question to consider is whether the matter in dispute falls within the scope of the arbitration clause.[124] The fact that the rights and liabilities of other persons may be impacted by the arbitration, or that there may be an overlap of issues with another dispute involving a third party, does not preclude a stay.[125] Hence, whether a dispute is arbitral or not 'cannot depend on a plaintiff party to an arbitration agreement deciding to claim not only against the counterparty, but also a third party stranger'.[126]

This analysis must be correct, otherwise many commercial disputes would never be referred to arbitration, because of the possible impact on related or distant third parties. The mandatory stay procedure under the *New York Convention* and the *Model Law* would be seriously weakened.[127]

The Western Australian Court of Appeal in *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* recently confirmed the above principles, noting that while matters affecting the rights of third parties can be determined in an arbitration between parties to the arbitration agreement, any proceedings *by or against* a third party must remain in court unless an exception to privity is established.[128] There is consistent Canadian authority.[129]

122 [2015] NSWSC 451, [9] (Hammerschlag J).

123 Ibid [9]–[12], [57].

124 Ibid [64]–[65], [88].

125 Ibid [72], [86].

126 Ibid [88]–[89], doubting *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110, [43] (Steytler P and Newnes AJA).

127 See also *Fitzpatrick v Emerald Grain Pty Ltd* [2017] WASC 206. This case involved a suit by grain growers against an entity responsible for pooling the grain and selling it to purchasers: at [1] (Martin CJ). The fact that not all growers who had contributed grain to the pool were claimants in the dispute did not preclude the dispute being referred to arbitration: at [97]–[99].

128 (2020) 55 WAR 435, 464–5 [152]–[158], 466 [163]–[164], 467 [171], 469 [186] (Quinlan CJ, Beech and Vaughan JJA agreeing at 513 [475]).

129 *IWK Health Center v Northfield Glass Group Ltd* [2016] NSSC 281, [130] (Muise J).

B *Case Management Stays*

Another method of avoiding multiple litigations is the power of common law courts to stay proceedings by or against third parties on case management grounds or in the court's 'inherent jurisdiction'. Such powers are not referred to in the *New York Convention* or the *Model Law* but have been used occasionally when the 'claiming through or under' exception to privity is unavailable but the court considers that the interests of justice require that a stay be nevertheless granted. The existence of the power was acknowledged by Brennan and Dawson JJ (Toohey J agreeing) in *Tanning Research Laboratories* who noted that a court has a discretion to stay any matters not within the scope of the arbitration clause until an award is made on the matter referred.[130] A cited benefit of the approach is that it 'avoids any artificial construction as to the identity of the parties to the arbitration whilst preserving an orderly resolution of the issues in one forum'.[131]

This principle was applied by the Full Court of the Federal Court in *Hancock Prospecting Pty Ltd v Rinehart* ('*Hancock Prospecting*') to stay the claims brought against the third-party companies.[132] The High Court on appeal did not question the correctness of this approach but, as noted earlier, granted a stay of the claims on other grounds. Case management stays have been granted by Australian,[133] New Zealand,[134] Canadian[135] and Singaporean[136] courts in the context of claims by or against third parties. Since the 'claiming through or under' exception to privity no longer exists in New Zealand and Canadian law (apart from in the province of British Columbia) it is possible

[130] *Tanning Research Laboratories* (n 22) 345 (Brennan and Dawson JJ, Toohey J agreeing at 354).

[131] David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 3rd ed, 2015) 234 [7.50]. See also Hosking (n 4) 545, 554.

[132] *Hancock Prospecting* (n 89) 524–5 [332]–[336] (Allsop CJ, Besanko and O'Callaghan JJ).

[133] *Karadag v Samkara Holdings Pty Ltd* [2022] NSWSC 380, [146]–[150] (Ward CJ in Eq).

[134] *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* [2014] NZHC 1681, [54], [97]–[98] (Venning J) ('*Danone*'), affd [2014] NZCA 536, [7], [20] (White J for the Court); *On Line International Ltd v On Line Ltd* (High Court of New Zealand, Master Venning, 4 April 2000) 12–13 [47]–[50].

[135] *Kaverit Steel & Crane Ltd v Kone Corp* (1992) 87 DLR (4th) 129 (Alberta Court of Appeal) 138–40 (Kerans JA for the Court).

[136] *Trinity Construction Development Pte Ltd v Sinohydro Corp Ltd (Singapore Branch)* [2020] SGHC 215, [43]–[44] (Lee Seiu Kin J).

that this remedy may become the main method for resolving stay applications involving third parties in those countries.[137]

In *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-Operative Group Ltd* ('*Danone*'), Venning J of the High Court of New Zealand granted a case management stay where an arbitration proceeding was pending between signatories, but the claimants in the arbitration then sued another related company of the defendant who was a non-signatory.[138] The stay was ordered because the claims in the court proceedings were closely related to those in the arbitration, with significant factual overlap, the claimant was the same in both proceedings and the risk of inconsistent findings was high.[139] Given also that the party seeking the stay was a consenting non-signatory, this result accords with the view expressed earlier that courts should be more generous in restraining litigation in such circumstances.

The case management stay power has however been criticised, again in the context of non-signatory claimants. For example, it is arguably unconscionable that a claimant non-signatory must wait until the arbitration between signatories is completed before it can commence its proceeding and often only then with the permission of the court.[140] Such delay is itself a barrier to justice. A case management stay was indeed refused on this ground by a Singaporean court in *Parmod Kumar Verma v Unique Food Partners Pte Ltd*.[141] Moreover, even if the non-signatory can proceed with its claim post-arbitration, the findings and outcome of the arbitration could seriously impact on its rights or even render its claim redundant.

The above sentiments were strongly echoed by Slicer J of the Supreme Court of Tasmania in *Origin Energy Resources Ltd v Benaris International NV*.[142] His Honour felt that 'convenience or consistency of outcome' were weak justifications for a stay of any kind since the practical effect is to preclude a non-signatory 'from seeking to enforce its rights within this jurisdiction'.[143] For a signatory to assert that proceeding with the arbitration while at the same time restraining the non-signatory's court action would 'practically resolve' the non-

[137] See above nn 32–4.

[138] *Danone* (n 134) [23], [25]–[26], [97]–[98] (Venning J).

[139] Ibid [94], [97]–[98].

[140] Brekoulakis, 'Rethinking Consent in International Commercial Arbitration' (n 97) 634.

[141] [2020] SGDC 254, [59] (Sheik Umar Bin Mohamed Bagushair DR) ('*Parmod Kumar Verma*').

[142] [2002] TASSC 50, [42]–[43], [50].

[143] Ibid [50].

signatory's claim is both speculative and presumptuous. The views of Slicer J are consistent with the main contention of this article that a strong case should be required before an involuntary non-signatory's court action is restrained. Courts should not, therefore, lightly disturb 'the [p]laintiff's right to choose whom and where [it] wants to sue'.[144]

Again, however, the criticism applies with less force when a signatory is restrained from suing a non-signatory as occurred in *Danone* and the Full Court of the Federal Court decision in *Hancock Prospecting*. A signatory claimant can hardly complain about denial of access to justice when, instead of suing the non-signatory in court, it could have allowed the non-signatory to enter arbitration, thus making any case management stay unnecessary.

VI Fifth Phase: The Anti-Arbitration Injunction

Throughout this article, a common theme which has emerged in the jurisprudence of Australian and other common law courts on third parties and arbitration is a concern with the proliferation and multiplicity of proceedings. Specifically, courts have tried, where possible, to avoid proceedings being split between judicial and arbitral tribunals. It was first noted that courts tended to refuse to stay any court proceedings where third-party claimants or defendants were present. Next, in the era where mandatory referrals to arbitration applied, courts sought to avoid fragmentation by creating wider exceptions to privity of contract, construing arbitration clauses widely and using the case management stay power.

More recently, however, a remedy has returned that many had thought had disappeared in the contemporary, pro-arbitration world: the anti-arbitration injunction. Such an order involves a party restraining the commencement or pursuit of an arbitration either in the forum or a foreign country. Similar to the history of stay orders, such injunctions were once routinely granted by common law courts[145] but since the advent of the *New York Convention* and the *Model Law*, they have become more controversial given their direct targeting of the arbitral process.[146] Indeed, in many national arbitration laws, including those based on the *Model Law*, a provision exists that appears to preclude such relief

144 *Parmod Kumar Verma* (n 141) [59] (Sheik Umar Bin Mohamed Bagushair DR).

145 *Doleman & Sons v Ossett Corporation* [1912] 3 KB 257, 273–4 (Farwell LJ); *Lloyd v Wright* [1983] 1 QB 1065, 1075–6 (Dunn LJ).

146 See generally Richard Garnett, 'Anti-Arbitration Injunctions: Walking the Tightrope' (2020) 36(3) *Arbitration International* 347.

entirely, at least in the case of locally seated arbitrations. For example, art 5 of the *Model Law* ('Extent of court intervention') provides: 'In matters governed by this Law, no court shall intervene except where so provided in this Law.'

Despite the seemingly clear message of non-intervention sent by such a provision, common law courts have continued to award anti-arbitration injunctions, most relevantly in the context of proceedings involving third parties.

The decision of Chief Judge Randerson of the High Court of New Zealand in *Carter Holt Harvey Ltd v Genesis Power Ltd* ('*Carter Holt*') is illustrative.[147] *Carter Holt* concerned court proceedings in relation to a 'co-generation' contract between Carter Holt and Genesis and arbitration proceedings between Genesis and Rolls-Royce arising out of a related 'turnkey' contract.[148] Rolls-Royce sought an anti-arbitration injunction on the basis that the existence of concurrent court and arbitration proceedings in respect of similar subject matter amounted to an abuse of process.[149] The Court found that it had jurisdiction to grant the order as there was no matter governed by the *Model Law* under art 5.[150] Because the concurrent court proceeding involved a third-party non-signatory, Carter Holt, the stay power in art 8 of the *Model Law* was not engaged.[151]

What was critical in *Carter Holt* for the grant of the anti-arbitration injunction was the presence of the third-party non-signatory. The troubling implication of the decision, however, is that whenever a third party is involved in concurrent court proceedings that overlap with an arbitration, an anti-arbitration injunction may be ordered to protect its interests. In theory, this approach could lead to a non-signatory deliberately commencing court proceedings that overlap with an existing arbitration and then using the court action as a basis for an anti-arbitration injunction.

This last situation indeed ensued in the decision of the Federal Court of Malaysia in *Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd*.[152] There, the Court upheld an application by a non-signatory to an arbitration clause to

147 [2006] 3 NZLR 794.

148 Ibid 796 [5]–[7] (Chief Judge Randerson).

149 Ibid 797 [9].

150 Ibid 807 [59]–[61].

151 Ibid 806–7 [54], [57]–[59].

152 [2019] 5 MLJ 1 ('*Jaya Sudhir Jayaram*').

restrain pursuit of a Malaysian-seated arbitration.[153] Like *Carter Holt*, the premise of the Court's decision was that the *Model Law* does not apply to non-parties to an arbitration agreement.[154] Consequently, there was no bar to a third party seeking an injunction to restrain a local arbitration. The Court was particularly concerned that a third party would suffer harm to its rights by an arbitration proceeding without its involvement.[155] Concurrent court and arbitration proceedings were also undesirable as they would have increased the risk of inconsistent results.[156]

While all this is true, it is highly questionable whether a third person should be able to opportunistically commence court proceedings that overlap with an existing arbitration and then use the court action as a springboard to injunct the arbitration. The *Model Law* policies of upholding arbitration agreements and deterring court intervention would seem to be more compelling considerations.[157] As asserted earlier, non-signatory third parties should have a right to bring independent claims in court without being compelled to arbitrate, unless their rights they seek to enforce are wholly derived from an original contracting party. In that sense, third parties need the protection of the court from being unfairly dragged into arbitration. It is another thing entirely, however, for a proceeding to be instituted by a third party for the sole purpose of derailing an arbitration between signatories through the issuing of a subsequent injunction. Third parties should not be allowed to interfere with or obstruct valid arbitration proceedings between parties.

Such an approach may of course lead to claims of injustice by third parties on the basis that they cannot stop an arbitration which harms their interests. Yet, such concerns are outweighed by the needs of the *Model Law* in minimising judicial intervention in arbitration and preserving arbitration agreements where possible. If third parties are likely to be affected by issues to be determined in an arbitration, then they can apply to be joined to the proceeding. If their application for joinder is refused, they would be then entitled to commence concurrent litigation. What they should not be able to do, however,

153 Ibid 8 [1]–[3], 12 [15], 43 [98] (Idrus Harun FCJ for the Court).

154 Ibid 22 [41]–[42], 40 [91], citing *Arbitration Act 2005* (Malaysia) ss 8, 10. Sections 8 and 10 of the *Arbitration Act 2005* (Malaysia) are derived from arts 5 and 8 respectively of the *Model Law* (n 7).

155 *Jaya Sudhir Jayaram* (n 152) 31 [69] (Idrus Harun FCJ for the Court).

156 Ibid 28–30 [59]–[67].

157 Garnett (n 146) 366–7.

is restrain parties to a valid arbitration agreement from pursuing their rights in arbitration.

VII Sixth Phase: The Unexplored Applicable Law Dimension

Finally, a largely unexplored issue in Australian jurisprudence, which has the potential to expand the circumstances in which non-signatories may be bound by an arbitration clause, is the impact of applicable law or choice of law rules. In this article, the assumption has been that only principles of Australian law will apply to determine the question of whether a third party is bound in the context of a stay application in an Australian court. If, however, the case contains a cross-border element, for example, one of the parties is a foreign corporation or the seat of the arbitration is in another country, the possibility of a foreign law applying to the issue arises.[158]

Under current Australian law, however, this pathway would seem excluded. According to the decision of the Full Court of the Federal Court in *Trina Solar (US) Inc v Jasmin Solar Pty Ltd* ('*Trina Solar*'), the question of whether a third person is a party to, or otherwise bound by, an arbitration clause is classified as a matter of formation of contracts and governed by the law of the forum.[159] *Trina Solar* involved an application for leave to serve originating process out of the jurisdiction in the context of an agreement to arbitrate in New York, rather than a stay application under s 7(2) of the *IAA*.[160] The Court applied Queensland law to determine the question of whether a third party was bound by the agreement.[161]

The consequence of this approach is that potentially wider rules of joinder under foreign law such as implied consent,[162] the group of companies

[158] For support of the view that 'transnational substantive rules', rather than applicable law principles, should be applied to resolve joinder questions, see Stavros L Brekoulakis, *Third Parties in International Commercial Arbitration* (Oxford University Press, 2010) 13 [1.62]–[1.63].

[159] (2017) 247 FCR 1, 14 [45]–[46] (Greenwood J), 27–8 [126]–[133] (Beach J, Dowsett J agreeing at 3 [1]) ('*Trina Solar*').

[160] Ibid 25 [108]–[113] (Beach J).

[161] Ibid 5 [9], 14 [46] (Greenwood J), 28 [133] (Beach J, Dowsett J agreeing at 3 [1]). Note that Greenwood J would have applied the law governing the arbitration agreement to the issue of formation, had it arisen on a stay application under s 7(2) of the *IAA* (n 1): ibid 21 [84].

[162] See, eg, *The Titan Unity* (n 84) [35] (Shaun Leong Li Shiong AR).

doctrine,[163] third-party beneficiary contracts[164] and equitable estoppel[165] cannot be applied in an Australian court, which means that the *Rinehart* test has exclusive application. Of course, as noted earlier, such doctrines could alternatively be adopted by Australian courts in development of the Australian common law on joinder of third parties, but so far there is no sign of such a trend.

Interestingly though, the Full Court in *Trina Solar* acknowledged that a different applicable law rule would apply at the stage of recognition and enforcement of a foreign arbitral award in Australia under s 8(5)(b) of the *IAA*.[166] Section 8(5)(b) provides that enforcement 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'. The Court accepted that validity in this context would embrace the question of whether an arbitration agreement bound a third party,[167] a view consistent with that taken by the Supreme Court of the United Kingdom in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*[168] and the Court of Appeal of Singapore in *PT First Media*.[169] Consequently, if enforcement of a foreign award is sought in Australia and an award debtor argued that the arbitration agreement was invalid because it had been improperly joined to the arbitration, foreign law may determine that question. This avenue would allow potentially more expansive doctrines of joinder of third parties to arbitration agreements to be applied by Australian courts.

Yet, in the context of stay applications in Australian courts, *Trina Solar* demands that Australian law apply in every case to third-party joinder issues.

[163] See, eg, *Dow Chemical France v Isover Saint Gobain* (Interim Award, International Chamber of Commerce, Case No 4131 of 1982, 23 September 1982) 136–7. This doctrine 'forms no part of English law': *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603, 612 [59] (Langley J).

[164] See, eg, *Contracts (Rights of Third Parties) Act 1999* (UK) s 1; *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2004] 1 All ER (Comm) 481, 489 [31]–[33], 494 [52] (Colman J).

[165] See above nn 78–80.

[166] *Trina Solar* (n 159) 20–1 [81]–[82] (Greenwood J), 37–8 [181]–[182] (Beach J, Dowsett J agreeing at 3 [1]).

[167] Ibid.

[168] *Dallah* (n 2) 802 [2], 807–8 [18], 812 [29] (Lord Mance JSC, Lord Hope DPSC agreeing at 849 [149], Lord Clarke JSC agreeing at 851 [163], Lord Saville JSC agreeing at 851 [162]), 828–9 [77] (Lord Collins JSC, Lord Hope DPSC agreeing at 849 [149], Lord Clarke JSC agreeing at 851 [163], Lord Saville JSC agreeing at 851 [162]), 849–50 [155] (Lord Saville JSC).

[169] *PT First Media* (n 83) 426–7 [156]–[158] (Sundaresh Menon CJ for the Court).

By contrast, in England and other common law countries, the courts have held that the same law should generally be applied at the stay stage as at the time of enforcement of the award to create a symmetry of applicable law within the *New York Convention*. The principal applicable law rule applied to the question of whether a third party is bound by an arbitration agreement is the law governing that agreement.[170] Rather than characterising this issue as a question of formation of contract, instead it should be characterised as a matter relating to the 'party scope' of the arbitration clause. Since questions of subject matter scope are referred to the law governing the arbitration agreement, so too should issues of party scope. The law governing the arbitration agreement will be the same law as that which governs the principal contract, at least where the latter law has been expressly chosen.[171]

The English position on applicable law for third parties and arbitration agreements has, however, gone beyond applying the law governing the arbitration agreement in certain cases. For example, civil law countries commonly recognise a doctrine of universal succession whereby after a company subsumes by merger another company, all rights and obligations of the former company are automatically transferred to the new entity. In determining whether the new entity is bound by an arbitration clause entered into by the predecessor, English courts have applied the law of the place of incorporation of the original signatory company (the *lex incorporationis*).[172] Such law is the means by which the purported transfer of rights and obligations has occurred, which includes the arbitration clause. This law is considered to have a closer connection to the issue of joinder than the law governing the arbitration agreement.

Another decision in this category, *Egiazaryan v OJSC OEK Finance* ('*Egiazaryan*'), concerned a Russian subsidiary who was a signatory to an arbitration agreement, but whose parent company was not.[173] Under English law, as the law governing the arbitration agreement, the parent company could not be joined to the agreement but under Russian law the parent company was liable for its subsidiary's breaches of contract and so could be made a party to

[170] *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2022] 2 All ER 911, 918 [18], 926 [53] (Lord Hamblen and Lord Leggatt for the Court) ('*Kabab-Ji*'); *Lifestyle Equities CV v Hornby Street (MCR) Ltd* [2022] Bus LR 619, 642 [112] (Lewison LJ, Macur LJ agreeing at 639 [92]) ('*Lifestyle Equities*').

[171] *Kabab-Ji* (n 170) 920–1 [28], 922 [33], 922–3 [35]–[36] (Lord Hamblen and Lord Leggatt for the Court).

[172] *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964, 969–71 (Longmore J).

[173] [2017] 1 All ER (Comm) 207, 210–12 [1]–[6] (Burton J).

the arbitration clause.[174] Again, the Court applied the law of the place of incorporation of the signatory party to resolve the joinder question.[175]

By contrast, in a very recent case involving infringement of a trademark, a majority of the Court of Appeal of England and Wales applied the law governing the arbitration agreement to the joinder question. *Lifestyle Equities CV v Hornby Street (MCR) Ltd* involved a claimant owner of trademarks, Lifestyle Equities, who had acquired the rights by assignment from a company, BHPC.[176] BHPC had previously entered a co-existence agreement with another company, SBPC, where each party consented to the other using their respective marks.[177] The agreement contained a California arbitration clause.[178] Lifestyle Equities brought a claim in the English courts against SBPC for infringement of trademarks and SBPC sought a stay, arguing that Lifestyle Equities was bound by the arbitration clause in the co-existence agreement.[179] A majority of the Court of Appeal applied Californian law as the law governing the arbitration agreement to this question, on the basis that the issue related to the scope of such agreement.[180] The Court distinguished *Egiazaryan* on its facts.[181]

Under the English position on applicable law, there is clearly substantial scope to apply foreign law principles on joinder of non-signatories. In Australia, however, unless the approach in *Trina Solar* is reconsidered, such possibilities will remain hypothetical, at least in the context of stay applications.

VIII Conclusion

This article has examined the question of third parties and international commercial arbitration through the lens of court applications to restrain litigation in favour of arbitration and anti-arbitration injunctions. While the position of third parties has been much debated in the literature, less attention has been drawn to the critical role of the courts in the process and the significance of the issue for judicial-arbitral relations more generally.

174 Ibid 211–12 [6].

175 Ibid 218 [21]. Merkin and Flannery (n 55) agree that the law governing the arbitration agreement does not have exclusive application: at 70 [§ 6.1.9], 524 [§ 46.10.1].

176 *Lifestyle Equities* (n 170) 623 [11] (Snowden LJ).

177 Ibid 622 [7]–[8].

178 Ibid 623 [10].

179 Ibid 624 [16]–[18].

180 Ibid 642–3 [110]–[113] (Lewison LJ, Macur LJ agreeing at 639 [92]).

181 Ibid 642–3 [113]–[114] (Lewison LJ, Macur LJ agreeing at 639 [92]).

Initially, the presence of third parties in litigation before common law courts had the effect of defeating the enforcement of arbitration agreements as courts strove to avoid multiple and fragmented dispute resolution across different forums. Yet, as the status of arbitration agreements rose after the adoption of the *New York Convention* and the *Model Law*, courts were now compelled to enforce arbitration agreements, even where the interests of third parties were affected.

Judicial concerns for the efficiency of dispute resolution did not disappear, however, as courts devised new ways of marrying the contractual nature of arbitration with the need to centralise proceedings in a single forum. The most important basis for joining third parties to arbitrations in Australian law has been the 'claiming through or under' exception in the international and domestic arbitration legislation. While initially the provision was given a restrictive interpretation, the High Court in *Rinehart* has dramatically altered the position. On its face, the decision appears to be both pro-arbitration and pro-efficiency in that it expands the reach of arbitration while minimising the risk of multiple proceedings, goals that were once considered incompatible.

Third parties, however, cannot be treated in a monolithic manner. Specifically, non-signatory claimants in litigation should have their right to court adjudication respected and so should only be forced to arbitrate in exceptional circumstances, namely, where their claims are wholly derived from a party to the arbitration agreement. Non-signatory defendants stand in a different position, however, because of their willingness to arbitrate, and so can be subject to more liberal rules of joinder, such as the *Rinehart* 'essential element' test. While courts are now facilitators and supporters of arbitration, this task should be performed with the fundamental principles underlying arbitration, that is, consent and party autonomy, in mind. Encouragement of arbitration should not mean undue expansion to embrace all relevant or connected parties to a dispute. Establishing different tests of joinder for consenting and non-consenting signatories can hopefully assist in achieving this goal.

Also, while this article has recognised the need to protect third parties' rights of consent and access to justice, such persons equally should not be able to use the courts to undermine the arbitral process. Specifically, courts should hesitate strongly before granting anti-arbitration injunctions which seek to protect concurrent litigation opportunistically filed by third parties.

In conclusion, courts play a critical role in managing the relationship between third parties and international commercial arbitration. The continued

success and legitimacy of arbitration demands that the role be performed with an awareness of the interests of all relevant persons.