THE COURTS AND ARBITRATION (1 HOUR SESSION)

JUSTICE KRISTINA STERN[1]

Court of Appeal, Supreme Court of NSW

I ISSUES ARISING WITH CONCURRENT ARBITRAL AND COURT PROCEEDINGS

It is by no means uncommon for court and arbitral proceedings, relating to the same or overlapping subject matter, to intersect. This situation may give rise to difficult questions of both substantive law and case management for a number of different reasons. In this paper I propose to focus only upon two issues:

- The circumstances in which there should be a mandatory (as opposed to discretionary) stay of curial proceedings because of overlap between curial and arbitral proceedings
- The circumstances in which a party to curial proceedings should be found to be claiming through or under a party to arbitral proceedings, such that a curial matter should be referred to arbitration even though the party raising the matter is not themselves a party to the arbitration agreement

Before turning to some of the issues that arise, some points should be made by way of introduction.

First, whilst the Commercial Arbitration Acts[2] and the *International Arbitration Act 1974* (Cth) require that, subject to certain exceptions, arbitral awards are to be recognised and enforced by courts, that does not alter the fact that arbitral proceedings are premised upon contractual rights, an arbitrator's authority is contractual in nature, and the making of an arbitral award discharges the parties former rights and creates a new charter by reference to which the parties' legal rights

1 I am indebted to Francesca Spry for her research and assistance which contributed significantly to this paper.

2 *Commercial Arbitration Act 2010* (NSW), *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), *Commercial Arbitration Act 2011* (VIC), *Commercial Arbitration Act 2011* (SA), *Commercial Arbitration Act 2011* (TAS), *Commercial Arbitration Act 2012* (WA), *Commercial Arbitration Act 2013* (QLD), *Commercial Arbitration Act 2017* (ACT), hereafter "Commercial Arbitration Acts".

and obligations are in the future to be decided. The former rights of the parties are discharged in this way by an accord and satisfaction.[3] This consensual character of arbitral proceedings provides context for the issues discussed in this paper.

Second, this is an area in which international jurisprudence needs to be considered given that, as held by Stewart J in *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company*[4] (as regards the *International Arbitration Act* but with equal application to some provisions in the Commercial Arbitration Acts) the New York Convention[5] and the UNCITRAL Model Law[6] should be interpreted "with the aim of achieving international uniformity in their interpretation" and "[d]ue regard should be paid to reasoned decisions of the courts of other countries where their laws are either based, on, or take their content from, international conventions such as the New York Convention and the Model Law". However, the legislative provisions which identify that a party who is claiming "through or under" an arbitral party do not themselves derive from either the New York Convention or the UNCITRAL Model Law. Thus, it could be suggested that those provisions fall outside of this principle.

Third, the resolution of those issues can be complicated by practical impediments, such as a lack of information available to the court as to what has or will be occurring in the arbitral proceedings, the related issue of confidentiality as regards material prepared for or received in the arbitration and the discoverability of documents from the arbitral proceedings in the curial proceedings. Under the Commercial Arbitration Acts confidential information in relation to the arbitral proceedings is protected, so the court may be limited as to the information that is available to it, for example, as to the nature of the claims made in ongoing arbitral proceedings, as to the extent to which claims are being enforced and on what basis, and as to what evidence is relied upon in support of the claims. Whilst there are circumstances under ss 27F and 27G of the Commercial Arbitration Acts where confidential information may be disclosed, this can lead to an additional level of complexity. There is a further practical impediment which is that the timing of arbitral proceedings can be, to some extent, dependent upon the will of the parties to those proceedings, particularly where those parties may share a particular forensic objective.

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3 See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 at [9] (French CJ and Gageler J) at [78] (Hayne, Crennan, Kiefel and Bell JJ).

4 (2021) 290 FCR 298; [2021] FCAFC 110 at [18] (Allsop CJ and Middleton J agreeing).

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

6 UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended on 7 July 2006).

Fourth, there may also be difficult choice of law questions involved, such that the curial proceedings and the issues in the arbitral proceedings, and construction of the arbitration agreement itself, may turn on different bodies of laws.

The issues which I propose to address, necessarily briefly, are those arising when an application is made for a mandatory referral of an arbitral party, or a non-arbitral party who is said to be an arbitral party on the basis that they claim "through or under" an arbitral party.[7] Given the breadth of the topic, I propose only to address some recent authorities and academic commentary on some of the issues. The latter issue, namely the effect of arbitration agreements on non-signatories, has been described by Lord Collins in the UK Supreme Court as "[o]ne of the most controversial issues in international commercial arbitration."[8] Commentators have also identified this as an issue upon which "courts and tribunals internationally conflict and divide" and describe this as eroding the commercial certainty offered by arbitration[9] and as "one of the most contentious and challenging issues in international commercial arbitration"[10].

II REFERRAL OF A MATTER THE SUBJECT OF AN ARBITRATION AGREEMENT: WHAT IS REFERRED?

A Background

The starting point for consideration of this issue in Australia is s 8 of the Commercial Arbitration Acts, which is uniform legislation relating to domestic commercial arbitration in each of the states and territories of Australia, largely based upon the UNCITRAL Model Law.

Section 8 provides:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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7 Commercial Arbitration Acts, s 8.

8 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 at [105] ("*Dallah*").

9 George Napier, 'The "Non-Signatory" Dilemma in International Commercial Arbitration: An Inconsistent International Landscape' (2023) 32 *Australian Dispute Resolution Journal* 232.

10 Richard Garnett, 'Third parties and International Commercial Arbitration: Reframing the Debate' (2023) 47(1) *Melbourne University Law Review* 154.

(2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Whilst the language is of referral, the way in which referral is effected is by ordering a stay of the curial proceedings to the extent of the matter the subject of an arbitration agreement.

There is a broadly analogous provision in s 7(2) of the *International Arbitration Act* (formerly called the *Arbitration (Foreign Awards and Agreements) Act 1974* (Cth)). These provisions are both based upon art 8 of the UNCITRAL Model Law. The international context for these provisions is art II(3) of the New York Convention (included as Sch 1 to the *International Arbitration Act*), noting that *the International Arbitration Act* was enacted to give effect to Australia's obligations under the New York Convention.

B The circumstances and consequences of referral

A request that a matter be referred to arbitration may be made by any party to the arbitration agreement (or person falling within the extended definition of party in the Commercial Arbitration Acts) but does not have to be a party to the particular controversy that is to be referred.[11]

If an application is made, referral is mandatory – this is not a matter of discretion under the s 8 of the Commercial Arbitration Acts. However, it was recently held by the Privy Council, in the context of Cayman Island provisions based on the New York Convention and the UNCITRAL Model Law, that:[12]

> "…the court could refuse an otherwise mandatory stay if the applicant has no real or proper purpose for seeking the stay. That could include not only an application for a stay in relation to issues that were peripheral to the legal proceedings but also an application that amounted to an abuse of process … There may be circumstances in which a party seeks a stay for an improper purpose and it would be contrary to justice if the court could not act to prevent an abuse of process…"

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11 *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2022] WASCA 97 at [141] (Quinlan CJ and Beech JA) at [386] (Vaughan JA) ("*DFD Rhodes*").

12 *FamilyMart China Holding Co Ltd (Respondent) v Ting Chuan (Cayman Islands) Holding Corporation (Appellant)* [2023] UKPC 33 at [64] ("*FamilyMart*").

Lord Hodge, who gave the judgment of the Privy Council, also disagreed with the statement of the English and Welsh Court of Appeal in *Republic of Mozambique (acting through its Attorney General) v Credit Suisse International* that "the practical futility of a stay will in all circumstances be irrelevant".[13]

It is only proceedings involving one or more parties to the arbitration (including within the extended definition of parties that I will shortly address) that can be stayed under s 8. That, of course, leads to potential dislocation of curial proceedings in two ways:

(1) because part only of the curial proceedings may be stayed. The obvious issue is then what is to be done with the issues and parties remaining in the curial proceedings; and

(2) because there may well be overlapping questions both of fact and law being determined in the arbitral and curial proceedings, giving rise potentially to issue estoppels. That gives rise to difficult questions as to timing and discretionary stays of those matters which have not been referred to arbitration. In this regard, the Western Australian Court of Appeal has held that the availability of issue estoppels may be a matter of some weight potentially supporting an application for a discretionary stay, albeit that the Court made it clear that close attention had to be given to the ways in which the relevant issues would arise in the curial proceedings in order to ascertain whether there was in fact a meaningful risk of issue estoppels arising and the consequences of any issue estoppel arising.[14]

Even if a court refers the parties to arbitration, the court cannot compel the parties to arbitrate.[15] As Emmett J held in *Hi-Fert*, the effect of a referral (through the mechanism of a stay) is that:[16]

> "…if the dispute is to be resolved it will be necessary for it to be referred to arbitration. If the plaintiff chooses not to refer the dispute to arbitration, the claim could not otherwise be pursued. On the other hand, the refusal of a defendant to participate in a

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13 *Republic of Mozambique (acting through its Attorney General) v Credit Suisse International* [2021] EWCA Civ 329; [2022] 1 All ER Comm 235 at [64] ("*Mozambique*").

14 *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77(S) at [135]-[174] (Beech and Vaughan JJA, Quinlan CJ agreeing at [5])

15 See eg *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 3*) (1998) 86 FCR 374 at 393-394 (Emmett J) ("*Hi-Fert*"); *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* [2020] WASCA 77 at [267] (Quinlan CJ, Beech and Vaughan JJA agreeing on this issue) ("*Hancock Stay Appeal*").

16 *Hi-Fert* at 394.

> reference to arbitration commenced by the plaintiff could never constitute a failure to comply with a court order. The consequences of not participating, once duly notified of the reference, is simply that an award may be made in absentia."

This gives rise to issues of particular resonance where a litigant's claim is referred to arbitration because they fall within the extended definition of "party" in the Commercial Arbitration Acts but they are not a party to the arbitration agreement. They may not in those circumstances be in a position to compel the arbitral parties to arbitrate their claim, arbitration being a consensual process. There also may be complications associated with Emmett J's finding that the solution in those circumstances is simply to go ahead with an arbitration without the other party's participation, particularly if there is another arbitration on foot between the other arbitral parties.

An issue might arise as to whether the litigant could then return to court to ask that the stay be lifted. It may be that a stay could be lifted on the basis that the arbitration agreement was incapable of being performed in the circumstances such that the basis for the stay was not established.

C What is a matter which is the subject of an arbitration agreement?

The key question which arises is whether, and if so the extent to which, "an action is brought in a matter … is the subject of an arbitration agreement". The leading authority as to the meaning of "matter" in this context is *Tanning Research Laboratories v O'Brien Inc*.[17] The case involved a contract of sale between Tanning (a Florida corporation) and Hawaiian Tropic Pty Ltd which was in liquidation. The contract had an arbitration clause. Tanning had sought to prove in the winding up and the liquidator rejected the proof of debt. Tanning sought an order in the Supreme Court of NSW that the liquidator's decision be reversed and at first instance the Court varied the liquidator's rejection and to a limited extent allowed Tanning's proof of debt.

On appeal, the liquidator sought to have the matter referred to arbitration. Tanning argued that the "matter" was whether the indebtedness of Hawaiian should be admitted by the liquidator in the winding up, and that that matter was not capable of settlement by arbitration. The Court rejected that contention and found that a decision as to the admission of the debt in the winding

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17 (1990) 169 CLR 332 ("*Tanning*").

up in this case depended entirely upon the amount, if any, enforceable as a debt for goods sold and delivered under a licence agreement between Tanning and Hawaiian. That was the relevant matter and it was capable of settlement by arbitration, and thus referred to arbitration, notwithstanding that were residual issues (namely whether the liquidator's decision should be reversed) to be determined by the Court.[18]

In that case the Court was considering s 7(2) of *the Arbitration (Foreign Awards and Agreements) Act* which provided for a stay on application of a party where "the proceedings involve the determination of a matter that … is capable of settlement by arbitration". Justices Deane and Gaudron found that to be such a matter:[19]

> "requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy. The words 'capable of settlement by arbitration' indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power."

In *Rinehart v Hancock Prospecting Pty Ltd*[20] where the key issue was whether disputes as to the validity of the arbitral agreement were themselves the subject of the arbitration clause for the purpose of s 8 of the Commercial Arbitration Acts, Kiefel CJ, Gageler, Nettle and Gordon JJ, having referred to *Tanning,* said that it was sufficient for a matter that the defence puts in issue:[21]

> "among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy".

As has subsequently been observed[22] the meaning of the judgment in *Tanning* as to this was not controversial in *Rinehart*.

Since *Rinehart*, there has been little dispute in Australia as to the following:

1) The emphasis under the Commercial Arbitration Acts is upon "the voluntary submission by parties of their disputes to arbitration" and the mandatory nature of s 8

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18 *Tanning* at 343, 344-345 (Brennan and Dawson JJ, Toohey J agreeing) at 350 (Deane and Gaudron JJ).
19 *Tanning* at 351.
20 (2019) 267 CLR 514 (*"Rinehart"*).
21 *Rinehart* at [68].
22 See *FamilyMart* at [95] (Hodge LJ).

of the Commercial Arbitration Acts ensures that the parties to an arbitration agreement are "held to their bargain".[23]

2) As held in *Hancock Prospecting Proprietary Limited v Rinehart*[24], "any rigid taxonomy of approach" and "the labels 'prima facie' and 'merits' approach" are unhelpful to determining issues on an application under s 8 of the Commercial Arbitration Acts. The Court found that "broadly speaking", but with some qualification, aspects of the "prima facie" approach to determining matters in an application under s 8 "have much to commend them" but "it is difficult to see how the Court can exercise its power under s 8 without forming a view as to the meaning of the arbitration agreement" and "it may be that if there is a question of law otherwise affecting" the issue "it might be less than useful for the Court not to deal with it."[25] Rather, in determining a dispute under s 8 of the Commercial Arbitration Acts, the court must:[26]

    a. Characterise the boundaries of the dispute on the material available to assess whether it can be seen to be the subject of the arbitration agreement;

    b. Then construe the relevant clause of the arbitration agreement, "at least to the point of being satisfied that the disputes forming the matter are the subject of the agreement, or not";

    c. Not every legal question about the rights and obligation of the parties need be, or should be, decided by the court. Otherwise the practical and effective operation of s 8 would be undermined;

    d. If there is "no sustainable argument that a matter or dispute can be characterised as falling within the arbitration agreement, it should not be referred to arbitration", but "it would generally be wrong for the Court to examine an argument in the form of summary disposal application, and, if it were thought that an asserted case, in terms otherwise falling within the scope of the agreement, was sufficiently weak not to be 'sustainable', not to refer the matter to arbitration."

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23 *Hancock Stay Appeal* at [250] (Quinlan CJ).
24 (2017) 257 FCR 442 ("*Rinehart FFC*").
25 *Rinehart FFC* at [145] (Allsop CJ, Besanko and O'Callaghan JJ).
26 *Rinehart FFC* at [146]-[149].

3) "Generally speaking… it is not appropriate for a court considering an application for a stay under s 8 to consider the merits or arguability of the parties' contentions in the dispute said to constitute a matter which is the subject of an arbitration agreement", although that position is not without "possible exception"[27]. For example, the particular language of the arbitration clause in question may, as was in the case in *Tianqi*, require that the merits of the particular claim be considered.

4) Arbitration clauses should be interpreted by orthodox principles of interpretation.[28] As to construction of an arbitral clause, context will almost always tell one more "than textual comparison of words of a relational character".[29] The starting point is that the clause should be construed to seek to discover what the parties actually wanted and intended to agree to, by reference to language, the circumstances known to the parties and the commercial purpose or objects to be secured.[30] In *Lepcanfin*, Bell CJ endorsed the following passage from *Rinehart FFC*:[31]

> "The existence of a 'correct general approach to problems of this kind' does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument (Gleeson CJ in *Francis Travel* at 165); another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as 'under' or 'arising out of' or 'arising from'. None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same common-sense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it."

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27 *Tianqi Lithium Kwinana Pty Ltd v MSP Engineering Pty Ltd (No 2)* (2020) 56 WAR 169 at [85]-[86] (Buss P, Murphy and Mitchell JJA) ("*Tianqi*").

28 *Rinehart* at [18].

29 *Rinehart FFC* at [193] cited with approval in *Rinehart* at [26].

30 *Lepcanfin Pty Ltd v Lepfin Pty Ltd* (2020) 102 NSWLR 627 at [79]-[80] (Bell CJ, Payne and McCallum JJA agreeing) ("*Lepanfin"*).

31 *Rinehart FFC* at [167] in *Lepcanfin* at [93].

5) A matter the subject of an arbitration agreement may be raised in a number of ways, including in a claim, a defence, or a reply or in submissions. By way of example, it could be raised in contentions as to whether or not a particular document is privileged – as has recently happened in the Hope Downs litigation in Western Australia where a contention was made that the iniquity exception to privilege is said to raise a matter that should be referred to arbitration.[32]

1 Recent UK jurisprudence

There are two recent decisions on this topic in the UK, both of which include a detailed survey of jurisprudence in common law jurisdictions. The relevant provision there is s 9 of the *Arbitration Act 1996* (UK) which provides:

> **Stay of legal proceedings.**
>
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

In *Mozambique*, there were a number of supply contracts (between the Republic and a supplier) and also lending contracts entered into (between the Republic and lenders) to fund those supplies. The supply contracts contained an arbitration agreement. Proceedings were brought against the lenders, and some employees of the lenders, alleging a conspiracy involving bribes paid by the supplier including to employees of the lenders. The lenders' employees had in fact pleaded guilty to federal offences in the US. The lenders then brought third party proceedings against the supplier. The supplier then applied for a stay of the proceedings on the basis that the Republic's claims fell within the arbitration agreements in the supply contracts.

Lord Hodge (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Richards agreed) reviewed the jurisprudence in the UK, Hong Kong, Singapore, Australia, and the Privy Council. His Lordship summarised what he identified from that review as his understanding of

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[32] See *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd (No 24)* [2023] WASC 393 at [119], [161]-[163].

the consensus among the leading jurisdictions involved in international arbitration in the common law world.

First, resolution of an application under s 9 involved a two-stage enquiry:[33]

(1) to identify the matter or matters in respect of which the legal proceedings are brought; and

(2) to ascertain whether the matter or matters falls within the scope of the arbitration agreement on its true construction.

In carrying out that exercise, the court must ascertain the substance of the dispute between the parties by looking at the pleadings, "but not being overly respectful to the formulations in those pleadings" and taking into account all reasonably foreseeable defences.[34] His Lordship later said that the court is "not tied to the pleadings but should look to the substance of the claims and likely defences".[35]

Second, "the 'matter' need not encompass the whole of the dispute between the parties".[36]

Third, "a 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings and is susceptible to be determined by an arbitrator as a discrete dispute. It must be an essential element of the claim or of a relevant defence to that claim. A matter does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. It is also something more than a mere issue or question that might fall for decision in the court proceedings or the arbitral proceedings.[37] His Lordship identified this as consistent with *Tanning* and with the decision of Foster J in *WDR Delaware Corpn v Hydrox Holdings Pty Ltd* [2016] FCA 1164.[38]

Fourth, "the exercise involving the judicial evaluation of the substance and relevance of the 'matter' entails a question of judgment and the application of common sense, rather than a

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33 *Mozambique* at [48].
34 *Mozambique* at [73].
35 *Mozambique* at [85].
36 *Mozambique* at [74].
37 *Mozambique* at [75].
38 *Mozambique* at [76].

mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay whether in whole or in part".[39]

Fifth, when determining "whether the matter falls within the scope of the arbitration agreement on its true construction, the court must have regard not only to the true nature of the matter but also to the context in which the matter arises in the legal proceedings." As to the fifth point, his Lordship observed that whilst "[t]here may not yet be a consensus on this matter" it was supported by "existing jurisprudence" and further supported by "common sense".[40]

On the facts, Lord Hodge found that the commerciality of the supply contracts or the value given by the implementation of those contracts (the arbitrable matters) were not matters in respect of which the legal proceedings were brought. Such questions were not an essential part of the Republic's claims and proving the opposite is not an essential part of a relevant defence to the claims. As to the question whether the dispute about quantification of the claims could itself be a matter which had to be stayed, his Lordship found that such a dispute "may be a substantial matter in dispute between the parties"[41] but held that it was unnecessary for him to decide this given that he found that that "partial dispute on quantum", in the context of claims that were not themselves within the scope of the arbitration agreements:[42]

> "Rational businesspeople would not seek to send to arbitration such a subordinate factual issue arising in such legal proceedings and the arbitration agreements must be construed accordingly".

In *FamilyMart* (decided under art II(3) of the New York Convention) there was a shareholders agreement between the parties with an arbitration clause. The questions before the Privy Council were whether that agreement prevented FamilyMart from pursuing a petition to wind up the other contracting party in the Grand Court of the Cayman Islands and whether the application for a winding up order rendered the arbitration agreement inoperative as regards all matters which were raised in the winding up proceedings. The Privy Council found that the

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39 *Mozambique* at [77].
40 *Mozambique* at [78].
41 *Mozambique* at [98].
42 *Mozambique* at [107].

arbitration agreement remained operative as regards the substantive disputes that provided the factual foundation for the winding up petition, and granted a mandatory stay of the curial proceedings as regards those matters. The Privy Council stayed the remainder of the curial proceedings on a discretionary basis pending the resolution of the arbitral matters. The Privy Council also found that the arbitration agreement did not prevent FamilyMart from pursuing the winding up petition.

In this context, Lord Hodge, giving the judgment of the Privy Council, elaborated somewhat on the analysis in *Mozambique* and cautioned that:[43]

> "No judicial formula encapsulating the meaning of 'matter' should be treated as if it were a statutory text."

In *FamilyMart*, it was argued, relying upon *Tanning* and *Rinehart*, that to be susceptible to a mandatory stay, "a matter must be a determination of a right or liability and not merely a declaration".[44] Lord Hodge rejected the contention that to constitute a matter capable of settlement by arbitration "the arbitral panel must have the jurisdiction to make an award such as an order for payment to enforce the right or require a party to fulfil its obligation".[45] His Lordship did not interpret the judgment of Deane and Gaudron JJ in *Tanning* as excluding the possibility of the determination of a dispute or controversy by means of a declaration "where the dispute is a matter of substance".[46] Lord Hodge found that the matters in issue were "controversies relating to legal or equitable rights which are of substance".[47] In this regard his Lordship relied upon the controversies as to whether there had been a breach of equitable rights leading to a loss of trust and confidence and whether the relationship of the parties had irretrievably broken down. These controversies lay at the heart of the legal proceedings, being highly relevant to the applications. Moreover, the parties had accepted that those matters fell within the scope of the arbitration agreement.[48] The approach taken by his Lordship demonstrated a highly practical focus, with emphasis both on the substance of the actual dispute and the ambit of the commercial agreement to arbitrate.

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43 *FamilyMart* at [64].
44 *FamilyMart* at [94].
45 *FamilyMart* at [95].
46 *FamilyMart* at [95].
47 *FamilyMart* at [96].
48 *FamilyMart* at [96].

III WHO MAY REQUEST A REFERRAL OR BE REFERRED TO ARBITRATION?

A The applicable legislation

A second question arising is as to who may be referred. This question arises where, as has occurred on a number of occasions, a dispute arises in respect of a matter which is the subject of an arbitration agreement but, whether wholly or in part, the dispute involves a person(s) who is not a party to the arbitration agreement. The context for these disputes is that s 2 of the Commercial Arbitration Acts defines a party to an arbitration agreement to include "any person claiming through or under a party to the arbitration agreement".

There is, however, no provision dealing with the position of non-parties in the New York Convention or in the UNCITRAL Model Law. Commentators have noted that statutory provisions such as are to be found in the Commercial Arbitration Acts[49] "offer only limited textual guidance" and "have been subject to inconsistent judicial treatment".[50] As Born observes, the English and Singaporean authority suggests a narrower approach to the question of whether an entity is claiming under or through an arbitral party, whereas Australian and Indian courts have interpreted those terms more broadly.

B The position in Australia: Tanning then Rinehart

1 Tanning

In *Tanning*, there was an arbitration agreement between Hawaiian and Tanning. Tanning lodged a proof of debt in the winding up of Hawaiian and the liquidator rejected Tanning's proof of debt. Tanning sought to appeal that refusal and was successful at first instance but, on appeal by the liquidator, the Court of Appeal held that the proceedings should be stayed under s 7(2) of the *International Arbitration Act*. The question on appeal to the High Court was whether the liquidator of Hawaiian, who was not a party to the arbitration agreement, was claiming through or under Hawaiian so as to be within the extended definition of party in s 7(4) in the Act and hence entitled to a stay. The High Court held that he was. Having observed that

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49 See also *International Arbitration Act 1994* (Singapore), s 6(5); *Arbitration and Conciliation Act 1996* (India), s 8; *Arbitration Ordinance* (Hong Kong) cap 609, s 73(1)(b).

50 Gary B. Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd Ed, 2021) 1524.

this was a question which turned on the proper construction of s 7(4), Brennan and Dawson JJ (Toohey J agreeing) held:[51]

> "a person who claims through or under a party may be either a person seeking to enforce or a person seeking to resist the enforcement of an alleged contractual right. The subject of the claim may be either a cause of action or a ground of defence. Next, the prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence. A liquidator may be a person claiming through or under a company because the causes of action or grounds of defence on which he relies are vested in or exercisable by the company; a trustee in bankruptcy may be such a person because the causes of action or grounds of defence on which he relies were vested in or exercisable by the bankrupt." (Emphasis added.)

Their Honours, in this passage, convey two potentially distinct concepts. The first is that of a derivative cause of action or defence, that is one which was vested in or exercisable in the arbitral party and is then claimed or exercised derivatively by the litigant. The second, said to be "in other words" is that an essential element of the cause of action or defence was vested in or exercisable by the arbitral party. On the facts, because the liquidator was relying upon a ground which was available to the company, he claimed through or under the company.[52]

Justices Deane and Gaudron observed that the process of identification required for determining the "matter" the subject of proceedings was also necessary in ascertaining whether a party is a person claiming "through or under".[53] Their Honours found that "matter" is a word of wide import and, in the context of the arbitration legislation:[54]

> "indicates something more than a mere issue which might fall for decision in the court proceedings" … [and] … "requires that there be some subject matter, some right or liability in controversy which if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

Their Honours found that the substance of the controversy between Tanning and the liquidator was as to the amount enforceable as a debt for goods sold by Tanning to Hawaiian. In that

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51 *Tanning* at 342.
52 *Tanning* at 342-343.
53 *Tanning* at 351.
54 *Tanning* at 351.

regard, the liquidator stood in precisely the position in which Hawaiian would have stood if it had required determination of its indebtedness to Tanning. Thus:[55]

> "So standing, the liquidator claims the benefit of the defences and answers which would have been available to Hawaiian, and thus claims through or under Hawaiian."

They added that it was not suggested that there were any grounds upon which the liquidator would be entitled as a matter of discretion to refuse to admit the debt.[56]

It could be suggested that, in this analysis, and in drawing a distinction between a mere issue falling for determination on the one hand, and that which is capable of settlement as a discrete controversy on the other, Deane and Gaudron JJ were adopting a more nuanced approach than that subsequently taken in *Rinehart* and were favouring a multifactorial analysis. In particular, it is difficult to see what relevance the fact that the liquidator did not suggest discretionary basis to refuse to admit the debt had if not to indicate the relevance of a range of factors, including the centrality of the particular claim sought to be referred to the matters relied upon in defence of the claim, to the question of whether the liquidator was claiming through or under.

Subsequently, in *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd,*[57] *Tanning* was applied and a stay ordered under s 7(2) the *International Arbitration Act*. In that case there was an arbitration agreement between Flint Ink NZ Ltd and Huhtamaki New Zealand Limited ("Huhtamaki NZ"), another member in the same group of companies as the defendant in the curial proceedings, Huhtamaki Australia Pty Ltd ("Huhtamaki Australia"). Huhtamaki Australia was sued by Lion Dairy and Drinks Pty Ltd, and it brought third party proceedings against Flint Ink alleging negligence in its supply of ink, which was used on the packaging. Flint Ink successfully sought that those proceedings be stayed as Huhtamaki Australia was claiming through or under Huhtamaki NZ. The Court rejected Huhtamaki Australia's contention that *Tanning* required that the two parties must be "privies whose rights were derived from the party via an assignment or other process of law" and also that the whole of a claim or defence be vested in or exercisable by the party to the arbitration contract.[58] Rather, on the facts before them Huhtamaki Australia's claim was based upon proximity between it

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55 *Tanning* at 353.
56 *Tanning* at 353.
57 [2014] VSCA 166 ("*Flint Ink*").
58 *Flint Ink* at [18].

and Huhtamaki NZ, and breaches of Flint Ink in its advice and warnings given to Huhtamaki NZ. The pleaded duty arose out of the agreement between Flint Ink and Huhtamaki NZ.[59]

2 Rinehart

In *Rinehart*, decided under s 8 of the Commercial Arbitration Acts, three of the corporate defendants to Bianca Rinehart and John Hancock's claims were not parties to the arbitration agreement (being the Hope Downs Deed) but were assignees of HPPL and HRL who were both parties to the arbitration agreement. Bianca and John's claims against the third party companies were that they were knowing recipients of the tenements which had been transferred to them in breach of trust by the arbitral parties, who in turn had received the tenements as knowing participants in a fraudulent and dishonest design by Gina Rinehart. Thus, Bianca and John claimed that the third party companies held the mining tenements as constructive trustees for them.

The third party companies sought a stay of the proceedings on the basis that each of them was a "party" to the arbitration agreement as a "person claiming through or under" the arbitral parties. The third party companies contended that an essential element of their defence was that the arbitral parties were beneficially entitled to the tenements, alternatively that the arbitral parties had obtained releases and the third party companies were entitled to those releases as assignees of the tenements. Thus, they were seeking themselves to rely upon the releases in the arbitration agreement – and they contended that the question of their entitlement to rely upon those releases could only be determined in the arbitration as it turned on the construction of the arbitration agreement. At first instance and on appeal the third party companies' application for a stay was rejected, but the High Court reached a different conclusion. The High Court found that the third party companies were entitled to a mandatory stay under s 8, of those claims on the basis that, having regard to the nature of the defences, they were persons claiming through or under an arbitral party.

The majority (Kiefel CJ, Gageler, Nettle and Gordon JJ) held that, whilst Brennan and Dawson JJ:[60]

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59 *Flint Ink* at [23]-[24], [26] (Warren CJ); see also, at [68], [75] (Nettle JA) at [149], [150] (Mandie JA).

60 *Rinehart* at [66].

> "stated at one point in their reasons in [*Tanning*] that 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, their Honours' ultimate formulation of the test was…whether 'an essential element of the defence was or is vested in or exercisable by the party to the arbitration agreement'."

Their Honours then referred to the analysis in *Michael Wilson and Partners v Nicholls*[61] (discussed below) that the liability of a knowing assistant depends upon establishing that there has been a breach of fiduciary duty by another and found that that observation also applies to the liability of a knowing recipient. Thus, their Honours found that:[62]

> "the statutory conception of 'through or under' applies to an alleged knowing recipient of trust property who invokes, as an essential element of their defence, that the alleged trustee was beneficially entitled to the subject property".

Relying upon the analysis of Deane and Gaudron JJ in *Tanning*, the Court then found that to fall within s 8:[63]

> "It is sufficient that the defence puts in issue, among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy".

And held:[64]

> "The third party companies admit that they took the tenements as assignees from HPPL and HRL. The controversy is as to whether HPPL and HRL were beneficially entitled to the mining tenements and so free to assign the mining tenements to the third party companies without breach of trust. The first and potentially determinative issue is, therefore, whether HPPL and HRL were beneficially entitled to the mining tenements. That is a discrete matter of controversy capable of settlement by arbitration under the arbitration agreement and, as between the appellants and HPPL, has been referred to arbitration in accordance with the Hope Downs Deed."

Thus, the third party companies took their stand upon a ground available to the assignor of the tenements and stood in the same position vis-à-vis the claimants as the assignor. The majority held that the recognition in *Tanning* that the liquidator was claiming through or under the company was dispositive of the issue in *Rinehart*.[65]

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61 (2011) 244 CLR 427 at [101]-[106] (*"Michael Wilson"*).
62 *Rinehart* at [66].
63 *Rinehart* at [68].
64 *Rinehart* at [69].
65 *Rinehart* at [80].

The majority found that to hold otherwise would give the arbitration agreement uncertain operation, jeopardise orderly arrangements, potentially lead to duplication of proceedings and potentially increase uncertainty as to what would be determined by litigation and what would be determined by arbitration. Ultimately it would frustrate the evident purpose of the statutory definition.[66]

Edelman J, dissenting on this issue in *Rinehart,* held that there was no basis for an extended meaning of party that would compel a third party to submit to arbitration without the third party having consented to the procedure, without an arbitrator to whose appointment the third party had consented, and possibly by a legal system that would not have been chosen by and would otherwise not have applied to the third party.[67] In his analysis, Edelman J gave significance to the consensual basis of arbitration and "a basic tenet of justice that a voluntarily assumed obligation should not be imposed upon a person without some manifestation by the person of an undertaking to be bound by the obligation".[68] Edelman J held that the test of "derivative action" adopted by Brennan and Dawson JJ in *Tanning* was "consistent with the basic notion of justice that a person is not bound by new duties to which he or she had not consented" and observed that the later explanation did not limit or qualify the "derivative action" test.[69] Edelman J disagreed with the majority's characterisation of how the "long unpopular" decision in *Roussel-Uclaf v GD Searle and Co Ltd*[70] had been treated by English courts and commentators. In particular, his Honour observed that Mance J in *Grupo Torras SA v Al-Sabah*[71] "certainly did not suggest that a common central issue in dispute was sufficient to constitute a third party as claiming through or under a party".[72]

3 Michael Wilson – relied upon in Rinehart

By way of context, in *Michael Wilson,* there was an arbitration in London between Michael Wilson & Partners ("MWP"), a company incorporated in the British Virgin Islands, and Mr Emmott, a former director and shareholder, in which MWP made claims of breach of contract and breach of fiduciary duties against Mr Emmott. In proceedings in NSW, determined before

66 *Rinehart* at [73].
67 *Rinehart* at [86].
68 *Rinehart* at [87].
69 *Rinehart* at [93].
70 [1978] 1 Lloyd's Rep 225 ("*Roussel-Uclaf*").
71 [1995] 1 Lloyd's Rep 374 ("*Al-Sabah*").
72 *Rinehart* at [96].

an interim award was given in the London arbitration, the Court found that two other former employees (Nicholls and Slater), and associated companies, were liable for knowingly assisting in Mr Emmott's breaches of his fiduciary obligations (Mr Emmott declined to be joined to the NSW proceedings). The award in the London arbitration held that Mr Emmott was liable to MWP in some, but not all, of the respects in which the NSW Court had found Nicholls and Slater liable for knowingly assisting in Mr Emmott's breaches of his fiduciary duties.

There was, however, no application in the NSW proceedings for those proceedings to be stayed pending the arbitration proceedings in London. Although not referred to, that provides context for the observation of Gummow A-CJ, Hayne, Crennan and Bell JJ (Heydon J agreeing on this issue) that, although MWP alleged knowing assistance in the NSW proceedings, MWP "could not have those complaints heard and determined by the one process, whether arbitral or curial".[73] The issue before the High Court did not concern a stay, it was whether the NSW proceedings were an abuse of process. One foundation of the complaint was that in the NSW proceedings the Court had found that the loss of MWP was greater than was found in the London arbitration. Nicholls and Slater contended that, in these circumstances, there was an abuse of process and the Court of Appeal set aside the orders made at first instance and held that there should be a new trial, not to commence until an appeal against the London arbitral award had been finally determined. The High Court allowed MWP's appeal against that order, holding that there was no abuse of process.

In considering the relationship between the liability of the defaulting fiduciary (Mr Emmott) and the knowing recipients (the defendants in the NSW proceedings), Gummow A-CJ, Hayne, Crennan and Bell JJ held:[74]

> "liability to account as a constructive trustee is imposed directly upon a person who knowingly assists in a breach of fiduciary duty. The reference to the liability of a knowing assistant as an 'accessorial' liability does no more than recognise that the assistant's liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows, as MWP submitted, that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ. It follows

73 *Michael Wilson* at [16].
74 *Michael Wilson* at [106].

> that neither the nature nor the extent of any liability of the respondents to MWP for knowingly assisting Mr Emmott in a breach or breaches of his fiduciary obligations depends upon the nature or extent of the relief that MWP obtained in the arbitration against Mr Emmott."

This emphasises not just, as the majority in *Rinehart* found, that one element to be established is breach by the defaulting fiduciary, but also that the liability of the knowing assistant, or recipient, is independent and not constrained by the liability of the defaulting fiduciary, both in nature and extent. Further, the Court held in *Michael Wilson* that "it may be doubted" that MWP would have been precluded from pursuing the allegation of knowing assistance in the NSW proceedings even if the arbitrators had found, before judgment, that Mr Emmott had not breached his fiduciary obligations as "such a finding, in proceedings between other parties, would not estop MWP from asserting to the contrary in the proceedings against alleged knowing assistants".[75] However, on the analysis in *Rinehart*, had an application for a stay been made, the parties in the NSW proceedings would have been referred to arbitration as regards that issue.

4 Commentary on the approach in Rinehart

Commentators have identified the significance of the majority judgment in *Rinehart* and the extent of its divergence from the approach taken in the UK.[76] It has also been noted that in its approach, the High Court has "taken the meaning of claiming 'through or under' beyond consensual contract law theories" and to have elements in common with the doctrine of arbitral estoppel developed by US Courts.[77]

Garnett identifies that the *Rinehart* decision has the effect of "forcing claimants to forgo their right to litigate" giving rise to a "significant access to justice question…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 of which it may never have been aware".[78] He contends that an aim of procedural efficiency and consolidation of dispute resolution "should not be a barrier to justice for third party claimants". His solution to this problem is that where there is a significant "consent deficit", namely where a non-arbitral party commences proceedings against an

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75 *Michael Wilson* at [107].

76 See Vicky Priskich, 'Binding non-signatories to arbitration agreements – who are persons 'claiming through or under' a party?' (2019) 35(3) *Arbitration International* 375, 381.

77 Priskich at 382.

78 Garnett at 169.

arbitral party, it is preferable for the question whether the claimant is claiming through or under an arbitral party to be determined by asking whether "their claim is derived or inherent from that of" an arbitral party. He contends that that test requires that the non-signatory claimant be "an assignee, liquidator, subrogee, principal or successor in title of the original party".[79]

5 *Consequences of Rinehart*

The practical complications flowing from the approach in *Rinehart* can be seen from the decision of the Western Australian Court of Appeal in *DFD Rhodes*.

In very simplified form, in the Hope Downs litigation in Western Australia claims were initially made by WPPL and Rhodes against HPPL and related parties, but John and Bianca were joined to those proceedings given that in Federal Court proceedings they made claims against HPPL and related parties in respect of the same mining tenements ("the Hope Downs Tenements"). Thus, in the WA proceedings, WPPL and Rhodes made claims to the Hope Downs Tenements, including claims that the Hope Downs Tenements were held on trust for them, and, by way of defence to those claims, John and Bianca claimed that the tenements were held on trust for them (and not for WPPL and Rhodes) by reason of breaches of trust by Gina Rinehart, HPPL and Hope Downs Limited.

Rhodes, who put John and Bianca to proof as to these claims, also asserted, by way of alternative pleading raised by way of amended reply, in summary (omitting much of the detail), that:[80]

(1) if the tenements were transferred away from HPPL as John and Bianca alleged, then that was a breach of Lang Hancock's fiduciary, equitable and statutory duties owed to HPPL which prevented that transfer being effective or was such that equity would not impose a constructive trust in favour of John and Bianca; and

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79 Garnett at 170.

80 See *DFD Rhodes* at [61]ff.

(2) that in any event HPPL reacquired the tenements subsequent to the alleged breaches in a bona fide transaction for value and HPPL was not knowingly concerned in any breaches of trust or fiduciary duty by Mrs Rinehart; and

(3) in any event Bianca and John did not come to court with clean hands because the alleged trust was based upon breaches by Lang Hancock or HPPL.

HPPL sought that the controversy created by that part of Rhodes' amended reply be referred to arbitration. Rhodes contended that they were not claiming through or under HPPL because:[81]

(1) there was no relationship of proximity between Rhodes and HPPL and the "relationship between the claimant and the party must be an essential ingredient of the claim" and also relevant to the claim;

(2) the statutory purpose of s 8 of the Commercial Arbitration Acts was not facilitated by requiring strangers to the arbitration agreement to participate in an arbitration simply because they raise the same or similar factual issues in their claim; and

(3) *Rinehart* should be interpreted as an application of the "through or under" test to the particular controversy before the Court and not as giving rise to "a rigid proposition of law".

The Court (Quinlan CJ and Beech JA, Vaughan JA agreeing) rejected these contentions and found that by reason of the "claims" advanced in Rhodes' reply, Rhodes was claiming through or under HPPL, a party to the arbitral agreement and referred that controversy to arbitration. The Court held that that conclusion was "compelled by the High Court's decision in *Rinehart*".[82] The Court thus rejected that contention and held that the reasoning in *Rinehart* was inconsistent with there being any requirement of proximity in the "through or under" test. This was because, consistent with *Rinehart*:[83]

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81 See *DFD Rhodes* at [105].
82 *DFD Rhodes* at [107].
83 *DFD Rhodes* at [111].

> "The focus is on the nature and source of the claims and defences of the person said to be claiming through or under a signatory to the arbitration agreement, not on the relationship between the two parties or on the relationship of the first person to the arbitration agreement."

In that regard the Court found that "an essential element of Rhodes' response to Bianca and John's defence" was "a right or interest vested in, or exercisable by, signatories to the arbitration agreement (including HPPL and Gina)".[84] That element was that HPPL and Gina were, at various relevant points in time, themselves entitled to the tenements. Thus, even though Rhodes' claim in the proceedings was a claim against HPPL, and the two were far from aligned in the curial proceedings generally, in the relevant paragraphs of the reply Rhodes claimed through or under HPPL.

What is significant in this context is that, having regard to the judgment in *Rinehart*, it was sufficient to require referral to arbitration that Rhodes was asserting a basis on which John and Bianca could not succeed, which involved a contention that HPPL who was alleged to hold the tenements on trust for Rhodes, was itself entitled to the tenements at relevant points in time.

This decision exposed the practical reality that referral to arbitration will not, however, compel the arbitral tribunal to admit the third party to the arbitration. None of the parties to the extant arbitration would agree to Rhodes being joined to that arbitration, forcing the Rhodes parties to commence their own arbitration. As regards that arbitration, the parties who had sought that the Rhodes parties be referred to arbitration then contended that the Rhodes arbitration was not valid or on foot.[85]

There is also something of an irony about the outcome in *DFD Rhodes*. John and Bianca's defence to WPPL and Rhodes' claims could not be referred to arbitration under s 8 of the Commercial Arbitration Acts, including to the extent that it raised contentions that were also raised in the arbitral proceedings, because that was not a matter the subject of an arbitration agreement.[86] However, the controversy constituted by Rhodes' amended reply to that defence could be stayed under s 8 on the basis that Rhodes relevantly "[took] its stand on a ground which is available to [HPPL or Gina Rinehart]".[87]

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84 *DFD Rhodes* at [112].
85 *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2023] WASCA 88 at [59].
86 As found in the *Hancock Stay Appeal*.
87 *DFD Rhodes* at [112].

By contrast to the orders in *DFD Rhodes*, in *Flint Ink*, the orders were that the relevant claim was stayed on the condition that Flint Ink, the party who sought referral, used its best endeavours to refer the claim to arbitration and to pursue the arbitration with due expedition. That was permitted under the terms of s 7(2) of the *International Arbitration Act*, which expressly provides that a stay should be ordered "upon such conditions (if any) as [the court] thinks fit.

C The approach in England, Singapore and New Zealand

In *Roussel-Uclaf,* decided in the 1980s, Graham J held that the subsidiary of an arbitral party was entitled to a mandatory stay of curial proceedings against it for patent infringement on the basis that its "claim" as defendant was through or under its parent company. The subsidiary was the distributor of the parent company's products and the plaintiff claimed that both the parent and subsidiary had sold a product in breach of the plaintiff's exclusive patent licence.[88] Graham J held that "the two parties and their actions are … so closely related … that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is 'claiming through or under' the parent to do what it is in fact doing whether ultimately held to be unlawful or not".[89]

In *Al-Sabah* Mance J said that he did not "find it easy to extract any principle from the reasoning" in *Roussel-Uclaf*. As to the suggestion in Mustill and Boyd that the stay could "perhaps be explained on the basis of agency" Mance J observed that "that was not the basis of the Judge's reasoning".[90] David Joseph QC considers this comment by Mance J to be correct.[91] Mance J found that "in any event" *Roussel-Uclaf* was distinguishable on the facts as in that case, unlike in the case before Mance J, "the licence agreement was central to the issues against both defendants and the first defendant's position depended on the entitlement of its parent under the licence agreement."[92]

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88 *Roussel-Uclaf* at 231-232.

89 *Roussel-Uclaf* at 231.

90 *Al-Sabah* at 450-451, referring to Michael J. Mustill and Stewart C Boyd, Commercial Arbitration, (Butterworths, 2nd Ed, 1989), p 137, fn 2.

91 David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 3rd Ed, 2015), 233-234.

92 *Roussel-Uclaf* at 451.

Mustill and Boyd's reference to *Roussel-Uclaf* had in fact been not just that it could perhaps be explained by agency, but that was because "otherwise it is difficult to see how the first defendant could have taken any part in the arbitration".[93]

In *City of London v Sancheti*[94] Lawrence Collins LJ (Richards and Laws LLJ agreeing) held that *Roussel-Uclaf* was wrongly decided. Lawrence Collins LJ held that a stay "can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient".[95] In *Sancheti* there was an extant arbitration under a Bilateral Investment Treaty. The parties to that arbitration were the United Kingdom and Mr Sancheti. Mr Sancheti had outstanding rent owed to the Corporation of London which the Corporation of London was seeking to recover. Mr Sancheti sought a stay of that curial proceeding on the basis that the Corporation of London was claiming through or under the United Kingdom including because the UK in practice controls the Corporation of London, relying upon *Roussel-Uclaf*.

In *Rinehart*, the majority referred to the UK case law including *Sancheti* and found that the analysis of *Roussel-Uclaf* in that case presupposed that Graham J had based his decision on a mere legal or commercial connection when in fact the basis of the decision was that "a licence agreement was central to the issues against both the parent company and subsidiary and the position of the subsidiary depended upon the entitlement of the parent company under the licence agreement".[96] Further, the Court held that *Roussel-Uclaf* accorded with the *Tanning* test (as interpreted in *Rinehart*) as if the parent company were blameless under the licence agreement the subsidiary would be equally blameless.[97]

More recently in England, the High Court refused to stay the claim of a non-arbitral party (Naibu Jersey) which was based on either contractual or tortious duties owed to it directly and individually by the defendant (Pinsent Masons) despite those duties being similar to duties alleged to be owed by the defendant to a separate corporate entity who was a party to an arbitration agreement (Naibu HK). That was so notwithstanding that the duties in both cases

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93 Mustill and Boyd, p 137 fn 2.
94 [2008] EWCA Civ 1283 ("*Sancheti*").
95 *Sancheti* at [34].
96 *Rinehart* at [76], purportedly based upon the analysis of Mance J in *Al-Sabah* at 450-451.
97 *Rinehart* at [76].

arose out of the one due diligence exercise of the defendant in preparing the company for an IPO and Naibu Jersey held 100% of the share capital of Naibu HK.[98]

In Singapore, in *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pty Ltd*,[99] the defendant entered into a supply agreement with a seller in which payment was made by the defendant in promissory notes. There was an arbitration clause in that supply agreement. The seller then discounted the promissory notes to the plaintiff who sued the defendant when it dishonoured the promissory notes. The defendant sought a stay on the basis that the plaintiff was suing through or under the seller and that the plaintiff's action was brought in respect of a matter which was the subject of the arbitration agreement (within ss 6(1) and 6(5)(a) of the *International Arbitration Act 1994* (Singapore)). These questions turned on Singaporean law. The Court held that the question whether the plaintiff claimed through or under the seller was a separate question, with a distinct purpose, from the question whether the action was brought with respect to a matter the subject of the arbitration agreement.[100] The Court found that the cases "did not disclose a principled basis" to determine when a claim was made through or under an arbitral party, but that the core of the phrase "through or under" must lie in the law of obligations and thus the question is whether the governing law would consider the plaintiff to be bound by the arbitration agreement.[101] The Court found here that through the assignment of the arbitration agreement, which was bundled together with the right the assignee took,[102] the plaintiff took the benefit and the burden of the arbitration agreement absent any contrary agreement.[103] Thus, the plaintiff was claiming through or under the seller and this was consistent with the consensual nature of arbitration.[104] However, the Court refused a stay on the basis that the plaintiff's claim was not in respect of a matter which was the subject of the arbitration agreement. This was because the plaintiff's claim related to the promissory notes which gave rise to rights and obligations "separate and independent from" the supply contract.[105]

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98 *Naibu Global International Co plc v Daniel Stewart & Co plc* [2020] EWHC 2719 (CH) at [62]-[65] (Bacon J).

99 [2016] 1 SLR 79 (Vinodh Coomaraswamy J) ("*Cassa di Risparmio*").

100 *Cassa di Risparmio* at [56].

101 *Cassa di Risparmio* at [69]-[70].

102 *Cassa di Risparmio* at [117].

103 *Cassa di Risparmio* at [95].

104 *Cassa di Risparmio* at [120], [125].

105 *Cassa di Risparmio* at [204].

The Singapore Court of Appeal dismissed an appeal against this decision on the basis that the cause of action arose from the plaintiff's position as holder of promissory notes which were not incorporated into the supply contract.[106] The Court of Appeal expressly declined to make any finding on the "thorny matters" of the primary judge's analysis based upon assignment of both the benefit and burden of an agreement containing an arbitration clause. Those thorny matters included the need to reconcile the analysis with both the "consensual nature of arbitration" and the doctrine of privity.[107]

The position in *Rinehart* can also be contrasted with that in New Zealand. In *Mount Cook (Northland) Ltd v Swedish Motors* Tamblin J held that, to be claiming through or under, the relationship between the non-arbitral party and the arbitral party "must be an essential ingredient of the claim" and if that relationship is "irrelevant to the grounds advanced in support of the claim then it is not a claim brought through or under the arbitral party".[108]

IV CONCLUSION

At present there is something of a tension in the law, I suggest, between the approach to whether there is a matter the subject of an arbitration agreement and the approach to whether or not a third party is claiming through or under an arbitral party. In particular:

(1) as broadly accepted in international jurisprudence, as regards the former, the approach is multifactorial and accepted to be one to which context is relevant; and

(2) as regards the latter, in Australia, the approach has become somewhat formulaic, with the courts applying a somewhat inflexible test, said to be derived from *Tanning*, that the question is whether an essential element of the third party's cause of action was vested in an arbitral party.

The approach which is currently adopted to the latter issue focusses upon a specific formula, or test, without directing attention to more practical considerations or context. Moreover, the current approach gives no attention to the distinction between third parties who seek to join the arbitration voluntarily, or to have claims stayed relying on an arbitration agreement, and those

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106 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [49].
107 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* at [55]-[56].
108 [1986] 1 NZLR 720 at 725.

who have no relationship whatsoever with the arbitration agreement and are effectively being involuntarily precluded from having the merits of their dispute resolved by properly instituted curial proceedings. Garnett argues that such distinction should be vital in determining how the law deals with the question whether such persons are within the extended definition of arbitral parties.

It remains to be seen whether the High Court will reconsider or refine the position in *Rinehart*, or whether intermediate or first instance courts will consider that, read in the context of *Tanning*, it permits some flexibility of approach. Thus far, Australian courts appear to have interpreted *Rinehart* as if it requires a somewhat formulaic approach to the question of whether a third party is within the extended definition of an arbitral party in the Commercial Arbitration Acts. How that sits with the consensual basis of arbitration has not to my knowledge received any judicial attention. Nor have the courts given any express attention, to my knowledge, to the nature of the relationship between the particular controversy which is sought to be referred to arbitration, and how as a matter of practicality it sits with the issues in the case more generally. It may be that a broader approach which encapsulated those issues would resolve some of the issues that have been identified by commentators flowing from the current approach.

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