This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements

Simon Allison and Kanaga Dharmananda*

ABSTRACT

The determination of the law governing arbitration agreements has been the subject of recent close attention. The relationship of third parties to arbitration agreements is sensitive to an increasingly unwieldly array of factors including: the subject matter of a dispute, the nature of the purported basis for the transfer of an arbitration agreement, and the wording of the original instrument containing the arbitration clause. A rising question is whether third parties are to be considered parties or non-parties otherwise bound by arbitration agreements. In addition, there is an issue of timing: when are the arbitration agreements or relevant awards to be impugned, and does the third-party issue pertain to the validity or just the scope of an arbitration agreement. This article seeks to address these issues.

INTRODUCTION

It seems fundamental to be able to recognise a counterparty to a transaction and, by extension, a party to any arbitration agreement covering disputes that may arise from the transaction. It is a vital aspect of the capacity to discern relevant parties to know which law to apply to the question. It will be important to appreciate how that law treats non-signatories and when such non-signatories could be held to be parties or otherwise bound by the arbitration agreement. Against these desirable objectives, there is the need to grapple with the position in the United Kingdom as to applicable law relevant to the ascertainment of parties and persons otherwise bound by an arbitration agreement.

As the UK embarks on a review of the Arbitration Act 1996, consideration could turn to the lacunae and practical methodological inconsistencies on display in recent English arbitral case law.[1] Three interrelated questions are worthy of discussion: the law applicable to arbitration agreements; the validity of arbitration agreements; and the status of third parties in the context of arbitration agreements. These questions have implications for stays of domestic proceedings,[2] anti-suit injunctions in restraint of foreign proceedings,[3] court assistance for arbitral tribunals[4] and the recognition and enforcement of arbitral awards.[5] Questions of who is a party to (or is otherwise bound by) an arbitration agreement are usually seen as matters concerning the validity of an arbitration agreement. In most cases this inevitably becomes a question of the law applicable to an arbitration

* Simon Allison, PhD (Law) (Cantab), M.Phil. (Law) (W.Aust.) LL.B. (Hons.) B.Ec., Associate Lecturer, Faculty of Law, Curtin University, Western Australia. Member, Queens' College, Cambridge. Contact: s.allison@curtin.edu.au; Kanaga Dharmananda, Senior Counsel, B.Juris. (Hons.), LL.B. (Hons.), BCL (Oxon), LL.M. (Harvard); Adjunct Professor, University of Western Australia Law School. Contact: skd@quaysidechambers.com. The authors thank Leigh Smith, Harry Sanderson, Donovan Castelyn and Axel Landin for their comments on earlier drafts.

[1] UK Law Commission, 'Law Commission to Review the Arbitration Act 1996' <https://www.lawcom.gov.uk/law-commission-to-review-the-arbitration-act-1996/> accessed 5 June 2022.

[2] For stays of English court proceedings in favour of arbitration see Arbitration Act 1996 s 9. See s 2(2) that s 9 applies 'even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined'.

[3] Senior Courts Act 1981 s 37.

[4] See Arbitration Act 1996 s 44.

[5] ibid ss 100-104.

Published Version: Simon Allison and Kanaga Dharmananda, 'Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements' (2022) 38 *Arbitration International* 151 <https://doi.org/10.1093/arbint/aiac008>.

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

agreement. Often is the case that out of the two most obvious candidates for law governing an arbitration agreement, one will see the arbitration agreement as operative between two particular parties to a dispute, and the other will not.[6]

Attempts to clarify the question of the law governing arbitration agreements took place in Enka[7] and Kabab-Ji.[8] Following the recent Court of Appeal decision in Lifestyle Equities[9] this area of law is far from clear and it would seem that non-parties can be forced by English courts to endure the time and expense of foreign arbitration processes only to be left with an unenforceable award.

1 CHOICE OF LAW AND ARBITRATION AGREEMENTS

Article II(3) of the New York Convention[10] requires State court refer matters to arbitration where there is a valid arbitration agreement under Article II, unless the court finds that such an agreement is null and void, inoperative or incapable of being performed.[11] Article III of that convention provides States shall recognise arbitral awards as binding. Under Article V(1)(a) of the New York Convention recognition and enforcement may be resisted where 'under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.[12] Art V(1)(c) concerns challenges to awards based on the particular dispute being beyond the scope of the arbitration agreement.[13]

While it is recognised that parties to an arbitration agreement may specify the law applicable to the arbitration agreement, separately, and in many cases in addition to the law governing the underlying agreement many arbitration agreements lack this detail, with some only specifying the law applicable to the underlying substantial agreement, and others not specifying even that. The doctrine of separability,[14] often seems as primarily designed to save arbitration agreements in the face of underlying potential invalidity of a substantive contract (enabling arbitral tribunals to resolve that question) is sometimes applied in support of not extending

[6] See XL Insurance Ltd v Owens Corning [2000] 2 Lloyd's Rep 500; C v D [2007] EWCA Civ 1282.

[7] Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev1) [2020] UKSC 38 (09 October 2020).

[8] Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2021] UKSC 48 (26 October 2021).

[9] Lifestyle Equities CV v Hornby Street (MCR) Ltd [2022] EWCA Civ 51 (26 January 2022).

[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The 'New York Convention'), 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959); See Enka (n 7): 'The New York Convention, to which the United Kingdom became a party in 1975 and which more than 160 states have now signed, has been described as "the single most important pillar on which the edifice of international arbitration rests", and as "perhaps … the most effective instance of international legislation in the entire history of commercial law" … The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states' (citations omitted): at [126]; cited in Kabab-Ji (n 8) at [21].

[11] See also UNCITRAL Model Law on International Commercial Arbitration 1985 (with the amendments adopted in 2006) (the 'UNCITRAL Model Law') Art 8 which provides that '(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his 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. (2) Where an action referred to in paragraph (1) of this article 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'.

[12] New York Convention Art V(1)(a).

[13] ibid Art V(1)(c).

[14] Enka (n 7). See Lord Hamblen and Lord Leggatt at [41] and generally at [60]–[94].

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

general choice of law provisions to arbitration agreements in contracts, with the arbitration agreements seen as a independent, severable part.

In other instances, it is seen as merely an extension of party autonomy that parties may nominate a separate body of law to govern arbitration agreements to general, substantive, choice of law provisions, and with the absence a selection of such not always justifying a conclusion that the parties intended broader underlying choice of law provisions to extend to arbitration agreements themselves. The discussion often becomes focused on a battle between those favouring the application of substantive underlying choice of law provisions and those wanting the law of the seat of arbitral tribunals to take primacy.[15] Of course, it remains conceivable that a third country's laws may be inferred as governing the arbitration agreement, yet that would seem rare. This choice of law question is often regarded as separate yet seems, instinctively, intimately linked to question of the law applicable to the recognition and enforcement of arbitral awards.

The orthodox common law approach to such general questions of contractual choice of law is a three-step process, first favouring an express choice of law by the parties, next an implied choice of law, and third the law of the country with the closest and most real connection with the arbitration agreement. Conclusions to these steps may differ based on the different emphasis given to particular steps, or as the Court of Appeal decision in Sulamerica notes, the potential interrelation and conflation of the three steps.[16]

Early cases seemed to largely favour the extension of underlying governing law clauses to be manifestations of parties' intention as to the law that would govern the interpretation and application of arbitration agreements.[17] This approach was put into question in a number of cases such as the Bermuda form cases such as C v D[18] and Sulamerica.[19] Often in these cases, the doctrine of separability[20] would raise its head, almost acting as a homing device in English Courts when the seat in question is London: if an arbitration agreement is severable and should be considered in isolation from the rest of a contract, and the closest and most real connection test from conflicts of laws is favoured, the seat will almost inevitably be considered to be representative of the body of law applicable

[15] ibid [3]-[4]: 'There have been Court of Appeal decisions falling on either side of this divide'; citing the Court of Appeal in Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev 1) [2020] EWCA Civ 574 (29 April 2020) as noting that 'the time has come to seek to impose some order and clarity on this area of the law': see [89] (Popplewell LJ); and citing Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638 (16 May 2012); C v D (n 6).

[16] Sulamerica (n 15) [26]-[27] (Moore-Bick LJ).

[17] Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG [1982] 2 Lloyd's Rep 446 456; Sumitomo Heavy Industries Ltd v Oil & Natural Gas Commission [1994] 1 Lloyd's Rep 45; Sonatrach Petroleum Corp v Ferrell International Ltd [2002] 1 All ER (Comm) 627.

[18] C v D (n 6); See also XL Insurance Ltd v Owens Corning (n 6); Lorelie S Masters, John Jay Range and Paul Moura, 'The Bermuda Form and Arbitration of Disputes in London' (2018) 73 Dispute Resolution Journal 67, 74–5: Masters, et al, note that while it 'may appear odd' to require parties to a contract to arbitrate disputes in the United Kingdom when that agreement is otherwise governed by New York law 'there are historical reasons for this procedure' including the perception that New York law is insurer friendly, while England as a forum for court or arbitration disputes provide more certainty as a seat in terms of dispute resolution and the avoidance of 'undesirable outcomes in insurance disputes in the United States'. Further, they note that English law is regarded as limiting the circumstances in which an eventual arbitral award can be challenged; See also John Fellas, 'International Arbitration under the Bermuda Form' (2014) 8 Dispute Resolution International 129; and see generally Richard Jacobs and others, Liability Insurance in International Arbitration: The Bermuda Form (Bloomsbury Publishing 2022).

[19] Sulamerica (n 15) [56] (Lord Neuberger MR): 'Accordingly, (i) there are a number of cases which support the contention that it is rare for the law of the arbitration to be that of the seat of the arbitration rather than that of the chosen contractual law, as the arbitration clause is part of the contract, but (ii) the most recent authority is a decision of this court which contains clear dicta (albeit obiter) to the opposite effect, on the basis that the arbitration clause is severable from the rest of the contract and plainly has a very close connection with the law of the seat of the arbitration'.

[20] Arbitration Act 1996 s 7: unless otherwise agreed by the parties, 'an arbitration agreement which forms or was intended to form part of another agreement … shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement'; Enka (n 7) [41].

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

to arbitration agreements. This approach arguably stretches the separability doctrine beyond its intended scope and purpose.[21]

Despite these logical flaws, the outcome, namely that the seat is regarded as the default legal system governing arbitration agreements in the absence of express party choice is to be normatively preferred as providing internal coherency and uniformity in the broader arbitral process.[22] As noted in Enka:

> The point of agreeing a seat is to agree that the law and courts of a particular country will exercise control over an arbitration which has its seat in that country to the extent provided for by that country's law. A choice of seat can in these circumstances aptly be regarded as a choice of the curial law.[23]

Despite its popularity, the arbitral seat theory, where the lex arbitri follows the law of the arbitral seat has been subject to criticism. Departure from that theory in favour of the proper law of the underlying contract 'may produce problems and complications'.[24]

The question of law applicable to arbitration agreements, often determining their validity, is very often determinative of whether a third party is bound by an arbitration agreement.[25] Some attempt to create a workable methodology for the question of third parties occurred in the 2010 case of Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan.[26] The case concerned a Saudi Arabian company which entered an agreement (MoU) with Pakistan concerning housing for Pakistani pilgrims in Mecca, Saudi Arabia. A trust was used by the Pakistani Government to enter into the agreement for disputes to be resolved through ICC arbitration. When Dallah sought enforcement of the award in the UK, it was challenged on the basis of Section 103(2)(b) of the Arbitration Act 1996 based on the lack of a valid arbitration agreement between the parties pursuant to the law of the seat of the arbitration (being Paris so French law). This argument was accepted by the High Court.

The Court of Appeal dismissed the case on appeal.[27] Then, the case went to the Supreme Court where at the same time Dallah also applied to enforce the award in France. Pakistan applied to set aside all three awards in France. The Supreme Court refused a stay of Dallah's appeal on the basis that it was waiting for the outcome of the French application.

The Supreme Court affirmed the decision of the lower courts, refusing enforcement under Section 103(2)(b) of the Arbitration Act 1996. As there was no choice of law governing the arbitration agreement, the default rule in Art V(1)(a) favouring the law of the seat of the arbitral tribunal as the law governing the arbitration agreement.

---

[21] Simon Allison and Kanaga Dharmananda, 'Incorporation Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience' (2014) 30 Arbitration International 265, 275.

[22] See Kanaga Dharmananda, 'The Unconscious Choice Reflections on Determining the Lex Arbitri' (2002) 19 Journal of International Arbitration 151.

[23] Enka (n 7) [68]; citing Carpatsky Petroleum Corpn v PJSC Ukrnafta [2020] EWHC 769 (Comm) [67]-[71] (Butcher J).

[24] Dharmananda (n 22) 156.

[25] See generally Stavros Brekoulakis, 'The Notion of the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It?' (2007) 24 Journal of International Arbitration 341.

[26] Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan [2011] 1 AC 763.

[27] Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2009] EWCA Civ 755 (20 July 2009).

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

While it was accepted there was a broad pro-enforcement policy and that the burden of resisting enforcement was on the party seeking to do so, the court was not required to follow the tribunal's decision on its own jurisdiction (and those party to, or bound by, its decisions).[28]

Questions of whether a party is bound by an arbitration agreement were to be determined by the consideration of validity under Art V(1)(a) of the New York Convention. A lack of a valid and binding arbitration agreement per Art II thus invoked the court's jurisdiction under Art V(1)(a) to refuse to enforce the award. One argument raised in support of enforcement was the use of the discretion-associated term 'may' in Art V(1) of the New York Convention. This argument did not gain much traction before the Supreme Court. The Court noted that had the foreign law been considered as violating important public policy in the enforcement state, this may act to limit the ability of the award debtor to resist enforcement.[29]

Dallah proposed a broad three-step test for approaching questions of determining who is bound by an arbitration agreement.[30] First, is a consideration of the legal system that applies to the construction and operation of an arbitration agreement. Second, is the purported basis on which a third party is argued to be bound by the arbitration agreement. Third, is application of those principles to the facts of a case in hand. Such an approach seems methodical.

2 *KABAB-JI* ON ENFORCEMENT UNDER 103(2)(b) AND ART V(1)(a)

Section 103(2)(b) of the Arbitration Act 1996 provides that recognition and enforcement of an arbitral award may be resisted where 'the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made'.[31]

Section 103(2)(b) is based on Art V(1)(a) of the New York Convention[32] and was in play in the case of Kabab-Ji.[33] The case involved a Franchise Development Agreement (FDA) that Kabab-Ji SAL and Al Homaizi Foodstuff Company were initially parties to. The FDA contained an English governing law clause as well as an arbitration agreement providing for the settlement of disputes in Paris under ICC rules. The FDA did not specify the law applicable to the arbitration agreement. Al Homaizi later became a subsidiary of Kout Food Group (KFG).

When a dispute arose, Kabab-Ji sought arbitration against KFG. KFG claimed not to be a party to the arbitration agreement under English law. The arbitral tribunal found in favour of Kabab-Ji and found that KFG was a party to the agreement. KFG commenced proceedings in Paris Court of Appeal to set aside the arbitral award. The Paris Court of Appeal found in favour of Kabab-Ji, refusing to annul the arbitration award on the basis that in its view, KFG was a party to the arbitration agreement.[34]

---

[28] Dallah (n 26) [101] (Lord Collins).

[29] ibid [102], [128].

[30] ibid 105-106 (Lord Collins); cited in Lifestyle Equities (n 9) [27].

[31] Arbitration Act 1996 s 103(2)(b).

[32] New York Convention art V(1)(a) provides that '[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that [the] parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made' .

[33] Kabab-Ji (n 8).

[34] Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [Court of Appeal Paris], 23 June 2020, n°17/22943.

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

Kabab-Ji commenced enforcement proceedings under Section 101 of the Arbitration Act 1996 in the English High Court. The enforcement was successfully resisted by KFG on the basis that it did not become a party to the arbitration agreement. This finding was upheld by the Court of Appeal[35] before coming before the Supreme Court.[36]

For the Supreme Court, the law applied to answer the question of whether KFG was a party to the arbitration agreement should be the putative proper law, that is the law which would applicable to the arbitration agreement if the arbitration agreement was valid.[37] They noted that the choice of wording in Art V(1)(a) of the New York Convention created a two-option choice of law test for those seeking to impugn the validity of arbitration agreements (or arguing that one party was under an incapacity) at the recognition and enforcement stage.[38] That is, the parties may be found to have formed an indication of the law applicable, failing which the default rule favouring the law of the country in which the award was rendered (the seat) will be invoked. The court noted that the wording of Art V(1)(a) was different to the wording of Art V(1)(d) concerning challenges to awards based on grounds that the composition of an arbitral tribunal where the default rule is only invoked failing 'any agreement' between the parties as to the law applicable.[39]

The Supreme Court favoured discussion of the opinion of one of the spectators of the formation of the New York Convention over any in-depth discussion of the Convention's travaux préparatoires on this point.[40] For the Supreme Court, the wording of indication meant a lesser threshold than say what would normally constitute an agreement.[41]

Despite emphasis on the unique wording of Art V(1)(a) of the New York Convention, the Supreme Court seemed eager to note that their reasoning was no more than an extension of the approach in Enka to the governing law and related invalidity of arbitration agreements in situations concerning anti-suit injunctions.[42] The Supreme Court had pointed out that while Enka was concerned with the question of validity and scope of an arbitration agreement prior to arbitration taking place, Kabab-Ji instead concerned the validity of an arbitration agreement once an arbitration has taken place and enforcement proceedings have been brought in English courts.[43]

While Enka concerned the English common law choice of law rules to the law governing arbitration agreements, Kabab-Ji was focused on the choice of law rules as set out in Section 103(2)(b) of the Arbitration Act 1996.[44] Despite noting this difference between the applicable tests at common law and under Section 103(2)(b) of the Arbitration Act 1996, the Supreme Court opined that it 'would be illogical if the law governing the validity of

[35] Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA Civ 6 (20 January 2020).

[36] Kabab-Ji (n 8).

[37] ibid [27].

[38] ibid [33].

[39] ibid [33]; See New York Convention art V(1)(d): 'Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that' the 'composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.

[40] Kabab-Ji (n 8) [32].

[41] ibid [35].

[42] ibid [1]-[2], [33], [35]-[36] (Lord Hamblen and Lord Leggatt).

[43] ibid [2].

[44] ibid [3].

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

the arbitration agreement were to differ depending on whether the question is raised before or after an award has been made'.[45]

It is hard to resist the Supreme Court's opinion that to have divergent approaches to these two questions would indeed be illogical. What a mess the institution of dispute resolution would be if state legal systems encouraged the resolution of disputes by arbitration yet refused to recognise and enforce awards from such arbitrations as a result of applying different tests at the agreement recognition and award recognition phases. It is thus curious that on the way to this point, the Supreme Court emphasised the difference of the underlying text of tests applicable at the different phases. The word 'indication' in Section 103(2)(b) of the Arbitration Act 1996 and Art V(1)(b) of NYC the first two steps is arguably just a synonym for the first two stages of the choice of law test in Sulamerica: namely whether the parties have expressly or impliedly chosen the body of law applicable to an arbitration agreement.

The Supreme Court noted there was little international uniformity or consensus as to question of determining the indicative choice of law governing validity of arbitration agreements under Art V(1)(a) of the New York Convention.[46] The Supreme Court seemed to be supportive of comity and uniformity in the law of international commercial arbitration before rather abruptly (and without any cited material) concluding that there was no consistency between national approaches to the matter, and that courts should instead proceed on first principles.[47]

The Supreme Court opined that any finding of the arbitral tribunal as to its own jurisdiction with respect to KFG was of 'no legal or evidential value to the court'.[48] The court added that present case was:

> not concerned with the rules of law to be applied by the arbitrators to the merits of the dispute. The issue is what law governs the validity of the arbitration agreement, for the purpose of deciding whether enforcement of the award may be refused pursuant to section 103(2)(b) of the 1996 Act. Not only is this a question for the court and not the arbitrators, but what law the arbitrators were required to apply to the merits of the dispute has no direct relevance in answering the question. [49]

The court stated that the governing law clause of main contract will normally suffice as an 'indication of the law to which the parties subjected the arbitration agreement'.[50] The wording of '[t]his Agreement' in the governing law clause meant the underlying governing law clause extended to arbitration agreement.[51] Even 'without any express definition, that phrase is ordinarily and reasonably understood […] to denote all the clauses incorporated in the contractual document, including [the arbitration agreement]'.[52] The Supreme Court further went on to

[45] ibid [35]: 'If there is to be consistency and coherence in the law, the same law should be applied - and therefore the principles for identifying the applicable law should be the same - in either case'.

[46] ibid [32].

[47] ibid [32].

[48] ibid [46]. The Supreme Court observing in passing that the 'arbitrators appear to have given no reason for their view that they should apply the law of the seat to decide whether they had jurisdiction'; citing Dallah (n 26) [30]. See also Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 [35] (Lord Mance); citing at [36] his comments in Dallah (n 26) [24] that 'Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them'. See also [84] (Lord Collins).

[49] Kabab-Ji (n 8) [46].

[50] ibid [33]; citing Enka (n 7) at [129].

[51] Kabab-Ji (n 8) [37].

[52] ibid [38].

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

note that if there were still doubt about the meaning of the phrase, then in the case of the FDA the phrase was 'specifically defined' for 'good measure' in a clause which defined '[t]his Agreement' as consisting of the terms 'set forth herein below' which 'manifestly' included the arbitration agreement. There was 'no good reason' to infer that the parties to the FDA had intended to exclude the arbitration agreement from the operation of the governing law clause.[53] Thus, the Supreme Court held the governing law clause in the main contract was 'absolutely clear' and that the 'law to which the parties subjected the arbitration agreement' was English law.[54] It followed that the question of whether KFG was a party to the arbitration agreement was a question of English law.

The discussion of a lower threshold for Art V(1)(a) challenges may indeed be obiter, with the Supreme Court seemingly deciding the case on the basis of privity of contract in light of a number of No Oral Modification (NOM) clauses in the FDA.[55] Since Rock Advertising,[56] contractual terms detailing form requirements for any subsequent amendments (such as they be in writing) have been upheld in England. Kabab-Ji confirmed speculation that this would have implications for a range of contractual form requirement clauses such as those relating to amendment, waiver, entire agreements, licensing and transferability of rights under contracts have been regarded as valid in England.[57] The Supreme Court regarded the FDA in question as having a 'double-lock', that is it required that amendments be in writing, and that any waiver of such writing requirements needed to be in writing.[58]

For the Supreme Court, the claimant had contemplated a form of novation 'whereby the original contract between the claimant and Al Homaizi was terminated by agreement and replaced by an agreement on the same terms save that the licensee was to be both Al Homaizi and KFG'.[59] The Supreme Court responded by extending the Rock Advertising approach to the termination clause.[60] The NOM clause applied not only to any contractual modifications but additionally to any purported termination. Any 'such termination was required to be in writing and signed by or on behalf of' the original parties to the FDA.[61] Without such a document, no novation took place. This seems exceptional.

There was an exception noted in Rock Advertising on the basis of estoppel[62] consisting of unequivocal words or conduct that a variation would be valid even if it did not comply with form requirements set out in a NOM

[53] ibid [38].

[54] ibid [38]-[39].

[55] See Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24. Such clauses in English law are considered with estoppel being the only exception. See generally Jonathan Morgan, 'Contracting for Self-Denial: On Enforcing "No Oral Modification" Clauses' (2017) 76 The Cambridge Law Journal 589; Luke Tattersall, 'No Oral Modification Clauses: Contractual Freedom under English and New York Law' (2019) 6 J. Int'l & Comp. L. 117; Florian Wagner-von Papp, 'European Contract Law: Are No Oral Modification Clauses Not Worth the Paper They Are Written On?' (2010) 63 Current Legal Problems 511; Elad Finkelstein and Shahar Lifshitz, 'The Tension Between the Real and the Paper Deal Concerning "No Oral Modification" Clauses' (2021) 80 The Cambridge Law Journal 460; George Pasas, 'No Oral Modification Clauses: An Australian Response to MWB Business Exchange Centres v Rock Advertising [2018] 2 WLR 1603' (2019) 45 University of Western Australia Law Review 141.

[56] Rock Advertising (n 55).

[57] Kabab-Ji (n 8) [59]; See Harry Sanderson, 'Wavering between a Rock and a Hard Place: The Future of No-Waiver Clauses in English Law' (2021) 37 Journal of Contract Law 122: As predicted by Sanderson, Rock Advertising was regarded in Kabab-Ji as naturally extending to the efficacy of no-oral waiver clauses.

[58] Kabab-Ji (n 8) [59].

[59] ibid [64].

[60] ibid [64].

[61] ibid [64].

[62] Rock Advertising (n 55) [16]; cited in Kabab-Ji (n 8) at [67].

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

clause.[63] While the Supreme Court in Kabab-Ji acknowledged this, they doubted that, even if there was an estoppel against an original party to the FDA 'that would not necessarily affect the position of KFG' who was entitled to 'assume that it could not become a party' to the FDA unless the form requirements of the NOM clauses were complied with.[64] The NOM clauses thus became, under English law' an 'insuperable obstacle' to any argument by the claimant that a novation of the FDA had taken place.[65]

A tension arises in the Supreme Court's reasoning here. On one hand, the court appears strongly motivated by notions of privity of contract, refusing to find KFG became a party to the arbitration agreement in the FDA as it was not an original party to the FDA agreement or arbitration agreement which it contained. The focus in this respect appears to be on FDA, and their consent (or lack thereof) to the arbitration agreement. Yet, key to the Supreme Court's finding that FDA did not become a party to, or consent to, the arbitration agreement is the wording of the NOM clauses in the FDA, an agreement KFG was not involved in making. The Supreme Court seems to be placing a curious emphasis on the original contract to determine its extension to third parties at a later date, and in the name of party autonomy. If KFG is truly a third party to the FDA, then there must be some limit to what a contract concluded between other parties may reveal about KFG's own decisions regarding its autonomy.

The dismissal of the pro-validation approach[66] seen in the Bermuda Form cases and at play in the Court of Appeal decision in Sulamerica to arbitration agreements was stark. As was the lack of any discussion of how the separability doctrine influenced findings of the law governing arbitration agreements in cases such as Sulamerica.[67] The court in Enka had noted that, on the basis of Sulamerica, where the the law intended to govern the entire contract would result in the potential invalidity of an arbitration agreement contained within:

> because of its severable character its putative invalidity may support an inference that it was intended to be governed by a different law from the other provisions of the contract - or may at least negate an inference that the law generally applicable to the contract was intended to apply to the arbitration clause.[68]

In Sulamerica the express choice of Brazilian law to govern the underlying contract, with a London arbitration clause, was not taken as an implied choice of that body of law to govern the arbitration agreement, because 'there is at least a serious risk that a choice of Brazilian law would significantly undermine that agreement'.[69] In that case the Court of Appeal turned to 'what system of law the agreement has the closest and most real connection'.[70] While there was no doubt for the Court of Appeal in that case that the London arbitration

[63] In addition to 'something more ... than the informal promise itself': Kabab-Ji (n 8) [67].

[64] ibid [68].

[65] ibid [69].

[66] Peter Tzeng, 'Favoring Validity: The Hidden Choice of Law Rule for Arbitration Agreements' (2016) 27 American Review of International Arbitration 327; Sabrina Pearson, 'Sulamerica v Enesa: The Hidden Pro-Validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement' (2013) 29 Arbitration International 115.

[67] Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm) (20 December 2012) [12], [22] and [31]; Discussed in the Court of Appeal decision in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) (n 35) [36]-[37], [47]-[50]; Sulamerica (n 15) [9]-[10], [18],[21]. [26] (Moore-Bick LJ). [54]-[56] (Lord Neuberger MR); Enka (n 7) [3], [40]-[41] (Lord Hamblen and Lord Leggatt). Note critique at [53], [60]-[64]; cf Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (Rev 1) (n 15) [92]-[94] (Popplewell LJ); C v D (n 6) [22]-[23],[26] (Longmore LJ); See also Dallah (n 26) [16], [23] (Lord Mance), [84] (Lord Collins).

[68] Enka (n 7) [97]; See Sulamerica (n 15) [26], [29]-[32].

[69] Sulamerica (n 15) [31]. Moore-Bick LJ continued: 'I do not think that the parties can have intended to choose a system of law that either would, or might well, have that effect. This, it seems to me, reflects the fact that, although one may start from the assumption that the parties intended the same law to govern the whole of the contract, including the arbitration agreement, specific factors may lead to the conclusion that that cannot in fact have been their intention. In the end, therefore, I am unable to accept that the parties made an implied choice of Brazilian law to govern the arbitration agreement'.

[70] ibid [32].

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

agreement had 'a close and real connection' with the underlying contract it formed part of, Moore-Bick LJ stressed that its 'nature and purpose [were] very different'.[71] Looking towards its purpose, while the London arbitration clause lacked a 'close juridical connection' with the body of law governing the policy of insurance being New York law, it had its closest and most real connection with English law as the 'law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective'.[72]

The Supreme Court in Enka was impressed by this line of reasoning stating the fact an arbitration agreement would be invalid under the proper law of the underlying contract was 'itself a strong reason' for not applying that body of law to the arbitration agreement itself.[73]

Despite this discussion in Enka, no mention of the separability doctrine was made in Kabab-Ji. As to the pro-validation principle, the Supreme Court was critical of any attempt to apply that principle to the question of who is a party to an arbitration agreement, stating to do so would seek to 'seeks to extend the validation principle beyond its proper scope'.[74] For the Supreme Court, that principle of contractual interpretation applies when 'parties to the dispute have agreed to resolve disputes by arbitration and seeks to uphold their presumed intention that their agreement should be legally effective'.[75] It 'presupposes that an agreement has been made which may or may not be valid' and cannot be invoked to 'create an agreement which would not otherwise exist'. [76] The question of who is a party to an impugned arbitration agreement is thus a prerequisite for the pro-validation principle to have any work to do. [77] It followed that the pro-validation principle did not apply to questions of validity in what the Supreme Court described as its 'expanded sense' in which it is used for the purposes of Art V(1)(a) of the New York Convention and Section 103(2)(b) of the Arbitration Act 1996 'to include an issue about whether any contract was ever made between the parties to the dispute'.[78]

Questions about and the rationale for the various instances in which arbitration agreements may or may not be applied to third parties under the laws of subrogation,[79] incorporation by reference and assignment,[80] agency,[81] third-party legislation,[82] estoppel[83] groups of companies[84] and doctrines of derived rights and obligations,[85] and

[71] ibid [32].

[72] ibid [32].

[73] Enka (n 7) [105].

[74] Kabab-Ji (n 8) [51].

[75] ibid [51].

[76] ibid [51].

[77] ibid [51]: 'There is no reason to approach the question whether parties to a dispute have made any agreement at all with each other with any presumption that they did so. Applying such a presumption would simply beg the question which the court has to answer in this case'.

[78] ibid [53].

[79] West Tankers Inc v Ras Riunione Adriatica de Sicurta SpA ('The Front Comor') [2005] EWHC 454.

[80] Thomas & Co Ltd v Portsea SS Co Ltd [1912] AC 1; Federal Bulk Carriers Inc v C Itoh & Co Ltd (The 'Federal Bulker') [1989] 1 Lloyd's Rep 103; Allison and Dharmananda (n 21).

[81] Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS v VSC Steel Company Ltd [2013] EWHC 4071 (Comm).

[82] See eg Third Parties (Rights Against Insurers) Act 1930; Contracts (Rights of Third Parties) Act 1999.

[83] Carpatsky Petroleum Corpn v PJSC Ukrnafta (n 23).

[84] Egiazaryan v OJSC OEK Finance [2017] 1 All ER 207 (Comm). Burton J considered it to be a question of the jurisdiction of the arbitral tribunal and not whether a third party had become a party to the arbitration agreement. English conflict of laws provided the test for incorporated entities would be that applicable in the subsidiaries place of incorporation.

[85] The Padre Island [1984] 2 Lloyd's Rep 408.

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

transferred loss (currently being played out before English courts in the Frio Dolphin[86]) were ignored or otherwise dealt with shortly by the Supreme Court. The reality is that third party consignees under bills of lading become parties to arbitration agreements every day either by consignment or through the application of incorporation by reference rule to the terms of charterparties.

There is the curious wording of Section 82(2) of the Arbitration Act 1996 to consider. Section 82(2) provides that references in Part I of that Act to 'to a party to an arbitration agreement include any person claiming under or through a party to the agreement'. The section has attracted attention in the English High Court.[87] The High Court of Australia recently considered the wording 'through or under' in the Australian domestic commercial arbitration legislation.[88] That legislation mirrors the wording of 'party' in Section 7 of the Australian Arbitration Act 1974 and Section 82(2) of the Arbitration Act 1996.[89]

An Australian glance

In Rinehart v Hancock Prospecting Pty Ltd, beneficiaries under a trust deed brought court proceedings against the respondent trustee as well as third-party companies alleged to be the recipients of assets in breach of trust. The companies sought a stay of the court proceedings. The trust deeds in question contained arbitration agreements. The respondent companies sought to rely on those arbitration agreements to compel the claimants to arbitration, arguing that despite being third parties, they were a party claiming 'through or under' the respondents, per the relevant state commercial arbitration act.[90]

The majority of the High Court accepted this argument, finding that the third-party companies were claiming 'through or under' the respondents and were thus parties to the arbitration agreement as a result of the legislation.[91] The third-party companies, as assignees of mining tenements, were contesting the claimant's claim that they knowingly received those tenements in breach of trust.[92] In asserting that there was no breach of trust, or that the assignor was otherwise absolved of responsibility for breach of trust:

> the assignee takes its stand upon a ground which is available to the assignor and stands in the same position vis-à-vis the claimant as the assignor. Accordingly, since the assignor and the claimant are bound by an arbitration agreement applicable to the claim of breach of trust, there is no good reason why this claim should not be determined as between the claimant and the assignee in the same way as it will be determined between the claimant and the assignor. To exclude from the scope of the arbitration agreement binding on the assignor matters between the other party to that agreement and the assignee would give the arbitration agreement an uncertain operation.[93]

The majority considered such an approach would 'jeopardise orderly arrangements, potentially lead to duplication of proceedings and potentially increase uncertainty as to which matters of controversy are to be determined by litigation and which by arbitration' and 'ultimately it would frustrate the evident purpose of the

[86] Argos Pereira Espana SL v Athenian Marine Ltd (the "Frio Dolphin") [2021] EWHC 554 (Comm).

[87] Naibu Global International Company PLC v Daniel Stewart & Company PLC [2020] EWHC 2719 (Ch).

[88] Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 1.

[89] See Section 2(1) Commercial Arbitration Act 2010 of New South Wales, defines the a party as meaning a party to an arbitration agreement' including 'any person claiming through or under a party to the arbitration agreement' and 'in any case where an arbitration does not involve all of the parties to the arbitration agreement, those parties to the arbitration agreement who are parties to the arbitration'.

[90] Rinehart v Hancock Prospecting Pty Ltd (n 88) [52], [57]-58].

[91] ibid [74] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[92] ibid [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[93] ibid [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

statutory definition'.[94] They stated that the case was a 'matter in which the defendant third party companies claim a defence through or under parties to an arbitration' in circumstances 'where the appellants agreed with those parties to the arbitration agreement that any dispute as to those parties' beneficial title to the mining tenements would be determined by arbitration'.[95]

Edelman J, in a powerful separate opinion, declined to adopt the majority's broad interpretation of the phrase 'through or under'.[96] His Honour could not infer an intention on the part of the legislature behind the commercial arbitration act to depart from the principle of privity of contract 'by the use of the century-old formula concerning "claiming through or under a party", which had a long-standing meaning consistent with privity'.[97] To widely and liberally stretch, as the majority had done, the words 'any person claiming through or under a party to the arbitration agreement' would be 'antithetical' to arbitration as a matter of contract and undermine the notion that parties 'may specify with whom they choose to arbitrate their disputes'.[98] While acknowledging the potential benefits of arbitration as a less costly, more convenient 'one-stop adjudication' shop,[99] there was no basis for a wide meaning of 'party' that would:

> compel a third party to submit its independent claim or defence to arbitration, without the third party having consented to the procedure, without an arbitrator to whose appointment the third party had consented in the exercise of its own "voice in the choosing of the arbitrators", and possibly by a reference to a legal system that would not have been chosen by and would not otherwise have applied to the third party.[100]

Edelman J noted that an 'arbitration clause' will 'often be part of a package of rights and duties agreed by the parties'.[101] A third-party claim will be characterised as 'through or under' a party to an arbitration agreement where the third party seeks to 'enforce or to resist the enforcement of a right held or duty owed by the party'.[102] He continued:

> So understood, this is not an exception to privity of contract, because if a third party's claim relies upon or resists a right of the party to the arbitration agreement, then the third party is agitating the right of a party and not agitating its own right.[103]

In circumstances such as those in the case at hand, where third parties 'rely upon the right of a party' and are therefore bound by arbitration agreements 'include where the third party's claim is based upon an assignment

[94] ibid [73] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[95] ibid [77]-[79] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

[96] ibid [84] (Edelman J).

[97] ibid [84] (Edelman J).

[98] ibid [85] (Edelman J) (footnotes omitted).

[99] ibid [83], [86] (Edelman J).

[100] ibid [85] (Edelman J) (footnotes omitted).

[101] ibid [87] (Edelman J).

[102] ibid [88] (Edelman J); citing Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332342.

[103] Rinehart v Hancock Prospecting Pty Ltd (n 88) [88] (Edelman J).

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

or novation of the rights of the party'.[104] In such a case, the 'assignee takes the assigned right with both the benefit and the burden of the arbitration clause'.[105]

The treatment of the 'through or under' phrase by the Australian High Court is illuminating even if the majority's approach brings with it doctrinal challenges. It signals the likely continuation of the approach taken in the United Kingdom, despite some infelicities in conception.

The fragmentation in this area of law is only growing. Kabab-Ji was perhaps a missed opportunity to develop a cohesive rationale for the circumstances in which third parties are, or are not, bound to arbitration agreements. It would seem on the reasoning of the Supreme Court it is now fairly easy to circumvent arbitration agreements through assignment or related legal doctrines.

3 STAYS UNDER SECTION 9, BOUND NON-PARTIES AND *LIFESTYLE EQUITIES*

Section 9 of the Arbitration Act 1996 concerns stays of domestic UK court proceedings in the face of agreements providing for the resolution of disputes by arbitration in the UK. It states:

> 9 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.
>
> …
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.[106]

Non-parties became bound to arbitrate Section 9 of the Arbitration Act 1996 in the context of trademark disputes in Lifestyle Equities.[107] That case concerned the logos used by the Beverly Hills Polo Club (BHPC) and the Santa Barbara Polo Club (SBPC). Disputes arose in the United States when the BHPC became the registered proprietor of trademarks relating to their logo in the mid-1990s as the BHPC logo was similar in resemblance to that used by SBPC since 1911. BHPC and SBPC subsequently entered an agreement to resolve a dispute concerning the similar logos in 1997. The agreement included an arbitration clause providing for the determination of disputes by arbitration in California in accordance with the procedural rules of the American Arbitration Association. Lifestyle Equities later became the assignee of BHPC's trademarks and disputes as to the trademarks began to resurface. In 2020, Lifestyle Equities brought proceedings in England against SBPC for trademark infringement contrary to EU and UK law. Lifestyle Equities claimed it was neither a party to the 1997 arbitration agreement, nor that it was otherwise bound to arbitrate under that agreement as a result of being an assignee of trademarks under EU and UK law. The litigation proceeded on the basis that Lifestyle Equities was not aware of the 1997

[104] ibid [88] (Edelman J); citing, inter alia The Padre Island (n 85) 414 (other footnotes omitted).

[105] Rinehart v Hancock Prospecting Pty Ltd (n 88) [88] (Edelman J); citing Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 1 Lloyd's Rep 279, 285. For Edelman J, these third party claims within s 2(1) could 'equally be introduced pursuant to traditional contract law theories'; citing also Stavros Brekoulakis, Third Parties in International Commercial Arbitration (Oxford University Press 2010) 107 [3.45].

[106] Arbitration Act 1996 s 9.

[107] Lifestyle Equities (n 9).

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

agreement between BHPC and SBPC containing the arbitration clause at the time it became assignee to the BHPC trademarks. SBPC responded seeking a stay of proceedings under Section 9 of the Arbitration Act 1996.[108]

Two bases were relied upon in support of extending the arbitration agreement to Lifestyle Equities as a third party – that they were assignees of the trademark and on the basis of equitable estoppel. At first instance, Hacon J agreed with SBPC, staying the English proceedings on the basis that Lifestyle Equities had become party to the arbitration agreement under English law and, alternatively, as a matter of Californian law as an obligation that passed to Lifestyle Equities with the assignment and that, as a matter of Californian law, Lifestyle Equities was estopped in equity from resisting that they were bound by the arbitration agreement.[109]

On appeal, the English Court of Appeal upheld the decision of Hacon J on the basis of a non-party becoming bound by an arbitration agreement (as opposed to becoming party to it).[110] For the majority, this was a question of Californian law (as the proper law of the arbitration agreement).[111] In upholding the decision of Hacon J at first instance, the Court of Appeal majority opinion seemed to turn on an expansive reading of Section 9 of the Arbitration Act 1996 deeming nothing stood in the way of relief being granted in the way of a stay of domestic proceedings, despite their finding that Lifestyle Equities was a non-party to the arbitration agreement.[112]

Snowden LJ, in dissent, agreed that the appellants were not parties to the arbitration agreement, however disagreed with the majority that Californian law should decide whether the appellants were bound to arbitrate.[113] His Lordship was willing to adopt the distinction of the majority between parties and bound-non parties. This meant that while Snowden LJ acknowledged 'the "putative governing law"' approach from Kabab-Ji[114] would apply to determine whether a third party became a party to an arbitration agreement,[115] this approach would not assist the determination of whether a third party became bound to arbitrate by operation of a non-contractual mechanism, such as the law of assignment and its interaction with doctrines of intellectual property.[116] If the relevant question was who, as a non-party, was bound to arbitrate, it was wrong to determine this question by reference to contractual-based choice of law rules informing the validity, scope and

---

[108] Arbitration Act 1996 s 9: '(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…. (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or bincapable of being performed'.

[109] Lifestyle Equities CV v Hornby Street (MCR) Ltd [2020] EWHC 3320 (30 November 2020) [21] (Hacon J).

[110] Lifestyle Equities (n 9) [119].

[111] ibid [110].

[112] ibid [96] (Lewison LJ): 'Those who are parties are therefore entitled to apply for a stay under section 9. But there is nothing in section 9 (1) (at least on the face of it) which says that the application for a stay may only be made against another party to the arbitration agreement (as opposed to a party to the proceedings). I agree with the judge, therefore, that the defendants are entitled to make the application against the claimants despite the fact that the claimants were not party to the arbitration agreement itself'.

[113] ibid [83] (Snowden LJ).

[114] *Kabab-Ji* (n 8) [87].

[115] Lifestyle Equities (n 9) [24] (Snowden LJ): It was 'also well established in private international law that where there is a dispute about whether an arbitration agreement exists at all or is valid, the general approach is to apply the law that would govern the agreement if it exists or is valid (the so-called "putative governing law")'; citing Kabab-Ji (n 8) [27].

[116] Lifestyle Equities (n 9) [40]-[43], [48], [56], [87] (Snowden LJ): 'In the instant case, as I have indicated, the only additional factor that arguably connects the Appellants to the arbitration agreement in the 1997 Agreement is that they took assignments of the Trade Marks. Since it is plain that the law governing the Trade Marks (i.e. UK or EU law, as appropriate) would apply to the substantive underlying dispute as to whether the co-existence provisions of the 1997 Agreement were binding on the Appellants or not, it seems to me entirely logical that the same law should apply to the question of whether the Appellants are to be treated as bound by the arbitration clause in the same agreement' at [56]; favouring the application of rule 135 over rule 64 in Dicey, Morris & Collins on the Conflict of Laws 15th Ed, (15th ed, Sweet & Maxwell 2012) to the case in hand; citing with approval the comments of Neuberger J in Peer International Corp v Termidor Music Publishers Ltd [2002] EWHC 2675, [22].

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

interpretation of arbitration agreements.[117] The relevant choice of law rules concerned the assignment of proprietary rights, not interpretation of the arbitration agreement. It was English law with which those assigned rights had their closest and most real connection.[118] As a matter of English law, the appellants were not bound to arbitrate disputes concerning their assigned proprietary rights.

Responding to Snowden LJ's application of choice of law rules for assignment or proprietary rights, the majority confined the operation of choice of law rules concerning assignment of proprietary rights to the substance of disputes under the wider agreement, and not the validity or scope of the arbitration agreement for the purposes of a stay application under Section 9 of the Arbitration Act.[119] The majority favoured an approach based on the choice of law rules informing the validity, scope and interpretation of arbitration agreements. [120] In their short, 26 paragraph, majority opinion Lewison LJ (Macur LJ concurring) determined that the case was concerned with scope of the arbitration agreement, somehow different to the interpretation of it.[121]

The distinction between parties, and bound-non parties, as well as that between interpretation and scope of arbitration agreements did not feature in the Supreme Court decision in Kabab-Ji. Such distinctions do seem to fly in the face of the Supreme Court in Kabab-Ji where it noted it would be illogical if a different approach were taken to questions of validity and parties to arbitration agreements at the agreement and award recognition phases of the broader arbitration process. There, the relevant question there was whether KFG was a party to the arbitration agreement so that an award could be enforced or challenged under s103(2)(b) of the Arbitration Act 1996. Could KFG have been considered a non-party bound to arbitrate in Paris under Section 9 of the Arbitration Act 1996 even if any eventual award was unable to be enforced on them in England by virtue of the wording of Section 103(2)(b) and Art V(1)(a) of the New York Convention? Or does the new constitution of the issue as one concerning the scope of an arbitration clause mean that the discussion is freed from the clutches of Art V(1)(a) and instead deals with the application of Art V(1)(c) of the New York Convention? The interaction of scope (or often termed arbitrability) in Art V(1)(c) with capacity and validity under Art V(1)(a) is not made clear.

It seems conceptually and practically difficult to separate the question of interpretation of an arbitration agreement from its scope, particularly where that inquiry is focused on the language of the arbitration agreement. This majority's notion that a non-party to an arbitration agreement may still be bound by it unless it is inoperative is curious. It is hard to justify why principles relating to who is party to an arbitration agreement (whether for agreement application or award recognition) should be distinguished from a question of when non-parties are otherwise bound by such agreements. Further, if such a distinction were to be accepted, it is

[117] Lifestyle Equities (n 9) [85] (Snowden LJ). This meant that, unlike the majority, Snowden LJ was unwilling to determine whether the appellants were bound to arbitrate by reference to the choice of law rules governing validity, scope and interpretation of arbitration agreements. Cf ibid [93] (Macur LJ), [101], [108]-[111] (Lewison LJ); Snowden LJ preferring rule 135 (Assignment of Intangible Things) from Dicey, Morris & Collins on the Conflict of Laws 15th Ed, (n 117).

[118] Lifestyle Equities (n 9) [46]-[48] (Snowden LJ).

[119] See ibid [110]-[111] (Lewison LJ): 'I do not consider that it governs the scope or effect of the arbitration agreement' noting that in his view it was 'a contractual rather than a proprietary question'. He considered that the 'question is governed by the proper law of the arbitration agreement' agreeing with Snowden LJ that this question is not properly characterised as the interpretation of the arbitration agreement. The rule as stated in Dicey, Morris and Collins is not a statute, and it would be wrong to apply it as if it were. But and 'if it were necessary to shoehorn this question into the rule as stated in Dicey, Morris and Collins, I would prefer to characterise it as an aspect of the scope of the agreement' (citations omitted).

[120] Cf Lifestyle Equities (n 9) [93] (Macur LJ), [101], [108]-[111] (Lewison LJ); relying on rule 64 on rule 64 on validity, scope and interpretation of an arbitration agreements from Dicey, Morris & Collins on the Conflict of Laws 15th Ed, (n 117).

[121] ibid [110]-[111], [117]-[119] (Lewison LJ).

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

difficult to see why the scope of an arbitration clause, formed between parties A and B, should decide whether non-party C is bound to arbitrate.

Lifestyle Equities suggests a category of bound non-parties to arbitration, who lack the powers and defences normally afforded to a party to arbitral tribunal proceedings. This is despite the remark of Lewison LJ who formed part of the majority in that case that '[a]s a general proposition, the law governing the validity of the arbitration agreement also governs the question who becomes party to it' and that '[l]ogically, the same principle must apply to the question who is bound by it'.[122] There is little textual or contextual basis to recognise a special category of bound non-parties subject to arbitration agreements. Neither is there a strong textual or contextual basis to read Section 9 as expansive and isolated from the rest of the regime embodied in the Arbitration Act 1996.[123]

4 CONCLUSION

So, in light of various decisions, we have parties, non-parties bound by Section 9, non-parties who can escape enforcement under Section 103(2)(b) of the Arbitration Act 1996,[124] non-parties who are restricted from resisting arbitration under section 9 unless they can establish their involvement was beyond the scope of the arbitration agreement. The following table illustrates the current dilemma:

	Persons Entitled		
Action	Parties to the Arbitration Agreement	Non-Parties Otherwise Bound by the Arbitration Agreement	Non-Parties Not Bound by the Arbitration Agreement
Ability to Pursue English Court Proceedings Despite Arbitration Agreement	✗	✗	✓
Ability to Seek a Stay of English Proceedings in Favour of Arbitration in England	✓	✓	✗
Ability to Seek a Stay of English Proceedings in Favour of Arbitration in a Foreign Jurisdiction	✓	?	✗
Availability of Anti-Suit Injunction to Restrain Foreign Proceedings in Breach of an Arbitration Agreement	✓	?	✗
Ability of Award Creditor to Enforce Arbitral Award Rendered in a Foreign Arbitration in England	✓	?	✗
Ability of Award Debtor to Resist Enforcement of Foreign Arbitral Award in England	✗	?	✓

The table reveals gaps and uncertainties. The position is less than clear. What is clear that dispute resolution by arbitration has become fragmented internally within England. Kabab-Ji spoke of a lack of international uniformity generally on these questions, but it is becoming increasingly clear that perhaps a more pertinent

[122] ibid [112] (Lewison LJ); citing Kabab-Ji (n 8) [18], [53].

[123] See, for example Arbitration Act 1996. For arbitrations seated in England, Wales and Northern Ireland, Section 72 protects options for challenge for 'third parties' who refuse to participate in arbitration under protest. Pursuant to Section 72(1) of the Arbitration Act 1996 an entity 'alleged' to be a 'party' may question, in court for the purposes of injunctive, declaratory 'or other appropriate relief' whether: there is a valid arbitration agreement; the tribunal is properly constituted; or, to question what matters have been 'submitted to arbitration in accordance with the arbitration agreement'. Under sub-s (2) a 'party' alleged to be a 'party' to arbitration but who refuses to take part may challenge an award on the basis that the tribunal lacked substantive jurisdiction in relation to them (under Section 67) or on the ground of serious irregularity affected them (under Section 68) and will not have to exhaust arbitral procedures (under Section 70[2]) to do so.

[124] Kabab-Ji (n 8).

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>

This article was accepted for publication in *Arbitration International* published by Oxford University Press on behalf of the London Court of International Arbitration *in* Volume 38, Issue 3, September 2022, 151–167: https://doi.org/10.1093/arbint/aiac008.

problem is the lack of uniformity within England itself. While this article is somewhat critical of a number of aspects of the Supreme Court's reasoning in Kabab-Ji, the assertion that differing approaches to the question of validity at pre and post award stages would be illogical is hard to resist. Did, as suggested by the Court of Appeal in Lifestyle Equities, the Supreme Court in Dallah draw a meaningful distinction between third parties as parties to arbitration agreements, and third parties as bound-non parties to arbitration agreements?

The Court of Appeal in Lifestyle Equities justified their approach on the basis that nothing in Section 9 of the Arbitration Act 1996 stopped the granting of a stay with respect to non-parties. Such an approach is difficult to accept considering the text and context of the Act, including Section 9 itself. Section 9(1) refers both to the entity seeking a stay as a 'party' and the notice requirements set out in terms of 'other parties to the proceedings'.[125] It would seem that the purpose of Section 9 is directed at the relationship between parties to arbitration agreements, and not the relationship between a party to an agreement and a non-party considered bound by an arbitration agreement.

In sum, the table reveals the known unknowns when it comes to considering who may litigate, despite an arbitration clause, seek a stay, or resist or enforce an award, and where such actions may be taken. It does not seem to advance the march of arbitration for such unknowns to remain, even if the tail of the donkey has been pinned in the identification of the issues remaining.

With well-planned official parties, vetting and settling on the guest list is a key step to ensuring a harmonious and convivial atmosphere. Party crashers disturb the balance. In a similar way, not being certain how to determine if a person is a party to an arbitration agreement or a bound-non party seems to go against the grain of arbitration resting on the pillars of party autonomy and consent. The party is not over on the issue of parties in arbitration, but it well should be.

[125] Arbitration Act 1996 s 9(1).

Citation and Link to Published Article: Allison S and Dharmananda K, "Party Crashers: Issues in Identifying Parties and Others Bound by Arbitration Agreements" (2022) 38 Arbitration International 151 <https://doi.org/10.1093/arbint/aiac008>