

Case Note

AN ASSIGNEE'S OBLIGATION TO ARBITRATE AND THE PRINCIPLE OF CONDITIONAL BENEFIT

*Cassa di Risparmio di Parma e Piacenze SpA v
Rals International Pte Ltd*
[2016] 1 SLR 79

Under the general law of assignment, only benefits of a contract may be transferred from assignor to assignee; burdens do not pass. In *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* (“*Cariparma v Rals*”), the High Court applied the principle of conditional benefit to hold that an assignee is bound to arbitrate a dispute arising from the underlying contract which falls within the scope of the relevant arbitration clause. *Cariparma v Rals* is significant for a few reasons: it is likely to be the first case in which such an analysis has been applied to an arbitration agreement. Further, this analysis is likely to be adopted by arbitral tribunals in the face of jurisdictional challenges brought by assignees. This note discusses the principle of conditional benefit, its application to arbitration agreements, and its general implications.

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I. Introduction

1 In *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd*¹ (“*Cariparma v Rals*”), the High Court considered whether a duly-assigned arbitration agreement bound an assignee to submit its dispute with the other contracting party to arbitration. If so, a stay of court proceedings would be granted under s 6 of the International Arbitration Act² (“IAA”). In applying s 6, the court found that an assignee was bound to arbitrate its claim and would be claiming “through or under”³ a party to the arbitration agreement (that is, the

* The author wishes to thank Koo Zhi Xuan (State Counsel, Attorney-General’s Chambers) for his insightful comments on an earlier draft. All errors remain the author’s.

1 [2016] 1 SLR 79.

2 Cap 143A, 2002 Rev Ed.

3 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 6(5)(a).

assignor). On the facts, however, the court found that the claim by the claimant-assignee in respect of dishonoured promissory notes, was not the “subject”⁴ of the arbitration agreement and the court declined the grant of a stay.

2 Of significance is the court’s reasoning on why an assignee who under the law of assignment typically only receives the benefits of a contract additionally bore the burden of submitting its dispute to arbitration. In arriving at this position, the judge applied the principle of conditional benefit. This principle is an exception to the general rule in the law of assignment that only benefits pass to an assignee while burdens remain with the assignor. The result of the conditional benefit analysis is that the assignee’s entitlement to sue under the main contract is annexed with the burden of the assignee being compelled to submit any disputes to arbitration. *Cariparma v Rals* is likely to be the first judgment to deal specifically with the obligations of an assignee *vis-à-vis* an arbitration agreement.⁵ The decision is also significant because arbitral tribunals who face a jurisdictional challenge by an assignee are likely to look to the decision for guidance. Likewise, the same reasoning could be applied to jurisdictional clauses.

II. Facts

3 *Cariparma v Rals* concerned a claim brought by an assignee, Cassa di Risparmio di Parma e Piacenze SpA (“Cariparma”), over unpaid promissory notes. These notes were the payment mechanism in an underlying contract for the supply of equipment to shell and process raw cashew nuts (“the Supply Agreement”).⁶ The contracting parties to the Supply Agreement were Oltremare, the supplier, and Rals, the buyer. As consideration for the equipment, Rals undertook to pay the purchase price of €1,950,185 in ten instalments. The last eight of these instalments were to be paid by way of promissory notes, to be presented at specified time intervals.⁷

4 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 6(1).

5 Parts of the decision were devoted to a discussion on the choice of law rules concerning the assignment of arbitration agreements. See *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [72]–[89].

6 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [14]. There was a related services agreement between Oltremare and Rals for the former to assemble and commission the relevant equipment. Payment for these services was included in the purchase price stipulated in the Supply Agreement and nothing turns on this separate but related contract.

7 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [15]–[16].

4 Clause 9 of the Supply Agreement provided that all disputes in connection with the Supply Agreement shall be settled by arbitration under the Rules of the International Chamber of Commerce in Singapore, should a prior obligatory attempt at conciliation fail.⁸

5 All eight promissory notes were delivered by Rals to Oltremare's banks, Unicredit Banca, on 23 December 2010. These were to be held and released only upon Oltremare's presentation of certain documents.⁹

6 In July 2011, Oltremare and Cariparma entered into a discount contract whereby Oltremare would assign the eight promissory notes to Cariparma without recourse and Cariparma would pay Oltremare the value of the eight notes at a discount ("the Discount Contract").¹⁰ The assignment of the eight notes was accompanied by an assignment of Oltremare's right to receive payment of €1,804,000.¹¹ In tandem with the assignment, Oltremare made declarations that the receivable was in existence, valid and unencumbered, and assignable, and that the notes were autonomous from the receivable. Rals was notified of the assignment. On 5 August 2011, Oltremare negotiated the notes to Cariparma, and on 12 August 2011, Cariparma duly paid Oltremare a discounted sum of €1,657,105.11.¹²

7 Subsequently, Cariparma presented the notes for payment on their maturity dates of 6 January 2012, 6 July 2013, 6 January 2013 and 6 July 2013, and all of them were dishonoured.¹³ Consequently, Cariparma sued in the Singapore High Court to recover the sum of €902,000 on the four dishonoured notes.

8 In response to the court proceedings, Rals applied for a stay under s 6 of the IAA. The relevant parts of s 6 read:

6. – (1) where any party to an arbitration agreement ... institutes any proceedings in court against any other party to the agreement *in respect of any matter which is the subject of the agreement*, any party to the agreement may ... apply to that court to stay the proceedings ...

8 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [18].

9 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [24].

10 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [26].

11 The right to an export credit insurance policy was similarly assigned by Oltremare to Cariparma.

12 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [35]–[36].

13 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [37].

...

- (5) For the purpose of this section ...
- (a) *a reference to a party shall include a reference to any person claiming through or under such party.*

[emphasis added]

- 9 The questions before the court, so far as relevant here, were:
- (a) whether Cariparma was a “person claiming through or under such party”,¹⁴ and
- (b) if the action was a matter which is the subject of the agreement.

10 The judge found that even though an assignment typically transfers only the benefits and not the burdens of a contract, the principle of conditional benefit applied such that the assignee was bound to arbitrate disputes arising from the assigned contract.¹⁵ Thus, Cariparma, as assignee, was a person “claiming through or under” Oltremare, the assignor, for purposes of s 6(5) of the IAA. However, the judge declined a stay of court proceedings in favour of arbitration as he found that the claim, brought in respect of dishonoured promissory notes, was not a “matter subject of the agreement”. He found that Cariparma’s statutory claim under the Bills of Exchange Act¹⁶ was “narrowly confined” and that “the rights and obligations arising under [the Supply Agreement] are separate and independent from the statutory contract represented by the notes”.¹⁷

III. Discussion

A. *The intersection of the law of assignment and the law of arbitration*

11 *Cariparma v Rals* is likely to be the first decision analysing the basis of an assignee’s obligation to arbitrate. The preponderance of decisions on the relationship between the law of assignment and its

14 There was the anterior question of whether Cariparma was a “party” to the arbitration agreement but, as expected, the judge found this not to be the case: see *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [47]–[55].

15 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [100]–[123].

16 Cap 23, 2004 Rev Ed.

17 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [204].

effects on an arbitration agreement deal mainly with the assignee's right to compel arbitration or whether the assignor or assignee is the proper party to bring proceedings in the context of the tribunal's jurisdiction. Some basic principles have emerged from the cases. First, it has been long recognised that an arbitration agreement is a right which may be assigned.¹⁸ Where the assignment is absolute, it is likely that an assignor no longer retains a right to arbitrate.¹⁹ Further, where the assignment occurs midway through ongoing arbitration proceedings, it is possible for the assignee to continue the proceedings²⁰ provided it gives notice within a reasonable time.²¹

12 Only a handful of cases have discussed the esoteric question of whether an assignee is bound to arbitrate its claim. In these decisions, however, the *nature* of an assigned arbitration agreement was not the focal point, though a conditional benefit-type analysis may have been alluded to. In *Schiffahrtsgesellschaft Detlev von Appel GmbH v Voest Alpine Intertrading GmbH*²² (“*The Jay Bola*”), the English Court of Appeal granted an anti-suit injunction preventing the insurer from suing in Brazil, in breach of an English arbitration clause in the main contract. Hobhouse LJ explained:²³

The insurance company has the right to refer the claim to arbitration, obtain if it can an award in its favour from the arbitrators, and enforce the obligations of the time charterer to pay that award. Likewise the insurance company *is not entitled to assert its claim inconsistently with the terms of the contract*. One of the terms of the contract is that, in the event of dispute, the claim must be referred to arbitration. *The insurance company is not entitled to enforce its right without also recognising the obligation to arbitrate*. [emphasis added]

18 *Shayler v Woolf* [1946] Ch 320 at 322–323; [1946] 2 All ER 54 at 58–59, effectively reversing the prior decision of *Cottage Club Estates Ltd v Woodside Estates Company (Amersham) Ltd* [1928] 2 KB 464 where the judge considered an arbitration agreement too personal a right to be assigned. See also *Montedipe SpA v JTP-RO Jugotanker* [1990] 2 Lloyd's Rep 11 at 15–17 and *Firma C-Trade SA v Newcastle Protection and Indemnity Association (No 2)* [1991] 2 AC 1 at 33.

19 *The Halcyon the Great* [1984] 1 Lloyd's Rep 283 at 289; and *NBP Developments Ltd v Buildko & Sons* [1993] 66 BLR 120. It is suggested that, where the original contracting party, the assignor, continues to perform ongoing obligations in a contract, and is intimately acquainted with the factual background, it should be an implied term of the assignment that the assignor may bring proceedings on behalf of the assignee subject to a duty to account to the assignee for any damages. Where an assignee is merely an insurer or financier, such an implied term is sensible given the assignee lack of familiarity with the factual background. It would otherwise be hamstrung from bringing an action.

20 *Montedipe SpA v JTP-RO Jugotanker* [1990] 2 Lloyd's Rep 11.

21 *NBP Developments Ltd v Buildko & Sons* [1993] 66 BLR 120.

22 [1997] 2 Lloyd's Rep 279.

23 *Schiffahrtsgesellschaft Detlev von Appel GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279 at 286.

13 In *West Tankers Inc v Ras Riunione Adriatica di Sicurta*²⁴ (“*The Front Comor*”), in analysing the law governing the issue of transfer by subrogation, Colman J explained, *obiter*, that it would be inconsistent for an assignee to enforce contractual rights without accepting the obligation to arbitrate.²⁵ Finally, in *STX Pan Ocean Co Ltd v Woori Bank*,²⁶ again, by way of *obiter dicta*, Flaux J endorsed the view that an insurer was not entitled to assert its claim inconsistently with the terms of the contract, which included that the claim must be referred to arbitration.²⁷ In these cases, the courts found that it would be inconsistent for the assignee to avoid the obligation to arbitrate but stopped short of explaining why.

14 It should be noted that *The Jay Bola* and *The Front Comor* involved insurers suing under their right of subrogation. Technically, a subrogated claim is brought in the name of the insured, while in the context of an assignment, the claim is brought by the assignee in its own name. It is therefore clearer that a subrogated insurer suing in the name of the insured, and stepping in its shoes, takes its rights subject to the dispute resolution clause. By comparison, it is less clear whether an assignee is so bound.

B. The principle of conditional benefit

15 The principle of conditional benefit is a little-known exception to the general rule that in an assignment, only the benefits of the contract pass from the assignor to the assignee.²⁸ As explained in *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd*²⁹ (“*Tolhurst*”), it would be unfair to a contracting party if the burden of a contract which he expected the other party to bear was transferred to another without his consent.³⁰ The same reason broadly explains why

24 [2005] 2 Lloyd’s Rep 257.

25 *West Tankers Inc v Ras Riunione Adriatica di Sicurta* [2005] 2 Lloyd’s Rep 257 at 261–262.

26 [2012] 2 Lloyd’s Rep 99.

27 *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd’s Rep 99 at 101.

28 *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103E.

29 [1902] 2 KB 660 at 668–670; *Southway Group Ltd v Wolff and Wolff* [1991] 57 BLR 33 at 52–53.

30 *Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668–670, *per* Collins MR. See also Marcus Smith & Nico Leslie, *The Law of Assignment* (Oxford University Press, 2nd Ed, 2013) at para 21.15:

... no-one should be able to transfer an onerous obligation to an unknowing third party; and the (contractual) counterparty to the person attempting to assign the burden is entitled to have ‘his’ benefit performed by the person he contracted with – or at least, in the manner laid down by the contract.

personal rights are generally not transferrable. In contrast, the case for benefits is different – it normally makes no difference how an assignor deals with his benefit under the contract. The choice to transfer anticipated or accrued benefits should be of no concern to the non-assigning party. It is for this reason that an assignment does not normally require the other contracting party's consent, although it is now common for contracts to so provide. Thus, where a transferor wishes for the benefits and burdens to pass, the proper method to do so is by way of a novation, which involves all three parties.³¹

16 As an exception to the rule, the conditional benefit principle attempts to pass on a contract burden to the assignee. The principle is best explained by reference to this passage in *Tito v Waddell (No 2)*,³² where Megarry V-C said:³³

An instrument may be framed so that it confers only a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such as an obligation to make certain payments. Such restrictions or qualifications are *an intrinsic part* of the right: you take the right as it stands, and you cannot pick out the good and reject the bad. In such cases it is not only the original grantee who is bound by the burden: his successors in title are unable to take the right without also assuming the burden. *The benefit and burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit.* [emphasis added]

17 The principle has been applied in a variety of other contexts.³⁴ The main difficulty is identifying when the benefit and burden are “annexed” to each other “*ab initio*”, as in the words of Megarry V-C. While the courts have stressed that the question is ultimately one of construction,³⁵ the authorities helpfully shed light on the relevant

31 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103.

32 [1977] 1 Ch 106.

33 *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 290.

34 One common situation is that of a contract of insurance. According to a leading commentary, “[w]here the right to recover under an insurance contract is assigned, the assignee would be bound to perform any conditions precedent to recovery, such as giving notice of loss”: Marcus Smith & Nico Leslie, *The Law of Assignment* (Oxford University Press, 2nd Ed, 2013) at para 21.26. It has further been held in *Britain & Overseas Trading (Bristles) Ltd v Brooks Wharf & Bull Wharf Ltd* [1967] 2 Lloyd's Rep 51 that where a right is qualified by an exclusion clause, the assignee would be bound by that clause. Guest gives a further example in the context of the sale of goods. A contract may provide that the seller of goods is to be under no liability unless the buyer informs it of defects within a certain time. If the buyer's rights are assigned, the assignee will be obliged to comply with this requirement: Anthony Guest, *Guest on the Law of Assignment* (Sweet & Maxwell, 1st Ed, 2012) at para 9-06.

35 *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 302; Marcus Smith & Nico Leslie, *The Law of Assignment* (Oxford University Press, 2nd Ed, 2013) at para 21.25.

considerations. In *Halsall v Brizell*,³⁶ the defendant's predecessor in title was granted a right to use estate roads and sewers and had agreed to pay a part of the maintenance fees. It was held that the use of the roads and sewers were conditioned on payment of maintenance fees – and the defendant as assignee was likewise bound. A contrasting decision is *Rhone v Stephens*.³⁷ Here, the original owner of a house and an adjacent cottage had decided to sell both premises separately. The house and the cottage shared a common roof. When selling the cottage, the owner undertook to maintain the roof to reasonable satisfaction. Years later, the roof was in disrepair thereby causing water leakage into the cottage. The owners of the cottage sued the successor in title to the house arguing they were bound by the original owner's covenant. It was argued that by accepting the benefits of the conveyance, the successors in title to the house were under a reciprocal duty to upkeep the roof. The House of Lords dismissed the appeal, holding that there was no such duty. It held that where such burdens were to be made a condition of a benefit, "the condition must be *relevant* to the exercise of the right" [emphasis added].³⁸ It reasoned that unlike *Halsall v Brizell*, the benefits of the conveyance and the duty to upkeep the roof were "independent provisions".

18 Further, there is a closely related doctrine called that of the "pure principle of the burden and benefit" which is helpful by way of contradistinction.³⁹ The "pure principle" was brought to the fore by Megarry V-C in *Tito v Waddell (No 2)*.⁴⁰ Unlike the principle of conditional benefit, the "pure principle" allows independent obligations (burden and benefit) to be tied together, such that an assignee would be bound to perform the related burden. In *Tito v Waddell (No 2)*, Megarry V-C held that the assignees of certain deeds, which gave rights to mine for phosphates on the Southern Pacific Islands, were liable to the landowners to replant specific crops over worked-out lands. This was even though the learned judge found that the right to mine was not made expressly conditional upon the obligation to replant crops. The circumstances of the case showed that the assignees intended to take both the benefits and burdens in the deed. It is unclear if the "pure principle" remains good law – indeed, Megarry V-C's decision may be explicable on grounds of construction. Although one commentator⁴¹ has

36 [1957] Ch 169.

37 [1994] 2 WLR 429.

38 *Rhone v Stephens* [1994] 2 WLR 429 at 437.

39 See generally Marcus Smith & Nico Leslie, *The Law of Assignment* (Oxford University Press, 2nd Ed, 2013) at paras 21.15–21.47 and Christine J Davis, "The Principle of Benefit and Burden" (1998) 57(3) Camb LJ 522.

40 *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 302.

41 Christine J Davis, "The Principle of Benefit and Burden" (1998) 57(3) Camb LJ 522.

shown that in unique categories such as deeds, the principle (or one of similar effect) continues to be applied, Guest⁴² and Smith and Leslie⁴³ suggest that it is too uncertain to be adopted – it is too difficult to know when two independent contractual obligations could be intertwined and recent cases have distanced themselves from such an approach.⁴⁴ Further, the “pure principle” may undermine the parties’ contractual freedom (and responsibility) to delineate their rights and obligations.

19 By contrast, then, it is reasonably clear when an assigned benefit could be a conditional benefit:

(a) First, the burden must not be independent of the relevant benefit. Thus, at the very least, as between the original contracting parties, the transferred benefit must be premised on the performance of a related burden. As a guide, they cannot be “separate, unconnected clauses”,⁴⁵ though obviously there should be no dogmatic insistence that the benefit and burden be stipulated in the same clause.

(b) Secondly, the link between the burden and benefit should be so apparent that it would not require the court to conduct a rigorous analysis of the contract to ascertain if, as a matter of construction, the relevant benefit and burden are to be pegged together.

(c) Finally, and related to the second point, if the connection between the benefit and burden is not at first blush apparent, the court should be entitled to assume that they are independent. It is for the contracting parties to make clear what rights and obligations they agree to, as well as what may or may not pass to their successors in title.

20 This third point (in (c) above) is best illustrated by *Pan Ocean Shipping Ltd v Creditcorp Ltd*⁴⁶ (“*Pan Ocean*”). In this case, Pan Ocean Shipping Ltd (“Pan Ocean”) chartered a vessel from Trident Shipping (“Trident”). The contract was such that the charter hire was payable in advance, and if the vessel was off hire, an adjustment to the account between the parties would be made. Subsequently, Trident assigned its rights to receive payments to Creditcorp Ltd (“Creditcorp”). Trident

42 Anthony Guest, *Guest on the Law of Assignment* (Sweet & Maxwell, 1st Ed, 2012) at para 9.13.

43 Marcus Smith & Nico Leslie, *The Law of Assignment* (Oxford University Press, 2nd Ed, 2013) at pp 486–487.

44 *Rhone v Stephens* [1994] 2 WLR 429; *Pan Ocean Shipping Ltd v Creditcorp Ltd* [1994] 1 WLR 161.

45 Christine J Davis, “The Principle of Benefit and Burden” (1998) 57(3) Camb LJ 522 at 526.

46 [1994] 1 WLR 161.

subsequently went insolvent, and Pan Ocean sued Creditcorp for overpaid amounts arising from off-hire periods. The House of Lords rejected the claim, with Lord Goff placing particular emphasis on the contractual arrangement between Trident and Creditcorp. His Lordship reasoned that Creditcorp, the assignees, had given full consideration in the form of an upfront payment in exchange for Trident's benefits. It would therefore not be fair to impose an additional obligation on Creditcorp to pay the balance owed by Trident to Pan Ocean. Essentially, the overall tenor of *Pan Ocean* is that a court should be slow to intervene with the contractual bargain.

C. *What benefits are burdened?*

21 In the context of a contract providing for disputes to be resolved by arbitration, how does the conditional benefit analysis apply? A cursory reading of the case may suggest that the arbitration agreement is both the benefit and the burden; that is to say, a party who has accepted the benefit of having its rights resolved by way of arbitration has the symmetrical burden of refraining from resolving its disputes in other ways. Such a view of how the conditional benefit principle works may appear to be supported by Megarry V-C's "annexed *ab initio*" dicta as well as the emphasis in earlier cases that an assignee cannot inconsistently want the benefit of arbitration but deny the burden of arbitration. However, it is submitted that such a view does not explain the analysis.

22 Read clearly, *Cariparma v Rals* suggests that the arbitration agreement is a burden annexed to the substantive rights being assigned. The judge explained:⁴⁷

... [the arbitration agreement] is entered into, not as one of the parties' substantive rights or obligations, but only to prescribe a procedural right and obligation which caters for the possibility of future disputes over their substantive rights and obligations ...

Therefore, the proper conception of the principle in the present context is to say that the substantive rights that are assigned are qualified by the procedural right to enforce them through arbitration. Put another way, an agreement to arbitrate (while separable) is a procedural fetter on the substantive rights of the parties. In substance, the other contracting party has agreed that any breaches on his obligations may be resolved by way of arbitration, and arbitration only. Thus, a transfer of benefits necessarily carries with it the procedural fetter of the obligation to arbitrate. Indeed, this was the way the judge expressed it: an arbitration

⁴⁷ *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [111].

agreement's "entire purpose and value arises from the substantive rights and obligations to which it is annexed".⁴⁸

23 Therefore, while it is theoretically correct to view an arbitration agreement as consisting of mutual rights and obligations⁴⁹ (as between the original contracting parties) and as an inseparable bundle of benefit and burden in a general sense, in the specific context of an assignment, the arbitration agreement is a procedural burden which *passes with* the substantive rights from the assignor to the assignee. The principle of conditional benefit, so applied, holds that the substantive rights being assigned are annexed *ab initio* to the procedural qualification to resolve disputes arising therefrom by way of arbitration. Perhaps some confusion is created by the fact that the applicable doctrine is called the principle of "conditional benefit", while the discussion is on arbitration agreements being a burden. It may be better in the context of this discussion to call the arbitration agreement an "annexed burden" to avoid the risk of mistaking it to be a conditional benefit, which it is not.

24 Similar reasoning has been applied to jurisdiction agreements.⁵⁰ It is difficult to see why an arbitration clause should be any different. Both an arbitration agreement and a jurisdiction clause are procedural fetters to substantive rights – "archetypal"⁵¹ conditional benefit.

25 Finally, *Cariparma v Rals* is not alone in adopting such analysis. In the explanatory notes to the arbitration provisions of the English Contract (Rights of Third Parties) Act 1999,⁵² the same view was taken:

48 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [111].

49 See, for instance, *The Makhutai* [1996] AC 650 at 666A–666C, where the Judicial Board of the Privy Council reasoned that an exclusive jurisdiction clause conferred "mutual rights and obligations". The shipowners there sought a stay of proceedings in Hong Kong on the basis of an exclusive jurisdiction clause in favour of Indonesia, arguing that the Himalayan clause in the relevant bill of lading allowed them to invoke the jurisdiction agreement as an "exception, limitation, provision, condition or liberty". The Privy Council decided they could not on grounds, *inter alia*, that the jurisdiction agreement is not of the character of the type of exemption or benefit sought to be passed on to agents under a Himalayan clause, the prime example of such being exemption clauses of limitation periods.

50 *Glencore International AG v Metro Trading International Inc* [1999] 2 Lloyd's Rep 632 at 645; [1999] 2 All ER (Comm) 899 at 917:

The ordinary rule is that an assignee of a chose in action under English law cannot be better off than the assignor and so takes the chose assigned to him together with any restrictions attaching to it, including an exclusive jurisdiction clause.

51 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [111].

52 c 31.

The third party's substantive right (for example, to payment by the promisor) is conferred subject to disputes being referred to arbitration ... This section is based on a 'conditional benefit' approach. It ensures that a third party who wishes to take action to enforce his substantive right is not only able to enforce effectively his right to arbitrate, but is also 'bound' to enforce his right by arbitration (so that, for example, a stay of proceedings can be ordered against him under Section 9 of the Arbitration Act).

D. Whither consent?

26 After concluding that the assignment was subject to the principle of conditional benefit, the judge sought to address the logical consequences of his conclusion.⁵³ First, the judge considered that whatever the assignor and assignee may agree in their assignment agreement is irrelevant to whether the assignee is bound by the arbitration agreement. In his words:⁵⁴

... the assignor and assignee cannot break apart the right and the remedy which the assignor and obligor have created *ab initio* as a single, indivisible whole in their contract, at least not without the [other contracting party's] consent.

This is consistent with assignment orthodoxy. In the spirit of *Tolhurst*, it could be argued that the original contracting party never intended any breaches of his obligations to be brought to a forum other than arbitration.

27 Second, the judge also rejected the assignee's argument that it did not consent to the arbitration agreement, which the assignee argued, undermined the fundamental nature of arbitration as a consensual dispute resolution mechanism. The judge reasoned that arbitration is:⁵⁵

... [a] consensual dispute resolution procedure only in the contractual sense, not in the subjective sense. A desire to arbitrate or a subjective intent to be bound by a promise to arbitrate is quite unnecessary for a party to find itself contractually bound to arbitrate ... The gap between the subjective and the objective – at least in commercial matters – is simply one of the risks of doing business.

At first glance, this conclusion will not sit well with those who take the view that nothing less than the assignee's consent should suffice to bind

53 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [114]–[122].

54 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [115].

55 *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 at [121].

it to arbitrate. However, the judge's reasoning is defensible. As the judge himself explained, the assignee has an opportunity to review the original contract and decide what commercial risks it wishes to take. The presumption of consent here is somewhat of a fiction – but an important and fair fiction of policy.⁵⁶

28 There appears to be essentially one overarching concern sought to be protected by the conditional benefit analysis – the legitimate expectations of the non-assigning party. Where the contract does not require either party's consent to an assignment, the non-assigning party would be in no position to dictate the terms of the assignment. Between the non-assigning party and the assignee, policy should favour that the burden of contracting out of a dispute resolution mechanism lies on the one late to the party. The protection of the non-assigning party's legitimate expectations becomes even more important in the context of multi-tiered clauses. Many parties insist on multi-tiered clauses precisely because they prefer the potentially swift and affordable methods of mediation and negotiations over a costly and time-consuming adversarial process. Further, the original parties and, in particular, the non-assigning party, may have chosen arbitration for reasons of confidentiality because sensitive trade and business information may be involved, or the perceived advantage of ease of enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵⁷

E. When would a stay be granted? The test in ss 6(1) and 6(5)

29 Having articulated that the assignee's substantive rights were fettered by the arbitration agreement, the judge went on to hold that the dispute over payment of the promissory notes was, however, not "in respect of any matter which is the subject of the [arbitration] agreement" under s 6(1) of the IAA. A discussion on the judge's analysis on the unique position of promissory notes goes beyond the scope of this note. Indeed, leave to appeal was given as it was not clear from the existing authorities which path the Singapore courts should take, and a much wider discussion of the topic is required.

56 In so far as it may be suggested that the separability principle could allow the assignee receive the benefits free of the procedural fetter, this should be rejected. The chief aim of the separability doctrine is principally to protect arbitration agreements from being impugned by allegations that the underlying contract is invalid. It saves the dispute resolution mechanism, but does not make the clause stand apart from the matrix agreement. The clause is separable and not separate. It should not lead one to the heresy that an assignee takes free of the arbitration agreement.

57 10 June 1958; entry into force 7 June 1959.

30 Nonetheless, it should be cautioned that the structure of the test should not be seen as a two-stage one, and that the question of whether the claimant is claiming “through or under” should not normally be seen as separate from the question as to whether the claim is a “subject matter” falling within the arbitration agreement. The case of promissory notes is exceptional, and it is suggested that in most cases involving contract claims the test under ss 6(1) and 6(5) as to when an assignee is bound to arbitrate is normally singular: *Is this a claim which the assignor would have been bound to arbitrate?* This test sits well with *Cariparma v Rals*, and is not undermined by the unique situation concerning promissory notes. In cases where there exists an arbitration agreement between two contracting parties (ignoring cases involving assignment for the time being), the common law courts have generally allowed one to litigate its claim over promissory notes because of the unique nature of bills of exchange as an independently enforceable right.⁵⁸

31 No doubt assignees who wish to assail the clause will seek to pose the question in two stages and hope that they may succeed by bringing the subject matter of the dispute outside the ambit of the arbitration agreement. However, an overzealous enquiry and an intrusive approach to what is or is not a matter falling within the scope of the arbitration agreement ultimately dilutes the strength of the conditional benefit analysis, which in the absence of a contrary contractual arrangement presumes an assignee is bound to arbitrate all its substantive rights. Leaving aside the unique exception of promissory notes, it should readily be assumed that an assignee receives the benefits of the contract knowing full well that the parties have agreed to submit their disputes to arbitration, and that any dispute arising from the contract is fettered with this procedural burden.

58 *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei* [1977] 1 WLR 713; *CA Pacific Forex Ltd v Lei Kuan Jeong* [1999] 2 HKC 571; *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110. These cases were analysed by the judge in *Cassa di Risparmio di Parma e Piacenze SpA v Rals International Pte Ltd* [2015] 1 SLR 79 (“*Cariparma v Rals*”) at [157]–[178]. There is of course the decision of *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 (“*Piallo*”) where the court held that the dispute over dishonoured post-dated cheques fell within the ambit of the arbitration agreement and ought to be arbitrated. The divergence between *Piallo* and the above cited cases is the very subject of the appeal from *Cariparma v Rals*. However, if some tentative thoughts could be proffered, while one can appreciate the equities in *Piallo* militating the eventual result, it is thought that *Piallo* contradicts the orthodox position in the common law to respect bills of exchange as independent, enforceable, rights. The party who bargained for payment to be made in post-dated cheques must be taken to appreciate that its failure to honour payment would be subject of independent proceedings to enforce those rights, regardless of the underlying dispute.

IV. Conclusion

32 *Cariparma v Rals* is significant for analysing the nature of an arbitration agreement in the context of an assignment. It is likely that arbitral tribunals who face jurisdictional challenged by assignees will look toward this decision for guidance. Likewise, the same reasoning could be applied to the assignment of jurisdictional clauses. Applying the principle of conditional benefit, the assignee's assigned rights or benefits are qualified by the procedural fetter to enforce them by way of arbitration. Given that an assignee would typically be claiming "through or under" the assignor under s 6 of the IAA, leaving aside the *sui generis* case of promissory notes, as a starting point the test for whether a stay should be granted under ss 6(1) and 6(5) should typically be whether the assignor would have been bound to arbitrate the particular claim.
