Cambridge Law Journal, **80(1)**, March 2021, pp. 101–129
doi:10.1017/S0008197321000039

EXPLAINING ASSIGNMENTS OF ARBITRATION AGREEMENTS

YING KHAI LIEW*

ABSTRACT. *The case law and literature to date have struggled to locate the rationale for the assignability of arbitration agreements. While different justifications have been proffered, each of them rests on questionable premises. This has given rise to a host of uncertainties over the rules which apply in practice. This paper proposes that a satisfactory rationale can be found in the "acceptance principle". This principle indicates, first, that arbitration agreements which are not actual burdens can be assigned, and second, that the assignability of arbitration agreements is grounded in the assignee's acceptance in the form of non-disclaimer of the assignment. Bringing the acceptance principle to the fore not only provides a theoretically sound justification for the assignability of arbitration agreements; it also suggests how the practical uncertainties in this area of law can be resolved satisfactorily.*

KEYWORDS: *assignment, arbitration, acceptance, benefit and burden, conditional benefit, subject to equities.*

I. INTRODUCTION

The use of arbitration as a means of resolving contractual disputes has become commonplace in commercial dealings. At the same time, the ability to assign contractual rights plays an increasingly vital role in modern-day efficient commercial life. Given their practical importance, it might have been thought that English law provides a body of well-formulated rules, underpinned by sound rationales, to regulate and guide assignments of arbitration agreements or clauses.

Unfortunately, this is not so. Different justifications have been proffered for the assignability of arbitration agreements, each resting on questionable premises. This has given rise to a host of uncertainties over the rules which

* Associate Professor in Law, University of Melbourne. Address for Correspondence: Email: ying.liew@unimelb.edu.au. I thank Ed Taylor for drawing my attention to this topic, and Michael Bryan, Tony Guest, Lusina Ho, Lionel Smith and Chee Ho Tham for their comments on an earlier draft. I am also grateful to Priyanka Banerjee and Robin Gardner at the MLS Academic Research Service for research assistance.

apply in practice, such as whether the assignee must join the assignor to initiate arbitration proceedings, whether an assignor can remain in arbitration proceedings already commenced, and whether the obligor may initiate arbitration proceedings against the assignee. These ambiguities are concerning, not only to those whose legal positions are directly affected by them but also to tribunals applying English law. Moreover, the lack of harmonised rules in the international arbitration context concerning the assignment of arbitration agreements[1] leaves parties to international arbitration in a state of uncertainty as to whether they are better off arguing for or against English law as the applicable law.[2]

The aim of this paper is twofold.

First, it develops a new rationale for the assignability of arbitration agreements. To this end, Section II sets out the generally accepted rules concerning the assignment of arbitration agreements; Section III critiques the prevailing justifications for the assignability of arbitration agreements; and Section IV develops a new rationale, the "acceptance principle".

Second, this paper applies the new rationale towards resolving the practical uncertainties which shroud this area of law. This is the task of Section V.

II. The Present Law

It is trite that the benefit of an arbitration agreement is a chose in action capable of being assigned.[3] Thus, it is agreed that an assignment provides the assignee the right to commence arbitration proceedings against the obligor,[4] or to continue arbitration proceedings previously initiated by the assignor.[5] It has also been held[6] that the assignee is treated for the purposes of the Arbitration Act 1996 as "a party to an arbitration agreement", she being

[1] S. Jagusch and A.C. Sinclair, "The Impact of Third Parties on International Arbitration: Issues of Assignment" in L.A. Mistelis and J.D.M. Lew (eds.), *Pervasive Problems in International Arbitration* (Alphen aan den Rijn 2006), [15-6].

[2] See generally A. Garnuszek, "The Law Applicable to the Contractual Assignment of an Arbitration Agreement" (2016) 82 Arbitration 348.

[3] See e.g. *Aspell v Seymour* [1929] W.N. 152 (C.A.); *Shayler v Woolf* [1946] 1 Ch. 320; *Rumput (Panama) S.A. v Islamic Republic of Iran Shipping Lines* (hereafter "*The Leage*") [1984] 2 Lloyd's Rep. 259 (Q.B.); *Court Line v Aktiebolaget Gotaverken AB* (hereafter "*The Halcyon the Great*") [1984] 2 Lloyd's Rep. 283 (Q.B.); *Socony Mobil Oil Co. Inc. v The West of England Ship Owners Mutual Insurance Association (London) Ltd.* (hereafter "*The Padre Island*") [1984] 2 Lloyd's Rep. 408 (Q.B.); *Kaukomarkkinat O/Y v Elbe Transport-Union GmbH* (hereafter "*The Kelo*") [1985] 2 Lloyd's Rep. 85 (Q.B.); *Montedipe SpA v JTP-RO Jugotanker* (hereafter "*The Jordan Nicolov*") [1990] 2 Lloyd's Rep. 11, 15 (Q.B.). Cf. *Cottage Club Estates Inc. v Woodside Estates Co. (Amersham) Ltd.* [1928] 2 K.B. 463; *The London Steamship Owners Mutual Insurance Association Ltd. v Bombay Trading Co. Ltd.* (hereafter "*The Felicie*") [1990] 2 Lloyd's Rep. 21, 25 (Q.B.).

[4] Throughout this paper, the "obligor" is the assignor's contractual counterparty.

[5] *The Halcyon the Great* [1984] 2 Lloyd's Rep. 283, 289 (Q.B.); *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 19 (Q.B.).

[6] *Through Transport Mutual Insurance Association (Euroasia) Ltd. v New India Assurance Co. Ltd.* [2005] EWHC 455 (Comm.), at [25]. See also *The Leage* [1984] 2 Lloyd's Rep. 259, 261–62 (Q.B.), where the Act's predecessor, the Arbitration Act 1975, was in issue.

a "person claiming under or through a party to the agreement",[7] that is, the assignor.

There are two main situations in which arbitration agreements are assigned.

The first is where arbitration agreements are directly assigned ("direct assignments"). This includes cases where an assignor expressly assigns an arbitration agreement, or an accrued cause of action in arbitration such as the right to damages after the damage had occurred,[8] to the assignee. The assignment may or may not be accompanied by an express assignment of a right under the main contract to which the arbitration agreement relates. Direct assignments are possible, just as rights to litigate are generally assignable. However, just as in relation to rights to litigate,[9] the assignment of a "bare" right to arbitrate is invalid for maintenance or champerty unless a recognised exception applies, for example, that the assignee has a "genuine commercial interest" in taking the assignment.[10]

The second, more common scenario involves an assignment of a right or rights under the main contract which is within the scope of an arbitration agreement, without a distinct assignment of the arbitration agreement itself. The position in English law is that the agreement to arbitrate is automatically assigned without the need for a distinct transfer ("automatic assignments"). The reason for this rule is that it prevents the assignor from circumventing arbitration simply by assigning the benefits under the main contract.[11]

Whether the assignment of an arbitration agreement is "direct" or "automatic", it is always subject to the parties' contractual freedom to restrict the assignability of contractual rights.[12] Thus, an arbitration agreement cannot be assigned if the contract expressly precludes its assignment,[13] or if the contractual right subject to the arbitration agreement is within the scope of a non-assignment clause.[14]

III. The Prevailing Explanations

Although the assignability of arbitration agreements is now well settled, judges and commentators have struggled to identify its precise rationale.

[7] Section 82(2).
[8] *The Kelo* [1985] 2 Lloyd's Rep. 85, 89 (Q.B.); *Baytur S.A. v Finagro Holdings S.A.* [1992] 1 Q.B. 610.
[9] See generally Y.K. Liew, *Guest on the Law of Assignment* (London 2018), ch. 4.
[10] In the arbitration context, see e.g. *The Kelo* [1985] 2 Lloyd's Rep. 85 (Q.B.); in the litigation context, see e.g. *Trendtex Trading Corp. v Credit Suisse* [1982] A.C. 679 (H.L.).
[11] J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (London 2003), [7-53].
[12] *Shayler v Woolf* [1946] 1 Ch. 320, 322.
[13] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, [7-55]; Jagusch and Sinclair, "The Impact of Third Parties on International Arbitration", [15-14].
[14] *Yeandle v Wynn Realisations Ltd.* (1995) 47 Con. L.R. 1, 11 (C.A.); *Herkules Piling Ltd. v Tilbury Construction Ltd.* (1992) 32 Con. L.R. 112 (Q.B.).

The main hurdle is the well-accepted and incontrovertible rule that only rights or benefits can be assigned and not obligations, liabilities or burdens.[15] On one view at least, an assignee of an arbitration agreement appears to be "burdened" with the obligation to arbitrate.

In order to overcome this concern, courts and commentators have adopted one of five different strategies. The first attempts to explain both "direct" and "automatic" assignments, while the other four attempt to explain "automatic" assignments. Each of them does not withstand close scrutiny, however.

A. Not Burdens

The first strategy attempts to avoid categorising arbitration agreements as "burdens" at all, in order to sidestep altogether the need to explain the contravention of the general rule against the assignability of a burden.

Two distinct analyses have been suggested to this end. The first analyses arbitration agreements as mere remedies; the second analyses them as benefits but not burdens.

1. Mere remedies

The first analysis, that arbitration agreements are simply remedies, is based on a perceived dichotomy between remedies on the one hand, and rights and duties on the other. As Daniel Girsberger writes, English courts ask "whether the arbitration agreement contains a bundle of rights and obligations or merely a remedy. … If the arbitration agreement is considered an obligation (other than a mere remedy), the consent of a passive assignee is required".[16]

Given that the assignee's consent is not required for arbitration agreements to be assigned, some courts have taken the view that these agreements are mere remedies.

For example, in *The Jordan Nicolov*, Hobhouse J. explained why the assignee's separate consent is not required for the legal assignment of an arbitration agreement in the following terms: "where the assignment is the assignment of the cause of action, it will, in the absence of some agreement to the contrary, include as stated in section 136 all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action."[17]

[15] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd.* [1902] 2 K.B. 660, 668; *Nokes v Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014, 1019; *Davies v Collins* [1945] 1 All E.R. 247, 249 (C.A.); *Southway Group Ltd. v Wolff* (1991) 57 B.L.R. 33, 52; *Linden Gardens Trust Ltd. v Lenesta Sludge Disposals Ltd.* [1994] 1 A.C. 85, 103 (H.L.); *Don King Productions Inc. v Warren* [2000] Ch. 291.

[16] D. Girsberger, "The Law Applicable to the Assignment of Claims Subject to an Arbitration Agreement" in F. Ferrari and S. Kröll (eds.), *Conflict of Laws in International Commercial Arbitration* (Munich 2010), 385 (footnote omitted).

[17] *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.).

Similarly, in *The Jay Bola*, Hobhouse L.J. (as His Lordship had then become) rejected counsel's argument that it was inappropriate to treat an arbitration agreement as having been assigned because it involved the assignment of a contractual burden.[18] His Lordship focused on the equitable remedy being sought in that action, namely an anti-suit injunction, holding that such a remedy "is not a 'cause of action' of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt. It is an application for an equitable remedy to protect [the obligor] against the consequences of unconscionable conduct."[19]

In reality, however, remedies are not disengaged from rights and obligations as these cases suggest.

In his influential monograph *Remedies Reclassified*,[20] Rafal Zakrzewski undertook an extensive survey of the variety of ways in which the term "remedy" has been used,[21] and came to the conclusion that the "core meaning of the term … most commonly expressly adopted by those who write on remedies"[22] is that it is simply an order of the court.[23] Of course, an order of the court is not the equivalent of substantive (primary or secondary) rights and duties:[24] substantive rights and duties may (and often do) pre-exist court orders. However, there is an organic interconnection between substantive rights and duties and the remedy awarded. Thus, certain remedies "replicate" primary rights in that they simply restate the content of those rights; others "reflect" secondary rights in that they allow judicial discretion to determine the content of the remedy in order to best give effect to the right holder's pre-trial substantive right; yet others "transform" substantive rights in that they create a legal relation significantly different from those which had arisen pre-trial.[25]

The close relationship between remedies, and rights and duties, is clearly at play in the context of arbitration agreements. A court order compelling an original contractual party to arbitrate is a "replicative" remedy which restates the parties' rights and duties as revealed in their arbitration agreement. Similarly, where an arbitration agreement is assigned, the assignee's right to arbitrate arises from a right-duty relationship she has with the obligor arising as a consequence of the assignment; thus, a court order which effectively recognises a tribunal's jurisdiction to arbitrate disputes between

[18] *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH* (hereafter "*The Jay Bola*") [1997] 2 Lloyd's Rep. 279, 286 (C.A.).
[19] Ibid.
[20] R. Zakrzewski, *Remedies Reclassified* (Oxford 2005).
[21] Ibid., at ch. 2.
[22] Ibid., at 17. See e.g. W. Blackstone, *Commentaries on the Laws of England*, 1st ed., vol. 3 (Oxford 1768), 396; P. Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 U.W.A.L. R. 1, 5; and the cases and commentators cited in Zakrzewski, *Remedies Reclassified*, 17, 44.
[23] Zakrzewski, *Remedies Reclassified*, 44.
[24] Ibid., at ch. 4.
[25] Ibid., at ch. 6, as refined in Y.K. Liew, "Reanalysing Institutional and Remedial Constructive Trusts" [2016] C.L.J. 528, 534–37, and Y.K. Liew, *Rationalising Constructive Trusts* (London 2017), 18–23.

the obligor and assignee, such as a declaration to that effect or the award of an anti-suit injunction, is a "replicative" remedy. Moreover, tribunal awards are also "remedies", given that they are legally binding and therefore analytically similar to court orders; those awards can therefore themselves be analysed as replicative, reflective or transformative remedies, depending on the precise award.

In short, arbitration agreements cannot be analysed as "remedies" as divorced from the rights and duties they create.

2. Benefits without burdens

The second analysis, that arbitration agreements provide benefits but do not impose burdens, can be gleaned from Hobhouse L.J.'s judgement in *The Jay Bola*. As observed earlier, His Lordship rejected counsel's argument that an assignment of an arbitration agreement involves transferring a burden; but His Lordship also expressly held that the assignee obtains "the *right* to refer the claim to arbitration".[26] More explicitly, in the Singaporean case of *Rals International Pte Ltd. v Cassa di Risparmio di Parma e Piacenza SpA*, the decision in *The Jay Bola* was cited as indicating an "approach of entitlement rather than obligation".[27]

There is considerable difficulty in deemphasising the burden of arbitration agreements in this way. It is useful to remind ourselves that the "benefits without burdens" analysis purports to explain the *assignability* of arbitration agreements by appealing to the inherent characteristics of arbitration agreements, and therefore the relevant characteristics are those *measured at the time of the assignment*. From that perspective, it is often plainly unclear whether an assignment of an arbitration agreement will be beneficial or burdensome to the assignee. As Lord Macmillan said in *Heyman v Darwins Ltd.*: "[An] arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution."[28]

Moreover:[29] "An arbitration agreement is capable of being seen as both a benefit and a burden, depending on one's perspective. … Simply put, an arbitration agreement is a benefit to a party – whether the obligor or the obligee – who wishes to arbitrate. It is a burden to a party – whether obligor or the obligee – who does not."[30]

[26] *The Jay Bola* [1997] 2 Lloyd's Rep. 279, 286 (C.A.) (emphasis added).
[27] *Rals International Pte Ltd. v Cassa di Risparmio di Parma e Piacenza SpA* [2016] SGCA 53, at [55]. In the judgment, this idea was presented as closely linked to the "conditional benefit" analysis, discussed below.
[28] *Heyman v Darwins Ltd.* [1942] A.C. 356, 373 (H.L.).
[29] *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd.* [2015] SGHC 264, at [102].
[30] See, to the same effect, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com. No. 242), [14.18]: "arbitration … must be seen as both conferring rights and imposing duties and do not lend themselves to a splitting of the benefit and the burden."

In short, whether an arbitration agreement provides a benefit or burden to the assignee often depends on events occurring in the future. It is therefore at least true to say that all arbitration agreements *potentially* impose a burden on the assignee. One cannot simply paper over that potential burden when seeking to explain the assignability of arbitration agreements.

B. Conditional Benefit

On the basis that arbitration agreements potentially impose a burden, the most common strategy to explain their assignability, in the context of automatic assignments, is by way of the "conditional benefit" principle.

The oft-cited general statement of this principle is found in *Tito v Waddell (No 2)*, where Megarry V.C. said:

> 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 the burden have been annexed to each other ab initio, and so the benefit is only a conditional benefit.[31]

The conditional benefit principle has been applied in a number of different contexts,[32] and some cases have attempted to rely on it to explain the assignability of arbitration agreements.[33] An example is found in Scott VC's judgment in *The Jay Bola*,[34] where he held that "[the assignee] is bound by the arbitration agreement … because [the assignor]'s contractual rights … the benefit of which [the assignee] has become entitled … are subject to the arbitration agreement".

The conditional benefit principle does not provide a convincing explanation for two reasons.

First, the limitations to which the conditional benefit principle is subject are not reflected in the rules concerning the assignment of arbitration agreements. In *Davies v Jones*, the Court of Appeal examined (among other cases) the House of Lords' decision in *Rhone v Stephens*[35] and listed three requirements which must be satisfied for the conditional benefit principle to apply:

[31] *Tito v Waddell (No. 2)* [1977] Ch. 106, 290.
[32] See generally C.J. Davis, "The Principle of Benefit and Burden" [1998] C.L.J. 522.
[33] See e.g. *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.); *Phoenix Finance Ltd. v Federation Internationale De L'Automobile* [2002] EWHC 1028 (Ch), at [82]; *Jones v Link Financial Ltd.* [2012] EWHC 2402 (Q.B.), [2013] 1 W.L.R. 693, at [32]; *Hatzl v XL Insurance Co. Ltd.* [2009] EWCA Civ 223, at [52], [66]; *Through Transport v New India Assurance* [2005] EWHC 455 (Comm), at [22]. Cf. *Rals v Cassa di Risparmio* [2016] SGCA 53, at [54].
[34] *The Jay Bola* [1997] 2 Lloyd's Rep. 279, 291 (C.A.).
[35] *Rhone v Stephens* [1994] 2 A.C. 310.

> (1) The benefit and burden must be conferred in or by the same transaction . . .
> (2) The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter . . .
> (3) The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit.[36]

It is clear that arbitration agreements are assignable even though requirements (1) or (2) are not satisfied.

In relation to (1), an arbitration agreement may be contained in a separate document from the main contract, signed either simultaneously or successively by the contracting parties. In these cases, the contractual right and the arbitration agreement do not arise from "the same transaction"; yet the assignee cannot escape arbitrating disputes concerning an assigned right under the main contract. In relation to (2), suppose the obligor discharges a contractual debt (subject to an arbitration agreement) by paying the assignee twice by mistake. The obligor must surely arbitrate to claim restitution by way of unjust enrichment against the assignee. This would be so even though it is difficult to analyse the assignee's burden of defending the claim as being "conditional on or reciprocal to" to the contractual right assigned to the assignee.

The second reason for rejecting the conditional benefit principle is that it does not fully address the general rule that contractual burdens cannot be assigned. Whilst requirement (3) in the *Davies v Jones* judgment indicates that the conditional benefit principle safeguards the *assignee*'s position, the rule prohibiting the assignment of contractual burdens aims to protect the *obligor*.[37] The conditional benefit principle does not even begin to address questions which arise concerning the obligor's position, such as: is there a need to protect the obligor where an arbitration agreement is assigned; if so, are obligors sufficiently protected; if not, why not?

C. The Enforcement Approach

When the cases which purport to apply the conditional benefit principle are closely scrutinised, it emerges that many of them in fact rely on an entirely different justification, which can for convenience be labelled the "enforcement approach".

The starting point is to observe that the conditional benefit principle purports to explain the *assignability* of arbitration agreements. As seen

[36] *Davies v Jones* [2009] EWCA Civ 1164, [2009] 2 WLR 1286, at [27].

[37] Thus, "It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent *of the contractee*": *Tolhurst v Associated Portland Cement Manufacturers (1900)* [1902] 2 K.B. 660, 668 (emphasis added). See also *Linden Gardens v Lenesta Sludge Disposals* [1994] 1 A.C. 85, 103 (H.L.).

from the quote from *Tito* above,[38] the principle explains the transferee's "*taking* the right as it stands" with the benefit and burden having been "annexed to each other *ab initio*".[39] Thus, the principle ostensibly[40] explains why the assignee becomes bound by the arbitration agreement *at the time of the assignment*. On this explanation, some courts have held that the assignee *must* be treated as having taken the benefit of the main contract subject to the obligation to arbitrate.[41]

However, many other cases confound assignability with *enforcement*. While purporting to apply the conditional benefit principle, they in fact describe the assignee as having the option not to "assert"[42] or "enforce"[43] the assigned right, which would relieve her of the burden to arbitrate. A stark example is found in the Explanatory Notes to the Contracts (Rights of Third Parties) Act 1999 where, in explaining section 8 of the Act, it states:

> 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. … This approach is analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden.[44]

The enforcement approach and the conditional benefit principle are clearly distinct. While the latter entails that, once assigned, the assignee *must* arbitrate disputes concerning the assigned right, the former entails that she has a *choice* over whether to do so. Worryingly, however, that fundamental distinction is often overlooked. For example, in *Through Transport Mutual Insurance Association (Euroasia) Ltd. v New India Assurance Co. Ltd.*, Moore-Bick J. confusingly said the following:

> a person who obtains by an assignment or transfer of some other kind the right to pursue a claim under a contract can only *enforce* that right in accordance

[38] See main text from note 31 above.

[39] Further on in the judgment, Megarry V.C. also noted that the conditional benefit principle imposes an "obligatory" burden, in the sense that the burden binds immediately when the benefit is transferred (*Tito v Waddell (No. 2)* [1977] Ch. 106, 290). This was distinguished from certain cases falling within the "pure principle of benefit and burden", where "optional burdens" are imposed: in those cases, the transferee has the option of refusing the benefit which would also avoid the burden (ibid., at 290–91). The "pure principle" was decisively rejected in *Rhone v Stephens* [1994] 2 A.C. 310.

[40] Ostensibly, because there are problems with this explanation, as discussed earlier.

[41] See e.g. *Firma C-Trade S.A. v Newcastle Protection and Indemnity Association* (hereafter "*The Fanti*") [1991] 2 A.C. 1, 33 (H.L.); *Phoenix Finance v Federation Internationale De L'Automobile* [2002] EWHC 1028 (Ch), at [82]; *Charterers' Mutual Assurance Association v British and Foreign* [1997] I.L.Pr. 838, at [44] (Q.B. Comm.).

[42] See e.g. *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.); *Jones v Link Financial* [2012] EWHC 2402 (QB), at [32]; *Aspen Underwriting Ltd. v Credit Europe Bank NV* [2020] UKSC 11, at [27].

[43] *The Jay Bola* [1997] 2 Lloyd's Rep. 279, 286, 291 (C.A.); *Aline Tramp S.A. v Jordan International Insurance Company* [2016] EWHC 1317 (Comm), at [40]. See also G.J. Tolhurst, *The Assignment of Contractual Rights*, 2nd ed. (Oxford 2016), [6.177].

[44] At [34] (emphasis added).

> with the terms of the contract and subject to any restrictions or limitations which those terms may impose. In other words, what he obtains is a chose in action whose precise scope is determined by the contract under which it arises and which is inherently subject to certain incidents, in this case a *requirement* that it be enforced by arbitration.[45]

There are at least three reasons why the enforcement approach provides a deficient explanation.

First, it does not answer the question that those which rely on it purport to answer. While attempting to explain the assignability of arbitration agreements, the enforcement approach ultimately ends up focusing on the assignee's choice; but such a choice only arises if the arbitration agreement is assignable in the first place. The enforcement approach thus *presumes* that arbitration agreements are automatically assigned without explaining why that is so.

Second, it does not provide any useful guidance as to the parties' legal position where the assignee decides not to "assert" or "enforce" the assigned right. If the right has validly been assigned – a position which follows from the presumption on which this approach operates – does the right then lie in abeyance, or does it revert at some point to the assignor? If it reverts, at what point does that occur? In either case, does the assignor have the right to initiate arbitration proceedings to enforce the "assigned" right? And if so, can the assignor take the fruits of the claim for her own benefit, or must she hold those fruits as trustee for the assignee (as is the case where an assignor successfully recovers an equitably assigned chose against the obligor)?[46] It is clear that the enforcement approach raises more practical questions than it answers.

Third, it does not afford sufficient protection to the obligor. Suppose the obligor wishes to arbitrate against the assignee, alleging that by virtue of the assignment the assignee has not only taken the benefit of the main contract but has also come under a positively enforceable duty on which the benefit was conditional.[47] The enforceability approach allows the assignee to avoid the obligation to submit to arbitration by arguing that she had not asserted or enforced her contractual right. This materially disadvantages the obligor. In reality, there seems no reason why the assignee should be able to avoid submitting to arbitration to defend the claim.

[45] *Through Transport v New India Assurance* [2005] EWHC 455 (Comm), at [22] (emphases added). See also *The Jay Bola* [1997] 2 Lloyd's Rep. 279, 291 (C.A.), and *Aspen Underwriting v Credit Europe Bank* [2020] UKSC 11, at [27], where, respectively, Scott V.C. and Lord Hodge erroneously attribute the enforcement approach to *Tito v Waddell (No. 2)* [1977] Ch. 106.

[46] *Three Rivers District Council v Bank of England (No 1)* [1996] Q.B. 292, 307–08.

[47] This is an adaptation of one of the ways in which the decision in *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd.* [1903] A.C. 414 (H.L.) can be understood: see the discussion in Liew, *Guest on the Law of Assignment*, [9–08].

D. Subject to Equities

Another strategy is to explain that arbitration agreements are automatically assignable because the assignee takes the right under the main contract "subject to equities".

The subject to equities principle is a principle "more perfectly established in a court of equity than another"[48] and is not open to doubt.[49] It is also enshrined in section 136 of the Law of Property Act 1925 for legal assignments, subsection (1) of which provides that an assignment is "subject to equities having priority over the right of the assignee".

In *The Leage*, Bingham J. indicated that this principle is relevant in the arbitration context because the assignee's position is "derivative":[50] she cannot by virtue of the assignment be placed in a better position than the assignor in relation to the obligation to arbitrate. Often, however, this principle is not relied upon as a standalone rationale, but rather in conjunction with – or as an elaboration of – the conditional benefit principle. For example, in *STX Pan Ocean Co. Ltd. v Woori Bank*, Flaux J. held that "English law is quite clear that an assignee takes the rights which it is assigned subject to any equities, including any arbitration provision in the contract assigned to the assignee",[51] a position which he thought "was set out very clearly" in *The Jay Bola* and *The Jordan Nicolov* – cases which, as we have discussed earlier, rely on the conditional benefit principle.[52]

But the subject to equities and conditional benefit principles address fundamentally different concerns. While the latter is concerned with burdens which "intrinsically restrict or qualify" assigned rights,[53] the former is an expression of the *nemo dat* rule: "[t]he subsequent grantee takes only that which is left in the grantor."[54] It is therefore necessary to examine the usefulness of the subject to equities principle as a distinct explanation for the assignability of arbitration agreements.

There are three reasons why the subject to equities principle does not provide a sound justification.

[48] *Mangles v Dixon* (1852) 10 E.R. 278, 290.

[49] *Cockell v Taylor* (1852) 51 E.R. 475, 481. See also *Coles v Jones and Coles* (1715) 23 E.R. 1048; *Ord v White* (1840) 49 E.R. 140; *Smith v Parkes* (1852) 51 E.R. 720; *Wakefield and Barnsley Banking Co. v Normanton Local Board* (1881) 44 L.T. 697, 700; *Roxburghe v Cox* (1881) 17 Ch.D. 520, 526; *Dixon v Winch* [1900] 1 Ch. 736, 742; *Turner v Smith* [1901] 1 Ch. 213, 219; *Edward Nelson & Co. Ltd. v Faber & Co.* [1903] 2 K.B. 367, 375.

[50] *The Leage* [1984] 2 Lloyd's Rep. 259, 262 (Q.B.).

[51] *STX Pan Ocean v Woori Bank* [2012] EWHC 981 (Comm), [2012] 2 Lloyd's Rep. 99, at [9]. See also discussion in C. Ambrose, "When Can a Third Party Enforce an Arbitration Clause?" [2001] Journal of Business Law 415, 421–22.

[52] Similarly, *Cassa di Risparmio v Rals International* [2015] SGHC 264, at [106], and Jagusch and Sinclair, "The Impact of Third Parties on International Arbitration", [15]–[43] treats *The Jay Bola* [1997] 2 Lloyd's Rep. 279 (C.A.), as reflecting the "subject to equities" principle.

[53] To paraphrase Megarry V.C. in *Tito v Waddell (No. 2)* [1977] Ch. 106, 290.

[54] *Phillips v Phillips* (1861) 45 E.R. 1164, 1166. See also M. Smith and N. Leslie, *The Law of Assignment*, 3rd ed. (Oxford 2018), [26.45]; Tolhurst, *The Assignment of Contractual Rights*, [1.03].

First, it does not provide a positive reason for the assignability of arbitration agreements. The subject to equities explanation takes as its starting point the understanding that one who agrees to arbitrate "forego[es] the possibility to bring a complaint in a judicial forum".[55] It then proceeds to claim that the assignee cannot be placed in a better position than the assignor by obtaining the right to litigate which the assignor had foregone. But this only speaks to what assignments of arbitration agreements are *not*, it does not address what they *are*: explaining why the assignee has no right to litigate does not justify why she *has* the right to arbitrate. After all, it hardly follows from the principle "one cannot give what one does not have" that "one always gives what one has". It is trite that arbitration agreements give rise to positive rights and obligations. The subject to equities principle does not explain why those rights and duties are automatically assignable.

Second, it is doubtful that arbitration agreements can be analysed as "equities". An "equity" is not a chose in action;[56] rather, it is "an inchoate right binding on specific property", which "[o]f itself … does not give the claimant a beneficial interest or an extant security in the property".[57] Thus, an equity is not assignable unless it is transferred as an incident of property conveyed or a chose in action assigned;[58] it cannot be assigned separately from the property to which it is incident.[59] But the benefit of an arbitration agreement is clearly a chose in action, inherently capable of being assigned.[60] Therefore, it is difficult to explain its assignability by way of the subject to the equities principle.

Third, those equities which are the subject matter of the subject to equities principle "are essentially defensive things … There are no circumstances in which the debtor can actually recover money from the assignee. Such claims are not equities, and do not affect the assignee".[61] Certainly, arbitration agreements can be used defensively, such as where they are relied upon to resist litigation proceedings.[62] However, arbitration

[55] D. Girsberger and C. Hausmaninger, "Assignment of Rights and Agreement to Arbitrate" (1992) 8 Arb. Intl. 121, 142. It is also "an escape from judicial appeals": N. Andrews, *Arbitration and Contract Law* (Switzerland 2016), [1.06].

[56] *Investors Compensation Scheme Ltd. v West Bromwich Building Society (No. 1)* [1998] 1 W.L.R. 896, 915 (H.L.).

[57] *Snell's Equity*, 33rd ed. (London 2016), [2-006]. See also Smith and Leslie, *The Law of Assignment*, [2.98], [2.104]–[2.105].

[58] *Prosser v Edmonds* (1835) 160 E.R. 196 (K.B.); *Fitzroy v Cave* [1905] 2 K.B. 364, 371.

[59] *Dickinson v Burrell* (1866) L.R. 1 Eq. 337; *Seear v Lawson* (1880) 15 Ch.D. 426; *Gross v Lewis Hillman Ltd.* [1970] 1 Ch. 445, 460.

[60] See e.g. *Aspell v Seymour* [1929] W.N. 152 (C.A.); *Shayler v Woolf* [1946] 1 Ch. 320; *The Leage* [1984] 2 Lloyd's Rep. 259 (Q.B.); *The Halcyon the Great* [1984] 2 Lloyd's Rep. 283 (Q.B.); *The Padre Island* [1984] 2 Lloyd's Rep. 408 (Q.B.); *The Kelo* [1985] 2 Lloyd's Rep. 85 (Q.B.); *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.). Cf. *Cottage Club Estates v Woodside Estates* [1928] 2 K.B. 463; *The Felicie* [1990] 2 Lloyd's Rep. 21, 25 (Q.B.).

[61] Smith and Leslie, *The Law of Assignment*, [26.37].

[62] As was the case in *The Jay Bola* [1997] 2 Lloyd's Rep. 279 (C.A.): see, in particular, statements at 286.

agreements do much more than negate liability;[63] they allow parties to make positive claims in arbitration.[64]

E. Preconditioned Burden

The final strategy can be gleaned from Professor Tham's recent monograph, *Understanding the Law of Assignment*.[65] Tham suggests that contractual burdens are never actually assignable. Thus, commenting on the conditional benefit principle, Tham writes:

> a "transfer" of such burdens may, in a manner of speaking, arise in connection with the assignment of such a chose. Such burdens may, of course, be performed by the assignor or her assignee, so long as the performance is not stipulated to be personal to the assignor. Such burdens may, therefore, be "transferred" to the assignee, but only in a very loose sense in that, so far as the assignee may be motivated to perform said burden so as to fulfil the precondition to the obligor's counter-performance, the benefit of which had been assigned to the assignee.[66]

This analysis can for convenience be termed the "preconditioned burden" analysis: it analyses the assignment of a benefit as being "preconditioned" on the *assignor's* performance of the burden, which the assignee may vicariously perform in order to enjoy the assigned benefit.

Applying the analysis to arbitration agreements, it would appear that, in Tham's view, the assignment of a contractual right does not automatically entail the assignment of the arbitration agreement to which it relates. This is at least clear in relation to legal assignments, given that Tham thinks that section 136(1) does not, on a proper interpretation, transfer *all* the assignor's entitlements to the assignee,[67] arbitration agreements being one of those falling outside the scope of that subsection.[68] But although Tham makes no argument specifically about equitable assignments of arbitration agreements, he might be inclined towards the same analysis since, as discussed earlier, all arbitration agreements potentially impose a burden on assignees. If so, then Tham's preconditioned burden analysis can be generalised as follows: when a contractual right which is subject to an arbitration agreement is assigned, the assignee's enjoyment of that contractual right is preconditioned upon the performance of the "burden" to arbitrate. The "burden" inheres throughout with the assignor; but the assignee will be motivated to arbitrate "on the assignor's behalf" in order to enjoy the contractual right assigned.

[63] This being the definition of a defence: see J. Goudkamp, *Tort Law Defences* (Oxford 2013).
[64] See also *Privity of Contract*, [14.17]: "it is clear law that an arbitration agreement (or a jurisdiction agreement) cannot be regarded as a defence to an action . . . Rather the agreement is simply enforceable by and against the parties to it through a stay of litigation."
[65] C.H. Tham, *Understanding the Law of Assignment* (Cambridge 2019).
[66] Ibid., at 104, note 110.
[67] Ibid., at 345.
[68] Ibid., at 360.

The main difficulty with Tham's analysis is that it goes against the grain of two significant groups of established case law.

The first group consists of cases which explicitly recognise that a contractual burden *is* transferred to assignees in certain situations, for example as part of a conditional benefit. They include those cases discussed earlier where courts purport to apply the conditional benefit principle to explain the assignability of (the burden of) arbitration agreements;[69] they also include other cases outside the arbitration context, for example, those where the conditional benefit principle has been applied to impose a positive obligation on assignees to fulfil certain contractual conditions the non-performance for which they could incur liability.[70]

The second group consists of cases which explicitly hold that the assignor loses the right to arbitrate after an assignment. For example, in *The Jordan Nicolov*, Hobhouse J. held that a "legal assignment extinguishes the legal cause of action of the assignor against the party liable so that the assignor cannot thereafter himself ask for an award against the party liable".[71] The reason for this is that "the assignment … will … include as stated in s 136 all the remedies in respect of that cause of action. The relevant remedy is the right to arbitrate and obtain an arbitration award in respect of the cause of action".[72] These cases suggest that the preconditioned burden analysis is incapable of explaining the assignability of arbitration agreements.

IV. The Acceptance Principle

The deficiencies in the prevailing understanding call for a renewed analysis. It is suggested that a new rationale can be found in what can be termed the "acceptance principle". This rationale is "new" in the sense that it has not to date been explicitly recognised as the underlying justification for the assignability of arbitration agreements; but it is not *novel*, having been well-developed in other areas of private law, for example, in the context of gifts,[73] declarations of trusts,[74] and indeed the general law of assignment.[75]

[69] C.J. Davis, "The Principle of Benefit and Burden" [1998] C.L.J. 522.
See e.g. *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.); *Phoenix Finance v Federation Internationale De L'Automobile* [2002] EWHC 1028 (Ch), at [82]; *Jones v Link Financial* [2012] EWHC 2402 (Q.B.), [2013] 1 W.L.R. 693, at [32]; *Hatzl v XL Insurance* [2009] EWCA Civ 223, at [52], [66]; *Through Transport v New India Assurance* [2005] EWHC 455 (Comm), at [22]. Cf. *Rals v Cassa di Risparmio* [2016] SGCA 53, at [54].

[70] See cases cited in Liew, *Guest on the Law of Assignment*, [9-08].

[71] *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.).

[72] Ibid. See also *NBP Developments v Buildko & Sons Ltd.* (1992) 8 Constitutional. L.J. 377; *BXH v BXI* [2020] SGCA 28, at [74]–[75].

[73] See e.g. *Standing v Bowring* (1885) 31 Ch.D. 282, 290; *Re Gulbenkian's Settlements (No 2)* [1970] A. C. 508, 518 (H.L.).

[74] See Y.K. Liew and C. Mitchell, "The Creation of Express Trusts" (2017) 11 J.Eq. 133, 152ff.

[75] See e.g. Liew, *Guest on the Law of Assignment*, [3-13]; Smith and Leslie, *The Law of Assignment*, [13.86].

Briefly, the acceptance principle refers to the principle that a gift, trust, assignment, etc, must be *accepted* by the intended recipient *in the form of a non-disclaimer*; or to put this in another way, the transaction would be void if the intended recipient disclaims. Applied to the present discussion, the assignee's acceptance is taken as the basis upon which arbitration agreements are assigned and the reason which justifies their assignability.

A. The Principle Stated

The acceptance principle is made up of two components.

The first component is a qualifying requirement. It is clear that the question of acceptance does not arise at all if the subject matter which is purported to be transferred, set up on trust, assigned, etc, does not qualify as a valid subject matter. Benefits – rights, choses, real and personal property, etc. – obviously qualify; but in relation to burdens, the law draws a critical distinction between what can for convenience be termed "actual burdens" and "anticipatory burdens".

For example, it is beyond doubt that a purported declaration of trust over a burden such as a debt owed is invalid and of no effect;[76] but a declaration of trust over a right which contains a "remote contingent liability"[77] is not invalid, such as shares that are not fully paid up or property which would give rise to disadvantageous tax consequences. The crucial point in time is the time that the trust is purported to be established: actual burdens cannot be held on trust, while anticipatory burdens – those which have not yet materialised – can.

If the subject matter is not disqualified for imposing an actual burden, then the second component comes into focus. This is the heart of the principle, which speaks to the need for acceptance. It is a crucial but often overlooked requirement for a successful transfer, declaration of trust, assignment, etc, that the intended recipient always has the opportunity to accept or reject the transaction for whatever reason: "a man cannot have an estate put into him in spight of his teeth."[78] Given that these transactions are almost always beneficial to the recipients, the law does not require express acceptance by words or conduct; acceptance in the form of a non-disclaimer is sufficient.[79] A disclaimer, too, need not be expressed in so many words: it can be construed from the relevant circumstances.[80]

[76] This is why if a trustee wrongfully pays trust money into an overdrawn account there is no fund over which any proprietary claim can operate: *Moriarty v Atkinson* [2008] EWCA Civ 1604, at [15].

[77] *Jervis v Wolferstan* (1874) L.R. 18 Eq. 18, 26. See also *Whittaker v Kershaw (No 2)* (1890) 45 Ch.D. 320, 326, where Cotton L.J. used the terminology of a "shadowy" liability.

[78] *Thompson v Leach* (1690) 86 E.R. 391, 396 (K.B.).

[79] *Townson v Tickell* (1819) 106 E.R. 575, 577. See also *Hardoon v Belilios* [1901] A.C. 118, 123 (P.C.); *JW Broomhead (Vic) Pty Ltd. v JW Broomhead Pty Ltd.* [1985] V.R. 891, 931 (V.S.C.); N. Crago, "Principles of Disclaimer of Gifts" (1999) 28 U.W.A.L.R. 65, 71; J. Hill, "The Role of the Donee's Consent in the Law of Gift" (2001) 117 L.Q.R. 127, 142.

[80] *Naas v National Westminster Bank* [1940] A.C. 366, 400.

However, a disclaimer is "a solemn irrevocable act", and so it must be "fully proved by the party alleging it".[81]

For an effective disclaimer (and, to the same extent, for an effective acceptance in the form of non-disclaimer) the intended recipient must have knowledge of the interest alleged to be disclaimed.[82] From that point, disclaimer must occur within a reasonable time, otherwise, tacit acceptance may be inferred or presumed.[83] Disclaimer operates by way of avoidance and not by way of disposition, therefore no writing is required.[84] If there is a valid disclaimer, then the intended recipient "is, in respect of his liabilities, his burdens, and his rights, in exactly the same position as though no conveyance had ever been made to him":[85] the transaction (insofar as the intended recipient is concerned) is void ab initio. But if the intended recipient has accepted, then it is too late to disclaim: "for a person who has already possessed himself of an estate and acted as its owner, to come and say 'I will not be its owner', is really a contradiction in terms."[86]

Applying the acceptance principle to the context of assignments of arbitration agreements, the following two propositions emerge. First, only arbitration agreements which constitute benefits and anticipatory burdens qualify as assignable; those which constitute actual burdens do not. Second, the assignability of arbitration agreements requires the acceptance of the assignee in the form of a non-disclaimer, such acceptance having the effect of binding the assignee to arbitrate disputes over the contractual rights assigned. The assignee's acceptance is that which justifies her obligation to arbitrate those disputes if and when that obligation arises post-acceptance.

B. The Principle in Action

The acceptance principle has not been expressly applied in the cases concerning assignments of arbitration agreements. One of the main reasons is that no reported case has involved anyone attempting to trespass on the essential features of the acceptance principle, for instance, by arguing that an actual burden of an arbitration agreement can be assigned, or that there had been a disclaimer of an assignment. Another reason is that tribunal decisions are confidential, and therefore it is unclear whether these issues have arisen in arbitration proceedings and, if so, how they have been resolved.

Nevertheless, there is no reason to doubt that the acceptance principle is a fundamental principle which is invariably *assumed* to be applicable in the

[81] Ibid.
[82] Ibid.
[83] *JW Broomhead (Vic) v JW Broomhead* [1985] V.R. 891, 931 (V.S.C.).
[84] *Re Paradise Motor Co. Ltd.* [1968] 1 W.L.R. 1125, 1143.
[85] *Mallott v Wilson* [1903] 2 Ch. 494, 501.
[86] *Bence v Gilpin* (1868) L.R. 3 Exch. 76, 81.

context of assignments of arbitration agreements – and this is what we find through a close examination of the decided cases.

1. The first component

The first component of the acceptance principle is detected by observing that the decided cases reflect the general rule, observed earlier, that actual burdens cannot be assigned.[87]

It is useful to consider separately two groups of decided cases, divided according to whether the assignment occurs before or after the assignor's cause of action has accrued.

Falling within the first group of cases are those involving assignments of a "cause of action",[88] that is, assignments occurring after the facts entitling the assignor to obtain a remedy against the obligor have occurred.[89] Most of the decided cases fall within this group. To cite but a few examples, they have involved an assignment of a right to damages after the damage had occurred,[90] an assignment of rights under an agreement where the assignor's claim right to excess interest against the obligor had accrued,[91] and an assignment of a right to a debt arising from a consumer credit agreement with a debtor after the debtor had fallen into arrears.[92] Also falling within this group are those judicial statements which, either in ratio or obiter, have contemplated that an assignment can occur after the assignor has already commenced arbitration proceedings:[93] they assume that a cause of action sounding in arbitration can be assigned.

In all of these cases, courts have not taken the assignment of an arbitration agreement to involve the assignment of an actual burden. This might be thought to be surprising, given that, by virtue of the assignment, the assignee would be subject to the obligations inherent in all arbitration agreements, namely "to refrain from instituting ordinary, court proceedings, waive some guarantees of the State court proceedings, adhere to an administered arbitration scheme excluding any appeal, nominate an arbitrator, pay advance on costs and pay substantial fees and expenses".[94]

[87] *Tolhurst v Associated Portland Cement Manufacturers (1900)* [1902] 2 K.B. 660, 668; *Nokes v Doncaster Amalgamated Collieries* [1940] A.C. 1014, 1019; *Davies v Collins* [1945] 1 All E.R. 247, 249 (C.A.); *Southway Group v Wolff* (1991) 57 B.L.R. 33, 52; *Linden Gardens Trust v Lenesta Sludge Disposals* [1994] 1 A.C. 85, 103 (H.L.); *Don King Productions v Warren* [2000] Ch. 291.

[88] *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.).

[89] A "cause of action" entails "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person": *Letang v Cooper* [1965] 1 Q.B. 232, 243.

[90] *The Kelo* [1985] 2 Lloyd's Rep. 85, 89 (Q.B.); *Baytur v Finagro Holdings* [1992] 1 Q.B. 610.

[91] *The Halcyon the Great* [1984] 2 Lloyd's Rep. 283 (Q.B.).

[92] *Jones v Link Financial* [2012] EWHC 2402 (Q.B.).

[93] See e.g. *The Halcyon the Great* [1984] 2 Lloyd's Rep. 283, 289 (Q.B.); *The Felicie* [1990] 2 Lloyd's Rep. 21, 26; *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.); *Baytur v Finagro Holdings* [1992] 1 Q.B. 610, 619; *NBP v Buildko & Sons* (1992) 8 Const L.J. 377; *A v B* [2016] EWHC 3003 (Comm), [2017] 1 W.L.R. 2030, at [48].

[94] J.C. Landrove, *Assignment and Arbitration: A Comparative Study* (Zurich 2009), 26. It also precludes access to legal aid: Ambrose, "When Can a Third Party Enforce an Arbitration Clause?", 417.

Moreover, an assignee could well be on the losing end for reasons other than the prima facie merits of her claim, for example, the negligence of her counsel or a procedural hiccup. But the matter is assessed from the point in time at which the assignment occurs; and from that perspective, these are merely anticipatory burdens. After all, the fact that the assignor has assigned her *cause of action* suggests that the assignee had a good prima facie case against the obligor, and so it is by no means clear that the assignee will lose the claim. The same analysis is detected in the closely analogous context of rights to litigate, where it has never been suggested that their assignment involves the assignment of an actual burden, even though pursuing an assigned right to litigate invariably incurs legal fees, and even though the assignee's success is not guaranteed. Those burdens are merely anticipatory in nature at the time of the assignment.

In the second group of cases, an assignment of the benefit of a contract subject to an arbitration agreement occurs before any cause of action accrues in the assignor's favour. Typically, the assignment takes place before the obligor's breach of the main contract.[95] When a cause of action did later accrue, courts have held that the assignee was bound to resolve the dispute in arbitration. The assignability of the arbitration agreement is easy to explain: at the time of the assignment the arbitration agreement did not impose an actual burden.

However, it is not implausible that, after an assignment has taken place, a cause of action might accrue in favour of the *obligor*, such as where she has an arguable case that the assignee has by virtue of the assignment come under a positively enforceable duty on which the assigned benefit was conditional,[96] or that the assignee has taken an unjustifiably wide interpretation of the obligor's contractual obligations. Should the obligor initiate arbitration proceedings, there is no doubt that the assignee would be obliged to arbitrate. This result can be explained on the basis that, *at the time of the assignment*, these burdens were merely anticipatory in nature, and therefore the arbitration agreement had already been validly assigned.

Crucially, in no case has it ever been held that an assignor can validly assign an arbitration agreement after the obligor had initiated arbitration proceedings against the assignor. The explanation for this is that the arbitration agreement would represent an actual burden at the time of the assignment, and actual burdens are not assignable.

Conceptually, the first component of the acceptance principle strikes a desirable balance between the anticipatory burdens inherent in arbitration agreements with their imposition on assignees when they are assigned. So long the arbitration agreement does not impose an actual burden, the assignee

[95] See e.g. *Shayler v Woolf* [1946] 1 Ch. 320; *STX v Woori Bank* [2012] EWHC 981 (Comm), [2012] 2 Lloyd's Rep. 99; *Rals v Cassa di Risparmio* [2016] SGCA 53.
[96] *Three Rivers District Council v Bank of England (No 1)* [1996] Q.B. 292, 307–08.

is the best judge of whether it is worth the risk to accept its assignment: if it is, then she need not do anything; if it is not, then she is free to disclaim.

2. The second component

The second component of the acceptance principle is consistent with the fact that no decided case has ever contemplated that arbitration agreements can be assigned even though the assignee has disclaimed. Putting the same positively, in all the cases which have decided or suggested that an assignment of an arbitration agreement was valid, they have contemplated that the assignee had knowledge of the arbitration agreement and passed up the opportunity to disclaim.

Looking at the fact-pattern of the cases to date, it is not surprising that no case has expressly discussed the issue of acceptance or disclaimer. Where such assignments have been held to be effective, the assignee's acceptance has always been crystal-clear. For example, where the cases have involved a direct assignment of a contractual right subject to an arbitration agreement, in most (probably all) of them the arbitration agreement was incorporated within the main contractual document. As the assignee would have had knowledge of the arbitration agreement simply by virtue of her opportunity to examine the contractual documentation, her acceptance would have been implied through her non-disclaimer within a reasonable period from that point. Similarly, in the cases involving a statutory assignment of contractual rights subject to an arbitration agreement, for example by way of section 1 of the Third Parties (Rights against Insurers) Act 1930[97] or section 189 of the Consumer Credit Act 1974,[98] the relevant arbitration agreement on which the assignee sought to rely was incorporated within the main contractual document. The assignee's reliance on the arbitration agreement is wholly consistent with her acceptance of that agreement in the form of a non-disclaimer.

Although the second component of the acceptance principle is assumed rather than positively applied in the decided cases, bringing the principle to the fore provides a sound justification for why assignees are compelled to arbitrate. If and only if an assignee has had knowledge that an assigned right is subject to an arbitration agreement, and if and only if she accepts (in the form of non-disclaimer), will the law be justified in treating her as being bound to arbitrate disputes arising after the assignment has occurred, either as claimant or defendant.

V. Practical Implications

The discussion so far has suggested that the acceptance principle explains the assignability of arbitration agreements: it is in line with the rule against

[97] See e.g. *The Fanti* [1991] 2 A.C. 1 (H.L.).
[98] *Jones v Link Financial* [2012] EWHC 2402.

the assignability of (actual) burdens, and it justifies the assignability of arbitration agreements by way of the assignee's acceptance. But theoretical coherence is far from being the only advantage of the renewed analysis: it is capable of resolving a plethora of practical ambiguities which have bedevilled this area of law.

In general, the resolution of these practical ambiguities flows from three key aspects of the acceptance principle. The first aspect, which relates to the first component of the principle, is the fact that anticipatory burdens can be assigned. The second aspect, which relates to the second component of the principle, is the fact that acceptance requires the assignee to have knowledge of the right assigned. The third aspect, which is a general point concerning the acceptance principle, is the fact that the principle is a feature of the law of assignment rather than the law of arbitration.

A. The First Aspect: Assignability of Anticipatory Burdens

We have seen earlier that arbitration agreements which do not impose an actual burden at the time of the assignment are clearly assignable, and that the assignee becomes bound to arbitrate future disputes after she has passed up the opportunity to disclaim. Of course, this includes claims by the assignee to enforce her rights against the obligor; but this may also include the burden of answering the obligor's claim in arbitration proceedings.

1. Claims brought by the obligor

The fact that the assignee can be bound to arbitrate in a claim brought by the obligor raises an issue of practical importance. It is often important for the obligor to know which among the assignor and the assignee is the appropriate counterparty. For example, this may affect the question of whether the obligor's claim is time-barred. The existing law does not provide any clear guidelines.

On the acceptance principle, the distinction between actual and anticipatory burdens is instructive: the assignor is the appropriate counterparty in relation to a burden which had materialised at the time of the assignment, while the assignee is the appropriate counterparty where at that time the burden was merely prospective. Thus, the assignor (for example) bears the burden of positive obligations undertaken under the main contract or of defending a claim in arbitration proceedings already commenced by the obligor against her before the assignment, while the assignee (for example) bears the burden of arbitrating if the obligor raises a later dispute concerning the scope of her obligations in relation to an assigned right.

2. Assignor's continuing obligations

The distinction between actual and anticipatory burdens is also instructive for resolving two practical uncertainties shrouding the extent to which an

assignor continues to be liable to the obligor after an assignment has taken place.

First, in *Baytur SA v Finagro Holdings SA*,[99] Lloyd L.J. suggested that the assignor is the appropriate counterparty to an obligor's counterclaim in an arbitration proceeding initiated by the assignee against the obligor.[100] The acceptance principle cautions that this is not an absolute rule, but one requiring refinement. The assignor will only be the proper counterparty where the counterclaim is in relation to an actual burden which existed at the time of the assignment, such as a counterclaim for damages in relation to defects caused by the assignor in works done for the obligor under the main contract.[101] Where the counterclaim concerns a burden which at the time it was assigned was only anticipatory, then the counterclaim is to be made against the assignee and not the assignor.

Second, the cases are in agreement that the assignor is liable for costs incurred in commencing and pursuing arbitration before the assignment of the cause of action.[102] This must be correct, as those costs represent an actual burden which cannot be assigned to the assignee. However, in *Baytur SA*,[103] Lloyd L.J. suggested that, if the assignor ceases to exist or becomes insolvent after the assignment, then the assignee may be liable for the assignor's portion of costs, and might even be compelled to defend any and all counterclaims. In light of the acceptance principle, this suggestion ought to be rejected. Measured at the time of the assignment, those costs already incurred by the assignor, as well as counterclaims which ought properly to be brought against the assignor, are actual burdens which could not have been assigned.[104] The assignor's state of solvency does not provide any sound basis for transferring those actual burdens on to the assignee's shoulders.

A separate but related question is whether the assignor can remain as a party to arbitration proceedings after the assignment. While Jagusch and Sinclair suggest that "the assignor may remain involved in pending proceedings but if it does it will recover nothing",[105] Hobhouse J. in *The Jordan Nicolov* observed that there would be "no practical difficulty about the arbitration being continued and completed in the name of the assignee even if it was also desired to keep the assignor as a party to the

[99] *Baytur v Finagro Holdings* [1992] 1 Q.B. 610, 619.
[100] Ibid.
[101] See *Young v Kitchin* (1878) 3 Ex.D. 127, discussed in Liew, *Guest on the Law of Assignment*, [7-32].
[102] See e.g. *The Felicie* [1990] 2 Lloyd's Rep. 21, 26; *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 19 (Q. B.); *Baytur v Finagro Holdings* [1992] 1 Q.B. 610, 619.
[103] *Baytur v Finagro Holdings* [1992] 1 Q.B. 610, 619.
[104] See, in relation to costs, *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 19 (Q.B.). Cf. *The Felicie* [1990] 2 Lloyd's Rep. 21, 26, where this is explained on the basis that those costs "are personal to the parties and cannot properly be the subject of a transfer".
[105] Jagusch and Sinclair, "The Impact of Third Parties on International Arbitration", [15-22].

arbitration and therefore, as an additional party potentially liable in respect of the costs and expenses of the arbitration."[106]

The acceptance principle suggests that Hobhouse J.'s statement is to be preferred. The assignor is liable for costs and personally answerable to counterclaims which relate to actual burdens. There is no reason why the assignor ought not to be permitted to remain as a party to the arbitration proceeding for the tribunal to rule on these matters.

B. The Second Aspect: Knowledge of the Assignee

Knowledge on the part of the assignee of the arbitration agreement is a necessary precondition for acceptance in the form of non-disclaimer. Three practical implications flow from the knowledge requirement.

1. State of assignment before knowledge acquired

The first concerns the state of an assignment in the period between the time of the assignment and the time the assignee acquires knowledge of the arbitration agreement.

There are two possible views. The first view is that, pending the assignee acquiring knowledge, the assignment is conditional and incomplete, since it is liable to be disclaimed by the assignee. The second view is that the assignment is complete from the moment it is effectuated although it is subject to the right of the assignee to disclaim upon learning of the assignment.

The acceptance principle suggests that the second view is to be preferred, a view which is also consistent with the authorities outside the arbitration context.[107] According to the acceptance principle, the assignee's acceptance can be inferred from inaction; a positive act of acceptance is not required. If assignments of arbitration agreements were incomplete until acceptance, there would be practical difficulties, first, with ascertaining when such an acceptance occurred (since it is a potentially complicated matter to determine when the assignee obtained knowledge of the arbitration agreement), and second, with determining where the rights and obligations of the arbitration agreement lay at any particular point in time. Conversely, taking assignments to be complete ab initio is conducive to certainty and efficacy in commercial transactions: it allows parties to rely on a distinct, observable act – the assignment – and to presume that it is valid until and unless it is disclaimed.

[106] *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 19 (Q.B.).

[107] See e.g. *Tate v Leithead* (1854) 69 E.R. 279; *Bill v Cureton* (1835) 39 E.R. 1036; *Standing* (1885) 31 Ch.D. 282, 288, 290; *Naas* [1940] A.C. 366, 375; *Grey v Australian Motorists & General Insurance Co. Pty Ltd.* [1976] 1 N.S.W.L.R. 669, 673. Cf. *Alexander v Steinhardt, Walker & Co.* [1903] 2 K. B. 208, which, however, is capable of being explained on other grounds: see Smith and Leslie, *The Law of Assignment*, [13.28].

2. Concurrent and successive arbitration agreements

A second implication is that the acceptance principle allows the law to treat assignments of arbitration agreements in a unified manner, regardless of how and when an arbitration agreement is reached between the obligor and the assignor.

As discussed earlier,[108] in most or all of the decided cases the arbitration agreement is contained in the same document as the main contract, and assignees usually obtain knowledge of the arbitration agreement at or around the time of the assignment. But this need not be the case,[109] since notice to the assignee is not a prerequisite either for a legal or equitable assignment to be effective.[110] Thus, an arbitration agreement may well be automatically assigned with the benefit of the main contract even where the arbitration agreement is set out in a different document from the main contract, signed by the contracting parties contemporaneously or successively. The more remote the arbitration agreement is from the main contract in space and time, the more likely it is that the assignee will only become aware of the arbitration agreement after the assignment of the contractual right has taken place. The acceptance principle treats these cases similarly, by providing the assignee with the opportunity to disclaim within a reasonable period of time after obtaining knowledge of the arbitration agreement, whenever that may be. It is aligned with commercial expectations and certainty of transactions that assignees who are initially unaware of the arbitration agreement are not deprived of the opportunity to disclaim upon becoming aware, whether that assignment be legal, equitable or statutory.

3. Objective knowledge

A third implication is that the acceptance principle takes an objective approach towards the element of knowledge.

One important respect in which this issue might arise concerns the question of whether a contractual right assigned is covered by the scope of an arbitration agreement. This is a particularly pertinent question where only one of a number of rights in the main contract is assigned.[111] Alternatively, the question might arise as to whether an assigned contractual right is itself within the scope of a non-assignment clause.[112] Where there is ambiguity in one of these respects, it might be asked whether acceptance by way of non-disclaimer can only occur if the assignee has subjective knowledge that the assigned contractual right is assignable and falls within the scope of an arbitration agreement.

[108] See main text to note 97 above.
[109] Cf. *Cassa di Risparmio v Rals International* [2015] SGHC 264, at [121].
[110] See Liew, *Guest on the Law of Assignment*, [2-19], [3-50].
[111] See *BXH v BXI* [2019] SGHC 141, at [139].
[112] As occurred in *Herkules Piling v Tilbury Construction* (1992) 32 Con. L.R. 112 (Q.B.).

It is suggested that the answer must be in the negative. This is consistent with how a court or tribunal would determine questions of scope, which is in line with the usual principles of construction of contracts generally,[113] by focusing on the parties' objective and not subjective intentions.[114] An assignee ought not to be able to avoid the obligation to arbitrate by arguing that she did not personally appreciate that the contractual right assigned was within the scope of the arbitration agreement. Such an approach promotes commercial efficacy, as it disallows assignees from avoiding arbitration "long after the event" simply on the basis of their secret subjective intention.[115]

C. The Third Aspect: The Law of Assignment

The acceptance principle is a feature of the general law of assignment. This indicates that it is from the perspective of the law of assignment, and not arbitration law, that the reasons, rules and effects of assignments of arbitration agreements are primarily to be determined.

Five specific practical implications flow from this.

1. Assignee's distinct consent not required

The first implication is that the acceptance principle dispels any doubt that arbitration agreements are automatically assigned with the assignment of a contractual right within its scope without the need for the assignee's distinct consent.

Although this rule is now well settled in English law, it has been subjected to sustained attack. One attack emphasises the contractual and therefore consensual nature of arbitration.[116] This is said to be at tension with the law of assignment, since "arbitration requires consent of all parties involved . . . assignment of rights does not".[117] Another attack relies on the view that arbitration agreements are "severable": "the arbitration clause remains binding despite the invalidity, discharge, termination or rescission of the

[113] See *Chitty on Contracts*, 32nd ed., vol. 1 (London 2015), [13-041]; *IRC v Electrical and Musical Industries Ltd.* [1949] 1 All E.R. 120, 126.

[114] *Re Gillott's Settlement* [1934] 1 Ch. 97, 111.

[115] *Byrnes v Kendle* [2011] HCA 26, at [55]–[56] (trusts). Cf. Girsberger and Hausmaninger, "Assignment of Rights", 144, who suggest that assignments ought to require the assignee's written consent in order to inform the assignee "about the extent of the commitment to arbitrate". This does not represent English law.

[116] See e.g. A. Lista, "International Commercial Contracts, Bills of Lading, and Third Parties: In Search of a New Legal Paradigm for Extending the Effects of Arbitration Agreements to Non-signatories" [2019] J.B.L. 21, 21; J.M. Hosking, "The Third Party Non-signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent" (2004) 4 Pepperdine Dispute Resolution Law Journal 469, 472; B. Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts-parties-issues: An Analysis" (2001) 18 Journal of International Arbitration 253, 255.

[117] Girsberger, "Law Applicable to the Assignment of Claims", 381. See also Jagusch and Sinclair, "The Impact of Third Parties on International Arbitration", [15-4].

contract."[118] It follows, it is argued, that a distinct assignment of the arbitration agreement and distinct consent by the assignee ought to be required.[119]

The acceptance principle addresses these attacks by directing us towards the law of assignment for answers. From that perspective, an assignee "is bound by the arbitration agreement not because there is any privity of contract between [the assignee] and [the obligor]",[120] but because arbitration agreements, like any other contractual benefits,[121] are choses in action capable of assignment without requiring the assignee's distinct consent. There is nothing in the assignability *of arbitration agreements* which calls for special justification as compared to the assignability of contractual rights more generally, and it is clear that the justification for the general assignability of contractual rights is primarily grounded in commercial efficacy.[122]

On the other hand, it is patently not the case that *no* consent is required, and that arbitration agreements can be forced onto the assignee.[123] As the acceptance principle indicates, the assignee always has the opportunity to disclaim upon learning of the arbitration agreement. Thus, a distinct act of consent is unnecessary, but acceptance in the form of non-disclaimer is.

The acceptance principle also strikes a balance between the "severability" view, and its opposite "dependency" view which is that the duty to arbitrate "is an inseparable component of the subject-matter transferred".[124] For obvious reasons, those who subscribe to the "dependency" view are commonly in favour of the automatic assignability of arbitration agreements.[125] The acceptance principle allows us to avoid pigeonholing arbitration agreements into the "severability" or "dependency" boxes, and instead to incorporate elements of both views. Thus, the principle reflects the "severability" view by requiring the assignee to accept the arbitration agreement as distinct from the assigned contractual right. But it also reflects the "dependency" view: as will be discussed below, if the assignee disclaims the assignment of the arbitration agreement then the assigned contractual right to which it relates is also automatically disclaimed. This indicates

[118] *Harbour Assurance Co. (UK) Ltd. v Kansa General International Insurance Co. Ltd.* [1992] 1 Lloyd's Rep. 81, 83.

[119] See e.g. *The Felicie* [1990] 2 Lloyd's Rep. 21, 26; Lista, "International Commercial Contracts", 24–25; *BXH v BXI* [2019] SGHC 141, at [136]; Girsberger and Hausmaninger, "Assignment of Rights", 136–39.

[120] *The Jay Bola* [1997] 2 Lloyd's Rep. 279, 291 (C.A.).

[121] *Belmont Park Investments Pty Ltd. v BNY Corporate Trustee Services Ltd.* [2011] UKSC 38, [2012] 1 A.C. 383, at [167].

[122] See e.g. Sir W. Holdsworth, "The History of the Treatment of Choses in Action by the Common Law" (1920) 33 Harv.L.Rev. 997, 1016ff; H.D. Macleod, *Principles of Economical Philosophy*, vol. 1 (London 1872), 481.

[123] Cf. the suggestion in Smith and Leslie, *The Law of Assignment*, [21.21], that future assignees may always be bound where the main contract specifically provides for this. The freedom of a future assignee to disclaim an assignment cannot be curbed in such a manner.

[124] *West Tankers Inc. v Ras Riunione Adriatica Di Sicurta (The Front Commor)* [2005] 2 Lloyd's Rep. 257, at [33]. See also *The Fanti* [1991] 2 A.C. 1, 33 (H.L.).

[125] Ibid.

that the arbitration agreement and the main contract are interdependent, since the assignee must accept both or none at all.

2. Notice to the obligor not required

The second implication is that notice to the obligor is not required for arbitration agreements to be assigned.

There are a number of cases which have decided that the assignee must give notice to the obligor in order to succeed to the assignor's rights in arbitration proceedings already commenced by the assignor.[126] Certainly, notice will have been provided if the assignment is a legal assignment, as required by section 136 of the Law of Property Act 1925. But in *Baytur S.A.*, Lloyd L.J. seemed to think that such notice was necessary, not only for the assignee to take over the assignor's position in arbitration, but also to "perfect" equitable assignments of arbitration proceedings already commenced.[127]

Insofar as that obiter statement suggests that until and unless such notice is given the equitable assignment is conditional and incomplete, it is inconsistent with the acceptance principle, as discussed earlier.[128] Pertinent to the present discussion is the fact that the obiter is also inconsistent with the general rule that notice is not a prerequisite for a valid equitable assignment.[129]

The better view is that notice to the obligor does not affect the completeness of equitable assignments, but – as is the case in the law of assignment generally – it functions to protect the assignee: an obligor who does not receive notice can obtain a good discharge against the assignor, but once notice is provided the obligor can only obtain a good discharge against the assignee.[130] Thus, until and unless the obligor is notified, the assignor remains free to pursue the claim against the obligor in arbitration. Since the assignment is valid and complete[131] unless and until the assignee disclaims, however, the assignor would "claim as trustee for [the assignee]".[132] This, too, reflects the position which obtains in the general law of assignment.

[126] *Baytur v Finagro Holdings* [1992] 1 Q.B. 610, 617–18.
[127] Ibid., at 618. See also *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 18 (Q.B.).
[128] See Section V(B)(1) above.
[129] See Liew, *Guest on the Law of Assignment*, [3-50].
[130] See *Herkules Piling v Tilbury Construction* (1992) 32 Con. L.R. 112, 120 (Q.B.), and Liew, *Guest on the Law of Assignment*, [3-50], for a detailed discussion.
[131] This is not to say that the assignee automatically becomes party to the arbitration proceedings upon the equitable assignment: notice must be given to the tribunal and the assignee must submit to the tribunal's jurisdiction: see e.g. *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 18 (Q.B.); *NBP v Buildko & Sons* (1992) 8 Const.L.J. 377; *Baytur v Finagro Holdings* [1992] 1 Q.B. 610, 618; *Charles M Willie & Co. (Shipping) Ltd. v Ocean Laser Shipping Ltd. (The Smaro)* [1999] 1 Lloyd's Rep. 225, 243 (Q.B.).
[132] *Herkules Piling v Tilbury Construction* (1992) 32 Con. L.R. 112, 120 (Q.B.), relying on *Warner Bros Records Inc. v Roll Green Ltd.* [1976] Q.B. 430.

3. Joinder

The third implication concerns the question of whether joinder of the assignor is required for an equitable assignee to initiate a claim against the obligor.

Outside the arbitration context, a significant number of cases have considered this point.[133] The present position is that joinder is no longer compulsory and may be dispensed with, although it may in specific cases be desirable, for example, where it ensures that all parties with an interest in the subject matter assigned are before the court and where it is necessary to bind the assignor to a court order.

In the arbitration context, however, only a handful of cases have addressed the point. In *The Leage*, Bingham J. assumed in passing that joinder was necessary,[134] while in *Sim Swee Joo Shipping Sdn Bhd v Shirlstar Container Transport Ltd.*, Mance J. thought that it was a matter for tribunals to decide whether joinder is necessary.[135] On the other hand, in *BXH v BXI*, the Singaporean High Court left undecided the question as to whether joinder "goes to the equitable assignee's *right* to arbitrate, or is merely a matter of procedure."[136] Commentators who have addressed the point seem to assume that joinder is indispensable, and that "[t]his creates obvious problems when assignors refuse to co-operate".[137]

The acceptance principle indicates that the lack of joinder ought not to be fatal. The principle's emphasis on the law of assignment suggests that the position which obtains in the law of assignment generally should also apply to arbitration agreements; it also suggests that there is nothing in the nature of arbitration agreements which requires joinder to be insisted upon. Moreover, one of the advantages of the acceptance principle is that it provides certainty as to the location of the assigned right at any particular time – it inheres in the assignee from the moment of assignment until and unless she disclaims. It would be counterproductive for the law then to turn around and insist on the procedural joinder requirement for the assignee's right to be enforceable, as this would cause uncertainty for the assignee, for example, where the assignor ceases to exist.

4. The assignor's right and obligation to arbitrate

The fourth implication concerns the assignor's right and obligation to arbitrate after an assignment has taken place.

[133] These are discussed in Liew, *Guest on the Law of Assignment*, [3-14].
[134] *The Leage* [1984] 2 Lloyd's Rep. 259, 262 (Q.B.).
[135] *Sim Swee Joo Shipping Sdn Bhd v Shirlstar Container Transport Ltd.* [1994] C.L.C. 188 (Q.B.).
[136] *BXH v BXI* [2019] SGHC 141, at [177] (emphasis in original).
[137] Jagusch and Sinclair, "The Impact of Third Parties on International Arbitration", [15-22]. See also Hosking, "The Third Party Non-signatory's Ability", 492.

In *The Halcyon the Great*, Staughton J. found it "unnecessary to decide" whether an assignment would deprive the assignor of the right to arbitrate and vest it in the assignee, although he suggested an inclination towards that position.[138] In two later cases, judges have held that an assignment "extinguishes the legal cause of action of the assignor",[139] and that the assignor no longer has any "right to sue in their own name".[140]

The acceptance principle affirms that these later cases correctly state the legal position, although it suggests further refinement.

Because an assignment is complete and effective from the moment of assignment, the assignor loses the right to arbitrate in relation to the assigned contractual right; she is likewise freed of the obligation to defend any claim brought by the obligor in arbitration in relation to a burden which was anticipatory at the time of the assignment. If, however, the assignee validly disclaims, then the assignment is void ab initio, with the result that the assignor is treated as never having been divested of the right and obligation associated with the arbitration agreement.

It goes without saying that, if the assignor only assigns some of the rights in the main contract subject to the arbitration agreement, then her right and obligation to arbitrate those unassigned rights would not be affected.

5. Protecting the obligor

The fifth and final implication is that the assignment of arbitration agreements does not fail to protect the obligor.

There have been a number of commentators who have expressed concern that allowing assignments of arbitration agreements might be detrimental to the obligor, for example, where the assignee's financial health would endanger the obligor's ability to recover costs.[141] They suggest that, if an assignment would put the obligor in a potentially precarious position, then the obligor ought to be able to deny the validity of the assignment.[142] Implicitly, the suggestion is that the obligor's consent is necessary in such cases; or, to put this in another way, only novation,[143] and not assignments of arbitration agreements, should be allowed where the obligor may be prejudiced.

The acceptance principle militates against these concerns by emphasising that the assignability of arbitration agreements is primarily a matter for the law of assignment. The default position in English law is that contractual

[138] *The Halcyon the Great* [1984] 2 Lloyd's Rep. 283, 289 (Q.B.).
[139] *The Jordan Nicolov* [1990] 2 Lloyd's Rep. 11, 15 (Q.B.).
[140] *NBP v Buildko & Sons* (1992) 8 Const L.J. 377. See also *BXH v BXI* [2019] SGHC 141, at [137].
[141] See Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, [7-55].
[142] See e.g. ibid.; Girsberger and Hausmaninger, "Assignment of Rights", 147.
[143] If the obligor's consent is obtained then what we have is a novation and not an assignment: *Linden Gardens v Lenesta Sludge Disposals* [1994] 1 A.C. 85, 103 (H.L.); *Alina Budana v The Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980, at [68], [118]; Liew, *Guest on the Law of Assignment*, [1-56]–[1-58].

rights are choses in action capable of being assigned. So ubiquitous is this view that there ought to be no doubt that commercial parties are or ought to be fully aware of this position – and it is the commercial context in which we most commonly find arbitration agreements. Therefore, there is no reason why it should avail the obligor to complain that, when she entered into the main contract with the assignor, she did not know or foresee that (for example) the assignee would be impecunious. If that had been a concern for the obligor, then she should have negotiated for a non-assignment clause to prevent dealings with any third party.[144]

Moreover, requiring the obligor to consent in some but not all cases raises more problems than it solves. It would, for example, allow an obligor unilaterally to decide whether to deal with the assignor or the assignee and, pending that choice being made, there would be ambiguity as to where the relevant contractual right inheres. In addition, difficulties would arise as to how "detrimental to the obligor" would be defined. There would also be the conceptual problem of justifying why future eventualities should impact on the prior assignability of arbitration agreements.

There is, however, one important respect in which the acceptance principle protects the obligor. Where a contractual right which is subject to an arbitration agreement is assigned, it seems clear that the assignee would not be allowed to accept the assignment of the contractual right without also accepting the assignment of the arbitration agreement. In other words, disclaimer of the assigned arbitration agreement would automatically entail disclaimer of the contractual right. This provides protection to the obligor because it ensures that the assignee does not obtain a more advantageous position than the assignor vis-a-vis the obligor. It also ensures that the assignee is not allowed to circumvent arbitration through an assignment of the benefits under the main contract.[145] Thus, the acceptance principle ensures that the obligor's right to arbitrate disputes relating to the contract remains intact, unaffected by an assignment of a contractual right to which it relates.

[144] *Yeandle v Wynn Realisations* (1995) 47 Con. L.R. 1, 12 (C.A.).
[145] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, [7-53].