ASSIGNEE'S RIGHT AND OBLIGATION TO ARBITRATE UNDER SINGAPORE LAW: A MISSED OPPORTUNITY BY THE COURT OF APPEAL?

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Abstract

Is an assignee entitled to rely on and be bound by an arbitration agreement in the underlying assigned contract under Singapore law? This question was deliberately left open by the Singapore Court of Appeal in its recent decision of Rals International Pte Ltd v. Cassa di Risparmio di Parma e Piacenza S.p.A.. Its approach is in stark contrast to the decision of the Court below, which answered the question with a definitive 'yes'. In this note, the authors discuss whether the Court of Appeal's hesitation to express a definitive view on this question was driven by sound juridical considerations. In particular, the authors discuss whether (i) the lack of consent by the assignee and (ii) the long-standing rule that assignments cannot convey burdens, generate such conceptual difficulties as to warrant deferring a decision on the question to a later time. In addition, the authors also consider the practical implications of having this question left unanswered under Singapore law.

I. Introduction

In its recent decision of *Rals International Pte Ltd.* v. *Cassa di Risparmio di Parma e Piacenza S.p.A.*,[1] the Singapore Court of Appeal expressed doubt on whether an assignee should be entitled to rely on and be bound by an arbitration agreement found in the underlying assigned contract under Singapore law. Even though the Court of Appeal's comments on this issue were *obiter* given that the appeal was dismissed on a separate ground, these comments are significant. The Court below[2] made important findings of law that would have established Singapore law's position on this issue. Thus, the Court of Appeal's comments could be seen as a deliberate decision to leave this issue open under Singapore law for future consideration.

Such a decision by the Court of Appeal leaves uncertainty in the law and may be seen as contrary to Singapore's clearly enunciated policy of promoting Singapore as a hub for international arbitration. In this regard, it is trite that certainty and clarity in law are fundamental to commerce. Moreover, assignments of contractual rights are common in business and commercial transactions. In that light, the Court of Appeal's decision to defer the opportunity to clarify Singapore law's position on an assignee's right and obligation to arbitrate under an arbitration agreement in the underlying contract may appear undesirable.

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1 [2016] SGCA 53 (Singapore) [*hereinafter* "Rals"].

2 Cassa di Risparmio di Parma e Piacenza S.p.A. v. Rals International Pte Ltd., [2016] 1 SLR 79 (Singapore) [*hereinafter* "Cassa di Risparmio"].

On the other hand, the issue of the rights and obligations of an assignee under an arbitration agreement engages other complex and difficult legal issues, such as the requirement of consent for a binding arbitration agreement and the well-established rule that a burden cannot be assigned. These are issues of legal principle, which cannot be easily and lightly modified just to fit the policy of promoting Singapore as an international arbitration hub.

Against this backdrop, this note discusses the legal issues engaged in the consideration of the rights and obligations of an assignee to arbitrate and whether the Singapore Court of Appeal was justified in leaving these issues open under Singapore law.

Background Facts: Rals International Pte Ltd ["**Rals International**"] is a Singapore company in the business of processing raw cashew nuts and exporting processed cashew nuts. Oltremare SRL ["**Oltremare**"] is an Italian company which manufactures and sells machines to process cashew nuts.

Under a supply agreement dated August 9, 2010 [the "**Supply Agreement**"], Oltremare agreed to manufacture and deliver to Rals International equipment to shell and process raw cashew nuts. In exchange for the equipment, Rals International agreed to pay Oltremare €1,950,185 in ten instalments, each one at 10% of the total purchase price. The first two instalments were to be paid in cash while the last eight instalments were to be paid by eight promissory notes. On December 23, 2010, pursuant to the Supply Agreement, Rals International drew eight promissory notes in favour of Oltremare.

The Supply Agreement was expressly governed by Singapore law and contained an arbitration agreement at Clause 9 in the following terms:

Arbitration
All dispute [sic] arising in connection with this Agreement shall be settled by a direct conciliation between the parties. Failing this conciliation, the dispute will be settled in accordance with the rules of conciliation and Arbitration Rules of the International Chamber of Commerce in Singapore.

On July 19, 2011, Oltremare and an Italian bank, Cariparma di Risparmio di Parma e Piacenza S.p.A. ["**Cariparma**"], entered into a contract to discount the eight promissory notes ["**Discount Contract**"]. The Discount Contract is expressly governed by Italian law and confers exclusive jurisdiction over disputes on the courts of City of Parma, in Italy. Under the Discount Contract, Oltremare was obliged to assign the eight promissory notes to Cariparma. In exchange, Cariparma agreed to pay Oltremare the value of the promissory notes at a discounted value.

Under the Discount Contract, Oltremare also agreed to assign to Cariparma the benefit of an export credit insurance policy issued to Oltremare by Sace S.p.A. ["**Sace**"], an Italian export credit guarantee agency. The Discount Contract records that Oltremare made certain declarations to Cariparma. One of the declarations was that the Supply Agreement complies with Sace's requirements, one of which was that the Supply Agreement included an arbitration agreement providing for disputes to be resolved by arbitration in a New York Convention country (Singapore is a New York Convention country). In effect, thus, Cariparma was aware that the Supply Agreement was subject to an arbitration agreement.

On August 5, 2011, pursuant to the Discount Contract, Oltremare assigned the eight promissory notes to Cariparma. In exchange, Cariparma paid Oltremare the discounted sum of €1,657,105.11 on August 12, 2011. Cariparma then presented for payment four of the eight promissory notes but each of them was dishonoured. Thus, Cariparma commenced an action in the Singapore High Court to recover the sums on the four promissory notes and to seek a declaration that Rals International is liable to pay to Cariparma the remaining four promissory notes.

Rals International then applied to stay Cariparma's action under Section 6 of the International Arbitration Act.[3] Section 6(1), Section 6(2) and Section 6(5)(a) of the International Arbitration Act, with the parts relevant to the present discussion highlighted in bold, provide:

6.—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any 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, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.*

(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

(5) For the purposes of this section and sections 7 and 11A —

(a) a reference to a party shall include a reference to ***any person claiming through or under*** *such party*

II. Was Cariparma's Claim within the Scope of the Arbitration Agreement?

In order to obtain a stay of Cariparma's action under Section 6 of the International Arbitration Act, Rals International had to establish that:

Cariparma was a "*party*" to the arbitration agreement or that Cariparma was "*claiming through or under*" Oltremare ["**Party Issue**"]; and

Cariparma's action was in respect of a matter which is the subject of the arbitration agreement ["**Subject Matter Issue**"].

In favour of Rals International, the High Court held that Cariparma was a person "*claiming through or under*" Oltremare. In reaching this conclusion, the Court enunciated Singapore law's position on the rights and obligations of an assignee to arbitrate, which will be further discussed in the next section.

While the High Court held in favour of Rals International on the Party Issue, it held that Cariparma's claim was outside the scope of the arbitration agreement in the Supply Agreement. Consequently, the High Court lifted the stay granted in the first instance by the Assistant Registrar on Cariparma's action.

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3 Cap. 143A, 2002 Rev. Ed.

On the Subject Matter Issue, the Court observed that Cariparma had deliberately confined its claim to the eight promissory notes and did not rely on its rights under the Supply Agreement[4] or the Discount Contract.[5] Further, the High Court held that the commercial purpose of stipulating a bill of exchange (of which a promissory note is a species) as a payment mechanism is for the bill of exchange to function as a substitute for cash,[6] such that the payee of a bill of exchange is entitled to ignore any underlying contractual dispute with the drawer, to frame its claim as resting on the bill alone and to seek and secure summary judgment for that claim with no prospect of the drawer securing any sort of stay to defer execution.[7] At paragraph 148 of its judgment, the High Court held:

The commercial purpose of a bill of exchange is to be a freely transmissible store of economic value. In order to achieve this purpose, the Bills of Exchange Act establishes a bill of exchange as a standardised statutory contract to which the application of certain common law contractual rules has been modified or abrogated entirely. Thus, once drawn and delivered, a bill of exchange in and of itself obliges the drawer to the payee without any need for offer, acceptance or consideration at common law. Similarly, an indorsee of a bill of exchange – the statutory equivalent of an assignee – can sue on the bill in his own name as a holder and without any need to give notice of the indorsement. Most importantly, a holder of a bill who fulfils the conditions to be a holder in due course takes it free of any equities that the drawer may be able to assert against the payee. A holder in due course is, in effect and by statute, an assignee who acquires title to the assigned rights which is better than his assignor's.

Thus, the High Court held that ordinarily, "*a claim on a bill is outside the scope of an arbitration agreement*"[8] and rejected Rals International's argument that Cariparma's claim fell within the scope of the arbitration agreement.

On appeal, the Court of Appeal agreed with the High Court's finding that Cariparma's claims fell outside the scope of the arbitration agreement.[9] The Court of Appeal emphasized that the Bills of Exchange Act provides an immediate right of recourse to the holder against the drawer and indorsers of a dishonoured bill and for the amount of the bill to be claimed as liquidated damages, for which summary judgment will generally be ordered.[10] The Court of Appeal held that an arbitration clause in an underlying contract will generally not be treated as covering disputes arising under an accompanying bill of exchange in the absence of express language or express incorporation.[11] Rals International's application for a stay of Cariparma's action under Section 6 of the International Arbitration Act was therefore dismissed.

III. Was Cariparma a Person "Claiming Through or Under" Another Party?

To succeed in its stay application, Rals International had also to show that Cariparma was either a "*party*" to the arbitration agreement in the Supply Agreement or that Cariparma was "*claiming through or under*" Oltremare in its action. It should be noted that, under Singapore law, the burden

4 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 144.
5 *Id.*
6 *Id.* ¶150.
7 *Id.* ¶ 151.
8 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 155(b).
9 Rals, [2016] SGCA 53 (Singapore), ¶ 3.
10 *Id.* ¶ 29.
11 *Id.* ¶ 42.

on Rals International to establish either of the above was a light one.[12] It only had to show that it was at least *arguable* that the prerequisites of Section 6 of the International Arbitration Act have been met.[13]

The High Court held that Cariparma was not a "*party*" to the arbitration agreement. It reasoned that a "*party*" to the arbitration agreement under Section 6 of the International Arbitration Act must mean a party in the contractual sense.[14] In that way, only Rals International and Oltremare were "*parties*" to the arbitration agreement; Cariparma was not such a "*party*". Cariparma did not challenge this finding on appeal, nor did the Court of Appeal disturb this finding.[15]

While Cariparma was not a "*party*" to the arbitration agreement, the High Court held that Cariparma, as an assignee, was a person "*claiming through or under*" Oltremare within the meaning of Section 6(5)(a) of the International Arbitration Act. The Court held that the cases interpreting the phrase "*through or under*" or "*under or through*" in English and Australian arbitration legislations do not lay out a principled approach for ascertaining which plaintiffs ought to be compelled to arbitrate disputes.[16]

The Court then held that the core of the phrase "*through or under*" must lie in the law of obligations, such that the "*operation of s 6(5)(a) of the Act will, in that situation, do no more than mirror the operation of the general law*".[17] Thus, the Court proceeded to determine whether, under Singapore law, an assignee will itself be contractually entitled and bound under the general law to arbitrate despite not being a party to the arbitration agreement. In this regard, the High Court laid out three propositions of law at paragraph 91 of its judgment:

1. Arbitration agreements are, as a class, capable of assignment.
2. Where an assignor and an obligor have entered into an arbitration agreement, an assignee of a contractual right against the obligor is *entitled* to exercise all the remedies of the assignor in respect of that right, including the right to arbitrate disputes with the obligor falling within the scope of that arbitration agreement.
3. Where an assignor and an obligor have entered into an arbitration agreement, an assignee of a contractual right against the obligor is *obliged* to submit to arbitration all disputes with the obligor falling within the scope of that arbitration agreement, notwithstanding the well-established rule that an assignment can convey to the assignee only contractual benefits and never burdens.

The first of these three propositions is well-settled. While an earlier English authority suggested that an arbitration agreement was a personal covenant and not capable of assignment,[18] the English Court of Appeal held in its 1946 decision in *Shayler* v. *Woolf*,[19] that an arbitration

12 Tjong Very Sumito v. Antig Investments Pte Ltd.,[2009] 4 SLR(R) 732 (Singapore), ¶ 24.
13 *Id.*
14 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 52.
15 Rals, [2016] SGCA 53 (Singapore), ¶ 36.
16 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 69.
17 *Id.* ¶ 70.
18 Cottage Club Estates Limited v. Woodside Estates Company (Amersham) Ltd., [1928] 2 K.B. 463 (Eng.) [*hereinafter* "Cottage Club"].
19 [1946] 2 All E.R. 54.

agreement is assignable in its nature and this remains the position under English law.[20] On appeal, the Singapore Court of Appeal confirmed that the High Court's first proposition was indeed not controversial.[21]

IV. An Assignee's Right to Arbitrate

With regard to its second proposition, the High Court reasoned that this was the result of "*moving beyond simply reversing the old rule denying the assignability of arbitration agreements and working out the ordinary consequences of an assignment*".[22] The Court of Appeal did not comment on this reasoning by the High Court. With respect, however, it is difficult to see how the High Court's second proposition can be established by simply "*working out the ordinary consequences of an assignment*". While it is uncontroversial to state that an arbitration agreement *can* be assigned, it is not self-evident that the benefit of an arbitration agreement *is* assigned along with the assignment of the underlying contract. To assert that the assignment of a contractual right carries with it the benefit of the arbitration agreement only begs the question.

To be clear, the authors are not saying that the assignment of a contractual right should not or does not carry with it the benefit of the arbitration agreement. In fact, English law is well-settled on the position that generally, in the absence of contrary agreement, the benefit of an arbitration agreement is assigned along with an assigned contractual right.[23] Rather, the authors simply submit that the explanation for why the benefit of an arbitration agreement is assigned along with the assigned contractual right needs to go beyond "*working out the ordinary consequences of an assignment*".

The High Court also relied on the English decision of *Montedipe S.p.A.* v. *JTP-RO Jugotanker*[24]["**The Jordan Nicolov**"] for its second proposition. In *The Jordan Nicolov*, the assignor had already commenced arbitration against the obligor before assigning its cause of action to the assignee. In its award, the arbitral tribunal held that the assignor's claim was well-founded on the merits but it could not award the assignor any relief because the assignor had failed to prove that it continued to have title to the claim. The question before Hobhouse J. was whether the award should be remitted to the arbitral tribunal for them to consider making an award in favour of the assignee. Hobhouse J. held that an assignee of a cause of action takes the benefits of all the remedies associated with that cause of action, which, in the absence of contrary agreement, include any right which the assignor may have agreed with the obligor to vindicate that cause of action in arbitration.[25] In reaching his conclusion, Hobhouse J. relied upon Section 136 of the English Law of Property Act 1925 (c 20), the material parts of which provides as follows:

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20 DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT ¶¶ 7.08-7.09 (3d ed., 2015); ANTHONY GUEST & DR YING KHAILIEW, GUEST ON THE LAW OF ASSIGNMENT ¶¶ 1-23 (2d ed., 2015).

21 [2016] SGCA 53, ¶ 53 (Singapore).

22 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 95.

23 DAVID SUTTON ET AL, RUSSELL ON ARBITRATION ¶ 3.031 (24th ed. 2015); Montepide S.p.A. v. JTP-RO Jugotanker, [1990] 2 Lloyd's Rep. 11, ¶ 15 (Eng.) [*hereinafter* "The Jordan Nicolov"]; Schiffahrtsgesellschaft Detlev Von Appen GmbH v. Voest Alpine Intertrading GmbH, [1997] 2 Lloyd's Rep. 279, ¶¶ 285-286 (Eng.) [*hereinafter* "The Jay Bola"]; Through Transport Mutual Insurance Assocation (Eurasia) Ltd v. New India Assurance Co. Ltd., (No. 2) [2005] EWHC 455 (Eng.).

24 The Jordan Nicolov, [1990] 2 Lloyd's Rep. 11.

25 *Id.* ¶ 15.

(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

[…]

all legal and other remedies for the same" (Emphasis added)

The Singapore High Court noted that Section 4(8) of the Singapore Civil Law Act (Cap. 43, 1999 Rev. Ed.) is virtually identical to Section 136 of the English Law of Property Act 1925. On that basis, the Court held that the position under Singapore law should follow *The Jordan Nicolov*.

With respect, the High Court's reasoning may have too readily assumed that Section 4(8) of the Civil Law Act allows an assignee of a contractual right to take the benefit of an arbitration agreement. The High Court's reasoning is based on the fact that Section 4(8) of the Civil Law Act and Section 136 of the English Law of Property Act are *in pari materia*. Section 136 of the English Law of Property Act was re-enacted from Section 25(6) of the repealed Judicature Act 1873. However, as explained in an earlier section, under English law, it was originally thought, at least in 1927,[26] that an arbitration agreement was a personal covenant that was not assignable. This state of English law as it was at least before 1927 was also recognized by the Singapore High Court in its judgment.[27] It is therefore reasonable to assume that Section 136 of the English Law of Property Act, enacted in 1925, did not envisage an assignment of a contractual right to include the right of arbitrate.

The Court of Appeal did not comment on the High Court's holding that *The Jordan Nicolov* should be adopted under Singapore law. However, the Court of Appeal held that there is "*less difficulty*" in accepting the position that an assignee has the right to rely on an arbitration agreement.[28] In particular, the Court of Appeal observed that such a position is more easily reconcilable with the consensual nature of arbitration because the consent of assignee may be inferred from its choice to exercise its assigned contractual rights.[29] However, while this reasoning makes clear that consent is not an obstacle to finding that the benefit of arbitration is assigned along with the underlying contractual right, it still does not explain why the benefit of arbitration is assigned along with the underlying contractual right.

While the Court of Appeal makes clear that consent is not an obstacle, it expressed concern that the High Court's second proposition may be faced with the conceptual difficulty that allowing assignees to rely on arbitration agreements would be tantamount to allowing non-parties to an arbitration agreement to avail themselves of the right to arbitrate, which, on its face, conflict with

26 *See* Cottage Club, [1928] 2 K.B. 463 (Eng.) (being the year of this decision).
27 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 93.
28 Rals, [2016] SGCA 53 (Singapore), ¶ 55.
29 *Id.* ¶ 55.

the doctrine of privity.[30] With respect, such difficulty as described by the Court of Appeal may be more illusory than real.

First, as held by the High Court, Section 6(5)(a) of the International Arbitration Act recognizes the ability of a person, who is not a "*party to the arbitration agreement*" in the contractual sense, to rely on an arbitration agreement if that person is claiming "*through or under*" a party to the arbitration agreement. This arguably constitutes a limited statutory exception to the doctrine of privity as it applies to arbitration agreements for the purpose of specific provisions under the International Arbitration Act.[31]

Moreover, Section 6(5)(a) of the International Arbitration Act appears to be based upon Section 82(2) of the UK Arbitration Act 1996, which provides that references to a party to an arbitration agreement in Part I of the UK Arbitration Act (Sections 1 to 84) include any "*person claiming under or through a party to the agreement*". English cases[32] have established that an assignee was such a "*person*" within the meaning of Section 82(2) of the UK Arbitration Act 1996.

Second, the right of a non-party to rely on an arbitration agreement has already been accepted in other contexts, such as that of an undisclosed principal[33] and a third party under Section 8(1) of the English Contracts (Rights of Third Parties) Act 1999. Moreover, in the specific context of assignees, the Court of Appeal, citing the English case *The Jay Bola*, held at paragraph 55:

Regarding the second proposition, there is less difficulty. The English Court of Appeal case of Schiffahrtsgesellschaft Detlev von Appen GmbH v. Voest Alpine Intertrading GmbH,[34] *[1997] 2 Lloyd's Rep 279 ["**The Jay Bola**"] **suggests the reason that an assignee of a contract containing an arbitration agreement may be bound by that agreement has nothing to do with becoming a party** to the agreement as a result of the assignment. It suggests instead that such an assignee would not be entitled to enforce its rights against the other party without also recognising the obligation to arbitrate (see The Jay Bola at p 291 per Sir Richard Scott VC).* (emphasis added)

Indeed, in *The Jay Bola*, Sir Richard Scott VC held that the assignee was bound by the arbitration agreement "*not because there is any privity of contract between [the assignee] and the [obligor]*".[35] It is therefore respectfully suggested that the doctrine of privity does not pose a real conceptual difficulty to accepting the right of an assignee to benefit from an arbitration agreement.

Rather, with respect, the real conceptual difficulty with the High Court's second proposition lies in the jurisprudential rationale for the assumption that the benefit of an arbitration agreement flows to the assignee along with the assigned contractual rights. However, as will be explained below, the rationale may be found in the principle of conditional benefit.

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30 *Id.*

31 International Arbitration Act, No. 23 of 1994 §§ 6, 7, 11A (Singapore).

32 Rumput (Panama) SA v. Islamic Republic of Iran Shipping Lines, The League, [1984] 2 Lloyd's Rep. 259; The Jay Bola, [1990] 2 Lloyd's Rep. 11.

33 JOSEPH QC, *supra* note 20, ¶ 7.45.

34 The Jaya Bola, [1990] 2 Lloyd's Rep. 11.

35 *Id.* at 291.

V. An Assignee's Obligation to Arbitrate

To reach its conclusion that Cariparma was bound by the arbitration agreement in the Supply Agreement, the High Court reasoned that under Singapore law, an assignee is bound by the burden of an arbitration agreement, notwithstanding two conceptual difficulties: (i) the well-established rule that assignment cannot convey burdens and (ii) the lack of consent of an assignee to arbitrate.[36] The High Court reasoned that the principle of conditional benefit operates to resolve these two conceptual difficulties.

The principle of conditional benefit, as enunciated by Megarry VC in *Tito* v. *Waddell (No. 2)*,[37] provides that a successor in title of a right takes the benefit of that right subject to all of the burdens which are annexed *ab initio* to that right.[38] The High Court extended this principle to the burden of an arbitration agreement. It held at paragraph 113 of its judgment:

The result is that ***a contractual right which is subject to an arbitration agreement has annexed to it ab initio both the right and the obligation to arbitrate****. If the contractual right is assigned, in the absence of any express or implied agreement to the contrary, the assignment operates to transmit to the assignee both the benefit and the annexed burden of arbitration. If the assignee chooses to enforce its assigned right, it is not only entitled by law to do so by arbitration, it is also bound by law to do so by arbitration.* (Emphasis added)

In this way, the principle of conditional benefit would also then supply the rationale for why the benefit of an arbitration agreement flows to the assignee along with the assigned contractual right. Curiously, however, it does not appear from its judgment that the High Court sought to support its second proposition on the principle of conditional benefit.

Further applying the principle of conditional benefit to its third proposition, the High Court held that the consent of the assignee to arbitrate is located in its "*consent to take the substantive right in question*".[39] It held that the assignee need not have actual notice of the arbitration agreement to be taken to have consented to the arbitration agreement.[40] At a conceptual level, the High Court held that consent to arbitration is understood as consent on an objective sense, so the subjective desire of the assignee is not required to be found.[41] At a practical level, the High Court observed that every assignee has the opportunity to review the substantive agreement between the assignor and the obligor before agreeing to the assignment and would therefore be aware of any arbitration agreement.[42]

The Court of Appeal described the High Court's reasoning as "*a principled and attractive argument*".[43] However, the Court of Appeal did not go further to endorse the High Court's reasoning, but held that further consideration is needed on this matter.[44] In particular, the Court

36 Rals, [2016] SGCA 53 (Singapore), ¶ 53.
37 [1977] 3 All E.R. 129 (Eng.).
38 *Id.* ¶ 290.
39 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 118.
40 *Id.* ¶ 117.
41 *Id.* ¶ 121.
42 *Id.* ¶ 122.
43 Rals, [2016] SGCA 53 (Singapore), ¶ 54.
44 *Id.*

of Appeal expressed concern that the High Court's statement that "*nothing which the assignee does or knows can result in him receiving or rejecting the obligation to arbitrate separately from receiving the assigned right*"[45] appears at odds with another statement that it is possible for the assignor and obligor to contract in such a way to exclude the principle of conditional benefit.[46] However, with respect, these two statements by the High Court do not in our view appear contradictory. The High Court's first statement was that the obligation to arbitrate is bundled together with the right which the assignee takes and so, the assignee is unable to separate the obligation to arbitrate from the assigned right. This is not inconsistent with the High Court's later statement, which is that the assignor and obligor, *not the assignee*, may, however, separate the obligation to arbitrate from the assigned right in their agreement.

In *Jones* v. *Link Financial Ltd.*,[47] the English High Court held that "*[i]t is well established that an assignee of such a contract is bound to arbitrate in accordance with such a clause because it cannot assert its right inconsistently with the terms of the assigned contract*".[48] Indeed, if the rationale for binding an assignee to an arbitration agreement is based on its inability to assert its right inconsistently with the assigned contract, an assignee should be able to avoid arbitration if the assignor and obligor agree that the assignee should be able to assert its right without being bound by arbitration.

VI. Concluding Observations

While the Court of Appeal was reluctant to express definitive views on the position under Singapore law on the right and obligation of an assignee to arbitrate, given that this issue was not fully argued before it, the Court nevertheless made certain observations and expressed doubts on the validity of two of the three critical propositions of law laid down by the High Court. It would thus appear that the Court of Appeal deliberately wanted to leave this issue open under Singapore law.

It may be that the Court of Appeal has other concerns that it has not enunciated that explain its reluctance to take a definitive view on the issue. However, if one looks only at the concerns the Court has enunciated in its judgment, it would appear that, with respect, the Court of Appeal might have been overly cautious.

Leaving aside for now the jurisprudential discussion on what the correct position under Singapore law should be, the Singapore Court of Appeal's decision to cast doubt on the High Court's pronouncement on the right and obligation of an assignee to arbitrate has immediate practical consequences for business and commercial transactions governed by Singapore law.

Assignments of contractual rights are commonplace in business and commerce. Disputes do not always arise out of the assignments of contractual rights. However, when they do, it is fundamental to identify the correct forum to submit the dispute, be it arbitration or the national courts. Starting a dispute in the wrong forum results in waste of time and costs. Moreover, in some cases, it may also allow the other party to argue that by submitting the dispute to the wrong forum, a party has waived the right to submit the dispute to the correct forum.

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45 Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 117.
46 *Id.* ¶ 123.
47 [2012] EWHC (QB) 2402 (Eng.).
48 *Id.* ¶ 32.

Regrettably, the Court of Appeal's decision makes it more difficult for parties to be certain that they have correctly identified the forum to which their dispute should be submitted. While the law may regard arbitration agreements as playing a subsidiary role, having "*no purpose and no value in itself*",[49] some commercial parties see the benefits offered by arbitration, particularly its confidentiality, as an important part of the transaction. Therefore, in some instances, the right of recourse to arbitration may be seen as an important and intrinsic part of the contractual bargain. In these cases, the Court of Appeal's decision, which cast doubt on the ability of an obligor to invoke an arbitration clause in the assigned contract against the assignee, erodes the legitimate expectation of the obligor to receive the benefit of arbitration under the contract.

[49] Cassa di Risparmio, [2016] 1 SLR 79 (Singapore), ¶ 111.