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THE CONDITIONAL BENEFIT DOCTRINE AND ITS IMPACT ON THE ENFORCEMENT OF THE NEGATIVE ASPECT OF EXCLUSIVE DISPUTE RESOLUTION AGREEMENTS

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Abstract

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The conditional benefit doctrine is a rather new concept reflected in modern English law. Case law has demonstrated that the doctrine plays an important role in the context of enforcing the negative aspect of exclusive dispute resolution agreements. The present thesis, therefore, focuses on two main aspects. The first is the features of the conditional benefit doctrine itself. Under the first category, the origin, essence, doctrinal justification, historical development and the governing scope of the doctrine will be provided. Under the second category, the effect of the doctrine on anti-suit injunctions and stay of action enforcing exclusive dispute resolution agreements will be analysed. Inspired by the conflicting Court of Appeal judgments delivered in *The Jay Bola*, *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, the thesis will address the grantability of quasi-contractual anti-suit injunctions against third parties bound by arbitration agreements under the conditional benefit doctrine. Due to the importance status of *The Jay Bola* and the position of the three cases on the authoritative hierarchy, the issue is taken as the cutting-in point. Following this, the thesis will provide answers on the grantability of quasi-contractual anti-suit injunctions against third parties bound by exclusive jurisdiction agreements under the conditional benefit doctrine, stay of action enforcing exclusive dispute resolution agreements under the conditional benefit doctrine and the application of the conditional benefit doctrine in privity of contract doctrine context.

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Professor Johanna Hjalmarsson is the second person I owe a big 'thank you' to. As well as information on my PhD topic, Professor Hjalmarsson has always been the person to go for when I need any career opportunity advice. I still remember when I was on anti-depressant and having delusions, she had the most instant reaction and called me into her office and calmed me down. I still remember she would double check if I was well afterwards and insisted that I should access first-aid psychological support provided by the University. The second thank you should then certainly go to her!

I had the chance to come to Southampton Law School during my undergraduate year due to the connection between Dalian Maritime University and the University of Southampton. Following the completion of my undergraduate degree, I continued my education in Southampton for both master study and PhD study. Without the faculty providing the strong administrative assistance, nothing would have been achieved. Therefore, I am grateful that I have been a member of Southampton Law School within the past 5 years. Also, Dalian Maritime University has always been welcoming me as a family member and I am truly proud that I could benefit from the connection between

the two institutions. Therefore, the fourth thank you will go to Dalian Maritime University.

To all my friends and family members, Jiufeng has never been an easy kid. Thank you for your unconditional love. That is something I can benefit from for my whole life and I will put my best endeavour to make full use of what I learned and to give back to the community.

Chapter 1

Introduction to the Thesis

Arbitration has been utilised in practice as a dispute resolution measure for centuries in England.[1] The arbitration agreements under the present thesis include the ones under the Arbitration Act 1996 and the non-statutory arbitration agreements.[2] Arbitration agreements impose both a negative and a positive obligation on the parties to it.[3] The negative aspect requires the claimant to not bring proceedings to any non-contractual forums.[4] Authorities provide that when such a clause is breached, the innocent party can potentially be assisted by the law.[5] Anti-suit injunctions are one of the measures to enforce the clauses. Anti-suit injunctions are measures to restrain a party from instituting or prosecuting in a foreign court.[6] The threshold for such anti-suit injunctions under English law is rather controversial for many reasons.[7] The controversy is made worse when a possible breaching party is a third party to the agreements.[8] An additional question will arise as to what is the kind of association between the third parties and the arbitration agreements that English courts recognise before they are confident to issue an anti-suit injunction enforcing arbitration agreements against third parties. The third party matters then come into the picture. The

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[1] R Merkin, *Arbitration Law*, 3rd rev ed, 2004, at para 1.1.

[2] For arbitration agreements to fall within the scope of Arbitration Act 1996, certain thresholds have to be crossed. (*Arbitration Law*, at para 3.1, 3.2) In the present thesis, certain arbitration agreements may not fall within the statutory definition. Therefore, it should be assumed that when the thesis discusses statutory stay of action, the arbitration agreements referred to are the ones falling within the 1996 Act. For statutory stay of action, see section 7.1.1.

[3] *Arbitration Law*, at para 3.2.

[4] *Arbitration Law*, at para 3.2.

[5] See section 7.2 introducing stay of action and section 8.3.1 providing anti-suit injunction as a measure to enforce the negative aspect of exclusive dispute resolution agreements.

[6] *Dicey, Morris and Collins on The Conflict of Laws*, 15th ed, 2012, at para 12-078.

[7] For multiple grounds for anti-suit injunctions, see section 6.3.4; For the discretion in anti-suit injunction issues, see section 6.6.2.2

[8] For the definitions of third parties under the present thesis, see section 3.4.1

relevant third party issues considered by the present thesis are those surrounding the conditional benefit doctrine. The doctrine is a fairly new concept and there is limited clarification on it provided by the legislators or case law. The first key issue dealt with by the thesis is whether an anti-suit injunction can be granted to enforce an arbitration agreement when the relationship between the breaching third party and the innocent original contracting party[9]is governed by the so-called conditional benefit doctrine. Following the resolution of the first key issue of the thesis, it then become possible to analyse other types of enforcement measures of the negative aspect of not only arbitration agreements, but also exclusive jurisdiction agreements under the conditional benefit doctrine. Furthermore, since the conditional benefit doctrine is the central topic of the present thesis, the wider application of the conditional benefit doctrine in modern English law will be explored.

1.1 Existing Literature in the Relevant Areas

The question is worth researching because it has already caused difficulties at the Court of Appeal level. The Court of Appeal in *The Jay Bola*[10], *The Hari Bhum(No.1)*[11]and *The Yusuf Cepnioglu*[12] (hereinafter 'the three problem cases') analysed the third party issues in the three cases and reached consistent judgments. However, on whether an anti-suit injunction should be granted in the respective cases, the Courts seemed to have come to conflicting conclusions.[13] Further confusion was introduced into the picture because the Courts in all three cases also jumped to the conclusions without giving much guidance in the cases themselves. Moreover, the fact all three cases are rather

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[9] See footnote 36 of the present thesis for the definition of original contracting parties.

[10] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279.

[11] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67.

[12] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386.

[13] See also *Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd* – QBD (Comm Ct) [2018] EWHC 3009 (Comm) as a recent authority on this issue.

recent Court of Appeal authorities makes them the leading cases in the area.[14] In addition, due to the fact that it is a rather new issue, reliable secondary sources on it are also limited. On the one hand, this further provides the originality of the present thesis. On the other hand, it also means cases will be the major sources supporting the analysis of the present thesis.

1.2 Research Objectives

The first issue to be analysed in the present thesis is the resolution of the conflict in the three problem cases. The final result of this process will be 'a bridge' between the decisions on the third party issues and the ones on the anti-suit injunction applications in the three problem cases. This 'bridge' built will shed lights on the grantability of anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine generally. This is also the first original contribution of the present thesis.

Following the building of the 'bridge', the thesis will also provide guidance on related unresolved issues and explore the development of the law in the relevant areas on a larger margin. The first of them is the grantability issue of stay of action enforcing arbitration agreements under the conditional benefit doctrine.[15] Two types of stay of action will be considered. One of them is the statutory stay under Arbitration Act 1996 and the other is the inherent stay. For the former, the rules are rather clear that an original party to the arbitration agreement can apply for statutory stay of action enforcing arbitration agreements against a third party under the conditional benefit doctrine.[16] However, it is not rather clear whether a third party under the conditional

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[14] Note that this proposition may be subject to *The Front Comor* where the House of Lords was rather in favour of granting an anti-suit injunction against a third party under the conditional benefit doctrine. (*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2007] UKHL 4, at para 25. See also section 6.3.2) However, the case was eventually resolved on another ground. (*Allianz SpA v West Tankers Inc (The Front Comor)* (ECJ) [2009] 1 Lloyd's Rep 413, at para 15.)

[15] See Chapter 7

[16] See section 7.4

benefit doctrine can apply for a stay of action against an original contracting party. Again conflicting judgments were reached at the Court of Appeal level in *Nisshin Shipping* and *Fortress*.[17] After clarifying the conditional benefit doctrine, it becomes possible to analyse the conflict and provide clarity. This answer to the question whether a third party caught by the conditional benefit doctrine is an eligible party to apply for a statutory stay is the second original contribution by the thesis. The third original contribution in the present thesis will be the prediction of the rules governing the grantability of inherent stay of action under the conditional benefit doctrine.[18]

Apart from one residual issue, the thesis has completed the analysis on the enforcement of the negative aspects of arbitration agreements under the conditional benefit doctrine outside the EU dimension. That residual issue is given rise by the fact that exclusive jurisdiction agreements have some similar features with the arbitration agreements under the context of the thesis. Subsequently, the fourth original contribution of the thesis is the enforcement of the negative aspect of exclusive jurisdiction agreements under the conditional benefit doctrine outside the EU dimension.[19]

Finally, following the analysis on the conditional benefit doctrine when resolving the conflict in the three problem cases, it becomes apparent that the scope of the conditional benefit doctrine extends rather far beyond assignment under English law. The association between the doctrine with the privity of contract doctrine is shown. Case law also demonstrates that decisions similar to the judgment providing the conditional benefit doctrine[20]in the leading cases are existent in other exceptions to the benefit aspect of the privity of contract doctrine. Subsequently, the modern scope of the conditional benefit doctrine will be analysed so that the thesis can provide the margin of the effect of the conditional benefit doctrine on the enforcement of the negative

[17] See section 7.5

[18] See section 7.6

[19] See Chapter 8

[20] For the definition of a conditional benefit judgement, see section 3.4.6.

aspect of arbitration agreements and exclusive jurisdiction agreements. This is also the last contribution of the present thesis.

1.3 Methodology

The researching method adopted by the thesis will be doctrinal, employing both inductive and deductive analysis. Deductive research is rather common in the thesis and is not difficult to comprehend. Once there is a foundational information justifying further relevant research, the further relevant research will then be conducted by the thesis to reach further conclusions. The inductive research process will be assessing information around the relevant areas, identifying the concerned issues, creating presumptions and testing the presumptions. An example where the thesis will adopt the inductive research method is the establishment of the connection between the principle of subject to equities and the conditional benefit doctrine. In that situation, there is available clear provision of both the principle of subject to equities and the conditional benefit doctrine in authorities. There are also clear similarities between the operation of the two principles. Nonetheless, there is no authorities providing the united essence of the two principles with full clarity. As a result, the thesis will make a presumption that the two principles have the same essence and test the presumption.

Chapter 2

The Problem Cases and the Issues Causing Difficulties

2.1 Introduction to Chapter Two

It has been mentioned in the introduction that the questions of the grantability of anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine is worth investigating because confusion on the Court of Appeal level has been demonstrated by the three problem cases. They are *The Jay Bola*, *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*. Due to the complexity of the three cases and the importance of them, it is necessary to disseminate them and identify the central issues. The present chapter will go through the three problem cases on the grantability of anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine. The first issue to be dealt with is the dissemination of the facts and judgments in the three cases. It will be provided that all three cases involve a 'third party enforcing derivative contractual right' situation and that the third parties are all bound by contractual arbitration agreements contained in the original contract. Furthermore, there have been attempts to enforce the binding arbitration agreements in all three cases. Following the analysis on the facts and judgments in the three problem cases, the issues causing the difficulties on the Court of Appeal level will become clear which will further provide guidance on the direction of analysis in the following chapters.

2.2 The Facts & Judgments in the Problem Cases and the Conflict

It has been mentioned that the three problem cases in the present thesis concerns a conflict at the Court of Appeal level. It will be provided in section 2.2 that there are some similar elements in the facts of the three problem cases. Furthermore, based on the similar facts, the Court of Appeal delivered consistent decisions on the third party issues. Nonetheless, when it comes to the anti-suit injunction issue, the Court of Appeal

reached conflicting judgments.

2.2.1 The Similar Elements in the Facts of the Three Problem Cases

Chronologically, the first case in line is *The Jay Bola*. In that case, the defendant was the carrier and the plaintiff was the assignee insurer of the cargo owner whose voyage was lost. There was a London Arbitration clause contained in the contract between the defendant and the assignor insured while the plaintiff started court proceedings in Brazil. Relying on that arbitration agreement, the defendant applied for an anti-suit injunction restraining the plaintiff from continuing the Brazilian Court proceedings.[21]

In *The Hari Bhum(No.1)*, the defendant is the shipper's insurer and the plaintiff is the carrier's insurer. The cargo was shipped on the vessel The Hari Bhum and was lost during the voyage. The shipper's right to claim was assigned to their insurer. The shipper's insurer then claimed in front of the Finish Court against the carrier's insurer directly under a Finish Statute 'which gave the claimant the right to proceed directly against the defendant's liability insurers when the defendant himself was insolvent'.[22] Under the contract between the carrier and the carrier's insurer, there was an arbitration clause providing London Arbitration. The carrier's insurer then applied for an anti-suit injunction in front of English court preventing the plaintiff from continuing the Finish proceedings.[23]

In *The Yusuf Cepnioglu*, it was a set of proceedings between the charterer of the ship and the shipowner's P&I Club. Under the contract between the shipowner and the P&I Club, there was an arbitration agreement and a pay to be paid clause, as well as choice of English Law. The charterer started proceedings directly against the P&I Club in Turkey relying on a Turkish statute providing such direct actions. Subsequently, the

[21] [1997] 2 Lloyd's Rep 279, at page 279.

[22] [2005] 1 Lloyd's Rep 67, at page 67.

[23] [2005] 1 Lloyd's Rep 67, at page 67.

P&I club started English proceedings applying for a service out of jurisdiction on the charterer and an anti-suit injunction.[24]

There are some common features of the three cases. First, in all of them, there was a third party who sought to make a *contractual claim* by relying on a foreign statute against the debtor. It will be mentioned later in the thesis that, in the three cases, the foreign proceedings were actually for the purpose of enforcing certain rights arising out of contracts.[25] Therefore, the claimants in the foreign proceedings are third parties to the contracts out of which the rights enforced arose.[26] This, however, also leads to the definition of a contractual claim under the present thesis. Even if the claim was criminal from the outside, as in *The Prestige (No.2)*[27]the thesis defines it as a contractual claim subject to the analysis in the modern development chapter. On the other hand, In *The Playa Larga*[28], it was provided that disputes relating to the contract will be governed by contractual arbitration agreements. Furthermore, even disputes of other nature will be governed by contractual arbitration agreements if they are closely knitted with contractual issues to be resolved.[29] Such a claim will *not* be defined as a contractual claim under the present thesis even if they fall within contractual arbitration agreements which will be defined later in the thesis.[30] The reason is that such a claim is not concerned with the enforcement of a contractual right. It is also to be noted that there can be more than one contract existing in the facts considering the involvement of

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[24] The facts of the case were provided in the High Court judgment. (*Shipowners' Mutual Protection and Indemnity Assiciation(Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret A.S. (The Yusuf Cepnioglu)* [2015] EWHC 258, at page 567)

[25] See section 2.2.2.1

[26] [1997] 2 Lloyd's Rep 279, at page 291, [2005] 1 Lloyd's Rep 67, at para 58, [2016] EWCA Civ 386, at para 3, 20.

[27] *The London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige) (No 2)* [2015] 2 Lloyd's Rep 33, at para 25. also see section 9.6)

[28] *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 1 Lloyd's Rep 171

[29] [1983] 1 Lloyd's Rep 171, at page 182, 183. See also *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, at page 91, 96)

[30] See section 5.3.2

multiple parties. However, from the perspective of the anti-suit injunction application, the only relevant contract is the one that the injunction applicant is a party to. As a result of the benefit aspect of the privity of contract doctrine, one party can only enforce a contract to which it is a party.[31] Following the above analysis in the present section, the contract that the injunction applicant is a party to is defined by the thesis as the *'main contract or the 'original contract"*. There will usually be two parties to the main contract. The injunction applicant will be referred to as the *'debtor'* and the counter contracting party to the injunction applicant will be referred to as the *'originally entitled party'*. The debtor and the originally entitled party together will be referred to as the *'original contracting parties'*. *'Third Parties'* under the present thesis are parties who are not either of the original contracting parties. For the purpose of the thesis, this approach of definition will satisfy the analysis on the conditional benefit doctrine and the principle of subject to equities.[32] Secondly, in the contracts involved in all three cases, there was an arbitration agreement to be enforced against a third party. Thirdly, all three cases concerned an anti-suit injunction application enforcing the said arbitration agreement.[33] Note that it is an established principle that '[a] right to obtain an…injunction is not a cause of action…It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the

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[31] See *Tweddle v Atkinson* 121 E.R. 762, at page 763~764; *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847, at page 853; *Kepong Prospecting Ltd v Schmidt* [1968] A.C. 810, at 825 F, G; *Beswick v Beswick* [1968] A.C. 58, at 77 F; *Snelling v John G Snelling Ltd* [1973] Q.B. 87, at 99 C, E

[32] See section 3.6 concluding that the conditional benefit doctrine is the manifestation of the principle of subject to equities and that the conditional benefit doctrine has a contractual basis.

[33] Note that it is an established principle that '[a] right to obtain an…injunction is not a cause of action…It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.' (*British Airways Board v Laker Airways Ltd* [1985] AC 58, at page 81 A, B) On the other hand, London arbitration are indeed amenable to the jurisdiction of English Courts. (See *The Front Comor* [2007] UKHL 4, at para 21, 23) Since all three problem cases involves the enforcement of arbitration agreements, such pre-existing cause of action has been provided in all three cases. Subsequently, the pre-existing cause of action issue will not be analysed in detail in the present thesis.

defendant is amenable to the jurisdiction of the court.'[34] On the other hand, London arbitration are indeed amenable to the jurisdiction of English Courts.[35] Since all three problem cases involves the enforcement of arbitration agreements, such pre-existing cause of action has been provided in all three cases. Subsequently, the pre-existing cause of action issue will not be analysed in detail in the present thesis.

2.2.2 The Consistent Judgments on the Third Party Rules in the Three Problem Cases

The Courts in the three cases essentially reached the same decision on the third party matters.

2.2.2.1 The Third Parties Were Enforcing Derivative Contractual Rights

In *The Jay Bola*[36], it was provided by the Court of Appeal that '[i]t is clear in my judgment that the rights being asserted in the Brazilian action by the insurance company are rights *derived from and dependant upon the rights of the voyage charterers*'.[37] Those rights of the voyage charterers were certainly defined by the main contract, the charterparty. Therefore, the third party in *The Jay Bola* was essentially enforcing derivative contractual rights by bringing the third party actions.

In *The Hari Bhum (No.1)*[38], the third party claim was also considered to be enforcing a right derived from the main contract between the shipowner and the P&I Club.[39] The

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[34] *British Airways Board v Laker Airways Ltd* [1985] AC 58, at page 81 A, B

[35] See *The Front Comor* [2007] UKHL 4, at para 21, 23

[36] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

[37] [1997] 2 Lloyd's Rep 279, at page 286.

[38] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[39] [2005] 1 Lloyd's Rep 67, at para 58. For the question posted by the Court of Appeal as to whether the rights enforced by the third party was derivative contractual rights or an independent right, see *The Hari Bhum (No.1)* [2005] 1 Lloyd's Rep 67, at para 57.

Court of Appeal first set out the first instance judge's decision that '[t]he judge held that the claim is in substance to enforce against the Club as insurer the contract made by the insured.' The Court of Appeal then recognised the first instance judge's decision that

> '[h]e was in our opinion right so to hold for the reasons he gave. In short, the title to s.67 is the "insured person's entitlement to compensation under general liability insurance" and the right is defined as a right "to claim compensation in accordance with the insurance contract direct from the insurer" in certain defined circumstances. The claim under the Act is not therefore in any sense independent of the contract of insurance but under or in accordance with it. In these circumstances it seems to us that the judge was correct to hold that the issue under the Act is one of obligation under the contract.'[40]

In *The Yusuf Cepnioglu*[41], it was provided that

> 'I agree with the judge…the nature of the victim's right in Turkish law is to a large extent circumscribed by the contractual provisions between the Club and its member…[the direct claim] should be classified as essentially contractual in this case also'.[42]

One of the authorities relied on by the Court of Appeal when reaching this conclusion is *The Hari Bhum (No.1)*. Therefore, the Court of Appeal in *The Yusuf Cepnioglu* also held that the rights enforced in the third party claim were derivative contractual rights.

From the above judgments in the three problem cases, it is apparent that the Court of

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[40] [2005] 1 Lloyd's Rep 67, at para 58.

[41] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[42] [2016] EWCA Civ 386, at para 20.

Appeal either directly set out that the third parties in the respective cases were enforcing derivative contractual rights or provided that the rights enforced by the third parties were circumscribed (or conferred) by the main contract. In the opinion of the Court of Appeal in *The Yusuf Cepnioglu*, those rights are still classified as contractual rights.[43] According to the Court of Appeal decision in *The Prestige (No.2)*[44] and also *The Yusuf Cepnioglu*[45] itself, the latter position also entails the meaning that the third parties' rights were derivative contractual rights. It is subsequently submitted by the thesis that, in all three problem cases, the third parties' rights enforced were derivative contractual rights.

2.2.2.2 The Third Parties Were Bound by the Arbitration Agreements Contained in the Main Contract

In *The Jay Bola*, Lord Hobhouse gave the leading judgment. He cited his own speech in *The Jordan Nicolov*[46]that

> '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 s136 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. The assignee is *bound by* the arbitration clause in the sense that it cannot assert the assigned *right* without also accepting the obligation to arbitrate.'[47]

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[43] [2016] EWCA Civ 386, at para 20. Note that this differs from the position where the rights are independent from the contract (where the contract only describes the scope of the liability). In that situation, the rights will not be classified as contractual in nature. (see *The Prestige (No.2)* [2015] 2 Lloyd's Rep 33, at para 25).

[44] *The Prestige (No.2)* [2015] 2 Lloyd's Rep 33, at para 26.

[45] *The Yusuf Cepnioglu* [2016] EWCA Civ 386, at para 21.

[46] *Montedipe S.p.A. v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11

[47] [1990] 2 Lloyd's Rep 11, at page 15; [1997] 2 Lloyd's Rep 279, at page 285~286.

In *The Jay Bola* itself, Lord Hobhouse followed his earlier approach and held that

> 'the *rights* which the insurance company has acquired are *rights* which are subject to the arbitration clause. The insurance company has the right to refer the claim to arbitration, obtain if it can an award…Likewise, the insurance company is not entitled to assert its claim inconsistently with the terms of the contract…the insurance company is not entitled to enforce its rights without also recognizing the obligation to arbitrate.'[48]

Furthermore, Sir Richard Scott, V.C. in the same Court provided that

> 'WAV [the assignee] is bound by the arbitration agreement not because there is any privity of contract between WAV and DVA [the debtor] but because Voest's [the assignor] contractual rights under the charter-party, to the benefit of which WAV has become entitled by subrogation are subject to the arbitration agreement which, too, is part of the sub-charter-party. WAV cannot enforce those contractual *rights* without accepting the contractual burden, in the form of the arbitration agreements to which those *rights* are subject (cf. *Halsall v Brizel*, [1957] Ch. 169 and *Tito v Waddell (No.2)*, [1977] Ch. 106 at p. 309)'.[49]

On the third party issue, the court of appeal in *The Hari Bhum (No.1)* accepted the first instance judge's approach that

> 'whether New India [the third party insurer] is *bound* by the arbitration clause which in turn depends on whether it is seeking to enforce a contractual obligation derived from the contract of insurance or an independent right of

[48] [1997] 2 Lloyd's Rep 279, at page 286.

[49] [1997] 2 Lloyd's Rep 279, at page 291.

recovery arising under the insurance contracts.'[50]

It has been mentioned that the claim was indeed considered to be enforcing the contract between the club and the carrier[51], subsequently the shipper's insurer was *bound* to claim in arbitration in London.[52]

Similarly, in *The Yusuf Cepnioglu*, it was held that '[o]nce it is decided that the charterers are exercising an essentially contractual right, it must follow that the charterers are *bound* to accept that their claim is governed by English law and must be arbitrated in London.'[53] Since the above judgment was given after the court recognised that the right in the present case was contractual in nature[54], the judgment should then be deployed in the case. Therefore, the third party charterer in *The Yusuf Cepnioglu* was also bound by the arbitration agreement contained in the contract between the original contracting parties.

Therefore, in all three problem cases, it has been recognised that the third parties were *bound* by the respective arbitration agreements in the respective main contracts. Also, such 'being bound' is the result of the fact that the rights enforced by the third parties were derivative contractual rights. In *The Hari Bhum (No.1)*, there was the most direct provision of this principle.[55] In *The Jay Bola*, it was provided that the reason why the third party insurer was bound by the arbitration agreement in the main contract is that the rights acquired by the insurer were rights which were subject to the arbitration agreement.[56] The wording 'must' used by the Court of Appeal in *The Yusuf Cepnioglu* also provides that the fact that the third party was enforcing a contractual right results

[50] [2005] 1 Lloyd's Rep 67, at para 57.
[51] [2005] 1 Lloyd's Rep 67, at para 58.
[52] [2005] 1 Lloyd's Rep 67, at para 64.
[53] [2016] EWCA Civ 386, at para 21.
[54] [2016] EWCA Civ 386, at para 20.
[55] [2005] 1 Lloyd's Rep 67, at para 57.
[56] [1997] 2 Lloyd's Rep 279, at page 286.

into the third party's being bound by the arbitration agreement contained in the main contract.[57]

2.2.2.3 Conclusions on the Consistent Judgments on the Third Party Rules in the Problem Cases

Thus, in all three cases, it has been recognised that the third parties, when enforcing derivative contractual rights[58]against one of the debtor, are bound by the arbitration agreements contained in the same contracts. Furthermore, there is a causative relationship between the two elements. Because the third parties are enforcing derivative contractual rights, they are bound by the arbitration agreements in the original contracts.

2.2.3 The Different Judgments on the Anti-Suit Injunction Applications

As has been mentioned earlier, in all three cases, the third parties had acted inconsistently with the arbitration agreements by which they were bound. The court proceedings the third parties brought also led to the anti-suit injunction applications in the three cases. However, although the facts of the three problem cases are rather similar and the Court of Appeal held that all the three third parties were bound by the arbitration agreements at hand, the results of the anti-suit injunction applications diverged.

In *The Jay Bola*[59], Hobhouse J held that had the court actions in Brazil been commenced by the voyage charterer, there would have been breach of contract[60]and an anti-suit

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[57] [2016] EWCA Civ 386, at para 21.

[58] It will be submitted later in the thesis that it is actually the equitable interests contained in the contractual rights that matter. (See section 4.2.1 providing the doctrinal justification behind the innocent conveyance of equitable interest.)

[59] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

[60] For the definition of breach of contract, see section 6.3.4.1.

injunction would have been grantable.[61] The judge went on to discuss whether an anti-suit injunction can be granted against the third party insurer in the present case and held that 'the application of the time charterers for an injunction has been made to protect a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognize'[62] The injunction was eventually maintained.[63]

In *The Hari Bhum(No.1)*[64], on the anti-suit injunction aspect, the court held that breach of arbitration agreements is enough to justify an anti-suit injunction, but there is no such breach of contract in the present case.[65] Therefore, *The Angelic Grace*[66]does not apply when the third party acting against an arbitration agreement is merely *bound* by the arbitration agreement and no anti-suit injunction is grantable.[67] There was no detailed reasoning given on why *The Angelic Grace* does not apply in the present case. The Court provided this conclusion with rather limited explanation. However, given the fact that the Court of Appeal held that the third party did not become a party to the arbitration agreement[68], it seems that the Court is suggesting a third party's being *bound* by and acting inconsistently with the arbitration agreement does not give rise to breach of the arbitration agreement.[69] Also, it seems that, in the Court's opinion, only a direct breach of contract can justify the grant of such an anti-suit injunction.

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[61] [1997] 2 Lloyd's Rep 279, at page 285.

[62] [1997] 2 Lloyd's Rep 279, at page 286.

[63] [1997] 2 Lloyd's Rep 279, at page 288.

[64] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[65] [2005] 1 Lloyd's Rep 67, at para 95, 98.

[66] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87.

[67] [2005] 1 Lloyd's Rep 67, at para 92, 98.

[68] [2005] 1 Lloyd's Rep 67, at para 52.

[69] See also the first instance judgment in *The Front Comor* favouring this approach. (*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] 2 Lloyd's Rep. 257, at para 68) Note that the judge still granted the anti-suit injunction applied for in that case. ([2005] 2 Lloyd's Rep. 257, at para 68)

In *The Yusuf Cepnioglu*[70], on whether an anti-suit injunction should be granted against the bound third party when it acts inconsistently, Longmore L.J. spotted the conflict within authorities.[71] It was recognised that *The Angelic Grace* was applied in *The Jay Bola* but was not applied in *The Hari Bhum (No.1)* while under both cases the claimant in foreign proceedings were bound by the arbitration agreement and there was a necessity to choose between the two cases.[72] Citing multiple authorities[73]negating the approach adopted in *The Hari Bhum (No.1)*, *The Jay Bola* was said to be holding the preferable approach.[74] An anti-suit injunction was subsequently granted.

Therefore, although the facts and the third party aspects of the three cases are rather similar, the Court of Appeal eventually reached different conclusions. From the outside, there is a conflict. Two cases held that the threshold for anti-suit injunctions is crossed when the bound third party acts inconsistently with the arbitration agreement while one held the opposite. Subsequently, further research as will be seen in the following is required to clarify this intractable legal difficulty.

2.3 The Issues Causing Difficulties at the Court of Appeal Level

From the above analysis in the previous section, the conflicting judgments in the three problem cases reflected the question 'whether an anti-suit injunction can be granted to enforce an arbitration agreement when the breaching party is a third party who is bound by the arbitration agreement'. Given the above several disseminated perspectives of the three problem cases in section 2.2, the present section will provide that two issues gave

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[70] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[71] [2016] EWCA Civ 386, at para 32.

[72] [2016] EWCA Civ 386, at para 32.

[73] The judge expressly mentioned two volumes where the criticism toward *The Hari Bhum* can be found. The first one is *The Conflict of Laws* and the second one is *The Anti-Suit Injunction*. (*Dicey, Morris and Collins on The Conflict of Laws*, 14th ed, 2006, at para 16-092, footnote 37, Thomas Raphael, *The Anti-Suit Injunction*, 2008, at para 10.17-10.20)

[74] [2016] EWCA Civ 386, at para 33.

rise to the difficulties encountered by the Court of Appeal in the three problem cases. They are the complicated legal principles on anti-suit injunctions and the unclear effect of the third party judgments.

2.3.1 The Complicated Legal Principles on Anti-Suit Injunctions

It is submitted that the complexity of the legal principles governing anti-suit injunctions is one of the reasons why a potential conflict of decisions is spotted at the Court of Appeal.

The grant of anti-suit injunctions is indeed a task involving great difficulty for the court. In *The Anti-Suit Injunction*, It was described as 'one of the most controversial and contested remedies in the court's armoury'.[75] Several problems make whether to grant an anti-suit injunction a difficult question for English Courts. First, there are several grounds and an applicant in a court often argues more than one grounds.[76] Secondly, the threshold for each ground is rather vague and the boundaries between the grounds are not clear.[77] Thirdly, the discretionary nature of the injunctions requires the courts to take into consideration the circumstances in the facts which vary from case to case.[78]

In the three problem cases, besides the breach of arbitration agreement ground, unconscionability was also included in all of them. The first instance judgment of *The Yusuf Cepnioglu* and the Court of Appeal judgment of *The Jay Bola* recognised that bringing the particular foreign proceedings in them were unconscionable.[79] In *The Hari Bhum(No.1)*, unconscionability was also mentioned. However, the Court of Appeal denied the existence of unconscionability in that case.[80] In addition, even if the

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[75] *The Anti-Suit Injunction*, at para 1.01

[76] See section 6.4.1.3.1

[77] On the different interpretations of unconscionability, see section 6.4.1.1.

[78] For the discretionary nature of anti-suit injunctions, see section 6.6.2.2

[79] [2015] EWHC 258, at para 74; [1997] 2 Lloyd's Rep 279, at page 286.

[80] [2005] 1 Lloyd's Rep 67, at para 96.

facts in the three problem cases are similar, they are not identical. It is then possible that certain circumstances in some of them may provide the Court with the reason to refuse the grant of the anti-suit injunctions at the discretionary stage.[81]

Therefore, an analysis on the relevant anti-suit injunction rules surrounding the facts of the three problem cases is necessary for the resolution of the conflicts involved in the cases.

2.3.2 The Unclear Effect of the Judgments on the Third Party Rules

It is submitted that another reason why the Court of Appeal struggled to reconcile the three problem cases is the limited clarification on the relevant third party rules from past authorities.

It has been examined that the third parties in all three cases were *bound* by the arbitration agreements contained in the particular contracts. Nevertheless, on the question whether there will be breach of contract when the bound third parties act inconsistently with the arbitration agreements, *The Jay Bola* and *The Hari Bhum(No.1)* reached opposite conclusions. In *The Jay Bola*, Hobhouse L.J. first recognised that '[i]n my judgment, as a matter of language, the claim is brought to enforce a contract and to obtain relief in respect of a breach of contract governed by English law.'[82] He then asked two questions, '[i]s there a contract?' and '[i]s the plaintiff seeking to enforce that contract against the defendant?'[83] He suggested both questions being answered in the affirmative.[84] Together with the fact that the anti-suit injunction was eventually continued, the Court essentially recognised the existence of breach of contract in the case. In other words, a third party's being bound and acting inconsistently can give rise

[81] For the discretionary nature of anti-suit injunctions, see section 6.6.2.2

[82] [1997] 2 Lloyd's Rep 279, at page 286~287.

[83] [1997] 2 Lloyd's Rep 279, at page 287.

[84] [1997] 2 Lloyd's Rep 279, at page 287.

to breach of contract in the opinion of the Court of Appeal *in The Jay Bola*. On the other hand, the Court of Appeal in *The Hari Bhum(No.1)* denied the existence of breach of contract when the bound third party started the foreign proceedings.[85] As for *The Yusuf Cepnioglu*, although the Court of Appeal was more in favour of the *The Jay Bola* than *The Hari Bhum(No.1)* and maintained the anti-suit injunction, Lord Justice Moore-Bick held that there was no breach of contract in the case.[86] Therefore, even if the final result in *The Yusuf Cepnioglu* is consistent with *The Jay Bola*, the later case did not follow either of the two earlier ones on the effect of the third party's being 'bound'.

Several key questions should then be asked to solve the problems. First, what is the effect of the third party's being bound by arbitration agreements in the problem cases? Secondly, whether the third party's being bound by arbitration agreements and acting inconsistently can justify the grant of anti-suit injunctions? Thirdly, what are the reasons behind the inconsistent judgments in the three problem cases on the anti-suit injunction issue?

2.4 Conclusions on the issues introduced by the Problem Cases

From the above analysis in the present chapter, it can be seen that there have been third parties enforcing derivative contractual rights by relying on foreign statutes. Also, the Court of Appeal has been of the opinion that the third parties were bound by the arbitration agreements contained in the same contracts. Furthermore, the original contracting parties in all three cases applied for anti-suit injunctions to enforce the binding arbitration agreements against the third parties' foreign court proceedings. However, on the anti-suit injunction application, a conflict arose reflecting the question 'whether an anti-suit injunction can be granted to enforce an arbitration agreement when the breaching party is a third party who is bound by the arbitration agreement'. It

[85] [2005] 1 Lloyd's Rep 67, at para 95, 98.

[86] [2016] EWCA Civ 386, at para 50.

was then further provided that the issues causing the difficulty are the complicated legal principles surrounding anti-suit injunctions and the unclear effect of the third party issues. As a result, a clarification on the relevant third party rules and anti-suit injunction issues is necessary for the resolution of the conflicts at the Court of Appeal level.

Chapter 3

The Wording 'Bound' and the Essence of Conditional Benefit Doctrine

3.1 Introduction to Chapter Three

From the analysis in the previous chapter, one of the reasons why the conflicting judgments in the three problem cases arose is the limited clarification from past authorities on the third party rules concerned in the cases. Although the judgments in all three of them recognised that the third parties were bound by the arbitration agreements, no consensus was reached as to whether the bound third party's acting inconsistently with the arbitration agreements amounts to breach of contract or satisfies the threshold for anti-suit injunctions.[87] The current chapter will first link the wording 'bound' to the conditional benefit doctrine by analysing authorities surrounding *The Jay Bola*. Following that finding, it will be submitted that the conditional benefit doctrine originated from assignment and that it is the manifestation of the principle of subject to equities. Furthermore, the effect of the wording 'bound' will then be understood under the meaning of the principle of subject to equities. That, in turn, will provide guidance to the later analysis in the thesis for the purposes of resolving the conflict within the three problem cases.[88]

3.2 *The Jay Bola* as the 'Link'

Explanatory Note 34 of the Contracts (Rights of Third Parties) Act 1999 provides the spirit behind s8(1) of the Act that

> '[t]his section is based on a 'conditional benefit' approach. It ensures that a

[87] See section 2.3.1

[88] See section 2.2.3

> third party who wishes to take action to enforce his substantive right is not only able to enforce effectively his right to arbitrate, but is also *"bound"* to enforce his right by arbitration (so that, for example, a stay of proceedings can be ordered against him under section 9 of the Arbitration Act 1996). This approach is analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden (see, for example, *DVA v Voest Alpine, The Jay Bola* [1997] 2 Lloyd's Rep 279)'[89].

The wording 'bound' was expressly included and put in quotes. Therefore, it is certain that the third party's being bound in *The Jay Bola* is the consequence of the conditional benefit doctrine, or at least the meaning of the wording 'bound' in *The Jay Bola* has the same meaning as that under the conditional benefit doctrine. The natural following question then is what is the *applicability of the conditional benefit doctrine in the other two problem cases* given that the wording 'bound' was also mentioned in them. Also, it is equally important to know the effect of the conditional benefit doctrine on the relationship between the third parties and the arbitration agreements to provide clarity on the anti-suit injunction issues. Note that there are indeed several available authorities on the conditional benefit doctrine itself. It will be mentioned later in the thesis that there is a line of authorities providing the development of the doctrine of burden and benefit and three of which are leading House of Lords cases, namely *Halsall v Brizell*[90], *Tito v Waddell (No.2)*[91], *Rhone v Stephens*[92]. The first two of them were also cited by the Court of Appeal in *The Jay Bola* confirming their relevance.[93] Note that the three cases are essentially on the more general principle 'the doctrine of burden and benefit'. However, it will be submitted later in the thesis that the conditional benefit doctrine is

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[89] Explanatory 34 of the Contracts (Rights of Third Parties) Act 1999. The 1999 Act is available at https://www.legislation.gov.uk/ukpga/1999/31/contents

[90] *Halsall v Brizell* [1957] Ch. 169.

[91] *Tito v Waddell* (No.2) [1977] Ch. 106.

[92] *Rhone v Stephens* [1994] 2 A.C. 310.

[93] [1997] 2 Lloyd's Rep 279, at page 291

the most recent variant of the doctrine of burden and benefit. [94] Therefore, they are essentially the same for the purpose of the thesis. Nonetheless, these several cases do not provide much guidance on the effect of contractual conditions on third parties taking contractual benefits except that they are imposed on the third parties upon the enjoyment of contractual benefits.[95] On the other hand, the effect of the contractual conditions on the third parties is essential to answer the question whether an anti-suit injunction can be granted should the bound third party act against the contractual conditions.[96] Subsequently, it is important to go further and explore other approaches to reach a conclusion on the matter. Luckily, authorities have suggested that the conditional benefit doctrine does have an origin. Therefore, further research on the origin of the conditional benefit doctrine will potentially provide guidance on a key question: what is the effect of the conditional benefit doctrine on the relationship between third parties and the conditions imposed on them. The answer to this key question will further answer the applicability question and the grantability of anti-suit injunction question in such a scenario.

3.3 The Assignment Origin of the Conditional Benefit Doctrine

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[94] Note that the three cases are essentially on the more general principle 'the doctrine of burden and benefit'. However, it will be submitted later in the thesis that the conditional benefit doctrine is the most recent variant of the doctrine of burden and benefit. Therefore, they are essentially the same for the purpose of the thesis. (See section 4.2.1.3.2)

[95] Note that the fact that the three main cases on the doctrine of burden and benefit provided the triggering effect of the doctrine make them essential for associating the principle of subject to equities to the doctrine of burden and benefit. (see section 4.2.1.3 for the fairness consideration) The clarification of the triggering effect of the doctrine also cast light on the applicability of the principle of subject to equities outside assignment context. (see section 4.2) Also, the three cases did provide guidance on the question which conditions can be imposed by the debtor and the timing when the choice arises which is rather useful in some of the materials later in the thesis. (see section 4.2.1.3.1)

[96] Furthermore, it will be mentioned later in the thesis that the conditional benefit doctrine manifested from the principle of subject to equities under assignment. (see section 3.6) The 'derivative' rights under the conditional benefit doctrine can be explained without difficulty with the assistance of principles under assignment. (see section 3.5.1.2) The principle of subject to equities also makes it easier to analyse the reason why certain clauses can be equity clauses. (see section 5.4) This is another reason why the thesis has to explore the nature of the conditional benefit doctrine from perspectives other than merely the doctrine of burden and benefit.

Multiple evidence has suggested that the origin of the conditional benefit doctrine is in assignment.

3.3.1 The Assignment Basis of *The Jay Bola*

The Jay Bola was regarded as a link between the wording 'bound' and the conditional benefit doctrine by the thesis.[97] The case has been recognised as an assignment case under multiple circumstances. First, the Explanatory Note 34 of the 1999 Act considers it as an assignment case. Secondly, in the so called 'subrogation receipt' in the case itself, it was provided that '[b]y way of consideration of the payments they have made to us we hereby assign and transfer to the above underwriters any and all recovery and redress rights, grounds for action…'[98] The context of the present thesis is contractual because the conditional benefit doctrine has the contractual basis.[99] Also, contractual rights are certainly choses in action.[100] Therefore, the assignment concerned in the present thesis is the assignment of choses in action.

As well as confirming that *The Jay Bola* is an assignment case, the Explanatory Note 34 of the 1999 Act also stated that the conditional benefit doctrine is analogous to relevant principles under assignment.

Therefore, a preliminary conclusion can be reached that the conditional benefit doctrine is at least connected to assignment.[101]

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[97] See section 3.2

[98] [1997] 2 Lloyd's Rep 279, at page 283.

[99] See section 3.4.1

[100] It is provided in the volume *The Law of Assignment* that '[r]ights under a contract are choses in action. They are legal choses.' (Marcus Smith, *The Law of Assignment*, 3rd ed, 2018, at para 5.09)

[101] Note that among the three main cases on the doctrine of burden and benefit, *Halsall v Brizell* and *Tito v Waddell* also have assignment basis. (For the documents evidencing the transfer of the properties in *Halsall v Brizell*, see *Halsall v Brizell* [1957] Ch. 169, at page 172~176. For *Tito v Waddell* (No.2) [1977] Ch 106, the Law Commission Report No.242 provided evidence. In footnote 34 of para 10.29, *Tito v*

3.3.2 The Law Commission Report No. 242 Commenting on the Relationship between Assignment and the Conditional Benefit Doctrine

During the legislation process of the Contracts (Rights of Third Parties) Act 1999, the legislator also confirmed the assignment origin of the conditional benefit doctrine. It was provided in the Law Commission Report No. 242 that

> '[w]here, however, rights are assigned, the extent of the rights assigned are defined by the contract. Thus, an exemption clause which is construed as defining the limits of the assignor's rights will be binding on an assignee. Similarly, the assignment of a conditional benefit may require satisfaction of the condition of the remainder of the right assigned is to be enjoyed: the *restrictions* or *qualifications* may be an *integral part* of the right which the assignee must take as it stands.'[102]

An indicated piece of information is that the conditional benefit doctrine applies under assignment of rights. Furthermore, earlier in the report, it was provided that '[a] useful, *if not exact*, analogy can be drawn between our willingness to permit the conferral of conditional benefits but not the imposition of burdens, and the law of assignment'.[103] If the first statement is merely providing the applicability of the conditional benefit doctrine in assignment cases, the second statement is certainly expressing that the doctrine originated from the legal rules governing assignment. There are two meanings conveyed in the second statement. First, the Law Commission, when drafting the 1999 Act, is *adopting the conditional benefit doctrine as the underlying spirit of the Act*.

Waddell was cited as an authority demonstrating the doctrine of burden and benefit under assignment.)

[102] Law Commission Report on Privity of Contract: Contracts for the Benefit of Third Parties (Law Commission Report No. 242), available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/lc242_privity-of-contract-contracts-for-the-benefit-of-third-parties.pdf, at para 10.29.

[103] Law Commission Report No. 242, at para 10.29.

Secondly, the conditional benefit doctrine is a doctrine based in assignment.

3.3.3 Conclusions on the Origin of the Conditional Benefit Doctrine

From the above analysis on the statements in the Law Commission Report No. 242, Explanatory Note 34 of the 1999 Act and the assignment basis of *The Jay Bola*, it is submitted that the conditional benefit doctrine is not only related to and analogous to certain principles under assignment, the doctrine also originated from the assignment rules. Therefore, it is a reliable approach to explore the origin principle of the conditional benefit doctrine in assignment and to understand the position of the third party under the conditional benefit doctrine.

3.4 The Relationship between the Principle of Subject to Equities and the Conditional Benefit Doctrine–The Essence of the Conditional Benefit Doctrine

After confirming that the conditional benefit doctrine originated from assignment, there is then the presumption that the conditional benefit doctrine is the manifestation of a principle within the legal rules governing assignment. The real effect of the conditional benefit doctrine on the relationship between the third party assignee and the arbitration agreement can potentially be learned after knowing the origin principles behind the doctrine. Within assignment, the principle of subject to equities has some common features with the conditional benefit doctrine and the two principles are consistent with each other.[104] Furthermore, there has been the opinion from academia that the judgment providing the conditional benefit doctrine in *The Jay Bola*[105]is an application of the principle of subject to equities. Commenting *The Jay Bola*, it was provided in *The Anti-Suit Injunction* that '[i]n some specific cases, such as assignment, the third party's attempt to evade the contractual jurisdiction clause will be inconsistent with an

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[104] See section 3.4.3

[105] [1997] 2 Lloyd's Rep 279, at page 286.

established substantive equity, such as the equitable principle that an assignee is subject to the equities that bind an assignor'.[106] Therefore, it is a promising presumption that the principle of subject to equities is the origin principle of the conditional benefit doctrine. Given the contractual basis of the conditional benefit doctrine[107], the presumption is further modified to that 'the conditional benefit doctrine is the manifestation of the principle of subject to equities under the context of third parties enforcing assigned contractual benefits'.

3.4.1 The Law Commission Report No. 242 and the Definition of the Conditional Benefit Doctrine

The first step to test the presumption that the conditional benefit doctrine is the manifestation of the principle of subject to equities is to identify the key features of the conditional benefit doctrine. In the Law Commission Report No. 242, the definition of the conditional benefit doctrine was provided that 'the contracting parties may impose conditions upon the enjoyment of any benefit by the third party'.[108] This is the definition of the conditional benefit doctrine because a later statement in the same paragraph commented the approach that '[a]lthough we wish to confirm our provisional view, this issue of *conditional benefits* is not entirely straightforward'. Furthermore, it has been mentioned earlier in the thesis that there are three leading authorities on the conditional benefit doctrine. A reason may arise why the definition of the doctrine in those three cases are not adopted. The answer is rather straightforward. *The Jay Bola* is one of the three subject problem cases in the present thesis. On the other hand, the Law Commission Report No. 242 is for the purpose of preparing for the 1999 Act where explanatory note 34 expressly cited and relied on *The Jay Bola*. Furthermore, the most updated version of the doctrine of burden and benefit is consistent with the definition

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[106] *The Anti-Suit Injunction*, at para 10.08, footnote 18.

[107] See section 3.4.1 providing the contractual basis of the conditional benefit doctrine

[108] Law Commission Report No. 242, at para 10.24.

provided in the Law Commission Report No.242.[109] Therefore, adopting the definition of the conditional benefit doctrine provided in the Law Commission Report No. 242 is the better option. Besides, it will be analysed later in the thesis that the doctrine involved in the three main cases are actually the doctrine of burden and benefit and it demonstrates a swing of pendulum in the area. Thus, they are less reliable for the purpose of providing the definition of the conditional benefit doctrine.

The above definition introduces three features of the conditional benefit doctrine which are referred to as the two pre-requisites and one timing requirement [110] for the satisfaction of the conditional benefit doctrine.

The first pre-requisite is that the doctrine has a contractual basis and it only exists under the context of third parties enjoying a *contractual benefit*. This means that, to say the benefits enjoyed are subject to the conditional benefit doctrine, the benefits must be contractual benefits. Later in the thesis, this will be referred to as the contractual basis pre-requisite.

The second pre-requisite is that, under the conditional benefit doctrine, contracting parties may only impose burdens qualifying the contractual benefits upon *third parties who make a move* to enjoy the benefits. Subsequently, the conditional benefit doctrine applies under third party situations where third parties to contracts seek to enjoy

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[109] See section 4.2.1.3.2 for the most updated version of the doctrine of burden and benefit section

[110] Note that the wording choice of 'pre-requisite' and 'requirement' is merely for the purpose of separating the concepts from each other. Essentially all three conditions need to be satisfied or should be satisfied under a transaction governed by the conditional benefit doctrine. However, 'condition' is a word that is frequently used in the present thesis. It is wise to avoid using it. The contractual basis pre-requisite and the third party enforcement pre-requisite are more closely connected with each other as will be mentioned later in the thesis. (see section 9.2.2 for the relationship between the privy of contract doctrine and the conditional benefit doctrine) Therefore, it is reasonable to put them under the same wording. On the other hand, the timing requirement mentioned in the definition is the concomitant of the principle of subject to equities. (see section The Mechanism behind the Consistent Timing Factors under the Principle of Subject to Equities and the Conditional Benefit Doctrine) Therefore, the concept is isolated.

contractual benefits. This pre-requisite will be referred to as the third party enforcement pre-requisite. Before moving further, it is necessary to define the third parties under the conditional benefit doctrine context. The starting point is the fact that the Law Commission Report No.242 during the process of legislating the new Act (the 1999 Act afterwards) provided the definition of the conditional benefit doctrine.[111] The new Act (the 1999 Act) was expressly mentioned to be neutralising the negative result of the privity of contract doctrine under certain circumstances.[112] Therefore, it is tenable to conclude that the third party context under the benefit aspect of the privity of contract doctrine and the third party context under the conditional benefit doctrine are the same. Moreover, *Tweddle v Atkinson*[113]roviding the benefit aspect of the privity of contract doctrine expressly provided that the third parties in that context are strangers to the consideration.[114] This definition should be comprehended together with the principle that the mutual provision of consideration is a necessity for the conclusion of contracts.[115] This is furthered by the Law Commission Report No.242 description of the privity of contractual doctrine that 'the doctrine of privity means that, as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it.' [116] Therefore, it is arguable to submit that the third parties under the privity of contract doctrine or the conditional benefit doctrine are non-parties to certain contracts at the conclusion of the contracts.

The timing requirement is that the timing when the original contracting parties' choice to impose the conditions arises is the moment of the enjoyment of the benefit. As a matter of fact, the action to enforce the benefits suffices the 'upon the enjoyment'

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[111] Law Commission Report No. 242, at para 10.24.

[112] Law Commission Report No.242, at para 2.6.

[113] *Tweddle v Atkinson* 121 E.R. 762

[114] *Tweddle v Atkinson* 121 E.R. 762, at page 763~764. The rule received support from the House of Lords in *Dunlop v Selfridge* where Viscount Haldane followed the fundamental rule that only a party to a contract can enforce a contractual term. (*Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847, at page 853); see also the Law Commission Report No.242, at para 2.5.

[115] *Eleanor Thomas v Benjamin Thomas* 114 E.R. 330.

[116] Law Commission Report No.242, at para 2.1

wording even if it is before the actual enjoyment of the contractual benefits. This is because, in the examples given by the Law Commission Report No. 242, the conditional benefit doctrine is already triggered when the third parties *seek to enforce* the contractual benefit.[117] Furthermore, under s8(1) of the 1999 Act, an associated arbitration agreement is imposed on the third parties at the 'enforcement of the substantive term'. Another evidence suggesting that the triggering element of the conditional benefit doctrine is the enforcement of contractual benefits by third parties is the 1999 Act. From the legislative process of the 1999 Act, it is clear that the Act operates under the light of the conditional benefit doctrine.[118]

3.4.2 The Principle of Subject to Equities under Assignment

Under English law, assignment is an important measure enabling the transfer of choses in action and it exists in many aspects of the law. Authorities have provided that the principle of subject to equities inherently applies under assignment. In *STX*[119], The Court provided that 'the deed of assignment was expressly governed by English law and in those circumstances 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'[120] On the other hand, the two main types of

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[117] Law Commission Report No. 242, at para 10.27. The existence of the timing requirement of the conditional benefit doctrine is sensible because it is not reasonable to have a third party bound by certain conditions when what they did was mere inaction. It is also against the burden aspect of the privity of contract doctrine. It is a commonly recognised principle under English Law that third parties to contracts should not be burdened by the contractual terms. (Law Commission Report No.242, at para 10.27; *Rhones v Stevens* [1994] 2 A.C. 310, at page 316 H, citing *Cox v Bishop* 44 E.R. 604)

[118] See the Law Commission Report No.242 where it was provided that '[w]e recognise that the approach we are here taking constitutes a narrow view of the extent to which a person who takes a benefit must also take the burden.' (Law Commission Report No.242, at para 10.28)

[119] *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep 99

[120] [2012] 2 Lloyd's Rep 99, at para 9. Note that there are also cases where the type of the assignment was not specified by the Court while the Court still recognised the principle of subject to equities generally. For the same proposition, see also *Rumput (Panama) S.A. v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259, at page 262. *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 W.L.R. 578, at page 582. Furthermore, it will be mentioned later in the thesis that

assignment considered more in depth by the present thesis are the legal assignment[121]under the Law of Property Act 1925[122]and equitable assignment. There are also other types of assignment.[123] However, there is no need to analyse all different types of assignment because the purpose of the present section is to identify the origin principle of the conditional benefit doctrine within assignment. Thus, analysing the two main types of assignment is more than sufficient to locate that origin principle.

3.4.2.1 The Principle of Subject to Equities under Legal Assignment

S136(1) of the 1925 Act provides that

> '(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-(a) the legal right to such debt or thing in action; (b) all the legal and other remedies for the same; and (c) the power to give a good discharge for the same without the concurrence of the assignor: Provided that, if the

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the reason why the principle of subject to equities is inherent in assignment is the fairness consideration when there is enforcement of derivative equitable interest. (See section 4.2.1.3) Therefore, not only it is provided by case law, there is also doctrinal support that when there is enjoyment of equitable interest, the fairness consideration comes into the picture making sure equities travel together with the equitable interest.

[121] As a matter of fact, statutory assignment is also arguably equitable in origin. It was held in *E Pfeiffer* that the effect of statutory assignment on assignee is similar to that of equitable assignment in general. (*E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150, at page 163). See also *Chitty on Contracts* where the equitable origin of assignment is provided. (Joseph Chitty, *Chitty on Contracts*, 32nd ed, 2015, at para 19-043)

[122] Available at https://www.legislation.gov.uk/ukpga/Geo5/15-16/20/section/136.

[123] For the assignment basis of the Third Parties (Rights Against Insurers) Act 1930 and 2010, see section 4.3.2.1

debtor, trustee or other person liable in respect of such debt or thing in action has notice- (a) that the assignment is disputed by the assignor or any person claiming under him; or (b) of any other opposing or conflicting claims to such debt or thing in action; he may, if he thinks fit, either call upon the persons making claim thereto interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.'

In the section, it was provided in brackets that the assignment of things in action are '*subject to equities having priority over the right of the assignee*.' The express inclusion of the limitation is not groundless. On the matter of statutory assignment, the Judicature Act 1873 is the predecessor of the 1925 Act.[124] S25(6) of the 1873 Act also includes similar wording that the transfer of choses in action under statutory assignment should be '*subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed*'.[125]

An application of the principle of subject to equities in a statutory assignment case under the 1873 Act was made in *Young v Kitchin*[126]. In that case, the proceedings were between the assignee of an amount of money due to the assignor by the defendant. The debt arose under a building contract. On the plaintiff's claiming against the defendant, the defendant counter-claimed for damages resulted from the assignor's breach of contract. The judge in the case recognised the fact that the assignment in the present case was an assignment under the 1873 Act and the assignee were conferred with the chose in action subject to equities.[127]

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[124] In *The Principles of Personal Property law*, it is stated that '[s]ection 136(1) of the Law of Property Act 1925 has its origins in section 25(6) of the Supreme Court of Judicature Act 1873'. (Duncan Sheehan, *The Principles of Personal Property law*, 2011, at page 87)

[125] For a full content of s25(6) of the Judicature Act 1873, see *Young v Kitchin* (1878) 3 Ex. D. 127.

[126] *Young v Kitchin* (1878) 3 Ex. D. 127.

[127] (1878) 3 Ex. D. 127, at page 130. See also *Stoddart v Union Trust Ltd* [1912] 1 K.B. 181, at page 187.

Therefore, the principle of subject to equities has been and still is an underlying principle within statutory assignment.

3.4.2.2 The Principle of Subject to Equities under Equitable Assignment

The same as that under statutory assignment, the transfer of choses in action under equitable assignment is also subject to equities. This is not a surprising position because the principle of subject to equities provided in s25(6) of the 1873 Act contains the wording that 'if this Act had not passed'. Therefore, it is indicated that the principle of subject to equities was not introduced by the 1873 Act or the 1925 Act. On the contrary, the statutes were only codifying the existing rules. Therefore, a presumption can be formed that the principle of subject to equities has existed in general equitable assignment since before the coming into force of the 1873 Act and it is still alive within non-statutory assignment.

The above presumption can be tested by examining case law. In *Bushby v Munday*[128], there was an anti-suit injunction application by the plaintiff against the assignee of the bond to stop the assignee of the bond from enforcing it in Soctland. The judge held on the assignment in that case that '[i]n this country, the assignee of a bond takes *subject to all the equities* as between the obligor and obligee'.[129] The judgment was delivered before the coming into force of the 1873 Act and thus, the judgment was given under the context of assignment generally.

Therefore, the *subject to equities* limitation is not a new concept brought up in statutory assignment, it is a general requirement in equitable assignment as well.

3.4.3 The Identification of the Principle of Subject to Equities as the Potential Origin

[128] *Bushby v Munday* 56 E.R. 908.

[129] 56 E.R. 908, at page 910, 911.

of the Conditional Benefit Doctrine within Assignment

From the language used by the English Court and the Law Commission, the principle of subject to equities and the conditional benefit doctrine seem to follow the same pattern when operating. Under both, there is one party receiving certain beneficial elements and certain restrictive effect attached to the beneficial elements may be imposed on the said party. Therefore, there is consistency between the two principles on the surface. Thus, a presumption is created that the conditional benefit doctrine and the principle of subject to equities are essentially the same under the context of third parties enforcing assigned contractual rights.

3.4.3.1 The Direct Association between the Principle of Subject to Equities and the Conditional Benefit Doctrine Provided by Authorities

A preliminary evidence is provided in *Post Office*[130]. In that case, while describing the effect of the 1930 Act on the third party, the Court of Appeal provided that

> '[t]herefore it might be said that what is *assigned* to the Post Office (the third party) are all those rights. I think it may be accepted that it is so, as far as I am concerned; but even so, the *contract* contains not only rights, but limitations of those rights. You cannot, I think, *assign* to somebody part of the rights under the *contract* without *assigning* to him the condition.'[131]

It is rather noticeable that the statement takes the form of the principle of subject to equities while the wording 'rights under the contract' and 'conditions' used gives more of the taste of the conditional benefit doctrine. Therefore, it is rather possible that the principle of subject to equities and the conditional benefit doctrine are essentially the

[130] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363

[131] [1967] 2 Q.B. 363, at page 376 E, F.

same under contractual context.

Also, commenting on *The Jay Bola*, it was provided in *The Anti-Suit Injunction* that '[i]n some specific cases, such as assignment, the third party's attempt to evade the contractual jurisdiction clause will be inconsistent with an established substantive equity, such as the equitable principle that an assignee is subject to the equities that bind an assignor'.[132] This is directly recognizing the application of the principle of subject to equities in *The Jay Bola*. Combining this conclusion with the finding that the conditional benefit doctrine also applied in *The Jay Bola*, a preliminary conclusion can be reached that the conditional benefit doctrine and the principle of subject to equities have the same essence, at least under the context of *The Jay Bola*, namely third party enforcing assigned contractual rights.

Furthermore, it has been mentioned that Lord Hobhouse in *The Jay Bola* cited his own statement in *The Jordan Nicolov*[133]while providing the judgment on the conditional benefit doctrine.[134] Note that the first instance Court in *STX*[135]cited that statement and provided that it is essentially the principle of subject to equities.[136] This is another piece of evidence providing that the conditional benefit doctrine and the principle of subject to equities are essentially the same under assignment context.

3.4.3.2 The Merging of the General Operation of the Conditional Benefit Doctrine and the Principle of Subject to Equities in the Context of Assigning Contractual Rights

The arguable conclusion on the essence of the conditional benefit doctrine can also be reached by examining the satisfaction of the conditional benefit doctrine under the

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132 *The Anti-Suit Injunction*, at para 10.08, footnote 18 at page 235.

133 [1990] 2 Lloyd's Rep 11, at page 15.

134 [1997] 2 Lloyd's Rep 279, at page 285~286.

135 *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep 99

136 [2012] 2 Lloyd's Rep 99, at para 9.

principle of subject to equities. It has been mentioned that the conditional benefit doctrine demonstrates three features, namely the contractual basis pre-requisite, the third party enforcement pre-requisite and the timing requirement.[137] It will be analysed in the present section that the relevant features of the conditional benefit doctrine can be explained under the principle of subject to equities, hence further supporting the arguable conclusion that the conditional benefit doctrine and the principle of subject to equities are the same concept, at least in the context of assigning contractual rights.

3.4.3.2.1 The Existence of the Principle of Subject to Equities in Contractual Context and the Contractual Basis Pre-Requisite of the Conditional Benefit Doctrine

As has been concluded earlier in the thesis[138], the conditional benefit doctrine has a contractual basis. Therefore, if it is not possible for the principle of subject to equities to exist in contractual context, there will be no necessity to test the presumption further at all. On the other hand, if it can be proved that the principle does apply in contractual context, another progression on testing the presumption will be made. Since the principle of subject to equities is an established overarching principle under assignment, the principle of subject to equities will apply automatically when a contractual chose in action is assigned.[139] In other words, the question of the applicability of the principle of subject to equities in contractual context is essentially a question on the assignability of contractual choses in action. As a matter of fact, authorities have provided that contractual rights are freely assignable.

<u>The Assignability of Contractual Rights under Equitable Assignment</u>

The assignability of contractual rights under equitable assignment is provided in case law. The general rule is that contractual benefits are freely assignable while contractual

[137] See section 3.4.1

[138] See section 3.4.1

[139] [2012] 2 Lloyd's Rep 99, at para 9.

burdens cannot be assigned without the consent of the other party to the contract.[140]

It was held by the House of Lords in *Tolhurst*[141]that '[i]t is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee'.[142] It should be recognised as an established rule since that judgment was later relied on in *Dawson v Great Northern*[143]by the Court of Appeal.[144] Also, in the Law Commission Report No. 242, it was provided that '[t]he effect of assignment is that the promisor is faced with an action brought on the contract by a person whom he did not regard as a party and whom he may not have intended to benefit.'[145] The assignability of contractual benefits should be read together with the nature of contractual benefits that they are essentially rights.[146]

Therefore, it is submitted that contractual rights can be assigned freely under equitable assignment.

The Assignability of Contractual Rights under Statutory Assignment

Section 136 of the *1925 Act* utilised the wording 'the assignor would have been entitled to claim such debt or thing in action'.[147] Therefore, the assigned subject matter under statutory assignment is debt or thing in action. It will be submitted later in the present thesis that contractual rights are legal rights consisting of both legal title and equitable interest.[148] Therefore, it is arguable that contractual rights are legal things in action

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[140] *The Law of Assignment*, at para 5.09.

[141] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] A.C. 414

[142] [1903] A.C. 414, at page 420.

[143] *Dawson v Great Northern & City Railway Co* [1905] 1 K.B. 260

[144] [1905] 1 K.B. 260, at page 270.

[145] Law Commission Report No. 242, at para 2.16.

[146] *Chitty on Contracts*, at para 19-043.

[147] This is in contrast to a chose in action which is not assignable under common law unless certain exceptions are satisfied. *Chitty on Contracts*, at para 19-001.

[148] See sections 3.4.4.1.3, 3.4.4.1.4.

which are assignable under statutory assignment. Furthermore, in *Chitty on Contracts*, it was stated that the rules on assignability of contractual benefit in *Tolhurst*[149] and *Dawson v Great Northern*[150] apply to both statutory assignment and equitable assignment that '[d]espite the existence of the statutory form of assignment under s136 of the Law of Property Act 1925, the assignability of a contractual right in any given case is generally governed by the rules of equity existing before the Judicature Acts, and these rules now apply to statutory and equitable assignments alike.'[151] In addition, case law also provided that contractual rights can be the subject of statutory assignment.[152] Therefore, the opinion held is contractual rights are freely assignable under statutory assignment.[153]

Conclusions on the Existence of the Principle of Subject to Equities in Contractual Context and the Contractual Basis Pre-Requisite of the Conditional Benefit Doctrine

Thus, it is submitted that contractual rights can be the subject matter assigned under assignment. Also, there is a unified principle that contractual rights are assignable under both statutory assignment and equitable assignment. Since the principle of subject to equities is an overarching principle governing assignment[154], it is further submitted that the principle of subject to equities applies when there is assignment of contractual rights. Subsequently, it is possible to apply the principle of subject to equities in contractual context and consistency can be found between this conclusion and the contractual basis pre-requisite of the conditional benefit doctrine.

3.4.3.2.2 The Assignee's Capacity to Enforce Assigned Choses in Action and the Third

[149] [1903] A.C. 414, at page 420.

[150] [1905] 1 K.B. 260, at page 270.

[151] *Chitty on Contracts*, at para 19-043.

[152] For an example where contractual rights were assigned under 1873 Act, see *Torkington v Magee* [1902] 2 K.B. 427.

[153] See also *The Principles of Personal Property Law*, at page 85.

[154] *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep. 99, at para 10.

Party Enforcement Pre-Requisite of the Conditional Benefit Doctrine

The next analysis made by the thesis will be the enforceability of contractual choses in action assigned by third parties. It has been submitted that the second pre-requisite of the conditional benefit doctrine is the third party enforcement pre-requisite.[155] As a result, proving the third party assignees' competency to enforce contractual choses in action assigned means the third party enforcement pre-requisite can be satisfied in the context of the assignment of contractual rights where the principle of subject to equities applies. A further link between the principle of subject to equities and the conditional benefit doctrine is then established. There are indeed cases expressly providing the third party assignees' capacity to enforce the assigned subject matter.

It was held by the House of Lords in *Tolhurst* that '[i]t is well settled that as a general rule the benefit of a contract is assignable in equity and *may be enforced* by the assignee'.[156] The judgment was later confirmed in *Dawson v Great Northern* by the Court of Appeal.[157] Also, the legislators indirectly recognised that third party assignees are able to enforce contractual choses in action assigned. In the Law Commission Report No. 242, it was provided that '[t]he effect of assignment is that the promisor is *faced with an action* brought on the contract by a person whom he did not regard as a party and whom he may not have intended to benefit.'[158] Therefore, it is submitted by the thesis that English law has acknowledged the principle that third party assignees can enforce the assigned subject matter. Subsequently, another consistency between the principle of subject to equities and the conditional benefit doctrine can then be found.

3.4.3.2.3 The Timing Issue under the Principle of Subject to Equities and the Timing Requirement of the Conditional Benefit Doctrine

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[155] See section 3.4.1

[156] [1903] A.C. 414, at page 420.

[157] [1905] 1 K.B. 260, at page 270.

[158] Law Commission Report No. 242, at para 2.16.

It has been mentioned that, under the conditional benefit doctrine, the conditions only come into the picture *upon the enjoyment* of the contractual benefits.[159] Also, it was submitted that seeking to *enforce* contractual benefits suffices the requirement of enjoyment.[160]Subsequently, if the conditional benefit doctrine is the manifestation of the principle of subject to equities. Similar features may be retained. The present section will investigate the timing issue under the principle of subject to equities and the timing requirement of the conditional benefit doctrine.

The Timing Issue under the Principle of Subject to Equities

Under s25(6) of the 1873 Act and s136 of the 1925 Act, the wording is rather vague as to when the equities become effective on the third party assignees under the principle of subject to equities. However, in the earlier foundational case on assignment *Bushby v Munday*, the thesis has quoted the speech that '[i]n this country, the assignee of a bond takes subject to all the equities as between the obligor and obligee'[161]. Through a close examination, there is the inclusion of the wording 'takes' in the statement. Emphasis was put on the wording 'takes' in *Snell's Equity* that '[t]he rule is that the assignee *takes* subject to equities, not that he *is* subject to the equities.'[162] The volume made this statement following a statement earlier that

> 'a mere equity is an inchoate right binding on specific property. In functional terms, to say that a person has a 'mere equity' in relation to property means that the property is susceptible to an equitable proprietary claim if and when the claimant elects to *enforce* it.'[163]

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[159] See section 3.4.1

[160] See section 3.4.1

[161] 56 E.R. 908, at page 911.

[162] John McGhee, *Snell's Equity*, 33rd ed, 2015, at para 3-028.

[163] *Snell's Equity*, at para 2-006.

Therefore, the equities under the principle of subject to equities only become effective after the assignee 'takes' the assigned choses in action. Furthermore, these procedural rights[164]provide defence to the debtor which is realised in the form of equitable claims. Also, seeking to *enforce* the assigned choses in action suffices the action to *take* which will trigger the effect of the equities.

The Mechanism behind the Consistent Timing Factors under the Principle of Subject to Equities and the Conditional Benefit Doctrine

As a matter of fact, the consistency between the timing issue under the principle of subject to equities and the timing requirement under the conditional benefit doctrine has doctrinal support according to case law and secondary authorities.

There has been academic observation that the equities under the principle of subject to equities are the ones providing *defences* to the debtor upon the enforcement of certain properties without setting out the detailed analysis.[165] Nevertheless, the defensive nature of equities has also been provided by case law. In *Edward Nelson & Co Ltd v Faber & Co*[166], Joyce J provided that

> '[i]t is a general rule with respect to a chose in action that an assignee takes it subject to all the equities—in other words, *whatever defence* by way of set-off or otherwise the debtor would be entitled to set up against the assignor's claim up to the time of his receiving notice of the assignment he may also raise and maintain against the assignee'[167]

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[164] See earlier section 3.4.4.2.2

[165] *The Law of Assignment*, at para 2.99; *Snell's Equity*, at para 2-006; See also section 3.4.4.2.2 where equities are defined.

[166] *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367

[167] [1903] 2 KB 367, at page 375; *Roxburghe v Cox* (1881) 17 Ch. D. 520, at page 526. see also *The principles of personal property law* where the proposition is confirmed. (see page 106 and footnote 116

Therefore, it is an established principle that the equities under the principle of subject to equities are defensive in nature.

On the other hand, it has been mentioned earlier in the present thesis that, in *Rhone v Stephens*, it was provided that the eligible conditions enforceable by third parties under the conditional benefit doctrine are the ones which limit the exercising of the contractual rights transferred.[168] In other words, the conditions under the conditional benefit doctrine are not positive rights that can be enforced by third parties as of right, it is only enforceable for the purposes of limiting the exercising of the transferred contractual rights. The essence of the judgment is clearly that conditions under the conditional benefit doctrine provide defences.

Thus, it is submitted by the thesis that the reason why the timing issue under the principle of subject to equities and the timing requirement of the conditional benefit doctrine are consistent is that the equities are defences and conditions provide defences.

3.4.3.2.4 The Similar Provision of the Doctrinal Justifications of the Conditional Benefit Doctrine and the Principle of Subject to Equities

Another evidence on the merging of the conditional benefit doctrine and the principle of subject to equities can be found by assessing the provision of the doctrinal justifications under the respective rules.[169]

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pointing to *Roxburghe v Cox* (1881) 17 Ch. D. 520 and *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367)

[168] [1994] 2 A.C. 310, at page 322 G. see section 3.4.4.2.1

[169] It is to be noted that the analysis of the present section is not specific to the context of the assignment of contractual rights. Therefore, it does not fit into the frame of section 3.4.3.2 squarely. However, a general rule certainly covers the more specific context. Thus, it is reasonable to include the material under section 3.4.3.2.

The finding of the doctrinal justification behind the conditional benefit doctrine has to be carried out by examining the authorities on the doctrine of burden and benefit. It will be mentioned later in the thesis that the conditional benefit doctrine is one interpretation of the doctrine of burden and benefit.[170] Therefore, the investigation of authorities on the doctrine of burden and benefit for the finding of the doctrinal justification behind the conditional benefit doctrine is the correct approach. Later in the thesis, it will be submitted that the doctrinal justification behind the doctrine of burden and benefit is the fairness consideration.[171]

On the other hand, it will also be submitted later in the thesis that the doctrinal justification behind the principle of subject to equities is a similar principle requiring the innocent conveyance of equitable interest.[172]

Consequently, the doctrinal justification behind the principle of subject to equities is the same as that behind the conditional benefit doctrine.

3.4.3.3 Conclusions on the Identification of the Principle of Subject to Equities as the Potential Origin of the Conditional Benefit Doctrine within Assignment

From the above analysis in section 3.4.3, it can be seen that the features of the conditional benefit doctrine, namely the contractual basis pre-requisite, the third party enforcement pre-requisite and the timing requirement, can be explained under the principle of subject to equities. Therefore, it is submitted that the principle of subject to

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[170] See section 4.2.1.3.2

[171] It is to be noted that detailed analysis on the doctrinal justifications behind the doctrine of burden and benefit and the principle of subject to equities will be conducted later in the thesis while discussing the possibility of applying the principle of subject to equities outside assignment. (see section 4.2.1.3) The reason is that it is easier to comprehend the consistency of the doctrinal justifications under the conditional benefit doctrine and the principle of subject to equities following the clarification of the nature of relevant concepts under the two rules.

[172] See the analysis on the *post office* case in section 4.2.1.2

equities is arguably the origin principle behind the conditional benefit doctrine.

3.4.4 The Identical Nature of the Relevant Concepts under the Principle of Subject to Equities and the Conditional Benefit Doctrine Testing the Presumption

Besides the fact that the general operation of the two principles are similar to each other from the outside, evidence has suggested that the relevant equivalent concepts within the two principles are identical in nature. In the present section, the relevant equivalent concepts of the principle of subject to equities and the conditional benefit doctrine will be compared. It will be submitted that the equivalent concepts essentially have identical nature and that the principle of subject to equities and the conditional benefit doctrine are the same principle in contractual context.

3.4.4.1 Contractual Benefits, Contractual Choses in Action and the Identical Nature of Enjoying Contractual Benefits under the Conditional Benefit Doctrine & Taking Contractual Choses in Action under Assignment

Generally speaking, the subject matters under both legal assignment and equitable assignment are choses in action.[173] In *The Law of Assignment*, it is stated that

> 'a chose in action "describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession". It follows that because the rights in a chose cannot be enforced by taking physical possession, the essence of a chose in action is that it is a right or

[173] In *The Law of Assignment*, it is provided that '[t]he law of assignment is concerned with intangible property. Traditionally, English law has tended to use the label choses (or things) in action to describe this species of property, and this term is still widely used. As a result, in order to understand the historical development of the law of assignment it is at times necessary to make use of the term "chose in action"'. (*The Law of Assignment*, at para 1.01) It is also to be noted that choses in action, things in action and intangibles should be treated as the same concept under the present thesis.

interest in an intangible.'[174]

Furthermore, another definition of choses in action is 'all *rights* which can only be claimed or enforced by action'.[175] It has been recognised that '[c]hoses in action can be either legal or equitable'.[176] Therefore, a summary of the several above descriptions is submitted that choses in action are the intangible legal and/or equitable property interests which can only be enforced by action.

On the other hand, case law has provided that, under assignment context, 'contractual benefits' are rights which are assignable and can be enforced by the assignee[177] Thus, under assignment context, both contractual benefits and contractual choses in action are contractual rights which are assignable.

However, it is still too early to conclude that contractual benefits and contractual choses in action can be the same concepts under the context of assignment and it is certainly too early to submit that the contractual benefits referred to in authorities on assignability[178]are the same as those under the conditional benefit doctrine. Different types of assignment involve different assigned subject matters while it is not clear whether the contractual benefits under the conditional benefit doctrine also diverge into

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[174] *The Law of Assignment*, at para 2.76.

[175] *The Law of Assignment*, at para 2.56. See also *Torkington v Magee* where it was provided that '"[c]hose in action" is a known legal expression used to describe *all personal rights of property* which can only be claimed or enforced by action and not by taking physical possession.' (*Torkington v Magee* [1902] 2 K.B. 427, at page 430)

[176] *The Law of Assignment*, at para 2.95.

[177] *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] A.C. 414, at page 420. For the recognition of contractual benefits as contractual rights, see the Court of Appeal judgment of *Tolhurst* where it was provided that 'it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice.' (*Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 K.B. 660, at para 668) see also *Chitty on Contracts*, at para 19-043

[178] See section 3.4.3.2.1 for the assignability analysis in the present thesis

different genres or if it matters at all. Thus, it is necessary to analyse the subject matter assigned under equitable assignment and statutory assignment and the contractual benefits enjoyed under the conditional benefit doctrine. The purpose is to see whether there is consistency between the benefits enjoyed under the conditional benefit doctrine and the subject matter taken under the two different types of assignment. Note that the context of the discussion on the consistency issue is contractual[179]. Subsequently, the assignment discussed in the present section is the assignment of contractual choses in action. Therefore, the question to be answered in the present section is further modified into whether contractual choses in action assigned under different types of assignment goes consistently with the contractual benefits under the conditional benefit doctrine.

3.4.4.1.1 Subject Matter Acquired by the Assignee under Equitable Assignment and the Consequence of the Enforcement of the Subject Matter

Clues on the subject matter acquired by the assignee under equitable assignment can be found in both secondary resources and case law. The court in *Cator v Croydon*[180]case provided that

> '[i]t was said that, as these proceedings were instituted by the assignee, the assignor ought to have been made a party to the suit. It is quite clear that, where the assignor has a legal title and he assigns his interest, and any proceedings are taken by the assignee with respect to the property so assigned, the assignor must be a party to the suit, because, by his assignment, he does not part with the legal estate, and the person having the legal estate must be before the Court.'[181]

[179] See section 3.4.1 for the contractual basis of the conditional benefit doctrine.

[180] *Cator v Croydon Canal Company* 160 ER 1149.

[181] *Cator v Croydon Canal Company* 160 ER 1149, at page 1149, 1150.

The context of the present case was equitable assignment.[182] In this context, the speech subsequently provides two principles. First, equitable assignment of a legal choses in action only transfers the equitable interest and the legal title stays with the assignor. Secondly, the person holding the legal title has the right of action, hence the assignor under an equitable assignment of a legal choses in action has to be included in the enforcement proceedings.[183] A direct expression of the proposition was provided in the volume *The principles of personal property law* that '[t]he effect of an equitable assignment of a legal chose in action is that the assignee acquires only equitable rights and the assignor retains the legal rights'.[184]

Subsequently, when an assignee *takes*[185]the assigned subject matter under equitable assignment, it is actually enforcing the equitable interest of the assigned subject matter since the equitable interest is the only subject matter conferred onto the third party assignee.[186] In other words, the choses in action 'taken' under equitable assignment is equitable interests.

3.4.4.1.2 Subject Matter Assigned under Legal Assignment and the Consequence of the Enforcement of the Subject Matter

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[182] 160 ER 1149, at page 1149. It is equitable assignment because the case was based in the year of 1843 which is before any statutory measures enabling the assignment of choses in action.

[183] It is an established principle that an assignee has no right of action to enforce the assigned subject matter under equitable assignment in default and that the assignor has to be joined in the action. (*The Leage* [1984] 2 Lloyd's Rep 259, at page 262; *Bushby v Munday* 56 E.R. 908, at page 910) In *The Principles of Personal Property law*, it is provided that 'one important difference between legal and equitable assignment is that an equitable assignee must usually sue in the name of the assignor, but a legal assignee sues in his or her own name…As stated in *Warner Bros Records Ltd v Rollgreen Ltd*, the equitable assignee does not have any legal rights against the debtor'. To reach this conclusion, the volume referred to *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, *Warner Bros Records Ltd v Rollgreen Ltd* [1976] Q.B. 430 (CA) and *Crouch v Credit Foncier of England Ltd* (1873) LR 8 QB 374. (*The Principles of Personal Property Law*, at page 93)

[184] *The principles of personal property law*, at page 92.

[185] See earlier section The Timing Issue under the Principle of Subject to Equities

[186] See earlier section The Timing Issue under the Principle of Subject to Equities

According to the 1925 Act, the assigned subject matter under statutory assignment is 'debt or other legal thing in action'. The definition of 'legal thing in action' is a difficult one.[187] Academia has provided that thing in action is a traditional way to name intangible property and that legal thing in action and legal choses in action should be considered as interchangeable concepts.[188]

The Transfer of Legal Title under Legal Assignment

On the acquisition of the legal title by an assignee under statutory assignment, the conclusion can also be drawn from another perspective. An assignee under statutory assignment can certainly sue with their own name. In *King v Victoria Insurance Co Ltd*[189], the assignment was conducted under a statute which has essentially the same effect as the English Judicature Act 1873.[190] One of the central issues in the present case was whether the insurer could maintain the action against the defendant with their own name. The privy council provided that

> '[i]t is true that subrogation by act of law would not give the insurer a right to sue in a court of law in his own name. But that difficulty is got over by force of the express assignment of the bank's claim, and of the Judicature Act, as the parties must have intended that it should be when they stipulated that nothing in the assignment should authorize the use of the bank's name'[191]

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[187] In *King v Victoria Insurance*, it was provided by the privy council that '[t]heir Lordships do not express any dissent from the views taken in the Court below of the construction of the judicature Act with reference to the term 'legal chose in action.' They prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term'. (*King v Victoria Insurance Co Ltd* [1896] A.C. 250, at page 256)

[188] This proposition is supported by the recognition in *The Law of Assignment* that choses (or things) in action are generally speaking the assigned subject matter under assignment. (*The Law of Assignment*, at para 1.01)

[189] *King v Victoria Insurance Co Ltd* [1896] A.C. 250

[190] [1896] A.C. 250, at page 254.

[191] [1896] A.C. 250, at page 256.

In other words, the Council was of the opinion that statutory assignment entitles the assignee to enforce the assigned choses in action with their own name.[192] This feature of the assignees under the 1873 Act is also shared by the assignees under the 1925 Act. In *Warner Bros Records Ltd v Rollgreen Ltd*[193], the central issue before the Court of Appeal was whether the assignee could enforce the right to extend the assigned contractual right with its own name.[194] Lord Denning M.R. gave the leading judgment provided the situation under legal assignment under s136 of the Law of Property Act 1925 that

> '[i]f, therefore, notice had been given in writing to Mr. Stewart and his company of the assignment by old Mercury to New Mercury, alias Phonogram, on or before August 7, 1973, then the assignment would have been effective to pass to New Mercury, alias Phonogram, the right to exercise the option and the letter of August 7, 1973, would have been a valid exercise of the option for the assignee.'[195]

However, the judge also held that assignees under equitable assignment have no such capacity.[196] Roskill L.J. in the same Court also concurred that

> '[t]he present equitable assignee never became the legal assignee, and so, in my judgment, never became in a position to enforce the contractual right, or, as Lord Denning M.R. has put it, the legal chose in action, created by the grant of the option to the original grantee'.[197]

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[192] See also *Re Westerton* [1919] 2 Ch 104, at page 111~112, 113~114.

[193] *Warner Bros Records Inc v Rollgreen Ltd* [1976] Q.B. 430

[194] [1976] Q.B. 430, at page 440 F.

[195] [1976] Q.B. 430, at page 441 D.

[196] [1976] Q.B. 430, at page 442 B, H, 443 A.

[197] [1976] Q.B. 430, at page 444 A.

The same was also provided by Sir John Pennycuick that

> '[w]here there is a contract between A and B, and A makes an equitable but not a legal assignment of the benefit of that contract to C, this equitable assignment does not put C into a contractual relation with B, and, consequently, C is not in a position to exercise directly against B any right conferred by the contract on A'[198]

Therefore, the court is indicating that had the assignment been a legal assignment under the 1925 Act, the assignees could have been able to sue with their own name.[199]

The above conclusion should be analysed together with the nature of a right of action and the relationship between a right of action and a legal title. A rights of action is the right to bring an action.[200] A party with the right of action has the capacity to sue in their own name to enforce a benefit or to recover a damage.[201] *Holding the legal title of certain legal choses in action is significant for pursuing the rights.*[202] The above analysis in the present paragraph further confirms that the legal title of a intangible is also transferred to the assignee under statutory assignment.

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[198] [1976] Q.B. 430, at page 445 A, B.

[199] The proposition is also supported by secondary resources. Citing *Re Westerton* [1919] 2 Ch 104, *The Principles of Personal Property law* provided that '[i]n such circumstances [statutory assignment under the 1925 Act] the assignee is entitled to sue in his or her own name for the debt, irrespective of the provision of consideration'. (*The Principles of Personal Property* law, at page 87); In *The Law of Assignment*, it is provided that '[s]ection 136 of the Law of Property Act 1925 entitles an assignee of a debt or other legal chose in action to recover it by way of proceedings brought in his own name, provided the conditions of the section are met.' (*The Law of Assignment*, at para 16.01)

[200] *The Law of Assignment*, at para 3.01.

[201] In *Morris v Ford Motor Co* [1973] Q.B. 792, Lord Denning held that subrogation is not assignment of rights of action that 'this entitlement [subrogation] does not amount to an assignment of the right of action. It does not entitle the insurer or indemnifier to sue in his own name a wrongdoer who has caused the loss or damage'. ([1973] Q.B. 792, at page 800 F) He also held that, under assignment of right of action, the insurer can sue in their own name. ([1973] Q.B. 792, at page 801 C)

[202] See the analysis in section 3.4.4.1.1 on *Cator v Croydon Canal Company* 160 ER 1149.

The Transfer of Equitable Interest under Legal Assignment

The privy council in *King v Victoria*, while commenting on an assignment under a statute with the same effect as the English Judicature Act 1873, provided that '[t]he learned judges below consider that the term 'legal chose in action' includes *all rights* the assignment of which a *Court of* Law or Equity would before the Act have considered lawful'.[203] It has been mentioned that a legal chose in action contains both equitable interest and legal title.[204] Therefore, both the legal title and the equitable interest are transferred under a statutory assignment in terms of the Judicature Act 1873. The proposition has been further confirmed by *The Principles of Personal Property Law* where it is provided that '[t]he section [s136 of the 1925 Act] covers equitable choses in action, but this does not matter much in practice as statutory assignment of such choses gives no rights that equitable assignment does not.'[205] Therefore, the equitable interest under a legal choses in action is also conferred onto the assignee under legal assignment.

The Consequence of Taking Choses in Action under Legal Assignment

Following the submissions that both the legal title and the equitable interest are transferred under legal assignment, it is submitted that an assignee taking choses in action under legal assignment takes both the legal title and the equitable interest.

3.4.4.1.3 The Legal or Equitable Nature of Contractual Rights

Contractual rights are intangibles which are capable of being assigned.[206] It was provided in *The Law of Assignment* that contractual rights are generally legal

[203] [1896] A.C. 250, at page 254.

[204] *The Law of Assignment*, at para 2.96.

[205] *The Principles of Personal Property law*, at page 89.

[206] *Chitty on Contracts*, at para 19-043.

rights[207] meaning that it can be separated into legal title and equitable interest considering the conclusion reached in the previous section.[208] Combining this understanding together with the analysis in the above two sections, it can be further submitted that a third party assignee taking contractual choses in action under equitable assignment or legal assignment will certainly take contractual equitable interest.

3.4.4.1.4 The Nature of Contractual Benefits and the Contractual Benefits Enjoyed under the Conditional Benefit Doctrine

Contractual rights are legal choses in action which are capable of being assigned.[209] Therefore, learning the nature of the beneficiary component of legal choses in action in general will cast light on the nature of contractual benefit as a result.

Guidance can be found in *Dearle v Hall*[210]where the conferral of equitable interests under a trust was referred to as assignment throughout the entire report. Considering the case was decided before the 1873 Act, it is arguable that it is an equitable assignment case. Therefore, the Court in the case is indicating that the transfer of property under trust follows the principles governing equitable assignment.[211] This should be understood together with the fact that the benefits conferred on third party beneficiaries under trusts are equitable interests.[212] Subsequently, it can be submitted that the

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[207] It was summarised that '[r]ights under a contract are choses in action. They are legal choses.' (*The law of assignment*, at para 5.09) Such contract rights include 'options; rights under a charterparty; rights under a bill of lading; rights under a policy of life assurance; and rights under licences'. (*The Law of Assignment*, at para 5.12)

[208] See also *The Law of Assignment*, at para 2.96

[209] *Chitty on Contracts*, at para 19-043; See also section 3.4.3.2.1 on the assignability analysis in the present thesis.

[210] *Dearle v Hall* 38 E.R. 475.

[211] The conclusion is furthered by *The principles of personal property law* that '*McFarlane* therefore goes so far as to suggest that an equitable assignment is equivalent to a trust of the chose in action…*McFarlane* is correct that there is a trust: a new equitable interest in the chose in action is created.' (*The principles of personal property law*, at page 92)

[212] In *Grey v IRC*, Lord Radcliffe in the House of Lords provided that '[m]y Lords, if there is nothing

beneficial component of a legal chose in action is essentially the equitable interest.

The beneficial component of contractual rights, as generally assignable legal choses in action, is subsequently also the equitable interest. Thus, *contractual benefits are essentially contractual equitable interest* and that the benefits under the conditional benefit doctrine are contractual equitable interest. It is to be noted that the traditional view toward contractual rights is that it is a legal right. In the context of enforcing dispute resolution clauses, *The Anti-Suit Injunctions* provided that '[t]here is a *legal right* to enforce a valid contractual forum clause governed by English Law'.[213] This is especially important when it comes to the question whether a creditor is a secured creditor or an unsecured creditor toward a property. In particular, when there is breach of contract occurring, the right of compensation arises can certainly be enforced in a common law Court before the merging of Common Law Court and Equity Court. Therefore, it is rather hard to suggest that there is equitable interest contained in that right of compensation. However, what is overlooked is that contractual rights in the modern law is also a type of property and is capable of being assigned or transferred generally. Transactions such as trust and assignment are certainly governed by the principle of subject to equities. Due to this transfer, the same benefit in any contractual rights including contractual rights of compensation gains the equitable features and becomes equitable interest.[214] Since the dicusssion thesis is always surrouding the enjoyment of contractual benefit by third parties due to the third party nature of the

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more in this appeal than the short question whether the oral direction that Mr. Hunter gave to his trustees on February 18, 1955, amounted in any ordinary sense of the words to a 'disposition of an equitable interest or trust subsisting at the time of the disposition,' I do not feel any doubt as to my answer. I think that it did. Whether we describe what happened in technical or in more general terms the full *equitable interest* in the 18000 shares concerned, which at that time was his, was (subject to any statutory invalidity) diverted by his direction from his ownership into the beneficial ownership of the various equitable owners, present and future, entitled under his six existing settlements'. (*Grey v Inland Revenue Commissioners* [1960] A.C. 1, at page 15)

[213] *The Anti-Suit Injunction*, at para 3.08

[214] See *The Law of Assignment*, at para 2.95 mentioning that the nature of the right depends on the rules based on which the rights are pursued.

conditional benefit, these contractual benefit will almost certainly always gain the equitable feature.[215]

Furthermore, it has been submitted that *The Jay Bola* is on the conditional benefit doctrine.[216]On the other hand, it is also an assignment case. The third party in that case was certainly taking equitable interest according to the analysis on the nature of taking choses in action under assignment.[217]It can then be further confirmed that the benefit under the conditional benefit doctrine is the same as the target subject taken under assignment which is contractual equitable interest.

3.4.4.1.5 Conclusions on the Identical Nature of Enjoying Contractual Benefits and Taking Contractual Choses in Action

From the above analysis in section 3.4.4.1, it is clear that the consequence of taking contractual choses in action under assignment and that of enjoying contractual benefits are the same. The subject matter taken or enjoyed is essentially contractual equitable interest.

3.4.4.2 Related Equities and Associated Conditions

Another pair of equivalent concepts under the conditional benefit doctrine and the principle of subject to equities are related equities and associated conditions. They share an identical feature which indicates that they are essentially the same concepts. The feature itself is that both the equities under the principle of subject to equities and the

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[215] Further more, the Court of Appeal in *The Jay Bola* even reconised that a contractual right contained in an arbitration agreement can also be subject to equitable rules by referring the right to arbitration in that case as a right recognized by equity. ([1997] 2 Lloyd's Rep 279, at page 286)

[216] See section 3.2

[217] See section

conditions under the conditional benefit doctrine restrict the enforcement of certain subject matter by a third party to a relationship.[218] The present section will investigate the nature of the associated conditions and the related equities under the respective principles.

3.4.4.2.1 Associated Conditions

Case law has established that, under the conditional benefit doctrine, only conditions associated with the benefit enforced can be imposed on the third party under the conditional benefit doctrine.

The Jay Bola and *The Yusuf Cepnioglu*

To start with, it was expressly stated in *The Jay Bola* that the arbitration agreement in that case is one that the contractual rights enforced are subject to.[219] Furthermore, citing the judgment providing the conditional benefit doctrine in *The Jay Bola*, the Court of Appeal in *The Yusuf Cepnioglu* directly confirmed that the conditional benefit doctrine is an established principle.[220] It was then held in *The Yusuf Cepnioglu* that

> '[i]n my view, however, there is no real distinction. As was made clear in the 'Jay Bola', the arbitration agreement becomes binding on the claimant because it forms an *integral part* of the contract *giving rise to the obligation*, a circumstance which is not affected by the manner in which the claimant obtained the right to enforce it.'[221]

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[218] The limiting effect of equities under the principle of subject to equities can be easily identified from the wording 'subject to'. On the other hand, the limiting effect of conditions under the conditional benefit doctrine has been recognised by the Law Commission. (Law Commission Report No. 242, at para 10.29)

[219] [1997] 2 Lloyd's Rep 279, at page 286; See also section 2.2.2.2

[220] [2016] EWCA Civ 386, at para 46.

[221] [2016] EWCA Civ 386, at para 47. See also *Rhone v Stevens* [1994] 2 A.C. 310, at page 322 E, G; see also the first instance judgment in *The Front Comor* which relied on *The Jay Bola*. Therefore, the

Therefore, two conclusions can be drawn from the above analysis in the present section. First, the conditions under the conditional benefit doctrine are contractual terms. Secondly, those eligible terms are associated with benefit enforced by the third parties.

The Main Authorities on the Doctrine of Burden and Benefit

There is also express provision that conditions are related to the contractual benefit enjoyed under the conditional benefit doctrine in the three main cases on the doctrine of burden and benefit. It has been mentioned earlier in the thesis that there are three cases on the conditional benefit doctrine before *The Jay Bola*. They are *Hazel v Brizel*, *Tito v Waldall (No.2)* and *Rhone v Stevens*.[222] Technically, they are authorities on the doctrine of burden and benefit. However, it will be submitted later in the thesis that the conditional benefit doctrine is one version of the doctrine of burden and benefit.[223] There is no necessity to analyse all three cases on the doctrine of burden and benefit on this occasion since the most recent House of Lords authority of the three, *Rhone v Stevens*, cited and interpreted the earlier two authorities. In *Rhone v Stephens*, citing *Cox v Bishop*, Lord Templeman in the House of Lords provided the burden aspect of the privity of contract doctrine that only a party to a contract can be burdened by the contractual terms.[224] However, there is an exception to the above conclusion reached

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judge arguably applied the conditional benefit doctrine. In that case, it was held that the arbitration agreement at hand was an *inseparable component* of the subject matter transferred to the subrogated insurer. Therefore, if the subrogated insurer seeks to enforce the transferred right of action under subrogation, the enforcement has to be consistent with the arbitration agreement under the contract between the shipowner and the insured. (*The Front Comor* [2005] 2 Lloyd's Rep. 257, at para 32, 33, page 257). See also Law Commission Report No.242 commenting on *Tito v Waddell* (No.2) [1977] Ch 106 and *Rhone v Stevens* [1994] 2 A.C. 310. (Law Commision Report No. 242, at para 10.29, footnote 34)

[222] It will be mentioned later in the thesis that the three cases are actually on the doctrine of burden and benefit and the conditional benefit doctrine is the most recent development of the doctrine of burden and benefit. (see section 4.2.1.3.2)

[223] See section 4.2.1.3.2

[224] [1994] 2 A.C. 310, at page 316 H, 317D, F, 318A.

by the House of Lords. In *Rhone v Stephens*, the House of Lords interpreted *Tito v Waddell* and *Halsall v Brizell* that

> 'Mr. Munby also sought to persuade your Lordships that the effect of the decision in the *Austerberry* case had been blunted by the '*pure principle of benefit and burden*' distilled by Sir Robbert Megarry V.-C. from the authorities in *Tito v Waddell (No.2)* [1977] 1 Ch. 106, 301 et seq. I am not prepared to recognise the 'pure principle' that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Sir Robert Megarry V.-C. relied on the decision of Upjohn J. in *Halsall v Brizell* [1957] Ch. 169…*Halsall v. Brizell was just such a case and I have no difficulty in wholeheartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right*'.[225]

From the statement given by the Court, two conclusions can be drawn. First, even if the law has changed its opinion multiple times as to which contractual burdens should be transferred to the third parties taking contractual benefits and whether they are enforceable, the one unchanged attitude is that certain burdens should be conferred on the third parties taking contractual benefits. Secondly, it is apparent that the favoured approach in *Rhone v Stevens* is that 'any party deriving any benefit from a conveyance

[225] [1994] 2 A.C. 310, at page 322 E, G. Therefore, *Halsall v Brizell* [1957] Ch. 169 and *Rhone v Stevens* [1994] 2 A.C. 310 reached a consensus that the benefit and burden doctrine does not transfer conditions unless the third party takes the benefit under the contract. In modern cases, more restrictions have been put on the transfer of the conditions and the enforcement of the burdens by the original contracting parties. The restriction on the transfer is that only associated conditions are transferred. The restriction on the enforcement is that they can only be enforced as defences. (See section The Mechanism behind the Consistent Timing Factors under the Principle of Subject to Equities and the Conditional Benefit Doctrine of the present thesis)

may be imposed and enforced upon *conditions which are relevant* to the exercise of the right.'

The Law Commission Report No.242

It was provided in the Law Commission Report No. 242 that '[t]he assignment of a conditional benefit may require satisfaction of the condition of the remainder of the right assigned is to be enjoyed: the *restrictions* or *qualifications* may be an *integral part of the right* which the assignee must take as it stands.'[226] Subsequently, it is clearly the position that conditions under the conditional benefit doctrine are associated with the benefit.

Conclusions on Associated Conditions

From the above analysis in section 3.4.4.2.1, it is submitted that conditions under the conditional benefit doctrine are restrictions and limitations being an integral part of and associated with the benefit enjoyed by the third parties.

3.4.4.2.2 Related Equities

On the other hand, under the principle of subject to equities, equities include vitiating equities and set-off, both of which are related to the choses in action assigned.[227] In *Snell's Equity*, it is provided that 'a mere equity is an *inchoate right binding on specific property*'.[228] More specifically, in the volume *The Law of Assignment*, it is provided that a 'mere' equity is 'a *procedural right ancillary to some right of property*'[229]

[226] Law Commission Report No. 242, at para 10.29.

[227] In *The Principles of Personal Property law*, it is provided that '[t]here are two types of equities. There are substantive equities that are traditional vitiating factors, such as fraud or misrepresentation that relate directly to the chose.' (*The Principles of Personal Property law*, at page 107)

[228] *Snell's Equity*, at para 2-006.

[229] *The Law of Assignment*, at para 2.98.

Furthermore, in *The Principle of Personal Property*, it is provided that

> '[i]t [the obligation to give notice] will also be relevant to the questions of the equities, subject to which the assignee takes the *contractual right* assigned. Equities arising between the assignor and the debtor after notice has been given cannot be asserted vis-à-vis the assignee, *only those of which the debtor could have availed his or herself against the assignor at the time of assignment, or are otherwise closely connected with the assigned debt.*'[230]

The above features of equities should be read together with the statement provided in *Edward Nelson & Co Ltd v Faber & Co*[231]that

> '[i]t is a general rule with respect to a chose in action that an assignee takes it subject to all the equities–in other words, *whatever defence* by way of set-off or otherwise the debtor would be entitled to set up against the assignor's claim up to the time of his receiving notice of the assignment he may also raise and maintain against the assignee.'[232].

Subsequently, it is submitted that equities are procedural defensive rights which are *ancillary to or closely connected* with some right of property and that contractual rights can be such property. Also, an equitable claim can arise should a third party enforces the property invading the procedural defensive rights.

3.4.4.2.3 A Remaining Issue—The Theoretical Relationship between Equities and Equity Clauses

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[230] *The Principle of Personal Property*, at page 103~104.

[231] *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367

[232] [1903] 2 KB 367, at page 375; *Roxburghe v Cox* (1881) 17 Ch. D. 520, at page 526. See also *The principles of personal property law* where the proposition is confirmed. (see page 106 and footnote 116 pointing to *Roxburghe v Cox* (1881) 17 Ch. D. 520 and *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367); see also section 3.4.3.2.3

As can be seen from the above analysis on the features of the equities under the principle of subject to equities and the conditions under the conditional benefit doctrine, equities should be related to the choses in action assigned while conditions are the ones associated with the contractual benefits enjoyed. A further consistency between the principle of subject to equities and the conditional benefit doctrine is then demonstrated.

However, before fully recognising the consistency between the equities under the principle of subject to equities and the conditions under the conditional benefit doctrine, there is one remaining issue. From the analysis in the previous two sections, it is apparent that equities under the principle of subject to equities are procedural defensive rights of the debtor while conditions under the conditional benefit doctrine are contractual terms. Therefore, equities and conditions cannot have the same essence. On the other hand, to testify the presumption that the principle of subject to equities and the conditional benefit doctrine are indeed the same, it has to be proved that the two concepts have some connection, at least under the context of arbitration agreements at the preliminary stage for the purpose of resolving the conflict in the three problem cases.[233] Question then arises what is that connection between the essence of the two concepts.

The definition of the 'substantive equity' adopted by *The Anti-Suit Injunction* is that the counter party to the party who entitled the equity is bound 'to not bring the dispute to a forum or tribunal other than the arbitration tribunal designated in the main contract.[234]'. The definition is consistent with the definition of equities under the principle of subject to equities as was submitted earlier in the thesis.[235] On the other hand, the present thesis focus on the enforcement of the negative aspect of arbitration agreements and other

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[233] See also section 8.2 for the analysis on exclusive jurisdiction agreements' capacity to be clauses providing equities.

[234] *The Anti-Suit Injunction*, at para 10.08, footnote 18 at page 235.

[235] See section 3.4.4.2.2

exclusive dispute resolution agreements. Under this context, the above definition of equities is the same as that of the negative aspect of exclusive dispute resolution agreements. In *Ust*[236], the Supreme Court recognised the negative aspect of exclusive dispute resolution agreements that

> '[t]he negative aspect of an arbitration agreement is a feature shared with an exclusive choice of court clause. In each case, the negative aspect is as fundamental as the positive. There is no reason why a party to either should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum'.[237]

It is apparent that the negative aspect of exclusive dispute resolution agreements has the same content as an equity when there is an arbitration agreement in the main contract, at least in anti-suit injunction context. Furthermore, it will be mentioned later in the thesis that the contracting parties can enforce the negative aspect of exclusive dispute resolution agreements when their counter party breaches the negative aspect of the agreements.[238] Therefore, the negative aspect of the exclusive dispute resolution agreements can be a right of the innocent party which is capable of being enforced. Subsequently, it is submitted that equities have identical nature as the negative aspect of exclusive dispute resolution agreements when the exclusive dispute resolution agreements are conditions under the conditional benefit doctrine.[239] Following the above finding, the fact that conditions under the conditional benefit doctrine are contractual terms does not affect the finding of consistency between related equities and associated conditions.

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[236] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281

[237] [2013] 2 Lloyd's Rep 281, at para 21.

[238] See section 6.3.4.1

[239] Note that the scope of this finding is more than enough for the purpose of the thesis. The thesis only concerns the enforcement of the negative aspect of exclusive dispute resolution agreements. Therefore, there is no necessity to discuss the identical nature of equities and conditions outside the context.

3.4.4.3 Conclusions on the Identical Nature of the Relevant Concepts under the Principle of Subject to Equities and the Conditional Benefit Doctrine Testifying the Presumption

From the above analysis in section 3.4.4, the thesis has submitted that the relevant concepts under the principle of subject to equities and the conditional benefit doctrine share the same nature. First, the consequence of enjoying contractual benefit under the conditional benefit doctrine and the consequence of taking choses in action under the principle of subject to equities are both the enjoyment of equitable interest. Secondly, associated conditions provide restrictions and limitations on the right enjoyed by third parties while equities are procedural defensive rights inchoate to the right taken. The two concepts are especially identical when it comes to the enforcement of the negative aspect of arbitration agreements in anti-suit injunction context. This further testifies the arguable conclusion that the conditional benefit doctrine and the principle of subject to equities are the same in the context of third party enforcing contractual benefit subject to contractual exclusive dispute resolution agreements.[240]

3.4.5 The More Fundamental Status of the Principle of Subject to Equities than the Conditional Benefit Doctrine

The above analysis on the consistency between the principle of subject to equities and the conditional benefit doctrine in section 3.4 essentially confirmed the presumption that the conditional benefit doctrine is the manifestation of the principle of subject to equities in the context of third party enforcing contractual benefits.[241] However, there is one residue issue. The thesis has submitted that the conditional benefit doctrine and the principle of subject to equities merge into one concept in the context of third party

[240] See section 3.4.3.2

[241] See section 3.4 for the presumption

enforcing contractual benefits. Nevertheless, it is still not explained why the conditional benefit doctrine is the manifestation of the principle of subject to equities in such context instead of being the other way around. Several justifications for the thesis's position can be provided.

First, the apparent justification has already been provided by the thesis when reaching the conclusion that the conditional benefit doctrine originated from assignment[242]and that the principle of subject to equities is an inherent principle within assignment.[243] Therefore, an arguable conclusion can be reached that the principle of subject to equities has the more fundamental status.

Secondly, the thesis already established the direct association between the conditional benefit doctrine and the principle of subject to equities and such association has received fundamental doctrinal support [244] . Nonetheless, even if there are the associations and consistencies, it should be noted that the conditional benefit doctrine applies under more restrained situations, hence being more contextual.[245] It is then reasonable to hold that the conditional benefit doctrine is the manifestation of the principle of subject to equities, not the other way round.[246]

3.4.6 Conclusions on the Essence of the Conditional Benefit Doctrine

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[242] See section 3.3.3

[243] *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep 99, at para 9

[244] See section 3.4.3.1

[245] See section 3.4.1 on the three features of the conditional benefit doctrine

[246] Note that there is indeed attempt in case law seeking to entitle the doctrine of burden of benefit more effect. For example, the pure benefit and burden doctrine has the effect of imposing the entire contract on the third party taking contractual benefits. However, the most updated version of the doctrine of burden and benefit is the conditional benefit doctrine. (see section 4.2.1.3.1 on the comparison between several versions of the doctrine of burden and benefit.) Besides, the construction of the doctrine of burden and benefit should not affect the answer to the questions whether the doctrine originated from the assignment or whether it is the manifestation of the principle of subject to equities.

In the above content of section 3.4, the thesis identified the principle of subject to equities originating from assignment as a potential origin principle of the conditional benefit doctrine. Based on the above finding, the thesis investigated further on the consistency between the two doctrines in the context of assigning contractual rights and reached an arguable conclusion that the principle of subject to equities and the conditional benefit doctrine merge into one concept in that context. The thesis then moved on to confirm the arguable conclusion by investigating the meaning of the relevant concepts under the two rules and finding consistency. As a conclusion, it is submitted by the thesis that the conditional benefit doctrine is the manifestation of the principle of subject to equities in the context of third parties enforcing *derivative contractual equitable interest*. Following the above findings, it is possible for the thesis to define conditional benefit judgments for easier reference in later analysis. Three types of conditional benefit judgments are defined in the present section. The first type takes the form of the one in the Law Commission Report No.242, namely 'contracting parties may impose associated conditions upon the third parties' enjoying contractual benefit'.[247] The second type of conditional benefit judgment takes the form of the one in *The Jay Bola*. It takes the two-step form. First, the court will recognise that a third party to a contractual is enforcing a derivative contractual right. Secondly, due to the fact that the third party is enforcing a derivative contractual right, they are bound by a contractual exclusive dispute resolution agreement.[248] It is to be noted that the same judgments were also provided by the Court of Appeal in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*[249]. The thesis will move on to discuss whether the relevant judgments in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* share the same nature. Therefore, the second type of conditional benefit judgment will not be used at this stage.[250] The third type of conditional benefit judgment will be defined as a result of

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[247] Law Commission Report No. 242, at para 10.24.

[248] See Explanatory Note 34 of the Contracts (Rights of Third Parties) Act 1999

[249] [2005] 1 Lloyd's Rep 67, at para 57, 58; [2016] EWCA Civ 386, at para 20, 21; see also section 2.2.2

[250] The second type of the conditional benefit judgment will be used without restrictions following the clarification in the thesis that the conditional benefit doctrine also applied in *The Yusuf Cepnioglu* [2016] EWCA Civ 386 and *The Hari Bhum (No.1)* [2005] 1 Lloyd's Rep 67.

the finding that the conditional benefit doctrine is the manifestation of the principle of subject to equities in the context of third party enforcing contractual benefits.[251] Provision of the principle of subject to equities in the context of third party enforcing contractual benefits will also be considered as conditional benefit judgments.

3.5 The Effect of the Principle of Subject to Equities on the Position of the Third Party Assignee

After it is concluded that the conditional benefit doctrine originated from assignment and that the origin principle of it is the principle of subject to equities, the next question coming in line is the effect of the principle of subject to equities on the position of the third party assignee. The purpose of that is to assess the effect of the conditional benefit doctrine on the position of the third party assignee which will potentially provide guidance on the relationship established between the third party assignee and the arbitration agreements contained in the main contract. This will eventually cast lights on the grantability issue of anti-suit injunctions against such third parties when they act inconsistently with the arbitration agreements. In general, the effect of the principle of subject to equities is that the assignee cannot be in a better position than the assignor. In *Turton v Benson*[252], there was an equitable assignment of a bond which is, in the Court's words, 'not good in equity' as a result of the existence of a debt owed by the assignor to the debtor's mother.[253] Due to the invalidity of the bond, the assignee cannot set up the debtor's liability in equity.[254] In other words, since equity does not recognise the effect of the bond, the assignee cannot enforce the bond against the debtor. On the comparison between the assignor's position and that of the assignee, the

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[251] Note that up until the present section, the third party context is still the context of assigning contractual rights. For the expansion of this conclusion outside assignment, see the section of the present thesis on the possibility of applying principle of subject to equities outside assignment (section 4.2) and the modern development Chapter (Chapter 9)

[252] *Turton v Benson* (1718) 1 P. Wms. 496

[253] (1718) 1 P. Wms. 496, at page 489.

[254] (1718) 1 P. Wms. 496, at page 489.

judgment given was that 'the creditors of Benson (the assignees) could not be in a better condition than Benson (the assignor) himself'.[255] Note that such effect of the principle of subject to equities is not a surprising one and there are material reasons why the assignee cannot be in a better position than the assignor as against the debtor. There are two key features of the principle of subject to equities explaining the said effect. First, the assignee is enforcing the rights which were originally the assignor's rights. Secondly, whatever defences available to the debtor when the enforcing party is the assignor is still available to the debtor when the enforcing party is the assignee.

3.5.1 The Assignee's Rights Which Were Originally the Assignor's Rights and the Curtailing Effect of the Principle of Subject to Equities

Authorities have provided that the rights enforced by an assignee are originally the assignors' rights. Note that instead of being an effect of the principle of subject to equities on the position of the assignee, it is better to regard the above proposition as the reason behind such effect.

3.5.1.1 The Transferring Nature of Assignment

The starting point is that the transferring basis of assignment. It is provided in *The Law of Assignment* that '[the assignment of choses in action] is a mode of transferring choses that is to be contrasted with assignments by way of trust and assignments by way of contract.'[256] Therefore, the transferring of choses in action is the overall feature of assignment.

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[255] (1718) 1 P. Wms. 496, at page 489; *Newfoundland v Newfoundland Railway Co* (1888) 13 App. Cas. 199, at page 209~210; *Dawson v Great Northern & City Railway Co* [1905] 1 K.B. 260, at page 272~273. *The Principle of Personal Property*, citing *The Law of Assignment* and *Edward Nelson & Faber* [1903] 2KB 367, provided that '[t]he assignee should be in no better position than the assignor. This is an aspect of *nemo dat* and applies even against *bona fide* purchasers for value'. (*The Principle of Personal Property*, at page 106, Marcus Smith, *The law of assignment*, 2nd ed, 2007, at paras 13.49~13.50)

[256] *The Law of Assignment*, at para 13.01.

3.5.1.2 The Derivative Nature of the Assignee's Rights

Following the finding that assignment is a measure of transferring choses in action, it is then not surprising that authorities providing the principle of subject to equities usually recognise the derivative nature of the assignee's rights.

In *The Leage*, it was provided that '[t]he *derivative nature* of the assignee's claim is underlined by the rule that an assignee takes subject to equities.'[257] The same position was also provided in *The Jay Bola*. In *The Jay Bola*, the reason why the third party claim should be brought under the arbitration agreement in the main contract is that the rights enforced in the *claim derived from the assignor's rights* which are subject to the arbitration agreement.[258]

Therefore, it is submitted that, under assignment, the assignee is enforcing the rights which were the assignor's rights and principle of subject to equities only allows the transfer of rights that the assignor was entitled.

3.5.2 Whatever Defences Available to the Debtor When the Enforcing Party is the Assignor is Still Available to the Debtor When the Enforcing Party is the Assignee

Authorities have provided guidance on the effect of the principle of subject to equities on the position of the assignee. It has been mentioned earlier in the thesis that equities are defensive in nature.[259] The present section will provide the scope of the equities

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[257] *Rumput (Panama) S.A. v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259, at para 262.

[258] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279, at page 284.

[259] See section The Mechanism behind the Consistent Timing Factors under the Principle of Subject to Equities and the Conditional Benefit Doctrine

which restrict assignees. In *Mangles v Dixon*[260], the Lord Chancellor held that

> '[i]f there is one rule more perfectly established in a court of equity than another, it is, that whoever takes an assignment of a chose in action, which this charterparty was, for it is not assignable in law, although it is in equity, takes it subject to *all* the equities of the person who made the assignment. No barrister would presume to deny in any court of equity, that at the time that assignment was taken, and down to the time when the notice was given[261], during all these months, the bankers took *precisely the same* interest, and were subject to the same liabilities.'[262]

The principle was more clearly provided in *Edward Nelson & Co Ltd v Faber & Co*[263]by Joyce J that

> '[i]t is a general rule with respect to a chose in action that an assignee takes it subject to all the equities—in other words, *whatever defence* by way of set-off or otherwise the debtor would be entitled to set up against the assignor's claim up to the time of his receiving notice of the assignment he may also raise and maintain against the assignee'[264]

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[260] *Mangles v Dixon* 10 E.R. 278.

[261] Note that the timing issue under the principle of subject to equities in the present case is different from that under the majority of the authorities. (See section The Timing Issue under the Principle of Subject to Equities) This is caused by the different definition of the wording 'take'. However, the present case is a rather old authority. Therefore, it can be considered that the more recent authorities have overruled the proposition on the timing issue. As for the effect of the principle of subject to equities on the position of the third party assignee, the present case can still be viewed as a valid authority.

[262] 10 E.R. 278, at page 290.

[263] *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367

[264] [1903] 2 KB 367, at page 375; *Roxburghe v Cox* (1881) 17 Ch. D. 520, at page 526. See also *The principles of personal property law* where the proposition is confirmed. (see page 106 and footnote 116 pointing to *Roxburghe v Cox* (1881) 17 Ch. D. 520 and *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367)

Following the finding that the triggering factor giving rise to the principle of subject to equities is the taking of derivative equitable interest, it is then easier to understand the effect of the principle on the position of the assignee. It has been concluded that equities are inchoate to the rights taken by the assignee.[265] Therefore, the limitations are attached to the assigned subject matter. It is then not surprising that the equities travel with the assigned subject matter. The consequence of that attachment and concurrent conferral is that whatever defence available to the debtor will always be available to the debtor. Citing multiple authorities[266], *The principles of personal property law* commented on the reason behind the effect of the principle of subject to equities that '[t]he rule is said to be based on the fact that the assignor cannot assign a right greater than the one he or she has'.[267] Therefore, the availability of the 'whatever defences' is that the assignee is left with a right that is no greater than what the assignor is entitled.

3.5.3 Conclusions on the Effect of the Principle of Subject to Equities on the Position of the Third Party Assignee

Following the above analysis on the effect of the principle of subject to equities on the position of the third party assignees, several conclusions in a chain can be reached. Since equities are inchoate to certain rights of property, the equities travel with the rights assigned. Because the assignees are taking the rights of the assignors, the rights they took are also subject to the same equities which are defensive in nature. The consequence of the above two factual issues is that whatever defences available to the debtor when the enforcing party is the assignor will still be available to the debtor when the enforcing party is the assignee. From the outside, it will appear to be that the assignee is not in a better position than the assignor as against the debtor.

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[265] *Snell's Equity*, at para 2-006; see also section 3.4.4.2.2

[266] *Re Blakeley Ordnance Co* (1867) 3 Ch App 154; *Graham v Johnson* (1869) LR 8 Eq 36; Greg, Tolhurst, *The Assignment of Contractual Rights*, 2006, at page 427

[267] *The principle of personal property*, at page 106; *Turton v Benson* (1718) 1 P. Wms. 496, at page 489; *Chitty on Contracts*, at para 19-075

3.6 Conclusions on the Wording 'Bound' and the Essence of Conditional Benefit Doctrine

In the present chapter, the thesis successfully associated the wording 'bound' with the conditional benefit doctrine and found that the origin principle of the conditional benefit doctrine is the principle of subject to equities under assignment. The thesis then discovered multiple consistencies between the principle of subject to equities and the conditional benefit doctrine which tested the presumption that the two doctrines are essentially the same, or one of them originated from the other to be exact. Nonetheless, even if both of them are applicable in a general property law context, the principle of burden and benefit, now the conditional benefit doctrine, only applies in a contractual context. On the other hand, the operation of the principle of subject to equities suffices all the features of the conditional benefit doctrine. Thus, it is reasonable to conclude that the conditional benefit doctrine is a branch of the principle of subject to equities. Given the contractual basis of the conditional benefit doctrine, it is subsequently submitted that the conditional benefit doctrine is the manifestation of the principle of subject to equities in the context of third party enforcing contractual benefits.[268] Therefore, it is submitted that the third party's being bound by the arbitration agreement in *The Jay Bola* is the result of the principle of subject to equities. Under the principle, the consequence of the burden aspect of the arbitration agreement will restrict the assignee's rights if the debtor choose to impose such burden aspect on the assignee upon the enforcement of the choses in action assigned. The effect of such imposition under the principle of subject to equities is that the assignees cannot be in a better position than the assignor as against the debtor. Furthermore, following the conclusion that the conditional benefit doctrine is the manifestation of the principle of subject to equities in the context of third party assignee enforcing the assigned contractual rights,

[268] Following this conclusion, in the context of third party enforcing contractual benefits, the equivalent concepts under the two principles will be used interchangeably later in the thesis.

the two doctrines can then be considered as the same in this context. Therefore, unity is found between the principle of subject to equities and the conditional benefit doctrine in the context of third party enforcing the assigned contractual benefits. Also, authorities establishing general principles providing guidance on one of them should consequently be applicable to the other.

Chapter 4

The Unity of the Meaning of the Wording 'Bound' in the Three Problem Cases

4.1 Introduction to Chapter Four

In the earlier chapters, it has been submitted that the third party's being bound by the arbitration agreement in *The Jay Bola*[269] is the result of the conditional benefit doctrine and that the conditional benefit doctrine originated from the principle of subject to equities.[270] The result of the above conclusions is that the reason why the third party assignee in *The Jay Bola* is bound by the arbitration agreement at hand is the principle of subject to equities and that the third party assignee's position is under the governing power of the principle.[271] However, the thesis drew the conditional benefit doctrine and the principle of subject to equities out of the legal rules governing assignment.[272] That means it is unclear whether the two principles apply outside the context of assignment, or for the purpose of the thesis, whether they apply in *The Hari Bhum (No.1)*[273] and *The Yusuf Cepnioglu*[274] in particular.[275] Only upon proving that the

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[269] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

[270] See sections 3.2 and 3.3

[271] See section 3.6

[272] See section 3.3.3 on the conclusions on the origin of the conditional benefit doctrine.

[273] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[274] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[275] It has been mentioned that the Court of Appeal in *The Yusuf Cepnioglu* expressly cited *The Jay Bola*, confirmed that the conditional benefit doctrine in *The Jay Bola* is an established principle ([2016] EWCA Civ 386, at para 46), and favoured *The Jay Bola* on the anti-suit injunction issue. ([2016] EWCA Civ 386, at para 33, see also section 6.6.1) Therefore, it is arguable to submit that *The Yusuf Cepnioglu* applied the conditional benefit doctrine itself. Combining this conclusion with the conclusion that the conditional benefit doctrine is the manifestation of the principle of subject to equities in the context of third party enforcing contractual benefits (see section 3.6), it is arguable to hold that the principle of subject to equities imposed effect in *The Yusuf Cepnioglu*. However, the thesis will analyse the issue in more details.

principle of subject to equities did apply in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*, can it be said that the third parties' being bound by the arbitration agreements in the two cases is also the result of the principle of subject to equities. The present chapter aims at investigating such applicability. It has been concluded that the conditional benefit doctrine relied on in *The Jay Bola* originated from the principle of subject to equities.[276] Furthermore, it has been concluded that the judgment on the third party issue in *The Jay Bola* was the conditional benefit doctrine.[277] As has been set out earlier in the thesis, the Court of Appeal in the three problem cases made consistent judgments on the third party issues.[278] Therefore, judgments similar to the conditional benefit judgments in *The Jay Bola* were indeed also given in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*.[279] It is then rather possible that the principle of subject to equities did impose effect in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*. However, further analysis is needed to test the presumption based on the similarity of judgment format.

The present chapter will first submit that it is possible to apply the principle of subject to equities outside assignment by examining the doctrinal justification behind the principle of subject to equities. Following the provision of such possibility, an analogous conclusion on the application of the principle of subject to equities in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* will be provided by comparing the foreign statutes in the two cases and two domestic English statutes. Furthermore, the present chapter will analyse the satisfaction of the doctrinal justification of the principle of subject to equities in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* and provide that the principle of subject to equities certainly applies in the two cases.

4.2 The Possibility of Applying the Principle of Subject to Equities outside Assignment Context

[276] See sections 3.3, 3.6

[277] See section 3.2

[278] See section 2.2.2

[279] See sections 2.2.2.1, 2.2.2.2 setting out the relevant judgments.

Case law has provided the possibility of applying the principle of subject to equities outside assignment context.

4.2.1 The Doctrinal Justification behind the Innocent Conveyance of Equitable Interests

It has been mentioned that the principle of subject to equities is triggered by the taking of derivative equitable interest in assignment context.[280] In the following content of section 4.2.1, the thesis will discuss authorities suggesting that there is a doctrinal justification behind the triggering effect of taking equitable interest on the application of the principle of subject to equities. This doctrinal justification is the reason why a third party's taking equitable interest will trigger the principle of subject to equities.

4.2.1.1 The Innocent Conveyance of Equitable Interest Recognised in *Phillips v Phillips* and the Principle of Subject to Equities

A preliminary conclusion on the possibility of applying the principle of subject to equities outside assignment can be reached by examining *Phillips v Phillips*[281]. It has been mentioned earlier in the thesis that the triggering factor of the principle of subject to equities is the third party assignee's taking equitable interest.[282] *Phillips v Phillips* has provided that the conveyance of equitable interest generally is subject to the previous legal relationship under which the equitable interest exists.[283] The case was recognised to be 'the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made'.[284] The Lord Chancellor provided that 'I take it to be a clear proposition

[280] See section 3.4.4.1

[281] *Phillips v Phillips* 45 E.R. 1164.

[282] See section The Timing Issue under the Principle of Subject to Equities

[283] 45 E.R. 1164, at page 1167, 1168.

[284] 45 E.R. 1164, at page 1168.

that every *conveyance of an equitable interest* is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more.'[285] The established principle in *Phillips v Phillips* should be understood together with the finding that equities are inchoate to rights of property and travel together with the rights of property.[286] Therefore, a preliminary conclusion can be reached that the principle of subject to equities is an overarching principle when there is conveyance of equitable interest.

4.2.1.2 *Post Office* and the 'Duff Metaphor'

It will be mentioned later in the thesis that the operation of the 1930 Act is analogous to the statutory assignment under the 1925 Act and that the principle of subject to equities applies in actions brought under the 1930 Act.[287] It will also be submitted later in the thesis that the benefit enjoyed by the third party under the 1930 Act is derivative contractual equitable interest.[288]

Based on the above background, it is then possible to understand the doctrinal justification behind the innocent conveyance of equitable interest. The position is provided by *Post Office*[289]where the court provided that '[y]ou cannot, I think, *assign* to somebody part of the rights under the contract without *assigning* to him the condition subject to which those rights exist…You cannot pick out one bit-pick out the plums and leave the duff behind.'[290] Therefore, it is clear that there is togetherness between the rights taken and the conditions subject to which those rights exist. This is, on the one hand, consistent with the fact that equities are inchoate with the assigned choses in

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[285] 45 E.R. 1164, at page 1166.

[286] *Snell's Equity*, at para 2-006; see also section 3.5.2

[287] See section 4.3.2.1

[288] See section 4.3.2.2

[289] *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363

[290] [1967] 2 Q.B. 363, at page 376 E, F.

action.[291] On the other hand, this also explains the reason why the conveyance of equitable interest should be innocent. Technically speaking, taking the edible part of a plum while leaving the duff behind is achievable with the devotion of a certain amount of effort. However, that is definitely not the fair and just approach. Thus, it is submitted that the reasons why every conveyance of equitable interest should be innocent are distributed to two. The first is due to the inherent association between equitable interest and equities. The second is due to the fairness and justice consideration.

4.2.1.3 The Doctrine of Burden and Benefit and the Fairness Consideration

However, besides the existence of the superficial proof giving rise to the arguable conclusion reached in the previous section, it is more important to investigate the doctrinal support for the proposition that the principle of subject to equities can indeed be applied outside the context of assignment. Such doctrinal support can be found by investigating the three leading authorities on the doctrine of burden and benefit.[292]

4.2.1.3.1 The Shifting of Positions on the Relationship between Contractual Benefits and Burdens

The discussion on the relationship between contractual benefit and burden in third party context has a rather long history. English law has shifted its opinion when it comes to the doctrine of burden and benefit multiple times. The two main versions of the doctrine are the conditional benefit doctrine and the pure benefit and burden doctrine. The shifting of the law in this area has been summarised by the House of Lords in *Rhone v Stephens* and the House of Lords in that case holds the opinion that *Tito v Waddell* is in

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[291] *Snell's Equity*, at para 2-006; *The Law of Assignment*, at para 2.90; see also section 3.4.4.2.2

[292] The burden and benefit wording is borrowed by the thesis from *Tito v Waddell* (No.2) [1977] Ch 106. In *Tito v Waddell (No.2)*, the Court provided the doctrine of burden and benefit that 'I next consider the principle that he who takes the benefit of a transaction must also bear the burden'. The discussion was carried out under the title 'benefit and burden'. (*Tito v Waddell (No.2)* [1977] Ch. 106, at page 289 C)

favour of the pure benefit and burden doctrine. On the other hand, *Halsall v Brizell* and *Rhone v Stephens* themselves were in favour of a approach where the imposition of contractual burden is more restricted.[293]

As well as the pendulum swing within the three main cases themselves, the Court in *Halsall v Brizell* cited an earlier authority and provided that

> '[b]ut it is conceded that it is *ancient law* that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I need but refer to one sentence during the argument in *Elliston v Reacher*, where Lord Cozens-Hardy M.R. observed: "[i]t is laid down in Co. Litt. 230b, that *a man who takes the benefit of a deed is bound by a condition contained in it*, though he does not execute it."'[294]

It is subsequently submitted that the relationship between contractual benefit and burden is governed by an ancient principle, namely the doctrine of burden and benefit.[295]

4.2.1.3.2 The Conditional Benefit Doctrine as the Most Updated Development of the Doctrine of Burden and Benefit—The Association among the Conditional Benefit Doctrine, the Doctrine of Burden and Benefit and the Principle of Subject to Equities

From the conclusion in the previous section, it is apparent that the approach adopted in *Rhone v Stevens* on the relationship between contractual benefit and burden is rather similar to the definition of the conditional benefit doctrine provided in the Law

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[293] *Rhone v Stephens* [1994] 2 A.C. 310, at page 322 E, G. see also section The Main Authorities on the Doctrine of Burden and Benefit and the third footnote in that section

[294] *Halsall v Brizel* [1957] Ch. 169, at page 182.

[295] This is the proper definition of the doctrine of burden and benefit althouth the principle has been mentioned briefly multiple times ealier in the thesis.

Commission Report No.242 although the timing requirement of the conditional benefit doctrine is missing from the recognised approach in *Rhone v Stevens*.[296]. Moreover, the Court of Appeal in *The Jordan Nocolov* was also holding the pure benefit and burden doctrine.[297] This was cited and relied on by *The Jay Bola*[298] Subsequently, a presumption can be created that the conditional benefit doctrine is a version of the doctrine of burden and benefit. The thesis already associated the conditional benefit doctrine with the principle of subject to equities. As long as the relationship can be established between the doctrine of burden and benefit with one of them, the presumption can then be tested and a unity among all three doctrines can then be established. In fact, authorities have provided the relationship between the doctrine of burden and benefit and the conditional benefit doctrine.

It has been mentioned earlier that *The Jay Bola* adopted the conditional benefit doctrine.[299] It has also been mentioned that the wording 'bound' is the key effect of the conditional benefit doctrine on the relationship between the third party assignee and the arbitration agreement contained in the main contract.[300] Nevertheless, the Court of Appeal in *The Jay Bola* expressly associated the wording '*bound*' with the principle of burden and benefit by citing and relying on *Hazel v Brizel* and *Tito v Waldall (No.2)* that

> 'WAV [the assignee] is bound by the arbitration agreement not because there is any privity of contract between WAV and DVA [the debtor] but because Voest's [the assignor] contractual rights under the charter-party, to the benefit of which WAV has become entitled by subrogation are subject to the arbitration agreement which, too, is part of the sub-charter-party. WAV cannot

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[296] Law Commission Report No. 242, at para 10.24.

[297] *The Jordan Nocolov* [1990] 2 Lloyd's Rep 11, at page 16

[298] [1997] 2 Lloyd's Rep 279, at page 285~286

[299] See section 3.2

[300] See section 3.6

enforce those contractual rights without accepting the contractual burden, in the form of the arbitration agreements to which those rights are subject (cf. *Halsall v Brizel*, [1957] Ch. 169 and *Tito v Waddell (No.2)*, [1977] Ch. 106 at p. 309)'.[301]

Since both *Tito v Waddell* and *Halsall v Brizel* concerns the doctrine of burden and benefit and both were cited by the Court of Appeal in *The Jay Bola*[302], it is tenable to submit that the conditional benefit doctrine and the pure burden and benefit doctrine are essentially under the same footing.[303] To be precise, they are variants of the doctrine of burden and benefit.

This consistency between the doctrine of burden and benefit and the conditional benefit doctrine was further stated by the Law Commission that the conditional benefit doctrine 'constitutes a narrow view of the extent to which a person who takes a benefit must also take the burden.'[304]

Subsequently, it is submitted by the thesis that the conditional benefit doctrine is essentially one version of the doctrine of burden and benefit reflecting the law's attitude toward the relationship between contractual benefit and burden.

4.2.1.3.3 The Fairness Consideration Behind the Doctrine of Burden and Benefit

In *Tito v Waddell (No.2)*, the Court provided the doctrine of burden and benefit that 'I

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[301] [1997] 2 Lloyd's Rep 279, at page 291.

[302] The House of Lords in *Pan Ocean* also referred to the benefit and burden analysis in *Tito v Waddell* (No.2) [1977] Ch 106 as the conditional benefit approach. (*Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 W.L.R. 161, at page 171 A)

[303] This conclusion is furthered by the fact that the Law Commission Report No. 242 cited *Tito v Waddell* (No.2) [1977] Ch 106 to reference the conditional benefit doctrine under assignment. (Law Commission Report No.242, at para 10.29, footnote 34)

[304] Law Commission Report No.242, at para 10.28.

next consider the principle that he who *takes* the benefit of a transaction must also bear the burden'[305] The Court provided that the justification of the doctrine is 'the *simple principle of ordinary fairness and consistency*[306]that from the earliest days most of us heard in the form "[y]ou can't have it both ways," or "[y]ou can't eat your cake and have it too," or "[y]ou can't blow hot and cold."'[307] Following the unity among the doctrine of benefit and burden, the conditional benefit doctrine and the principle of subject to equities, it can then be said that the justification behind all three doctrines is the simple principle of ordinary fairness and consistency.

Besides, it has been submitted earlier in the thesis that the triggering factor of both the principle of subject to equities and the conditional benefit doctrine is the enforcement of the derivative equitable interest by a third party in the context of third party enforcing assigned contractual rights.[308] Following the above finding in the present section linking the conditional benefit doctrine and the doctrine of burden and benefit, the same triggering element should certainly also apply to the doctrine of burden and benefit.

4.2.2 Conclusions on the Possibility of Applying the Principle of Subject to Equities outside Assignment Context

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[305] [1977] Ch. 106, at page 289 C. Note that the exact wording used by the Court in the case is 'benefit and burden' and that it was suggested that the authoritative power of *Tito v Waddell* (No.2) [1977] Ch 106 has been compromised as a result of *Rhone v Stephens* [1994] 2 A.C. 310. (*Snell's Equity*, at para 3-028) *Rhone v Stephens* pointed out that *Tito v Waddell(No.2)* was wrong to suggest the 'pure principle of benefit and burden'. (*Rhone v Stephens* [1994] 2 A.C. 310, at 322). However, what *Rhone v Stephens* suggested otherwise is essentially merely the timing requirement of the conditional benefit doctrine and the scope of conditions imposed. (*Rhone v Stephens* [1994] 2 A.C. 310, at page 322 E, G) Therefore, the authoritative effect of *Tito v Waddell* (No.2) [1977] Ch 106 on the issue of the *doctrinal justification* for the conditional benefit doctrine is unaffected. Besides, the Court in *Tito v Waddell* (No.2) did use the wording 'takes' which demonstrates the timing requirement.

[306] Later on in the thesis the principle will be referred to as the 'fairness consideration'.

[307] [1977] Ch. 106, at page 289 G. See also *Newfoundland v Newfoundland Railway Co* (1888) 13 App. Cas. 199, at page 210.

[308] See sections 3.4.3.2.3, 3.6

In the present section, the thesis investigated the relationship between the doctrine of burden and benefit, the conditional benefit doctrine and the principle of subject to equities and found consistency within the three rules. To be specific, the thesis found consistency between the doctrinal justifications of the doctrine of burden and benefit and the principle of subject to equities. The doctrinal justification of both the principle of subject to equities and the doctrine of burden and benefit is the fairness consideration. More importantly, from the wording of the doctrinal justifications of both the doctrine of burden and benefit and the principle of subject to equities, the enunciated elements are justice and fairness when there is enforcement of derivative equitable interest. It is submitted that the fairness consideration is associated with the enforcement of derivative equitable interest rather than assignment itself. Subsequently, it is further submitted that it is possible for the principle of subject to equities to apply outside assignment context. Due to the possibility that the principle of subject to equities can apply outside assignment, it is further submitted that the concerned parties under the principle should be redefined. The party upon whom the equitable interest is enforced remains to be the debtor. The party who holds the equitable interest as the original counter party to the debtor will be referred to as an originally entitled party. The party who takes over the equitable interest from the originally entitled party and becomes the new counter party to the debtor will be referred to as the new entitled party.[309]

4.3 An Analogous Conclusion Reached by Examining the Similar Features of the Foreign Statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* and Certain English Domestic Statutes

On the application of the principle of subject to equities in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, an preliminary conclusion may be reached from an analogous perspective by comparing the statutes in the two cases and two domestic English

[309] It is to be noted that if the facts in the particular cases still fall under assignment, the thesis may still use the wording the assignor and the assignee instead of the originally entitled party and the new entitled party.

statutes.

4.3.1 The Features of the Statutory Provisions in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* shared by the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act 2010

The third party direct actions in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* were brought based on foreign statutes. There are some similar elements between the two statutory provisions. In *The Hari Bhum (No.1)*, s67 of the Finnish statute provides that

> '[a] person who has sustained bodily injury, property damage or financial loss under general liability insurance is entitled to claim compensation *in accordance with the insurance contract direct from the insurer*, if: (1) the insurance policy has been taken out pursuant to laws or regulations issued by the authorities; (2) the insured has been declared bankrupt or is otherwise insolvent; or (3) the general liability insurance has been mentioned in marketing efforts launched to promote the insured's business…'[310]

In *The Yusuf Cepnioglu*, article 1473 of the Turkish statute provides that

> '*[u]nder a liability insurance contract*, the insurer shall pay to the victim compensation *up to the amount stipulated in the insurance contract*, for the liability of the insured due to an event that occurred, unless otherwise agreed, during the contract period, even if the loss materialised after that period.'[311]

Several common features between the two statutes can be identified. First, both of them specify that they apply to liability insurance contract and the actions brought under

[310] [2005] 1 Lloyd's Rep 67, at para 10.

[311] [2016] EWCA Civ 386, at para 5, 6.

them are essentially claiming for insurance payment. Secondly, in both statutes, the third party victims will have the right to claim against the insurer directly. Thirdly, under both statutes, the third parties relying on them are enforcing derivative contractual rights.[312]

Under English law, the Third Parties (Rights Against Insurers) Act 1930[313], now the Third Parties (Rights Against Insurers) Act 2010 contain similar provisions.[314] S1(1) of the *1930 Act* provides that

> '(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—(a)in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or (b)in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge; if, either before or after that event, any such liability as aforesaid is incurred by the insured, his ***rights against the insurer under the contract in respect of the liability*** shall, notwithstanding anything in any Act or rule of law to the contrary, ***be transferred to and vest in the third party*** to whom the liability was so incurred.'

On the other hand, s1 of the 2010 Act provides that

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[312] This conclusion is reached by adopting the Courts decision on the third party issues in the two cases. (see section 2.2.2.1)

[313] Available at https://www.legislation.gov.uk/ukpga/1930/25/pdfs/ukpga_19300025_en.pdf.

[314] Available at https://www.legislation.gov.uk/ukpga/2010/10/contents.

> '(1) This section applies if—(a)a relevant person incurs a liability against which that person is insured under a contract of insurance, or (b)a person who is subject to such a liability becomes a relevant person. (2) The ***rights of the relevant person under the contract against the insurer in respect of the liability*** are transferred to and vest in the person to whom the liability is or was incurred (the "third party").'

From the provisions, it is apparent that they share the same features as having been identified in the statutory provisions relied on in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*. Furthermore, the comparability of the two domestic statutes with the foreign statute in *The Yusuf Cepnioglu* was also expressly provided by the Court of Appeal.[315] On the other hand, the comparability of the 1930 Act with the foreign statute in *The Hari Bhum (No.1)* was also enunciated by the Court of Appeal.[316] Thus, English Law's attitude toward the 1930 Act and the 2010 Act can arguably be the same as that toward the statutory provisions in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*.

The 2010 Act is a rather new Act and authorities on it are limited. However, by examining the statutory provisions set out in the present section, the wording in s1(2) of the 2010 Act concerning the transfer of the insured's rights to the third party is rather similar to that in s1(1)(b) of the 1930 Act. Also academic summaries[317]on the changes that the 2010 Act made to the 1930 Act do not include the way in which the rights of the insured are transferred to the third party. Besides, the features of the rights transferred are not changed.[318] In *Colinvaux's*, after giving the list of the changes done by the 2010 Act, it was further stated that '[o]ther features of the 1930 Act have been

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[315] [2016] EWCA Civ 386, at para 1.

[316] [2005] 1 Lloyd's Rep 67, at para 64, 94.

[317] *Colinvaux's Law of Insurance*, 10th ed, 2014, at 21-041, also J Lowry, P Rawlings and R Merkin, *Insurance Law: Doctrines and Principles*, 3rd ed, 2011, at chapter 14, 4.2.

[318] The rights transferred are still essentially rights to make insurance claims.

retained.'[319] Therefore, authorities on the 1930 Act are of vital importance for the purposes of the thesis. If the principle of subject to equities applies in third party direct actions under the 1930 Act, it should arguably apply in third party direct actions under the 2010 Act.

Note that the conclusions in the present section is based on the principle that foreign law is regarded as evidence and English Court has no capacity to interpret foreign law. In *The Conflict of Laws*, 15th ed, it is provided that '[i]t is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority. Such materials can only be brought before the court as part of the evidence of an expert witness, since without his assistance the court cannot evaluate or interpret them.'[320] This approach was later cited and approved by the Court in *Kyrgyz Republic v Stans Energy Corporation*.[321] From all the authorities mentioned in the present thesis where there were foreign statutes involved, the courts always look at them from the English perspective, that is how Foreign statutes as evidence is treated. As a matter of fact, those statutes are usually a measure under which a third party claim is brought to enforce a contractual benefit which triggers the conditional benefit doctrine. Therefore, the courts will only look at the statutes for characterisation purposes. On the other hand, characterisation will be based on lex fori.[322] This is probably the reason why the courts always approach foreign statutes from the English perspective in the context of the thesis.

4.3.2 The Principle of Subject to Equities under the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act 2010

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[319] *Colinvaux's Law of Insurance*, at 21-041.

[320] *The Conflict of Laws*, 15th ed, at para 9-013

[321] *Kyrgyz Republic v Stans Energy Corporation* [2017] EWHC 2539 (Comm), at para 44

[322] *Macmil- lan Ltd. v. Bishopsgate Investment Trust Plc (No. 3)* [1996] 1 W.L.R. 387, at page 407B–C, cited in *The Hari Bhum (No.1)* [2005] 1 Lloyd's Rep 67, at para 56

Authorities have suggested that the principle of subject to equities governs actions brought under the 1930 Act and the 2010 Act.

4.3.2.1 The Assignment Basis of the Third Party Direct Actions under the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act 2010

Case law has demonstrated that the legal basis of the 1930 Act is assignment. In *Post Office*, while describing the effect of the 1930 Act on the third party, the Court of Appeal provided that

> '[t]herefore it might be said that what is *assigned* to the Post Office (the third party) are all those rights. I think it may be accepted that it is so, as far as I am concerned; but even so, the contract contains not only rights, but limitations of those rights. You cannot, I think, *assign* to somebody part of the rights under the contract without *assigning* to him the condition subject to which those rights exist…You cannot pick out one bit-pick out the plums and leave the duff behind.'[323]

This statement almost expressly provided the principle of subject to equities under the 1930 Act and the 'plum and duff' metaphor certainly entails the philosophy of the simple principle of fairness and consistency justifying the principle of burden and benefit.[324] In addition to that, for the purpose of the present section, the usage of the wording by the Court expressed their attitude that the third party direct actions under the 1930 Act is essentially assignment in nature.

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[323] [1967] 2 Q.B. 363, at page 376 E, F.

[324] [1977] Ch. 106, at page 289 G. See also section 4.2.1.3 mentioning the fairness consideration.

When providing the proposition that '[t]he *assignee* takes the *assigned* right with both the benefit and the burden of the arbitration clause'[325], an authority on the 1930 Act, *The Padre Island*[326], was cited and relied on by the Court of Appeal in *The Jay Bola*.[327] This is indicating that the 1930 Act is based on assignment. Furthermore, in the first instance judgment of *The Jay Bola*, it was provided that

> 'I have been presented with no material or argument to suggest that the position of the insurers, even though they have the right to bring proceedings in their own name, rather than stepping into the shoes of Voest in the English sense of subrogation, is to be treated differently from a statutory assignee under the 1930 Act, or from an assignee under the Law of Property Act.'[328]

Therefore, the first instance Court is providing that the basis of the 1930 Act is assignment and that the assignment under the 1930 Act is rather similar to that under the 1925 Act.

Therefore, it is submitted by the thesis that the 1930 Act has its basis in assignment.[329] It has been mentioned earlier in the thesis that the principle of subject to equities is an inherent principle under assignment.[330] Subsequently, it is further submitted that the

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[325] Note that this may not be the correct approach based on the analysis on the origin principle of the conditional benefit doctrine and the decision in *Rhone v Stevens* [1994] 2 A.C. 310. (See section 3.4.3.2.3 on the timing issue under the principle of subject to equities and the timing requirement of the conditional benefit doctrine.)

[326] *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island) (No 1)* [1984] 2 Lloyd's Rep 408.

[327] [1997] 2 Lloyd's Rep 279, at page 285.

[328] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH and related action (The Jay Bola)* [1996] C.L.C. 1807, at page 11.

[329] See also *The Jay Bola* and *Post Office* where the wording used indicates that the 1930 Act has assignment basis. ([1997] 2 Lloyd's Rep 279, at page 285, *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363, at page 376 E, F)

[330] *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep. 99, at para 10; see also section Conclusions on the Existence of the Principle of Subject to Equities under Contractual Context and the Contractual Basis Pre-Requisite of the Conditional Benefit Doctrine

principle of subject to equities applies in actions brought relying on the 1930 Act.

4.3.2.2 The Enforcement of Derivative Contractual Equitable Interest under the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act 2010

The 1930 Act and the 2010 Act are English domestic statutes and the benefits enforced by the third parties under the statutes are clearly from insurance contracts to which they are not parties. The conclusion can be reached by examining the wording of the relevant provisions of the statutes. According to s1(1) of the 1930 Act, what is transferred to the third party are the insured's '*rights against the insurer under the contract*'.[331] Similarly, s1(2) of the 2010 Act also enables the transfer of the insured's right against the insurer under the insurance contract. Therefore, an action brought under the 1930 Act or 2010 Act is essentially an insurance claim.

The nature of the rights enforced under insurance claims has been provided by case law. In *The Albazero*[332], the mechanism was provided on how a *right of action*[333]to claim for damages for breach of contract arises. It was said to be that the innocent party has benefit in the subject matter of the contract. When the contract is breached, the benefit will subsequently be deprived of.[334] Furthermore, it was provided that this mechanism is also applicable to insurance policies where there will be a breach of contract by the insurer when the insurance risk occurs causing the interested party to lose the benefit

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[331] See also *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island) (No 1)* [1984] 2 Lloyd's Rep 408, at page 414; *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363, at page 376 E, F

[332] *Owners of Cargo Laden on Board the Albacruz v Owners of the Albazero (The Albazero)* [1977] A.C. 774

[333] Question may arise whether the right of action nature of the rights transferred under the 1930 Act is against the champerty rule. It is submitted that it is not because the transfer of the right of action is under the aid of a statutory device. (For the justification of this submission, see *Dawson v Great Northern & City Railway Co* [1905] 1 K.B. 260, at page 271)

[334] [1977] A.C. 774, at page 847 C~F.

of entering into the contract.[335] The assessment of damages under breach of contract is that damage compensates the loss of the innocent party, hence restoring the benefit contained in the subject matter under the contract.[336] This statement should be understood together with the fact that the cause of action arises out of breach of contract is a mere right of action[337]and mere rights of action are traditionally not assignable.[338] Therefore, it is arguable that, when a contracting party manages to transfer a right of action arising from breach of contract, the contractual benefit lost due to the breach must also travel with the right of action.[339] And that is certainly true when the right of action transferred is a right of action to bring an insurance claim.

Subsequently, it is submitted that an insurance claim is essentially a claim for damages for breach of contract causing the loss of contractual benefit. Given the fact that the actions under the 1930 Act and 2010 Act are essentially insurance claims, the third party actions under the two acts are enforcing contractual benefits, or contractual equitable interest in other words.[340]

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[335] *The Albazero* [1977] A.C. 774, at page 847 E. This approach was subsequently recognised by the House of Lords in *Linden Gardens* (*Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 A.C. 85, at page 113 E~H) and the Court of Appeal in *Darlington*. (*Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, at page 79 F~H)

[336] *Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, at page 73 B; *Johnsan v Agnew* [1980] A.C. 367, at page 400; *British Westinghouse Electric and Manufacturing Co. Ltd v Underground Electric Railways Co. of London Ltd* [1912] A.C. 673, at page 689.

[337] *Trendtex Trading Corporation and Another v Credit Suisse* [1980] Q.B. 629.

[338] Mere rights of action are not assignable because of the law of champerty and maintaince. (*Dawson v Great Northern & City Railway Co* [1905] 1 K.B. 260, at page 271; *Prosser v Edmonds* (1835) 1 Y. & C. Ex. 481; *Torkington v Magee* [1902] 2 K.B. 427, at page 433)

[339] The right of action and the contractual benefit in the subject matter deprived combining with each other may be referred to as 'a right to compensation'. As this point, the original contractual benefit has been converted to a new benefit contained in the right of compensation. (For a referral to this concept, see *Dawson v Great Northern & City Railway Co* [1905] 1 K.B. 260, at page 274. It is to be noted that *Dawson* itself is not a breach of contract case. However, a breach of contract, in the opinion of the present thesis, should be considered as a wrong to a third party under the meaning of *Dawson*.)

[340] Note that this submission is consistent with the remark of the Court of Appeal in *The Hari Bhum (No.1)* on a foreign statute with similar effect. ([2005] 1 Lloyd's Rep 67, at para 58)

The above conclusion can also be reached from a much simpler route. The first instance Court in *The Jay Bola* provided that the nature of the assignment in that case has the same feature as a statutory assignment under the 1930 Act and that under the 1925 Act.[341] Therefore, the assignment under the 1930 Act should arguably be treated the same as that under the 1925 Act when it comes to the enforcement of the assigned subject matter. Combining this conclusion with the earlier submission that the contractual benefit taken under a statutory assignment under the 1925 Act is essentially contractual equitable interest[342], it can then also be submitted that the benefits taken under the third party direct action is also contractual equitable interests from the insurance contract.

4.3.2.3 Conclusions on the Principle of Subject to Equities under the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act 2010

From the above analysis in section 4.3.2, it is clear that the 1930 Act and the 2010 Act have their legal basis in assignment and that they enable eligible third parties to insurance contracts to enforce derivative contractual equitable interest. Subsequently, it is submitted that the principle of subject to equities underlies the third party direct actions under the 1930 Act. Since it has already been submitted that the 2010 Act does not change the 1930 Act when it comes to the manner under which the rights are transferred to the third parties[343], it can then also be submitted that the principle of subject to equities applies in actions under the 2010 Act.[344]

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[341] See the first instance judgment in *The Jay Bola* [1996] C.L.C. 1807, at page 11.

[342] See section The Consequence of Taking Choses in Action under Legal Assignment

[343] See section 4.3.1

[344] Note that this conclusion is further confirmed by the fact that the third parties under the 1930 Act cannot be in a better position than the insured. In *Post Office*, Lord Denning M.R. held that under s1 of the 1930 Act, '*the injured person steps into the shoes of the wrongdoer.* (*Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 Q.B. 363, at 373 E) See also *Total Graphics v AGF Insurance* where Mance J held that 'TGL [the third party] is under the 1930 Act in no better position in this connection than Buntingford [the insured], and, if there were otherwise any claim within the policy wording, it would

4.3.3 Conclusions on the Similar Features of the Foreign Statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* to Certain English Domestic Statutes and The Principle of Subject to Equities

The statutory provisions relied on by the third parties in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* are similar to the relevant sections of the 1930 Act and 2010 Act under English law. The attitude of English Courts toward the domestic provisions is then highly essential for the purposes of predicting the attitude of them toward the foreign statutes in the two problem cases. Case law has expressed the opinion that the 1930 Act is based on assignment and the Courts have been giving judgments on the application of the principle of subject to equities under the Act. Subsequently, it is submitted that the operation of the foreign statutes in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* should also have been recognised as being assignment in nature[345]and that the principle of subject to equities should apply in the eyes of English Courts. In other words, a deduction can be made that because the principle of subject to equities applies in cases where the 1930 Act or the 2010 Act is relied on, the rule could also apply in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* where similar statutory provisions were relied on.

4.4 The Doctrinal Justification behind the Application of the Principle of Subject to Equities and the Application of the Principle of Subject to Equities in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*

When there is taking of contractual equitable interest by third parties, equities will then

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fail accordingly.' (*Total Graphics Ltd v AGF Insurance Co Ltd (QBD (Comm Ct))* [1997] 1 Lloyd's Rep 599, at page 607) *Collivaux* holds the opinion that 'under both Acts [the 1930 Act and the 2010 Act] *the third party is in general terms in no better position with the assured.*' (*Colinvaux's Law of Insurance*, at 9-082)

[345] See section 4.3.1

follow the equitable interest as a result of the fairness consideration.[346] As a result, the principle of subject to equities will apply.[347] Therefore, if it can be identified that there is enforcement of derivative contractual equitable interest by the third parties in *The Hari Bhum(No.1)*[348]and *The Yusuf Cepnioglu*[349], it can then be submitted that the principle of subject to equities also applied in the two cases and cast effect on the relationship between the third parties and the arbitration agreements in question. It has been mentioned earlier in the thesis that the third parties in all three problem cases were indeed enforcing derivative contractual rights.[350] However, it is not certain whether those rights were equitable interests. Clarity on this issue can be provided by analysing the statutory provisions relied on in the three cases.

4.4.1 The Assignment Basis of the Foreign Statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* and the Enforcement of Equitable Interest by the Third Parties in the two Cases

It has been mentioned that the Court of Appeal in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* recognised that the respective foreign statutes are comparable to the 1930 Act.[351] On the other hand, the first instance Court in *The Jay Bola* has provided that the mechanism behind the operation of the 1930 Act is analogous to the legal assignment under the 1925 Act.[352] This also indirectly led to the conclusion that the foreign statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* base their roots in assignment and the principle of subject to equities applies as an inherent principle.[353]

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[346] See section 4.2.1.3.3

[347] See section 4.2.2

[348] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[349] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[350] See section 2.2.2.1

[351] See section 4.3.1

[352] See section 4.3.2.1

[353] *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep 99, at para 9

On the other hand, it has been submitted earlier in the thesis that when there is assignment of contractual rights, the benefits taken (if the assignee elects to take the benefits) are contractual equitable interest.[354] Combining the above conclusion with the finding that the third parties in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* were enforcing derivative contractual rights[355], it can then be further submitted that the third parties were taking contractual equitable interests.

4.4.2 The Insurance Claim of the Third Party Actions in the *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* and the Enforcement of Equitable Interest by the Third Parties in the Two Cases

The statutory provisions in the Finish statute and the Turkish statute in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* have been set out earlier in the thesis.[356] It has been mentioned that they share some common features with the English domestic statutes 1930 Act and 2010 Act. One of the them is that the third parties claiming under them are essentially bringing an insurance claim.[357] It has also been submitted that an insurance claim is essentially enforcing contractual benefit (equitable interest) under the insurance contract even if it is brought by a third party to the insurance contract.[358] Therefore, it is submitted that the third parties in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* are also enforcing contractual equitable interest triggering the principle of subject to equities.

4.4.3 Two Different Types of Foreign Statutes Involved in the Problem Cases and the Consequence

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354 See section 3.4.4.1.4

355 See section 2.2.2.1

356 See section 4.3.1

357 See section 4.3.2.2

358 See section 4.3.2.2

Although in all three problem cases, there was enforcement of contractual rights by third parties and the actions were all brought under foreign statutes, the statutes concerned fall within two genres. This brings into the picture a residue question, whether the fact that statutes in the three problem cases are of different nature compromises the conclusion that the principle of subject to equities applied in all three cases. Discussion surrounding this question will be conducted in the current section.

4.4.3.1 Enabling Statutes and Material Statutes as Defined by the Present Thesis

Before setting out the difference between the two types of statutes, it is essential to understand the nature of legal contractual rights as properties. It has been mentioned that a legal contractual right can be further separated into legal title and equitable interest.[359] Furthermore, the holder of the legal title (not necessarily also the holder of the equitable interest) will have the right of action to enforce the equitable interest contained in contractual rights.[360] However, with the assistance of other devices, it is also possible for a separate right of action to be created for third parties to enforce the equitable interest.

If a third party is acquiring all the rights from a contract by relying on a statute, those rights should include both contractual legal title to sue and contractual equitable interest. These statutes are defined by the present thesis as material statutes.[361] On the other hand, some statutes merely provide the third parties to a contract with the right of action to enforce certain contractual benefits (or equitable interest). These benefits could have been acquired by the third parties from a previous assignment[362]or from an agreement made between the original contracting parties[363]. Such statutes are defined by the thesis

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[359] See sections 3.4.4.1.3, 3.4.4.1.4

[360] See the analysis on *Cator v Croydon Canal Company* 160 ER 1149 in section 3.4.4.1.1

[361] These statutes in the context of the present thesis include the 1930 and 2010 Act and the foreign statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*.

[362] An example of such a statute is the foreign statute in *The Jay Bola*.

[363] The Contracts (Rights of Third Parties) Act 1999 as has been mentioned earlier in the thesis is such

as enabling statutes.

4.4.3.2 The Nature of the Foreign Statutes in the Three Problem Cases

The nature of the foreign statutes relied on in the three problem cases are different.

In *The Jay Bola*[364], it was already certain that the third party was the assignee of the contractual choses in action before the foreign statute came into the picture.[365] However, it was provided by the Court of Appeal that '[u]nder Brazilian law an insurance company which has indemnified its insured is entitled to sue in its own name in respect of the loss suffered by its assured'.[366] The effect of the combination of the assignment and the relying on the foreign statute was held to be the same as that of the 1930 Act and the 1925 Act.[367] It has been mentioned earlier in the thesis that the 1925 Act also transfers the legal title to the assignee.[368] Since an assignment was already carried out in *The Jay Bola* before the assignee's relying on the statute[369], it can then be said that the foreign statute only provided the right of action which enables the assignee to sue in its own name.

However, the statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* do not have the same feature. It has been mentioned that the foreign statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* are analogous to the 1930 Act which is treated the

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a statute. The 1999 Act itself does not enable the transfer of any contractual rights, but merely gives effect to the original contracting parties' intention by enabling eligible third parties to enforce the contractual benefit conferred onto them. (see s1(4) of the 1999 Act)

[364] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

[365] [1997] 2 Lloyd's Rep 279, at page 283.

[366] [1997] 2 Lloyd's Rep 279, at page 283~284.

[367] *The Jay Bola* [1996] C.L.C. 1807, at page 11.

[368] See the analysis on the 1925 Act in section 3.4.4.1.2

[369] [1997] 2 Lloyd's Rep 279, at page 283.

same as the statutory assignment under the 1925 Act.[370] According to the analysis earlier in the thesis, the statutory assignment under the 1925 Act confers onto the assignee both the equitable interest in the property and the right to sue to enforce the equitable interest.[371] Thus, it is submitted that the foreign statute in *The Jay Bola* is an enabling statute while the foreign statutes relied on by the claimants in *The Hari Bhum(No.1) and The Yusuf Cepnioglu* are material statutes.

4.4.3.3 The Consequence of the Involvement of the Two Different Types of Statutes in the Three Problem Cases

It has been concluded that the foreign statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* were material statutes which confers on the third parties both the contractual equitable interest and the legal title entitling the enforcement of the equitable interest.[372] The third party claims in the two cases were then clearly enforcing derivative contractual equitable interest. This satisfies the doctrinal justification that the principle is triggered upon the taking of derivative equitable interest by a new entitled party to maintain fairness and consistency.[373] Therefore, there is no doubt that the third party claims in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* were certainly measures to enforce contractual equitable interests. On the other hand, even if the foreign statute in *The Jay Bola* did not give the third party the legal title from the main contract, the consequence of relying on it is still the enforcement of the equitable interest contained in the main contract. Subsequently, the fairness consideration will still come into the picture. Thus, it is submitted that the conclusion reached in the earlier section that the principle of subject to equities applied in all three problem cases[374]is not compromised by the different nature of the foreign statutes in the three cases.

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[370] See section 4.3.3

[371] See section 3.4.4.1.2

[372] See section 4.4.3.2

[373] See section 4.2.1.3.3

[374] See section 4.4.2

4.5 Conclusions on the application of the Principle of Subject to Equities in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*

In the present chapter, it has been submitted that the doctrinal justification behind the principle of subject to equities and the doctrine of burden and benefit is the fairness consideration when there is enforcement of derivative equitable interest. Therefore, the possibility to apply the principle of subject to equities extends outside assignment into the general context of enforcing derivative equitable interest. Furthermore, it has been concluded earlier in the thesis that the principle of subject to equities underlies assignment. Following the conclusion that the foreign statutory provisions relied on by the third parties in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* were arguably based on assignment, it is then rather probable that the judgments in the two problem cases were given based on the principle of subject to equities even if the Court of Appeal did not use the exact wording 'subject to equities'. Furthermore, the foreign statutes also enabled the enforcement of derivative contractual rights which triggers the fairness consideration justifying the application of the principle of subject to equities. Therefore, it is submitted by the thesis that the 'bound' wording used by the Court of Appeal in the *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*[375] was certainly associated with the principle of subject to equities.

[375] See section 2.2.2.2 for the 'bound' judgments in the two cases.

Chapter 5

The Theoretical Effect of the Principle of Subject to Equities on the Relationship between the Third Parties and the Arbitration Agreements in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*

5.1 Introduction to Chapter Five

It has been concluded that it is possible for the principle of subject to equities to apply outside the context of assignment and that the doctrinal justification for the application of the principle of subject to equities do exist in *The Hari Bhum(No.1)*[376]and *The Yusuf Cepnioglu*[377].[378] However, before submitting that the third parties were bound by the arbitration agreements under the effect of the principle of subject to equities in the two problem cases, a further issue must be discussed. That is whether the arbitration agreements in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* also have the capacity of being equities under the principle of subject to equities. The present chapter will investigate the mechanism behind arbitration agreements' capacity of being equities under the principle of subject to equities and answer the question. Note that this is the theoretical situation based on the facts that the Court of Appeal took into consideration when reaching the judgment on the third party issues in the two cases. Certain facts in the two cases that the Court of Appeal did not expressly mention could actually change the effect of the principle of subject to equities on the third parties' relationship with the arbitration agreements contained in the main contract.[379] This is why the adjective 'theoretical' is included in the title for the present chapter.

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[376] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[377] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[378] See section 4.4

[379] For a clearer clarification, those facts will be analysed later in the thesis. (see section 6.6.2.1 section providing the principle of subject to equities was excepted in *The Hari Bhum (No.1)*)

The investigation will be conducted in steps. First, the question of the capacity of certain clauses to be equity clauses will be separated into three key issues. Secondly, the three key issues will be analysed separately. Thirdly, the arbitration agreements in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* will be examined according to the three key issues.

5.2 The Research Method of the Investigation on Whether Certain Contractual Clauses can be Equity Clauses under the Principle of Subject to Equities

It has also been mentioned that equities are procedural defensive rights of the debtors which are ancillary to certain rights of property.[380] Therefore, the ancillary connection is the key factor for an equity to be identified. On the other hand, it has been mentioned earlier in the thesis that equity clauses provide equities to the debtor.[381] Combining the above several conclusions, it is submitted that *the reason why certain contractual clauses can be equity clauses under the principle of subject to equities is that they provide procedural defensive rights which are ancillary*[382]*to the contractual benefits taken.* This conclusion is further tested by the fact that whatever defences available to the debtor when the enforcing party is the originally entitled party will still be available to the debtor when the enforcing party is the new entitled party under the light of the principle of subject to equities.[383] The logic is simple. The principle of subject to equities is based on the simple principle of fairness and consistency.[384] Subsequently, if the debtor would have been able to enforce certain procedural defensive rights which are ancillary to certain right of property, the principle of subject to equities will then

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[380] See section 3.4.4.2.2

[381] See section 3.4.4.2.3 on the relationship between equity clauses and equities.

[382] The ancillary connection is consistent with the principles that conditions under the conditional benefit doctrine must be related to the exercise of the right. (see section 3.4.4.2)

[383] See section 3.5.2

[384] See section 4.2.1.3 for the relationship between the principle of subject to equities and the principle of fairness and consistency

make sure the debtor still has the capacity to take advantage of the procedural rights.

Due to the association between the principle of subject to equities and the fact that arbitration agreements can be conditions under the conditional benefit doctrine, it is apparent that arbitration agreements can indeed be equity clauses under the principle of subject to equities. Following the conclusion reached in the previous paragraph, it can then be said that, in cases where arbitration agreements were held to be capable of being equity clauses, the arbitration agreements must have provided procedural defensive right to the debtor which are ancillary to the contractual benefits taken. *The several questions to be answered are 'why arbitration agreements as equity clauses can provide the procedural defensive rights', 'why the debtor can take advantage of the procedural defensive rights provided by arbitration agreements as equity clauses' and 'why the procedural defensive rights are ancillary to the contractual benefits taken'*. The answer to the first question can be easily drawn from the analysis earlier in the present thesis. It has been mentioned that arbitration agreements have a negative aspect which requires contracting parties to not resolve their dispute in other Courts or tribunals.[385] It has also been mentioned that the substantive equity in *The Jay Bola* shares the same meaning.[386] The identical meaning of the two concepts was utilised as a testifying factor of the consistency between the principle of subject to equities and the conditional benefit doctrine. Following the final conclusion that the conditional benefit doctrine is indeed the manifestation of the principle of subject to equities[387], the identical nature of the two above concepts are then further strengthened. For the purpose of answering the first question proposed in the present section, it can then be submitted that the reason why arbitration agreements can provide procedural defensive right is that they have a negative aspect. The second question also almost answers itself. The analysis of the present section is very much based on the effect of the principle of subject to equities that the debtor will be entitled whatever defences available to them had the counter

[385] See section 3.4.4.2.3

[386] See section 3.4

[387] See section 3.6

party been the original contracting party.[388] Therefore, the reason why the debtor is entitled to enforce an equity under the principle of subject to equities is the same as the reason why the debtor is entitled to enforce the same procedural defensive right when the counter party is the original contracting party. On the other hand, only an original contracting party can enforce a contractual benefit due to the benefit aspect of the privity of contract doctrine.[389] Therefore, it can then be submitted that the debtors' capacity to enforce the arbitration agreements against the third party results fundamentally from the fact that they are one of the original contracting parties. The conclusion is further testified that, at least in the context of anti-suit injunctions issued under the conditional benefit doctrine, the anti-suit injunctions are still in respect of contract.[390] Subsequently, in the eyes of the current English law, the debtor is still enforcing a contractual right even in the third party context of the conditional benefit doctrine when enforcing contractual conditions, or equity clauses in other words. The third question, however, require more detailed analysis to provide clarity.

5.3 The Relationship between the Contractual Benefits Taken and the Arbitration Agreements under the Principle of Subject to Equities

Note that the context of the research in the present section will be contractual context since the subject cases *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* involves the enforcement of contractual rights.[391] Thus, to fully understand whether the arbitration agreements are equities in those two cases, the thesis in the present section will investigate how equity clauses, arbitration agreements particularly, are ancillary to *contractual* equitable interest taken by third parties.

Following the clarification of the context of discussion, the next issue is to investigate

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[388] See section 3.5.2

[389] *Tweddle v Atkinson* 121 E.R. 762, at page 763~764

[390] See section 6.2.1

[391] See section 2.2.2.1

how the 'ancillary' connection between the contractual equitable interests taken and the arbitration agreements are established in cases where arbitration agreements are equity clauses upon the third parties' taking the contractual equitable interests. There is a body of authorities providing the proposition. Subsequently, investigating the existing authorities where the arbitration agreements have the capacity to be equity clauses under the principle of subject to equities will provide clarity on the third question proposed in the previous section, namely *'why the procedural defensive rights are ancillary to the contractual benefits taken'*.

5.3.1 Existing Authorities on Arbitration Agreements' Capacity to be Equity Clauses under the Principle of Subject to Equities in the Context of Third Party Enforcing Derivative Contractual Rights

There is a body of cases providing that a third party assignee is essentially enforcing derivative equitable interest when taking the assigned benefit. Some of the cases in contractual context also demonstrated a pattern on the 'ancillary' issue.

The first one coming in line is *The Leage*[392]where there were in total three parties involved. The first plaintiff was a finance company. The second plaintiff was the owner of the ship the *Leage*. The defendant was the charterer of the ship. There was a charterparty between the second plaintiff and the defendant containing an arbitration clause. The freight was assigned to the first plaintiff by the second plaintiff. On the first plaintiff's claiming the freight, the defendant sought a stay of action under the light of s1 of the *Arbitration Act 1975*.[393]

Bingham J held that the claim in the case was brought by the assignee under the name of the assignor based on a debt arising out of a contract subject to an arbitration

[392] *Rumput (Panama) S.A. v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259

[393] *The Leage* [1984] 2 Lloyd's Rep 259, at page 259.

agreement. There were several important statements made that

> '[i]t [the claim] appears to me that on a simple reading of the statutory language an assignee of a debt does claim against the debtor 'through or under' the assignor…*The derivative nature of the assignee's claim is underlined by the rule that an assignee takes subject to equities* and by the practice of joining the assignor as either plaintiff or defendant in bringing suits on an equitable assignment…It does therefore seem to me that an assignee of a debt *only*, where the debt arises out of a contract subject to an *arbitration agreement*, falls within the statutory language [s1 of the *1975 Act*].'[394]

S1 of the Arbitration Act 1975 provides statutory stay of action. The stay of action respondent under the section is 'any party to an arbitration agreement to which this section applies, or any person claiming through and under him'. Therefore, the Court in *The Leage* was essentially recognising several issues. Firstly, the principle of subject to equities applied in that case. Secondly, the arbitration agreement was an equity clause. Thirdly, the effect of the principle of subject to equities in that case is enough to make a third party an eligible party under s1 of the 1975 Act. Fourthly, for such effect to come into existence, it has to be satisfied that the assignee's claim enforcing the debt is governed by the arbitration agreement. Finally, such condition is certainly satisfied when the rights enforced by the assignee are *derivative rights from the contract* where the arbitration agreements exist.

Following the unity of the conditional benefit doctrine and the principle of subject to equities and the anchor case status of *The Jay Bola*[395], the case can also be used as an authority on the principle of subject to equities. *The Jay Bola*, however, also provided guidance on the ancillary issue. In *The Jay Bola*, the reason why the third party claim

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[394] *The Leage* [1984] 2 Lloyd's Rep 259, at page 262.

[395] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279; see sections 3.2, 3.6

should be brought under the arbitration agreement in the main contract is that the rights enforced in the *claim derived from the assignor's rights* which are subject to *the arbitration agreement*.[396] In other words, the fact that the third party's right derived from the assignor's right which is subject to the arbitration agreement is the reason why the third party claim is governed by the arbitration agreement.

5.3.2 The Pattern Casting Lights on the Ancillary Issue

Following the above authorities where arbitration agreements have the capacity to be equity clauses under the principle of subject to equities, there is a clear pattern in the Court's judgment. It is rather noticeable that the Courts *always* mention that the rights enforced by the third parties are *derivative* before holding that the third party claims are governed by the respective arbitration agreements.

Generally speaking, arbitration agreements cover contractual issues because they are always qualified by wordings such as 'disputes arising under this contract' and 'in connection with this contract'.[397] Two examples can be found in *The Leage* and *The Jay Bola*. The arbitration agreement in *The Jay Bola* provides that '[i]t is mutually agreed that should any dispute arise between owners and charterers, the matter in dispute shall be referred to three persons in London for arbitration, one to be appointed by each of the parties here to and the third by the two so chosen. Their decision or that of any two of them shall be final and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The arbitrators shall be shipping men in daily operation or chartering practice'.[398] There is no direct provision of the arbitration agreements in *The Leage*. However, the Court provided that '[i]t does seem to me that an assignee of a debt only, where the debt arises out of a contract subject to an arbitration agreement, falls within the statutory language [of s1 of the Arbitration Act

[396] [1997] 2 Lloyd's Rep 279, at page 284.

[397] *Arbitration Law*, at 3.17

[398] [1997] 2 Lloyd's Rep 279, at page 282

1975]'.[399] On the other hand, the whole case is discussing whether the assignee in the case was subject to that statutory provision. Therefore, an indicated information is that the arbitration agreements indeed governs the contract concerned. These arbitration agreements are contractual arbitration agreements under the definition of the present thesis. Therefore, a natural presumption is that the derivative nature of the contractual benefit plays an important part in the ancillary connection.

Furthermore, the subject cases of the present chapter, namely *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, also have the potential to demonstrate such pattern. Both *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* involve third party enforcement of derivative contractual rights.[400] Both *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* concerns the enforcement of certain arbitration agreements upon the third parties' enforcing the derivative contractual rights.[401] Subsequently, if the derivative nature of the contractual rights enforced by third parties and the contractual nature of arbitration agreements is indeed the reason behind the ancillary nature, the ancillary connection between the rights taken and the contractual arbitration agreements in the two subject cases will also be established.

The presumption in the previous paragraph can be tested as followed. The starting point is that a dispute concerning the enforcement of contractual benefits will certainly be characterised as a contractual dispute[402]which will in turn be governed by a contractual arbitration agreement. Subsequently, had those contractual benefits at hand were enforced by an original contracting party against the debtor, the contractual arbitration agreements will entitle the debtor to rely on the negative aspect of the arbitration

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[399] *The Leage* [1984] 2 Lloyd's Rep 259, at page 262

[400] See section 2.2.2.1

[401] See section 2.2.3 on the application for anti-suit injunctions in the subject cases; The arbitration agreements will be set out at the later section providing the material scope of the arbitration agreements in the subject cases.

[402] For the wide governing power of contractual arbitration agreements, see section 2.2.1 where contractual claims under the present thesis were defined.

agreements.[403] In other words, *it is natural that a derivate from a contractual right to retain the contractual nature*, thus still falling within a contractual arbitration agreement.

The conclusion reached in the above paragraph should be read together with the conclusion that the principle of subject to equities ensures the debtor will be entitled whatever defences available to them when the enforcing party is the new entitled party and that is compared with the situation where the enforcing party is the originally entitled party.[404] Combining the above two propositions, the result then is a third party enforcing the same contractual benefits will also be under the containment of the debtor's defence provided by the same contractual arbitration agreement.[405]

5.4 Conclusions on the Mechanism behind Arbitration Agreements' Capacity to be Equity Clauses under the Principle of Subject to Equities in the Context of Third Party Enforcing Derivative Contractual Rights

Following the analysis in the above content of chapter 5, arbitration agreements' capacity as equity clauses under the principle of subject to equities is not merely an unsupported theoretical myth. On the contrary, there is a comprehensive mechanism behind the rule. The mechanism is as followed. Three questions need to be answered to learn if a particular contractual term is an equity clause under the principle of subject to equities. The first is whether the term can provide procedural defensive rights to the debtor. The question will be answered in the positive in arbitration agreements context since the negative aspect of arbitration agreements provides such procedural defensive rights. The second question is whether the debtor can enforce the procedural defensive

[403] See section 3.4.4.2.3 providing the negative aspect of arbitration agreements providing procedural defensive rights and section providing the benefit aspect of the privity of contract doctrine

[404] See section 3.5.2

[405] In conclusion, the derivative issue contributes in two aspects. First, it assists the process of tracing the scope of defence under the principle of subject to equities. Secondly, it assists the characterisation of the derivative rights and triggers the governing power of contractual arbitration agreements.

rights. The question will be answered in the positive when the debtor is a party to the contract containing an arbitration agreement as a potential equity clause. The third question is whether the procedural defensive right provided by the contractual term is ancillary to the derivative contractual equitable interest taken. The two investigations need to be made is the nature of the right sought to be enforced in the claim brought by the third party and the material scope of the arbitration agreement at hand. If the conclusion reached after the above investigations is that the dispute concerning the enforcement of the right falls within the material scope of the arbitration agreement, the arbitration agreement is then an equity clause providing related equities to the rights enforced under the claim brought by the third party. The characterisation of the dispute in turn depends on the nature of the right to be enforced.[406] Furthermore, from the attitude of English Courts as is demonstrated by case law, disputes are certainly contractual in nature when they are enforcing derivative contractual rights and will be governed by contractual arbitration agreements.[407] *In other words, contractual arbitration agreements will be equity clauses when a third party enforces derivative contractual equitable interest triggering the principle of subject to equities.*

5.5 The Capacity of the Arbitration Agreements in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* to be Equity Clauses under the Principle of Subject to Equities

Following the clarification of the question why and how certain arbitration agreements can be equity clauses under the principle of subject to equities, the thesis will examine the arbitration agreements in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* to see if they have such capacity. It has already been concluded that the capacity of arbitration agreements to be equity clauses under the principle of subject to equities depends on the answers to three questions.[408] The first two questions can be easily answered. In

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[406] *The London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige) (No 2)* [2015] 2 Lloyd's Rep 33, at para 24

[407] See section 2.2.1

[408] See section 5.2

both *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, the respective debtors were seeking to enforce arbitration agreements against certain third parties while the debtors were the original contracting parties to the respective arbitration agreements. Therefore, both the first and the second question set out earlier in the thesis will be answered positively. The following content of section 5.5 will concentrate on the answer to the third question, namely whether the equities provided by the arbitration agreements are ancillary to the rights enforced by the third parties.

5.5.1 The Material Scope of the Arbitration Agreements in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*

The material scope of the arbitration agreements can be seen by investigating the wording of them. In *The Hari Bhum (No.1)*, the arbitration agreement between the debtor insurer and the insured provides that

> '[i]f any difference or dispute shall arise between you (or any other person) and the Association [the debtor] out of or in connection with any insurance provided by the Association or any application for or an offer of insurance, it shall be referred to arbitration in London.'[409]

On the other hand, the arbitration agreement in *The Yusuf Cepnioglu* cannot be found from either the first instance decision[410]or the Court of Appeal decision[411]published. However, in an online resource in the debtor P&I Club's official website, it is indicated that the insurance contract in *The Yusuf Cepnioglu* is in pursuance to the club rules.[412] In the P&I Club rule, the mandatory dispute resolution agreement is actually a tiered

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[409] [2005] 1 Lloyd's Rep 67, at page 67.

[410] [2015] EWHC 258.

[411] [2016] EWCA Civ 386.

[412] See Daisy Rayner, 'Yusuf Cepnioglu – Direct rights of action against insurers are dealt a blow by the Court of Appeal', available at https://www.shipownersclub.com/daisy-rayner-yusuf-cepnioglu-direct-rights-of-action-against-insurers-are-dealt-a-blow-by-the-court-of-appeal/.

dispute resolution agreement with the second stage being arbitration.[413] The clause covers issues including

> 'any difference or dispute shall arise between a Member or joint Member and the Association out of or in connection with these Rules or arising out of any contract with the Association or as to the rights or obligations of the Association or the Member or joint Member thereunder or in connection therewith or as to any other matter whatsoever'.[414]

Therefore, both arbitration agreements cover disputes arising out of contract.[415] It has been mentioned earlier in the thesis that arbitration agreements of the sort even govern disputes related to the contract.[416]

5.5.2 The Nature of the Disputes in the Foreign Court Proceedings in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*

It has been mentioned earlier in the thesis that the rights enforced by the third parties in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* were both recognised as being derivative contractual rights.[417] On the other hand, it has been submitted by the thesis that the third parties in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* were enforcing contractual equitable interest with the assistance of the foreign statutes.[418] Therefore, the disputes in the two cases certainly fall under the scope of the respective arbitration agreements.[419]

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[413] For the Club's rule, see https://www.shipownersclub.com/media/2018/02/Club-Rules_2018_Web.pdf.

[414] See Rule 66 of the P&I Club in *The Yusuf Cepnioglu.*

[415] Note that the one in *The Hari Bhum (No.1)* has an even wider coverage.

[416] See section 2.2.1 of the present thesis.

[417] See section 2.2.2.1, *The Hari Bhum (No.1)* [2005] 1 Lloyd's Rep 67, at para 6 and the first instance judgment in *The Yusuf Cepnioglu* [2015] EWHC 258, at para 3

[418] See section 4.4.2

[419] Furthermore, it has been mentioned earlier in the thesis that the ancillary connection is provided due

5.6 Conclusions on the Theoretical Effect of the Principle of Subject to Equities on the Relationship between the Third Parties and the Arbitration Agreements in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu*

To investigate whether the arbitration agreements were equity clauses under the principle of subject to equities in *The Hari Bhum (No.1) and The Yusuf Cepnioglu*, the thesis explored the mechanism behind such capacity.[420] After the clarification of the mechanism, the thesis then investigated the facts in *The Hari Bhum (No.1) and The Yusuf Cepnioglu* and reached a positive conclusion on such capacity of the arbitration agreements in the two cases.[421] Following this conclusion, it can then be eventually submitted that the third parties' being bound by the arbitration agreements in *The Hari Bhum (No.1) and The Yusuf Cepnioglu* was the result of the principle of subject to equities.

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to the matching of the material scope of equity clauses and the nature of the right enforced. (see section 5.3.2) The causation between the nature of the right enforced by a third party and the third party's being bound by a contractual arbitration agreement was also provided in *The Yusuf Cepnioglu*. See *The Yusuf Cepnioglu* [2016] EWCA Civ 386, at para 21.

[420] See section 5.2

[421] See section 5.6

Chapter 6

The Anti-Suit Injunction Issues in the Problem Cases

6.1 Introduction to Chapter Six

It has been mentioned earlier in the thesis that the grant of anti-suit injunctions is a matter of great difficulty.[422] It is then not startling that the issue is not an easy task even for the Court of Appeal in the context of the conditional benefit doctrine. [423] Nonetheless, the particular anti-suit injunction applications in the three problem cases do not concern all the legal principles surrounding anti-suit injunctions. Due to the common features of the applications in the three cases, the issues to be clarified will be consolidated into a rather small margin. After clarifying those issues, the thesis will attempt to provide guidance on the grant of those particular types of anti-suit injunctions under the conditional benefit doctrine as a preparation for the resolution of the conflicting judgments in the three problem cases.

In the present chapter, the thesis will first summarise the common features of the anti-suit injunction applications in the three problem cases and narrow down the scope of the analysis to the extent of necessity. It will be submitted that the anti-suit injunction rules to be analysed only concern anti-suit injunctions against third parties bound by

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[422] See section 2.3.1

[423] Also, all three of them are Court of Appeal authorities where the decisions were made rather recently. There is indeed *The Front Comor* where the House of Lords arguably favoured the grant of anti-suit injunctions enforcing exclusive dispute resolution agreements under the principle of subject to equities. (*Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39 (*The Front Comor*) [2007] UKHL 4, at para 25.) However, the case was eventually resolved on another ground. (*The Front Comor* [2009] 1 Lloyd's Rep 413, at para 15) Therefore, it is not a strong authority on this issue. On the other hand, there are also other cases discussing the matter, yet the authoritative effect of them is not strong due to they position on the hierarchy. (See *Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd* –QBD (Comm Ct) [2018] EWHC 3009 (Comm); *Youell v Kara Mara Shipping Co Ltd* [2000] C.L.C. 1058; *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588)

exclusive dispute resolution agreements under the conditional benefit doctrine. The chapter will then analyse the threshold of such anti-suit injunctions from multiple perspectives and submit that English law is in favour of anti-suit injunctions against third parties bound by exclusive dispute resolution agreements at the preliminary stage. The thesis will then move on to the residual issue that the unconscionability concept mentioned in *The Jay Bola* is irrelevant to the analysis in the present thesis in relation to the conflicting judgments in the problem cases. At the end of the present chapter, despite the theoretical availability of the anti-suit injunctions concerned in the three problem cases, the fundamental reasons behind the conflicting judgments in the three problem cases will be provided.

6.2 The Common Features of the Anti-Suit Injunction Applications in the Problem Cases

One of the reasons why legal rules surrounding anti-suit injunctions are rather complicated is that the grounds based on which an anti-suit injunction can be granted vary and overlap.[424] Therefore, identifying the common features of the anti-suit injunction applications in the problem cases will effectively narrow down the scope of the legal rules requiring consideration in the thesis. As a result, the key questions can be analysed more in depth.

6.2.1 The Quasi-Contractual Nature of the Anti-Suit Injunctions Sought in the Problem Cases

As has been concluded earlier in the thesis, all the third parties in the three problem cases were bound by the respective arbitration agreements when they were enforcing

[424] See *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV* [1987] A.C. 24 [1987] A.C. 24, at para 40 B, C for different grounds for anti-suit injunctions and section 6.4 on the analysis on different interpretations of unconscionability.

the derivative contractual rights arising from the same contract.[425] Also, because they acted inconsistently with the arbitration agreements by which they were bound, the original contracting parties in all three cases applied for an anti-suit injunction.[426] The reason why they were bound was the conditional benefit doctrine or the principle of subject to equities as the essence.[427] Under the definition provided by *The Anti-Suit Injunction*, these anti-suit injunctions applied will be considered as being quasi-contractual anti-suit injunctions.[428] This definition will also be borrowed by the present thesis.

Note that the fact that the anti-suit injunctions in the problem cases are quasi-contractual anti-suit injunctions does not change the fact that these anti-suit injunctions are still ones in respect of contract. This is the opinion of the Court of Appeal in *The Jay Bola*[429]. The Court of Appeal provided that the injunction claimant was seeking to *enforce a contractual right* which equity recognises against the third party.[430] Furthermore, the Court of Appeal held that a contractual relationship was established between the third party injunction defendant and the debtor injunction claimant.[431] Moreover, from the perspective of the features of the conditional benefit doctrine, the doctrine only brings in conditions from the main contract.[432] Therefore, the debtor is enforcing a contractual right when applying for anti-suit injunctions against breach of

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[425] See section 2.2.2.1

[426] See section 2.2.3

[427] See section 3.2, 3.6

[428] *The Anti-Suit Injunction*, at para 10.03. This is further supported by Lord Woolf's Judgment in *Pan Ocean Shipping* where he held that when there is an assignment of contractual chose in action, the Court regards the relationship between the assignee and the original contracting party as a quasi-contract. (*Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 W.L.R. 161, at page 170 G)

[429] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

[430] [1997] 2 Lloyd's Rep 279, at page 286

[431] [1997] 2 Lloyd's Rep 279, at page 287, see also *The Anti-Suit Injunction*, at para 10.03, 10.08 footnote 18

[432] See section 3.4.1 providing the contractual basis of the conditional benefit doctrine and section 3.4.4.2 on related equities and associated conditions

contract under the conditional benefit doctrine.

6.2.2 The Recognition of the Non-EU Feature of the Anti-Suit Injunctions Sought in the Problem Cases

Another common feature of the anti-suit injunction applications in the three problem cases is that all three anti-suit injunctions applied are non-EU anti-suit injunctions. The reason why they are non-EU is not that none of the foreign court proceedings in the three problem cases were within the European Community. The reason is that the anti-suit injunctions were not caught by the Brussels Regime. The meaning of the Brussels Regime adopted by the present thesis refers to the set of international conventions and European Council regulations governing the jurisdiction of Courts in member states, as well as the recognition and enforcement of judgments under civil and commercial context within member states. The first of them coming in line is the 1968 Brussels Convention[433]which have been incorporated as a part of English Law by s2(1) of the Civil Jurisdiction and Judgments Act 1982[434]. Later the Lugano Convention 1988 was entered into by the then six members of the European Union Free Trade Association and was further replaced by the Lugano Convention 2007.[435]The Lugano Convention was also included as a part of English law by the Civil Jurisdiction and Judgments Regulations 2009 [436] . Therefore, both the Brussels Convention and the Lugano

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[433] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41968A0927%2801%29; The 1968 Brussels Convention which was realised as the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML)

[434] Available at http://www.legislation.gov.uk/ukpga/1982/27/contents.

[435] Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 1988, Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41988A0592. The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 is available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29.

[436] Available at http://www.legislation.gov.uk/uksi/2009/3131/contents/made.

Convention directly bind English Courts as a part of the law and that is followed by the fact that the Lugano Convention has materially the same content as the 1968 Brussels Convention. In the preamble of the Convention, it is provided that the Lugano Convention is for the purposes of extending the application of the Brussels Convention 1968 to the then EFTA member states.[437]Subsequently, cases recognised as authorities on one of them arguably also have authoritative effect on the other.[438] The non-EU feature of the anti-suit injunctions sought is of importance for a reason. As a result of the Brussels Regime, English courts cannot issue anti-suit injunctions in relation to a set of proceedings brought in front of courts within member states when the claims in those proceedings are caught by the Brussels Regime.[439] Thus, the non-EU feature of the anti-suit injunctions further narrows down the rules governing anti-suit injunctions to be analysed.

The anti-suit injunctions applied for in *The Jay Bola* and *The Yusuf Cepnioglu*[440]were apparently not restrained by the Brussels Regime because the foreign proceedings were

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[437] In the preamble of the Lugano Convention, it is provided that 'the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters, which extends the application of the rules of the 1968 Brussels Convention to certain States members of the European Free Trade Association'.

[438] Note that the Council Regulation (EC) No 44/2001 was later replaced by Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF) The content of the recast regulation is different from the original one or the Lugano Convention. Therefore, it is possible that authorities on the recast regulation cannot be directly applied on the Lugano convention and vice versa. Nevertheless, the repeal of several sections does not affect of preventive power of each individual instruments when it comes to the grant of anti-suit injunctions within member states under the context of section. The is provided by case law. It was held in *Turner v Grovit* that the restrictive power of the regime comes from the overall philosophy of the statute instead of an individual section. (*Turner v Grovit* [2005] 1 A.C. 101 , at para 37)

[439] *Turner v Grovit* Case C-159/02 [2004] 2 Lloyd's Rep 169, at para 24; *Allianz SpA v West Tankers Inc (The Front Comor)* [2008] 2 Lloyd's Rep 661, *Allianz SpA v West Tankers Inc (The Front Comor)* (ECJ) and [2009] 1 Lloyd's Rep 413, at para 30, 32.

[440] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

not brought in front of any Courts in member states.[441] However, the situation is not the same in *The Hari Bhum (No.1)*[442]where the foreign proceedings was brought in front of a Finnish Court.[443] Nonetheless, the anti-suit injunction application was still considered to be non-EU; the reason being that foreign proceedings brought in breach of arbitration agreements fall within the arbitration exception provided in art1(4) of the Brussels Convention 1968 according to the Court of Appeal.[444] Therefore, the anti-suit injunction in *The Hari Bhum(No.1)* was also regarded as a 'non-EU' one by the Court of Appeal.[445]

6.2.3 Conclusions on the Common Features of the Anti-Suit Injunction Applications in the Problem Cases

After the above analysis, there are indeed some common features of the anti-suit injunction applications in the three problem cases, namely they are all applications for quasi-contractual anti-suit injunctions enforcing arbitration agreements against third parties under the principle of subject to equities outside the Brussels Regime. As a result of that, it is submitted that the thesis only needs to consider legal rules related to the grant of anti-suit injunctions in respect of contract outside the Brussels Regime.

6.3 The Theoretical Availability of Quasi-Contractual Anti-Suit Injunction under the Conditional Benefit Doctrine

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[441] The particular set of foreign proceedings that the injunction applicant sought to restrain in *The Jay Bola* was brought in Brazil while the one in *The Yusuf Cepnioglu* was in Turkey. ([1997] 2 Lloyd's Rep 279, at page 279; [2016] EWCA Civ 386, at para 9)

[442] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[443] [2005] 1 Lloyd's Rep 67, at page 67.

[444] [2005] 1 Lloyd's Rep 67, at para 44, 48, 49.

[445] Note that this is merely a preliminary conclusion based on the attitude of the Court of Appeal in *The Hari Bhum (No.1)* [2005] 1 Lloyd's Rep 67. It will be mentioned later in the thesis that the EU element of the case still influenced the decision made. (see section 6.6.2.2.5)

Within primary and secondary authorities, there is guidance provided on the availability of quasi-contractual anti-suit injunctions. Especially following the analysis in the thesis on the principle of subject to equities, a more definite answer can be provided.

6.3.1 A Positive Opinion from Academia

An overall positive answer had been provided by academia. In *The Anti-Suit Injunction*, citing multiple cases[446], it is provided that

> '[u]ntil recently, the Courts had uniformly concluded that the case of derived rights was closely analogous to the direct situation, so that an anti-suit injunction should in general be granted against a third party seeking to take the benefit without the burden of the contract unless there was strong reason not to do so, even in situations where the third party's acquisition of rights was governed by a foreign law.'[447]

6.3.2 *The Front Comor* and the House of Lords Attitude

It has been mentioned earlier in the thesis that the three problem cases introducing the conflict are all Court of Appeal authorities. Therefore, without the guidance of an authority higher on the hierarchy, the resolution of this conflict involves great difficulty. Nonetheless, although there is no direct House of Lords authority or statutes providing guidance on the grantability issue of quasi-contractual anti-suit injunctions, there is indeed indirect guidance available from the House of Lords provided by *The Front Comor*.

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[446] *The Jay Bola* [1997] 1 Lloyds Rep 279; *The Charterers Mutual Assurance Association Ltd v British & Foreign* [1998] ILPr 838; *Youell v Kara* [2000] 2 Lloyds Rep 102; *Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanski)* [2002] 1 Lloyds Rep 106.

[447] *The Anti-Suit Injunction*, at para 10.15.

In *The Front Comor*[448], there was a charterparty between the insured refinery owner and the owner of the *Front Comor*. Under the charterparty, there was an arbitration clause providing London arbitration under English law. The *Front Comor* later collided with an oil jetty which caused the insured multiple losses. Some of the losses were paid under the insurance contract and some were not covered by the insurance. The subrogated insurer started court proceedings in Italy under an Italian Civil Code.[449] Earlier a set of proceedings were started by the shipowner claiming for an anti-suit injunction restraining the insurer in relation to the Italian proceedings and that court granted an interim anti-suit injunction. The insurer then started another set of court proceedings to set aside the interim injunction while the shipowner claimed that the interim injunction should be made permanent. Therefore, the facts in the present case is rather similar to those in *The Jay Bola* except that the insurer in *The Jay Bola* was the assignee, in contrast to the subrogated insurer in the present case.[450]

On the third party issues, relying on *The Jay Bola*, the High Court held that the claim brought by the insurer in Italy falls within the scope of the arbitration agreement and can only be brought under the arbitration agreements.[451] Although the judge did not expressly mention that the principle relied on is the conditional benefit doctrine, the judge did cite and rely on *The Jay Bola* and *The Hari Bhum (No.1)* as valid precedents and held that the third party insurers in that case were bound by the arbitration agreements contained in the main contract immediately after.[452] Therefore, it is arguable that the principle of subject to equities was indeed relied on. In the end, a permanent anti-suit injunction was granted in favour of the shipowners following the

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[448] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] 2 Lloyd's Rep. 257

[449] Note that the Italian Court proceedings were brought by the subrogated insurer in tort. ([2005] 2 Lloyd's Rep. 257, at para 30)

[450] This entire set of facts is available in the report of the first instance case. ([2005] 2 Lloyd's Rep. 257, at page 257)

[451] *The Front Comor* [2005] 2 Lloyd's Rep. 257, at para 31, 32, 33.

[452] [2005] 2 Lloyd's Rep. 257, at para 64~70.

The Angelic Grace[453]and *The Jay Bola* line of authorities.[454]

When the case reached the House of Lords, the attitude of the Court toward the judgment of Colman J was rather positive.[455] In particular, Lord Hoffmann put emphasis on the doctrine of Kompetenz-Kompetenz that

> 'it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of Kompetenz-Kompetenz) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate'.[456]

On the other hand, from the perspective of jurisdiction protection[457], it was stated in his speech that

> '[i]f the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will… There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.'[458]

Therefore, it is apparent that, for the grant of the anti-suit injunction applied in the present case, Lord Hoffmann in the House of Lords was rather in favour of a positive

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[453] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87

[454] [2005] 2 Lloyd's Rep. 257, at para 76.

[455] *The Front Comor* [2007] UKHL 4, at para 8.

[456] *The Front Comor* [2007] UKHL 4, at para 22.

[457] See *Turner v Grovit* where anti-suit injunctions were said to be precautionary or protective measures. (*Turner v Grovit* [2005] 1 A.C. 101 , at para 37)

[458] *The Front Comor* [2007] UKHL 4, at para 23.

answer even if the consistency question was still referred to the European Court of Justice (ECJ hereinafter).[459] Together with the mentioned conclusion that the conditional benefit doctrine arguably governs the claim in the present case, it is submitted by the thesis that English Courts do have the tendency of favouring anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine without the influence of the European elements.[460] Subsequently, another strong argument in favour of the grant of the quasi-contractual anti-suit injunctions is provided.

6.3.3 The Effect of the Principle of Subject to Equities on the Position of the Third Party Assignee and the Grantability of Quasi-Contractual Anti-Suit Injunctions

From the perspective of the effect of the principle of subject to equities, the principle ensures that the new entitled party is not in a better position than the original entitled party when enforcing the derivative equitable interest conferred.[461] The controlling of the new entitled party's power is achieved by imposing related equities to the extent that whatever defences available to the debtor when the enforcing party is the originally entitled party should still be available when the enforcing party is the new entitled party.[462] Therefore, to know whether certain defence should be available to the debtor when the enforcing party is the third party, it is important to assess the position of the originally entitled party.

For quasi-contractual situations specifically, the Court of Appeal in *The Yusuf Cepnioglu*[463] and *The Jay Bola*[464] provided that, *there would have been breach of*

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[459] *The Front Comor* [2007] UKHL 4, at para 25.

[460] See section 6.6.2.2.4

[461] See section 3.5

[462] See section 3.5.2

[463] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[464] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

contract had the originally entitled parties[465] brought the proceedings against their counter-party under the contracts.[466] It will be mentioned later in the thesis that anti-suit injunctions will be grantable if one of the original contacting parties breaches an exclusive dispute resolution agreement.[467] Therefore, an anti-suit injunction should also be available against the new entitled party who is bound by the exclusive dispute resolution agreement and started proceedings against the debtor in a way which is inconsistent with the said agreement.[468]

As a result, being bound by an exclusive dispute resolution agreement and acting inconsistently can give rise to an anti-suit injunction under the invasion of legal or equitable rights ground even if presumably that there is no direct breach of arbitration agreements.[469]

6.3.4 Quasi-Contractual Anti-Suit Injunction as a Subject Falling within the Existing Grounds for Anti-Suit Injunctions

Under English law, the opinions on the grounds for anti-suit injunctions diverge.[470]

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[465] In *The Yusuf Cepnioglu*, the original entitled party is the ship owner who is a party to the insurance contract with the P&I Club. In *The Jay Bola*, the original entitled party is the shipper who is a party to the carriage contract with the carrier. (*The Yusuf Cepnioglu)* [2015] EWHC 258, at page 567; *The Jay Bola* [1997] 2 Lloyd's Rep 279, at page 279.

[466] [1997] 2 Lloyd's Rep 279, at page 285; [2016] EWCA Civ 386, at para 22. Note that *The Hari Bhum(No.1)* is not mentioned here because it has a relatively independent identity which will be mentioned later in the present thesis. (see section 6.6.2)

[467] See section 6.3.4.1

[468] Note this is the exact approach that *The Jay Bola* followed. Lord Justice Hobhouse first recognised that the insurance company's rights derived from and dependant upon the rights of the voyage charterers…that the claims are claims which, if made by the voyage charterers were obliged to refer to arbitration in London under the arbitration clauses under the arbitration clause in the voyage charter-party'. He then held that had the court actions in Brazil were commenced by the voyage charterer, there would have been a breach of contract and an anti-suit injunction would have been grantable. The anti-suit injunction was eventually granted. ((1997) 2 Lloyd's Rep 279, at page 284, 285, 287, 288)

[469] This approach was exactly what was applied by the first instance judgment of *The Front Comor*. (*The Front Comor* [2005] 2 Lloyd's Rep. 257, at para 68)

[470] See *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV* [1987] A.C.

Following the summary of the common features of the anti-suit injunctions applied for in the three problem cases and the arguable conclusion provided by *The Front Comor*[471], the next step is to investigate these features and answer the question if they fit into the existing grounds for the potential of a more definite answer. Since it has been mentioned that quasi-contractual anti-suit injunctions are still in respect of contract and that the question whether there was a breach of contract has been brought to the Court of Appeal in all three problem cases[472], the reasonable starting point is to investigate whether there is breach of contract in quasi-contractual anti-suit injunction cases.

6.3.4.1 The Established Principles on the Grant of Anti-Suit Injunctions Restraining Breach of Exclusive Dispute Resolution Agreements Outside the Brussels Regime

There is a traceable line of cases providing anti-suit injunctions restraining the breach of exclusive dispute resolution agreements outside the Brussels Regime. Before analysing those cases, it is essential to resolve a background issue regarding the treatment toward exclusive court jurisdiction agreements and arbitration agreements. In the problem cases, the exclusive dispute resolution agreements the third parties acted against were arbitration agreements. However, case law does not treat arbitration agreements differently from other exclusive dispute resolution agreements when it comes to the grant of anti-suit injunctions restraining the breach of them. On the other hand, arbitration agreements are indeed exclusive dispute resolution agreements. As Sir John Megaw in *Aughton v Kent*[473]provided '[t]here are, in my opinion, three important inter-related factors peculiar to arbitration agreements. First, an arbitration agreement

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24, at page 40 B, C, *Glencore v Exter* [2002] C.L.C. 1090, at para 43, *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] C.L.C. 198, at page 6; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft* [2011] EWHC 345 (Comm), at para 34

[471] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] 2 Lloyd's Rep. 257

[472] See section 2.2.3

[473] *Aughton Ltd v M F Kent Services Ltd* (1992) 57 BLR 1

may preclude the parties to it from bringing a dispute before a court of law . . .'.[474] Also, in *Ust*[475], the Supreme Court recognised the negative aspect of arbitration agreements that '[t]he negative aspect of an arbitration agreement is a feature shared with an exclusive choice of court clause. In each case, the negative aspect is as fundamental as the positive. There is no reason why a party to either should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum'.[476] Most importantly, *Turner v Grovit* provided that '[u]nder English law, a person has no right not to be sued in a particular forum, domestic or foreign, unless there is some specific factor which gives him that right. A contractual arbitration or exclusive jurisdiction clause will provide such a ground for seeking to invoke the right to enforce the clause.'[477]

The foundation case in this area is *The Angelic Grace*[478]since it has been cited and followed by many later authorities.[479] Another reason why it is important for the thesis is that the problem cases had a conflict when it comes to whether *The Angelic Grace* applies under the conditional benefit doctrine context. In *The Yusuf Cepnioglu*, a conflict was spotted that *The Angelic Grace* was applied in *The Jay Bola* but was not applied in *The Hari Bhum (No.1)*.[480] In the present case, the parties before the court were the owners of the ship the *Angelic Grace* and the charterers. Under the charterparty,

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[474] (1992) 57 BLR 1, at pages 31 and 32

[475] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281

[476] [2013] 2 Lloyd's Rep 281, at para 21

[477] *Turner v Grovit* [2002] 1 WLR 107, at para 25

[478] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87

[479] *The Jay Bola* [1997] 2 Lloyd's Rep 279, at page 285; *The Hari Bhum (No.1)* [2005] 1 Lloyd's Rep 67, at para 67; *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281, at para 25; *Youell v Kara* [2000] 2 Lloyds Rep 102, at para 44; *Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanski)* [2002] 1 Lloyds Rep 106, at para 110. Note that *The Hari Bhum (No.1)* expressly provided that *The Angelic Grace* [1995] 1 Lloyd's Rep 87 did not apply to that case. ([2005] 1 Lloyd's Rep 67, at para 95)

[480] [2016] EWCA Civ 386, at para 32

there was an arbitration clause providing all disputes arising out of the contract shall be referred to London Arbitration. The dispute arose because of a collision between The Angelic Grace and a vessel owned by the charterers. The owners started arbitration proceedings in London. After that, the charterers started court proceedings in Italy in tort and the owners disputed the action in Italy for a declaration that all the claims and courter-claims arising out of the contract should be dealt with in London Arbitration. The owners then started the current court proceedings for the decision of two questions, namely

> 'whether the claims and counterclaims made or anticipated in the London arbitration and Italy were within the arbitration clause and thus within the jurisdiction of the London arbitrators and whether an injunction should be granted restraining the charterers from continuing their proceedings in Italy.'[481]

The judge of first instance granted a permanent anti-suit injunction on the basis of vexation.[482]

In the Court of Appeal, Millett J held on the court's power to grant anti-suit injunctions restraining breach of contract that

> '[i]n my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court *in breach of an arbitration agreement* governed by English law, the English Court need feel no difference in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and an

[481] [1995] 1 Lloyd's Rep 87, at page 87.

[482] [1995] 1 Lloyd's Rep 87, at page 87.

> exclusive jurisdiction clause…The jurisdiction for the grant of the injunction in either case is that without it the plaintiff will be *deprived of its contractual rights* in a situation in which damages are manifestly an inadequate remedy.'[483]

Therefore, in the opinion of the Court of Appeal, when a contracting party starts foreign court proceedings, English court may issue an anti-suit injunction on the basis of *breach of contract*. It is to be noted that there was concurrent existence of breach of exclusive dispute resolution agreements and unconscionable misconduct under the narrower construction in *The Angelic Grace*[484].[485] Leggatt L.J. held that the charterers will maintain the Italian proceedings even if English court holds that the claim is arbitrable and that the sole reason for the Italian proceeding was to relitigate the question of the scope of the arbitration agreements.[486] Subsequently, he affirmed the first instance judgement that an anti-suit injunction is available because of the charterers had behaved vexaciously.[487] The approach in *The Angelic Grace* is not hard to understand because the breach of contract in that case is also for the purpose of abusing the dispute resolution process.[488] In other words, the facts of the case fall under the situation where the breach of the exclusive dispute resolution agreement is accompanied by some other unconscionable elements under the narrower construction. Therefore, the effect of the case as an authority on anti-suit injunctions against breach of contract is not disrupted by the unconscionability element.

The Angelic Grace itself is a Court of Appeal authority, but it has received support from

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[483] [1995] 1 Lloyd's Rep 87, at page 96. This approach was also confirmed by Neill L.J. in the same court. ([1995] 1 Lloyd's Rep 87, at page 97) See also the first instance judgment in *The Front Comor*. (*The Front Comor* [2005] 2 Lloyd's Rep. 257, at para 67, 68)

[484] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87

[485] For the narrower interpretation of unconscionability, see later section 6.4.1.3

[486] *The Angelic Grace* [1995] 1 Lloyd's Rep 87, at page 91, 92

[487] *The Angelic Grace* [1995] 1 Lloyd's Rep 87, at page 96

[488] *The Angelic Grace* [1995] 1 Lloyd's Rep 87, at page 91, 92

both the House of Lords and the Supreme Court.[489] In *Donohue v Armco*[490], the House of Lords held that 'where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing them from it.'[491] In that particular case, the concerned measure under which effect will be given to such exclusive jurisdiction clause was an anti-suit injunction.[492] Subsequently, the House of Lords was essentially stating that anti-suit injunctions should normally be granted against parties departing from exclusive jurisdiction clauses binding on them. The same conclusions was also reached in *Ust*[493]where Lord Mance in the Supreme Court held that 'it was well established that the English courts would give effect to it, where necessary by injuncting foreign proceedings brought in breach of either an arbitration agreement or an exclusive choice of court clause.'[494] Following this judgment, there is no doubt that, under English Law, an anti-suit injunction can be granted against a claimant suing in breach of an arbitration agreement or an exclusive jurisdiction agreement.

In *Pena Copper*[495], there was a breach of an arbitration agreement by the injunction defendant's suing in Spain. The applicant started English court proceedings for an anti-suit injunction. Cozens-Hardy MR recognised that the agreement does exist between the applicant and the respondent and that 'there is certainly an *implied negative of the agreement*.'[496] He then held that the court has the jurisdiction to grant anti-suit

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[489] Note that *The Angelic Grace* [1995] 1 Lloyd's Rep 87 was also directly cited and relied on in *Ust*. (*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281, at para 25)

[490] *Donohue v Armco Inc and Others* [2002] 1 Lloyd's Rep 425

[491] [2002] 1 Lloyd's Rep 425, at para 24. This approach in *Donohue v Armco* was affirmed by a later authority *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft* [2011] EWHC 345 (Comm), at para 35.

[492] [2002] 1 Lloyd's Rep 425.

[493] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281

[494] [2013] 2 Lloyd's Rep 281, at para 23.

[495] *Pena Copper Mines, Ltd v Rio Tinto Co, Ltd* [1911-13] All ER Rep 209.

[496] [1911-13] All ER Rep 209, at page 215.

injunctions when a party to an arbitration agreement proceeds in a foreign court in breach of contract that '[i]t is beyond all doubt that this Court has jurisdiction to restrain the Rio Tinto Co [the respondent] from commencing or continuing proceedings in a foreign court if those proceedings are in *breach of contract*'[497]

Therefore, anti-suit injunctions are grantable when there is breach of arbitration agreements or exclusive jurisdiction agreements.[498] It is submitted that the justification of the unity seems to be English Court's hostility toward breach of contract[499], or more specifically toward the 'deprivation of contractual rights'. First, the wording 'deprived of its contractual rights' was expressly used in *The Angelic Grace*.[500] Also, in *Donohue v Armco*, it was expressly held that the justification for an anti-suit injunction restraining breach of contract is based on the principle that contractual parties should fulfil their obligations.[501] One party's obligation is also the other party's right. Therefore, such an anti-suit injunction is still a measure to protect the innocent party's contractual right in the eyes of the House of Lords. Also, an apparent conclusion can be reached by examining the above statements that the definition of breach of contract adopted by the Court of Appeal is 'derivation of contractual rights'.[502] Later in the present thesis, these anti-suit injunctions will be referred to as anti-suit injunctions against breach of contract, or anti-suit injunctions against breach of exclusive dispute

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[497] [1911-13] All ER Rep 209, at page 213.

[498] Tiered dispute resolutions agreements may also be the enforced subject matter of an anti-suit injunction. In *Channel Tunnel*, the breach of tiered dispute resolution clause with the final stage being arbitration still justified the stay of action. (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334, at paras 345G, 352B, 353A, 355A) Given the close connection between stay of action and anti-suit injunctions, the same rule can probably apply in anti-suit injunction cases.

[499] [1911-13] All ER Rep 209, at page 213.

[500] [1995] 1 Lloyd's Rep 87, at page 96.

[501] [2002] 1 Lloyd's Rep 425, at para 24.

[502] See also *Continental Bank* where an anti-suit injunction similar to the one in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 was said to be restraining the injunction defendant's breach of contract. The only difference is that the anti-suit injunction in that case was restraining the deprivation of contractual rights contained in an exclusive jurisdiction agreement. (*Continental Bank v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588, at page 598 E)

resolution agreements.

6.3.4.2 The Subject Enforced by Anti-Suit Injunctions Restraining the Breach of Exclusive Dispute Resolution Agreements—The Negative Aspect of Arbitration Agreements

The negative aspect of exclusive jurisdiction agreements is included in the title of the entire thesis. It was mentioned that the fact that arbitration agreements have a negative aspect is the reason why they provide procedural defensive rights which can be realised by the negative enforcement measures.[503] Anti-suit injunction is certainly one of those. When providing English Courts' capacity to enforce arbitration agreements with anti-suit injunctions, the Supreme Court in *Ust* first cited and relied on *Pena Copper* and confirmed that approach and *Donohue v Armco* that, under arbitration agreements, there is '"probably an express negative, but…certainly an implied negative", a contract "that they will not sue in a foreign court"'.[504] The Supreme Court in *Ust* then provided that the anti-suit injunctions in *The Angelic Grace* restraining the deprivation of contractual rights is following the approach in *Pena Copper*.[505] In other words, the breach of contract ground for anti-suit injunctions established in *The Angelic Grace* is essentially enforcing the negative aspect of exclusive jurisdiction agreements. The Supreme Court then cited *Donohue v Armco* where the negative aspect and the enforcement of the negative aspect was reinstated by the House of Lords.[506] Subsequently, it is submitted by the thesis that anti-suit injunctions restraining breach of contract is a measure of enforcing the negative aspect of the exclusive dispute resolution agreements including arbitration agreements.

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[503] See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281, at para 21. See also *The Anti-Suit Injunctions* where it is provided that '[t]here is a *legal right* to enforce a valid contractual forum clause governed by English Law'. (*The Anti-Suit Injunction*, at para 3.08)

[504] [2013] 2 Lloyd's Rep 281, at para 24.

[505] [2013] 2 Lloyd's Rep 281, at para 25.

[506] *Ust* [2013] 2 Lloyd's Rep 281, at para 25.

6.3.4.3 The Subject Matter Sought to be Enforced by Quasi-Contractual Anti-Suit Injunctions

After the discussions on the nature of the principle of subject to equities, it becomes possible to investigate the nature of the subject matter enforced by quasi-contractual anti-suit injunctions. It has been mentioned earlier in the thesis that whatever defence available to the debtor when the enforcing party is an originally entitled party will still be available to the debtor when the enforcing party is a third party.[507]

On the other hand, it has also been submitted that the negative aspect of arbitration agreements can provide defence to an innocent party who wishes to bring their disputes in front of the designated arbitral tribunal.[508] Under quasi-contractual situations where the third parties are bound by arbitration agreements, the defences certainly would have been available to the debtor if the enforcing party is the original contracting party.[509] Subsequently, the principle of subject to equities will then bring the negative aspect of the arbitration agreements into the picture to provide the same defence. As a result, the debtor would still be enforcing the negative aspect of the arbitration agreements under the third party situations at hand.

6.3.4.4 Conclusions on Quasi-Contractual Anti-Suit Injunctions as a Subject Falling within the Existing Grounds for Anti-Suit Injunctions

From the above analysis on the breach of contract ground for anti-suit injunctions, subject matters enforced by anti-suit injunctions restraining breach of contract and the subject matters enforced by quasi-contractual anti-suit injunctions, it is submitted that quasi-contractual anti-suit injunctions are still anti-suit injunctions restraining breach

[507] Section 3.5

[508] See section 3.4.4.2.3

[509] See section 3.5.2

of contract. Also, quasi-contractual anti-suit injunctions are still anti-suit injunctions restraining breach of contract and that the threshold for breach of contract[510]should be crossed in the given conditional benefit situations.[511]

6.3.5 Conclusions on the Theoretical Availability of Quasi-Contractual Anti-Suit Injunctions under the Conditional Benefit Doctrine

Following the above analysis on the threshold for quasi-contractual anti-suit injunctions, several issues have been clarified. First, the proposition has received supportive view from academia and the House of Lords[512]. Secondly, from the effect of the principle of subject to equities on third parties, an arguable positive conclusion on the availability of quasi-contractual anti-suit injunctions can also be submitted. Thirdly, evidence provided by authorities has suggested that the so-called quasi-contractual anti-suit injunctions under the meaning of the thesis falls within the existing ground for anti-suit injunctions restraining breach of contract. In conclusion, it is submitted that quasi-contractual anti-suit injunctions should be theoretically available to the debtor when third parties are bound by exclusive dispute resolution agreements including arbitration agreements as a result of the conditional benefit doctrine and act inconsistently.

6.4 The Theoretical Availability of Anti-Suit Injunctions in All Three Problem Cases under the Clarified Threshold for Quasi-Contractual Anti-Suit Injunctions

It has been submitted earlier in the thesis that the principle of subject to equities should have applied in all three problem cases and that the arbitration agreements should have

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[510] See *The Angelic Grace* [1995] 1 Lloyd's Rep 87, at page 96; see also section 6.3.4.1.

[511] See also the first instance judgment in *The Front Comor* where *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and *The Jay Bola* line of authorities were said to concentrate on the deprivation of the original contracting parties' contractual rights to bring actions to the designated tribunal. (*The Front Comor* [2005] 2 Lloyd's Rep. 257, at para 67, 68)

[512] *The Front Comor* has compromised authoritative effect since the case was eventually resolved in ECJ on another ground. (*The Front Comor* [2009] 1 Lloyd's Rep 413, at para 15)

been imposed on the respective third parties as equities.[513] However, in all three cases, the respective third parties had acted inconsistently with the arbitration agreements.[514] Following the above submissions on the threshold of quasi-contractual anti-suit injunctions, a natural result would be that there was breach of contract in all three cases and the anti-suit injunctions should have been granted according to *The Angelic Grace* and *Donohue v Armco* line of authorities.[515]

6.5 The Irrelevance of Unconscionability in *The Jay Bola*

Following the reaching of a theoretical conclusion on the availability of quasi-contractual anti-suit injunctions in the three problem cases, there is a residual issue. The thesis has mentioned that in both *The Yusuf Cepnioglu* and *The Jay Bola*, the judgments involved unconscionable misconduct and that the Court of Appeal granted the anti-suit injunctions based on the finding of unconscionability in the facts.[516] In *Turner v Grovit*[517], it was provided by Lord Hobhouse that unconscionability itself is operative for an anti-suit injunction independently.[518] Therefore, for the precision of the conclusion reached in section 6.4, it is of importance to exclude the influence of unconscionability as a potential variant. In other words, it is important to understand whether the concept of unconscionability has any effect on the conflicting judgments in the three problem cases. If the first question is to be answered in the positive, a following question is what is the influence.

6.5.1 Different Interpretations of the Concept 'Unconscionability' under English Law

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[513] See sections 4.5, 5.6

[514] See section 2.2.3

[515] See section 6.3.4.1

[516] *The Yusuf Cepnioglu* [2015] EWHC 258, at para 74; *The Jay Bola* [1997] 2 Lloyd's Rep 279, at page 286; Also point to earlier section

[517] *Turner v Grovit and others (Reference to ECJ)* [2002] 1 W.L.R. 107

[518] [2002] 1 W.L.R. 107, at para 25.

Under English Law, there are different interpretations of the concept unconscionability.

6.5.1.1 Unconscionability as a Flexible Concept and The Possibility of Adopting Different Interpretations of the Concept under English Law

Before investigating the meaning of unconscionability in *The Jay Bola*, it is important to understand that the definition of unconsicionability is not a definite one under English Law, thus providing the Courts with flexibility when interpreting the term. In many authorities involving anti-suit injunctions against unconscionability, the sub-grounds relied on is that the claimant in the foreign proceedings has committed vexatious and/or oppressive behaviour. Also, in *Lee Kui Jak*[519], it was held that, to establish unconscionability, there is no need to establish both vexation and oppression. It is sufficient to establish one of them.[520] Therefore, vexation and oppression can give rise to unconscionabiity and further satisfy the threshold for anti-suit injunctions.

However, the relationship between the concept unconscionability and vexation & oppression do not stop here. In *McHenry v Lewis*[521], Bowen L.J. concurring Jessel M.R. commented on vexation that

> 'I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case.'[522]

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[519] *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] A.C. 871

[520] [1987] A.C. 871, at page 893~894, para 899F.

[521] *McHenry v Lewis* (1882) 22 Ch. D. 397

[522] (1882) 22 Ch. D. 397, at page 408.

Also, in the High Court of *The Yusuf Cepnioglu*[523], Teare J held that '[a]s a matter of principle it seems to me that the question of whether proceedings are vexatious or oppressive will depend upon their effect on the defendant to them'.[524] Therefore, the interpretation of vexation and oppression is flexible. Subsequently, it is sensible that there may be more than one interpretations of unconscionability under English law given the flexibility. Case law has indeed demonstrated the different tendency.

6.5.1.2 The Wider Interpretation of the Concept Unconscionability within Equity

There are authorities suggesting a wide interpretation of unconscionability. What is important about this traditional wide interpretation of unconscionability is that it includes breach of contract. In *Understanding Equity & Trust*, it is provided that

> 'we will identify three key forms of unconscionable action that will merit the imposition of a proprietary constructive trust: first, actions seeking to breach a voluntary agreement or negotiations in relation to commercial contracts; second, actions abusing the rights of some other person…'.[525]

The same statement was also provided in *The Anti-Suit Injunction* that 'if unconscionability is interpreted broadly, so as to refer to anything equity will restrain, it follows trivially that, as equity will restrain a breach of contract, the breach of contract is in that sense unconscionable.'[526] Therefore, this traditional wide interpretation of unconscionability certainly includes breach of contract. Subsequently, if there is no other potential ground for anti-suit injunctions to be found in *The Jay Bola*, it can then be arguably submitted that the reason why there was unconscionability in *The Jay Bola*

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[523] *Shipowners' Mutual Protection and Indemnity Assiciation(Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret A.S. (The Yusuf Cepnioglu)* [2015] EWHC 258

[524] [2015] EWHC 258, at para 71. Note that the case then went to the Court of Appeal where the anti-suit injunction was granted on breach of contract basis and the unconscionability argument was avoided.

[525] Alastair Hudson, *Understanding equity and trusts*, 5th ed, 2015, at page 105.

[526] *The Anti-Suit Injunction*, at page 179, footnote 32.

is the breach of contract.

6.5.1.3 The Introduction of a Narrower Interpretation of the Concept Unconscionability Post- *'South Carolina'*

From the analysis in the previous section, the construction of the concept unconscionability in anti-suit injunction context or even equity context generally can be a rather wide one which has the tendency of including breach of contract. However, it was provided by the volume *The Anti-Suit Injunction* that '[t]he tendency to square the circle by equating vexation or oppression (or unconscionability) with breach of contract is neat but unsound. There may well be nothing vexatious or oppressive or unconscionable about a breach of contract'.[527] Subsequently, there is certainly justifications for the existence of a narrower interpretation of the concept of unconscionability where breach of contract is not included.

6.5.1.3.1 *South Carolina* and the House of Lords

As a matter of fact, case law has already introduced a narrower interpretation of unconscionability. S37(1) of the Supreme Court Act 1981 provides that '[t]he High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.' The application of the section was provided in *South Carolina*[528]where Lord Brandon, after stating the courts' general power to grant injunctions, provided the special features of the courts' jurisdiction to grant anti-suit injunctions in different situations and the injunctions themselves.[529] Among the others, the first feature is that English Courts'

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[527] *The Anti-Suit Injunction*, at para 7.12.

[528] *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV* [1987] A.C. 24

[529] For another express recognition of the application of s37(1) of the 1981 Act in anti-suit injunction cases, see *Youell v Kara* [2000] C.L.C. 1058, at para 41; See also *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281, at para 20.

power to grant anti-suit injunctions is a part of the general power to grant injunctions under s37(1) of the Senior Courts Act 1981. The second feature is that the application of the courts' power to grant anti-suit injunctions under s37(1) has been circumscribed to two titles, namely

> '(1) when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. (2) where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable.'[530]

Therefore, in *South Carolina*, the House of Lords demonstrated their attitude that certain grounds for anti-suit injunctions should be separated from the concept of unconscionability. This lays the foundation for the introduction of a narrower interpretation of unconscionability in later cases.

6.5.1.3.2 *Toepfer v Societe* and the Court of Appeal

In *Toepfer v Societe Cargill*[531], the Court of Appeal recognised that the two grounds for anti-suit inunctions are

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[530] *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV* [1987] A.C. 24 [1987] A.C. 24, at para 40 B, C. This 'two-ground approach' was also the opinion of the volume '*The Anti-Suit Injunction*' where it is provided that '[i]njunctions will be predominantly granted in two main situations: first, 'contractual' injunctions, where foreign proceedings are in breach of a contractual forum clause providing for the exclusive jurisdiction of the English courts or for London arbitrations; and second, 'alternative forum' cases, where foreign proceedings overlap with matters that are being ligated or can be litigated in England, and are also vexatious and oppressive (or unconscionable) for a variety of reasons.', at para 1.09 and *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft* [2011] EWHC 345 (Comm), at para 34. Note that the two-ground approach has been shifting to a particular direction.

[531] *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] C.L.C. 198

> '(1) The English court has a discretionary power to restrain by injunction a breach of contract. (2) The English court has recently asserted, in relation to those subject to English jurisdiction, the power to restrain by injunction the pursuit of proceedings in a foreign jurisdiction where such conduct is unconscionable: see *British Airways Board v Laker Airways Ltd* [1985] AC 58; *Midland Bank plc v Laker Airways Ltd* [1986] QB 689 ; *Airbus Industrie GIE v Patel* [1997] CLC 197 .'[532]

Nevertheless, the Court then continued that 'Cargill [the injunction defendant] has done nothing *intrinsically unconscionable* in commencing proceedings in France.' [533] Therefore, it is clear that the Court of Appeal held the opinion that, under modern English rules governing anti-suit injunctions, breach of contract ground is separated from unconscionability. The unconscionability in the context of anti-suit injunctions should only include 'intrinsically unconscionable' conducts and breach of contract is not one of them.

The preliminary conclusion in the previous paragraph is further tested by analysing the three cases that the Court of Appeal in *Toepfer* referred to. From the fact that *British Airways Board v Laker Airways Ltd* [1985] AC 58, *Midland Bank plc v Laker Airways Ltd* [1986] QB 689 and *Airbus Industrie GIE v Patel* [1997] CLC 197 were cited as authorities, it seems the Court of Appeal was of the opinion that the unconscionable misconducts concerned in those cases are intrinsically unconscionable. *It is to be noted that in none of the three cases did unconscionability include breach of contract.* In *British Airways*[534]*,* it was provided that

> '[i]f so, the decision was justifiable on the ground that the vexatious character of the proceedings against the American company was that its inclusion as

[532] [1998] C.L.C. 198, at page 6.

[533] [1998] C.L.C. 198, at page 6.

[534] *British Airways Board v Laker Airways Ltd* [1985] AC 58

defendants in the American proceedings was made *mala fide* for the sole purpose of laying an *ostensible* foundation for American jurisdiction for the claim against the English Company.'[535]

Therefore, the unconscionability in the context of *British Airways* entails the meaning of bad faith and fraudulent behavior. In *Airbus*[536], the House of Lords mentioned the Court of Appeal decision delivered by Hobhouse L.J. The unconscionability was put under several situations including *forum non conveniens*, inappropriate liabilities to the defendant in the foreign proceedings, as well as obtaining illegitimate and unjust advantages by the plaintiff in the foreign proceedings.[537] The unconscionable conduct in *Midland Bank*[538], on the other hand, also concerns *forum non conveniens*.[539] This further confirms the fact that the Court of Appeal in *Toepfer* separated breach of contract ground for anti-suit injunctions from unconscionability and that the interpretation of unconscionability adopted in *Toepfer* is narrower for that reason.

6.5.1.3.3 The Relationship Between the Breach of Contract Ground and the Invasion of Legal or Equitable Rights Ground for Anti-Suit Injunctions

Note that the narrower interpretation of unconscionability adopted in *Toepfer* is not inconsistent with the decision in *South Carolina*[540]. On the contrary, the invasion of legal or equitable rights ground in *South Carolina* embraces the breach of contract ground in *Toepfer*.

The Complicated Nature of Contractual Rights

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[535] [1985] AC 58, at page 86 G.

[536] *Airbus Industrie GIE v Patel* [1997] CLC 197

[537] [1997] CLC 197, at page 130 D~G. Note that the unconscionability issue was avoided eventually. (*Airbus Industrie GIE v Patel* [1997] CLC 197, at page 141 D)

[538] *Midland Bank plc v Laker Airways Ltd* [1986] QB 689

[539] [1986] QB 689, at para 700 H, 704 F, G.

[540] *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV* [1987] A.C. 24

The thesis has mentioned that contractual rights can be equitable or contractual in nature from the perspective of existing authorities.[541] There is evidence suggesting that the potential legal or equitable nature of rights contained in exclusive dispute resolution agreements are retained under anti-suit injunction context.

In *Charterer's Mutual*[542], the judge cited *The Jay Bola* and recognised that an anti-suit injunction enforcing an arbitration agreement is restraining the infringement of the legal rights of the debtor.[543] In *Continental Bank*[544], the Court described the right contained in an exclusive jurisdiction agreement enforced by an injunction claimant as a legal right.[545]

On the other hand, the rights enforced by the debtor against third parties by applying for an anti-suit injunction under the conditional benefit doctrine can be equitable as well from a different perspective. The background for this proposition is that the defining difference between legal and equitable rights is whether the rights were pursued under common law or equity.[546] To enforce those rights under a set of facts which is the same as that in the three problem cases, the debtor needs to rely on the principle of subject to equities and anti-suit injunction rules. Due to the principle of subject to equities, an original contracting party can enforce a contractual arbitration agreement on third parties. The principle of subject to equities originated from assignment which was originally an equitable rule.[547] Therefore, the right is pursued under equity. Secondly, anti-suit injunctions themselves are inherently equitable

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[541] See sections 3.4.4.1.3, 3.4.4.1.4

[542] *The Charterers Mutual Assurance Association Limited v British & Foreign and T.M.M. Transcap* [1998] I.L.Pr. 838

[543] [1998] I.L.Pr. 838, at para 44, 46.

[544] *Continental Bank v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588

[545] [1994] 1WLR 588, at page 598 E. See also *Youell v Kara* [2000] C.L.C. 1058, at para 41, 44.

[546] *The Law of Assignment*, at para 2.95.

[547] See footnote 127 of the present thesis

remedies. In *Airbus*[548], one of the proceeding parties argued that '[t]he purpose of the jurisdiction [anti-suit injunctions] is to provide an equitable remedy for injustice when the relevant intervention is consistent with notions of international comity'. [549] Therefore, under quasi-contractual anti-suit injunction context, the contractual rights they are enforcing should be considered as equitable rights since they are pursued under equity.[550] This is certainly what happened in *The Jay Bola*. In that case, the Court of Appeal provided that '[t]he insurance company [the assignee] is failing to recognize the equitable rights of the charterers. The equitable remedy for such an infringement is the grant of an injunction'.[551] Also, in *The Anti-Suit Injunction*, it was further provided that

> '[f]or example, if an assignee attempts to enforce his assigned contractual right independent of an exclusive forum clause which is binding on the right assigned, the debtor will have an *equitable right* to enforce the exclusive forum clause: *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279 (CA)'[552]

This is further confirmed by the same volume's recognition that the right was pursued under equity. Commenting on *The Jay Bola*, it was provided in *The Anti-Suit Injunction* that

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[548] *Airbus Industrie GIE v Patel* [1997] CLC 197

[549] [1997] CLC 197, at page 124 B

[550] There are two reasons why quasi-contractual anti-suit injunction application claim is equitable. First, the debtor cannot enforce the arbitration agreement on a non-party. Due to the common law privity of contract doctrine. However, due to the principle of subject to equities, an original contracting party can enforce. The principle of subject to equities originated from assignment which was originally an equitable rule. (see footnote 127 of the present thesis) Therefore, the right is pursued under equity. Secondly, anti-suit injunctions themselves are inherently equitable remedies. In *Airbus*, one of the proceeding parties argued that '[t]he purpose of the jurisdiction [anti-suit injunctions] is to provide an equitable remedy for injustice when the relevant intervention is consistent with notions of international comity'. (*Airbus Industrie GIE v Patel* [1997] CLC 197, at page 124 B)

[551] See section 2.2.3 of the present thesis which set out the Court of Appeal judgment in *The Jay Bola*.

[552] *The Anti-Suit Injunction*, at para 3.09, footnote 27.

> '[i]n some specific cases, such as assignment, the third party's attempt to evade the contractual jurisdiction clause will be inconsistent with an established substantive equity, such as the equitable principle that an assignee is subject to the equities that bind an assignor'.[553]

There is then a conflicting position when it comes to the characterisation of the debtor's contractual right which is the negative aspect of arbitration agreements under a principle of subject to equities situation.[554] Therefore, the conclusion is that the negative aspect of arbitration agreements, or exclusive dispute resolution agreements in general, can be either a legal right or an equitable right depending on the approach of characterisation.

An Overarching Judgment by the House of Lords because of the Confusion

Given the possible legal or equitable nature of contractual rights, it is rather probable that the breach of contract ground defined by *The Angelic Grace*[555] fall within the invasion of legal or equitable rights ground for anti-suit injunctions. Or a more extreme presumption can be created that the invasion of legal or equitable ground for anti-suit injunction in *South Carolina* is particularly oriented at the invasion of legal or equitable contractual rights and that the two grounds for anti-suit injunctions in *South Carolina*[556] are essentially the same as that in *Toepfer*[557].[558] The reason for the usage of the 'legal or equitable' wording is to provide an overarching rule to cover this

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[553] *The Anti-Suit Injunction*, at para 10.08, footnote 18.

[554] The conflict is further demonstrated from the fact that both *The Jay Bola* and *Youell v Kara* [2000] 2 Lloyds Rep 102 concern an anti-suit injunction application based on the respective dispute resolution agreements under a third party situation while the Courts reached different conclusion on the characterisation of the debtors' right. (see the material in the present section)

[555] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, at page 96.

[556] *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV* [1987] A.C. 24

[557] *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] C.L.C. 198

[558] [1995] 1 Lloyd's Rep 87, at page 96.

complicated area.

6.5.1.4 The Application of the Wider Construction of 'Unconscionability' in *The Jay Bola* and the Irrelevance of the Concept to the Thesis

It has been mentioned earlier in the thesis that the Court of Appeal held that there were instances of unconscionable misconducts in *The Jay Bola*.[559] To answer the question whether the involvement of the unconscionability affected the unity of the three problem cases on the nature of the anti-suit injunctions applied for. The apparent question to be answered is which construction of the concept unconscionability was adopted in *The Jay Bola*. If the unconscionability adopted was a narrower construction which does not include breach of exclusive dispute resolution agreements, *The Jay Bola* can then be distinguished from the other two problem cases and be considered separately. However, if the construction adopted was the wider construction and that the breach of arbitration agreements itself was considered to be unconscionable, *The Jay Bola* should still be examined with the other two problem cases.

In *The Jay Bola*, there was no sign of recognised unconscionable misconduct other than the potential breach of arbitration agreement by the claimant in the foreign court proceedings. Two observations can be made. Firstly, the Court of Appeal in *The Jay Bola* did not recognise any other conduct of the injunction defendant satisfying the threshold of anti-suit injunctions except for the breach of contract. Secondly, in *The Anti-Suit Injunction*, it was commented that the ground for the anti-suit injunction application in *The Jay Bola* was invasion of equitable contractual rights. In *The Anti-Suit Injunction*, it was provided that '[h]owever, they [certain equitable rights supporting the grant of anti-suit injunctions in non-contractual context] are not sufficiently road to support the vast bulk of cases where anti-suit injunctions are

[559] See section 2.3.1; *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279, at page 286.

granted'.[560] In footnote 27 supporting this statement, it was further provided that '[f]or example, if an assignee attempts to enforce his assigned contractual right independent of an exclusive forum clause which is binding on the right assigned, the debtor will have an *equitable right* to enforce the exclusive forum clause: *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279 (CA)'[561] This is also strengthened by *The Jay Bola* itself where it was provided that 'the application of the time charterers for an injunction has been made to protect a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognize.'[562] Therefore, it is apparent that the volume holds the opinion that the ground for anti-suit injunction relied on by the Court of Appeal in *The Jay Bola* was invasion of contractual equitable rights.[563] Therefore, it is arguable to conclude that the interpretation of unconscionability adopted in *The Jay Bola* was the wider one.

The above arguable conclusion can be further supported by examining the Court of Appeal decision in *Toepfer v Societe Cargill*. It has been mentioned that the Court in that case adopted a narrower interpretation of unconscionability.[564] On the other hand, when commenting the conduct of the injunction defendant, the Court of appeal in that case provided that

> '[t]he only ground on which objection can be taken to such conduct is that it is in conflict with Cargill's contractual agreement to arbitrate: see *Schiffahrtsgesellschaft Detlef von Appen mbH v Wiener Allianz Versicherungs AG* [1997] CLC 993 at p. 1009. Furthermore, the claims for declarations make

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[560] *The Anti-Suit Injunction*, at para 3.09

[561] *The Anti-Suit Injunction*, at para 3.09, footnote 27

[562] [1997] 2 Lloyd's Rep 279, at page 286

[563] Note that this further demonstrates the House of Lords' intention that the invasion of legal or equitable rights ground is meant for contractual anti-suit injunctions and quasi-contractual anti-suit injunctions in *South Carolina*. For a reinstatement of this opinion in the same volume, see para 4.21~4.25.

[564] See section 6.4.1.3.2

it plain that Toepfer's [the injunction claimant] application to the English court was founded on their contractual rights.'[565]

Therefore, *Toepfer v Societe Cargill* was of the opinion that the only conduct to be prevented by the injunction in *The Jay Bola* was the breach of contract.[566] This conclusion was also further confirmed by the Court of Appeal in *The Yusuf Cepnioglu*. In that case, it was provided that

'[t]he commencement of proceedings contrary to the arbitration clause is, I would suggest, sufficiently vexatious and oppressive, or at any rate sufficiently unconscionable and unjust, to provide sufficient grounds for the court's intervention by way of the equitable remedy of an injunction.'[567]

However, this conclusion was reached by applying *The Jay Bola* which is the subject case of the present section.[568] This further confirms the fact that the reason for the finding of unconscionability in *The Jay Bola* is the third party's breach of contract.

As a conclusion of the above analysis in the present section, it is submitted that the construction of unconscionability adopted by the Court of Appeal in *The Jay Bola* was the wider construction. The Court essentially held that the alleged breach of arbitration agreement gave rise to unconscionability by itself. Subsequently, the ground for the

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[565] [1998] C.L.C. 198, at page 6. Note that the case cited in this statement is *The Jay Bola* under a different citation.

[566] See also *Charterer's Mutual* where one of the proceeding parties alleged that '[a]ny action which either deprives a party to an English law contract of his contractual right to arbitrate or which deprives a party to an English Law contract of a defence available to him under English law by virtue of a *Scott v Avery* clause in that contract invades the legal or equitable rights of that party and is to be regarded as unconscionable'. (*The Charterers Mutual Assurance Association Limited v British & Foreign and T.M.M. Transcap* [1998] I.L.Pr. 838, at para 33) Note that the proposition was invoked by relying on *The Jay Bola*. (*Charterers Mutual Assurance Association Ltd v British & Foreign* [1998] I.L.Pr. 838, at page 13, footnote 7)

[567] [2016] EWCA Civ 386, at para 55.

[568] [2016] EWCA Civ 386, at para 55.

anti-suit injunction application in *The Jay Bola* was still based on only the alleged breach of arbitration agreement and the case is not distinguished from the other two problem cases on this issue. Thus, the fact that unconscionability was mentioned in *The Jay Bola* is irrelevant to the discussion in the present thesis.

6.6 The Reasons behind the Conflicting Judgments in the Three Problem Cases

Up until now, the thesis has assessed the facts and judgments on the third party issues of the three problem cases.[569] Based on the consistent decisions on the third party issues, the thesis reached the conclusions that there should have been breach of contract in all three of them and anti-suit injunctions should have been granted.[570] However, as has been mentioned, in *The Hari Bhum(No.1)*[571] and *The Yusuf Cepnioglu*[572], it was held that there was no breach of contract. Furthermore, no anti-suit injunction was granted in *The Hari Bhum(No.1)*. It is apparent that only the judgment in *The Jay Bola* is consistent with the theoretical result. Also, it has been mentioned that the decision in *The Jay Bola* is in line with the established principles on the relevant third party issues and anti-suit injunction issues and that the Explanatory note 34 of the 1999 Act expressly cited it as a valid authority.[573] Thus, it is reasonable to assume that *The Jay Bola*[574] adopted the correct approach. There are then two possibilities left for this inconsistency. First, the third party issues in *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* had been decided wrongly. Secondly, the thesis only analysed the facts of *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* that the Court of Appeal took into consideration expressly and reached the theoretical conclusion that the judgments on

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[569] See section 2.2

[570] See section 6.5

[571] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[572] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[573] See section 3.2

[574] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

the third party issues and the anti-suit injunction issues should be consistent within the three problem cases. However, it is possible that there are certain facts in the cases which would distinguish the later two cases from *The Jay Bola*. The present section will subsequently investigate the possibilities. The cause of the conflicting judgments in the three problem cases will then become clear.

6.6.1 The Reluctance of the Court of Appeal in *The Yusuf Cepnioglu*

It will be mentioned later in the present thesis that there were some elements disrupting the application of the principle of subject to equities in *The Hari Bhum (No.1)*.[575] Thus, the judgment on the third party issue in that case may not be completely reliable. In *The Yusuf Cepnioglu*, there were no such elements disrupting the application of the principle of subject to equities. Therefore, no identifiable third party issues require further consideration exist in *The Yusuf Cepnioglu*.

On the anti-suit injunction decision, however, it is to be noted that the Court of Appeal did not directly provide a definite conclusion on whether there was a breach of contract in *The Yusuf Cepnioglu.*[576] However, the Court of Appeal did indirectly recognise the approach in *The Jay Bola* by choosing it over *The Hari Bhum(No.1)* and the anti-suit injunction was granted eventually.[577] Therefore, this discrepancy will not significantly affect the authoritative effect of *The Jay Bola*.

Subsequently, it is submitted by the thesis that the conflicting factors introduced by *The Yusuf Cepnioglu* is essentially given rise by the conflicting judgments between *The Jay Bola* and *The Hari Bhum (No.1)*.

6.6.2 The Relatively Independent Position of *The Hari Bhum (No.1)*

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[575] See section 6.6.2

[576] [2016] EWCA Civ 386, at para 32.

[577] [2016] EWCA Civ 386, at para 33.

The conflict between *The Jay Bola* and *The Hari Bhum (No.1)* is rather significant.[578] Both the decisions on the third party issue and the decision on the anti-suit injunction in *The Hari Bhum (No.1)* require reconsideration. Three matters will be discussed in the present section. The first one is the effect of the foreign statute relied on by the third party in *The Hari Bhum (No.1)* on the application of the conditional benefit doctrine, or the effect of the conditional benefit doctrine on the arbitration agreement. The second one is the facts in the case which may have influenced the decision of the Court of Appeal on the grant of the anti-suit injunction given the discretionary nature of the remedy. The third one is the lateness in the application for an anti-suit injunction. On the fourth issue, the thesis will discuss the influence of the third parties attempt to avoid the respective pay to be paid clause in the original contracts in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*.

6.6.2.1 The Non-Conferral of the Arbitration Agreement in *The Hari Bhum (No.1)*

In the above analysis, the thesis has managed to link 'the third party's being bound by the arbitration agreements in the respective cases to the conditional benefit doctrine.[579] After that, it has been submitted that the origin principle of the conditional benefit doctrine is the principle of subject to equities.[580] Combining those two conclusions, it is then apparent that the arbitration agreements should be considered as having the effect of an equity clause under the principle of subject to equities. As has been concluded earlier in the thesis, the arbitration agreement in *The Hari Bhum(No.1)* should have been conferred on the third party insurer by the principle of subject to equities theoretically.[581] However, there is evidence suggesting that the arbitration

[578] See section 2.2.3; Also, in *The Yusuf Cepnioglu*, a conflict was spotted that *The Angelic Grace* [1995] 1 Lloyd's Rep 87 was applied in *The Jay Bola* but was not applied in *The Hari Bhum (No.1)*. As a result, the Court of Appeal had to choose one of them. ([2016] EWCA Civ 386, at para 32, 33)

[579] See section 3.2

[580] See section 3.6

[581] See section 5.6

agreement in *The Hari Bhum(No.1)* was never conferred on the third party as an equity clause under the principle of subject to equities.

As was recognised by the Court of Appeal, the foreign statute in *The Hari Bhum (No.1)* has the effect of rendering void the arbitration agreement in the original contract.[582] Therefore, in *The Hari Bhum (No.1)*, the claim arose under the Finish statute and the statute precluded the application of the arbitration agreement before the principle of subject to equities took any effect on the arbitration agreement. This conclusion is supported by *The Anti-Suit Injunction* where it was provided that '[t]he judgment in *Through Transport* was expressed cautiously, and strictly speaking it only directly decides the case of the particular Finish statute in question'.[583] Thus, even if the principle of subject to equities does apply and the claim could fall under the arbitration agreement, still the arbitration agreement will not be imposed on the third party because the arbitration agreement was void. Therefore, it is arguable to conclude that the effect of the principle of subject to equities on the third party in relation to the arbitration agreement was successfully avoided in *The Hari Bhum (No.1)*.[584] Subsequently, a second consideration could be given to the Court of Appeal's holding that the third party insurer in the present case was bound by the arbitration agreement at hand.

6.6.2.2 The Exercise of the Discretion in *The Hari Bhum (No.1)*

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[582] [2005] 1 Lloyd's Rep 67, at para 59, 17.

[583] *The Anti-Suit Injunction*, at para 10.17

[584] Note that *The Hari Bhum (No.1)* is not the only cases where the Court held that foreign statutes have the power to influence the relationship between contractual terms and a third party enforcing contractual benefits under the same contract relying on the said foreign statutes. The same was also provided in *The Prestige (No.2)* where the effect of the foreign statute was taken into account when deciding whether the claims brought based on the statute is contractual in nature and be subject to the arbitration agreement contained in the main contract. ([2015] 2 Lloyd's Rep 33), at para 24. See also the first instance judgment in *The Front Comor* where the Court took into consideration of Italian Law when deciding the arbitrability of the dispute in the third party claim in Italy. (*West Tankers Inc v Ras Riunione Adriatica de Sicurta SpA and Anr (The Front Comor)* [2005] EWHC 454, at para 32)

Anti-suit injunctions are discretionary remedies. Evidence can be found in multiple authorities. First, anti-suit injunctions have their origin in common injunctions. It is provided in the volume *The Anti-Suit Injunction* that '[t]he anti-suit injunction originally evolved from the 'common injunction' by which the English Court of Chancery had restrained litigants before the English common law courts from obtaining judgments which were contrary to the principle of equity'.[585] Furthermore, common injunctions are equitable and discretionary remedies. It is provided in the volume *Injunctions* that '[t]he same is not true of an injunction which, being an equitable remedy, is within the court's discretion…The jurisdiction remains discretionary even where the defendant (in disciplinary proceedings, for example) has acted in breach of the rules of natural justice; the court may still decline to grant an injunction in such cases.'.[586] Thus, it is natural that anti-suit injunctions, although have evolved with the development of the law, preserve the discretionary nature. The second piece of evidence can be found in s37(1) of the Senior Courts Act 1981. As has been mentioned above, the provision is the codification of English Courts' power to grant injunctions including anti-suit injunctions.[587] The section provides that '[t]he High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so'. In particular, the wording 'may' is essentially giving the Courts the option to either issue an injunction or not. Also, the wording 'it appears to the court' means that the Court can decide what is 'just and convenient'. Furthermore, the discretionary nature is certainly preserved when it comes to anti-suit injunctions against breach of contract. In *The Anti-Suit Injunctions*, it was provided that '[e]ven when foreign proceedings are in breach of an exclusive forum clause, the decision whether or not to grant an anti-suit injunction is always discretionary'[588] Also, in *Toepfer v Societe Cargill* where the Court of Appeal provided that one of the two grounds for anti-suit injunctions is '(1) The English Court

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[585] *The Anti-Suit Injunction*, at para 2.02

[586] David Bean, *Injunctions*, 2010, 10th ed, at para 2.02

[587] See section 6.4.1.3.1

[588] *The Anti-Suit Injunction*, at para 7.08.

has a discretionary power to restrain by injunction a breach of contract'.[589] Furthermore, case law has provided that, at the discretionary stage, further elements may be taken into consideration.[590] Therefore, anti-suit injunctions against breach of contract are discretionary in nature and English Courts may decide whether to issue an anti-suit injunction according to the facts of each case.

6.6.2.2.1 The 'Good Reason' Approach as a Guidance on How the Discretion Should Be Exercised in Breach of Contract Cases

The caution requirement is a general guidance on how the discretion should be exercised when it comes to the grant of anti-suit injunctions. For anti-suit injunctions restraining breach of contract, case law has provided a more specific one.

In *The Angelic Grace*, after giving the courts' power to grant anti-suit injunctions in breach of contract cases, the Court of Appeal continued that '[t]he jurisdiction is, of course, discretionary and is not exercised as a matter of court, but *good reason* needs to be shown why it should not be exercised in any given case.'[591] An identical judgment was also given by the House of Lords in *Donohue v Armco* where Lord Bingham held that 'where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation *in the absence of strong reasons* for departing them from it.'[592] Therefore, the 'good reason' defence can be a valid argument to be brought up by the injunction defendant at the discretionary stage.

In the volume *The Anti-Suit Injunction*, it was summarised that the strong reasons which

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[589] *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] C.L.C. 198, at page 6

[590] See *Starlight Shipping Co v Tai Ping Insurance Co Ltd Hubei Branch (The Alexandros T)* [2008] 1 Lloyd's Rep 230; *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425; *Glencore v Exter* [2002] C.L.C. 1090, at para 43; *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] C.L.C. 198, at page 6

[591] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, at page 96.

[592] *Donohue v Armco Inc and Others* [2002] 1 Lloyd's Rep 425, at para 24.

can stop the grant of anti-suit injunctions include 'reasons relating to the nature of the clause, factors relating to the nature of the litigation, considerations relating to the conduct of the injunction claimant, and principles of comity.' [593] Therefore, international comity could certainly be a strong reason to stop the granting of anti-suit injunctions.

6.6.2.2.2 The Caution Requirement for International Comity Consideration

Anti-suit injunctions act *in personam* and are addressed to the claimant in foreign proceedings rather than the foreign Courts. [594] However, that does not mean the discretion can be exercised without restrictions. In *South Carolina*, it was held that '[s]uch jurisdiction is, however, to be exercised with caution because it involves indirect interference with the process of the foreign court concerned.'[595] On the other hand, international comity conveys the meaning that 'different nations, and in particular their courts and legal systems, owe each other mutual and reciprocal respect, sympathy and deference, where appropriate.' [596] This definition apparently embraces the concerns expressed by the House of Lords in *South Carolina*[597]. Understanding the above two statements together, a conclusion can be reached that, by stating that anti-suit injunctions should be granted with caution, the House of Lords in *South Carolina* was essentially holding that English Courts should have further consideration before granting anti-suit injunctions even if the grounds are satisfied. This is indirectly recognising the caution requirement at the discretionary stage. Given the similar depiction of the caution requirement in *South Carolina* and international comity, it is arguable to conclude that *international comity is one of the matters which should be*

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[593] *The Anti-Suit Injunction*, at para 8.03.

[594] *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] A.C. 871, at page 892; *Turner v Grovit and others (Reference to ECJ)* [2002] 1 W.L.R. 107, at para 23.

[595] *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV* [1987] A.C. 24, at para 40 D.

[596] *The Anti-Suit Injunction*, at para 1.11.

[597] [1987] A.C. 24, at para 40 D.

taken into consideration at the discretionary stage.

6.6.2.2.3 The Power of International Comity in Cases on Anti-Suit Injunctions Restraining Breach of Contract

There is the possibility that the international comity consideration at the discretionary stage is only superficial. In *The Anti-Suit Injunction*, it was stated that '[i]t is unlikely, at least for the foreseeable future, that the English courts will accept that the barriers imposed by comity, even in non-contractual cases, should be raised high enough sharply to limit their powers to grant anti-suit injunctions.'[598] Therefore, an English Court normally does not give much emphasis on comity when granting anti-suit injunctions.[599] However, English courts are not completely ignorant toward the preventive effect of comity. In a later chapter of the volume *The Anti-Suit Injunction*, it was stated that 'the closer the connection of the litigation with England and the English court, and the more tenuous the link to the foreign jurisdiction, the weaker will be the inhibitions imposed by comity on the grant of the injunction.'[600] In *Airbus*[601], it was provided that comity requires anti-suit injunctions to be granted when English Court 'have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction requires.[602] Besides, international comity was expressly reserved as a reason against the grant of anti-suit injunctions in breach of contract cases.[603] Therefore, the preventive effect of

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[598] *The Anti-Suit Injunction*, at para 1.35.

[599] See also *Glencore v Exter* for the preventive power of international comity under breach of contract cases. (*Glencore v Exter* [2002] C.L.C. 1090, at para 43) See also *Ust* where the power of international comity was held to be rather limited under breach of contract cases (*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281, at para 25) See also *The Yusuf Cepnioglu* where it was provided that comity plays even less important a part when the claim is brought by a third party relying on a foreign statute. (*The Yusuf Cepnioglu* [2016] EWCA Civ 386, at para 34)

[600] *The Anti-Suit Injunction*, at para 4.48.

[601] *Airbus Industrie GIE v Patel* [1997] CLC 197

[602] [1997] CLC 197, at page 138 H

[603] *The Anti-Suit Injunction*, at para 8.03; *Airbus Industrie GIE v Patel* [1997] CLC 197, at page 124 B

international comity on anti-suit injunctions is a continuous spectrum. Also, when there are foreign elements involved, no matter how trivial the effect is, it always exists.

There are also discussions on the effect of international comity in breach of contract cases from case law. In *The Angelic Grace*, it was held that 'I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.'[604] This is negating the power of international comity in breach of contract cases. On the other hand, *Ust*[605], citing *Sakana Industries Inc v Freyre & Co Inc* [1994] 2 Lloyd's Rep 57, 66, Colman J recognised that '[b]y the 1990s it had come to be thought that the power to injunct foreign proceedings brought in breach of contract should be exercised "only with caution"'.[606] Furthermore, it is to be noted that the caution requirement in *South Carolina* is an overarching requirement[607] and *South Carolina* is a House of Lords authority. Therefore, the emphasis to be put on the above judgment in *The Angelic Grace* is limited.

Thus, the discouraging effect of international comity in anti-suit injunctions in breach of exclusive dispute resolution agreement cases is further confirmed.

6.6.2.2.4 The International Comity Issue in Anti-Suit Injunctions under EU Context

Under the Brussels Convention 1968, the principle of mutual trust is provided under recital 16 and 17 that '16: Mutual trust in the administration of justice in the Community

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[604] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, at page 96.

[605] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281

[606] [2013] 2 Lloyd's Rep 281, at para 25. See also *Lee Qui Jak* where the Privy Council recognised the caution requirement by relying on *In re North Carolina Estate Co. Ltd* (1889) 5 T.L.R. 328 and *Cohen v Rothfield* [1919] 1 K.B. 410. (*Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] A.C. 871, at page 892 E)

[607] [1987] A.C. 24, at para 40 D.

justices judgments given in a member state being recognised automatically without the need for any procedure except in cases of dispute…17: By virtue of the same principle of mutual trust, the procedure for making enforceable in one member state a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.'; In the EC Jurisdiction Regulation (Recast), the principle of mutual trust seems to have been retained in recital 26, although the statement providing it is less comprehensive. Based on the content provided in the Brussels Convention 1968 itself, the European Court of Justice provided the definition of mutual trust in *Turner v Grovit*[608]that 'each state recognises the capacity of the other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration.'[609] The principle was also the ultimate reason why the anti-suit injunction in respect of court proceedings in another member state was considered to be incompatible with the Brussels Convention and prevented by the European Court of Justice in *Turner v Grovit* and *The Front Comor*.[610]

Comparing the definition of mutual trust and international comity[611], it is obvious that they share the same effectual features. First, they function among different nations. Secondly, their function essentially is requiring different nations to respect each other's judicial systems. Thirdly, both of them have the power to prevent the intervention of a second acting judicial system.[612] Nonetheless, there is a major and apparent difference

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[608] *Turner v Grovit* Case C-159/02 [2004] 2 Lloyd's Rep 169

[609] Case C-159/02 [2004] 2 Lloyd's Rep 169, at para 31.

[610] Case C-159/02 [2004] 2 Lloyd's Rep 169, at page 101 G, paras 24~27, 31; [2009] 1 Lloyd's Rep 413, at para 15

[611] See section 6.6.2.2.2 mentioning the definition of international comity

[612] For the the preventive effect of international comity (spectrum), see section 6.6.2.2.3; For the preventive effect of mutual trust, see *Turner v Grovit* Case C-159/02 [2004] 2 Lloyd's Rep 169, at para 31.

between the principle of mutual trust and international comity. International comity merely requires the the legal systems in different jurisdictions *to not interfere* while mutual trust requires the legal systems in different jurisdictions *to recognise* the conduct of each other. This explains why the principle of mutual trust has the absolute effect of preventing the grant of anti-suit injunctions within convention member states[613]while international comity does not seem to have any definite preventive effect. Therefore, it is submitted that the principle of mutual trust has the effect of an enhanced and stricter version of international comity.

However, it is to be noted that outside the Brussels Regime context, international comity may not have the definite preventive power against anti-suit injunctions, but still merely a discouraging factor. In both *The Front Comor* and *Turner v Grovit*, the English Courts did not seem to have been bothered by the EU element and were prepared to grant the anti-suit injunctions before referring the compatibility issue[614]to the European Court of Justice.[615]

6.6.2.2.5 The Existence of the 'International Comity Issues' in *The Hari Bhum (No.1)*

The international comity elements in *The Hari Bhum (No.1)* may have functioned as a contributing preventive factor toward the particular anti-suit injunction applied for.

The foreign court proceedings brought by the third party in *The Hari Bhum (No.1)* took place in Finland which is a Lugano Convention member state. However, the Brussels Regime was held to be irrelevant to the present case. The Brussels Regime excludes

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[613] *Turner v Grovit* Case C-159/02 [2004] 2 Lloyd's Rep 169, at para 24; *The Front Comor* [2008] 2 Lloyd's Rep 661 *The Front Comor (ECJ)* [2009] 1 Lloyd's Rep 413, at para 30, 32.

[614] Here the compatibility issue defined in the present thesis is 'whether it is consistent with the Brussels Regimes for English Courts to grant anti-suit injunctions (including ones enforcing arbitration agreements) in respect of Court proceedings in another member state'.

[615] [2002] 1 W.L.R. 107, at para 17, 18, 27, 34, 25; [2005] 2 Lloyd's Rep. 257, at para 67, 68; *The Front Comor* [2007] UKHL 4, at para 8.

arbitration matters from the jurisdiction of the statutes. In the Lugano Convention itself, Article 1(4) provides that '[t]he Convention shall not apply to arbitration.'[616]

The European Court of Justice Judgment in *The Front Comor* as not given yet when *The Hari Bhum (No.1)* reached the Court of Appeal. In *The Front Comor*, the ECJ recognised that the anti-suit injunctions like the one in the present case are caught by the EC Jurisdiction Regulation.[617] Therefore, the Court of Appeal in *The Hari Bhum (No.1)* could consider the grantability of the anti-suit injunction. In the end, Clarke L.J. confirmed the judgment in another case that 'Brussels Convention does not apply to any court proceedings or judgements in which the principal focus of the matter is arbitration.' This means the questions 'whether the shipper's insurer is bound by the arbitration agreement' and 'whether an anti-suit injunction should be issued against the shipper's insurer' should be answered independently from the Brussels Convention.[618]

Nonetheless, it is submitted that the EU elements in *The Hari Bhum (No.1)* still influenced the decision reached by the Court of Appeal. The reason is that such an anti-suit injunction is not compatible with the Regulation as is provided by later authorities[619]. However, since the Court of Appeal did not expressly recognise the effect of the European elements, it had to follow the judgment in *Ivan Zagubanski*[620], *Toepfer v Cargill*[621]and *The Angelic Grace*[622]where the view toward Art1(4) of the Brussels Convention was that when a set of proceedings in breach of an arbitration agreement is

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[616] The equivalent articles with the same material in The Brussels Convention 1968 and the EC Jurisdiction Regulation (Recast) are respectively Art1(4) and Art1(2)(d).

[617] *West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa (The Front Comor)* [2009] 1 Lloyd's Rep 413 (ECJ), at para 26~28

[618] [2005] 1 Lloyd's Rep 67, at para 44.

[619] See *The Front Comor* [2009] 1 Lloyd's Rep 413 (ECJ), at para 32; A more general judgment on anti-suit injunctions in respect of Court proceedings in Brussels Regime member states was given in *Turner v Grovit*. ([2005] 1 A.C. 101, at para 17, 31, 37)

[620] *Navigation Maritime Bulgare v. Rustal Trading Ltd & Others (The Ivan Zagubanski)* [2002] 1 Lloyd's Rep 106.

[621] *Alfred C Toepfer International GmbH v Societe Cargill France* [1998] C.L.C. 198.

[622] [1995] 1 Lloyd's Rep 87.

brought in a member state of the Convention, an anti-suit injunction can still be granted. On the other hand, as later authority *STX*[623]suggested that the court in *The Hari Bhum (No.1)*[624]was still influenced by the EU matter.[625] Therefore, even if the issues in the present case fall outside of the Brussels Regime, the international comity between the states still influenced the decision of the Court of Appeal.

The present thesis has submitted that even if the international comity consideration will not be able to completely negate the possibility of granting anti-suit injunctions in any given case, it is certainly a discouraging factor.[626] Also, the discouraging factor survives in breach of contract context. Furthermore, the discouraging effect is stronger if the court proceedings are commenced in a Brussels Regime member state. In the present context, even if the international comity consideration in *The Hari Bhum (No.1)* was not a killing factor against the grant of the anti-suit injunction when the case was decided, it certainly discouraged the Court of Appeal.

6.6.2.3 A Delay in the Application

The last reason why the anti-suit injunction application was rejected in *The Hari Bhum (No.1)*[627]is that there was a delay in the application. It was observed in *STX* that the application for the anti-suit injunction in *The Hari Bhum (No. 1)*[628]was made lately.[629] Nevertheless, in the foundational authority for anti-suit injunctions restraining breach

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[623] *STX Pan Ocean Co Ltd v Woori Bank* [2012] 2 Lloyd's Rep. 99

[624] [2005] 1 Lloyd's Rep 67.

[625] [2012] 2 Lloyd's Rep. 99, at para 13. See also *The Front Comor* [2005] 2 Lloyd's Rep 257, at para 59~72; *The Yusuf Cepnioglu* [2016] EWCA Civ 386, at para 33; Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed, 2006, at para 16-092, footnote 37.

[626] See section 6.6.2.2.3 mentioning the spectrum and the trivial effect of international comity in non-EU cases.

[627] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[628] [2005] 1 Lloyd's Rep 67.

[629] [2012] 2 Lloyd's Rep. 99, at para 13.

of contract, *The Angelic Grace*, it was held that a pre-requisite for the grant of such anti-suit injunctions is that 'it is sought promptly'.[630] Therefore, it is probable that the lateness in *The Hari Bhum (No.1)* is another contributing reason why the injunction was not granted eventually.

6.6.2.4 The Influence of the Third Parties' Attempt to Avoid the Respective Pay-to-be-Paid Clause in the Original Contracts in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*

Beside the three reasons mentioned in sections 6.6.2.1, 6.6.2.2 and 6.6.2.3. There is another variant to be excluded. In both *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, there was a pay-to-be-paid clause involved in the contract between the third party and the originally entitled party. (reference) Such a clause will have the effect of frustrating a third party's direct action against the insurer since the insurer's liability only arises after the insured pays the third party for the loss suffered. (reference) In *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, the third parties could be attempting to avoid the pay-to-be-paid clause by prosecuting in the foreign Courts. However, since the anti-suit injunction was granted in *The Yusuf Cepnioglu* but not in *The Hari Bhum (No.1)*, the element does not seem to be the cause of the conflicting decisions on anti-suit injunction applications in the two cases.

6.6.3 Conclusions on the Cause of the Conflicting Judgments in the Three Problem Cases

Following the above analysis in the present chapter, it appears that the conflicting judgments in the three cases are not mistakes made by the Court of Appeal. Behind the decisions, there were indeed rational explanations which were not expressly provided by the Court of Appeal. *The Yusuf Cepnioglu* involves the application of the conditional

[630] [1995] 1 Lloyd's Rep 87, at page 96. This approach was also expressly cited in *Ust*. ([2013] 2 Lloyd's Rep 281, at para 25)

benefit doctrine. However, until the decision was made, there was still no clear authorities on whether the conditional benefit doctrine can apply outside the context of assignment. It is then reasonable that, the Court of Appeal, although was more in favour of *The Jay Bola*, did not go as far as holding that the bound third party under the conditional benefit doctrine will be in breach of contract if it acts inconsistently with the arbitration agreement in issue. On the other hand, in *The Hari Bhum (No.1)*, the foreign statute relied on by the third party arguably excluded the application of the English principle of subject to equities on the arbitration agreement concerned. That means the fundamental ground for the grant of quasi-contractual anti-suit injunctions is not satisfied. Furthermore, even if the arbitration agreement in the main contract indeed came into the picture, there was an international comity consideration at the discretionary stage combining with a delay in application in *The Hari Bhum (No.1)*. These elements combining with each other eventually resulted into the rejection of the anti-suit injunction application. Nonetheless, the Court of Appeal did not put these elements into words and reached the same conclusion from another perspective[631] which resulted into the seemingly conflicting decisions in *The Hari Bhum (No.1)* and *The Jay Bola*.

[631] It has been mentioned earlier in the thesis that Court of Appeal in *The Hari Bhum (No.1)* still reached the conclusion that there was not breach of contract even if the third party acted against the binding arbitration agreement. (see section 2.2.3) ([2005] 1 Lloyd's Rep 67, at para 64, 95, 98)

Chapter 7

Stay of Action Enforcing the Negative Aspect of Arbitration Agreements under the Conditional Benefit Doctrine

7.1 Introduction to Chapter Seven

The conditional benefit doctrine is a rather new concept under English law. Within the past several decades, discussions surrounding it have been an on-going phenomenon. Traces of it can be found in various areas. The conflicting judgments at the Court of Appeal level in *The Jay Bola*, *The Hari Bhum(No.1)* and *The Yusuf Cepnioglu* are one of them. Nevertheless, the area is by no means the only difficult subject where a problematic issue was caused or made worse by the conditional benefit doctrine. Therefore, following the resolution of the conflicting judgments in the three problem cases, guidance will also be provided on the clarification of other related issues and even the general development of the law in the relevant area. Difficulties caused by the conditional benefit doctrine were also demonstrated by two other Court of Appeal cases *Nisshin Shipping*[632]and *Fortress Value*[633]. It has been mentioned earlier in the thesis that an anti-suit injunction can be a measure of enforcing the negative aspect of exclusive dispute resolution agreements including arbitration agreements.[634] Stay of action, on the other hand, is another measure of enforcing the negative aspect of arbitration agreements. The Court of Appeal authority *Fortress Value* and its relationship with *Nisshin Shipping* demonstrate the necessity to analyse the grantability issue of stay of action enforcing arbitration agreements. The thesis will then move on to provide that there is clear availability of stay of action enforcing arbitration

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[632] *Nisshin Shipping Co Ltd v Cleaves & Co Ltd (QBD (Comm Ct)* [2004] 1 Lloyd's Rep 38.

[633] *Fortress Value Recovery Fund I Llc & Ors. (Respondents) v Blue Skye Special Opportunities Fund Lp & Ors. (Appellants)* [2013] 1 Lloyd's Rep 606.

[634] See section 6.3.4.1 and *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281, at para 21

agreements against bound third parties under the conditional benefit doctrine.

Since *Fortress Value* and *Nisshin Shipping* only concern one side of the stay of action matter under the conditional benefit doctrine. Other aspects of the area will also be considered in the present section for completion. Therefore, the present chapter will first provide the nature of stay of action as a measure to enforce the negative aspect of exclusive dispute resolution agreements. This clarifies the connection of the present chapter to the title of the entire thesis. The thesis will then proceed to provide the two possible contexts where stay of action maybe pursued under the conditional benefit doctrine. The resolution of the conflict introduced by *Fortress Value* and *Nisshin Shipping* and the impact of the result will then be provided.

7.2 Stay of Action as Another Measure to Enforce the Negative Aspect of Exclusive Dispute Resolution Agreements

Case law has provided that stay of action is another measure to enforce the negative aspect of arbitration agreements. The first type of stay of action enforcing arbitration agreements is provided by s9 of Arbitration Act 1996.[635] The second type is the stay of action under the Courts' inherent power. The Courts' power to statutory stay is rather straightforward. On English Courts' power to grant inherent stay of action, The volume *The Conflict of Laws* provided that 'English courts have an inherent jurisdiction, reinforced by *statutes*, to stay or strike out proceedings, whenever it is necessary to prevent injustice. The court also has an inherent power to order a stay to await the outcome of proceedings in a foreign court or arbitration in the exercise of case management.'[636] The footnote of this statement further points to Senior Courts Act 1981 s49(3) which reserved the Courts' power to grant inherent stay of action.

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[635] The content of s9 will be set out later in the thesis.

[636] *The Conflict of Laws*, 15th ed, at para 12-006

In *Ust*[637], Lord Mance held that

> 'it was well established that the English courts would give effect to it, where necessary by injuncting foreign proceedings brought in breach of either an arbitration agreement or an exclusive choice of court clause. Further, such relief was treated as the counterpart of the statutory power to grant a stay of domestic proceedings to give effect to an arbitration agreement'[638]

In a later paragraph, he also held that

> '[t]he power to stay domestic legal proceedings under section 9 and the power to determine that foreign proceedings are in breach of an arbitration agreement and to injunct their commencement or continuation are in truth opposite and complementary sides of a coin.'[639]

Up until now, the Supreme Court stated that statutory action under s9 of the 1996 Act is closely related to anti-suit injunctions enforcing exclusive dispute resolution agreements. The Court then gave the defining statement which connected all the dots that

> 'it is *inconceivable* that the 1996 Act intended or should be treated *sub silentio* as effectively abrogating the protection enjoyed under section 37 in respect of their negative rights under an arbitration agreement by those who stipulate for an arbitration with an English seat'.[640]

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[637] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281

[638] [2013] 2 Lloyd's Rep 281, at para 23.

[639] [2013] 2 Lloyd's Rep 281, at para 60.

[640] [2013] 2 Lloyd's Rep 281, at para 60. In the same case, para 22 provided that the enforcement of the negative aspect of arbitration agreements already exited 'prior to' the 1996 Arbitration Act.

Therefore, the Court expressly provided that the stay under the 1996 Act manifested from the Courts' inherent power provided by s37 of the 1981 Act and that they can both be the measure of enforcing the negative aspect of arbitration agreements.[641]

7.3 Two Possible Contexts Where a Stay of Action May be Pursued under the Conditional Benefit Doctrine

In the conditional benefit doctrine context in the thesis, the applicant for stay of action can be either an original contracting party or a third party. The first situation requires less effort to comprehend. Had the third party in *The Jay Bola*[642]started one set of Court proceedings in England, the remedy available to the shipowner would have been stay of action. The thesis will discuss the availability of such stay of action in the following section. The second situation where the grantability of stay of action may be discussed under the conditional benefit context is when the third party under the conditional benefit doctrine becomes a party to the arbitration agreement and an original contracting party started Court proceedings in an English Court. Question arises whether such stay of action should be granted against a bound third party who acted inconsistently with the binding arbitration agreement.

7.4 Clear Availability of Stay of Action against Third Parties Bound by Arbitration Agreements under the Conditional Benefit Doctrine

Since there are two types of stay of action enforcing arbitration agreements under the present thesis, the grantability of them will also be considered separately.

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[641] In fact, the inherent power to stay an action also survives the 1996 Act statutory stay and that it is possible the threshold for the two types of stay are concurrently satisfied in one set of facts. See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334, at 351 H, at 352 A, B; *A v B* [2007] 1 Lloyd's Rep 237, at para 107; *Racecourse Betting Control Board v Secretary of State for Air* [1944] Ch. 114, at page 126.

[642] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

7.4.1 The Availability of Statutory Stay of Action against Third Parties Bound by Arbitration Agreements under the Conditional Benefit Doctrine

The conditional benefit doctrine plays an important role in mandatory stay of action enforcing arbitration agreements under s9 of the 1996 Act.[643] The threshold for statutory stay of action enforcing arbitration agreements under the meaning of the thesis is provided in s9 of the 1996 Act that

> '(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) *in respect of a matter which under the agreement is to be referred to arbitration* may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter…(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.'

Therefore, for an arbitration agreement to be caught by s9 of the 1996 Act, it has to govern the dispute between the eligible parties. On the other hand, it has been submitted that the mechanism behind arbitration agreements' capacity to be equity clauses under the principle of subject to equities, hence conditions under the conditional benefit doctrine, is that they cover the substantive disputes between the third parties and the original contracting parties.[644] Therefore, once the context is set in statutory stay of action enforcing arbitration agreements under the conditional benefit doctrine, the

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[643] See *Rumput (Panama) S.A. v Islamic Republic of Iran Shipping Lines (The Leage)* [1984] 2 Lloyd's Rep 259 and the analysis on the case in the present thesis at section 5.3.1. See also *Fortress Value Recovery Fund I Llc & Ors. (Respondents) v Blue Skye Special Opportunities Fund Lp & Ors. (Appellants)* [2013] 1 Lloyd's Rep 606 and explanatory note 34 of the 1999 Act.

[644] See section 5.4

binding arbitration agreements certainly govern the substantive matters between the third party and the original contracting party. Subsequently, upon the third parties' bringing court proceedings against the original contracting parties ignoring the binding arbitration agreements, the requirement in s9(1) is satisfied. The default availability of stay of action to the original contracting parties is then proved.

7.4.2 The Availability of Inherent Stay of Action against Third Parties Bound by Arbitration Agreements under the Conditional Benefit Doctrine

The thesis has submitted earlier that inherent stay of action can be applied for to enforce the negative aspect of arbitration agreements.[645] Also, such a remedy was granted by the House of Lords in *Channel Tunnel*.[646] Unlike the clear instructions provided under statutory stay, the threshold for inherent stay enforcing arbitration agreements receives guidance from various cases.

In *Al-Naimi*, Waller L.J. held that 'a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters but can see that *good sense and litigation management* makes it desirable for an arbitrator to consider the whole matter first.'[647] In *The Fehmarn*, Willmer J held that

> 'it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, prima facie, this court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is *just and proper* to do so.'[648]

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[645] See section 7.2

[646] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334, at paras 345G, 352B, 353A, 355A

[647] *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] C.L.C. 647, at page 5.

[648] [1957] 1 W.L.R. 815, at page 819.

In *Reichhold*[649], Moore-Bick J held on the threshold of stay of action against breach of contract that 'I do accept, however, that such a step should only be taken if there are *very strong reasons* for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the plaintiff.'[650] This good reason approach was also adopted by the House of Lords in *Channel Tunnel* where it was provided that contracting parties can depart from exclusive dispute resolution agreements if they 'show *good reasons* for departing from them'[651] Therefore, the existing literature leaves a variety of options. Nonetheless, there is a common feature of those propositions. English Courts are given the power to decide what is desirable 'good sense and litigation management', when it is 'just and proper' and whether 'good reasons for departing from' exclusive dispute resolution agreement are shown. Therefore, similar to that in anti-suit injunction context[652], the Courts have a discretion over the matter. This result is within expectation since it has been mentioned earlier that the inherent power to stay is included in s37(1) of the 1981 Act and the section follows a 'just and convenient' approach.[653] Subsequently, the discretionary nature of stay of action under the inherent power is certain.

However, the finding of the various thresholds of inherent stay of action above does not provide direct resolution for the purpose of the thesis. In the absence of a clear threshold, it is rather difficult to reach a conclusion on whether inherent stay of action can be granted under the conditional benefit doctrine based on the guidance provided in those cases. Nonetheless, after knowing that inherent stay is discretionary, it is then possible to compare this type of stay with remedies that possess similar features. The grantability of those measures under the conditional benefit doctrine will then shed light on the

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649 *Reichhold Norway ASA v Goldman Sachs International* [1999] C.L.C. 486.

650 [1999] C.L.C. 486, at page 6.

651 [1993] A.C. 334, at 353 C.

652 See section 6.6.2.2

653 See section 7.2; [2013] 2 Lloyd's Rep 281, at para 60

grantability of inherent stay of action under the conditional benefit doctrine. On the other hand, the fact that inherent stay of action enforcing arbitration agreements is discretionary in nature also introduces the possibility of other elements influencing the grant of the remedy.[654] Nonetheless, the grantability of such stay under the conditional benefit doctrine can be approached by comparing the measure with relevant remedies with similar features.

7.4.2.1 The Lower Threshold of Inherent Stay than That of Statutory Stay

It has been mentioned earlier in the thesis that a third party under the conditional benefit doctrine can be a respondent to the statutory stay of action.[655] Therefore, if inherent stay of action has a lower threshold than statutory stay of action, a third party caught by the conditional benefit doctrine will equally have the possibility of being subject to inherent stay of action.

Evidence of the relatively lower threshold of inherent stay of action can be found in *Channel Tunnel*[656]. Note that the statutory stay considered in the present case was that under s1 of the 1975 Act. However, s1 of the 1975 Act and s9 of the 1996 Act have materially the same content except for the eligible applicant. Therefore, comparing the threshold of the statutory stay under s1 of the 1975 Act and that of inherent stay still provides sufficient guidance on the comparison between the threshold of the statutory stay under s9 of the 1996 Act and that of inherent stay. The above analogy arises because third parties bound by arbitration agreements under the conditional benefit doctrine will also trigger the application of s1 of the 1975 if they act inconsistently with

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[654] Similar to what happened in *The Hari Bhum (No.1)* where the anti-suit injunction could have been granted for the satisfaction of the preliminary ground, but was then rejected at the discretionary stage. (see section 6.6.2.2)

[655] If the third party action is brought under the 1999 Act and that s8(1) applies, the third party is certainly an eligible respondent to a statutory stay under s9 of the 1996 Act. That is provided under Explanatory 34 of the 1999 Act. (see section 3.2 of the present thesis for the content of the note)

[656] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 33

the arbitration agreements.[657] Therefore, if conclusions on the threshold of s1 of the 1975 Act and inherent stay can be reached, the purposes of the present section will then be achieved. Guidance is provided by *Channel Tunnel*. The House of Lords, after providing that inherent stay of action survives statutory stay of action under s1 of the 1975 Act, was also ready to hold that the threshold of s1 of the 1975 was satisfied.[658] However, Lord Mustill particularly provided that 'I would be willing to hold, in company with the Court of Appeal, that the respondents are entitled to a stay under the Act of 1975, but prefer to reach the same practical result by what seems to me the simpler and more natural route by way of the inherent jurisdiction.'[659] Therefore, since there was a question as to whether the dispute resolution agreement in that case constitutes an arbitration agreement under the 1975 Act[660], the House of Lords felt more confident to grant a stay of action under the Court's inherent power and finally granted the inherent stay of action. Subsequently, it is submitted that inherent stay of action has a lower threshold than statutory stay of action. Therefore, if a statutory stay of action can be granted against a third party bound by an arbitration agreement under the conditional benefit doctrine, the threshold of the remedy under the inherent jurisdiction should also be satisfied in an equivalent situation.

7.4.2.2 The Hostility Toward Breach of Contract and the Connection between Stay of Action and Anti-Suit Injunctions Enforcing Exclusive Dispute Resolution Agreements

It has been mentioned that the policy justification of anti-suit injunctions enforcing exclusive dispute resolution agreements is English law's hostility against breach of contract.[661] It has also been concluded earlier in the thesis that anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine are still anti-

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[657] See *(The Leage)* [1984] 2 Lloyd's Rep 259 and the analysis on the case in the present thesis at 5.3.1

[658] [1993] A.C. 334, at para 353 H, 355 A.

[659] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 33, at para 353 A, 355 A

[660] [1993] A.C. 334, at para 353 E.

[661] See section 6.3.4.1

suit injunctions in respect of contract.[662] Furthermore, such anti-suit injunctions can be granted when the third parties are bound by the arbitration agreements under the conditional benefit doctrine.[663]

As a matter of fact, stay of action enforcing exclusive dispute resolution agreements are closely connected to anti-suit injunctions enforcing exclusive dispute resolution agreements.[664] Lord Mance in *Ust*[665] provided two important statements about the relationship between stay of action and anti-suit injunctions under the breach of contract ground. The judge held that

> 'it was well established that the English courts would give effect to it, where necessary by injuncting foreign proceedings brought in breach of either an arbitration agreement or an exclusive choice of court clause. Further, such relief was treated as the counterpart of the statutory power to grant a stay of domestic proceedings to give effect to an arbitration agreement'[666]

He went on later that

> '[t]he power to stay domestic legal proceedings under section 9 and the power to determine that foreign proceedings are in breach of an arbitration agreement and to injunct their commencement or continuation are in truth opposite and complementary sides of a coin.'[667]

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[662] See section 6.3.4.4

[663] See section 6.3.5

[664] Note that some of the authorities mentioned in the present sections are actually on statutory stay of action. However, since the present section is comparing stay of action and anti-suit injunctions restraining breach of contract generally, the authoritative effect of them is not compromised.

[665] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281

[666] [2013] 2 Lloyd's Rep 281, at para 23.

[667] [2013] 2 Lloyd's Rep 281, at para 60.

Therefore, stay of action and anti-suit injunctions enforcing arbitration agreements are generally closely associated with each other. This is not a surprising conclusion since the policy justification for their existence within English law is essentially the same. It has been mentioned earlier in the thesis that case law has recognised that the policy justification for anti-suit injunctions enforcing exclusive dispute resolution agreements is English Courts' hostility toward breach of contract.[668] The same has also been provided by case law for stay of action. In *Racecourse Betting*[669], Lord Greene M.R. stated that

> '[i]t is, I think, rather unfortunate that the power and duty of the court to stay the action was said to be under s4 of the *Arbitration Act 1889*. In truth, that power and duty arose under a wider general principle, namely, that the court makes people *abide by their contracts*, and therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.'[670]

On the policy justification behind English Courts' inherent power to stay in particular, the House of Lords in *Channel Tunnel* provided that

> 'having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that *having promised* to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go.'[671]

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[668] See section 6.3.4.1

[669] *Racecourse Betting Control Board v Secretary of State for Air* [1944] Ch. 114

[670] [1944] Ch. 114, at page 126.

[671] [1993] A.C. 334, at 353 C.

Therefore, this consistent attitude toward breach of contract is certainly the justification for both stay of action (whether inherent or not) and anti-suit injunctions enforcing arbitration agreements (or even other exclusive dispute resolution agreements). Given such close association between anti-suit injunctions and stay of action enforcing arbitration agreements and same policy justification behind them, it would be a startling result that English Courts grant anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine, but not inherent stay of action for the same purpose.

7.4.2.3 The Lower Threshold of Stay of Action than That of Anti-Suit Injunctions in General

The grantability of inherent stay of action enforcing arbitration agreements[672]under the conditional benefit doctrine can also be clarified by comparing the threshold of stay of action and that of anti-suit injunctions in general. The comparability of the two remedies derived from the Supreme Court decision in *Ust* that the Courts' power to grant both inherent stay of action and anti-suit injunctions derives from s37(1) of the 1981 Act and that stay of action and anti-suit injunctions are 'two sides of the same coin'.[673]

Within secondary resources, *The Anti-Suit Injunction* provided that

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[672] Note that stay of action under the Courts' inherent jurisdiction can be granted under other grounds. The present section focus on inherent stay of action enforcing arbitration agreements. For an example on the grant of stay of action under the ground of *forum non conveniens*, see *Reichhold Norway ASA v Goldman Sachs International* [1999] C.L.C. 486, at page 9, 10. However, it is to be noted that it is possible that outside the Brussels Regime, the possibility of an English Court granting a stay of action based on *forum non conveniens* is rather limited. (*The Conflict of Laws,* 15th ed, at para 12-021); For an example on the grant of stay of action under the doctrine of *Kompetenz-Kompetenz*, see *A v B* [2007] 1 Lloyd's Rep 237, at para 136.

[673] *Ust* [2013] 2 Lloyd's Rep 281, at para 60

> '[t]he principles governing the grant of anti-suit injunctions brought to enforce an exclusive forum clause are not the same as those to be applied in the converse case of an application to stay English proceedings on the ground that they are in breach of contract, as *tighter* restraints derived from *comity* apply to anti-suit injunctions, although many concepts are cross-applicable'.[674]

This international comity consideration argument is also confirmed by case law. In *Spiliada*[675], when discussing the grant of stay of action under the inherent jurisdiction, it was held that

> 'it is pertinent to ask whether the fact that the plaintiff has, ex hypothesi, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English Court will not lightly disturb jurisdiction so established'.[676]

Thus, the international comity consideration seems to be an element favouring the grant of stay of action. This is in contrast with the fact that international comity imposes preventive effect on the grant of anti-suit injunctions however trivial that effect is.[677]

Furthermore, for stay of action in favour of arbitration, the principle of jurisdiction competence as is codified in s7 of the 1996 Act further lowers the threshold.[678]

Subsequently, it is submitted that stay of action has a relatively lower threshold than anti-suit injunctions generally. If the threshold for anti-suit injunctions enforcing arbitration agreements is satisfied under the conditional benefit doctrine subject to the

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[674] *The Anti-Suit Injunction*, at para 7.11.

[675] *Spiliada Maritime Corporation v Cansulex Ltd* (HL) [1987] 1 Lloyd's Rep 1

[676] [1987] 1 Lloyd's Rep 1, at page 10.

[677] See section 6.6.2.2.3 on the spectrum effect of international comity in anti-suit injunction cases.

[678] *Fiona Trust & Holding Corporation v Privalov (HL)* [2008] 1 Lloyd's Rep 254, at para 12.

discretionary stage[679], inherent stay of action should also be grantable against third parties acting inconsistently with binding arbitration agreements under the conditional benefit doctrine.

7.4.2.4 Conclusions on Stay of Action Enforcing Arbitration Agreements Against Third Party Caught by the Conditional Benefit Doctrine under the Courts' Inherent Jurisdiction

From the above analysis in section 7.4.2, multiple conclusions can be reached casting light on the grantability of inherent stay of action enforcing arbitration agreements under the conditional benefit doctrine. The starting point is that the inherent power to stay an action survives the arbitration statutes which makes the rest of the analysis possible. The thesis also found that there are indeed cases on the threshold of inherent stay of action. Nonetheless, due to the discretionary nature and the diverse opinions within the authorities, the grantability issue will be further complicated if the thesis explores the threshold of stay of action in great details. Subsequently, the alternative approach was adopted by comparing the threshold of stay of action and relevant measures. Since the hostility toward breach of contract as a policy justification for anti-suit injunctions is also existent under inherent stay of action, there is no reason to suggest that stay of action under the inherent jurisdiction cannot be granted in the context of the conditional benefit doctrine. Furthermore, it has been concluded that anti-suit injunctions and statutory stay enforcing arbitration agreements are available under the conditional benefit doctrine, it can then be further submitted that inherent stay of action in the same context should also be available given the lower threshold of them.

7.4.3 Conclusions on the Clear Availability of Stay of Action against Third Parties Bound by Arbitration Agreements under the Conditional Benefit Doctrine

[679] See section 6.3.5

Following the above analysis in section 7.4, a clear conclusion can be reached on the availability of stay of action applied for by the debtor against third parties bound by arbitration agreements under the conditional benefit doctrine. For statutory stay of action under the 1996 Act, it is submitted by the thesis that a mandatory stay will be granted when the third party is caught by s8(1) of the 1999 Act unless s9(4) of the 1996 Act is satisfied. As for inherent stay of action enforcing arbitration agreements, it is submitted that the preliminary ground for a remedy against a bound third party is theoretically satisfied subject to discretion.

7.5 The Resolution of the Difficulties Encountered in *Nisshin Shipping* and *Fortress Value*—Statutory Stay of Action Applied for by the Bound Third Parties under the Conditional Benefit Doctrine

Explanatory Note 34 of the Contracts (Rights of Third Parties) Act 1999 gives guidance on the application of s8(1) of the Act. It has been mentioned earlier in the thesis that it provides that the conditional benefit doctrine runs in the blood of s8(1) and that *The Jay Bola* demonstrates the application of the conditional benefit doctrine.[680]

In case law, the application of s8(1) was brought to the attention of the Court of Appeal in *Nisshin Shipping*[681]and *Fortress Value*[682]. It will be mentioned later in the thesis that the conflicting judgments is essentially caused by the conditional benefit doctrine.[683] Although the 1999 Act has come into force for almost two decades, authorities on s8(1) of the Act are rather limited. Nonetheless, following the clarification of *The Jay Bola*[684],

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[680] See section 3.2

[681] *Nisshin Shipping Co Ltd v Cleaves & Co Ltd (QBD (Comm Ct)* [2004] 1 Lloyd's Rep 38

[682] *Fortress Value Recovery Fund I Llc & Ors. (Respondents) v Blue Skye Special Opportunities Fund Lp & Ors. (Appellants)* [2013] 1 Lloyd's Rep 606

[683] See section 7.5.3.3

[684] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

The Hari Bhum(No.1)[685]and *The Yusuf Cepnioglu*[686], the conditional benefit doctrine and its effect have become clear. This cast lights on the operation of s8(1) of the 1999 Act and makes it possible to resolve the difficulties in *Nisshin Shipping* and *Fortress Value*.

7.5.1 The Application of the Conditional Benefit Doctrine in *Nisshin Shipping*

An application of s8(1) was made in *Nisshin Shipping*[687]. In that case, the defendant was the brokers (third parties to the charterparties) who negotiated 9 charterparties on behalf of the shipowners. Under the charterparties, there were clauses providing that commissions are payable to the third party brokers. Also, there were arbitration clauses in the charterparties providing that the disputes between the parties of the contract should be referred to arbitration although the clauses were also *wide enough to cover claims by the brokers against the shipowners for the payment of commission*. On the refusal to pay commission by the shipowners, the brokers brought arbitration proceedings and the arbitrators held that they do have jurisdiction over the matter under s1 and s8 of the *1999 Act*. The shipowners then brought proceedings in the present court challenging the arbitrators' jurisdiction. One of the questions asked was whether the enforcement of the broker's rights is subject to the arbitration agreements?[688]

The Court first recognised that the third party brokers were an eligible party under s1 of the *1999 Act*.[689] On whether the brokers were subject to the arbitration agreements and entitled to claim under the arbitration agreements relying on s8(1) of the 1999 Act, the court quoted the explanatory note 34 of the 1999 Act and applied the conditional

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[685] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[686] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[687] [2004] 1 Lloyd's Rep 38.

[688] [2004] 1 Lloyd's Rep 38, at page 38~39.

[689] [2004] 1 Lloyd's Rep 38, at para 13, 17~21, 23, 26, 31.

benefit approach under *The Jay Bola*.[690] On the effect of the conditional benefit doctrine underlying the 1999 Act, the court held that s1(4) sets out the analogy of the 1999 Act to assignment and that the third party should be put into the shoes of the promisee.[691] In the present case, the promisee would be the counter-party of the shipowner who was a party to the charterparties, as well as the arbitration agreement in them. Therefore, the Court was essentially indicating that the third party brokers should be entitled to rely on the arbitration agreement in the charterparties under the conditional benefit doctrine. The presumption is actually confirmed by the statement in the case that 'I conclude that in the present case Cleaves [the third party brokers] were *entitled and*, indeed, *obliged* to refer those disputes to arbitration and that the arbitrators had jurisdiction to determine them.'[692]

However, the above judgment given by the Court of Appeal in *Nisshin Shipping* should be interpreted together with another feature of arbitration agreements. Arbitration agreements have both benefit and burden aspects. In the Law Commission Report No. 242, it was provided that '[a]rbitration and jurisdiction clauses must be seen as *both conferring rights and imposing duties* and do not lend themselves a splitting of the benefit and the burden'.[693] As a result, in the opinion of the Court of Appeal in *Nisshin Shipping*, the conditional benefit doctrine under s8(1) maintains both the benefit aspect and the burden aspect of arbitration agreements. As a result, a third party caught by the conditional benefit doctrine, at least in the context of s8(1) of the 1999 Act, is not only bound by the arbitration agreement, but also entitled to rely on the arbitration

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690 [2004] 1 Lloyd's Rep 38, at para 34, 37.

691 [2004] 1 Lloyd's Rep 38, at para 42.

692 [2004] 1 Lloyd's Rep 38, at para 44.

693 Law Commission Report No. 242, at para 14.18. See also see also Lord Goff's judgment in *Mahkutai* that exclusive court jurisdiction agreements 'can be distinguished from terms such as exceptions and limitations in that it does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes. It is therefore a clause which creates mutual rights and obligations'. (*Mahkutai, The* [1996] A.C. 650, at para 666 B) Arbitration agreements also share the features with the exclusive dispute resolution agreements for obvious reasons.

agreement.[694]

7.5.2 Stay of Action under S9 of Arbitration Act 1996 and S8(1) of the Contracts (Rights of Third Parties) Act 1999 under the Light of *Nisshin Shipping*

In the previous section, it was concluded that, under the meaning of *Nisshin Shipping*, both the benefit aspect and the burden aspect of arbitration agreements are preserved under s8(1) of the 1999 Act. The possible consequence of that is that a third party caught by s8(1) of the 1999 Act would potentially be able to enforce the arbitration agreement brought into the picture by the section. A stay of action under English Law can be mandatory or non-mandatory.[695] The statutory stay under s9 of the 1996 Act is 'mandatory'. After the judgment under *Nisshin Shipping*, the relying on s9 of the 1996 Act by the third party becomes possible in the context of s8(1) of the 1999 Act.

S9 of the *1996 Act* provides that

> '9 Stay of legal proceedings. (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter…(4) On an application under this section the court *shall* grant a stay unless satisfied that the arbitration

[694] *Nisshin Shipping* is actually not alone. In *The Jordan Nicolav*, the court in that case first gave the conditional benefit statement that a third party assignee enforcing a contractual benefit should be bound by the arbitration clause in the same contract. After that, they also held that '[a]ccordingly, it is clear both from the statute and from a consideration of the position of the assignee that the [bound third party] assignee has the benefit of the arbitration clause as well as of the other provisions of the contract.' (*The Jordan Nicolov* [1990] 2 Lloyd's Rep 11, at page 16)

[695] By 'non-mandatory' stay, the thesis is referring to the stay of action under the inherent power of English Courts. That power has been codified in s37(1) of the Senior Courts Act 1981 and expressly preserved by s49(3) of the same Act. (see section 7.2)

agreement is null and void, inoperative, or incapable of being performed.'

S9(1) provides the eligibility of the stay applicant and the eligibility of the Court proceedings. Several requirements are included. First, the applicant must be a party to the arbitration agreement in issue. Secondly, the claim in the proceedings brought in front of English Courts the applicant seeks to stay must be within the material scope of the arbitration agreement.[696] On the other hand, s9(4) creates a presumption. That is once s9(1) is satisfied, a stay of action is mandatorily available to the applicant unless the stay defendant can prove the existence of certain rebutting factors.

Combining the interpretation of s8(1) of the 1999 Act adopted in *Nisshin Shipping* and s9 of the 1996 Act, a startling result will then be produced. That result is that a third party caught by s8(1) of the 1999 Act can apply for a mandatory stay of action under s9 of the 1996 Act if the debtor (an original contracting party) breaches the arbitration agreement which is brought into the picture by s8(1).[697] It is startling because the result is reached under the background that Explanatory Note 34 of the 1999 Act expressly provided that the third party caught by s8(1) can be a stay of action *respondent*.[698] One question then arises as to whether this is the correct approach toward the combined issue of s8(1) of the 1999 Act and s9 of the 1996 Act.

7.5.3 The Distinctive Facts and Judgments in *Fortress*

It has been mentioned in the previous section that s8(1) has the effect of making a third

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[696] See section 5.3.2 for material scope of arbitration agreements

[697] Note that the above conclusion is certainly based on the pre-requisite that the claim brought by the third party falls within the material scope of the arbitration agreement to satisfy the requirement of s9(1) of the 1996 Act. However, it is provided in s8(1)(a) of the 1999 Act that the arbitration agreement will only be imposed on the third party when the substantive claim is subject to arbitration. Therefore, the claim brought by the third party will always fall within the material scope of the arbitration agreement under the meaning of s9(1) of the 1996 Act if s8(1) of the 1999 Act is satisfied.

[698] Note that this is also true when it comes to the statutory stay under s1 of the 1975 Act. See *The Leage* [1984] 2 Lloyd's Rep 259, at page 262.

party enforcing contractual benefits under the 1999 Act a party to the arbitration agreement in the same contract. That will in turn make the third party a potentially eligible party to apply for a mandatory stay of action relying on s9 of the 1996 Act under the light of the judgment in *Nisshin Shipping*. An attempt of such a stay application was made in *Fortress*.

7.5.3.1 The Distinctive Facts in *Fortress*

In that case, there was a deed between the original contracting parties under which there were two clauses concerned in the current proceedings. The first is an indemnity and hold harmless clause conferred on the third party. The second is an arbitration clause requiring disputes between the original contracting parties to be referred to arbitration in Paris under English law. One of the original contracting parties claimed against the third party under the title of conspiracy, breach of contract and tort. Among other defences, the third party contended that they were entitled a stay of action under s9 of the 1996 Act because they became a party to the arbitration agreement when they enforced the exclusion clauses under the meaning of s8(1) of the *1999 Act*. Blair J, at first instance, refused the stay application and the third party appealed.[699]

Two judges in the Court of Appeal reached the conclusion that the appeal should be dismissed[700] with the third judge concurred.[701] However, the two judges provided different reasoning on why the appeal should be dismissed. The present thesis will analyse the two judges' decision and provide guidance on the grantability issue.

7.5.3.2 Tomlinson L.J.'s Judgment and Toulson L.J's Judgment in *Fortress*

Tomlinson L.J. first recognised that the issue in the case is a question with difficulty as

[699] [2013] 1 Lloyd's Rep 606, at page 606.

[700] [2013] 1 Lloyd's Rep 606, at para 38, 39.

[701] [2013] 1 Lloyd's Rep 606, at para 57.

a result of the feature of arbitration clauses that they involve both burdens and benefits.[702] He then cited *Nisshin Shipping* and approved the approach that the third party was both bound by the arbitration agreement and entitled to rely on the arbitration agreement under the meaning of s8(1).[703] Furthermore, exclusion clauses should not be treated differently from substantive terms conferring benefits.[704] Therefore, it seems the judge was almost ready to hold that the stay of action application by the third party would be granted as a result of the approach adopted in *Nisshin Shipping*.

Nevertheless, the judge rejected the stay of action application eventually[705]and gave two reasons. First, granting a stay in favour of the third party who became a party to the arbitration agreement under s8(1) will render all the disputes, not just the defences, to be deterred by the stay which extends beyond the power of s8(1).[706] The judge's second reason to refuse the stay was based on the finding that there was no dispute as to the enforcement of the exclusion clause, thus there was no substantive issue to be tried in the arbitration proceedings. He then held that, on this occasion, a stay should not be granted.[707]

Toulson L.J. recognised the conditional benefit basis of s8(1)[708]and held that it is open to the original contracting party to choose to enforce the arbitration agreement on the third party as a contractual condition.[709] On the other hand, s8(2) provides the third party with the right to enforce the arbitration agreement brought into the picture.[710] The judge further held that the application of the two sections cannot be confused with each

[702] [2013] 1 Lloyd's Rep 606, para 1.
[703] [2013] 1 Lloyd's Rep 606, at para 24.
[704] [2013] 1 Lloyd's Rep 606, at para 28.
[705] [2013] 1 Lloyd's Rep 606, at para 38.
[706] [2013] 1 Lloyd's Rep 606, at para 30, 31.
[707] [2013] 1 Lloyd's Rep 606, at para 32, 34.
[708] [2013] 1 Lloyd's Rep 606, at para 42.
[709] [2013] 1 Lloyd's Rep 606, at para 42, 43, 45, 54.
[710] [2013] 1 Lloyd's Rep 606, at para 45.

other.[711] In other words, although s8(1) makes the third party a party obligated by the arbitration agreement, it does not make the third party a party entitled to enforce the arbitration agreement against the original contracting parties.

7.5.3.3 Questions Arising from the Two Judges' Decisions

It is apparent that the two judges in the Court of Appeal in *Fortress* reached the same final conclusion that the stay application should be rejected. However, the authoritative effect of the judgments is compromised either because more clarity could have been provided or because the judgments contradicts with *Nisshin Shipping*[712].

The thesis agrees with Tomlinson L.J.'s judgment that exclusion clauses should not be treated differently from substantive beneficial terms since considering the position held by s1(6) of the 1999 Act. However, the judge's grounds to refuse the stay must be examined in detail to learn the essence of them. The function of exclusion clauses, especially the one in the present case, is to eliminate liabilities, thus providing defence to substantive claims.[713] Thus, when the beneficial term enforced by the third party under the 1999 Act is an exclusion clause, there will always be substantive claims brought into the picture. Therefore, the judge's first ground to refuse the stay is essentially that the arbitration agreement imposed on the third parties by s8(1) will never be enforceable by the third parties when the enforcement involves disputes other than the enforcement of the beneficial term. In other words, *only the debtor can enforce*

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[711] [2013] 1 Lloyd's Rep 606, at para 55.

[712] Note that *Nisshin Shipping Co Ltd v Cleaves & Co Ltd (QBD (Comm Ct)* [2004] 1 Lloyd's Rep 38 is also a Court of Appeal authority. Thus, the mere fact that *Fortress* is conflicting with it does not negate the validity of either case completely. Yet the authoritative effect of both cases are mitigated.

[713] In *Koffman & Macdonald's Law of Contract*, it is provided that '[a]t a basic level an exemption clause is one which excludes or limits, or appears to exclude or limit, liability for breach of contract, or other liability arising by way of tort, bailment, or statute. It should be noted that the exemption clause may seek to exclude totally a liability or merely to limit it. The terms "exemption clause" and "exclusion clause" are often loosely used to encompass both situations'. (*Koffman & Macdonald's Law of Contract*, 2014, 8th ed, at para 9.2)

the arbitration agreement imposed by s8(1) since other disputes will always be involved in the enforcement of the arbitration agreement by the third parties.

The judge's second ground to refuse the stay is inconsistent with existing authorities[714]. First, even if it can be said that the lack of substantive issue to be tried in arbitration can prevent the grant of stay of action enforcing arbitration agreements, the House of Lords in *Channel Tunnel* provided that 'English court could not properly conclude in the light of affidavit evidence alone that the appellants' claim is so unanswerable that there is nothing to arbitrate.'[715] In *Fortress* itself, there was no apparent evidence providing that there will be nothing to arbitrate should the third party brings the disputes to arbitration declaring non-liability. Furthermore, it was held in *Hume*[716]that as long as there is an arguable case either in law or in facts that the defendant has a defence against the claim, the substantive claim is disputable.[717] In *Fortress*, the existence of the exclusion clause which provides a defence to the defendant then rules out the judge's second ground to refuse the stay because the defence makes the substantive claim disputable. In addition to the above arguments suggesting the potential existence of disputable issues, the set-back position is that it is rather possible s9 of the 1996 Act does not require the existence of disputes to be referred to arbitration since that requirement in s1(1) of the 1975 Act was removed as is demonstrated in s9 of the 1996 Act. Therefore, the reliability of the judge's second ground to refuse the stay is limited.

Subsequently, what is left from Tomlinson L.J.'s judgment is the question *is it true that only the debtor (one of the original contracting parties) can enforce the arbitration agreement imposed by s8(1) of the 1999 Act when the beneficial term enforced is an exclusion clause*.

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[714] See *Hume v. A.A. Mutual International Insurance Co. Ltd* [1996] L.R.L.R. 19, at page 26, 27, 31. See also *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334, at 356 H, 357 A

[715] [1993] A.C. 334, at 356 H, 357 A.

[716] *Hume v. A.A. Mutual International Insurance Co. Ltd* [1996] L.R.L.R. 19

[717] [1996] L.R.L.R. 19, at page 31.

Toulson L.J.'s judgment is relatively more straight forward. Similar to the essence of Tomlinson L.J.'s speech, he expressly held that *only the debtor (one of the original contracting parties) can enforce the arbitration agreement imposed by s8(1) of the 1999 Act*. However, the distinction is that Toulson L.J. did not restrict the context of the third party's incapacity to enforce the arbitration agreement imposed by s8(1) to situations where the arbitration agreements were brought into the picture due to the third party's enforcing substantive *exclusion clauses* under s8(1). This is not only arguably contradicting the judgment by Tomlinson L.J. in the same case, but also apparently contradicting the approach adopted in *Nisshin Shipping* that the third parties caught under s8(1) are entitled to enforce the arbitration agreements imposed on them.[718]

It is submitted in the present thesis that several issues require clarification to resolve the conflicts identified in the previous section. First, whether a third party who is bound by an arbitration agreement imposed by s8(1) of the 1999 Act can enforce the arbitration agreement. Secondly, if the first question is to be answered positively, whether an exception can be made when the beneficial terms enforced under s1 of the 1999 Act are exclusion clauses in the form of the one in *Fortress*.

7.5.4 The Benefit Aspect of Arbitration Agreements under S8(1)

The background of the first question posted in the previous section is that arbitration agreements have two aspects, the benefit aspect and the burden aspect as has been mentioned earlier in the thesis.[719] Therefore, they cannot be called a term conferring only benefits or only burdens. Subsequently, the first question is the equivalent of whether s8(1) preserves the benefit aspect of the arbitration agreements imposed on the third parties. The question can be answered by examining certain features of the

[718] See sections 7.5.1, 7.5.2

[719] See section 7.5.1

principle of subject to equities and the intention of the legislators.

7.5.4.1 The Principle of Subject to Equities under S8(1) of the Contracts (Rights of Third Parties) Act 1999

It has been mentioned earlier in the thesis that part of the difficulty encountered in *Nisshin Shipping* and *Fortress Value* is caused by the conditional benefit doctrine and that the conditional benefit doctrine is the spirit of s8(1) of the 1999 Act.[720] It was also concluded that the origin principle of the conditional benefit doctrine is the principle of subject to equities.[721] A direct consequence of the above two conclusions is that the features of the principle of subject to equities should also influence of the operation of s8(1). For the purpose of the present section, two features of the principle of subject to equities are relevant to the question whether the arbitration agreements imposed by s8(1) retains the benefit aspect.

The first relevant feature is that equities are defences of the debtor.[722] In authorities where the principle of subject to equities is established, it can be seen that the 'equities' are limitations the enforcing parties are 'subject to'. Also, when providing the definition of the conditional benefit doctrine, Law Commission Report No. 242 expressly provided that the original contracting parties 'may choose' to impose conditions on third parties enforcing contractual choses in action. Under both situations, it is apparent that equities are supposed to be a 'shield' of the debtors to defend themselves. It would then be a bizarre result if the restricted third parties can in turn benefit from the equities which were supposed to be restricting their actions.

Giving the third parties who are bound by the arbitration agreements the power to enforce the arbitration agreements under s8(1) is also against another feature of the

[720] See sections 7.5.3.3, 3.2

[721] See section 3.3.3

[722] See section 3.4.4.2.2

principle of subject to equities. It has been mentioned earlier in the thesis that the justifying doctrine of the principle of subject to equities is the 'fairness consideration'.[723] It is certainly not fairness when a bound third party can benefit from equities which were brought into the picture as the other party's defence.

As a conclusion, from the perspective of the features of the principle of subject to equities, third parties under s8(1) of the 1999 Act should not have the capacity to benefit from the arbitration agreements imposed by the provision.

7.5.4.2 Explanatory Note 34 and 35 of the Contracts (Rights of Third Parties) Act 1999

Toulson L.J.'s judgement in *Fortress* has been set out earlier in the thesis.[724] In his judgment, he distinguished the situations where s8(1) and s8(2) of the 1999 Act apply.[725] The judgment, however, is strongly supported by Explanatory Note 34 and 35 of the 1999 Act.

Explanatory Note 34 specifies that the conditional benefit doctrine underlying s8(1) 'is analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural *burden*'.[726] Therefore, the arbitration agreements brought forward by s8(1) should be burdensome to the third parties. On the other hand, Explanatory Note 35 provides that third parties under s8(2) can enforce the arbitration agreement conferred on them, with measures including applying for a stay of action under s9 of the 1996 Act.[727]

Thus, there is intention demonstrated by the legislators that the arbitration agreements

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[723] See section 4.2.1.3.3

[724] See section 7.5.3.2

[725] [2013] 1 Lloyd's Rep 606, at para 42, 43, 45, 54.

[726] Explanatory Note 34 of the 1999 Act.

[727] Explanatory Note 35 of the 1999 Act.

under s8(1) only retain the burden aspect while s8(2) gives the third parties' the rights to enforce the arbitration agreements.

7.5.4.3 Conclusions on the Benefit Aspect of the Arbitration Agreements under S8(1)

From the above analysis, it is apparent that retaining the benefit aspect of the arbitration agreements imposed on the third parties under s8(1) is against both the features of the principle of subject to equities and the legislators' intention. Subsequently, it is submitted that the arbitration agreements under the meaning of s8(1) of the 1999 Act are pure burden and that the relevant judgment in *Nisshin Shipping* is curtailed by the nature of the conditional benefit doctrine underlining s8(1).[728] Furthermore, this confirms that Toulson L.J.'s reasoning on the stay application in *Fortress Value* is the correct approach.[729]

7.5.5 Special Treatment toward Exclusion Clauses?

The previous section reached the conclusion that, as to whether the arbitration agreements under s8(1) of the 1999 Act can be an entitlement, Toulson L.J.'s judgment in *Fortress* is the more favourable route. Thus, *Nisshin Shipping* is not favoured by the thesis. However, the benefit aspect of arbitration agreements imposed by s8(1) was expressly preserved by explanatory note 34 of the 1999 Act. Therefore, the authoritative effect of the above conclusion is compromised.[730] To resolve this residue issue, it is submitted by the thesis that even if s8(1) of the 1999 Act could retain the benefit aspect of the arbitration agreements imposed on the third parties, the set-back position is that the third parties in *Fortress* still cannot rely on the arbitration agreements in that case. The set-back position is provided by a feature of the particular exclusion clause in the

[728] See section 7.5.1 where the judgment was provided.

[729] [2013] 1 Lloyd's Rep 606, at para 55. For the details of the judgment, see section 7.5.3.2 setting out the whole judgment of the judge.

[730] This is also the reason why the analysis in this section is necessary.

facts.

Note that although the set-back position is brought up by the thesis due to the special feature of the exclusion clause, the feature is not merely that the clause is an exclusion clause. Thus, it is not the same as Tomlinson L.J.'s special treatment toward exclusion clauses in *Fortress* which is certainly against s1(6) of the 1999 Act.[731] The feature is that the exclusion clause is in the form of a Himalaya Clause.

7.5.5.1 Himalaya Clauses and *Mahkutai*

In *Nisshin Shipping*, the Court also rejected the argument that, without mentioning that the third party can enforce the rights under arbitration clauses, they cannot do so as was held in *Mahkutai*[732]. That case was distinguished on the ground that the decision in *Mahkutai* was based on the feature of *Himalaya clauses*.[733] It is submitted that a indicated meaning behind this decision is that had the beneficial term in *Nisshin Shipping* been a Himalaya Clause, the Court would have followed *Mahkutai* and reached a different conclusion. Although, the thesis is not in favour of the decision on the benefit aspect of the arbitration agreement in *Nisshin Shipping*, this Himalaya Clause argument indeed drew the thesis's attention since the beneficial term the third party sought to enforce in *Fortress* was an exclusion clause.[734] If the exclusion clause constitutes a Himalaya Clause, further confirmation may be provided on why the third party in *Fortress* cannot enforce the arbitration agreement in the main contract by applying for stay of action.

7.5.5.1.1 Himalaya Clauses

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[731] See section 7.5.3.2 providing the details of the judgment.

[732] *Mahkutai, The* [1996] A.C. 650.

[733] *Nisshin Shipping Co Ltd v Cleaves & Co Ltd (QBD (Comm Ct)* [2004] 1 Lloyd's Rep 38, at para 49.

[734] For the content of the clause see [2013] 1 Lloyd's Rep 606, at page 606.

Himalaya clauses are described as 'provisions contained in a contract between A and B by which A promises B that any exemptions from or limitations of liability available under that contract to B shall also be available for the benefit of C'[735] Clauses like this have the power to protect eligible third parties from certain contractual liabilities.[736]

7.5.5.1.2 *Mahkutai*

Mahkutai is an authority on the operation of Himalaya Clauses under bill of lading context[737]. In that case, there was a ship chartered by the carrier from the shipowner. The plaintiff is the cargo owner and the defendant is the shipowner. On the shipping of the cargo, the carrier issued a bill of lading containing a Himalaya clause entitling the servant of the carrier any exclusions under the bill of lading. The bill of lading also contained an exclusive jurisdiction clause in favour of Indonesian courts. On the breach of contract by the shipowner, the cargo owner sued the shipowner. The shipowner tried to invoke the exclusive jurisdiction clause in the bill of lading to stay the action in Hong Kong. The court of first instance granted the stay and the Court of Appeal reversed the decision. The case then went to the House of Lords.[738]

In the House of Lords, two potential grounds under which the shipowner can benefit from the exclusive jurisdiction clause were provided. First, he is a bailee of the goods. Secondly, there is a Himalaya clause in the bill of lading.[739] The court went through

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[735] *The Law of Assignment*, at para 5.38. For an example of such clauses, see *Adler v Dickson* (No.1) [1955] 1 Q.B. 158, at page 159. See also *Scruttons v Midland Silicones* [1962] AC 446 at page 474 cited in Wilson, *Carriage of Goods by Sea*, at page 150.

[736] [1955] 1 Q.B. 158, at page 184~187; *Scruttons Ltd v Midland Silicones Ltd* [1962] A.C. 446, at page 466. For an example where the third parties were expressly mentioned in the Himalaya Clause, see *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154, at para 165 B

[737] *Mahkutai, The* [1996] A.C. 650.

[738] [1996] A.C. 650, at page 650, 651.

[739] [1996] A.C. 650, at 658 G.

Eurymedon[740]and *New York Star*[741]where the stevedores were held to be able to benefit from the time bar clauses in the bill of lading. However, in those cases, the time bar clauses were expressly included in the bill of lading. The court in the present case held that an exclusive jurisdiction agreement is not a clause benefiting one party and that it cannot be included in the scope of a Himalaya Clause automatically without an express mentioning.[742] In the facts, the Himalaya Clause did not extend its scope to cover the jurisdiction clause. Therefore, the bill of lading did not include the jurisdiction clause at all. Subsequently, even if the shipowner could have benefited from the exclusive jurisdiction clause as a bailee, since the Himalaya clause does not include the exclusive jurisdiction clause, that possibility is vanquished. The justification for the judgment is that holding otherwise is inconsistent with the express term in the bill of lading.[743]

It is apparent from the judgment in *Mahkutai* that Himalaya clauses are treated as conferring contracting parties' intention under English law and the law tends to give effect to such intention. Therefore, party autonomy under Himalaya Clauses has the power to exclude the benefits that certain third parties to a contract could have enjoyed when the benefit is not covered by the Himalaya Clauses.

7.5.5.2 The Effect of Party Autonomy on the Principle of Subject to Equities in *Fortress*

The matter of giving effect to contracting parties' intention is one of party autonomy. In the Law Commission Report No.242, *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 was cited where it was recognised that '[t]he autonomy of the will of the parties should be respected…there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third

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[740] *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] A.C. 154.

[741] *'New York Star' Salmond and Spraggon (Australia) Pty. Ltd. v Port Jackson Stevedoring Pty. Ltd.* [1980] 2 Lloyd's Rep 317.

[742] [1996] A.C. 650, at 666 F.

[743] [1996] A.C. 650, at 668 E, F.

party where that is the expressed intention of the parties'.[744] Following the previous section, it is confirmed that the party autonomy under Himalaya Clauses can rule out the benefit aspect of the exclusive dispute resolution agreements. Therefore, it is possible that the failure to mention the arbitration agreement in the exclusion clause in favour of the third party eliminated the third party's capacity to invoke the arbitration agreement for their own benefit in *Fortress*.[745] However, the exclusion clause in *Fortress* was enforced under the 1999 Act and the arbitration agreement which the third party sought to rely on in *Fortress* was imposed by s8(1) of the 1999 Act under the conditional benefit doctrine.[746] Also, the origin principle of the conditional benefit doctrine is the principle of subject to equities.[747] Two potential questions then arise. First, whether the principle of subject to equities is subject to party autonomy itself? Secondly, whether the 1999 Act gives full effect to party autonomy?

7.5.5.2.1 The Effect of Party Autonomy over the Principle of Subject to Equities

There is evidence suggesting that party autonomy indeed has the power to alter the manifestation of the principle of subject to equities under a particular set of facts.

The first piece of evidence is provided by the connection between the principle of subject to equities and assignment. It has been concluded earlier in the thesis that the principle of subject to equities plays an essential role in assignment.[748] Therefore, the starting point of the investigation on whether party autonomy has the power to alter the

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[744] Law Commission Report No. 242, at para 1.1; [1995] 1 WLR 68, at page 76 E

[745] Note that this is not he proposition of either *Nisshin Shipping* or *Fortress*. The thesis agrees with the conclusion reached in *Fortress*, but is not convinced by the reasoning. Therefore, this presumption is created by the thesis following the critical examination of existing authorities on Himalaya Clauses and the fact that exclusion clauses identity of the concerned contractual terms were given emphasis in the two judges decision in *Fortress*. (For a more detailed description of the exclusive clause in that case, see *Fortress* [2013] 1 Lloyd's Rep 606, at page 606)

[746] See section 7.5.3.1

[747] See section 3.6

[748] See section 3.4.2

manifestation of the principle of subject to equities will be based within assignment context. It has been mentioned earlier in the thesis that contractual benefits are freely assignable while the same luxury does not exist in the assignment of contractual burdens or the whole contract.[749] However, case law has established that the above conclusion is subject to party autonomy and that whether a particular contractual benefit, or contractual burden, or an entire contract is assignable is eventually subject to party autonomy. Contractual burdens or entire contracts are not assignable in default position, but the contracting parties can make them assignable by agreement.[750] On the other hand, the originally freely assignable contractual benefits[751] can be forbidden from being assigned if the contract forbids such assignment.[752] From the above analysis in the present paragraph, it is submitted by the thesis that the assignability issue under contractual context is completely subject to party autonomy.[753] Furthermore, it has been mentioned earlier in the thesis that the principle of subject to equities is an overarching principle underlying assignment.[754] Subsequently, it would be an odd position that contracting parties have full capacity to control the assignability of benefits and burdens while they have no such capacity when it comes to the conferral of equities under the principle of subject to equities. Thus, it is submitted that the principle of subject to equities is arguably subject to party autonomy.

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[749] See section 3.4.3.2.1

[750] *National Carbonising Co Ltd v British Coal Distillation Ltd* [1936] 2 All ER 1012, at page 1015; *DR Insurance Co v Central National Insurance Co of Omaha* [1996] 1 Lloyd's Rep 74, at page 77, 78. Also, some authorities stand the position that contractual burdens or contracts containing both rights and obligations cannot be assigned without the consent of the counter party of the assignor. Nonetheless, this is, on the other hand, indicating that the burdens or entire contracts will become assignable if such consent is obtained. (See *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 K.B. 660, at page 668, 669; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, at para 103, *Torkington v Magee* [1902] 2 K.B. 427, at page 430~431)

[751] See section 3.4.3.2.1 providing the assignability of contractual benefits.

[752] *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 A.C. 85, at page 106 C, D, page 107 E

[753] See also *The Jordan Nicolov* where the Court of Appeal provided that '[t]he scope of any assignment must, of course, ultimately be determined by the terms of that assignment'. (*The Jordan Nicolov* [1990] 2 Lloyd's Rep 11, at page 15)

[754] See section 3.4.2

As well as the analogous conclusion reached by analysing the assignability rules under English law, guidance is also provided by authorities directly related to the power of party autonomy on the principle of subject to equities. The status of party autonomy as an exception to the principle of subject to equities is indirectly provided in *Pickersgill & Sons* [755]where it was held that the parties can perfect the assignment by agreeing that burdens are not assignable, so the burdens coming with the rights assigned will not be imposed on the assignee anymore.[756] The consequence of the above judgment is that the assignee will be in a better position than the assignor. Since the effect of the principle of subject to equities is that the assignee cannot be in a better position than the assignor[757], holding that party autonomy can put the assignee in a better position than the assignor is then essentially giving rise to an exception to the principle of subject to equities.[758] Therefore, by examining case law, it can also be submitted that the principle of subject to equities is subject to party autonomy when it comes to the conferral of equities.[759]

7.5.5.2.2 The Power of Party Autonomy under Contracts (Rights of Third Parties) Act 1999

On the other hand, there is also evidence suggesting that the 1999 Act gives full effect to party autonomy since the reform of the privity of contract doctrine by the 1999 Act is very much 'party autonomy-oriented'. The Law Commission Report No. 242 provided that '[w]e should emphasise, at the outset, that our recommendations are not concerned to override the allocation of liability within contracts but rather rest on an

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[755] *William Pickersgill & Sons Ltd v London and Provincial Marine & General Insurance Co Ltd* [1912] 3 K.B. 614

[756] [1912] 3 K.B. 614, at page 622

[757] See section 3.5

[758] See also *Graham v Johnson* (1869) LR 8 Eq 36 where the same proposition was provided based on the assignment of a bond. (*Graham v Johnson* (1869) L.R. 8 Eq. 36, at page 43, 44)

[759] For a secondary resource providing this proposition, see *Snell's Equity*, at para 3-029.

underlying policy of effectuating the contracting parties' intentions.'[760] This statement is not only recognising that party autonomy is a fundamental doctrine underlying contract law, but also providing that the purpose of the reform is to give effect to party autonomy in the context of third parties taking contractual benefits. Furthermore, The Law Commission Consultation Paper No. 121 provided that

> '[i]t will be seen later but our provisional view is that a third party should be able to sue on a contract made for his benefit where it is the intention of the contracting parties that he be given enforceable rights, and that this formula will provide a workable solution applicable in all cases without opening the floodgates to third party actions'.[761]

The Law Commission Report No.242 interpreting the approach proposed in the above statement that

> 'the principal feature of that scheme (that is, the test of enforceability) would be that a third party should be able to enforce a contract where the parties intended that the third party should receive the benefit of the promised performance and also intended to create a legal obligation enforceable by the third party.'[762]

Therefore, a further confirmation is provided on that the reform attempts to *give effect to the contracting parties' intention* to benefit third parties.

On the enforceability of eligible contractual benefits by third parties, the Law

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[760] Law Commission Report No. 242, at para 1.8.

[761] The Law Commission Consultation Paper No. 121, Privity of Contract: Contracts for the Benefit of Third Parties, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/08/No.121-Privity-of-Contract-Contracts-for-the-Benefit-of-Third-Parties.pdf, at para 2.19

[762] Law Commission Report No. 242, at para 1.5.

Commission came to the view that 'a novel approach to contractual intention is required in respect of creating legal rights for third parties that rests neither on the existing law relating to intention to create legal relations nor on implied terms.'[763] In addition, in a later paragraph, it was stated that

> '[w]e should emphasise that the basic policy of our reform-that the intentions of the contracting parties to confer legal rights on third parties should be upheld-is a compelling one and should not lightly be displaced by arguments that this would clash with the policies underlying other statutes.'[764]

Under s1(b) particularly, a presumption is created that third parties can enforce a contractual term if that contractual term confers benefits on them.[765] Thus, after the reform, the legislators wish to give effect to the original contracting parties' intention by allowing the eligible third parties[766]to enforce the eligible contractual benefits.

Furthermore, such enforceability by third parties can be excluded by the contracting parties' intention as well. As provided in s1(2), '[s]ubsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.' Besides, s2(1) provides that, under certain situations, the contracting parties cannot vary or rescind the beneficial term anymore. However, s2(3)(a) offers an exception to s2(1) that '[s]ubsection (1) is subject to any express term of the contract under which—(a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party.'

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[763] Law Commission Report No. 242, at para 7.9.

[764] Law Commission Report No. 242, at para 12.5.

[765] Law Commission Report No. 242, at para 7.17.

[766] S1 of the 1999 Act provides that '(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—(a)the contract expressly provides that he may, or (b)subject to subsection (2), the term purports to confer a benefit on him.'

In conclusion, giving effect to party autonomy is one of the main purposes (if not the only purpose) of the 1999 Act. Subsequently, it would be a startling result that such a statute does not allow party autonomy to rule out the conferral of the benefit aspect of arbitration agreements as equity clauses.

7.5.5.3 Party Autonomy and the Exclusion Clause in *Fortress*

Following the conclusions that party autonomy in Himalaya Clauses has the power to rule out the benefit aspect of exclusive dispute resolution agreements and that the 1999 Act and the principle of subject to equities generally respects party autonomy, the next question then is whether party autonomy played an important role in *Fortress*. In the facts of *Fortress*, it was provided that

> '[u]nder clause 17.2.1 none of the Associates [the third parties] had any liability for loss arising in connection with services to be performed save in respect of fraud, and under clause 17.2.2 Blue Skye Fund agreed to indemnify and hold harmless any Associate against all liabilities, claims, costs, demands, damages and expenses incurred from the provision of services other than, amongst other things, in respect of fraud, gross negligence and wilful misconduct.'[767]

Although the exclusion clause in *Fortress* did not take exactly the same form as the traditional form of Himalaya Clauses as provided earlier in the thesis[768], a clause like this should have the same effect as the Himalaya clause in *Mahkutai*[769]in the sense that it expressly provides that the third parties can benefit from the contractual promise. The exclusion clause in the present case certainly could have included the benefit of

[767] [2013] 1 Lloyd's Rep 606, at page 606.

[768] See section 7.5.5.1.1 Himalaya Clauses

[769] [1996] A.C. 650.

arbitration clauses, yet failed to do so. The omission will then bring the effect of *Mahkutai*[770]into the picture and the benefit aspect of the arbitration agreement was subsequently not conferred onto the third party even if s8(1) could have made the arbitration agreements an entitlement.

7.5.6 Conclusions on the Resolution of the Difficulties Encountered in *Nisshin Shipping* and *Fortress Value*

The conditional benefit doctrine is a relatively new concept in English law and that is the direct reason why the Court of Appeal in *Nisshin Shipping* and *Fortress* encountered difficulties when applying s8(1) of the 1999 Act which is based on the conditional benefit doctrine. Since the conditional benefit doctrine is the manifestation of the principle of subject to equities and equities are supposed to be burdensome to the third parties, the arbitration agreements conferred on the third parties under s8(1) should be burdensome only. Furthermore, presumably the benefit aspect of arbitration agreements is preserved when being conferred onto the third parties caught by s8(1) of the 1999 Act, the nature of the Himalaya Clause in *Fortress* would have had the effect of depriving the third party of such benefit aspect. That deprivation should also stand in the context of the principle of subject to equities and the 1999 Act. Subsequently, it is submitted by the thesis that the judgment in *Nisshin Shipping* holding these arbitration agreements can be both burdensome and beneficial is less convincing and Toulson L.J.'s decision in *Fortress* is the more favourable route. Also, it is certainly the correct approach to reject the stay application in *Fortress*.

7.6 Casting Lights on the General Availability of the Negative Enforcement Measures Applied for by the Bound Third Parties under the Conditional Benefit Doctrine

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[770] Without mentioning a contractual term with benefit in a Himalaya Clause that third parties can benefit from the term, an intention of the contracting parties is demonstrated that the third parties cannot benefit from the term. (*Mahkutai*, The [1996] A.C. 650, at 668 E, F)

From the above analysis on the availability of statutory stay of action applied for by the bound third parties under the conditional benefit doctrine, a deductive conclusion can also be reached on the availability of inherent stay of action enforcing arbitration agreements applied for by the bound third parties under the conditional benefit doctrine.

The apparent reason is that the arbitration agreements as equity clauses can only be a defensive right of the debtor and be burdensome to the third party.[771] Therefore, the bound third parties are not in the position to enforce the arbitration agreements as an entitlement. Subsequently, no inherent stay of action enforcing arbitration agreements as equity clauses should be available to the third parties bound by the very same arbitration agreements. The conclusion should certainly still be valid in the context of bound third parties applying for anti-suit injunctions against the debtor under the conditional benefit doctrine.[772]

7.7 Conclusions on Stay of Action Enforcing the Negative Aspect of Arbitration Agreements under the Conditional Benefit Doctrine

By deploying the conclusions reached in earlier chapters, the thesis successfully addressed the issue of the grantability of stay of action enforcing arbitration agreements under the conditional benefit doctrine. In particular, several questions were answered. First, there is clear availability of stay of action applied for by the debtor against a bound third party under the conditional benefit doctrine no matter if the ground relied on falls within the Courts' inherent power or statutory power. Secondly, third parties caught by s8(1) of the 1999 Act cannot be the applicant for a statutory stay of action under s9 of the 1996 Act to enforce the arbitration agreement imposed by s8(1). Thirdly, third parties bound by arbitration agreements as a result of the conditional benefit doctrine cannot enforce the arbitration agreements by applying for an inherent stay of

[771] *The Law of Assignment*, at para 2.98, 2.99; *Snell's Equity*, at para 2-006; see also section 3.4.4.2.2

[772] Note that technically speaking, this conclusion does not belong to chapter 7. However, for a more intact structure of the thesis, it is better to address the issue here.

action. Fourthly, bound third parties cannot apply for anti-suit injunctions to enforce the binding arbitration agreements under the conditional benefit doctrine.

Chapter 8

Quasi-Contractual Anti-Suit Injunctions Enforcing Exclusive Jurisdiction Agreements under the Conditional Benefit Doctrine

8.1 Introduction to Chapter Eight

Exclusive court jurisdiction agreements are another type of exclusive dispute resolution agreements. An exclusive jurisdiction agreement is a dispute resolution clause which '*obliges* the parties to resort *to the relevant jurisdiction*, irrespective of whether the word "exclusive" is used'.[773] Case law has been mentioning these clauses together with arbitration agreements when it comes to the grant of anti-suit injunctions.[774] Following the resolution of the problem cases and the clarification of the threshold of quasi-contractual anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine, the next question is the extension of the rule to quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements. The present section will analyse the relevant features of exclusive jurisdiction agreements and discuss the issues surrounding quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements under the conditional benefit doctrine. There are three inspirational reasons for this analysis. First, exclusive jurisdiction agreements share some common features with arbitration agreements which makes it possible for them to be equity clauses under the principle of subject to equities. Secondly, exclusive jurisdiction agreements receive identical treatment when it comes to contractual anti-suit injunctions. Thirdly, case law

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[773] See *Continental Bank* citing *Dicey & Morris, The Conflict of Laws*, 12th ed. (1993), vol. 1, p.422. (*Continental Bank v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588, at page 593 H) For another authority where this approach was adopted, see *S. & W. Berisford Plc. and Another v New Hampshire Insurance Co.* [1990] 2 Q.B. 631, at page 637 A. In the same case, the Court also provided that '[a]n exclusive jurisdiction clause is one which imposes a contractual obligation on one or more parties to litigate in the stated jurisdiction.' ([1990] 2 Q.B. 631, at page 636 F)

[774] *The Angelic Grace* [1995] 1 Lloyd's Rep 87, at page 96; *Donohue v Armco* [2002] 1 Lloyd's Rep 425, at para 24; *Ust* [2013] 2 Lloyd's Rep 281, at para 23. See also section 6.3.4.1 on the established rule for anti-suit injunction against breach of contract.

has indeed provided guidance on the grantability of quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements directly.

8.2 The Capacity of Exclusive Jurisdiction Agreements as Conditions under the Conditional Benefit Doctrine

To discuss the grantability of quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements under the conditional benefit doctrine, the preliminary issue is whether it is possible for exclusive jurisdiction agreements to be conditions under the conditional benefit doctrine. The thesis will approach exclusive jurisdiction agreements' capacity to be equity clauses by deploying the conclusions reached when analysing arbitration agreements' capacity to be equity clauses. Therefore, although the wording used in the title is 'conditions under the conditional benefit doctrine' as a reflection of the title of the entire thesis, the analysis carried out in the present section will be 'equity clauses under the principle of subject to equities' reflecting the wording used when assessing arbitration agreements' capacity to be equity clauses.[775] It is merely that the analysis of the present thesis focuses on the principle of subject to equities in contractual context given the contractual basis of the conditional benefit doctrine.[776]

The mechanism behind arbitration agreements' capacity to be equity clauses was summarised by answering three key questions. Therefore, the answers provide the criteria to be satisfied for a contractual term to be an equity clause under the principle of subject to equities. First, the contractual term should be able to provide procedural defensive rights.[777] Secondly, the debtor should be able to take advantage of the procedural defensive rights.[778] Thirdly, there has to be an ancillary connection between the defensive rights provided by the contractual term and the contractual benefits

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[775] See chapter 5

[776] See section 3.4.1 on the contractual basic pre-requisite of the conditional benefit doctrine.

[777] See section 5.2

[778] See Section 5.2

taken.[779]

8.2.1 The Negative Aspect of Exclusive Jurisdiction Agreements and Their Capacity to Provide Procedural Defensive Rights

It has been concluded that the reason why arbitration agreements can provide procedural defensive rights is that they have a negative aspect.[780] Case law has provided that such containment of a negative aspect is also a feature of exclusive jurisdiction agreements. In *Ust*, it was held that

> '[t]he negative aspect of an arbitration agreement is a feature shared with an exclusive choice of court clause. In each case, the negative aspect is as fundamental as the positive. There is no reason why a party to either should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum'.[781]

Therefore, similar to arbitration agreements, exclusive jurisdiction agreements have a negative aspect and subsequently the capacity to provide procedural defensive rights to eligible parties.

8.2.2 A Contractual Debtor's Capacity to Enforce Exclusive Jurisdiction Agreements

It has been mentioned that the reason why the debtor can enforce arbitration agreements under the conditional benefit doctrine is that they are the original contracting parties to the contract containing arbitration agreements.[782] The perspective adopted by the

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[779] See section 5.2

[780] See section 5.2

[781] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] 2 Lloyd's Rep 281, at para 21.

[782] See section 5.2

thesis when discussing the grantability of quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements is one similar to *The Jay Bola* except that the exclusive dispute resolution agreements are exclusive jurisdiction agreements. In other words, the context is where a contractual debtor applies for an anti-suit injunction restraining a third party who is bound by an exclusive jurisdiction agreement under the conditional benefit doctrine. Therefore, the debtors would still be the original contracting parties to the contracts containing the exclusive jurisdiction agreements concerned. Subsequently, they will certainly have the capacity to enforce the exclusive jurisdiction agreements following the analysis on arbitration agreements' capacity to be equity clauses under the principle of subject to equities earlier in the thesis.[783]

8.2.3 The Contractual Benefits Taken and the Exclusive Jurisdiction Agreements under the Principle of Subject to Equities

The third question to be considered when it comes to a contractual term's capacity to be an equity clause under the principle of subject to equities is whether the contractual term provides defensive procedural rights which are ancillary to the contractual benefits in question. It has been mentioned that the 'ancillary connection' is existent when the contractual term is an arbitration agreement which can cover the third party claim. That further depends on the material scope of the arbitration agreement and the characterisation of the claim.[784]

The material jurisdiction, or jurisdiction *ratione materiae*, of jurisdiction agreements defines the scope of jurisdiction agreements as to their capacity to include issues. The determination of the material jurisdiction of a jurisdiction agreement is a matter of

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[783] See section 5.3 on the mechanism. For an example where a party to an exclusive jurisdiction agreement applied for an anti-suit injunction to enforce the agreement, see the present thesis's analysis on *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588 at section 9.7.2.2

[784] See section 5.3.2

interpretation in accordance with the law governing the agreement.[785] Normally, the jurisdiction agreements provide that they are applicable to disputes 'arising from', or 'arising under', or 'arising under or in connection with a contract', etc.[786] It has been mentioned that contractual arbitration agreements with similar wording have the capacity to govern third party claims with contractual content.[787] Therefore, there is no reason to deny the same capacity of exclusive jurisdiction agreements. In fact, it will be mentioned later in the thesis that case law indeed recognises exclusive jurisdiction agreements' capacity to govern third party claims which are characterised as arising out of the contract.[788]

8.2.4 Conclusions on The Capacity of Exclusive Jurisdiction Agreements as Conditions under the Conditional Benefit Doctrine

From the above analysis on exclusive jurisdiction agreements combining with arbitration agreements' capacity to be equity clauses under the principle of subject to equities, it is submitted that exclusive jurisdiction agreements do have the potential to be equity clauses under the principle of subject to equities, hence being the conditions under the conditional benefit doctrine.

8.3 English Courts' Identical Attitude Toward Anti-Suit Injunctions Enforcing Exclusive Jurisdiction Agreements and Arbitration Agreements

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[785] *The Conflict of Laws*, 15th ed, 2012, at para 12-015.

[786] *The Conflict of Laws*, 15th ed, 2012, at para 12-015.

[787] See section 5.3.2 defining contractual arbitration agreements and contractual arbitration agreements' capacity to cover contractual disputes

[788] The actual material scope of exclusive jurisdiction agreements covering issue arising out contract may even be wider than that. The Court in *Continental Bank* recognised that this kind of exclusive jurisdiction agreements also govern tortious issues which are closely knitted with contractual issues. (*Continental Bank v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588, at page 593 B~F) This is similar to the decision in *The Playa Larga* [1983] 1 Lloyd's Rep 171 under arbitration agreement context. ([1983] 1 Lloyd's Rep 171, at page 182, 183)

The purpose of section 8 is to discuss the grantability of quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements under the conditional benefit doctrine. It has been submitted that exclusive jurisdiction agreements have the capacity to be equity clauses under the principle of subject to equities which brings in the conclusions on the third party rules earlier in the present thesis.[789] It has also been recognised that anti-suit injunctions enforcing both exclusive jurisdiction agreements and arbitration agreements are enforcing the negative aspect of the dispute resolution agreements.[790] The next question to be discussed is English Courts' attitude toward anti-suit injunctions when it comes to the enforcement of exclusive jurisdiction agreements. If English Courts' attitude toward anti-suit injunctions enforcing arbitration agreements and exclusive jurisdiction agreements are the same, an arguable conclusion can then be reached that theoretically anti-suit injunctions enforcing exclusive jurisdiction agreements are grantable under the conditional benefit doctrine.

8.3.1 The Identical Attitude in Authorities Establishing the Breach of Contract Ground for Anti-Suit Injunctions

It has been mentioned earlier in the thesis that there is a line of cases establishing the breach of contract ground for anti-suit injunctions. One of the authorities is *Ust*. Following the provision of the negative aspect of exclusive jurisdiction agreements, the Court in *Ust* provided that exclusive jurisdiction agreements can be the subject of measures including anti-suit injunctions due to English Law's hostility toward breach of contract.[791] This proposition is a well established rule by a line of authorities. It has been mentioned earlier in the thesis that the House of Lords in *Donohue v Armco* expressly held that anti-suit injunctions should be granted when there is breach of

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[789] See section 3.6 on the conclusions on the principle of subject to equities.

[790] See sections 6.3.4.2, 8.2.1

[791] The Supreme Court provided that 'the negative aspect is as fundamental as the positive. There is no reason why a party to either should be free to engage the other party in a different forum merely because neither party wishes to bring proceedings in the agreed forum.' [2013] 2 Lloyd's Rep 281, at para 21, 23. See also *The Angelic Grace* [1995] 1 Lloyd's Rep 87, at page 96.

exclusive jurisdiction agreements unless there is strong reason against it.[792]

Therefore, English law treats arbitration agreements and exclusive jurisdiction agreements in the same manner when it comes to the grantability of contractual anti-suit injunctions enforcing them. Subsequently, in the context of the principle of subject to equities, when certain contractual benefits are enforced by third parties and triggers the principle of subject to equities bringing in the effect of the exclusive jurisdiction agreement in the main contract, there is no reason to suggest that the debtor is not entitled the same remedy.[793]

8.3.2 *The Front Comor* and the Policy Justifications behind the Grant of Quasi-Contractual Anti-Suit Injunctions Enforcing Exclusive Dispute Resolution Agreements

An analogous conclusion can also be reached by examining the attitude of the House of Lords decision in *The Front Comor*[794]. It has been concluded earlier in the thesis that the House of Lords was holding a rather positive view on quasi-contractual anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine outside the Brussels Regime.[795] However, the second justification for such positive opinion was the protection of jurisdiction of arbitration to which English Courts have supervising power.[796] If the jurisdiction of the arbitrators needs the protection of anti-suit injunction under the conditional benefit doctrine, there is no reason to take that protection away when it comes to the jurisdiction of English Courts.

8.4 *Youell v Kara* as an Authority Directly Providing Quasi-Contractual Anti-Suit Injunctions Enforcing Exclusive Jurisdiction Agreement under the Conditional Benefit

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[792] [2002] 1 Lloyd's Rep 425, at para 24.

[793] This conclusion is subject to the discretionary stage. See section 6.6.2.2 on the exercise of the discretion in *The Hari Bhum (No.1)*.

[794] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2007] UKHL 4

[795] See section 6.3.2

[796] [2007] UKHL 4, at para 23.

Doctrine

As well as the analogous conclusions on the grantability of quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements under the conditional benefit doctrine, there is also an authority directly providing the grantability of the remedy in this context, namely *Youell v Kara*[797].

8.4.1 The Facts in *Youell v Kara*

In *Youell v Kara*, there was a third party suing an insurer under a third party direct action provided by an American statute.[798] However, between the insurer and the insured, there was an exclusive English Court jurisdiction agreement. The insurer subsequently applied in front of English Court for an anti-suit injunction, one of the grounds relied on was that the third party was bound by the exclusive jurisdiction agreement.[799] Therefore, the facts in *Youell v Kara* are rather similar to those of *The Yusuf Cepnioglu*.[800]

8.4.2 The Conditional Benefit Judgment in *Youell v Kara*

It has been mentioned that there are three leading cases on quasi-contractual anti-suit injunctions enforcing arbitration agreements. In all three of them, the Court of Appeal delivered consistent judgments on the third party issues concerned. Particularly, it has been recognised that the third parties, when enforcing contractual rights against the debtors, are bound by the arbitration agreements contained in the same contracts.[801] The thesis subsequently defined them as conditional benefit judgments.[802] Similar

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797 *Youell v Kara Mara Shipping Co Ltd* [2000] C.L.C. 1058.

798 [2000] C.L.C. 1058, at para 22.

799 [2000] C.L.C. 1058, at para 38.

800 See section 2.2.1 providing the facts of *The Yusuf Cepnioglu*.

801 See section 2.2.2.2

802 See section 3.4.6

position can also be identified in exclusive jurisdiction agreement context in *Youell v Kara*.

On the third party issues, the Court in *Youell v Kara* also gave a set of judgments which are rather similar to the conditional benefit judgment in the three problem cases.[803] The starting point is that the Court relied on *The Jay Bola* as an established authority on the third party issues concerned.[804] It was then recognised that

> 'the *nature of the rights* that the direct action statute confers on World Tanker [the third party] is *contractual*; it confers *a statutory right to make a claim on a contract* to which World Tanker was not originally a party. And (subject to para. C of the statute) the rights are confined to the 'terms and limits of the policy'.[805]

In the following paragraph, the Court continued that

> '[i]f World Tanker wishes to rely on some contract terms then, to an English lawyer, it must at least be highly arguable that it is subject to all the terms of that contract. So the YM insurers would be entitled to say that if World Tanker wishes to make a claim based on the H & M policy terms, it must be subject to *all the bundle of rights and obligations contained in that contract*, including the EJC [exclusive jurisdiction clause].'[806]

In the end, the Court held on the third party issue in the present case that 'the nature of the claim by World Tanker against the YM insurers in the direct action claim is

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[803] See section 2.2.2 providing the conditional benefit judgment in the three problem cases.

[804] [2000] C.L.C. 1058, at para 56, 57.

[805] [2000] C.L.C. 1058, at para 58.

[806] [2000] C.L.C. 1058, at para 59. It is to be noted that this is a different manifestation of the doctrine of burden and benefit, namely the pure benefit and burden approach.

contractual and the terms of that contract would include the English proper law clause and the EJC [exclusive jurisdiction clause]'.[807] Therefore, the Court first recognised the contractual basis of the third party claim and then held that certain contractual burdens will be imposed on the third party upon the commencement of the contractual claim. Although the thesis does not agree that all the rights and obligations contained in the main contract will be conferred[808], the above judgment does give the taste of the conditional benefit judgment in the three problem cases and certainly constitutes one version of the doctrine of burden and benefit.[809]

8.4.3 The Anti-Suit Injunction Decisions in *Youell v Kara*

Note that as well as the express provision of the conditional benefit judgments in *Youell v Kara*, the Court in the case also eventually granted the anti-suit injunction against the third party.[810] The decision is consistent with *The Yusuf Cepnioglu*[811] and the conclusions reached in the anti-suit injunction chapter of the present thesis.[812]

8.4.4 Conclusion on *Youell v Kara*'s Direct Provision of Quasi-Contractual Anti-Suit Injunctions Enforcing Exclusive Jurisdiction Agreement under the Conditional Benefit Doctrine

From the above analysis in section 8.4 on *Youell v Kara*, another evidence is provided that quasi-contractual anti-suit injunctions under the conditional benefit doctrine may also be granted to enforce exclusive jurisdiction agreements against bound third parties.

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[807] [2000] C.L.C. 1058, at para 61.

[808] See section 3.4.4.2 on related equities and associated conditions; See also the development of the doctrine of burden and benefit in section 4.2.1.3.2.

[809] See section 2.2.2 providing the conditional benefit judgments in the three problem cases and section 3.4.6 on the definition of conditional benefit judgment adopted in the present thesis, as well as section 4.2.1.3.2 on the doctrine of burden and benefit.

[810] [2000] C.L.C. 1058, at para 70, 108.

[811] See section 2.2.3 on the judgments on anti-suit injunction issues in that case.

[812] See section 6.3.

8.5 Conclusions on Quasi-Contractual Anti-Suit Injunctions Enforcing Exclusive Court Jurisdiction Agreements under the Conditional Benefit Doctrine

As can be seen from the above analysis in chapter 8, the presumption proposed in the introduction of the chapter is tested in the positive. On the one hand, exclusive jurisdiction agreements can indeed be potential equity clauses under the principle of subject to equities which is the origin principle of the conditional benefit doctrine. On the other hand, English law does have the same treatment toward arbitration agreements and exclusive jurisdiction agreements when it comes to anti-suit injunction[813]enforcing exclusive jurisdiction agreements. Combining the two conclusions, an arguable conclusion is submitted that the effect of the judgment in *The Jay Bola* and the theoretical availability of quasi-contractual anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine also extends to exclusive jurisdiction agreements. This arguable conclusion is also further confirmed by the direct recognition of the grantability of quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements in *Youell v Kara*.

[813] Or even quasi-contractual anti-suit injunctions under the conditional benefit doctrine directly.

Chapter 9

The Modern Development of the Conditional Benefit Doctrine

9.1 Introduction to Chapter Nine

The thesis traced the conditional benefit doctrine to assignment and submitted that the conditional benefit doctrine originated from assignment.[814] However, the thesis also submitted that the conditional benefit doctrine is the manifestation of the principle of subject to equities in the context of third party enforcing contractual benefits.[815] Furthermore, it has also been submitted that the principle of subject to equities can apply outside assignment context.[816] A reasonable deductive conclusion can then be made that the conditional benefit doctrine may apply outside assignment. The present chapter will investigate how far does the governing power of the doctrine extends outside assignment under modern English law.

The possibility of applying the conditional benefit doctrine outside assignment and the essence of the research in the present chapter will be the first issues to be clarified as the background. Furthermore, because the research of the present chapter concerns different kinds of exceptions to the benefit aspect of the privity of contract doctrine and that the nature of them diverges, the research method of the present chapter will be provided. Following the preliminary issues, the thesis will move on to the examination of different areas potentially governed by the conditional benefit doctrine. The first three coming in line are actions under Third Parties (Rights against Insurers) Act 1930, actions under Third Parties (Rights against Insurers) Act 2010 and actions under Carriage of Goods by Sea Act 1992. The following candidates are actions by subrogated insurers against third party wrong doers, criminal actions and tort actions.

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[814] See section 3.3.3

[815] See section 3.6

[816] See section 4.2

9.2 The Possibility of Applying the Conditional Benefit Doctrine Outside Assignment Context and the Essence of the Research in the Present Chapter

Before exploring the coverage of the conditional benefit doctrine under modern English law, it is necessary to clarify the initiatives and the essence of the research in the present section as a guidance of the rest of the content in the section.

9.2.1 The Possibility of Applying the Conditional Benefit Doctrine Outside Assignment Context

To begin with, it has been mentioned earlier in the thesis that the principle of subject to equities and the conditional benefit doctrine share the common origin principle, namely the simple principle of fairness and consistency[817]and that the principle of subject to equities applies outside assignment context[818]. Therefore, the reasonable presumption would be that the conditional benefit doctrine can also extend its scope outside assignment.

The possibility of applying the conditional benefit doctrine outside assignment can also be seen by analysing the Law Commission Report No. 242. Throughout the legislative process of the 1999 Act, the Law Commission especially recognised the problem caused by *Tweddle v Atkinson*[819]and spotted multiple difficulties while applying the privity of contract doctrine in modern cases[820]. It has been mentioned earlier in the thesis that, in the Law Commission Report No.242 proposing the introduction of the 1999 Act into English Law, the definition of the conditional benefit doctrine was

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[817] See section 4.2.1.3.3

[818] See section 4.2.2

[819] Law Commission Report No. 242, at para 2.5; *Tweddle v Atkinson* 121 E.R. 762

[820] Law Commission Report No. 242, at para 3.1~3.9.

given.[821] It is reasonable to assume that the definition is local to the 1999 Act. Nevertheless, given the 1999 Act's connection to the privity of contract doctrine generally and that the definition provided by the Law Commission is a rather general statement under the third party context, it is also possible that the conditional benefit doctrine can extend its scope over other exceptions to the benefit aspect of the privity of contract doctrine. The thesis is more in favour of the second proposition.

The above presumptive conclusion can also be tested in the positive by recalling the doctrinal basis of the principle of subject to equities and the conditional benefit doctrine, namely the simple principle of fairness and consistency.[822] It has been concluded that the simple principle of fairness and consistency, or the fairness consideration, is triggered by the taking of derivative equitable interest.[823] It will also be concluded that exceptions to the benefit aspect of the privity of contract doctrine enables third parties to certain contracts to enforce the benefit under those contracts.[824] Also, the fact that the conditional benefit doctrine underlies the 1999 Act and that actions under the 1999 Act constitute an exception to the benefit aspect of the privity of contract doctrine means that the definition of contractual benefit under the conditional benefit doctrine and that under the privity of contract doctrine are the same.[825] Subsequently, all exceptions to the benefit aspect of the privity of contract doctrine should trigger the fairness consideration theoretically. That in turn indicates that it is rather possible that the conditional benefit doctrine may govern actions brought under exceptions to the benefit aspect of the privity of contract doctrine.

9.2.2 The Essence of the Research Conducted in the 'Modern Development' Section

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[821] See section 3.4.1

[822] See section 4.2.1.3.2

[823] See section 4.2.1.3.2

[824] This underlies the research in Chapter 9.

[825] See section 3.4.1 on the unity of the third party contexts under the conditional benefit doctrine and the privity of contract doctrine. See Law Commission Report No. 242, at paras 2.5, 3.1~3.9 for the relationship between the 1999 Act and the privity of contract doctrine.

It has been submitted that the triggering effect of the conditional benefit doctrine is the enforcement of the contractual equitable interest by third parties to the contract under the governing power of the fairness consideration.[826] On the other hand, the whole concept of an exception to the privity of contract doctrine is based on enabling third parties to contracts to enforce contractual benefit. These conclusions are supplemented by the consistency between the third party situation under the conditional benefit doctrine and the third party situation under the privity of contract doctrine[827]. Therefore, once it is found that a certain device constitutes an exception to the benefit aspect of the privity of contract doctrine, it can then also be submitted that the conditional benefit doctrine applies in the device at the preliminary stage. Subsequently, at this stage, the essence of the research conducted in the 'Modern Development' section is the investigation of the question whether certain exceptions to the benefit aspect of the privity of contract doctrine are governed by the conditional benefit doctrine.

9.3 The Research Approach Adopted When Investigating the Existence of the Conditional Benefit Doctrine in the Selected Exceptions to the Benefit Aspect of the Pirivity of Contract Doctrine

Following the clarification of the possibility of finding the existence of the conditional benefit doctrine outside assignment and the essence of the research conducted in the 'Modern Development' section, it becomes probable to provide the research method for the section.

9.3.1 A Hierarchic Approach

A hierarchic researching approach will be adopted in the present thesis when

[826] See section 4.2.1.3.3.

[827] See section 3.4.1 on the unity of the third party contexts under the conditional benefit doctrine and the privity of contract doctrine.

investigating the application of the conditional benefit doctrine in each exception to the benefit aspect of the privity of contract doctrine. The first layer as a foundation on the hierarchy is certainly the investigation on whether a particular measure constitutes an exception to the benefit aspect of the privity of contract doctrine. Note that although it has been submitted that the conditional benefit doctrine should apply automatically in exceptions to the benefit aspect of the privity of contract doctrine[828], it is still necessary for the thesis to condense the authorities and extract the exceptions' capacity to enable third parties to enforce derivative contractual rights since such capacity is not always apparent.[829] Following the first layer of research, more layers of research will also be carried out to further confirm the conclusion. Questions may be answered during the process. Several examples are as followed. First, whether there is any express provision of a conditional benefit judgment indicating the governing power of the conditional benefit doctrine in the selected candidate exceptions.[830] A conditional benefit judgment or a judgment in a similar form is a strong indication of the governing power of the conditional benefit doctrine in the candidate exception to the benefit aspect of the privity of contract doctrine. Secondly, whether there is express provision of the principle of subject to equities under the candidate exceptions. The conditional benefit doctrine is the manifestation of the principle of subject to equities and the principle of subject to equities is involved in one of the conditional benefit judgments defined by the present thesis.[831] The finding of the principle of subject to equities in a particular candidate exception to the privity of contract doctrine is certainly a strong element in favour of the recognition of the existence of the conditional benefit doctrine in the device. Thirdly, whether there is express provision of the fairness consideration as a doctrinal justification for the conditional benefit doctrine and the principle of subject to equities.

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[828] See section 9.2.2

[829] For example, when the particular exceptions to the benefit aspect of the privity of contract doctrine has non-contractual appearance.

[830] See section defining 3.4.6 conditional benefit judgments.

[831] See section defining 3.4.6 conditional benefit judgments.

Note that after the completion of the preliminary analysis for the finding of the conditional benefit doctrine in a particular exception to the benefit aspect of the privity of contract doctrine, there is also the necessity to investigate whether there are any elements rebutting the preliminary conclusion. Each exception has their own features and, therefore, the preliminary conclusion will not always stand valid eventually. Thus, it is necessary to investigate if there are any elements negating the application of the principle of subject to equities in the candidate exceptions when existing authorities demonstrate such possibility.[832]

9.3.2 The Candidate Exceptions to the Benefit Aspect of the Privity of Contract Doctrine Selected by the Thesis and the Classification of the Exceptions for the Purpose of the Thesis

As a preliminary issue for the investigation to be further conducted in section 9.3, the potential candidate exceptions to the benefit aspect of the privity of contract doctrine will be selected and classified.

Several groups of exceptions are traced by the thesis. The first group includes those with assignment basis. It has been concluded that the conditional benefit doctrine originated from assignment.[833] Therefore, it is reasonable to examine exceptions with assignment basis. The second group includes actions brought by subrogated insurers due to the close connection between assignment and subrogation. The third group

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[832] An example of a potential negating element is timing issue. It has been concluded earlier in the thesis that the timing issue is a concomitant with the principle of subject to equities. (see section The Mechanism behind the Consistent Timing Factors under the Principle of Subject to Equities and the Conditional Benefit Doctrine) Therefore, normally there is no necessity to especially analyse whether the timing issue is satisfied under a potential candidate where the principle of subject to equities certain applies. However, if there is authority suggesting there may be a potential inconsistency with the timing issue. The thesis must clarify the conflict between the existence of the principle of subject to equities and the non-satisfaction of the timing issue.

[833] See section 3.3.3

includes the exceptions where conditional benefit judgments or quasi-'conditional benefit judgments' are provided by the Courts.[834]

On the other hand, the above selected exceptions have to be further classified for convenient analysis. The approach to analyse whether a measure is an exception to the benefit aspect of the privity of contract doctrine is by answering the question whether the exception enables a third party to contracts to enforce contractual benefits. Note that the thesis divides exceptions to the benefit aspect of the privity of contract doctrine into two categories, exceptions with a contractual basis and exceptions with a non-contractual basis. The exceptions with contractual basis under the definition of the thesis refers to the ones which expressly provide that they enable third parties to enforce certain *contractual* benefits. Under the meaning of the present thesis, they are actions under Third Parties (Rights against Insurers) Act 1930 and Third Parties (Rights against Insurers) Act 2010 and actions under Carriage of Goods by Sea Act 1992. While the ones with non-contractual basis are those exceptions where it cannot be identified from the outside whether they are enabling third parties to certain contracts to enforce contractual benefits or whether there is a 'third party to contract' relationship existing at all.[835] Under the meaning of the thesis, they are certain actions brought by subrogated insurers against third party wrong doers, certain criminal actions and certain tort actions. This differentiates the research method to be adopted when discussing the governing power of the conditional benefit doctrine under the two types of exceptions to the benefit aspect of the privity of contract doctrine. Under exceptions with contractual basis, the evidence is relatively easy to find. Nonetheless, under exceptions with non-contractual basis, the conclusion is not easily accessible. The characterisation of the right enforced by the claimants is needed. The necessity is given rise by the fact

[834] For the definition of a conditional benefit judgment, see section 3.4.6

[835] It is to be noted that, as a matter of fact, all exceptions to the benefit aspect of the privity of contract doctrine are contractual in nature eventually because they enable third parties to the contract to enforce contractual benefits. This division adopted by the thesis is based on the appearance of the candidate exceptions at the preliminary stage.

that the conditional benefit doctrine has a contractual basis. Therefore, before characterisation, the legal status of those exceptions to be exceptions to the benefit aspect of the privity of contract doctrine is not even clear yet while the thesis already mentioned the candidates governed by the conditional benefit doctrine analysed by the thesis are essentially exceptions to the benefit aspect of the privity of contract doctrine. Subsequently, the necessity to analyse it will not be demonstrated as it should be. Therefore, under non-contractual exceptions to the benefit aspect of the privity of contract doctrine, characterisation should actually be a priority matter. Further research on the particular candidate exception only matters after the resolution of the preliminary matter.

9.4 The Conditional Benefit Doctrine in the Third Party Actions under Three Domestic Statutes with Assignment Basis

It has been concluded that the principle of subject to equities derived from assignment originally.[836] Under English law, there are certain statutes with assignment basis, including Third Parties (Rights against Insurers) Act 1930, Third Parties (Rights against Insurers) Act 2010 and Carriage of Goods by Sea Act 1992. Thus, it is reasonable to start exploring the modern scope of the conditional benefit doctrine by analysing actions brought under these statutes.

9.4.1 The Conditional Benefit Doctrine under Third Parties (Rights against Insurers) Act 1930 and Third Parties (Rights against Insurers) Act 2010

To conclude that the conditional benefit doctrine applies to actions brought under the 1930 Act and the 2010 Act, the preliminary question to be answered is whether actions brought under the two statutes can be an exception to the benefit aspect of the privity of contract doctrine. To answer the question, it is necessary to investigate whether the

[836] See section 3.3.3

two statutes enable strangers to the consideration of certain contracts to enforce the benefits of the contract.

Unlike actions brought under foreign statutes in *The Jay Bola*[837], *The Hari Bhum(No.1)*[838], *The Yusuf Cepnioglu*[839], or tort and criminal proceedings which will be analysed later in the thesis, for actions brought under the 1930 Act and the 2010 Act, there is no necessity to characterise the rights enforced. It has been concluded that the 1930 Act and the 2010 Act enables third parties to the insurance contract to enforce derivative equitable interest from the insurance contract.[840] Therefore, actions under the 1930 Act and the 2010 Act are a measure for certain third parties to certain insurance contracts to enforce the benefits under the insurance contract and are indeed an exception to the benefit aspect of the privity of contract doctrine. A preliminary conclusion can then also be reached that the application of the conditional benefit doctrine does extend to actions brought under the 1930 Act and the 2010 Act.

The preliminary conclusion is also furthered by other evidence. Earlier in the present thesis, it has been concluded that the 1930 Act and the 2010 Act are based on assignment and that the principle of subject to equities underlies the two statutes.[841] Subsequently, there is no necessity to repeat the analysis.

9.4.2 The Conditional Benefit Doctrine under Carriage of Goods by Sea Act 1992

Another assignment-based domestic statute where the conditional benefit doctrine

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[837] *Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola) (CA)* [1997] 2 Lloyd's Rep 279

[838] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67

[839] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The "Yusuf Cepnioglu")* [2016] EWCA Civ 386

[840] See sections 4.3.2.1, 4.3.2.2

[841] See sections 4.3.2.1, 4.3.2.2

potentially applies is the Carriage of Goods by Sea Act 1992 and there is evidence suggesting that the conditional benefit doctrine also governs actions brought under the 1992 Act.

9.4.2.1 Actions Brought under Carriage of Goods by Sea Act 1992 as an Exception to the Benefit Aspect of the Privity of Contract Doctrine

For the finding of the legal status of actions under the 1992 Act as an exception to the benefit aspect of the privity of contract doctrine, the question to be answered is also whether the measure enables third parties to certain contracts to enforce the benefits under those contracts.

It is to be noted that S1(2) of the 1992 Act provides that '[t]his Act applies to the following documents, that is to say—(a) any bill of lading; (b)any sea waybill; and (c) any ship's delivery order.' Then s1(2)(a) provides that '[r]eferences in this Act to a bill of lading—(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but (b) subject to that, do include references to a received for shipment bill of lading.' Therefore, the 1992 Act has governing power over transactions carried out based on multiple types of shipping documents, yet the authorities on bill of lading transactions are the most easily available. As a result, the present thesis selects bill of lading transactions as the context in which the discussion on the conditional benefit doctrine will be carried out.[842] S2(1) of the 1992 Act provides that

> '(1) Subject to the following provisions of this section, a person who becomes—(a) the lawful holder of a bill of lading; (b) the person who (without

[842] From s2(1) of the 1992 Act, the relationship between the third party lawful holders of the shipping documents and the rights under the contract of carriage does not differentiate due to the difference of the context. Therefore, analysis on bill of lading authorities should be considered as being generally applicable in actions brought under the 1992 Act.

being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order, shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and *vested in him all rights of suit under the contract of carriage as if he had been a party to that contract*.'.[843]

Therefore, under the 1992 Act, a third party bill of lading holder can enforce the benefits under the carriage *contract* because he has vested in him *all rights of suit* under the contract. Subsequently, apparent conclusions can be reached that the 1992 Act enables third parties to the carriage contracts to enforce the benefits under the carriage contract and that actions under the 1992 Act is an exception to the benefit aspect of the privity of contract doctrine. A preliminary conclusion can then be reached that the conditional benefit doctrine governs actions brought under the 1992 Act.

9.4.2.2 The Express Provision of the Conditional Benefit Doctrine in Authorities on Actions Brought under the Carriage of Goods by Sea Act 1992

Authorities have also expressly provided the conditional benefit doctrine's governing power in actions brought under the 1992 Act.

9.4.2.2.1 The Express Provision of the Conditional Benefit Doctrine in *The Berge Sisar* in the Carriage of Goods by Sea Act 1992 Context

There was an express provision of the conditional benefit doctrine under the 1992 Act

[843] The definition of a lawful holder of a bill of lading is provided under s5(2) of the 1992 Act and the legal position as a lawful holder is also subject to the situations provided under s2(2).

in the House of Lords authority *The Berge Sisar*.[844] In that case, there was a sale and transfer of certain cargo under five bills of lading. The seller was the shipper of the cargo. One of the questions brought in front of the House of Lords was whether the shipowner's argument that the buyers were subject to liabilities under s3 of the 1992 Act on demand of delivery of the cargo for testing.[845]

Lord Hobhouse giving the leading judgment in the House of Lords mentioned the mechanism of the 1992 Act that '[a]s regards the liability of the holder under the bill of lading, their recommendation was in essence that a holder who seeks to take the benefit of the contract of carriage should not be permitted to do so without the corresponding burdens'.[846] This statement is almost identical to the principle of benefit and burden established by *Halsall v Brizell*[847], *Tito v Waddell*[848]and *Rhone v Stephens*[849]as has been mentioned earlier in the thesis.[850]

However, although there was the expression provision of the doctrine of burden and benefit in *The Berge Sisar*, it is still not certain which interpretation of the doctrine of burden and benefit was adopted by the House of Lords pending the timing issue.[851] The problem was then resolved in the case itself. On the timing requirement, the House of Lords first cited the Law Commission Report No. 196 and interpreted the relevant statement in the report that

> '[t]hey [the Law Commission and the Scottish Law Commission] preferred instead an approach which severed the link between property and right of

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[844] *Borealis AB (formerly Borealis Petrokemi AB and Statoil Petrokemi AB) v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17.

[845] [2001] UKHL 17, at para 17.

[846] [2001] UKHL 17, at para 27.

[847] *Halsall v Brizell* [1957] Ch. 169

[848] *Tito v Waddell* (No.2) [1977] Ch. 106

[849] *Rhone v Stephens* [1994] 2 A.C. 310

[850] See section 4.2.1.3.3

[851] On the different versions of the doctrine of burden and benefit, see section 4.2.1.3.2

> action and transferred the rights of suit to the holder without more, but not the liabilities. They recommended that there should not be an automatic linking of contractual rights and liabilities; pledgees would not be liable "unless they sought to enforce" their security'.[852]

Therefore, the transfer of contractual burden is not instant at the transfer of contractual benefit. Furthermore, the Court explained the operation of s3(1) of the 1992 Act that '[t]he solution adopted by the draftsman [under s3 of the *1992 Act*] was to use the principle that he who wishes to *enforce* the contract against the carrier must also accept the corresponding liabilities to the carrier under that contract.'[853] Thus, in the opinion of the House of Lords, the triggering time point of the liabilities is the enforcement of the carriage contract.[854] Subsequently, the timing requirement of the conditional benefit doctrine is also satisfied in the eyes of the House of Lords in *The Berge Sisar*.

9.4.2.2.2 The Express Provision of the Conditional Benefit Doctrine in Carriage of Goods by Sea Act 1992 Itself

Moreover, the 1992 Act itself has provided a principle which takes the standard format of the principle of subject to equities with the essence of the conditional benefit doctrine. s3 sets out that

> '(1)Where subsection (1) of section 2 of this *Act* operates in relation to any document to which this *Act* applies and the person in whom rights are vested by virtue of that subsection—(a)takes or demands delivery from the carrier of any of the goods to which the document relates; (b)makes a claim under the contract of carriage against the carrier in respect of any of those goods; or (c)is

[852] [2001] UKHL 17, at para 27.

[853] [2001] UKHL 17, at para 31.

[854] See section 3.4.1 mentioning the relationship between the enjoyment of contractual benefit and the enforcement of contractual benefit.

a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods, that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become *subject to the same liabilities under that contract as if he had been a party to that contract.*'.

The depiction adopted in the section is rather consistent with the format of the principle of subject to equities that a third party assignee takes the assigned choses in action subject to equities.[855] On the other hand, subsection 3(1)(b) triggering the application of the conferral of liabilities under carriage contract is essentially claiming damage for the breach of the carriage contract and subsections 3(1)(a) and 3(1)(c) are demanding performance of the carriage contract to which the bill of lading holder is a third party. All these actions are consistent with the definition of the enjoyment of contractual benefit as was defined by the Law Commission Report No. 242 and the present thesis.[856]

Subsequently, it is submitted by the thesis that the *1992 Act* has expressly provided the governing power of the conditional benefit doctrine in actions brought under the statutory device.

9.4.2.3 The Principle of Subject to Equities in Actions Brought under Carriage of Goods by Sea Act 1992

Within authorities on actions brought under the 1992 Act, there is also traceable evidence that the principle of subject to equities applies. Multiple authorities suggest that the consignment of negotiable documents, including that recognised by the 1992

[855] See section 3.4.2 providing the standard expressions of the principle of subject to equities.

[856] See section 3.4.1

Act, is assignment in essence. First, in commercial practice, a negotiable bill of lading will always include the wording 'to order or to assign' or words with that effect.[857] Secondly, there are cases where the consignees of bills of lading are regarded as assignees. In *Brandt v Liverpool*[858], Atkin L.J. indicated that the consignment of a bill of lading is analogous to assignment by referring to a consignee of a bill of lading as 'the assignee'.[859] Lastly, the policy behind the *1992 Act* was explained by the Law Commission in Paper No. 242 that 'the basic modal for the *1992 Act* is one of assignment'[860]and this has been confirmed by the Court in *The Ythan*[861]where an anology between the operation of the 1992 Act and assignment was made.[862] Therefore, it is submitted by the thesis that the transfer of negotiable documents under the 1992 Act is essentially assignment. Subsequently, it is reasonable for the thesis to consider the possibility that the principle of subject to equities governs actions brought under the 1992 Act.

9.4.2.4 The Nature of Contract or the Principle of Subject to Equities—The Satisfaction of the Timing Requirement in Actions Brought under Carriage of Goods by Sea Act 1992

S2(1) and s3(1) of the 1992 Act provides that the third party holders of the negotiable documents will be treated 'as if he had been a party' to the carriage contract. Subsequently, it is possible the reason why the third parties claiming under the 1992 Act are bound by certain contractual burdens is the bilateral nature of

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[857] For an example of such a bill of lading, see *Borealis AB (formerly Borealis Petrokemi AB and Statoil Petrokemi AB) v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, at para31.

[858] *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 K.B. 575

[859] It was provided that '[i]t appears to me that just as plainly as the *assignee* is bound by an implied contract, so is the shipowner, and the shiponwer's obligation in the case where freight has in fact been paid by the holder of the bill of lading, is that he will deliver the goods'. (*Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 K.B. 575, at page 599)

[860] Law Commission Report No. 242, at para 12.8.

[861] *Primetrade AG v Ythan Ltd* [2006] 1 Lloyd's Rep. 457

[862] *Primetrade AG v Ythan Ltd* [2006] 1 Lloyd's Rep. 457, at para 8

contracts[863]instead of the conditional benefit doctrine since s2(1) and s3(1) of the 1992 Act make third parties become contracting parties to the main contract. Apparently the issue concerns the question when are the liabilities imposed on the eligible third parties under the 1992 Act.

From the legislating history of the area, it can be seen that the third parties are only intended to be subject to the contractual liabilities in the carriage contracts upon the enforcement of the rights transferred under s2(1) of the 1992 Act. The relationship between the carriage contract and the bill of lading holder was originally governed by the Bill of Lading Act 1855.[864] S1 of the 1855 Act provides that

> '[e]very consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.'

The consequence of this provision was interpreted by Erle CJ in *Smurthwaite v Wilkins*[865]that

> '[l]ooking at the whole statute, it seems to be that the obvious meaning is, that

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[863] For the bilateral nature of contracts, see *The Law of Assignment* where it was stated that '[i]t is trite English Law that contracts affect only parties to them, and do not affect third parties. In other words, contractual rights and obligations are essentially bilateral, subsisting between the parties to the contract.' (*The Law of Assignment*, at para 5.05); For the binding nature of contracts, see *Racecourse Betting* where it was provided that it is a general principle that English courts 'make people abide by their contracts' (*Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114, at para 126). For another example of English Courts' hostility toward breach of contract, see *Pena Copper Mines, Ltd v Rio Tinto Co, Ltd* [1911-13] All ER Rep 209, at page 213.

[864] Available at http://www.legislation.gov.uk/ukpga/Vict/18-19/111/enacted.

[865] *Smurthwaite v Wilkins* (1862) 11 C.B. N.S. 842

> the assignee who receives the cargo shall have all rights and bear all the liabilities of a contracting party; but that, if he passes on the bill of lading by enforcement to another, he passes on all the rights and liabilities which the bill of lading carries with it.'[866]

Therefore, the transfer of the rights and liabilities of the carriage contract to the third party consignee of the bill of lading under the 1855 Act is concurrent. From the outside, the consequence of s1 of the 1855 Act is identical to that of s2(1) of the 1992 Act. However, on the rights and obligations of the third party document holders, 1855 Act has no further specification while the same is not true to the 1992 Act.

The 1992 Act was introduced for the unsatisfactory result of the 1855 Act. It was provided in The Law Commission Report No.196 that '[i]f the shipper's rights and liabilities were to be transferred to all holders, including those holding the bill merely as security, it would mean that such people, including banks who take up shipping documents in the normal course of financing international sales, would be liable for freight, demurrage and other charges.'[867] This was considered to be a 'commercially undesirable' result.[868] The merits of the repeal to the commercial practice is not the topic of the thesis. However, the change made by the 1992 Act makes the Act consistent with the timing issue of the principle of subject to equities. To examine that consistency, it is necessary to go back to s3 of the 1992 Act again. From the content of s3 of the 1992 Act and analysis set out earlier in the thesis, it can be recalled that the choice to invoke the fact that the third parties are bound by the liabilities arises when the above

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[866] *Smurthwaite v Wilkins* (1862) 11 C.B. N.S. 842, at page 848. See also *The Fehmarn* where it was held that '[i]n taking over the bill of lading they [the bill of lading holder] did, of course agree to be bound by the terms thereof'. (*Owners of Cargo Lately on Board the Fehmarn v Owners of the Fehmarn (The Fehmarn)* [1957] 1 W.L.R. 815, at page 820)

[867] Law Commission Report on Rights of Suit in Respect of Carriage of Goods by Sea (Law Commision Report No.196), available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-196-SC.-130-RIGHTS-OF-SUIT-IN-RESPECT-OF-CARRIAGE-OF-GOODS-BY-SEA.pdf, at para 3.3

[868] The Law Commision Report No.196, at para 3.3

transactions are carried out by the third parties. The several transactions listed in s3 which will trigger the imposition of contractual liabilities are either bringing a claim against the carrier or enforce the benefits under the carriage contract evidenced by the bill of lading. These transactions certainly demonstrate the intention to enjoy the contractual benefits.[869] Subsequently, the contractual liabilities are only imposed on the third party holders upon the enforcement of the rights transferred and that the operation of the 1992 Act is consistent with the timing requirement under the conditional benefit doctrine.

Therefore, under the *1992 Act*, the third party transferee of the negotiable documents is indeed entitled to enforce the carriage contract contained in the documents. However, the transfer of the documents does not automatically take the contractual liabilities under the carriage contract with it.

It is submitted that, in third party actions under the 1992 Act, the reason why the choice to impose contractual conditions arises is still the principle of subject to equities at the preliminary stage. It is merely that the statute has some further effects. Nonetheless, the conditional benefit doctrine originates from the principle of subject to equities. Once it is certain that the principle of subject to equities applied, what happens at a later stage does not influence the fact that the conditional benefit doctrine already applied. Subsequently, it is submitted that the conclusions reached by the thesis on the existence of the conditional benefit doctrine in actions brought under the 1992 Act are still valid.

9.4.2.5 Conclusions on the Conditional Benefit Doctrine under Carriage of Goods by Sea Act 1992

After the above analysis on the 1992 Act carried out by the thesis, conclusions have

[869] See section 3.4.1 on the relationship between enforcement and the intention to enjoy contractual benefits.

been reached that the Act does provide an exception to the benefit aspect of the privity of contract doctrine. Therefore, a preliminary conclusion can already be submitted that the conditional benefit doctrine governs actions brought under the 1992 Act. Moreover, the House of Lords authority *The Berge Sisar*[870]also provided the governing power of the conditional benefit doctrine in 1992 Act context when discussing the third party issues involved in that case. Furthermore, the Act even expressly provided the doctrine of burden and benefit in the provisions. This express provision of the doctrine is furthered by the fact that the timing requirement is satisfied in the 1992 Act context. Subsequently, it is submitted that the conditional benefit doctrine also governs actions brought under the 1992 Act.[871]

9.5 *The Prestige (No.2)* and the Conditional Benefit Doctrine in Criminal Actions

Another candidate to the conditional benefit doctrine is criminal actions, or explicitly criminal actions enforcing contractual benefits. The possibility was provided by the Court of Appeal decision in *The Prestige (No.2)*[872]. Since the authorities on this matter is rather limited and *The Prestige (No.2)* comprehensively demonstrated the possibility of recognising the conditional benefit doctrine in certain criminal actions under English law, the case will be examined in detail.[873]

9.5.1 The Facts of *The Prestige (No.2)*

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[870] *Borealis AB (formerly Borealis Petrokemi AB and Statoil Petrokemi AB) v Stargas Ltd (The Berge Sisar)* [2001] UKHL 17

[871] For an example of a quasi-conditional benefit situation where the Court held that a third party lawful holder under the meaning of s2 of the 1992 Act can and can only bring a procedural dispute inconsistent with the arbitration agreement in the contract, see *Sea Master Shipping Inc -v- Arab Bank (Switzerland) Limited (The Sea Master)* [2018] EWHC 1902 (Comm), at para 41.

[872] [2015] 2 Lloyd's Rep 33.

[873] Note that the reasoning process and the final decision made in *The Prestige (No.2)* [2015] 2 Lloyd's Rep 33 is rather similar to that of the three problem cases on the third party issue. (See section 2.2.2 on the third party decisions in the three problem cases) This is also the reason why criminal proceedings are considered as a potential candidate initially.

The facts of *The Prestige (No.2)*[874]is as followed. The tank the Prestige sunk off Spanish coast and caused damage. The expenses spent on cleaning up exceeded the CLC convention limit under which the shipowner's liability insurer is obliged to pay. The Spanish and French government started proceedings in Spain under a Spanish statute which entitles an injured third party to sue the insurer directly. The Club then started arbitration proceedings in England declaring non-liability in relation to any non-CLC liability and received an award. Following the decision in the arbitration proceedings, the Club sought to enforce the arbitration award in front of the English court and the Spanish Government first claimed state immunity, but then claimed that the English arbitral tribunal does not have jurisdiction over the matter because the cause of action was independent from the contract. Further, the claim is not arbitrable. The first instance judge gave judgement in favour of the Club. In the Court of Appeal, the appellant in the present case was the Spanish and French government while the respondent was the shipowner's liability insurer, the Club.[875]

9.5.2 The Criminal Proceedings in *The Prestige (No.2)* as an Exception to the Benefit Aspect of the Privity of Contract Doctrine

To constitute an exception to the benefit aspect of the privity of contract doctrine as established by *Tweddle v Atkinson*[876], the criminal proceedings must have the capacity of enabling third parties to a contract to enforce the contractual benefits in that contract. In *The Prestige (No.2)*, the criminal proceedings were recognised to be analogous to a third party direct action by an injured third party against the insurer.[877] This already indicates that the third party is actually enforcing a contractual right in the foreign proceedings.[878] Yet the Court of Appeal still went through the characterisation process.

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[874] *The London Steam Ship Owners Mutual Insurance Association Ltd v Spain (The Prestige) (No 2)* [2015] 2 Lloyd's Rep 33

[875] [2015] 2 Lloyd's Rep 33, at page 33.

[876] *Tweddle v Atkinson* 121 E.R. 762

[877] [2015] 2 Lloyd's Rep 33, at para 18~20.

[878] This conclusion is reached based on the fact that the 1930 Act and the 2010 Act enables the eligible

From the facts, the claimant in the Spanish proceedings was not a party to the contract between the insured shipowner and the P&I club. Therefore, the claimant meets the criteria of third parties under the meaning of *Tweddle v Atkinson*.[879] The remaining issue is whether the criminal proceedings did enable such third parties to enforce certain contractual benefit. The court held that the nature of the interests the third party sought to enforce under the Spanish statute depends on the content of the liability.[880] After going through the provisions of the foreign statute, the court held that 'the content of that right is defined largely, if not entirely, by the contract'.[881] But this is the first step on characterisation. The second step is to look at whether the provision entitles the third party the same rights under the contract between the insured and the insurer or defines the scope of the liability of the insurer which gives the third party an independent right.[882] The court subsequently found that the statute only confers onto the third party the right from the contract.[883] Therefore, the claim is essentially an insurance third party direct action against the insurer. The right enforced by the third party is essentially a right to claim against breach of contract.[884] The breach of contract is enforcing contractual benefit (equitable interest) contained within the contractual term to hold the insured harmless[885]even if the right of action is a duplication of the insured's right against the insurer created by the statute. Therefore, the benefit enforced by the third party is contractual in nature. Subsequently, it is submitted that criminal proceedings in *The Prestige (No.2)* is an exception to the benefit aspect of the privity of contract

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third parties to enforce derivative contractual rights. (see section 4.3.2.2); Also, given the earlier analysis on the existence of the conditional benefit doctrine in third party direct actions under the 1930 Act and the 2010 Act (see section 9.4.1), it is arguable that a preliminary conclusion can already be reached that the conditional benefit doctrine applied in *The Prestige (No.2)* [2015] 2 Lloyd's Rep 33.

[879] See section 3.4.1 providing the third party context under the thesis.

[880] [2015] 2 Lloyd's Rep 33, at para 17.

[881] [2015] 2 Lloyd's Rep 33, at para 24.

[882] [2015] 2 Lloyd's Rep 33, at para 25.

[883] [2015] 2 Lloyd's Rep 33, at para 26.

[884] See section 4.3.2.2

[885] See section 4.3.2.2

doctrine. Following this conclusion, it can be further submitted that the conditional benefit doctrine governed the criminal proceedings in *The Prestige (No.2)*.[886]

9.5.3 The Express Provision of the Conditional Benefit Doctrine in *The Prestige (No.2)*

In *The Prestige (No.2)*, there was also a judgment similar to the conditional benefit judgment in *The Jay Bola*, *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*.[887] The Court first recognised that 'whether the appellants are bound by the terms of the Club's rules, in particular the arbitration clause and the 'pay to be paid' clause which depends on ascertaining the nature of the right which the appellants seek to enforce.'[888] Following the conclusion that the rights the third party enforces under the Spanish statute is contractual in nature, the result is that the appellant is *bound* by the clauses in the contract between the Club and the shipowner[889]. Subsequently, the express provision of the conditional benefit judgment in *The Prestige (No.2)* furthered the preliminary conclusion that the conditional benefit doctrine applied in the case.

9.5.4 Conclusions on the Conditional Benefit Doctrine in *The Prestige (No.2)*

In the above analysis in section 9.6, it has been submitted that the criminal proceedings in *The Prestige (No.2)* provided an exception to the benefit aspect of the privity of contract doctrine and that the express provision of the conditional benefit judgment in *The Prestige (No.2)*. Therefore, it is further submitted that the conditional benefit doctrine did govern the criminal proceedings in the case which was expressly recognised by the Court of Appeal.

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[886] See section 9.3.1 providing the relationship between a device's capacity to be an exception to the benefit aspect of the privity of contract doctrine and the application of the conditional benefit doctrine.

[887] See sections 2.2.2, 3.4.6

[888] [2015] 2 Lloyd's Rep 33, at para 14.

[889] [2015] 2 Lloyd's Rep 33, at para 82, 83.

9.5.5 A Reflection of English Courts' Attitude toward the Application of the Conditional Benefit Doctrine in Criminal Proceedings

There is a remaining issue before concluding that the conditional benefit doctrine applies in third party criminal proceedings enforcing contractual benefits. As well as the fact that the third party proceedings in *The Prestige (No.2)* were indeed criminal from the outside[890], the proceedings in that case were also brought relying on a foreign statute. It is then essential to clarify the influence of the statutory elements in the case. For the purpose of the thesis, there is no much difference whether the criminal proceedings are based on a statute or not since characterisation is needed whatsoever. As long as the third party proceedings are brought relying on foreign law, the foreign law will then be considered as part of the facts.[891] However, what is certain is that the claim in foreign proceedings are criminal from the outside. Yet the Court of Appeal still recognised that the content of the claim is contractual. This sheds light on English Courts' attitude toward the principle that criminal proceedings can be an enforcement measure of contractual benefits and those criminal proceedings brought under foreign statutes constitute an exception to the benefit aspect of the privity of contract doctrine. Furthermore, as has been concluded in the previous section[892], the Court of Appeal also recognised the governing power of the conditional benefit doctrine in *The Prestige (No.2)*. Therefore, it is rather probable that domestic criminal proceedings brought by third parties enforcing contractual rights will also be governed by the conditional benefit doctrine if the 'content of the claim' is contractual.[893]

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[890] [2015] 2 Lloyd's Rep 33, at para 2, 78, 82.

[891] *Kyrgyz Republic v Stans Energy Corp* [2018] 1 Lloyd's Rep 66, at para 44.

[892] See section 9.6.4

[893] It is to be noted that the requirement for a criminal claim to be caught by an arbitration agreement is potentially stricter than that for a tort claim to be caught by an arbitration agreement. *The Prestige (No.2)* provides that the criminal claim should be enforcing the same right as a contractual right. (*The Prestige (No.2)* [2015] 2 Lloyd's Rep 33, at para 25) This is certainly different from what was provided in *The Playa Larga* under tortious context. (*The Playa Larga* [1983] 1 Lloyd's Rep 171, at page 183) Therefore, in criminal action context, the chance of the application of quasi-'conditional benefit doctrine' is rather limited.

9.6 The Conditional Benefit Doctrine in Tort Actions

Criminal proceedings enforcing contractual benefit is not the only non-contractual exception to the benefit aspect of the privity of contract doctrine where there is traceable evidence showing that the conditional benefit doctrine imposes governing power. The present section will investigate whether certain tort actions can be exceptions to the benefit aspect of the privity of contract doctrine and whether the conditional benefit doctrine governs those actions.

9.6.1 Tort Actions as an Exception to the Benefit Aspect of the Privity of Contract Doctrine

Case law has provided the position that tort actions can be an exception to the benefit aspect of the privity of contract doctrine. To constitute an exception to the benefit aspect of the privity of contract doctrine, the tort actions must enable third parties to enforce contractual benefits.[894] It was held in *Rothwell v Chemical & Insulating Co Ltd*[895]that to establish a cause of action in tort the court must be satisfied that there is a duty of care owed by the defendant to the plaintiff and the plaintiff suffered a loss caused by the defendant's breaching such duty of care.[896] The cause of action in that case has the capacity to enable a claimant to bring an action against the tort feaser to enforce a damage.[897] Subsequently, it certainly includes the right of action to enforce the benefit contained in an alleged damage.[898] *Rothwell* also provided that '[p]roof of the trespass

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[894] See section 3.4.1

[895] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39

[896] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, at para 64, 65.

[897] [2007] UKHL 39, at para 64, 65.

[898] See also *Coburn v College* where a cause of action was said to be including all the facts which will give rise to an action that '[t]he definition of "cause of action" which I gave in *Read v Brown* has been cited. I there said that it is "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court"'. (*Coburn v College* ([1897] 1QB 702 (CA), at 706-7); There is also the opinion that cause of action and right of action are interchangeable concepts.

or breach of contract is enough to found a cause of action'[899] Therefore, the question whether certain tort actions can be exceptions to the benefit aspect of the privity of contract doctrine is the equivalent of the question is it possible that a breach of contractual obligation against a counter contractual party can concurrently give rise to a breach of tortious duty of care to a third party. An answer can be produced by examining the textbook classic *Donoghue v Stevenson*[900].

In that case, the plaintiff was provided with some ginger beer by her friend who bought the ginger beer from the defendant manufacturer.[901] The ginger beer contained a decomposed snail which was only noticed after the plaintiff already consumed some of the ginger beer.[902] The defendant refused liability contending that there is no cause of action because there is no contractual relationship between the plaintiff and the defendant.[903] Lord Atkin held a wide view on duty of care[904]and recognised that there was a duty of care in this case[905]which was affirmed by another three judges. The important contribution to the thesis from this case comes from the fact that the whole established rule that, as long as a cause of action in tort can be established, one party can sue another party even if there is no contractual relationship between them.[906] Furthermore, such a tort action can be for the purpose of enforcing a contractual benefit in the contract between the tortfeaser and the tortfeaser's counterparty.[907] The principle

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(*The Law of Assignment*, at para 3.01)

[899] [2007] UKHL 39, at para 7.

[900] *Donoghue v Stevenson* [1932] A.C. 562.

[901] [1932] A.C. 562, at page 562.

[902] [1932] A.C. 562, at page 562, 563.

[903] [1932] A.C. 562, at page 565.

[904] [1932] A.C. 562, at page 580, 585.

[905] [1932] A.C. 562, at page 595.

[906] Lord Buckmaster in the House of Lords provided that '[b]efore examining the merits, two comments are desirable; (1.) That the appellant's case rests solely on the ground of a tort based not on fraud but on negligence'. (*Donoghue v Stevenson* [1932] A.C. 562, at page 566)

[907] From the fact that the House of Lords cited the privity issue exemplified by *Blacker v Lake & Elliot Ltd* (1912) 106 LT 533 and provided the tort action as alternative (*Donoghue v Stevenson* [1932] A.C. 562, at page 569, 595), a conclusion can be submitted that the tort action was essentially claiming for damages for the breach of a contractual obligation.

was further recognised in *Junior Books v Veitchi*[908]. In that case, the proceeding parties are the subcontractor flooring company and the company whose floor was furbished by the subcontractor.[909] There is no direct contractual relationship between the parties of the case because there is an intermediary party involved.[910] The material used for the flooring is arguably not suitable for the floor.[911] As a result, there was damage caused and thus a cost to remedy the damage.[912] The key issue surrounding which the parties argue in front of the court is whether there is a *tortious* liability owed by the subcontractor to the claimant in the absence of a contractual liability. Lord Brandon of Oakbrook in the House of Lords stated that

> '[m]y Lords, it appears to me clear beyond doubt that, there being no contractual relationship between the respondents and the appellants in the present case, the foundation, and the only foundation, for the existence of the duty of care owed by the defenders to the pursuers, is the principle laid down in the decision of your Lordships' House in *Donoghue v Stevenson* [1932] A.C. 562.'[913]

This judgment furthered the principle established by *Donohue v Stevenson* that in the absence of a contractual relationship, a tort action can still be brought by a third party against one of the original contracting parties to enforce certain contractual benefit. It can then be said that certain tort actions enable third parties to enforce certain contractual benefits, thus constituting an exception to the benefit aspect of the privity of contract doctrine. A preliminary conclusion can then be reached that these third party tort actions enforcing contractual benefits are governed by the conditional benefit doctrine.

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[908] *Junior Books Ltd. v Veitchi Co. Ltd.* [1983] 1 A.C. 520.

[909] [1983] 1 A.C. 520, at page 520 C.

[910] [1983] 1 A.C. 520, at page 520 D, 522G.

[911] [1983] 1 A.C. 520. at page 523 E.

[912] [1983] 1 A.C. 520, at page 520 E.

[913] [1983] 1 A.C. 520, at 549 B.

9.6.2 The Provision of the Quasi- 'Conditional Benefit' Judgment in Tort Action Context by *The Angelic Grace*

There is no traceable authority directly on the application of the conditional benefit doctrine in tort actions.[914] However, the tendency to recognise the existence of the doctrine in certain tort actions can be seen from the decision in *The Angelic Grace*.

9.6.2.1 *The Angelic Grace*

The thesis defined the conditional benefit judgments and one form of the conditional benefit judgment takes the form of the ones in the three problem cases.[915] In *The Angelic Grace*[916], there was a judgment with the rough form of a conditional benefit judgment. In the present case, before the analysis on the grantability of the anti-suit injunction, the Court of Appeal discussed whether the injunction defendant (the charterer) that sued in Italy was subject to the arbitration agreement contained in the charterparty. It was first recognised that the tort claim brought by the charterer in Italy arose out of the charterparty.[917] This conclusion was reached by a wide construction of the scope of the arbitration agreement.[918] From the Court's later judgment on the anti-suit injunction issues, the fact that the tort claim in Italy fell within the arbitration agreement brought into the picture all the effect of the arbitration agreement.[919]

Therefore, it is apparent that the Court first recognised the close relationship between

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[914] This is in contrast to the position under criminal proceedings where there is *The Prestige (No.2)* as a leading authority. (See section 9.6)

[915] See section 2.2.2

[916] *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87

[917] [1995] 1 Lloyd's Rep 87, at page 91.

[918] [1995] 1 Lloyd's Rep 87, at page 91.

[919] In the Court's opinion, by suing in Italy, the charterer was in breach of the arbitration agreement. (*Donoghue v Stevenson* [1995] 1 Lloyd's Rep 87, at page 96)

the contract and the tort claim. And because of the relationship between the contract and the tort claim, the arbitration agreement was held to be wide enough to cover the tort claim. The consequence is that the charterer was subject to the arbitration agreement when bringing the tort claim. This is very similar to the operation of the conditional benefit judgment in *The Jay Bola*.

9.6.2.2 The Influence of the Quasi-'Conditional Benefit' Status of the Third Party Decision in *The Angelic Grace*

However, the thesis refers to the third party judgment in *The Angelic Grace* as a quasi-'conditional benefit judgment' for two reasons. First, the foreign claimant whose claim was subject to the arbitration agreement was one of the contracting parties, rather than a third party. Because of this, the anti-suit injunction applied for in the present case should be considered as a contractual anti-suit injunction, rather than the quasi-contractual anti-suit injunction. Holding otherwise is against the bilateral and binding nature of contracts under English Law.[920] Secondly, the tort claim arose out of the contract, but was not for the purpose of enforcing a contractual benefit.[921] Therefore, theoretically the fairness consideration should not have been triggered. Nonetheless, it is submitted that the quasi-'conditional benefit judgment' in *The Angelic Grace* still provided English Courts' attitude toward the application of the conditional benefit doctrine in the context of third party tort actions enforcing derivative contractual rights.

Although, in *The Angelic Grace*, there were only two parties involved, some third party thoughts can be detected from the facts. In the case, the claim was brought by *one party to a contract against the other party in tort*[922] *with the potentials of avoiding the arbitration agreement in the contract*. This is, in a way*, rigidly creating a third party*

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[920] See *The Law of Assignment*, at para 5.05 for the bilateral nature of contracts under English Law

[921] [1995] 1 Lloyd's Rep 87, at page 91.

[922] For a discussion on whether the 'whether underwriting agents owed a duty of care to their names', see *Henderson v Merrett* [1994] C.L.C. 55.

relationship. Therefore, even if *The Angelic Grace* does not concern a genuine third party situation, it is a simulation of such a context. Moreover, it is true that the tort claim in *The Angelic Grace* merely arose out of the contract and the dispute in the tort claim did not concern derivative contractual benefits.[923] However, the Court did hold that the dispute was arbitrable due to the close connection between the tort claim and the arbitration agreement.[924] Besides, the fact that the benefit enforced by the injunction defendant was not contractual but tortious in nature does not prevent the anti-suit injunction to be contractual. Once it is certain that the claim brought by the injunction defendant falls within the arbitration agreement, the action to bring the foreign proceedings will be in breach of contract as was mentioned earlier in the thesis.[925]

A similar judgment to that in *The Angelic Grace* under exclusive jurisdiction agreement context was provide in *Continental Bank*. In that case, there was a loan agreement between the plaintiff bank and the defendant company. On the arising of a dispute, the defendant started court proceedings in Greece in tort. The plaintiff bank then applied in front of English court for an anti-suit injunction alleging that there was an exclusive jurisdiction agreement pointing to the jurisdiction of English Courts. The judge of first instance granted a permanent anti-suit injunction enforcing the exclusive jurisdiction agreement. The defendant then appealed to set aside the permanent anti-suit injunction. Two grounds relied on are that there was no exclusive jurisdiction agreement and that the English proceedings for the anti-suit injunction should have been stayed as a result of the Brussels Convention.[926] On whether the jurisdiction agreement in the facts was an exclusive jurisdiction agreement, the definition adopted was the one provided at *Dicey & Morris on the Conflict of Laws*, 12th ed. (1993), vol. 1, p.422, which submits

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[923] [1995] 1 Lloyd's Rep 87, at page 91.

[924] [1995] 1 Lloyd's Rep 87, at page 91.

[925] See section 6.3.4.1

[926] The facts are available at *Continental Bank v Aeakos Compania Naviera SA* [1994] 1 W.L.R. 588, at page 588~589.

that 'the questions is simply whether on its true construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word "exclusive" is used'.[927] In the present case, the result of interpreting the agreement is that the parties intended it to be an exclusive jurisdiction agreement, at least for the defendant.[928] Furthermore, on whether the tort action in the Greek proceeding was covered by the jurisdiction agreement, the Court of Appeal held that, analogous to the position in the context of arbitration agreements, contracting parties cannot have intended to have contractual claims and tortious claims closely knitted together resolved in different proceedings.[929] Finally, the additional importance of this case for the present analysis is that, different from what was held in *Donohue v Armco*, the Court of Appeal in the present case eventually maintained the anti-suit injunction.[930]

As a matter of fact, the principle provided by *The Angelic Grace* and *Continental Bank* above is an established rule under English Law.[931] Based on that principle, it is submitted by the thesis that, if the law will allow the imposition of arbitration agreements on the tort action claimant when the tort action is merely related to the

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[927] [1994] 1 W.L.R. 588, at page 593 H.

[928] [1994] 1 W.L.R. 588, at page 594 D, E.

[929] [1994] 1 W.L.R. 588, at page 593 B~F.

[930] [1994] 1 W.L.R. 588, at page 598 G, 599 A.

[931] See also the Court of Appeal in *The Playa Larga* (*Empresa Exportadora De Azucar v. Industria Azucarera Nacional (The Playa Larga)* [1983] 2 Lloyd's Rep. 171) In that case, the central issue was whether the tort of conversion preventing the performance of the contract falls within the material scope of the arbitration agreement in the same contract. Ackner L.J. confirmed the first instance judge's decision on the issue that '[i]t seems to me that the claimant must show either that the resolution of a contractual issue is necessary for a decision on the tortious claim (as in *Astro Vencedor v Mabanaft*, [1971] 2 Q.B. 588) or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can property be construed as covering the other' (*The Playa Larga* [1983] 2 Lloyd's Rep. 171, at page 182) He then commented that '[t]o our minds the learned judge having concluded that Isana had failed to show that the resolution of a contractual issue was necessary for a decision on the tortious claim, was nevertheless satisfied that they had passed the alternative test, namely that they had established that the contractual and tortious disputes were so closely knitted together on the facts, that an agreement to arbitration on one can properly be construed as covering the other. If that was his view, we agree on it'. (*The Playa Larga* [1983] 2 Lloyd's Rep. 171, at page 182) Thus, it seems that the second ground provided by the Court of Appeal seems to be the lower one.

contract, there is no reason why the law would negate the arbitrability of tort claims enforcing contractual benefits.

9.6.3 Conclusions on the Application of the Conditional Benefit Doctrine in Tort Actions

Tort actions can be a resort for a third party to a contract to enforce certain contractual benefits. Therefore, tort actions can be a valid exception to the benefit aspect of the privity of contract doctrine. On the other hand, the Court of Appeal decision in *The Angelic Grace* proves that a third party tort action enforcing a contractual benefit will certainly be subject to a contractual arbitration agreement contained in the same contract. It is essentially a quasi-'conditional benefit' judgment in *The Angelic Grace*, but this does provide the potential that a conditional benefit judgment may be delivered by English Courts given a proper set of facts.

9.7 Conclusions on the Modern Development of the Conditional Benefit Doctrine

From the above analysis in chapter 9, the thesis has drawn conclusions on the scope of the conditional benefit doctrine under modern English law. It has been clearly submitted that the conditional benefit doctrine applies in assignment actions, third party actions under Third Parties (Rights against Insurers) Act 2010, third party actions under Carriage of Goods by Sea Act 1992 and third party actions under Contracts (Rights of Third Parties) Act 1999, actions by subrogated insurers against third party wrong doers enforcing contractual benefit, (third party) tort actions enforcing contractual benefit and (third party) criminal actions enforcing contractual benefit.

Chapter 10

Conclusions

The present thesis was composed for the purpose of analysing the conditional benefit doctrine and the impact of the doctrine on the enforcement of the negative aspect of exclusive dispute resolution agreements including arbitration agreements and exclusive jurisdiction agreements. As a result of combining the analysis from chapter two to chapter nine, the thesis managed to provide answer to questions concerning the essence of the conditional benefit doctrine, the modern scope of the conditional benefit doctrine, the grantability of anti-suit injunctions against third parties bound by exclusive dispute resolution agreements under the conditional benefit doctrine, the grantability of stay of action against third parties bound by arbitration agreements under the conditional benefit doctrine and the grantability of stay of action applied by third parties enforcing arbitration agreements against original contracting parties under the conditional benefit doctrine.

The first issue resolved was the grantability of anti-suit injunctions enforcing arbitration agreements against bound third parties under the conditional benefit doctrine. The issue concerned three problem cases at the Court of Appeal level, namely *The Jay Bola*, *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*. All three cases concern the question whether an anti-suit injunction should be granted when third parties to contracts enforce derivative contractual rights ignoring the binding arbitration agreements contained in the same contract. The thesis came to the conclusion that the difficulty involved in the three problem cases comes from the combined issue of the complicated anti-suit injunction principles and the third party rules. The association between the three cases and the conditional benefit doctrine was established by the recognition of Explanatory Note 34 of the Contracts (Rights of Third Parties) Act 1999 where *The Jay Bola* was expressly mentioned. It was clearly provided that, in *The Jay Bola*, the third party enforcing contractual benefit was bound by the arbitration agreement contained in the

same contract and that the conditional benefit doctrine is the basis for such binding effect. On the other hand, since the 'bound' wording was also existent in the third party judgment in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, digging into the essence of the conditional benefit doctrine would be the key to resolve the third party issue in the three problem cases.

The thesis first managed to identify the assignment origin of the conditional benefit doctrine. Following that finding, it was discovered that the principle of subject to equities as an inherent principle under assignment generally exhibits striking resemblance with the conditional benefit doctrine from the outside. Consequently, the thesis moved on to analyse the relationship between the conditional benefit doctrine and the principle of subject to equities based on the presumption that the conditional benefit doctrine is the manifestation of the principle of subject to equities. A preliminary arguable positive conclusion was reached since there is direct association of the two principles by authorities and that the principle of subject to equities context allows the existence of all the relevant features of the conditional benefit doctrine. The arguable conclusion received further confirmation from the fact that all the equivalent concepts under the two doctrines are identical in nature. After the conclusion on the essence of the conditional benefit doctrine, the thesis was then able to provide the effect of the 'bound' wording on the position of the third party in *The Jay Bola*, or the effect of the principle of subject to equities on the position of the third party in *The Jay Bola*. It was submitted that whatever defence available to the debtor when the enforcing party is the assignor would still be available to the debtor when the enforcing party is the third party assignee and that the third party assignee cannot be in a better position than the assignor as against the debtor.

Although the wording 'bound' in *The Jay Bola* entails the effect of the principle of subject to equities, further analysis is still necessary to conclude that the same is also true to the 'bound' wording in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*. Therefore, the natural question arose as to whether the principle of subject to equities

applies outside assignment, and more specifically in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*. *The Jay Bola* itself is an assignment case and the principle of subject is an inherent principle in assignment. Thus, to learn the applicability of the principle of subject to equities in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, the first issue to be analysed is the applicability of the principle of subject to equities outside assignment. It was discovered that every conveyance of equitable interest is supposed to be innocent and the justification behind that is the fairness consideration. It was then further submitted that such fairness consideration certainly exists under the doctrine of burden and benefit of which the conditional benefit doctrine is the most updated manifestation. Therefore, it was eventually submitted by the thesis on the doctrinal justification of the conditional benefit doctrine that the fairness consideration will come into the picture automatically when there is conveyance of equitable interest triggering the doctrine of burden and benefit. Given the relationship between the conditional benefit doctrine and the principle of subject to equities, it can then be further submitted that the fairness consideration is also the doctrinal justification behind the principle of subject to equities. Consequently, whenever there is a conveyance of equitable interest, the principle of subject to equities will be triggered due to the fairness consideration.

Following the conclusion on the possibility of applying the principle of subject to equities outside assignment context, the thesis then went on to investigate whether the principle of subject to equities indeed applied in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*. An analogous conclusion was reached based on the similarities between the foreign statutes in the two cases and the Third Parties (Rights Against Insurers) Act 1930 and the Third Parties (Rights Against Insurers) Act 2010. Given the similarities between the statutory devices and the fact that the principle of subject to equities applies in the two domestic statutes, it was submitted that the principle of subject to equities should also apply in the foreign statutes in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*. On the other hand, it was provided after investigation that the actions based on the foreign statutes in the two cases were actually insurance claims where third parties to the insurance contract enforced contractual equitable interest. Thus, the

doctrinal justification behind the principle of subject to equities, namely the fairness justification, is triggered. Subsequently, it is further confirmed that the principle of subject to equities applied in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*.

Although the thesis already recognised the application of the principle of subject to equities in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu*, it was still too early to submit that the binding arbitration agreements in the two cases were equity clauses under the meaning of the principle of subject to equities. Therefore, the thesis moved on to investigate the mechanism behind arbitration agreements' capacity to be equity clauses. After going through the principles on the nature of equities, such capacity was further divided into three key questions, namely 'why arbitration agreements as equity clauses can provide the procedural defensive rights', 'why the debtor can take advantage of the procedural defensive rights provided by arbitration agreements as equity clauses' and 'why the procedural defensive rights are ancillary to the contractual benefits taken'. It was submitted that the first question concerns the negative aspect of arbitration agreements and the second question is connected to the debtor's legal identity as an original contracting party. On the third question, the thesis went through existing authorities exhibiting patterns on the ancillary issue, created and tested the presumption that the ancillary connection is established when the arbitration agreements cover the dispute in the third party claim at hand. This is certainly satisfied when the arbitration agreements are contractual arbitration agreements and the third party claims are for the purpose of enforcing derivative contractual rights. The thesis subsequently examined the arbitration agreements in *The Hari Bhum (No.1)* and *The Yusuf Cepnioglu* and the third party claims in the two cases and reached the conclusion that the arbitration agreements indeed have the capacity to be equity clauses under the principle of subject to equities. Thus, theoretically, the situation that third parties' bound by arbitration agreements in the two cases have the same legal meaning as the third parties' being bound by the arbitration agreement in *The Jay Bola*.

After analysing and providing clarity on the third party issues involved in the three

problem cases, the thesis moved on to investigate the relevant anti-suit injunction rules concerned. It was submitted that, in all three cases, the anti-suit injunctions are quasi-contractual anti-suit injunctions enforcing arbitration agreements against bound third parties outside the European dimension. The theoretical availability of such anti-suit injunctions has been provided by both the House of Lords authority *The Front Comor* and a secondary source. On the other hand, after further analysis, it was submitted that these anti-suit injunctions actually fall within existing category of anti-suit injunctions, namely anti-suit injunctions against breach of contract. This further confirmed the theoretical availability of these anti-suit injunctions at the preliminary stage.

However, before moving on to resolve the conflict involved in the three problem cases given the theoretical availability of quasi-contractual anti-suit injunctions under the conditional benefit doctrine, the thesis clarified a residual issue. Unconscionability was mentioned in both *The Jay Bola* and The *Yusuf Cepnioglu* while the theoretical availability of the said anti-suit injunctions was submitted based on the breach of contract ground from anti-suit injunctions. Thus, the necessity of such clarification is rather apparent. After investigation, it was discovered that there are both the narrow and the wide interpretations of unconscionability in anti-suit injunction context and the unconscionability mentioned in *The Jay Bola* and *The Yusuf Cepnioglu* covers breach of contract ground. Therefore, since there was no other conduct leading to the anti-suit injunction applications identified from the facts, it is tenable to reach the conclusion that the only unconscionable misconduct in the two cases was the breach of contract and that the unconscionability took the wide meaning in the two cases.

The thesis then moved on to investigate the fundamental reasons behind the conflicting judgments in the three problem cases. It was submitted that *The Yusuf Cepnioglu* was essentially taking the same position as *The Jay Bola*, it is merely that the Court of Appeal in that case did not want to reach a definite decision to avoid making wrong judgments. On the other hand, the conflict between *The Jay Bola* and *The Hari Bhum (No.1)* was definite and there are reasons behind the conflict. The starting point is that

the arbitration agreement was never conferred onto the third party since the foreign statute relied on by the third party in that case rendered the arbitration agreement void before the principle of subject to equities could impose any effect. Furthermore, even if the arbitration agreement in that case was imposed on the third party, the theoretical availability of quasi-contractual anti-suit injunctions is still subject to the discretionary stage. There are good reasons in *The Hari Bhum (No.1)* preventing the grant of the quasi-contractual anti-suit injunction. *The Hari Bhum (No.1)* involves international comity issue within the European community. Although the Court of Appeal held that the anti-suit injunction falls outside the Brussels Regime, the European element still discouraged the grant of the anti-suit injunction in that case. Furthermore, there was also delay in the injunction application which further affected the position of the injunction applicant.

Following the conclusion of chapter six, the thesis managed to successfully provided the grantability of quasi-contractual anti-suit injunctions enforcing arbitration agreements under the conditional benefit doctrine, investigated the essence of the conditional benefit doctrine and provided the possibility of applying the principle of subject to equities outside assignment. These resolved issues surrounding anti-suit injunction enforcing arbitration agreements and involved a rather material part of analysis on the conditional benefit doctrine in the thesis. Furthermore, it laid the foundation for the rest of the analysis on the enforcement of the negative aspect of arbitration agreements and exclusive jurisdiction agreements, as well as the investigation on the scope of the conditional benefit doctrine under modern English law.

The first following research conducted in the thesis was on stay of action enforcing arbitration agreements under the conditional benefit doctrine. It was provided as a preliminary issue that stay of action is another measure to enforce the negative aspect of exclusive jurisdiction agreements. The analysis on stay of action then diverged into two directions. It was provided that stay of action enforcing arbitration agreements against bound third parties is clearly grantable. That includes both statutory stay of

action and inherent stay of action. The conclusion on statutory stay under Arbitration Act 1996 was reached by analysing s9 of the device. The conclusion on inherent stay was reached by comparing the threshold of inherent stay of action with the threshold of related enforcement measures and by understanding the policy justification behind the negative enforcement measures, namely English Law's hostility against breach of contract. On the other hand, the second branch of the divergence points to stay of action applied by third parties bound by arbitration agreements against the original contracting parties. Analysis surrounding statutory stay on this second branch focuses on the conflict between *Nisshin Shipping* and *Fortress Value*. According to the former, the principle of subject to equities retains the benefit aspect of arbitration agreements even if they are imposed on third parties as equity clauses. Combining this proposition with s9 of the 1996 Act, a deductive result then is the third parties will be entitled a statutory stay against the original contracting parties should they act inconsistently with the arbitration agreement. This is inconsistent with the Court of Appeal decision in *Fortress Value*. It was submitted by the thesis that equities under the principle of subject to equities are defences of the debtor. Therefore, they cannot be taken advantages of by bound third parties. This also lead to the follow up conclusion that third parties bound by arbitration agreements cannot enforce the clauses generally due to the absence of the benefit aspect of the clauses. Furthermore, concentrating only on the conflict in *Nisshin Shipping* and *Fortress Value* itself, the Himalaya clause nature of the target clause in *Fortress Value* and the party autonomy consideration was also enough to strike out the possibility of the third party's relying on the arbitration agreement in that case.

Following the resolution of the dispute between *Nisshin Shipping* and *Fortress Value*, the thesis already completed all the analysis on the grantability of the negative enforcement measures enforcing arbitration agreement under the conditional benefit doctrine. The thesis then moved on to the analysis on exclusive jurisdiction agreements. The starting aspect selected by the thesis was quasi-contractual anti-suit injunctions enforcing exclusive jurisdiction agreements under the conditional benefit doctrine. It was submitted that exclusive jurisdiction agreements do have the capacity to be equity

clauses under the principle of subject to equities. Therefore, all the analysis on the third party issues involving arbitration agreements earlier in the thesis should also apply to exclusive jurisdiction agreements. On the anti-suit injunction aspect, it was submitted that English law treats arbitration agreements and exclusive jurisdiction agreements in the same manner when it comes to anti-suit injunctions enforcing them. On the other hand, there is also an authority, namely *Youell v Kara*, directly recognising the grantability of anti-suit injunctions enforcing exclusive jurisdiction agreements under the conditional benefit doctrine. The thesis subsequently submitted that these anti-suit injunctions are also grantable under English law. Following the above analysis on anti-suit injunctions in exclusive jurisdiction agreements context, the thesis also submitted that stay of action and anti-suit injunctions applied by bound third parties against original contracting parties are not grantable due to the defensive nature of equities and that stay of action enforcing exclusive jurisdiction agreements against third parties under the conditional benefit doctrine should be theoretically available.

The title of the present thesis is The Conditional Benefit Doctrine and Its Impact on the Enforcement of the Negative Aspect of Exclusive Dispute Resolution Agreements. Up until Chapter eight, the thesis already provided the origin and essence of the conditional benefit doctrine, the doctrinal justification of the doctrine and its impact on the enforcement of the negative aspect of exclusive dispute resolution agreements including arbitration agreements and exclusive jurisdiction agreements. Nevertheless, the thesis had not yet provided how far does that impact extend. For this reason, the central topic of the research conducted in Chapter nine is the modern development of the conditional benefit doctrine. It was submitted that there is indeed the possibility that the conditional benefit doctrine can apply outside assignment where it originated. Following the preliminary issue, the thesis submitted that the essence of the research on the scope of the governing power of the conditional benefit doctrine is to investigate whether it applies to certain exceptions to the benefit aspect of the privity of contract doctrine and that the research approach adopted will be a hierarchic one. The thesis then moved on to investigate the application of the conditional benefit doctrine in

selected exceptions to the benefit aspect of the privity of contract doctrine. For exceptions with a contractual basis, it was submitted that the conditional benefit doctrine applies in actions brought under Third Parties (Rights against Insurers) Act 1930, Third Parties (Rights against Insurers) Act 2010 and Carriage of Goods by Sea Act 1992. For actions with a non-contractual basis, it was submitted that the conditional benefit doctrine applies in actions by subrogated insurers against third party wrong doers enforcing contractual benefit, (third party) tort actions enforcing contractual benefit and (third party) criminal actions enforcing contractual benefit.

Anti-suit injunctions against third-party assignees

Emmott v Michael Wilson & Partners Ltd [2018] EWCA Civ 51 This was the appeal against a decision by O'Farrell J1 granting an interim anti-suit injunction restraining the injunction defendant from continuing court proceedings in Australia. The grounds relied on by the applicant included breach of arbitration agreement and abuse of process.

The Court of Appeal substituted the interim anti-suit injunction with one covering fewer issues. Although the decision did achieve justice to some extent, some of the reasoning was less convincing.

Litigation history and the injunction application

The factual background of the case is complex, due to the long litigation history between the parties. There were two contracts, the first of which was the MWP Agreement establishing a "quasi-partnership" between the injunction applicant Mr Emmott and the injunction defendant MWP. The MWP Agreement contained an arbitration agreement providing for arbitration in London under English Law. The second contract was the Cooperation Agreement, entered into by Mr Emmott, Mr Slater, Mr Nicholls and another for the purpose of setting up a consultancy owned and operated by TIL, which was the trustee of the four contracting parties. The Cooperation Agreement also provided for arbitration in London under English law. TSL, an associated service company of TIL, was also involved in the disputes. The Court of Appeal referred to these two entities together as "Temujin".

Following a falling out between Mr Emmott and Mr Wilson, MWP commenced arbitration against Mr Emmott, alleging that he had breached contractual and fiduciary duties owed to MWP. Mr Emmott, for his part, claimed for 33 per cent of the issued share capital of MWP in pursuance of the MWP Agreement. On the claims and counterclaims, the arbitrators reached conclusions on liability and quantum.

MWP subsequently started Australian court proceedings ("NSW1") against Mr Nicholls, Mr Slater and Temujin, on the grounds first that Mr Nicholls and Mr Slater had breached the fiduciary duties owed to MWP, and second that the two parties had assisted Mr Emmott in breaching the contractual and fiduciary duties owed to MWP. The judge at first instance supported the claims and held that Mr Nicholls, Mr Slater and Temujin were jointly liable to MWP on multiple grounds. The Court of Appeal of New South Wales and the High Court of Australia affirmed the decision. O'Farrell J in the English court at first instance provided a detailed description of the grounds establishing joint liability. Those included breach of contractual and fiduciary duties owed to MWP by Mr Emmott, Mr Nicholls and Mr Slater, as well as other damages caused by the formation of the Temujin Partnership.2

Upon the liquidation of Temujin, Mr Nicholls, Mr Slater and Temujin assigned their rights against Mr Emmott to MWP concerning the joint liability established in NSW1. MWP commenced a second set of court proceedings ("NSW2") in New South Wales against Mr Emmott, relying on the assigned rights and on certain rights relating to the assets and affairs of the partnership between Mr Emmott, Mr Nicholls and Mr Slater.

Anti-suit injunction application and judgment

Following commencement of NSW2, Mr Emmott applied to the English court for an anti-suit injunction against MWP for breach of the arbitration agreements in the MWP Agreement and the Cooperation Agreement. Burton J granted an interim anti-suit injunction and the relief was continued on the return date by O'Farrell J, who considered that the claims in NSW2 fell within the scope of the arbitration agreements in the MWP Agreement and the Cooperation Agreement and that NSW2 involved an abuse of process. As a result, an anti-suit injunction was granted against MWP.3 MWP appealed.

Sir Terence Etherton MR gave the leading judgment in the Court of Appeal. The statutory authority governing the issues was section 37 of the Senior Courts Act 1981. On anti-suit injunctions restraining breach of exclusive dispute resolution agreements, Sir Terence Etherton MR cited *Socie#te# Nationale Industrielle Ae#rospatiale v Lee Kui Jak*:

"(1) The jurisdiction is to be exercised when the ends of justice require it. (2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. (3) An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy. (4) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution."4

The Court of Appeal noted the House of Lords approval of these dicta in *Donohue v Armco Inc*5 and *Ecobank Transnational Inc v Tanoh*6 for cases of breach of exclusive dispute resolution agreements. Also, when there are parallel proceedings before an English and a foreign court and the foreign proceedings are vexatious or oppressive, an anti-suit injunction can be granted in relation to the foreign proceedings according to *Lee Kui Jak*.

Regarding the question whether the claims in NSW2 fell within the scope of the arbitration agreement in the MWP Agreement, the answer given by the Court of Appeal was negative; the reason being that the claims in NSW2 were based on the rights assigned by Mr Nicholls, Mr Slater and Temujin. The assignors were not bound by the arbitration agreement in the MWP Agreement and the assignee, MWP, was not bound by the same arbitration agreement when enforcing the assigned rights. Nor should the claims in NSW2 be considered to fall under the arbitration agreement in the Cooperation Agreement. Mr Emmott's own position was that there were never any signed consultancy agreements between him and the other two parties to the Cooperation Agreement and that he was not a party to NSW1. Relying on that submission, the Court of Appeal held that the arbitration agreement in the Cooperation Agreement did not cover the claims in NSW2. As the claims in NSW2 were not caught by the two arbitration agreements, no anti-suit

injunction could be granted on the ground of breach of exclusive dispute resolution agreements.

On the alternative ground for an anti-suit injunction, the Court of Appeal did recognise the conduct of MWP as being partly vexatious and oppressive on the ground of abuse of process. First, certain claims which had been brought up and dropped in the English arbitration were brought up again in NSW2. Secondly, MWP was also seeking to relitigate matters that had been dealt with in the arbitration proceedings. However, it was held that the question whether the Temujin partnership claims were unconscionable should be answered by the Australian court. These claims were the ones related to the Temujin Partnership.

Comment

The anti-suit injunction application relied on three alternative grounds: unconscionability; breach of the arbitration agreement in the MWP Agreement; and breach of the arbitration agreement in the Cooperation Agreement. The Court of Appeal correctly separated the breach of contract ground for anti-suit injunctions from the unconscionability ground for anti-suit injunctions. The court distinguished the claims that had been dealt with – or could have been dealt with – in arbitration proceedings from other allegations in NSW2 in relation to the question whether an anti-suit injunction should be granted based on vexatious and oppressive behaviour. It was recognised that seeking to recover in NSW2 what had been lost in the English Arbitration was oppressive and vexatious. The fact that MWP brought up the claims for fraud and conspiracy which were dropped in the arbitration proceedings was oppressive and vexatious. The interim injunction granted by the Court of Appeal in the present case reflected that attitude.

It was also recognised that the question whether the claims based on the assigned rights from Mr Slater and Mr Nicholls constituted an abuse of process depended on the substantive question whether those claims were a back-door approach to get back what had been lost in the arbitration proceedings. The Court of Appeal left those issues to be decided by the Australian court.7 This is a reflection of the requirement for caution, consistent with the foundational House of Lords authority on anti-suit injunctions, *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV*.8 Their Lordships there held that when an anti-suit injunction is granted restraining foreign proceedings, the jurisdiction has to be exercised with caution. This is because although an anti-suit injunction is an act in personam and not addressed directly to the foreign court, it still indirectly interferes with foreign courts.9

The arbitration agreement in the MWP Agreement

The decision on the MWP Agreement is consistent with the approach in *The Jordan Nicolov*,10 that when enforcing an assigned cause of action, "[t]he assignee is bound by the arbitration clause [in the same contract where the cause of action arose] in the sense that it cannot assert the assigned right without also accepting the obligation to arbitrate".11 This author agrees that MWP's claims in NSW2 will not be covered by the arbitration agreement under the MWP agreement because of *The Jordan Nicolov*.

However, the judgment of the Court of Appeal in the present case does run counter to the decision in the House of Lords authority *Fiona Trust*.12 The approach to construing the scope of arbitration agreements established in *Fiona Trust* takes the contracting parties' intention and commercial background into consideration.13 The first instance judge correctly relied on that approach,14 but it was not adopted in the Court of Appeal. It is submitted that such an omission is not convincing, at least regarding the claims in NSW2 which had been or could have been dealt with in the English arbitration. The original parties in NSW2 were still MWP and Mr Emmott, although MWP was in the position of assignor. Since the same parties are also parties to the arbitration agreement in the MWP Agreement which covered the claims in the English arbitration, it should still have the capacity to include the claims again in NSW2 if *Fiona Trust*15 is applied.

Arbitration agreement in the Cooperation Agreement

The Court of Appeal decided that the Temujin Partnership claims were not covered by the arbitration agreement in the Cooperation Agreement, either. However, it is submitted that they were, or that at least some of them were.

It appears from the description of the grounds relied on to establish the joint liability in NSW1 that all of them were directly or indirectly related to the Temujin Partnership.16 Since the claims in NSW2 were based on the assigned rights of Mr Nicholls, Mr Slater and Temujin in relation to the joint liability in NSW1, it is apparent that all those claims based on the assigned rights were related to the Temujin Partnership. However, the matters which had been dealt with or could have been dealt with in the English arbitration were within the scope of the anti-suit injunction already granted by the Court of Appeal. Thus, the Temujin Partnership claims allowed to be continued by the injunction granted by the Court of Appeal would be the remaining claims, which were based on the assigned rights. Those included Mr Emmott's share of the joint liability caused by Mr Slater's and Mr Nicholls's breach of contractual and fiduciary duties owed to MWP, as well as Mr Emmott's share of the joint liability as a result of the formation of Temujin.

Although the assignors in the present case were not parties to the MWP Agreement, the assignors *were* parties to the Cooperation Agreement.17 Therefore, in relation to the approach in *The Jordan Nicolov*,18 it is submitted that the only concern may be whether the claims based on the assigned rights arose out of the Cooperation Agreement, since the assignors were parties to the Cooperation Agreement. In the opinion of the present author, they did. The reason why Mr Emmott was included in the final award of NSW1 is the partnerships between him and the other two parties to the Cooperation Agreement. Therefore, even if there is no absolute certainty that the rights MWP sought to enforce in NSW2 arose from the Cooperation Agreement, the claims based on the assigned rights were at least closely connected with the agreements. In such circumstances, the arbitration agreement contained in the same contract can be imposed on the assignee as contractual conditions. As a result, the part of Temujin Partnership claims referred to in the interim injunction granted by the Court of Appeal are caught by the arbitration agreement in the Cooperation Agreement.

Interim anti-suit injunctions

The anti-suit injunction sought was an interim anti-suit injunction. For these, the threshold has been lowered to "a high degree of probability that there is an arbitration agreement which governs the dispute in question" as confirmed by the Court of Appeal.19 In the above analysis on the Cooperation Agreement, the Temujin Partnership claims should fall under that arbitration agreement, or at least be closely associated with the Cooperation Agreement. It is submitted that the lower threshold of interim anti-suit injunctions further supports the argument made above that the injunction granted by the Court of Appeal should have covered the Temujin Partnerships claims, based on the breach of the arbitration agreement in the Cooperation Agreement.

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1 [2017] 1 Lloyd's Rep 21.

2 [2017] 1 Lloyd's Rep 21, at para 38.

3 Actually she held that only claims based on the assigned rights from Mr Slater and Mr Nicholls in NSW2 fell under the arbitration agreement in the Cooperation Agreement; ibid at para 46.

4 [1987] AC 871 (PC), at page 892.

5 [2002] 1 Lloyd's Rep 425.

6 [2016] 1 Lloyd's Rep 360.

7 *Emmott v Wilson* (CA, at para 61; there may be a potential inconsistency between this judgment and the judgment reached in *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, at pages 91 and 92) where Leggatt LJ held that an anti-suit injunction should be granted on the ground of vexation when the foreign court proceedings are a means of relitigating what has been dealt with in arbitration. However, as both judgments are from the Court of Appeal, it cannot be said that the former judgment is better authority.

8 [1986] 2 Lloyd's Rep 317; [1987] AC 24.

9 Ibid at [1987] AC 24, para 40D.

10 *Montedipe SpA v JTP-RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep 11.

11 *The Jordan Nicolov*, at page 15 col 2; The approach was later confirmed and relied on in *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The Jay Bola)* (CA) [1997] 2 Lloyd's Rep 279, at page 286.

12 *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.

13 Ibid, at paras 5 to 13.

14 *Emmott v Wilson* [2017] 1 Lloyd's Rep 21, at paras 34 and 44.

15 *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.

16 *Emmott v Wilson* [2017] 1 Lloyd's Rep 21, at para 38.

17 TIL and TSL are not technically parties to the Cooperation Agreement. However, the claims based on the assigned rights from them are indeed closely associated with the Cooperation Agreement.

18 [1990] 2 Lloyd's Rep 11.

19 At para 39; See also *Albon v Naza Motor Trading Sdn Bhd* [2008] 1 Lloyd's Rep 1, at paras 13 and 14; *Markel International Co Ltd v Craft (The Norseman)* [2007] Lloyd's Rep IR 403, at para 31.

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