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RESEARCH ARTICLE

A call for clarity in contractual accessions to shareholder and partnership agreements

Kwan Ho Lau†

Yong Pung How School of Law, Singapore Management University, Singapore
Email: kwanholau@smu.edu.sg

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Abstract

This paper explores understudied issues surrounding accessions to shareholder and partnership agreements: the process by which such accessions take effect; the survival of equities following an accession; and the enforcement of a condition for incoming shareholders to have to execute and deliver a deed of accession. Accessions happen extremely often in modern commercial life, which renders surprising the dearth of academic and judicial discussion, but more disconcerting is the unsettledness of some of the complex issues implicated. The repurposing of unilateral contracts to explain how deeds of accession operate is not fully tested in English law; the conception of partial novation as adumbrated in *Unitech Global Ltd v Deutsche Bank AG*, which is not even law – much less bad law – has already generated academic controversy; and the enforcement of a condition precedent, in the form of prior accession to a shareholder agreement, for registration of membership in a company interacts in an uncertain way with the Companies Act 2006, lending impetus to the adoption of new methods for attaining relief.

Keywords: contract; accessions; partnerships; companies

Introduction

The rights, liabilities and obligations of shareholders and partners in companies and partnerships are contained in statutory and common law rules, in formal constitutive documents and in contractual arrangements. Representative of the last-mentioned category are the shareholder agreement and the partnership agreement. These agreements share a common function and purpose: they frequently contain bespoke provisions in respect of rights, liabilities and obligations over and above what is prescribed by legislation and the common law, and they are designed to survive changes in the constitution of the shareholders or partners during the life of the company or partnership.

Yet, the precise mechanism by which a person accedes and becomes a party to the shareholder or partnership agreement *after* its original execution is surprisingly unclear in English law. The lack of certainty about such a quotidian corporate action is normatively unsatisfactory and commercially unsettling.

In the first part of this paper, I analyse the accession process and conclude that a true accession takes place by way of novation. Armed with that understanding, in the next section I examine two understudied issues surrounding the novation and accession process. One is the untested concept

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of 'partial novation', lately mooted in the Court of Appeal, which contemplates personal equities emerging intact following a novation through operation of law and without requiring express contractual stipulation. I conclude that that concept as formulated would be an unnecessary legal addition. The other issue covered is germane to the specific (but oft-seen) case where accession to a shareholder agreement is stipulated to be a condition to registration of membership in a company. Here I conclude that the time is ripe to reconsider the enforcement methods relating to the satisfaction of such a condition against the provisions of the Companies Act 2006. Ultimately, it is hoped that the reasoning and conclusions herein can contribute to greater clarity on what are, by any account, vital commercial law issues that frequently arise for advice and resolution.

1. The accession process

(a) Accession

Generally, a shareholder or partnership agreement (or any agreement performing a similar function) must contend with a potential mismatch in expectation and operation. The agreement is intended to endure while the company or partnership is in existence – or at least for so long as the agreement is not prematurely terminated – and to be of application to every shareholder or partner from time to time during that period. That is because the non-inclusion of even a solitary shareholder or partner could defeat the commercial object pursued by the parties, namely, that the general body of shareholders or partners should be subject to the provisions of the agreement. However, the inevitable turnover within companies and partnerships often gives rise to practical difficulties. Simply put, people come and go as shareholders and partners. It would be inefficient – and increasingly cumbersome as the number of shareholders or partners grew – for all the existing and incoming shareholders or partners to execute a *new* agreement *every time* the company or partnership experienced a change in constitution.[1]

The modern shareholder or partnership agreement has therefore evolved a mechanism to attain the intended object more efficiently. That is the deed of accession (also known as a deed of adherence) which is almost always executed solely by an incoming shareholder or partner. The deed will invariably state that the incoming person agrees to perform and to be bound by, and shall be entitled to enforce, the provisions of the agreement as from a particular time. Frequently, the form of the deed is appended as a schedule to the existing shareholder or partnership agreement; in addition, there will be located an express provision in the agreement itself which stipulates that the existing parties agree to accept and treat as a party to the agreement any person who duly executes and delivers to them the deed of accession. In terms, therefore, a person's unilateral execution and delivery of the deed serves to make it a party to the agreement, without requiring the existing parties to sign any documentation.[2]

This would be a highly efficient method to remove, replace and add parties to the agreement if it were effective. The cases and the academic literature often assume without elaboration that it is. We shall shortly see that that assumption is correctly made, but what is also essential is to identify the contractual mechanism at operation here to locate its limits. In English law at least three such candidates exist, which, in increasing order of convincingness, are variation, construction and novation.

(b) Variation

One explanation for the effectiveness of a deed of accession is that any change in identity of the contracting parties amounts simply to a variation of contract. And, just as I can consent to your having the

[1]One need only contemplate coordinating the execution of an agreement by, say, 40 unrelated parties to understand the practical difficulties.

[2]In *Kynixa Ltd v Hynes* [2008] EWHC 1495 (QB), at [95], there was no difficulty in finding that the parties to the shareholder agreement there would have intended and agreed that an eligible person should become bound to the agreement by executing the deed of adherence. Such binding effect could be subject to conditions, such as that the deed must first receive 'acceptance' by the existing parties: see eg *R (Locke) v Revenue and Customs Commissioners* [2018] EWHC 1967 (Admin), [2018] STC 1938.

right to later unilaterally vary the terms of our contract,[3] so it is permissible for me to consent in advance, either to your being able to effect a substitution of a stranger as a formal party to the contract, or to the stranger's adding itself as a formal party to the contract. It is hardly mysterious then that a deed of accession is unilaterally executed by just the incoming party.

We can nevertheless rule this out as a satisfactory explanation because English law does *not* in fact recognise that a person may quit, and another person freshly enter, the contractual arrangements by means of the unilateral process just described. A true substitution or addition of parties is understood to take place in English law through a process of *novation*, not variation. The precise interposition of the stranger and of a new contract is vital. Whereas in a typical case of variation the alteration of the parties' mutual rights, liabilities and obligations neither discharges the contract between them nor introduces a stranger into the contractual relationship, a true substitution or addition of parties unavoidably necessitates the discharge of the original contract and the formation of a new contract with the incoming person: classically a case of novation.

Take the case of *Telewest Communications plc v Customs and Excise Commissioners*. For tax reasons, a conglomerate had taken certain actions aimed at dividing an existing supply (by one entity) of television services bundled with a magazine subscription into two separate supplies, one for television services and one for the magazine subscription, each made by a different entity. So far as the magazine subscription was concerned, then, the actions were to result in the original supplying entity's replacement by a new entity. The conglomerate argued that such replacement was permitted and effected by a variation clause in the existing contract between the original supplying entity and the subscriber, because the clause allowed the entity to vary any term of the contract without the consent of the subscriber. This argument was firmly rejected by Sir Francis Ferris in the Chancery Division, who said that:[4]

> … the introduction of a new party as the person contracting with the customer is quite a different matter from the alteration of the terms and conditions of the existing contract. The notices given to the customers did not purport to do the former and, if they had done so, this would, in my judgment, have been unauthorised and ineffective.

On this reasoning, it must be doubtful whether the conclusion would have been any different had the variation clause reached further to describe or expressly permit a change in parties as a 'variation'. While, from the perspective of the English language, a substitution or an addition can literally be described as a type of variation, from the vantage point of English law the courts will view a change in the parties to be ordinarily so fundamental a change as to be beyond legal characterisation as a variation;[5] the difference is not simply one of degree. Nor does it assist to say that those who contract can knowingly bind themselves to an untrue state of affairs,[6] for still they may not controvert established

[3] *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193, at [31]; *Bateman v Asda Stores Ltd* [2010] IRLR 370, at [31]; *Amberley (UK) Ltd v West Sussex County Council* [2011] EWCA Civ 11, at [22]; *MPloy Group Ltd v Denso Manufacturing UK Ltd* [2014] EWHC 2992 (Comm), at [65]. The effectiveness of any such amendment would be subject to contrary rules such as the Consumer Rights Act 2015, s 63, read with sch 2, paras 11, 22, 23 and 24.

[4] *Telewest Communications plc v Customs and Excise Commissioners* [2003] EWHC 3176 (Ch), [2004] STC 517, at [57]. See also *Telewest Communications plc v Customs and Excise Commissioners* [2005] EWCA Civ 102, [2005] STC 481, at [26]; *Langston Group Corp v Cardiff City Football Club Ltd* [2008] EWHC 535 (Ch), at [42]; *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281, at [112]; *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2021] EWHC 3432 (Ch), at [392]; *Astra Asset Management UK Ltd v Musst Holdings Ltd* [2023] EWCA Civ 128, at [82]; *Keezz Ltd v Te Whatu Ora – Health New Zealand* [2023] NZHC 1360, at [166]. This preponderance of authority suggests that the reasoning in *CMA CGM SA v Hyundai MIPO Dockyard Co Ltd* [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep 213, at [23] is erroneous insofar as Burton J thought that the substitution of one person for another that was described as a novation operated only to 'repeople the original contracts, leaving their provisions (including their dates) unchanged' without extinguishing the original contract and creating a new contract.

[5] *Samuels Finance Group plc v Beechmanor Ltd* (1994) 67 P & CR 282, at 285.

[6] Such as through the device of contractual estoppel: see eg *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637.

legal categories and doctrine.[7] Responding to counsel's submission in *Astra Asset Management UK Ltd v Musst Holdings Ltd*,[8] Falk LJ (with whom Peter Jackson and Whipple LJJ agreed) was of the opinion that a clause which rendered a 'variation' ineffective unless it was in writing and signed by the parties was inapplicable to novations for the simple reason that:[9]

> A novation is not a variation. A varied contract remains in place. In contrast, a novation is the replacement of a contract by a new contract between different parties.

(c) Construction

A slightly more convincing explanation derives from the body of rules of contractual interpretation. Assume, as is sometimes the case, that a shareholder agreement names a particular shareholder 'and its successors' to be a party to the agreement. It might then be contended, as a matter of construction of those words, that every party to the agreement has consented to that shareholder's possessing the ability to unilaterally introduce a stranger as its successor through observance of any stipulated conditions (the most pertinent being the execution of a deed of accession by the stranger).

Such an interpretative venture is not entirely without support. In *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*,[10] an individual had agreed to supply chalk to a company for at least 35 years. During the contract term the latter sold its undertaking to another company and went into voluntary liquidation. Notwithstanding the named parties to the contract being the individual and the original company, Lord Macnaghten held that they had intended for the contract to bind their successors and assigns, especially given that one of them was a company with perpetual succession. The contract was therefore to be:[11]

> … read and construed as if it contained an interpretation clause saying that the expression 'Tolhurst' should include Tolhurst and his heirs, executors, administrators and assigns …, that the expression 'the company' should include the company and its successors and assigns …, and that the words 'his' and 'their' should have a corresponding meaning.

Lord Shand concurred while Lord Lindley, also in the majority, was of the view that the 'nature of the agreement and the time it was to last negative the idea that it was confined to the parties to it'.[12]

This reasoning, in giving a seemingly unambiguous word or phrase (ie the identity of a named party) a wider implicit meaning, would cover *a fortiori* the case where the description of a particular shareholder or partner *expressly* included its successors. In essence, the word 'successors' would be construed as effectively conferring upon the relevant party the ability to unilaterally introduce a stranger into the contractual relations. This may perhaps be warranted in an exceptional case, such as where the relevant context and evidence demonstrates that that was a plausible meaning of the words chosen by the parties, including in situations where the contract term is a very long one, or where an identified legal successor (for instance, a liquidator or an estate administrator) is to assume the place of a party to the contract. To that extent, the operation of a unilateral deed of accession may be explained using an interpretative analysis. Outside of these situations, however, the use of the nominative words 'and its successors' in a contract ordinarily should *not* be understood to frank any entitlement to unilaterally introduce a new party to the contract.

In the first place, when used as part of the description of a party's identity, the word 'successors' is not rights-conferring but merely *contemplative* of the fact that that party's rights, liabilities and obligations may be transferred to another person. They fit and describe a scenario where such a transfer takes place, but the

[7]For an example in a different context, see *Street v Mountford* [1985] AC 809.
[8][2023] EWCA Civ 128.
[9]Ibid, at [82].
[10][1903] AC 414.
[11]Ibid, at 420.
[12]Ibid, at 423.

transfer itself must be authorised *pursuant to a separate provision* touching squarely on the permissibility of transfer. This literal meaning happens also to be the commercially accepted meaning. A lawyer inserting the word 'successors' is usually only aiming to achieve drafting coherence in the written document and to reduce the need for recurrent textual amendments during the term of the agreement. Reading into it a right to unilaterally interpose a stranger into the formal contractual relationship amongst all of the parties runs against the understanding in which the word is held by commercial lawyers.

Moreover, considerable uncertainty would be engendered if judges regularly countenanced the unilateral insertion or replacement of a contract party pursuant to a right franked merely by the word 'successors'. A person desirous of reserving to itself a right to transfer its contractual rights, liabilities and obligations normally does so by including a transfer provision, not merely writing the word 'successors' behind its name. This ex ante allocation of commercial risk is liable to be upset by an overly liberal use of the interpretative device à la *Tolhurst*, a case which should be confined to its facts. For a party in this way to permit the free substitution of its counterparty by an unknown stranger would be unusual and possibly require the court to imply too much into the words used, as King CJ observed in *Harry v Fidelity Nominees Pty Ltd*.[13]

Finally, and as already mentioned, orthodox English law understands the formal insertion or replacement of parties to a contract to take place following novation rules. To be clear, consent from the parties (including the incoming party) to a novation need not take any particular form or have to be contained in specific words.[14] However, distilling the fact of consent from the word 'successors' through an exercise in contractual interpretation can place too much weight on the word where it was not meant to bear that load.[15]

It may be noted as an aside that there exists a variant of the interpretative analysis, albeit one hailing from New Zealand and thus persuasive at best. That focuses on a standalone right-to-assign provision frequently found in a shareholder or partnership agreement. Now, a party can effect a unilateral assignment of its contractual rights in the absence of statutory proscription (obligations are, of course, generally unassignable),[16] and a clause in the contract which expressly permits an assignment of rights simply confirms that default position. It is well understood though that the unilateral act of assignment does not, without more, serve to bind the assignee to the non-assigning party.[17] Of interest, then, is how a contractual provision allowing a party to 'assign its interest' to a related company without the other party's consent was interpreted by the majority of the Supreme Court of New Zealand in *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd*[18] to mean that that party could *substitute a related company for itself* as a party within the formal contractual relationship, without requiring the other party's consent.[19]

There are two ways to understand this. From the perspective of English law, if the word 'assign' is being taken to describe a process of novation then that is very much a finding on the facts,[20] one

[13](1985) 41 SASR 458, at 460. A second member of the court (Johnston J at 470) agreed with King CJ's reasoning on this point. See also *Salter v Gilbertson* (2003) 6 VR 466, at [17]–[18].

[14]*Astra Asset Management UK Ltd v Musst Holdings Ltd* [2023] EWCA Civ 128, at [56].

[15]The interpretative argument succeeded in the British Columbia case of *Weyerhaeuser Co Ltd v Hayes Forest Services Ltd* 2008 BCCA 69, in which the Court of Appeal stated that a substitution of parties pursuant to an assignment clause did not involve a novation as such but was merely about the ordinary interpretation and operation of a contractual term (at [41]). However, this approach sidesteps the policy concerns over an expansive view allowing the replacement of contracting parties at will, and it must be uncertain whether the reasoning would be adopted in a similar case in England and Wales; see *Budana v Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980, [2018] 1 WLR 1965, where Davis LJ's analysis (at [93] and [102]) was rejected by the majority comprising Gloster and Beatson LJJ (at [65]–[69] and [118]–[119]).

[16]*MW High Tech Projects UK Ltd v Outotec (USA) Inc* [2023] EWHC 2885 (TCC), at [44]; *Magee v Crocker* [2024] EWHC 1723 (Ch), at [186].

[17]*Bexhill UK Ltd v Razzaq* [2012] EWCA Civ 1376, at [44]; *MW High Tech Projects UK Ltd v Outotec (USA) Inc* [2023] EWHC 2885 (TCC), at [44].

[18][2014] NZSC 121, [2015] 1 NZLR 281.

[19]Ibid, at [59].

[20]See eg *GMAC Commercial Credit Development Ltd v Sandhu* [2004] EWHC 716 (Comm), [2006] 1 All ER (Comm) 268, at [135]; *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd* [2020] EWHC 2537 (TCC), [2020] BLR 747, at [98];

which must be highly uncommon where the parties are advisedly aware of the difference between assignment and novation.[21] Alternatively, *Savvy Vineyards* can be taken to suggest that, in New Zealand, a true substitution of the parties may take place *solely* through a party's unilateral observance of certain contractual formalities, such as the delivery of a notice of 'assignment' or, relevantly for our purposes, a deed of accession. There exists sporadic willingness to develop the common law in that direction,[22] but *Savvy Vineyards* is not easily viewed as a prime specimen of change, not only because the majority's discussion on this issue was obiter,[23] but owing also to the potential impact of statutory intervention in New Zealand in the form of section 54(1) of the Contract and Commercial Law Act 2017, which contemplates that the 'burden of a contract' may be 'assigned'.[24] Whether the English law of assignment requires deep reformation in that way poses interesting questions which must be answered another time.

(d) Prospective consent

Instead, the most persuasive analysis (as alluded to above) is that a person's unilateral execution of a deed of accession does result in a novation under which it becomes a formal party to the shareholder or partnership agreement. Being a novation, then, there must have been the requisite consent from the incoming party as well as each of the existing parties. The incoming party provides consent to the novation by executing the deed of accession; the existing parties furnish their consent, not by taking any positive action, but in the form of their prior assent to a term in the agreement that they will accept any person fulfilling the stipulated conditions of entry as a party to the agreement.

In *Byrne v Reid*,[25] the articles of partnership provided that one of the partners could nominate and introduce into the partnership a son or other male who was at least 21 years' old and was to execute a deed binding himself to the terms and conditions contained in the articles. Two members of the Court of Appeal are recorded as having concluded that the nominee had the right to be admitted to the partnership upon provision of capital and his execution of the requisite deed.[26] No further action from the existing partners was necessary. The third judge quoted this passage from a well-known treatise:[27]

> If partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should

Body Corporate 406198 v Property Opportunities Ltd [2022] NZHC 418, (2022) 23 NZCPR 1, at [62]–[75]; *Keezz Ltd v Te Whatu Ora – Health New Zealand* [2023] NZHC 1360, at [166].

[21] *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* [2008] EWHC 1570 (TCC), (2008) 120 Con LR 1, at [153]. As Lord Hoffmann also said in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, at 16, 'if *the law* or practice on a point is settled, it should be assumed that persons entering into legal transactions will have been advised accordingly' (emphasis added).

[22] See eg *Circuit-Systems Ltd v Zuken-Redac (UK) Ltd* [1997] 1 WLR 721, at 723; *Promontoria (Henrico) Ltd v Samra* [2019] EWHC 2327 (Ch), [2019] CTLC 295, at [88]. Earlier, in *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 WLR 1, at 4–5, the Court of Appeal found an 'implied' novation to have occurred which allowed the non-transferring party to enforce a contract against a transferee, but one reading the judgment will struggle to find any contemporaneous indication of the requisite consent from the non-transferring party. The case, if correctly decided, might be characterised as an instance of either consent to novation being imputed or a unilateral transfer of liabilities being upheld to avoid injustice on the exceptional facts there.

[23] The majority preferred to resolve the appeal by reference to whether there was in fact assent to a novation. Subsequently, a first instance decision in New Zealand declined to follow the obiter dictum, holding instead that a clause which expressly conferred on a supplier the ability to transfer the burden of the agreement without consent could not alone give the supplier the ability to impose a novation: *Pendarves Packing Ltd v Baitworx Ltd* [2014] NZHC 3327, at [41].

[24] For judicial discussion of the predecessor to this section, see (in chronological order) *Gibbston Valley Estate Ltd v Owen* CA175/98, 2 June 1999; *SB Properties Ltd v Holdgate* [2009] NZCA 327, [2011] 1 NZLR 633, at [17]–[26]; *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281, at [88]–[92].

[25] [1902] 2 Ch 735.

[26] Ibid, at 740.

[27] Ibid, at 742 (quoting N Lindley, *A Treatise on the Law of Partnership* (London: Sweet & Maxwell, 6th edn, 1893) p 368) (emphasis added).

> not be bound by the agreement. *Persons who enter into such an agreement consent prospectively and once for all to admit into partnership any person who is willing to take advantage of their agreement, and to observe those stipulations, if any, which may be made conditions of his admission* … Those who form such partnerships, and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions.

In turn, the operation of an accession mechanism that is based on prospective consent given by the existing parties to a shareholder or partnership agreement can be rationalised on two different grounds.

(i) Consent in the 'broader sense'

Consider a shareholder agreement made between A and B. It contains an express provision stipulating that the existing parties thereto will accept and treat as a party to the agreement any person who duly executes and delivers to them a deed of accession in the form appended to the agreement. The deed, in turn, states that the person executing it agrees to perform and to be bound by, and shall be entitled to enforce, the provisions of the agreement from the time of execution.

It has been proposed in this scenario that A and B have consented to the future novation in a 'broader sense'; that is, they consent 'at the time of the original [contract]' to the subsequent introduction of a new party to the agreement, rather than at the (later) point in time when that party was actually introduced.[28] So, through their agreement to the relevant term in the original contract, A and B are said to already have implicitly furnished their consent, albeit a prospective one, to a future accession by C (the putative incoming party). That is half the story. The rest resides in C's execution and delivery of the unilateral deed of accession. Upon this trigger the conditions fall neatly into place for a novation, where the initial consent from A and B, together with the consent from C represented in the deed, are all 'rolled up' into a later agreement to novate among A, B and C.[29]

However, this hypothesised 'broader' notion of consent oversimplifies the formal requirement for consent *in a novation*. In just the basic tripartite scenario described above there are three contracts in play: the original contract between A and B, the agreement to novate among A, B and C, and the new contract created among A, B and C. The reproach is that the consent (be it implied or express) from A and B to permit a future novation is being treated like any ordinary term that can be the subject of agreement in a contract between those two parties, when that consent is only legally significant as a constituent part of the *tripartite* agreement to novate.

The matter can be tested using the same example. A and B have expressly consented, by a term in their contract, to C's future accession, which may or may not take place but if it does is stated to be by way of novation. This prior 'consent' does not affect the ordinary existence and performance by A or B of the contract. However, should the purported accession occur later, the 'consent' (even allowing it to be a continuing one) is said to automatically represent positive acceptance by A and B of a fresh agreement to novate *with* C. Seen this way, the initial accord between A and B rests on the same plane as a pure agreement to agree – not least, one seeking to strike a bargain with a *non*-party – with similar results as to enforceability. The resemblance does not diminish whether A and B are viewed as

[28] J Kirby 'Assignments and transfers of contractual duties: integrating theory and practice' (2000) 31 Victoria University of Wellington Law Review 317, at 345. Discussing the introduction of a new party in substitution for one of the existing parties, Kirby suggests that '[t]here is no compelling reason why a suitably worded prospective substitution provision should not enable a party to shed both its rights and obligations where these are assumed by another person' (at 348).

[29] One can perhaps locate a reed of assistance for this analysis in *The Tychy (No 2)* [2001] 1 Lloyd's Rep 10, at [66]–[81], where David Steel J did not seem to look askance at the concept of a party's prospectively consenting to the novation of its agreement from the counterparty to a stranger whose exact identity had not yet been ascertained; his only objection was that the contention was not made out on the evidence in that case. The relevant finding of fact was later reversed on appeal: *The Tychy (No 2)* [2001] EWCA Civ 1198, [2001] 2 Lloyd's Rep 403. See also R McDougall 'Australia and New Zealand case law update – Australia' (28th Annual Conference of the Banking and Financial Services Law Association, 4–6 August 2011), para 48.

consenting (directly) to a later tripartite novation or (less directly) to the other existing party having the ability to later novate. In both the intended outcome is the ostensible entry by A and B into fresh contractual relations with a stranger.

(ii) Unilateral contracts

The other explanation of the prospective consent analysis is more sophisticated. According to its proponents,[30] an express provision stipulating that the existing parties will accept, as a party to the agreement, any person who duly executes and delivers to them a deed of accession implicitly contains several standing offers. One offer, to terminate that agreement, is made by each of the existing parties to the other (A and B in our scenario). Another offer, to conclude a new agreement on (usually) the same terms, is made by A and B to all eligible persons within a stated class. The first set of offers may be accepted variously by A and B, while the last-mentioned offer may be accepted by C (the putative acceding party). Whether there are indeed the requisite acceptances depends on the fulfilment of the conditions prescribed in the novation mechanism in the original agreement, with one key condition being of course C's execution and delivery of the deed of accession.[31]

Acceptance by A and B of the offers directed to them converts their unilateral contract into 'a new synallagmatic contract between them in which they agree to discharge the original [shareholder agreement]'; while acceptance by C of the offer directed to it converts the unilateral contract among A, B and C into 'a new synallagmatic contract between them on the terms provided in the novation mechanism'.[32] Together these synallagmatic contracts 'constitute the effective novation' of the original agreement between A and B, resulting in a new agreement among A, B and C.[33] Modern authority supports this use of unilateral contracts which accords with an orthodox understanding of novation principles.

In *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd*,[34] a borrower and a syndicate of banks had executed a lending agreement. One of the banks later agreed to sell part of its loan share to a third-party bank. At around the same time the borrower became insolvent. Following a refusal of the purchasing bank to complete the transfer of the loan share, the selling bank debited the settlement amount from funds held with it by the purchasing bank, which then brought proceedings to recover that amount. One issue that arose was whether the borrower's consent to the transfer of the loan was required as that involved a novation of the facility agreement.

At the Court of Appeal it was held that the borrower's consent was required for a novation.[35] However, Moore-Bick LJ (with whom Rix LJ agreed) thought that such consent could be contained in the original lending agreement itself, so that a subsequent novation might be done in the manner prescribed in the agreement – here, by execution and delivery of a 'transfer certificate' – which required neither the borrower's action nor its 'specific consent' to the novation. (Note that, in the shareholder or partnership agreement context, a deed of accession would form the analogue to the transfer certificate.)

As to how any such novation became legally effective, Moore-Bick LJ considered the unilateral contract analysis mooted in *Argo Fund Ltd v Essar Steel Ltd*[36] to offer a persuasive explanation.[37] That case, too, concerned a lending arrangement where the transfer of a loan share did not require the borrower's active involvement; it was sufficient for the transferee and transferor to complete and deliver a 'transfer certificate'. Aikens J in *Argo Fund* construed the transfer provisions in the following way:[38]

[30]M Hughes 'Transferability of loans and loan participation' (1987) Journal of International Banking Law 5; KH Lau 'Novation and advance consent' (2022) 81 Cambridge Law Journal 581.

[31]Lau, above n 30, at 587.

[32]Ibid.

[33]Ibid.

[34][2010] EWCA Civ 1335, [2011] QB 943.

[35]Ibid, at [19].

[36][2005] EWHC 600 (Comm), [2005] 2 Lloyd's Rep 203.

[37]*Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWCA Civ 1335, [2011] QB 943, at [22].

[38]*Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600 (Comm), [2005] 2 Lloyd's Rep 203, at [51].

> [H]ow does [the borrower] agree to the termination of the contract with the original participant and agree to the new contract with the transferee? … In each case there is a 'standing offer' by [the borrower], which is contained in clause 27 of the Agreement. The offer to terminate the old contract is made to each original participant. The offer to conclude a new contract is made to all those who are eligible, ie are within the definition of 'bank or other financial institution'.

In the case of the old contract, the borrower's standing offer could be accepted by the original participant by delivery of the transfer certificate; and in the case of the new contract, the borrower's standing offer could be accepted by the transferee in its agreement both to the transfer on the terms set out in the transfer certificate and to the delivery of the transfer certificate by the original participant.[39]

Following *Habibsons Bank* it is clear that, through a suitably worded term in a loan agreement, an existing party may consent to a subsequent introduction of a stranger into the contractual relationship through novation. The effectiveness of that novation is explainable using the unilateral contract analysis. The agreement should contain a mechanism for the novation that is not nebulous, and the terms of the new contract formed must be sufficiently certain.[40] This device, it will be recalled, has the advantage of requiring action from potentially just the new incoming party (eg executing documentation to indicate its acceptance of and obligation to perform the terms), thereby eliminating the active participation of those existing parties who will also be privy to the post-novation contract.

The unilateral contract analysis in novation has been endorsed in England and Wales, mostly in the context of loan agreements but also in relation to a conditional fee agreement.[41] Relevantly for the present study, it has been proffered in explanation of a unilateral accession to a shareholder agreement in Australia[42] and (to a lesser degree of discussion) under English law as well.[43] Compared with the other possibilities discussed above, construing the accession mechanism as effecting a novation – albeit one to which the existing parties have consented in advance, and which requires only the incoming person to execute an accession deed – on the basis of unilateral contract theory comports best with, and inflicts the least damage on, an orthodox understanding of the rules on how contracts are interpreted, amended and novated.

2. Two understudied issues

With this understanding in place, we can undertake an examination of two lesser studied issues that arise in the operation of unilateral accessions to shareholder and partnership agreements.

(a) Equities

The unilateral accession of a person as a party to the shareholder or partnership agreement takes place through novation. This, as we have seen, is the preferable view. But adoption of the novation analysis also requires accepting its consequences, chief among them that any accession would normally result in the discharge of the existing agreement and the creation of a fresh agreement among the parties.

(i) The (non-)survival of equities

The crucial thing about this is that equities attaching to the existing agreement ordinarily become extinguished when the novation takes effect. Such equities would include a right of set-off or a right to rescind. However, the automatic extinguishment of equities may not always be welcome in the broader context of shareholder or partnership relations, which are typically intended to persist

[39] Ibid, at [51]–[52].

[40] *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWCA Civ 1335, [2011] QB 943, at [21]–[22].

[41] *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 471 (Comm), at [50]; *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] EWHC 2908 (Comm), at [46]; *Budana v Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980, [2018] 1 WLR 1965.

[42] *Yara Australia Pty Ltd v Oswal (No 2)* [2013] WASCA 187, at [67] and [424].

[43] *NDK Ltd v Huo Holding Ltd (No 2)* [2022] EWHC 2580 (Comm), [2023] 1 Lloyd's Rep 204, at [10] and [15].

for an extended period among the parties. Not infrequently, allegations of defective performance and unsatisfactory conduct can and will arise over the lengthy term of the agreement; the incidence of such occurrences is heightened further by the potentially large number of parties bound contractually to each other as shareholders or partners in a company or partnership.

Given this broader context, it may be contrary to their intentions for any accession by a future party to extinguish their existing equities inter se. Indeed, even the person who *subsequently* accedes to the agreement may not wish to have existing equities erased, for it could be replacing an outgoing party that has the benefit of certain equities and it might want to take and enforce those equities as well. A person who acceded would also be aware that, were all existing equities to be extinguished upon its accession, any *new* equities created in its favour would be likely to be similarly extinguished to its disadvantage if there were yet a further accession down the line.

One might think that the law would have resolved itself on an issue arising so frequently and with such important consequences. Unfortunately, it has not. In 2013, the Court of Appeal handed down the decision in *Unitech Global Ltd v Deutsche Bank AG*,[44] in which a challenge was issued that no judge since has attempted to meet.

(ii) The Unitech *decision*

The *Unitech* case involved a credit facility agreement pursuant to which US$150 million had been lent to Unitech Global. Interest on the sum was to be determined by reference to LIBOR. Deutsche Bank was the original lender, but eight other lenders subsequently acceded to the agreement. The nine lenders sued Unitech Global for defaulting on repayment, only to be met with a counter-allegation that Deutsche Bank had made misrepresentations to Unitech Global pertaining to the integrity of the bank's role in the LIBOR-setting process.

It was held by Cooke J in the Commercial Court that, to the extent Unitech Global had a right to rescind the credit facility agreement arising from Deutsche Bank's alleged misrepresentations, that right was lost when two of the eight lenders acceding to the agreement did so by means of novation, which extinguished the original agreement and replaced it with new agreements. The effect was 'not simply to assign or transfer a right or liability, but to extinguish the existing agreement and create a new contract'.[45]

Unitech Global appealed to the Court of Appeal, where Longmore LJ (with whom Underhill LJ and Sir Bernard Rix agreed) said that a novation in the strict legal sense – involving discharge of an existing contract and creation of a new contract – defeated any equities applicable to the existing contract.[46] However, he noted that, even if it could be said that two of the eight new lenders had acceded to the agreement by way of novation in the strict legal sense, the other six lenders had acceded 'by way of assignment, assumption and release' of the existing lender's rights or obligations. Longmore LJ therefore said that:[47]

> … there must at least be an argument that, on the facts of the present case, *there is only a partial novation so that [two lenders] became parties to a new contract freed of the equity of rescission whereas the other parties (whether the original or the other new lenders) remain bound under 'this Agreement' and will be affected by any such equity*. That is by no means to say that the concept of partial novation is free from difficulty but an application for permission to amend is not the right time at which all these problems should be addressed.

This conception of partial novation has been variously described as a novation with 'assignment-like' features[48] and as a tertium quid.[49] And not without reason: it would mean that the intended novation

[44][2013] EWCA Civ 1372.
[45]*Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 471 (Comm), at [50].
[46]*Unitech Global Ltd v Deutsche Bank AG* [2013] EWCA Civ 1372, at [33] and [37].
[47]Ibid, at [37] (emphasis added).
[48]L Gullifer and J Payne *Corporate Finance Law: Principles and Policy* (Oxford: Hart Publishing, 3rd edn, 2020) p 464.
[49]Lau, above n 30, at 600.

of a single entire contract could result in a multitude of contracts, including at least one new contract involving the incoming party unaffected by prior equities and another contract among those persons who, both before and after the novation, were and are in contractual relations and remain bound by those equities in spite of the novation.

(iii) Is the concept of 'partial novation' necessary or desirable?

I suggested above that parties to a shareholder or partnership agreement might be motivated to preserve existing equities in respect of the agreement notwithstanding that accessions might take place through novation at some future time. In practice, this has been achieved by inserting an express provision in the agreement and/or the accession mechanism that sets out the status of such equities after a novation takes effect.[50] Partial novation now potentially opens a path to a similar outcome *by operation of law*, since pre-novation equities could, absent contractual stipulation, survive as amongst at least those parties who were and continued to be in contractual relations. But the introduction of partial novation as theorised could also lead to a blemished state of the law for several reasons.

First, partial novation would be hard to square with a conventional common law understanding of assignments and novations. Their distinct rules, discussed earlier, are rooted in fields of significant antiquity. In particular, the primary effects of the novation of a single entire contract – discharge of that contract and creation of a new contract,[51] with the concomitant extinguishment of personal equities – are longstanding and unquestioned. The law ought not to be insensitive to development,[52] but partial novation seems an unnecessary novelty to address an issue (the survival of equities) which parties already account for through express stipulation. Secondly, this conventional understanding is notorious in the commercial world and has in turn generated established market practices. It would take something significant to upset all this; the issue of equities does not present so pressing a problem considering the workaround already mentioned. Thirdly, any recognition of partial novation as a valid doctrine would not just be in respect of shareholder, partnership or lending agreements, but would necessarily have to apply in every contracting context given the generality of the doctrine. Altering the rules across disparate areas in one fell swoop is difficult to justify in the absence of a serious defect in the law, something the *Unitech* case has arguably not revealed.

Finally, and turning to the substantive aspects, the operation of partial novation would often lead to the situation of parties who, although loosely speaking were all part of the same contractual venture, were really all privy to separate contracts because they joined and acceded at different times. The longer the lifetime of the overall contractual adventure and the greater the number of parties becoming involved, the more this proliferation of contracts would happen through operation of law. Calling this the 'splintering contract' puzzle, I criticised the partial novation analysis as being divorced from the intentions of parties using the words 'novation of the contract' in their agreements, who should 'generally be taken to understand that that involves the discharge of the original contract and the creation of a new contract for all of the parties concerned'.[53] On the other hand, if the law hewed to current orthodoxy and practice – such that the novation of a single entire contract has the ordinary effect of extinguishing the equities attaching thereto – while accepting that parties may expressly provide for the survival of equities, whether amongst all or some of the parties, and on such terms as might be stipulated in the accession mechanism, no prejudice would be caused to the parties by an approach

[50]This might require consideration of any relevant statutory provisions impacting on the issue: see eg Partnership Act 1890, ss 17 and 19.

[51]*Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48; [2021] Bus LR 1717, at [60].

[52]There is of course room for deeper study in this field; this paper can be seen as a partial response to the still-accurate claim that novation 'in English domestic law lacks systematic development and exegesis': M Bridge 'The proprietary aspects of assignment and choice of law' (2009) 125 Law Quarterly Review 671, at 677.

[53]Lau, above n 30, at 599–600; KH Lau 'Contractual novations: the "partial novation" phenomenon and is advance consent absolute?' (2023) 1 Journal of International Banking and Financial Law 8, at 10.

that aligns fully with the uncontroversial position that the post-novation relationship of the parties is shaped entirely by their intentions.[54]

The conception of partial novation as adumbrated in the *Unitech* case would therefore appear to be neither necessary nor desirable, leading possibly to the unprovoked creation of doctrinal fissures in a manner unlikely to reflect ordinary commercial motivations, and ought not to be readily accepted in that form.

(b) Enforcement

We turn to another issue arising in the operation of unilateral accessions. The enforcement of the terms of a novation agreement and the post-novation contract ordinarily raises no especial difficulty. In the case of deeds of accession to a shareholder agreement, however, problems may arise due to the uncertain interaction of the accession mechanism with certain statutory provisions. It is a surprisingly neglected area of study. The following discussion takes the example of a private unlisted company registered under the Companies Act 2006 and whose shareholders have also separately entered into a shareholder agreement containing their rights, liabilities and obligations as against each other.

(i) The distinction between accession and statutory registration

One of the important features of the accession mechanism typically featuring in a shareholder agreement is that a person must, to be registered as holder of the relevant shares, first execute and deliver the unilateral deed of accession.[55] It is easy to see why such execution and delivery is framed as a condition precedent to legal ownership of the shares.[56] The overarching intention of the parties is generally that every shareholder should be a party to the shareholder agreement containing the mutual rights, liabilities and obligations. That is especially the case where shareholders belonging to the same class expect to receive the same treatment. A single person who succeeded in becoming the legal owner of shares without also being bound by the provisions of the shareholder agreement could upset that commercial understanding.

This exceptional scenario is not merely a hypothetical possibility. Putting to one side a person who becomes entitled to shares through transmission by operation of law, the two primary ways to obtain legal title are to take an allotment of newly issued shares and to take a transfer of existing shares from another person. In both cases, the statutory process of registering a person as holder of the relevant shares in the company's register of members under the Companies Act 2006 is distinct from, and need not require, any prior or simultaneous execution of the deed of accession. Greater safeguards exist in the case of an allotment of shares, as we will see, but even then prejudice and protracted litigation can be occasioned if registration has occurred without the accession deed's having also been executed at or before that time.

Share allotments. In a company having only one class of shares, the directors may exercise any power of the company to allot shares except to the extent that they are prohibited from doing so by the company's articles.[57] In a company having one or more classes of shares, the directors may exercise a power of the company to allot shares if they are authorised to do so by the company's articles or by resolution of the company; such authorisation may be unconditional or subject to conditions.[58] Penal consequences await a director who knowingly contravenes, or permits or authorises a

[54]The extent of novation is flexible and dependent on the intention of the parties: M Bridge et al *The Law of Personal Property* (London: Sweet & Maxwell, 3rd edn, 2022) at paras 25-010–25-011.

[55]See eg the clauses in *Apex Global Management Ltd v FI Call Ltd* [2015] EWHC 3269 (Ch), at [24]; *NDK Ltd v Huo Holding Ltd (No 2)* [2022] EWHC 2580 (Comm), [2023] 1 Lloyd's Rep 204, at [12].

[56]See eg *Brewin v Bathroom Brands Holdings UK Ltd* [2020] EWHC 3210 (Ch), at [137]; *Port De Djibouti SA v DP World Djibouti FZCO* [2023] EWHC 1189 (Comm), [2023] 2 Lloyd's Rep 149, at [125]–[129]; *Hikari Miso (UK) Ltd v Knibbs* [2023] EWHC 1340 (Ch), at [71].

[57]Companies Act 2006, s 550.

[58]Ibid, s 551(1)–(2).

contravention of, these requirements.[59] However, neither the fact of contravention nor the imposition of criminal liability affects the validity of the allotment.[60] In general, the company must register an allotment of shares as soon as practicable and within two months after the allotment date, and also deliver to the registrar of companies a return of allotment within one month of the allotment.[61] For the purposes of the Companies Act 2006, shares are taken to be allotted when a person acquires the unconditional right to be included in the company's register of members (or to have its name and other particulars delivered to and registered by the registrar of companies) in respect of the shares.[62]

Share transfers. A company may not register a transfer of shares in the company unless a proper instrument of transfer has been delivered to it.[63] Where a transfer has been lodged with the company, the company must, as soon as practicable and within two months after the date of lodgement, either: (1) register the transfer; or (2) give the transferee notice of refusal to register the transfer, together with its reasons for the refusal.[64] In addition, a company must within two months after the lodgement date complete the certificates of the shares transferred and have them ready for delivery, unless the transfer is one which the company is for any reason entitled to refuse to register and does not register.[65]

(ii) Statutory relief where condition precedent to registration not satisfied

In the case of *allotments*, the totality of the statutory rules leads to a conclusion that directors may exercise the power of allotment without having to consider the (non-)satisfaction of the condition precedent relating to the allottee's executing a deed of accession to the shareholder agreement, unless the condition precedent was located in the articles or in a company resolution at the time of exercise. Even if it were so located, an allotment of shares to a person who had not satisfied the condition precedent might still be prima facie valid.

In the case of *transfers*, the company is obliged to register a proper and duly stamped instrument of transfer unless it is 'entitled to refuse' to do so. Non-satisfaction of the condition precedent found in the shareholder agreement (to which the company will usually be a party) may be grounds for refusal, and if the condition precedent is also in the articles or in a company resolution that will no doubt strengthen the company's refusal to register. However, non-satisfaction gives the company a reason to refuse registration; a threatened breach of the articles or resolution may justify injunctive relief, but if the transfer is in fact registered then arguably nothing in the Companies Act 2006 itself impugns the validity of the transfer.

It is understandable why the statute does not immediately provide that an allotment or a transfer of shares is invalid if registered in breach of a condition located in the articles or in a company resolution. Registration might occur deliberately ('knowingly' per section 549) in contravention of the condition, or it could occur negligently and absent wilful default. Given the varying degrees of blameworthiness, invalidating the registration altogether might be thought a crude tool to regulate the observance of conditions found in the articles or the resolution. In addition, a recurring feature of the statutory regime has been to promote certainty in share transactions and, correspondingly, to mitigate the risk that a prior transaction might call into question the status of subsequent transactions.[66] Were a

[59]Ibid, s 549(1) and (4).

[60]Ibid, s 549(6).

[61]Ibid, ss 554(1) and 555(2).

[62]Ibid, s 558.

[63]Ibid, s 770(1). I do not discuss a transfer of shares which is an exempt transfer within the Stock Transfer Act 1982 or which pertains to shares the title to which is evidenced and transferred without a written instrument.

[64]Ibid, s 771(1).

[65]Ibid, s 776(1)–(2).

[66]Even a failure to comply with *statutory* pre-emption procedures does not in itself invalidate an allotment of shares, but in appropriate cases the court may exercise its power under s 125 of the Companies Act 2006 to rectify the register of members: E Ferran et al *Principles of Corporate Finance Law* (Oxford: Oxford University Press, 3rd edn, 2023) p 153. Whether the company and its officers are further liable to compensate a person to whom a pre-emptive offer should have been made is covered by s 563 (see also the discussion in I Macneil 'Shareholders' pre-emptive rights' [2002] Journal of Business Law 78, at 97–98).

prior allotment or transfer to be invalidated such that legal title to certain shares failed to vest in the subscriber or transferee, that could result in the automatic invalidation of later transactions involving those shares notwithstanding that the parties to those transactions might have acted in good faith and without notice of any defect in title.[67] These severe consequences require careful treatment of the legal and statutory rules.

The remedy of statutory rectification usually affords some relief in these scenarios. Under section 125 of the Companies Act 2006, if the name of any person is entered in a company's register of members without sufficient cause, an application for rectification of the register may be made to court by the person, any member or the company. The court may refuse the application or may order rectification and payment by the company of any damages sustained by any party aggrieved. It may generally also decide any question necessary or expedient to be decided for rectification of the register.

There is authority suggesting that 'no sufficient cause' will exist for a person's name to be entered in the register where the claimed interest in shares is not created or transferred in accordance with a strict condition set out in the articles and in a shareholder agreement. *Re Coroin Ltd (No 2)*[68] concerned a transfer of shares that purportedly failed to comply with the requirements of a pre-emption provision located in the articles mirroring that found in the shareholder agreement. It was also stated that 'No Share nor any interest therein shall be transferred, sold or otherwise disposed of save as provided in [the pre-emption provision].' Construing this proscriptive language in its proper context, Moore-Bick LJ held that it was 'effective to invalidate transfers or the creation of interests otherwise than in accordance with the pre-emption provisions',[69] while Rimer LJ said that no sale, transfer or disposition would be effective between the parties 'unless it has been preceded by compliance with the pre-emption provisions' and that the board accordingly had no power to register an attempted, but non-compliant, share transfer as that would have been made in breach of the articles.[70] Importantly, however, if such registration had in fact taken place then rectification of the register might be available so as to restore the prior position (but with the person formally registered regarded as a member having rights up to the time of rectification).[71]

(iii) Relief where accession deed not executed and delivered as condition precedent to registration

Re Coroin Ltd (No 2) offers a path forward on the enforcement of a requirement for incoming shareholders to have to first execute and deliver a unilateral deed of accession to the shareholder agreement. The pre-emption provision in *Re Coroin Ltd (No 2)* was a condition precedent the non-fulfilment of which would render a purported transfer of shares ineffective as against the company. By parity of reasoning, the requirement for execution and delivery of an accession deed by a person wishing to be registered as a member and who is not already a party to the shareholder agreement can be expressly stated in the company's articles and the shareholder agreement to be a condition precedent to any allotment or transfer of shares to such person.[72] (For this purpose, however, it may be insufficient to say that the shareholders should 'take all steps within their power' to ensure the incoming person executes the deed of accession.[73]) Satisfaction of this condition precedent can be waived,[74] but if it is not and the incoming person's name has been registered in the company's register of members

[67]See also *Re Cleveland Trust plc* [1991] BCLC 424, 437.

[68][2013] EWCA Civ 781, [2013] 2 BCLC 583.

[69]Ibid, at [143].

[70]Ibid, at [161] and [162].

[71]Ibid, at [143] and [165].

[72]It is very much preferable to have the same provision inserted in the articles and the shareholder agreement to obviate issues of precedence and subordination.

[73]*Re Coroin Ltd* [2012] EWCA Civ 179, [2012] 2 BCLC 611, at [19].

[74]*Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, at 402. Waiver is a question of fact and there are countless scenarios that may trip up unsuspecting parties, one possible example being where a nominee director approves and causes the allotment or transfer to be registered on the instructions of the nominating shareholder, and who might therefore be taken to have waived satisfaction of the condition precedent on behalf of the shareholder.

without prior execution and delivery of a deed of accession, the company and its members may apply under section 125 for an order for rectification of the register to reflect the prior position. Any such order is made at the court's discretion and can be denied on the basis of a litigant's delay or unsatisfactory conduct.[75]

In law, however, as in life, prevention is frequently better than the cure.

Although taking out an application for an order for rectification and possibly damages under the Companies Act 2006 is one available course of action, there is a risk that the ensuing proceedings may be protracted owing to complicated factual disputes and questions, such as in relation to waiver, estoppel and acquiescence,[76] particularly if the stakes are high enough for the parties to wage a protracted forensic battle. Where, instead, it is somehow discovered, either before the allotment or transfer takes place or before the registration thereof, that the company intends to so allot, transfer or register (as the case may be) in defiance of the condition precedent for execution and delivery of a deed of accession, a member should in principle be able to obtain urgent injunctive relief to restrain the company from making the relevant registration until at least any full hearing of the dispute.[77] Various jurisdictional bases exist for the grant of the injunction, but the shape of the contentions will be similar in two respects: the injunction will be based on the member's right to enforce the company's observance of its articles and the shareholder agreement, and the member must fulfil the usual criteria for interim relief.[78]

With the issuance of an urgent injunction likely to be justified in these circumstances, one might perhaps go further and ask: cannot the articles and the shareholder agreement provide for equitable relief to be the *agreed* remedy for a contravention of the condition precedent?[79] In the case of a threatened contravention the agreed remedy would be an interim injunction, and in the event of an actual contravention the agreed remedy could be either an injunction to restrain the company from registering the allotment or transfer of shares, and/or an injunction compelling the company to apply for rectification of the register if registration has occurred.

The inquiry just posed can reinflate the important debate over whether parties to a contract may validly stipulate for agreed equitable remedies to enforce their performance interest. The accession mechanism provides arguably a perfect test case: a contract firmly situated in the commercial context, entered into by and amongst parties possessing comparable bargaining power, in which the relevant obligation is not a personal one, with breach thereof resulting in injury suffered by the parties in a common way for which compensation in damages could be an inadequate remedy.[80] Additional considerations leaning in favour of equitable relief include the typically direct manner in which an obligation to execute and deliver the deed of accession is drafted (so that performance thereof is easily ascertainable), as well as the concern to forestall protracted legal proceedings (eg relating to the suitability of injunctive relief, rectification or damages) not only for cost and efficiency reasons but also to avert prejudice caused to third parties relying on the propriety of the register. In short, they meet most, if not all, of the criteria mooted by Solène Rowan, a foremost proponent for the recognition of agreed

[75] *Re B & S Partnership Ltd* [2023] EWHC 648 (Ch), at [119]–[120].

[76] See, for example, *Magee v Crocker* [2024] EWHC 1723 (Ch).

[77] Occasionally, injunctive relief will not be obtained in time to prevent registration from occurring, as happened in *Re Thundercrest Ltd* [1995] 1 BCLC 117 (noted BJ Davenport 'Deeming provisions' (1995) 111 Law Quarterly Review 193), such that rectification of the register is likely to be the only worthwhile recourse.

[78] Namely, to establish that: (i) there is a serious issue to be tried; (ii) there is a risk of irremediable prejudice to the applicant-member if the injunction was not granted, that is, harm which cannot be compensated for in damages; and (iii) this risk of prejudice outweighs the prejudice that would be caused to the respondent if the injunction were granted.

[79] It is theoretically possible for the articles or shareholder agreement to provide for an order for rectification (and not simply an injunction) to be the agreed remedy. However, the primary difficulty with this taking effect according to its terms is likely to reside in surmounting the argument that the concomitant fettering of the court's wide statutory powers under s 125 of the Companies Act 2006 is an impermissible outcome.

[80] For instance, irreparable prejudice might be caused should registration result in a person assuming and passing on certain rights of a member in direct conflict with the extant terms of a shareholder agreement.

remedial terms in the common law.[81] The remaining objection of substance is that judicial discretion in this exercise of the equitable jurisdiction is effectively excised. Whether that ought reasonably to be viewed with equanimity or suspicion may well depend on the context in question.[82] The accession mechanism provides one compelling instance where a sensitive application of the factors considered earlier in this paragraph should permit the parties to have greater say over the attainment of more certain and efficient litigation outcomes.

Conclusion

Several understudied issues relating to accessions to shareholder and partnership agreements have been explored in these pages: the process by which such accessions take effect; the survival of equities following an accession; and the enforcement of a requirement for incoming shareholders to have to execute and deliver a deed of accession. Accessions happen frequently in modern commercial life, making the dearth of academic and judicial discussion somewhat surprising, but more disconcerting is the unsettledness of some of the complex issues implicated. The repurposing of unilateral contracts to explain how accessions operate in the context of shareholder and partnership agreements is not fully tested in English law; the conception of partial novation as adumbrated in the *Unitech* case, which is not even law, much less bad law, has already generated academic controversy; and the enforcement of a condition precedent to registration of membership in a company, in the form of prior accession to a shareholder agreement, interacts in an uncertain way with the Companies Act 2006, lending impetus to the adoption of new methods for attaining relief.

In addition to the specific issues discussed in this paper, two points of wider interest may be observed in closing. The first is the apparent incongruity of a heavily practised area of corporate transactions law – accessions to shareholder and partnership agreements – containing an unfortunate hole in understanding. However, many having experience in this field will instinctively appreciate that any great curiosity in the theoretical underpinnings of the law commonly gives way to the welcome certainty drafters and advisors get from relying on precedents and templates. Proper legal exposition may follow settled practice as a form of justification and confirmation, which is also how aspects of English commercial law have developed.[83] The present discussion of the accession mechanism contains modern evidence of that approach to law-making. In this regard, Lord Hoffmann rightly said that the courts should be slow to declare a commercial practice to be conceptually impossible in the absence of any public policy objection or threat to the consistency of the law,[84] but with respect may then have inverted the order when suggesting that parties entering into legal transactions could be assumed to have been advised accordingly if the practice on a point was a settled one.[85]

A further point of general interest, related to the first, is in the time it can take for the common law to formally establish a legal rule in circumstances where the business community is looking primarily to the courts for urgent guidance. The doctrine of partial novation mooted in *Unitech* would, if it becomes law, have important implications for banking and commercial practice. Yet, it has been almost completely untested by judges and academics for over a decade, leaving the industry in uncertainty. Another (unrelated) example is the doctrine of contractual estoppel, the limits of which remain undefined by the Supreme Court despite nearly two decades of handwringing in the lower courts.[86]

[81]S Rowan 'For the recognition of remedial terms agreed *inter partes*' (2010) 126 Law Quarterly Review 448; S Rowan *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (Oxford: Oxford University Press, 2012) ch 5.

[82]cf PG Turner 'Inadequacy in equity of common law relief: the relevance of contractual terms' (2014) 73 Cambridge Law Journal 493; KH Lau 'Injunctive relief: but let's agree not to have it?' (2016) 79 Modern Law Review 468.

[83]R Cranston *Making Commercial Law Through Practice 1830–1970* (Cambridge: Cambridge University Press, 2021).

[84]*In re Bank of Credit and Commerce International SA (No 8)* [1997] 3 WLR 909, at 919.

[85]*Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, at 16.

[86]Since the decision was handed down in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511. See further K Lewison 'How far can you go? The limits of contractual estoppel' (COMBAR Lecture, 12 February 2019); S Cockerill 'Contractual estoppel – the case for coherent principles' [2022] Journal of

Although numerous reasons exist for why matters do not always fall for judicial decision (such as owing to withdrawal or settlement prior to trial or appeal), it has not gone unnoticed that the Supreme Court is also consistently hearing relatively fewer commercial cases.[87] Now, of course, the work of others who till the fields, such as the Law Commissions[88] as well as academics striving to codify English commercial law,[89] cannot be overlooked or discounted. But the courts drive the development of the laws of commerce. In an era of expanded possibilities given the momentous advent of technology, it would be a cause for regret if the judicial engine in this jurisdiction were misfiring instead of contributing its fullest to global discourses in commercial law.[90]

Business Law 189; KH Lau 'Contractual estoppel and the fork in the road' [2019] Lloyd's Maritime and Commercial Law Quarterly 334 (discussing *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637).

[87]L Mulcahy and W Teeder 'Are litigants, trials and precedents vanishing after all?' (2022) 85 Modern Law Review 326, at 351, 361 and 363. On the permission to appeal procedure, see generally C Hanretty *A Court of Specialists: Judicial Behavior on the UK Supreme Court* (New York: Oxford University Press, 2020) ch 3; CJS Knight 'The Supreme Court gives its reasons' (2012) 128 Law Quarterly Review 477; B Alarie and AJ Green *Commitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges* (New York: Oxford University Press, 2017) ch 6.

[88]M Arden *Common Law and Modern Society: Keeping Pace with Change* (Oxford: Oxford University Press, 2015) ch 9; M Dyson et al (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Oxford: Hart Publishing, 2016); S Wilson Stark *The Work of the British Law Commissions: Law Reform… Now?* (Oxford: Hart Publishing, 2017); S Kenny 'The Law Commissions: constitutional arrangements and the rule of law' (2017) 39 Oxford Journal of Legal Studies 603; J Lee '"Not time to make a change"? Reviewing the rhetoric of law reform' (2023) 76 Current Legal Problems 129.

[89]R Goode 'The codification of commercial law' (1988) 14 Monash University Law Review 135; PJ Omar 'Lessons from the French experience: the possibility of codification of commercial law in the United Kingdom' (2007) 18 International Company and Commercial Law Review 235; G McMeel 'A code of English commercial law' [2021] Lloyd's Maritime and Commercial Law Quarterly 234. See also AL Diamond 'Codification of the law of contract' (1968) 31 Modern Law Review 361; M Arden 'Time for an English commercial code?' (1997) 56 Cambridge Law Journal 516; A Tettenborn 'Codifying contracts – an idea whose time has come?' (2014) 67 Current Legal Problems 273.

[90]That these discourses are taking place, sometimes urgently, is not generally doubted (see Lord Thomas of Cwmgiedd's 2023 Hamlyn Lectures discussing laws for transnational commerce, as well as A Phang and Y Goh 'Contract law in Commonwealth countries: uniformity or divergence?' (2019) 31 Singapore Academy of Law Journal 170). The extent to which the UK courts are an effective conversant, mainly through their judgments but also through other forms of leadership, depends on how well fiscal pressures are handled, not to mention the difficulties in attracting qualified candidates to apply for high judicial office, although those appear to have lessened in recent years: I Burnett 'Closing speech by the Lord Chief Justice' (Legal Wales Conference, 10 October 2022), para 21.

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