

**ASSIGNMENT OF THE ARBITRATION AGREEMENT: PERSPECTIVES OF
LEADING JURISDICTIONS**

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Abstract

This thesis addresses the issue of assignment in international commercial arbitration. Arbitration is a voluntary choice for settling disputes between the parties and it is well accepted that no one can be obliged to arbitrate. An interesting and discussable question is whether the arbitration agreement or arbitration clause is transferrable to a third party who is not an initial party of the main contract. The thesis provides the answers and explanation to the question. The thesis finds that different approaches are given by different jurisdictions and there is no uniform rule. The thesis identifies the rationale behind these differences. Moreover, the thesis gives the characteristics of assignment in some specific container contracts. Assignment is considered as a limit to the principle of separability which renders the latter a legal fiction and not absolute. Thus, the thesis gives clarification of such a conflict.

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List of Abbreviations

| | |
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| ADR | Alternative Dispute Resolution |
| AAA | American Arbitration Association |
| art. | Article |
| arts. | Articles |
| Ibid. | Ibidem |
| ICC | International Chamber of Commerce |
| ICCA | International Council for Commercial Arbitration |
| ICSID | International Centre for Settlement of Investment Disputes |
| LCIA | London Court of International Arbitration |
| NYC | New York Convention |
| para. | Paragraph |
| paras. | Paragraphs |
| PECL | Principles of European Contract Law |
| UNCITRAL | United Nations Commission on International Trade Law |
| UK | United Kingdom |
| US | United States |
| UCC | Uniform Commercial Code |
| SCC Institute | Arbitration Institute of the Stockholm Chamber of Commerce |

1. Chapter One: Introduction

Nowadays arbitration is a firmly established ADR. It provides to the parties the benefit to avoid courts and settle their dispute by an arbitration panel. It is an achievement of the principle of freedom of contract. Its popularity and extensive use show the awareness of the advantages of arbitration. As a dispute settlement method it is based on party autonomy, thus no one can be mandated to arbitrate unless he or she decides to do so.

The thesis addresses the issue of assignment in the field of international commercial arbitration. Although assignment¹ is a legal term known by lawyers as part of contract law, it is of particular importance in arbitration as well. It is not only relevant to the initial parties of the main arbitration agreement, but it is also significant for a third party who voluntarily or statutorily may become party of the contract.

The thesis answers two main questions. Firstly, the thesis is focused on whether the arbitration agreement or the arbitration clause is assignable with the main contract. The main features analyzed herein relate to: Whether the assignment of the entire agreement or certain rights and obligations means that the arbitration agreement or clause is also assigned. Further, whether the assignee is bound by the arbitration agreement/clause though not an initial party. If the obligor consent is necessary for the validity of the assignment and the crucial importance of the applicable law. Herein, the applicable law of the arbitration agreement regulates the assignability of the agreement and rights and obligation of the parties involved. Case law reflects the factors taken into consideration by the arbitral tribunals and courts, and different approaches used. It is viewed that there is no uniform rule followed by courts of different states. Moreover, courts of the same state may hold diverse decisions in regard to cases with similar facts.

¹ For the purposes of this thesis, the terms assignment and transfer will be used interchangeably.

Secondly the thesis provides an analytical examination of the assignment *vis à vis* the principle of the separability. The well accepted principle of separability allows an arbitration agreement or clause to be deemed separate from the underlying contract. Thus, the arbitration agreement or clause does not follow the fate of the main agreement. This second part discusses whether the assignability is considered as a limit to the separability principle.

The assignment of the arbitration agreement is a discussed issue in both theoretical and practical aspects. Firstly, the assignment legal term has his own individual features and may be regulated differently from one legal system to another.² Generally, it does not require a particular form. However, in case of assignment of the arbitration agreement, the issue is more complex. Consideration is given not only to how the applicable law determines the assignment, but also the rules and elements that regulate an arbitration agreement. Secondly, from a practical point of view, arbitral tribunals or courts should take into account not only the intent of the initial parties but the interest of all parties involved. In any case the aim should be the best solution possible and the balance of the parties' interest in avoiding an unjust result. The issue has been fairly elaborated on by leading authors of international commercial arbitration books, articles and case law commentary.³ Although discussed in continuity, the issue remains a difficult concern to be solved, especially in practice.

The thesis methodology is an analytical approach of the previous and current studies of the issue. In addition, it is an analytical approach related to different positions of diverse legal systems and arbitral tribunals and courts. The thesis relies on courts' decisions, arbitral case

² See Beale Hugh, Fauvarque-Cosson Benedict, Rutgers Jacobien, Tallon Denis, Vogenauer Stefan, "*Cases, Materials and Text on Contract Law*", Hart Publishing, Second Edition, 2010, 1295.

³ See Fouchard, Gaillard, Goldman "*International Commercial Arbitration*", Kluwer Law International, 1999, 417-436; See also Friedland Paul D, "*Arbitration Clauses for International Contracts*", Juris Publishing Inc., Second Edition, 2007, 110; See also Girsberger Daniel, Hausmaninger Christian, "*Assignment of Rights and Agreement to Arbitrate*", Arbitration International, LCIA, Volume 8, No.2, 1992, 121-165.

law, legal principles and arbitration rules. Moreover, the thesis is based on other sources including books, articles of law journals, internet sources and databases.

The thesis will be organized in five chapters. The first chapter is the introductory chapter. Chapter two gives a legal definition to the concept of assignment, its history and elaborates on capacity and consent of the parties, different approaches to assignability by courts and tribunals, applicable law, and formalities requirement. The third chapter explains the dynamics of assignment of the arbitration agreement or clause in specific contracts and different jurisdictions. It includes the multiple and connected agreements, the assignment of the ICSID arbitration agreement, the assignment of the arbitration clause in insurance contracts from US perspective, assignment from Irish, Indian, English and Swedish perspective and assignment of the labor arbitration. The fourth chapter elaborates on the principle of separability and its interplay with assignability of arbitration agreements or clauses. The thesis last chapter contains the findings of this research and the conclusion

2. Chapter Two: Assignment of the Arbitration Agreement

The assignment of the arbitration agreement or clause involves issues of the rights and obligations of the initial contractual parties, the assignee (as a third party non-signatory of the underlying agreement), the need for the consent or non-consent of the non-assignor initial party. It also covers the effects of the assignment depending on the time when the agreement was assigned, the different tracks followed from legal systems albeit with different final decision. It follows that a detailed scrutiny of the concerns is necessary for the comprehension of the topic.

2.1 Assignment as a Legal Term

Black's Law Dictionary defines assignment as: "...a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the act of transfer, but also the instrument by which it is effected."⁴ Otherwise said, the owner of a right, called the assignor, transfers it to a party called the assignee. Subsequently, the assignee steps into the shoes of the assignor and assumes all his contractual obligations and rights.

As Farnsworth argues, the rationale behind the free assignability of the contract rights is the existence of the credit economy.⁵ Likewise, arbitration was not only born by merchants but its development serves to the international economic cooperation.⁶ Thus, in terms of international business transactions where arbitration is the dominant form of disputes resolution, the assignment of the agreement is common as well. The validity of assignment requires the satisfaction of minimum requirements which vary from one legal system to another. Civilian systems regulate assignment under contract law, while English Law does not consider

⁴ Garner A. Bryan, Editor in Chief, "*Black's Law Dictionary*", Thomson West, Eighth Edition, 2004, 128.

⁵ Farnsworth E. Allan, "*Contracts*", Aspen Law & Business, Third Edition, 1999, 704.

⁶ Park William W, "*Arbitration of International Business Disputes*", Oxford University Press, First Edition, 2006, 4. See also Philip G. Phillips, "*Rules of Law or Laissez-Faire in Commercial Arbitration*", Harvard Law Review, Vol. 47, No. 4, 1934, 590 available at <http://www.jstor.org/stable/pdf/1331982.pdf?acceptTC=true> retrieved on 11 February 2015.

assignment as part of contract law.⁷ There is no unanimity of a particular form of an assignment. PECL do not require the assignment to be in writing and it may be proved by any means.⁸ Thus, under these principles the formality of the assignment is left to the national laws.

In the US the concept has evolved over the years. Early US common law considered contractual rights as personal rights and they were not freely assignable.⁹ Currently, UCC recognizes the assignment of the contract.¹⁰ Once the assignee accepts the contract, he is liable and the contract may be enforced by either the assignor or the other party to the original contract.¹¹

Although in certain contexts, the difference between assignment and delegation seems immaterial, there is a technical distinction deriving from contract law. As previously stated the assignment means that the assignee steps into the shoes of the assignor and there is a transfer of rights or obligations or both from the assignor to the assignee. Delegation is mostly referred to an obligor's empowering of another to perform the obligor's duty. It is known as a delegation of the performance of that duty.¹² The difference is also seen in the consequences each of these legal terms brings.¹³ The complexity of the assignment increases when assignment is discussed within the arbitration agreement. Arbitration is governed by its own rules and principles and parties have some expectations when they agree on arbitration. The applicable law regulating the main contract has a high importance.

2.2 Assignment of the Main Contract

⁷ Beale Hugh, Fauvarque-Cosson Benedict, Rutgers Jacobien, Tallon Denis, Vogenauer Stefan, "*Cases, Materials and Text on Contract Law*", Hart Publishing, Second Edition, 2010, 1295.

⁸ Principles of European Contract Law 2002, Part I, II and III, Lex Mercatoria, art. 11:104, available at <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/doc.html>, retrieved on 3 February 2015.

⁹ White James J., Summers Robert S., Hillman Robert A., "*Uniform Commercial Code*", West, Thomson Reuters, Sixth Edition 2012, Chapters 1-14, 394.

¹⁰ *Ibid.* 405.

¹¹ *Ibid.* 405.

¹² Garner A.Bryan, Editor in Chief "*Black's Law Dictionary*", Thomson West, Eighth Edition, 2004, 458, Definition: "The act of entrusting another with authority or empowering another to act as an agent or representative", Distinction between assignment and delegation, available at <http://assignments.uslegal.com/distinction-between-assignment-and-delegation/> retrieved on 22 March 2015

¹³ *Ibid.*

One of the first questions to be answered is whether the assignment of the main contract provided by the agreement itself matters when the parties have agreed on arbitration. Contracting is a consensual process and parties are free to include or not provisions to their best interest. Thus, parties may include the assignability of their agreement or prohibit it except when the agreement *per se* is deemed *intuitu personae*¹⁴. Assignment clauses are typical boilerplate clauses by which parties have future certainty. For instance, they predict protection from dealing with another third party which is not an initial signatory. Thus, parties choose arbitration for their dispute resolution and they prohibit the assignment of the contract. The solution seems simple. The assignment of the main contract is not intent of the parties. It seems meaningless to argue the assignment of an arbitration agreement or clause which is provided for the sole purpose of resolving possible disputes arising from a particular contract that itself prohibits the assignment.¹⁵ Therefore, the arbitration agreement or clause here is perceived as an accessory of the main agreement.

On the contrary, the case is debatable if the main contract allows the assignment. Different scenarios are possible. If the assignment clause explicitly mentions the transfer of the arbitration agreement or clause reasonably the latter will be transferred to the assignee. But here the element of consent may arise. Another situation is the partial assignment of the agreement. For example, it is possible to assign only rights and not obligations.¹⁶ The assignment clause may be an ill-drafted and does not identify the assigned contractual rights.

¹⁴ *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992, 1 SCR 1021, 1992 CanLII 105 (SCC), available at <http://canlii.ca/t/1fsb2> retrieved on 8 February 2015. See also United Nations Multilingual Terminology Database available at <http://unterm.un.org/DGAACS/unterm.nsf/8fa942046ff7601c85256983007ca4d8/3d42bdb12d82cec8852570f3005e76c3?OpenDocument> retrieved on 8 February 2015.

¹⁵ Fouchard, Gaillard, Goldman “International Commercial Arbitration”, Kluwer Law International, 1999, 427.

¹⁶ Tolhurst Greg, “*The Assignment of Contractual Rights*”, Hart Publishing, 2006, 6.

The question is whether the arbitration choice is considered a right or obligation or both of them for the initial contracting parties and what effects brings for the assignee. Each of the initial party has the right to compel arbitration. The effects for the assignee depend if the arbitration agreement or clause will be considered assignable. In additional, the main contract may be assigned in its entirety. One may presume that the arbitration agreement or clause is included in this “entirety”. It is argued that the acceptance of the main agreement presumes the acceptance of the arbitration agreement.¹⁷ Thus, the assignee accepts the main agreement and the application of the arbitration clause contained in the agreement. The mere logic is that the party who accepts the agreement take both rights and obligations. From this point of view, the arbitration clause is not separable. It follows the main agreement and is extended to the successor of one of the initial parties.¹⁸

The most frequent concern in this scenario deals with the principle of separability that will be elaborated further on for this purpose. The well accepted principle states that the arbitration agreement or clause escapes the fate of the container contract.¹⁹ Consequently, it is not easy to determine the extent of the principle and where the assignment interpretation begins.

2.3 Capacity and Consent of the Parties

The capacity of the parties means that parties are legally able to enter into a contract. Certain individuals are not capable of entering into a contract due to age limit, specific conditions or status. The general rule that any natural or legal person must have the legal capacity to enter into a contract applies to the arbitration agreement as well. In arbitration, the recognition and enforcement of the award depend on the capacity of the parties.²⁰ The incapacity if proven, is

¹⁷ Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 427.

¹⁸ *Ibid.*

¹⁹ Varady Tibor, Barcelo III John J., Von Mehren Arthur T., “*International Commercial Arbitration*”, Thomson Reuters, Fifth Edition, 2012, 133.

²⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, art.V, para.1 (a).

sufficient to refuse the recognition and enforcement of the award. The prevailing rule is that the legal capacity of the parties to enter into contract and the capacity to hold rights are recognized by their national law.²¹ Nonetheless, there are exceptions to the rule, for example when the capacity of the parties is established under the law applicable to the merits of that specific contract or act.²² The same logic applies to cases of the assignment. The national law of the parties defines their right to convey title and transfer rights and obligation to another party, and the right of the latter to accept the assignment.

Among other terms and conditions, the contract has a confidentiality provision. As the assignment would breach the confidentiality provision it may be interpreted that the transfer is prohibited. Such insinuation is very subjective and may be even obstructive. In daily life domestic and international contracts usually contain confidentiality provisions. These provisions are related to the nature of the contract or to the process where one of the parties is involved or trade secrets parties become aware of due to the performance of the contract. Normally, the transfer of the rights and obligations is accompanied by the transfer of the confidentiality provision as well. Whether the transfer would breach the confidentiality provision and for this reason the assignment is prohibited, is not very convincing.

The consent of the parties is the point of departure for an arbitration agreement and crucial requirement for the assignment. Parties are bound by the arbitration agreement because they have agreed to it. Their common intent stays as the basis of the existence and validity of arbitration agreement.²³ Rubino-Sammartano considers the intention of the parties the main source of international arbitration and the source of the procedural and substantive law.²⁴ The

²¹ Rubino-Sammartano Mauro, *“International Arbitration Law and Practice”*, Kluwer Law International, Second Revised Edition, 2001, 197-198.

²² *Ibid.* 199 See in the book, footnote no.17.

²³ Tolhurst Greg, *“The Assignment of Contractual Rights”*, Hart Publishing, 2006, 44.

²⁴ Rubino-Sammartano Mauro, *“International Arbitration Law and Practice”*, Kluwer Law International, Second Revised Edition, 2001, 56.

consent herein refers to the consent of the assignee, assignor, and the initial co-contractor. The assignee must consent to the assignment of the arbitration agreement.²⁵ The assignee is not one of the initial parties of the agreement. Hence, he has not expressed his intent on how to deal with possible disputes. No one can be bound by an arbitration agreement if he has not previously agreed. In France this approach was favoured in *Fraser v. Compagnie Européenne des Pétroles* and the court held that: “An arbitration clause remains subject to the principles of privity of contracts and cannot therefore circulate in a chain of contracts, unless the parties have expressly provided otherwise”²⁶ The justification of the decision lies on French law analysis that arbitration agreement creates more duties than rights.²⁷ In a later case, *SMABTP v Statinor*, it was held that arbitration clause has self-standing validity and it is extended to non-signatories parties only if they knew its existence and scope.²⁸

As Fouchard argues, the existence of the consent in this context is interpreted like other forms of consent to an arbitration agreement.²⁹ The consent of the assignor does not need to be discussed. Being an initial contractual party, it is presumed that he is aware of the existence of the arbitration agreement because he agreed on it. Moreover, there is no assignment without the consent of the assignor. The consent of initial co-contractor party may be required or not, depending on the content of the assignment clause.³⁰ If explicitly stated by the assignment clause, it is mandatory. If not, it can be argued on different grounds. The non–assignor signatory party may argue that the intention to enter an arbitration agreement is strictly related to the identity of the other party.³¹ Thus, if the characteristics of the other party were not crucial for

²⁵ Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 425.

²⁶ Mistelis Loukas A., Lew Julian D.M., Editors, “*Pervasive Problems in International Arbitration*”, Jagusch Stephen, Sinclair Anthony “*Assignment*”, Kluwer Law International, 2006. See also Supra Note 21 at 425.

²⁷ Redfern Alan, Hunter Martin, Blackaby Nigel, Partasides Constantine, “*Law and Practice of International Commercial Arbitration*”, Sweet & Maxwell, Fourth Edition, 2004, 151.

²⁸ *Ibid.* See also Ashford Peter, “*Handbook on International Commercial*”, JurisNet LLC, Second Edition, 2014, 79.

²⁹ Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 425.

³⁰ *Ibid.* 431-432.

³¹ *Ibid.* 434.

entering the arbitration agreement, the non–assignor party has implicitly agreed on the assignment. Another position is analyzed in *Gmac Commercial Credit LLC v. Springs Industries, INC.* and that is whether the arbitration is considered an obligation or a remedy.³² If the arbitration agreement is considered a remedial measure satisfying the requirement under the UCC the court held that:

“... Even an assignment of only contract ‘rights’ not entailing any duty of performance [citation omitted] must be deemed to include the bargained-for remedial procedure. Therefore, where a factor chooses to sue upon a contract with an arbitration clause, arbitration is part of the contractual right the plaintiff factor exercises.”³³

The case invokes previous case law that states that the finance assignee is not obliged to arbitrate unless he has consented.³⁴ But this case based on the adoption of the UCC reversed this position.³⁵ The rationale behind is the principle that an assignee does not stand in a better position than his assignor.³⁶ Girsberger considers the arbitration agreement a legal remedy rather than a combination of rights and duties, thus he does not agree that the assignment of the arbitration agreement requires the consent of all parties alike the assignment of the whole contract.³⁷ Furthermore, arbitration tribunals have held that the arbitration clause follows the assignment of a contractual right.³⁸

2.4 Applicable Law

The principle of party autonomy allows the parties to choose the law governing their contract.³⁹

The same principle applies in arbitration. Parties are free to choose the law or laws that will

³² *Gmac Commercial Credit LLC v. Springs Industries, INC.*, 171 F.Supp.2d 209, 44 UCC Rep.Serv.2d 903, S.D.N.Y., 2001, retrieved from Westlaw database, accessed on 14 February 2015.

³³ *Ibid.* Section 216, 8.

³⁴ *Ibid.* Section 213, 5.

³⁵ Ferrari Franco, Kröll Stefan, Editors, “*Conflict of Laws in International Arbitration*”, Girsberger Daniel, “*The Law Applicable to the Assignment of Claim Subject to an Arbitration Agreement*”, Sellier.European Law Publishers, 2011, 386, see footnote no.27.

³⁶ See Supra Note 29 *Gmac Commercial Credit LLC v. Springs Industries*, Section 213, 6. See also Tolhurst Greg, “*The Assignment of Contractual Rights*”, Hart Publishing, 2006, 7.

³⁷ See supra note 31, 386-387.

³⁸ Rubino-Sammartano Mauro, “*International Arbitration Law and Practice*”, Kluwer International Law, Second Edition, 2001, 291 reference to ICC proceedings No.3281, 1981.

³⁹ Lando Ole, Beale Hugh, “*Principles of European Contract Law*”, Parts I and II, The Commission on European Contract Law, Kluwer Law International 2000, art. 1:102 “*Freedom of Contract*”, 99.

govern the arbitration agreement, the arbitration proceedings and the merits of the dispute.⁴⁰

The principle is recognized by international acts. The ICC rules 2012 states: “The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute.”⁴¹ Parties may choose institutional arbitration or *ad hoc* arbitration, namely the institution rules or *lex arbitri* may apply.⁴² But party autonomy is not unlimited. In the framework of due process, the agreement must not be contrary to the laws of public policy of the state where the agreement has its consequences or international public policy.⁴³

The issue is not so straightforward in case of the assignment. The concern is whether the assignability of the agreement is regulated by the law governing the main agreement or the arbitration agreement.⁴⁴ Some authors note different approaches from one state to another and basically consider it as a matter of interpretation of the arbitral tribunals.⁴⁵ Some choose to apply the law most favorable to assignment, some others apply a material rule of international commercial arbitration and others *lex fori*.⁴⁶ The assignment of the arbitration agreement is not regulated by any of the international instruments as the NYC, the European Convention on International Commercial Arbitration and the UNCITRAL Model Law.⁴⁷ Commentators assume that the solution is left to national laws in accordance with the conflict of law rules.⁴⁸

⁴⁰ Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 31. See also Varady Tibor, Barcelo III John J., Von Mehren Arthur T., “*International Commercial Arbitration*”, Thomson Reuters, Fifth Edition, 2012, 533.

⁴¹ ICC Rules of Arbitration, 2012, art.21, para.1.

⁴² Varady Tibor, Barcelo III John J., Von Mehren Arthur T., “*International Commercial Arbitration*”, Thomson Reuters, Fifth Edition, 2012, 682.

⁴³ Kurkela Matti S., Snellman Hannes, “*Due Process in International Commercial Arbitration*”, Oceana Publications, Inc. 2005, 47-49.

⁴⁴ Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 420.

⁴⁵ Poudret Jean-François, Besson Sébastien, “*Comparative Law of International Arbitration*”, Sweet & Maxwell, Edition, 2007, 244.

⁴⁶ *Ibid.* 244-245.

⁴⁷ Hosking James M. “*The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*”, Pepperdine Dispute Resolution Law Journal, Vol. 4, Issue 3, 2004, available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1138&context=drlj> retrieved on 15 February 2015.

⁴⁸ *Ibid.* See footnote 119 referring Zimmer (USA) Europe S.A. (Belgium) v. Giuliana Crenascoli (Italy), June 3 1985, XI YEARBK. COMM. ARB'N 518 (1986), Girsberger & Hausmaninger.

ICC rules are also tacit regarding the assignment. In EU, Rome I Regulation provides for the regulation of the relationship between the assignor and the assignee.⁴⁹ It states that the law governing the contract between the assignor and the assignee determines its assignability and the relationship between the assignee and the debtor (non-assignor initial signatory party).⁵⁰ Thus, the law governing the assigned claim is the contract law creating the obligation and it will be the governing law of the relationship between the parties.

Another difficulty to be answered is what happens when the arbitration agreement is assigned after the arbitration proceedings have started.⁵¹ A representative case that gives answer to the question is the *Jordan Nicolov* where it was held that once the proceedings have started the assignee takes over the proceedings and cannot claim the right to appoint a new tribunal.⁵²

Fouchard considers that the relation between parties and the arbitrator or arbitrators is based on trust.⁵³ The belief that principles like good faith, trust and fair dealing are helpful in a very intensive daily life where actors try to gain profits and maximize the, seems innocent. No matter how trustful a relationship between two parties may be or they want it to be, at the end of the day, parties want to protect their own interests. Arbitral tribunals have held that the assignee is bound by the arbitration agreement or arbitration clause agreed by the initial parties when the law governing the contract is French or German law.⁵⁴ Some authors explain the assignment issue through the degree of autonomy of the arbitration agreement or arbitration

⁴⁹ Regulation (EC) no.593/2008, 17.06.2008 “*On the Law Applicable to Contractual Obligations*”, Rome (I), Official Journal, 04.07.2008, art.14. available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> retrieved on 15 February 2015.

⁵⁰ *Ibid.* art.14.

⁵¹ Mistelis Loukas A., Lew Julian D.M., Editors, “*Pervasive Problems in International Arbitration*”, Jagusch Stephen, Sinclair Anthony “*Assignment*”, Kluwer Law International, 2006, 312.

⁵² *Ibid.* See also Merkin Rob, Steele Jenny, “*Insurance and the Law of Obligations*”, Oxford University Press, First Edition, 2013, See footnote 99, 402.

⁵³ Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 420

⁵⁴ Girsberger Daniel, Hausmaninger Christian, “*Assignment of Rights and Agreement to Arbitrate*”, Arbitration International, LCIA, Vol. 8, No.2, 1992, 133.

clause with the main contract.⁵⁵ If the arbitration agreement or clause is autonomous, it is transferred only by express consent.⁵⁶ If the arbitration agreement or clause is dependent on the main contract is considered similar with security interest or accessory rights and it is assigned together with the main contract.⁵⁷

Although national legal systems may distinguish the internal disputes arbitrations and international disputes arbitration, at the end the arbitration remain national in both scenarios.⁵⁸ For instance, if the arbitration is taking place in one country, it is considered domestic to that country and arbitration taking place outside that country it is foreign to that country.⁵⁹ Nevertheless, the NYC established that awards resulting from arbitral proceedings governed by the law of a country other than the country where arbitration takes place are considered foreign awards.⁶⁰

Under the doctrine of privity of contract an arbitration agreement confers rights and imposes obligations on the parties to it. Indeed, this is referred to as the subjective scope.⁶¹ One example when non-signatories may be parties to the arbitration agreement is the principal-agent relationship. Theories used to extend the arbitration agreement to the non-signatories parties include Succession, the theory of group of companies, the piercing of the corporate veil and estoppel.⁶²

⁵⁵ *Ibid.* 136.

⁵⁶ *Ibid.* 137.

⁵⁷ *Ibid.* 137.

⁵⁸ Rubino-Sammartano Mauro, *“International Arbitration Law and Practice”*, Kluwer Law International, Second Revised Edition, 2001, 60.

⁵⁹ *Ibid.* 61.

⁶⁰ *Ibid.* 61.

⁶¹ ICCA’s Guide to the Interpretation of the 1958 New York Convention, International Council for Commercial Arbitration, 2011, available at

http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf

retrieved on 21 March 2015, 58.

⁶² *Ibid.* 59.

The law applicable to determine the subjective scope of the arbitration agreement, namely the parties bound by it, is the law governing the arbitration agreement.⁶³ It happens that parties do not agree on the issue. Generally, the rule is that the arbitration agreement will be governed by the law of the seat of arbitration or the law governing the main contract or the *lex fori*.⁶⁴ As well, international principle or *lex mercatoria* may apply.

The issue of extension of the arbitration agreement to a non-initial parties is faced by both arbitral tribunals and courts. The institutions struggle among the legal theories and legal principles to find solutions. The principle of autonomy of the arbitration agreement from national laws makes the agreement independent from national laws that may govern it under the choice of law method.⁶⁵ The importance of the choice of law is recognized by international conventions that connect the recognition or enforcement of the award with the validity of the arbitration agreement under the law chosen by the parties or under the law where the award was made.⁶⁶ Practically is not usually easy to determine the law governing the arbitration agreement. Although, it has been debated whether the arbitration agreement should be characterized as substantive or procedural, it is accepted that the arbitration agreement is a contract that set up a procedure.⁶⁷ The law governing the main contract may designate the law applicable to the arbitration agreement but this is not the case when the choice of law method is used.

The issue becomes more complex in the event of assignment. What is the law applicable to determine the validity of the assignment and its consequences to the parties involved? It should be stated that the law applicable to the assignment may not be the same with the law applicable to the arbitration agreement. The contract is governed by the law of the country to which it is

⁶³ *Ibid*, 60.

⁶⁴ *Ibid*.

⁶⁵ Fouchard, Gaillard Goldman "*International Commercial Arbitration*", Kluwer Law International, 1999, 218

⁶⁶ *Ibid*, 219.

⁶⁷ *Ibid* 221.

most closely connected⁶⁸ is a principle applicable even in the herein context. Therefore, the law most closely connected to the arbitration agreement may be indicated by the chosen arbitration rules or the seat of the arbitration. Pursuant to the principle, the assignment may be governed by the law most closely connected to the transaction, it may be the law of assignor or assignee domicile.

2.5 The Lack of an Uniform Rule

There are no uniform rules that regulate the assignment of arbitration clause when the contract is assigned. Diverse approaches are noted between common law and civil law legal systems. The common law systems have solved the issue on a case by case basis and under common law rule of assignment.⁶⁹ In contrary, civilian system solves the issue based on statutory provisions,⁷⁰ particularly under assignment provisions of the Civil Codes.

US case law has established two principle rules applied to assignment of arbitration agreement or clause. The Lachmar rule states that the assignee is bound by the arbitration agreement if he has expressly assumed to do so.⁷¹ Under this rule the consent of the assignee is essential. The Hosiery rule states that the arbitration clause is assigned automatically to the assignee as it is considered incidental to the main agreement.⁷² The rationale of the rule is that the arbitration clause has no value if it is avoided by assigning the main agreement to a third party. In both cases exceptions are allowed.⁷³

⁶⁸ Regulation (EC) no.593/2008, 17.06.2008 “*On the Law Applicable to Contractual Obligations*”, Rome (I), Official Journal, 04.07.2008, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> accessed on 15 February 2015. para.16.

⁶⁹ Girsberger Daniel, Hausmaninger Christian, “*Assignment of Rights and Agreement to Arbitrate*”, Arbitration International, LCIA, Vol. 8, No.2, 1992, 134.

⁷⁰ *Ibid.*

⁷¹ See Supra note 54, 124. See also *Lachmar v. Trunkline Lng Company and Trunkline Gas Company*, 753 F.2d 8, Second Circuit, 1985, para. 6.

⁷² *Ibid.* 123-124. See also Vincze Andrea, “*Arbitration Clause – Is it Transferred to the Assignee?*”, Nordic Journal of Commercial Law, 2003, 3, available at http://www.njcl.fi/1_2003/article4.pdf, retrieved on 08.02.2015.

⁷³ Girsberger Daniel, Hausmaninger Christian, “*Assignment of Rights and Agreement to Arbitrate*”, Arbitration International, LCIA, Vol. 8, No.2, 1992, 124.

UK does not provide for a specific rule of the arbitration clause in case of assignment.⁷⁴ Courts have held that the arbitration clause passes to the assignee and has the same effect as among initial parties but the consent of the other original party is required.⁷⁵ The arbitration clause it is not transferred when it is considered a personal covenant of the main contract.⁷⁶ The representative case for this approach is *Cottage Club Estates v. Woodside Estates Co.*⁷⁷ Mustill and Boyd argue that the assignee and the obligor can invoke the arbitration agreement or clause unless otherwise agreed and no consent of the obligor is needed.⁷⁸ English case law shows that the assignment of material rights and arbitration clause are considered closely connected.⁷⁹

In Germany the issue is explained under the BGB assignment provisions.⁸⁰ The arbitration agreement or clause follows the assignment of the claim. Exceptions are allowed when parties agree that assignees are not bound by arbitration or where the main contract is attributed to the identity of one of the initial parties. In Austria, the prevailing view has been similar to the German one. The solution has been found under ABGB but opposing arguments argue that ABGB cannot regulate the arbitration agreement since it is considered a procedural law contract.⁸¹ The approach is similar in France as well.⁸² The question whether the arbitration clause is transferred and the assignee is bound by it, is answered by the dispositions of the Civil Code. The controversy of the separability doctrine and the automatic assignment of the arbitration clause is strongly argued under French case law.

⁷⁴ *Ibid.* 125.

⁷⁵ *Ibid.* 125-126.

⁷⁶ See Supra note 58, 125.

⁷⁷ Poudret Jean-François, Besson Sébastien, *Comparative Law of International Arbitration*, Sweet & Maxwell, Edition, 2007, 249.

⁷⁸ *Ibid.* 248.

⁷⁹ *Ibid.* 249.

⁸⁰ Girsberger Daniel, Hausmaninger Christian, “Assignment of Rights and Agreement to Arbitrate”, *Arbitration International*, LCIA, Vol. 8, No.2, 1992, 126-127. See also Poudret Jean-François, Besson Sébastien, *Comparative Law of International Arbitration*, Sweet & Maxwell, Edition, 2007, 249.

⁸¹ Girsberger Daniel, Hausmaninger Christian, “Assignment of Rights and Agreement to Arbitrate”, *Arbitration International*, LCIA, Vol. 8, No.2, 1992, 127-128..

⁸² *Ibid.* 130-131.

In contrary to what stated previously, *Corte di Casazione* of Italy based on the separability principle held that the arbitration clause does not transfer automatically.⁸³ The assignee cannot invoke the arbitration clause if the obligor has not given its consent.⁸⁴ The Swedish position is somewhere in between. It accepts the assignability of the arbitration clause without requiring express consent but the clause is operable if the assignee has actual or constructive knowledge of it.⁸⁵

In the context of arbitration, the assignment of the arbitration award has been discussed. For instance, in *International Transactions Ltd. v. Embotelladora Agral Regiomontana S.A* it was found that parties can assign the arbitration award since it is transferable property interest and it is not prohibited by Federal Arbitration Act (FAA).⁸⁶ The different jurisdictions share the same approach in case of *intuitus personae*, when the conclusion of contract is related to the personal characteristics of one of the contracting parties.⁸⁷ In this context, neither the main agreement is assignable, nor the arbitration clause.

2.6 Formalities Requirement

In the fast going world, parties are in a hurry to enter into contracts and do not pay attention to certain elements like formalities. The seeming neglect can result in unintended consequences and legal costs for the parties. The correct designation of a contract and the compliance with the formalities avoids all the additional and unnecessary future intricacies. Much attention is

⁸³ Poudret Jean-François, Besson Sébastien, *Comparative Law of International Arbitration*, Sweet & Maxwell, Edition, 2007, 250.

⁸⁴ *Ibid.*

⁸⁵ Redfern Alan, Hunter Martin, Blackaby Nigel, Partasides Constantine, “*Law and Practice of International Commercial Arbitration*”, Sweet & Maxwell, Fourth Edition, 2004, 151.

⁸⁶ Rubinstein Mitchell H., *Assignment of Labor Arbitration*, ST. John’s Law Review, Vol. 81, 2007, 41-76, 72.

⁸⁷ *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992, 1 SCR 1021, 1992 CanLII 105 (SCC), available at <http://canlii.ca/t/1fsb2> retrieved on 8 February 2015. See also United Nations Multilingual Terminology Database available at

<http://unterm.un.org/DGAACS/unterm.nsf/8fa942046ff7601c85256983007ca4d8/3d42bdb12d82cec8852570f3005e76c3?OpenDocument> retrieved on 8 February 2015.

devoted to the writing requirement in international commercial arbitration. The writing requirement is not relevant to both arbitration agreement and the assignment.

The validity and enforceability of the arbitration agreement require the agreement to be in writing. The understanding of what is meant by an “agreement in writing” is not straightforward. The art. II of NYC deals in a part of it with the issue. Commentary of the convention refers to art. II as the article with the most turbulent drafting history.⁸⁸ The “in writing” formality is a condition to recognize the arbitration agreement.⁸⁹ It is explained that the “agreement in writing” requirement comprises an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.⁹⁰ Although the NYC drafting history is tacit to clarify the reasons of the “in writing” requirement, it is contended that the aim of such provision is to provide evidence for the conclusion of the arbitration agreement and/or its content, to provide a warning to the parties before they enter into an arbitration agreement, or to both provide evidence and a warning.⁹¹ That part of the provision, explicitly “by exchange of letters or telegrams” was a child of its time.⁹² Hence, at the time the “in writing requirement” meant clearly an agreement in writing. Today this part of the provision it is understood that some kind of evidence must be provided for the arbitration agreement.⁹³

Thus, the interpretation of the requirement itself is not a strict literal interpretation. The rationale behind it is a practical and economic one. It was drafted this way to serve the needs

⁸⁸ Wolff Reinamr Editor, New York Convention “*On the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958*” Commentary, Verlag C.H. Beck oHG, Hart Publishing, Nomos Verlagsgesellschaft mbh & Co. KG, 2012, 93.

⁸⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, art. II.

⁹⁰ *Ibid.* para.2.

⁹¹ Wolff Reinamr Editor, New York Convention “*On the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958*” Commentary, Verlag C.H. Beck oHG, Hart Publishing, Nomos Verlagsgesellschaft mbh & Co. KG, 2012, 116.

⁹² *Ibid.* 92.

⁹³ *Ibid.*

and usages of international trade and not to require that both parties signed the same document.⁹⁴ Moreover, the broad interpretation favors the parties' intent. A controversial issue is that it follows from all this explanation is whether in the event of assignment, the written form is a requirement. Two main prevailing opinions may be deduced. For those who support the automatic transfer of the arbitration clause or agreement, the written requirement belongs only to the first conclusion of the arbitration agreement.⁹⁵ Basically, the written form is not required in the event of transfer and the burden is placed on the assignee who should prove himself the presence of the arbitration clause or agreement.⁹⁶ This may be contestable because the validity of the arbitration agreement entails the intent of the parties. Were it left to the inquiry of the assignee, it may be implied that the assignee was not given the chance to decide to enter or not to an arbitration agreement.

For those who oppose the automatic transfer of the arbitration clause or agreement, the written requirement serves two purposes.⁹⁷ First, it complies with the requirement that an arbitration agreement must be in writing and secondly it assures the awareness of the assignee entering an agreement to arbitrate.⁹⁸ A crucial argument in line with this position is the fundamental right to bring suit before courts⁹⁹. The written form provides party certainty whether to compel arbitration or to file proceeding in a court. The agreement to arbitrate means that parties waive the right to bring proceedings before a court. This is not absolute because parties who have entered into an arbitration agreement, may still run to courts. Having in mind that the breach of the writing requirement may suffice to render the arbitration agreement invalid, void and vacate the award, it follows that the assignee consent must be expressed in writing.

⁹⁴ *Ibid.* 94.

⁹⁵ Girsberger Daniel, Hausmaninger Christian, "Assignment of Rights and Agreement to Arbitrate", *Arbitration International*, LCIA, Vol. 8, No.2, 142.

⁹⁶ *Ibid.* 143.

⁹⁷ *Ibid.* 142.

⁹⁸ *Ibid.* 142.

⁹⁹ Heard Roderic H., Walker Susan L., Cooley John W., "International Commercial Arbitration Advocacy", National Institute for Trial Advocacy, 2010, 37.

Another interpretation is that binding a non-initial signatory party to an arbitration agreement does not conflict with the writing requirement of the NYC.¹⁰⁰ The formal validity and the assessment of parties bound by the arbitration agreement are independent steps. Firstly, the third parties and in the herein context the assignee may be encompassed by the *ratione personae scope*¹⁰¹ of the arbitration agreement. Secondly the NYC does not prevent consent to arbitrate from being provided by a person on behalf of another.¹⁰²

UNCITRAL Model Law on International Commercial Arbitration states that the arbitration agreement shall be in writing.¹⁰³ The written form must not be perceived as a protection only to the original parties but by taking in consideration the principle that the assignee must not be in a less favorable position than the assignor¹⁰⁴, the compliance with it is desirable for the awareness and the protection of the assignee. The UNCITRAL recommendation states that art. II para.2 is applicable by having in consideration that the circumstances described by it are not exhaustive.¹⁰⁵ Hence, the awareness of the parties is essential for the validity of the arbitration agreement or clause and the written form ensures this awareness. Anyway there are some exceptions as: the specific reference when reference is done to a document that contains the arbitration clause or agreement, when the awareness of parties is presumed due to a continuing

¹⁰⁰ ICCA's guide to the Interpretation of the 1958 New York Convention, International Council for Commercial Arbitration, 2011, available at http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf retrieved on 21 March 2015, 59.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Option 1, art.7, para.2.

¹⁰⁴ See Supra note 39.

¹⁰⁵ Wolff Reinamr Editor, New York Convention "On the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958" Commentary, Verlag C.H. Beck oHG, Hart Publishing, Nomos Verlagsgesellschaft mbh & Co. KG, 2012, 564.

trading relationship, and where the standard conditions are well known in the international trade.¹⁰⁶

Whether such exceptions may be applied in case of the assignment is not convincing. The assignee is not an initial party, thus it cannot be presumed that it is aware of the specific reference in other documents or previous continuing relationship between the initial parties. Only in case when the standard conditions are well known in international trade and the assignee belongs to the field, it may be presumed his awareness that arbitration is the chosen or preferred method of solving disputes.

¹⁰⁶ Van den Berg Albert Jan, "The New York Convention of 1958: An Overview", 8-9, available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf retrieved on 4 March 2015.

3. Chapter Three: Some Specific Container Contracts and Assignability

Although assignment is well-known in contract law, and frequently used in international commerce practice, it represents more complexities under specific contracts or conditions. This chapter provides the approaches to assignment under some specific contracts, using case law to aid better understanding of the issue at stake.

This chapter starts with a focus on the multiple and connected agreements because in arbitration practice they appear often and require solution. Also, it elaborates on the assignment of the ICSID arbitration agreement, an important convention on the settlement of investment disputes with special requirements that must be met. Furthermore, the chapter includes the assignment of the arbitration clause in insurance contracts from US perspective, assignment from Irish, Indian, English and Swedish perspectives, and assignment of the labor arbitration to show that the issue is relevant and discussed everywhere.

3.1 The Multiple and Connected Agreements

The issue of multiple and connected agreements yields often in the arbitration field. It occurs that parties in an ongoing process or collaboration enter into several agreements. At the roots of them is the same purpose to be achieved by the parties, but the entire relationship of the parties is regulated by a series of agreement. The arbitration clause is contained only in one of them. For instance, main agreement contains the arbitration clause and the other agreement connected to it do not contain it. The construction of each contract is at core of deciding the issue.¹⁰⁷ If all contracts are entered into by parties that are the original parties, the mere logic presumes that they are aware that all possible disputes arising from each of the contract will be solved by arbitration although the arbitration clause is included only in the main contract.

¹⁰⁷ Rubino-Sammartano Mauro, *“International Arbitration Law and Practice”*, Kluwer Law International, Second Revised Edition, 2001, 286.

What happens if only one of the contracts not containing the arbitration clause is assigned? The solution may be as previously mentioned, the arbitration clause incorporated by reference in contract is enforceable.¹⁰⁸ Attention is given to the fact if the assigned contract refers to the main contract for the dispute resolution method. If it refers, the assignee may be burden to ask disposal of the main contract regarding the clause. If no reference, the existence or not of the arbitration clause may deduced by the common standards used in particular contract, when is well known that in specific transactions disputes are solved by arbitration.

The strict connection between the contracts is a factor to be taken in consideration. ICSID has held that when two contracts which are strictly connected because they serve the same purpose although they are entered into separately by two parties, the arbitration clause contained by one of them applies to both contracts.¹⁰⁹ It follows that in case of assignment, the assignee is bound by the arbitration clause. What is to be taken in consideration is not only the protection of the assignee as the weaker party (because of the fact that he may know less entering into an already existing contractual relationship) but also the possibility to infringe the interest of the non-assigning party.

Girsberger and Hausmaninger introduce arguments whether the automatic transfer of the arbitration agreement protects or harms the obligor. The protection of the obligor is sustained by the contract law principle that the legal position of one party to contract may not be altered by a unilateral act of the other party¹¹⁰ The harm on the obligor is explained by facts taken in consideration by the initial parties that may not be the same or valid for the assignee. For

¹⁰⁸ *Wendrovsky v. Chase Paymentech*, available at https://jenner.com/system/assets/assets/6712/original/Wendrovsky_20v._20Chase_20Paymentech.pdf retrieved on 25 March 2015. The court in this case held that courts routinely enforce arbitration clauses and rules governing arbitration clauses that are clearly incorporated by reference into a contract.

¹⁰⁹ See Supra Note 107, 288.

¹¹⁰ Girsberger Daniel, Hausmaninger Christian, “*Assignment of Rights and Agreement to Arbitrate*”, *Arbitration International*, LCIA, Vol. 8, No.2, 145.

example the neutral, foreign site for arbitral proceedings, may not be neutral and foreign to assignee.¹¹¹ Moreover, the obligor is also obligee to the assignor's duties and his consent is required.¹¹² An assignee may not be able to comply with the financial obligation related to arbitration agreement.¹¹³ Additionally, the interest of all parties involved must be protected and not harmed. While the assignment issue appears in an arbitration agreement, assignment some basic rules must be followed. For example, the assignor cannot assign greater rights that he has or the *nemo dat quod non habet* rule, an obligor should be no worse off by virtue of an assignment, and an assignee cannot be in a better position than the assignor was prior to assignment.¹¹⁴

3.2 Assignment of ICSID Arbitration Agreements or Clause

Assignment may be a more intricate matter when the assigned contract contains an ICSID arbitration clause.¹¹⁵ Generally the assignment of the ICSID arbitration agreement, is not problematic if the assignor and the assignee fulfill the nationality requirement of the ICSID Convention.¹¹⁶ Due to the scope of the ICSID Convention, which is to solve investment disputes involving a Contracting State, a different approach from other arbitral institutions is taken. Firstly, the three conditions must be generally be initially met, viz; the parties involved must be a Contracting State and a national of a contracting state that have agreed in writing to submit their disputes to the ICSID and the dispute arises from an investment.¹¹⁷

¹¹¹ *Ibid.* 146.

¹¹² *Ibid.* 146.

¹¹³ *Ibid.* 146.

¹¹⁴ Tolhurst Greg, "*The Assignment of Contractual Rights*", Hart Publishing, 2006, 4, 42.

¹¹⁵ Friedland Paul D, "*Arbitration Clauses for International Contracts*", Juris Publishing Inc., Second Edition, 2007, 164.

¹¹⁶ *Ibid.* 164.

¹¹⁷ International Centre for Settlement of Investment Disputes available at <http://www.internationalarbitrationlaw.com/arbitral-institutions/icsid/> retrieved on 5 March 2015

It occurs that along the investment duration, one of the parties, the investor transfers his rights and duties to another investor in entirety or partially.¹¹⁸ The assignee may or not be connected with the original investor.¹¹⁹ Besides the assignment issue, the first question herein to deal with is whether the new investor complies with the ICSID consent clause and may become a party to proceedings before the centre.¹²⁰ Case law has answered the question. Above all, crucial focus of the cases is the compliance with the nationality requirement of the parties, the modification of the initial consent to ICSID arbitration including the assignee and the identification of the proper parties. The ICSID lacks jurisdiction when the assignee does not have the nationality of a Contracting State party but for exclusion arbitration may proceed under Additional Facilitation Rules.¹²¹

In *Holidays Inns v. Morocco*¹²² the main agreement contained a provision allowing the foreign partners to assign their rights and duties.¹²³ The aim was the facilitation of the project and four companies were established but the initial consent to arbitration under ICSID was not modified to include the new entities.¹²⁴ When the request for arbitration was submitted on behalf of the new companies as well, the Moroccan Government (other party) objected on several grounds.¹²⁵ Since it was not agreed that the four companies would be treated as nationals of another Contracting State and they were not yet in existence, the main agreement were never assigned to them.¹²⁶ The tribunal held that: “The H.I.S.A companies cannot be parties to the present

¹¹⁸ Schreuer Christoph H., “*The ICSID Convention: A Commentary*”, Cambridge University Press, First Edition, 2001, 179.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Mistelis Loukas A., Lew Julian D.M., Editors, “*Pervasive Problems in International Arbitration*”, Jagusch Stephen, Sinclair Anthony “*Assignment*”, Kluwer Law International, 2006, 296.

¹²² *Holiday Inns S.A. and others v. Morocco* (Case No. ARB/72/1).

¹²³ See Supra Note 123.

¹²⁴ *Ibid.* 179.

¹²⁵ *Ibid.* 179.

¹²⁶ *Ibid.* 179-180.

proceedings before the ICSID.”¹²⁷ Neither the nationality requirement was met, nor specific circumstances.¹²⁸

In *Amco v Indonesia*¹²⁹ shares were transferred from Amco Asia to Pan American Development Ltd.¹³⁰ The Indonesian authorities approved the transfer of the shares but parties were silent in regard to ICSID’s jurisdiction. The Indonesian government challenged the jurisdiction of the Pan American Ltd. request for arbitration because there was no agreement for the jurisdiction of the centre.¹³¹ The tribunal held: “...the right acquired by Amco Asia to invoke the arbitration clause is attached to its investment, represented by its shares in PT Amco, and may be transferred with those shares...”¹³² Thus, the tribunal in the instant case found that independently whether or not the partial transfer of shares constituted a controlling transfer of shares, the right to invoke arbitration clause is transferred with the transferred shares.¹³³

Case law shows that ICSID tribunals are prudent when they decide to extent the jurisdiction of the ICSID to non-initial parties and take in consideration different circumstances.¹³⁴ There is a direct correlation between the approval of the assignment of duties and rights by the host state and the approval of the extension of jurisdiction *rationae personae* to the successor.¹³⁵ The state’s consent must be proved by the claimant.¹³⁶ The tribunals require the awareness of the State for the assignment. Otherwise, they will hesitate to extend the party status under the ICSID convention.¹³⁷ There is the presumption that while State agrees on the assignment of rights and

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* 180.

¹²⁹ *Amco Asia Corporation and others v Republic of Indonesia* (Case No. ARB/81/1).

¹³⁰ See Supra note 133.

¹³¹ *Ibid.*

¹³² *Ibid.* 180.

¹³³ *Ibid.* 180-181.

¹³⁴ *Ibid.* 184.

¹³⁵ *Ibid.*

¹³⁶ Mistelis Loukas A., Lew Julian D.M., Editors, “*Pervasive Problems in International Arbitration*”, Jagusch Stephen, Sinclair Anthony “*Assignment*”, Kluwer Law International, 2006, 296.

¹³⁷ Schreuer Christoph H., “*The ICSID Convention: A Commentary*”, Cambridge University Press, First Edition, 2001, 184.

duties it agrees on the transfer of the arbitration clause, accordingly the extension of the jurisdiction of the centre and *vice versa*.¹³⁸ The standard are not so strict when the assignee is closely connected to the assignor. Above all, the nationality requirement must be always complied with, hence the successor/assignee must be national of a Contracting State.¹³⁹

It follows that in these specific contracts the explicit authorization of the host State for the assignment of rights and obligations should comprise the arbitration clause.¹⁴⁰ In the event of subrogation under investment disputes¹⁴¹, the assignment of the arbitration clause is again linked with the nationality requirement of the party that steps into the shoes of the initial party. Keeping in mind that art.25¹⁴² of the convention covers disputes among contracting and nationals of other contracting state, it is easily deductible that if after the subrogation one of the parties does not comply with the conditions, it cannot become part of the ICSID proceedings. Hence, the assignment of the arbitration clause from this perspective is not assignable.

One should always bear in mind that the assignability of the arbitration clause or agreement herein, it is not discussed *per se* and strictly related to the main contract, but it is analyzed from the very strict conditions to be complied with under the ICSID Convention. Schreuer discusses the example of the insurer who steps into the shoes of the investor and argues that a State, a State Agency or international investment insurance organisation substituting the investor cannot compel arbitration under ICSID.¹⁴³ The rationale behind is not only due to fulfillment of the conditions of the convention but also the objectives and *travaux préparatoires* of the act

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.* 185

¹⁴¹ *Ibid.* 186.

¹⁴² Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Centre for Settlement of Investment Disputes, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm> retrieved on 21 March 2015

¹⁴³ Schreuer Christoph H., “*The ICSID Convention: A Commentary*”, Cambridge University Press, First Edition, 2001, 186-187.

do not allow this possibility.¹⁴⁴ Thus, in case of the subrogation, the claimant in ICSID would have to be still the investor and not the subrogee.¹⁴⁵

3.3 Assignment of the Arbitration Clause in Insurance Contract

The assignment of the arbitration clause or agreement is an issue that arises even when some rights under the insurance contract are assigned. Cases on this issue are discussed below.

3.3.1 *Association of New Jersey Chiropractors, et al., v. Aetna, Inc., et al.*¹⁴⁶

For instance, among other issues discussed, the assignment of the arbitration clause is as well discussed in *Association of New Jersey Chiropractors, et al., v. Aetna, Inc., et al.* In this case, the suit was brought before the District Court of New Jersey by healthcare providers and chiropractic professional associations against the insurance company Aetna and its affiliates. The case is a recent one and shows the relevance of the issue of assignment in insurance contracts.

The central matter of the case is the payment and reimbursement procedure agreed among the insurance company and the health care providers. One of the plaintiffs in the course of performing the contract commitments obtained claims assignments, thus he had the right to receive payments from the insurance company. The insurance company sought *inter alia* to compel arbitration for certain claims. The Court decided to compel arbitration for those claims. The plaintiff asserts that the right of the health provider to litigate claims in federal court travels with a claim.¹⁴⁷ It falls from this, as the plaintiff argues that an assignee of the health provider has the right to bring the claims in federal court and is not obliged to compel arbitration if the assignor of the claim has no such obligation for those same claims.¹⁴⁸ In this case, the court

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.* 188.

¹⁴⁶ *Association of New Jersey Chiropractors, et al., v. Aetna, Inc., et al.*, Civil Action No. 09–3761 (MAS)(TJB), Signed Dec. 31, 2014, United States District Court, D. New Jersey, retrieved from Westlaw database, accessed on 25 March 2015.

¹⁴⁷ *Ibid.* para.4.

¹⁴⁸ *Ibid.*

examines the arbitrability of the claims and peculiarity of the case is the assertion only of derivative claims.¹⁴⁹ In a prior, case the district court held that the scope of the arbitration clause included the derivative claims.¹⁵⁰ The rationale behind the prior case of *CardioNet, Inc. v. CignaHealth Corp.*, is the preexisting duty of the plaintiffs to arbitrate disputes that in substance are identical to the claims they bring as assignee.¹⁵¹ Thus, the analysis is not linked to the assignment of claims and arbitration clause itself but the very nature of the claim and its arbitrability.

In such context, an emphasis should be put on the importance of the agreement to arbitrate. When parties agree to arbitrate then the right to arbitrate extends to all claims covered by the scope of the arbitration clause. A contrary approach would impair parties' agreement to arbitrate. The higher court in *CardioNet* rejected and held differently. According to its decision, neither the derivative claims mandated arbitration, nor the arbitration clause covered derivative claims.¹⁵² Moreover, the court strengthened its reasoning, because there was not explicit requirement for the arbitration of assigned claims in the provider agreement. The court based its decision in the fundamental principle of assignment law:

“an assignee of a contract occupies the same legal position under a contract as did the original contracting party [;] or he she can acquire through the assignment no more and no fewer rights that the assignor had, and cannot recover under the assignment any more than the assignor could recover.”¹⁵³

Thus, the court decided, that the providers were not obliged to arbitrate derivative claims since they have not agreed to it. The court gave decisive importance to the law controlling the arbitrability of the assigned claims. The scope of the arbitration clause and how it is structured

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* See [*CardioNet, Inc. v. CignaHealth Corp.*, 751 F.3d 165 \(3d Cir.2014\)](#), in the instant case the Providers asserted two different types of ERISA claims: (1) direct claims, on behalf of themselves, and (2) derivative claims, brought by the Providers standing in the shoes of their patients.

¹⁵¹ See Supra Note 150, reference to the case.

¹⁵² See Supra Note 146, para.5.

¹⁵³ *Ibid.*

counts and is scrutinized in details. In the *CardioNet*, the arbitration clause included only those disputes regarding the performance or interpretation of the (provider agreement)”.¹⁵⁴ In the herein case, the arbitration clause extends to “(a)ny controversy or claims arising out of or relating to” the Provider agreement.¹⁵⁵ Moreover, it is factually proven that parties have not agreed to compel arbitration for the assigned claims. Therefore, in this particular case dealing with insurance terms such as subrogation¹⁵⁶, parties go to arbitration in the event of assigned claims one they have priory agreed to arbitrate those claims. Besides what above mentioned the case of *Atena* shows also the importance of constructing the clause. The construction of the arbitration clause and its content is scrutinized when some rights deriving from the contract are assigned.

3.3.2 *Stewart v McKenna & Ors*

Another approach comes from the Irish High Court ruling. In *Stewart v McKenna & Ors*¹⁵⁷ one of the preliminary concerns was whether the assignees of an insurance policy could have brought before arbitration the claim arising from that policy, in accordance to the arbitration clause included in the terms of the policy. In this case, the McKenna couple are the purported assignees of the benefit of an insurance policy and are entitled to recover any sums by the insurer.¹⁵⁸ The first issue answered by the court is the validity of assignment of the benefit of the policy and not the assignment of insurance contract *per se*.¹⁵⁹ The court found that the assignment was valid. There was no prohibition of assignment and any requirement for

¹⁵⁴ Opinion on *Association of New Jersey Chiropractors, et al., Plaintiffs, v. Aetna, Inc., et al., Defendants*. Civil Action No. 09–3761 (MAS)(TJB), See footnote no.10, available at http://www2.bloomberglaw.com/public/desktop/document/ASSOCIATION_OF_NEW_JERSEY_CHIROPRAC_TORS_et_al_v_AETNA_INC_et_al_D/1 retrieved on 2 March 2015.

¹⁵⁵ *Ibid.*

¹⁵⁶ Schreuer Christoph H., “*The ICSID Convention: A Commentary*”, Cambridge University Press, First Edition, 2001, 186.

¹⁵⁷ *Stewart v McKenna & Ors*, [2014] IEHC 301, 30.05.2014, available at <http://www.courts.ie/Judgments.nsf/0/14CB8C2D908AA14580257CF5002DD413> retrieved on 2 March 2015.

¹⁵⁸ *Ibid.* See also Insights and Publications, available at http://www.algoodbody.com/insightpublications/Irish_High_Court_rules_on_effect_of_an_assignment_on_agreement_to_arbitrate retrieved on 2 March 2015.

¹⁵⁹ *Ibid.*

formalities.¹⁶⁰ The consent of the insurer was not required as a matter of law but necessary from a practical point of view to avoid the payment to the creditor assignor and pay the sums to the assignees.¹⁶¹ Furthermore, the court held that the assignment of the benefit, including the arbitration clause was valid and the assignee could commence arbitration on their behalf.¹⁶² The court analyzed the issue of becoming a party to a pending arbitration.¹⁶³ Although it could not find any preclusion from joining in a pending arbitration, it held that the assignee does not automatically become a party.¹⁶⁴ The court referred to Lloyd L.J. stated in *Baytur S.A. v. Finagro Holding S.A.* [1991] 4 All E.R. 129 at 133: “An assignee does not automatically become party to a pending arbitration on the assignment taking effect in equity. Something more is required. He must at least give notice to the other side and submit to the jurisdiction of the arbitrator.”¹⁶⁵

Moreover, in *The Jordan Nicolov*, Hobhouse J. stated that: “[F]or the assignment to take full legal effect notice must be given not only to the other party to the dispute but also to the arbitrator or arbitrators as well.”¹⁶⁶ This requirement is due to the tripartite contractual nature of the arbitration between the claimant, respondent and the arbitrator(s).¹⁶⁷ As it is previously mentioned for the *Jordan Nicolov* case the particularity relies on the fact that the assignee joins the arbitration proceedings and it is not entitled to appoint a new tribunal.¹⁶⁸

In the *McKennas* case the relationship is limited between the assignor, assignee and insurer, so there is no need for notice to the arbitrator since there is no appointed arbitrator.¹⁶⁹ Despite the

¹⁶⁰ *Ibid*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Stewart v McKenna & Ors*, [2014] IEHC 301, 30.05.2014, available at <http://www.courts.ie/Judgments.nsf/0/14CB8C2D908AA14580257CF5002DD413> retrieved on 2 March 2015, para.22.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ See supra note 158.

¹⁶⁹ See Supra note 165, para.22

fact that the *McKennas* were not party to the arbitration commenced on October 2010 by the solicitors for the defendants, they could make a submission to join the arbitration proceedings but were not obliged to.¹⁷⁰ With the specific focus on the obligation to arbitrate, the court found that it was upon the *McKennas* to invoke or not arbitration.¹⁷¹ According to the court reasoning, the assignees were not bound by the arbitration clause because they were not party to the insurance policy.¹⁷² Thus, the assignee was entitled to litigate his claim if he did not proceed to arbitration. This position is different from the English one, where the rights to the assignee are transferred with both the benefit and the burden of the arbitration clause.¹⁷³

3.4 Assignment in Indian Cases

In a case before the High Court of Judicature at Bombay, it was held that a detailed scrutiny of the facts and circumstances of the case is necessary to determine whether the arbitration clause has been assigned or not.¹⁷⁴ Moreover, such assignment is not prohibited by any law. Indian authorities have held that the assignability depends on the subject matter of the arbitration agreement and the assignment issue is regulated under the law of assignment of contractual rights and obligations.¹⁷⁵ The agreement discussed herein allows the assignment.¹⁷⁶ All debts together with the security interest are transferred for the assignor to the assignee for valuable consideration.¹⁷⁷ Since the assignee acquired all rights and benefits under the agreement and parties are entitled to assignment without prior consent of the non-assignor, it is understood that

¹⁷⁰ See Insights and Publications, available at http://www.algoodbody.com/insightspublications/Irish_High_Court_rules_on_effect_of_an_assignment_on_agreement_to_arbitrate retrieved on 2 March 2015.

¹⁷¹ See Supra note 165, para.27

¹⁷² *Ibid.*, para.26.

¹⁷³ See Supra note 169.

¹⁷⁴ *Kotak Mahindra Prime Limited v Sanjeev*, High Court of Judicature at Bombay, on 13 October 2008, available at <http://indiankanoon.org/doc/835234/> retrieved on 21 March 2015, para. 20

¹⁷⁵ *Ibid.* para. 21.

¹⁷⁶ *Ibid.* para. 22.

¹⁷⁷ *Ibid.* para. 22.

the right to arbitrate has been assigned to the assignee.¹⁷⁸ Thus, the assignment of the entire agreement includes the arbitration clause.

Additionally, in a different case the plaintiff brought suit requiring that the arbitration agreement was illegal, null, void and unenforceable; and as a consequence the arbitration proceedings already commenced was null, void and without legal consequences.¹⁷⁹ The plaintiff sought for a permanent injunction for the defendants to pursue arbitration proceedings.¹⁸⁰ The parties entered into different contracts and one of them, the maintenance contract provided for a dispute resolution referred to as the arbitration clause.¹⁸¹ Plaintiff claimed that the assignment agreement novated the maintenance agreement between the parties.¹⁸² Since the agreement was now between two Indian parties, the plaintiff claimed that it was unlawful and against the public policy of India to refer disputes to arbitration.¹⁸³ The court scrutinized the assignment and subcontracting clause in the maintenance agreement and all terms and conditions of the assignment agreement. It found that the assignment agreement did not novate the maintenance agreement and did not discharge any obligations falling from it but aimed the facilitation of the project.¹⁸⁴ In this context, the Indian Court held:

“...even it is assumed for the sake of argument that some performance in the agreement has been altered and assigned to the defendant No. 1 which is an Indian entity, the arbitration clause which is a dispute resolution clause as per the well settled principle of law is a collateral term in the contract and cannot perish on account of the change or alteration in the performance as per the well settled principle of law.”¹⁸⁵

¹⁷⁸ *Ibid.*

¹⁷⁹ *Delhi Airport Metro Express Pvt. ... vs Caf India Pvt. Ltd. & Anr.*, High Court of Delhi at New Delhi on 14 August, 2015, available at <http://indiankanoon.org/doc/14224250/>, retrieved on 2 March 2015, para 1.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* para.4.

¹⁸² *Ibid.* para.5.

¹⁸³ *Ibid.* para.9.

¹⁸⁴ *Ibid.* paras.26, 44, 51.

¹⁸⁵ *Ibid.* para.45.

Therefore, the arbitration clause does not come to an end simply because the performances and obligations under the main agreement are assigned to another party, that is, the other defendant in the case herein.¹⁸⁶ A contrary opinion would be against the express terms of the contract.¹⁸⁷

3.5 Assignment under English Case law

A recent discussed scenario involving the assignability of the arbitration provisions is the merger of the companies with one another. The acceptance of the non-assignability of the arbitration provisions allows the party to avoid arbitration or terminate it by merging with another company.¹⁸⁸ *The Republic of Kazakhstan v Istil Group Inc* deals with the issue and the assignment during a pending arbitration.¹⁸⁹ At the beginning, the assignable nature of the contract had no effect on the arbitration agreement or clause because the latter was considered a personal covenant.¹⁹⁰ As a result of the assignment, the arbitrator had no jurisdiction to make an award. *Shayler v Woolf* altered the prevailing view and the court determined that the arbitration clauses are by their nature assignable and the assignment of the entire contract comprises the arbitration provision.¹⁹¹

English Arbitration Act recognizes the approach under the definition it gives to the party of an arbitration agreement.¹⁹² It falls from the provision that the assignee is a party who claims under a party of the arbitration agreement. Accordingly, the English courts require the assignment to be legal or equitable in nature in order that the assignee may become a party to the arbitration agreement.¹⁹³ Nevertheless, the principle cannot be wider, for example when a person who

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Seriki Hakeem, “*Injunctive Relief and International Arbitration*”, Informa Law from Routledge, First Edition, 2015, 21.

¹⁸⁹ *Ibid.* 22.

¹⁹⁰ *Ibid.* 21.

¹⁹¹ *Ibid.* 21.

¹⁹² Arbitration Act 1996, England, section 82 para. 2.

¹⁹³ Mistelis Loukas A., Lew Julian D.M., Editors, “*Pervasive Problems in International Arbitration*”, Jagusch Stephen, Sinclair Anthony “*Assignment*”, Kluwer Law International, 2006, 301.

becomes a party to a contract, is not bound by the arbitration clause, if he does not claim “under or through” the original contracting party.¹⁹⁴

In the *The Republic of Kazakhstan v Istil Group Inc*, the Republic of Kazakhstan applied to set aside a final LCIA award.¹⁹⁵ The case illustrates the example of two consecutive mergers. The defendant became the successor of the parent company into which a subsidiary merged and both merged companies ceased to exist.¹⁹⁶ Although the setting aside of the award was claimed on the grounds that the tribunal lacked substantive jurisdiction, the tribunal held that had substantive jurisdiction and claimant was liable to make payments to the respondent.¹⁹⁷

The issue relevant to the instant context was the possibility to assign the legal title to sue in a pending arbitration.¹⁹⁸ The plaintiff sought for the nullity of the partial award due to the non-compliance with the notice formalities.¹⁹⁹ On the grounds of the prior case law, the judge reached the decision that the partial award was not nullity.²⁰⁰ Seriki states the rules applicable to the assignability of the contracts govern the fate of the arbitration clause.²⁰¹ The author evidences two main features of the assignment during a pending arbitration. In the event of claimant change a notice within a reasonable time must be given to the arbitrator, otherwise the assignee is not entitled to join the arbitration proceedings.²⁰² Law of Property Act in England provides for an absolute assignment, namely, the assignment must comply with writing requirement and notice provided to the other party.²⁰³ Otherwise the assignee is not entitled to

¹⁹⁴ Merkin Robert, “Arbitration Law”, London Singapore, 2004, 91.

¹⁹⁵ Seriki Hakeem, “*Injunctive Relief and International Arbitration*”, Informa Law from Routledge, First Edition, 2015, 22.

¹⁹⁶ *Ibid.* See also International Arbitration News Letter available at https://files.dlapiper.com/files/upload/Intl_Arb_UK_0607.htm#_ftnref1a retrieved on 2 March 2015.

¹⁹⁷ Seriki Hakeem, “*Injunctive Relief and International Arbitration*”, Informa Law from Routledge, First Edition, 2015, 22.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Law of Property Act 1925, England, section 136 available at <http://www.legislation.gov.uk/ukpga/Geo5/15-16/20/section/136> retrieved on 22 March 2015.

sue.²⁰⁴ The fulfilment of the formalities requirement stands on the basis of the policy choice to prevent the parties to escape easily the arbitration proceeding by merging with another entity.²⁰⁵

3.6 Assignment of the labour arbitration

An interesting topic is that of the assignment of a labor arbitration agreement. The issue is incumbent upon labor unions and union members. Among other complexities, whether the individual grievant²⁰⁶ must be assigned the right to arbitrate his claim is not crystal clear. Solutions are given by case law, though there are few cases in this regard.²⁰⁷ *Martin v. City of O'Fallon* was the first case to address the issue.²⁰⁸ In the instant case, there was a collective bargaining agreement between the union and a public sector employer. The plaintiff was employed by the public sector employer and his employment was terminated by the later.²⁰⁹ The plaintiff submitted the agreement between him and Union, by means of which the plaintiff could proceed to arbitration against the employer.²¹⁰ The issue the court had to answer was:

“Whether the union, of which plaintiff was a member, may validly assign to plaintiff its right to demand arbitration under the collective bargaining agreement between the union and the City and, thus, compel the City to arbitrate directly with the employee rather than with the union or its designated representative.”²¹¹

The plaintiff argued that the right to arbitrate was freely assignable whilst the employer considered the collective bargaining agreement similar to a personal service contract.²¹² Hence, the employer argued that the personal nature of the agreement makes the agreement non-assignable. The court sustained the employer arguments and stated:

²⁰⁴ Ibid, See also Seriki Hakeem, “*Injunctive Relief and International Arbitration*”, Informa Law from Routledge, First Edition, 2015, 22.

²⁰⁵ *Ibid.*

²⁰⁶ Garner A. Bryan, Editor in Chief “*Black’s Law Dictionary*”, Thomson West, Eighth Edition, 2004, 722, Definition: “An employee who files a grievance and submits it to grievance procedure outlined in a collective-bargaining agreement.”

²⁰⁷ Rubinstein Mitchell H., “*Assignment of Labor Arbitration*”, ST. John’s Law Review, Vol. 81, 2007, 41-76, 44.

²⁰⁸ *Ibid*, 58.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.* 59.

“Where the personal qualities of either party are material to the contract, the contract is not assignable without the assent of both parties. . . . We agree that the personal nature of the roles of each party under the collective bargaining agreement prevents either party from assigning to a third party its right to demand arbitration.”²¹³

Nevertheless, the court decision seems mostly a policy choice and does not give much explanation to the right of the grievant to protect his own right.

In *Padovano v. Borough of East Newark* the right to pursue arbitration was assigned to the individual grievant. The discussion arose when the court vacated the award because the arbitration proceedings were not conducted in accordance with the collective bargaining agreement.²¹⁴ Differently from the previous case, here the court considered the non-assignability as a measure to protect the employer.²¹⁵ Its reasoning was based on the same logic pursued by the UCC wherein a party may assign its right except where assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract.²¹⁶

While in *Dillman v. Town of Hooksett*, the court recognized the exception when the assignment in such cases is rendered valid. Thus, the breach by the union of its duty of fair presentation would led to the validity of the assignment.²¹⁷ Rubinstein argues for a fair balance between arguments against assignment and those in favor of assignment and he persists to allow such assignments.²¹⁸ The author argues that court tend to take in consideration more the public policy and the protection of the employer without really considering the rights and needs of the individual grievant. Having in mind that the contract law allows assignment, the same approach should be followed for labor contract containing arbitration clauses.²¹⁹ The right to assign

²¹³ *Ibid.*

²¹⁴ *Ibid.*, 61.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.* 61-62. See also footnote no.85 of the article.

²¹⁷ *Ibid.*, 64.

²¹⁸ *Ibid.*, 66.

²¹⁹ *Ibid.*, 70-71.

should be two fold; the employees should make assignment to the unions and the unions should make assignment to the employees.²²⁰ Besides the disparities of labor arbitration with ordinary arbitration, they should not be the grounds to preclude assignment in labor arbitration.²²¹

3.7 Swedish Perspective

In a case submitted before the SCC Institute, it was discussed the issue whether parties could proceed to arbitration when an agreement containing the arbitration clause is assigned without notifying the other party.²²² The subject matters dealt with jurisdiction of the SCC Institute, the law applicable to the transfer of the arbitration agreement and the validity of the arbitration clause.²²³ The initial parties were a Danish company and two Chinese Companies.²²⁴ After some years of the initial agreement the Danish Company assigned all his rights and obligations to another company. The assignee initiated arbitration against the non-assignor initial parties. One of them objected to be party of the proceedings and the other one objected the jurisdiction of the SCC institute arguing that there was not valid arbitration agreement with the Claimant. As it was not clear that the SCC institute lacked jurisdiction, it proceeded further and appointed an arbitrator.

The main argument of the Respondent referred to the consent of both parties required by the contract itself in case of any amendment or alteration of terms and conditions. Thus, in the instant case it was submitted that the Respondent has never been notified and agreed on the assignment. The Claimant argued that the therein assignment is not an amendment or alteration of terms and conditions and the right to receive payment did not depend on the debtor consent. The sole arbitrator took in consideration that the arbitration proceedings have been instituted in

²²⁰ *Ibid*, 72.

²²¹ *Ibid*, 73-74.

²²² Bond Stephen, Bergman Lin, Editors, *SCC Arbitral Awards 2004-2009*, JurisNet, LLC, 2011, 73-79.

²²³ *Ibid*. 73.

²²⁴ *Ibid*. 74.

Sweden under the Rules of the SCC Institute and found that the procedural dispute was governed by Swedish law.²²⁵

Although the Swedish Supreme Court has held that the assignee is bound by the arbitration clause contained in the assigned contract, an arbitral tribunal has held that the respondent was not bound by the arbitration clause if he has not been notified of the assignment of the contract before the arbitration proceedings were initiated.²²⁶ The sole arbitrator ruled that the initial party that was not notified of the assignment, hence it was not bound by the arbitration clause and the arbitrator has no jurisdiction in the case.²²⁷

²²⁵ *Ibid.* 77.

²²⁶ *Ibid.* 77-78.

²²⁷ *Ibid.* 78-79.

4. Chapter Four: Separability and Assignability

The autonomy of the arbitration agreement is a crucial principle in international arbitration. Nevertheless, the notion has a dualistic nature.²²⁸ Sometimes, it refers to the separability of the arbitration agreement from the main agreement; and it also indicates the autonomy of the arbitration agreement from national laws.²²⁹ In the context herein, it refers to the first meaning. In general terms, separability in contract law means that any provision of the contract which is held invalid or against the law or not enforceable, shall not affect the remainder of the contract. Separability clause is a technical clause often included in legal documents like contracts, and parties who are not experts, trained with the requisite legal technique tend to be oblivious of such clause. Wherever disputes related to other clauses arise, separability clause may be the first to be viewed and interpreted.

4.1 Legal Definition of Separability and Arbitration Agreements or Clauses

Black's Law dictionary defines separability as: "[a] provision that keeps the remaining provisions of a contract...in force if any portion of that contract...is judicially declared void..."²³⁰ Basically, the same meaning is given to the separability of the arbitration clause in the field of arbitration. The principle permits the arbitration clause to escape the fate of the contract which contains it.²³¹ The principle seems well defined by the rules of arbitration institutions. ICC rules of arbitration provide that: "...The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void".²³² The principle is incorporated by the rules, but the term separability is not literally used.²³³

²²⁸ Fouchard, Gaillard, Goldman *"International Commercial Arbitration"*, Kluwer Law International, 1999, 197.

²²⁹ *Ibid.*

²³⁰ Garner A.Bryan, *"Black's Law Dictionary"*, Editor in Chief, Thomson West, Eighth Edition, 2004, 1406.

²³¹ Varady Tibor, Barcelo III John J., Von Mehren Arthur T., *"International Commercial Arbitration"*, Thomson Reuters, Fifth Edition, 2012, 133.

²³² ICC Rules of Arbitration, 2012, art.6, para.9.

²³³ See LCIA Arbitration Rules, 2014, art.23, paras. 1, 2, and AAA, Commercial Arbitration Rules and Mediation Procedures, 2013, Rule 7 paras. 1, 2.

International arbitration treaties do not provide an explicit provision for the principle. Both the NYC²³⁴ and European Convention²³⁵ do not contain a clear stipulation to introduce the independence of the arbitration agreement. Commentary on NYC explains that probably the issue was left to be regulated by national legal systems.²³⁶ Despite the fact that art. V para.3 of European Convention entitles the arbitrator to proceed with the arbitration without need to refer to court, it does not, however, regulate the autonomy issue. Essentially, the issue was not considered during the drafting process;²³⁷ as possibly, the issue was not crucial at the time. The independence of the arbitration clause is reflected in decisions of international case law.²³⁸ The French jurisprudence of the autonomy of the arbitration clause commences with *Raymond Gosset v. Société Carapelli*.²³⁹ The Court de Cassation held that an arbitration clause is legally autonomous from the contract which it relates.²⁴⁰ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*²⁴¹ established the principle of separability of the arbitration clause in US case law. The Supreme Court accepted that the arbitration clause is separable from other parts of the agreement. It ruled that the arbitration procedure should proceed as long as there is no issue which goes to the “making” of the arbitration clause itself.²⁴²

4.2 Limits of Separability in Arbitration

The arbitration agreement is a consensual act that waives a party’s right to bring suit before a competent court in favour of arbitration. The issue of non-signatory parties appears commonly

²³⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

²³⁵ European Convention on International Commercial Arbitration, Geneva 1961.

²³⁶ Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 203, that refers to Albert Jan Van Den Berg, The New York Arbitration Convention of 1958, at 146, 1981.

²³⁷ Hascher T.Dominique, *European Convention on International Commercial Arbitration 1961*, Commentary, Yearbook Comm. Arb’n XXXVI 2011, 526.

²³⁸ Varady Tibor, Barcelo III John J., Von Mehren Arthur T., “*International Commercial Arbitration*”, Thomson Reuters, Fifth Edition, 2012, 133

²³⁹ Gravel Serge, Peterson Patricia, “*French Law and Arbitration Clauses - Distinguishing Scope from Validity: Comment on ICC Case No. 6519 Final Award*”, McGill Law Journal, Vol. 37, 1992, 520.

²⁴⁰ *Ibid.* 521.

²⁴¹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 1967.

²⁴² *Ibid.*, 403, 404.

in two scenarios.²⁴³ Firstly, where two or more companies are linked through some common ownership.²⁴⁴ The second scenario relates to sovereign states and their government-owned instrumentalities.²⁴⁵

Assignment represents one of the exceptions when non-initial parties are allowed recourse to or bound by arbitration agreements.²⁴⁶ As authors think, the concepts of separate legal personality of corporate entities and privity of contract are not always sacrosanct.²⁴⁷ The “group of companies” doctrine, assignment, universal succession, are viewed as exceptions.²⁴⁸ The “group of companies” doctrine is concretized in the context of arbitration through the lift of the corporate veil, for example when a subsidiary company is party of an arbitration agreement and the parent company will become involved and treated as a party although it is not an initial party.²⁴⁹ Generally courts are reluctant to an easy lift of the corporate veil and different jurisdictions have different approaches. The veil is lifted in exceptional circumstances.

The English case *Shayler v Woolf* recognized the principle of assignment of arbitration agreements.²⁵⁰ Reference is done to the English Arbitration Act 1996 and the interpretation of a party to an arbitration agreement. According to the act, a party is any persons “claiming under or through a party to the agreement”; thus the assignee may invoke arbitration.²⁵¹

The group of companies doctrine has been accepted by several arbitral tribunals but courts of different jurisdictions have different approaches.²⁵² English courts have rejected the application

²⁴³ Varady Tibor, Barcelo III John J., Von Mehren Arthur T., “*International Commercial Arbitration*”, Thomson Reuters, Fifth Edition, 2012, 212.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

²⁴⁶ James Jim, Ridgeon Ben, “Arbitration Agreements Becoming Involved Despite not Being a Party”, International Arbitration Report 2014, Norton Rose Fulbright 2014, available at <http://www.nortonrosefulbright.com/files/20141002-arbitration-agreements-121532.pdf> retrieved on 2 March 2015, 6.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² Cook Trevor, Garcia Alejandro I., “*International Intellectual Property Arbitration*”, Kluwer Law International, 2010, 117.

of the doctrine and French Courts have accepted it.²⁵³ Arbitral tribunal decide to pierce the corporate veil when facing fraud or breach of principles of good faith.²⁵⁴ From the common law perspective, five are the recognized theories for binding non-signatories to arbitration agreement: incorporation by reference, assumption, agency, veil piercing/alter ego and estoppel.²⁵⁵ Fouchard states that the arbitration agreement is assigned in both statutory subrogation and universal succession.²⁵⁶ Thus, in the event of subrogation, the insurer is bound by the arbitration agreement accepted by the insured.²⁵⁷ In regard to universal succession it is accepted that the assignment agreement continues to be relied upon to after the conversion of a limited liability company into a joint stock corporation.²⁵⁸

Equity and good faith are considered by some national courts as the threshold for the extension of the arbitration clause to a non-signatory party. While in common law systems these considerations are justified by the estoppel doctrine, in the civil law system, the justifying doctrine is *venire contra factum proprium*, that is, ‘a party cannot contradict its previous actions’.²⁵⁹

The principle of separability was adopted and expanded based on two grounds: party autonomy and as a policy for promoting arbitration. In arbitration, this party autonomy has a particular significance. It is the *differentia specifica* between arbitration and the courts.²⁶⁰ The principle of separability is a legal-technical fiction to ensure the intent of the parties to arbitrate. Parties entering into an agreement require certainty and predictability. Once they choose arbitration as a means to solve their disputes, they do not expect to go to court if the dispute arises. The

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*, 118.

²⁵⁵ Varady Tibor, Barcelo III John J., Von Mehren Arthur T., “*International Commercial Arbitration*”, Thomson Reuters, Fifth Edition, 2012, 219.

²⁵⁶ See Fouchard, Gaillard, Goldman “*International Commercial Arbitration*”, Kluwer Law International, 1999, 429.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*, 430.

²⁵⁹ *Ibid.*, 118.

²⁶⁰ Varady Tibor, Barcelo III John J., Von Mehren Arthur T., “*International Commercial Arbitration*”, Thomson Reuters, Fifth Edition, 2012, 70.

decisions of courts which hold parties to arbitrate their dispute according to parties' agreement promote the arbitration as a dispute resolution method.²⁶¹ If arbitration is not sustained from external actors, it would remain a wish of the parties other than reality. However, the principle is not absolute otherwise would bring absurd results. From what was previously discussed, it may be concluded that the general view is that in case of assignment of the main agreement, the principle of separability is not applied.

²⁶¹ Rogers Andrew, Launders Rachel, "*Separability — the Indestructible Arbitration Clause*", LCIA, Arbitration International, Vol. 10, No. 1, 1994, 89.

5. Chapter Five: Findings and Conclusion

This thesis is based on the assignment of arbitration agreement. Parties choose arbitration as a method to resolve their dispute due to its substantive and procedural advantages. In every contractual relationship, it may happen that one of the parties assigns rights and obligations to another non-initial party. The assignment is very probable in the field of international business transactions and in long term agreements. Thus, the thesis discussed whether the assignment of the entire agreement or certain rights and obligations means that the arbitration agreement or clause is assigned as well.

5.1 Findings

It is found that the arbitration agreements are assignable but not without hesitation at least in the beginning when the issue arose. Courts and arbitration tribunals take in consideration several factors before deciding. As above discussed, the French court in *Fraser v. Compagnie Européenne des Pétroles* decided that an arbitration clause does not circulate in a chain of contracts if parties have not agreed so. Generally civilian system like Germany and France regulate under the Civil Code provisions on assignment. Issues regarding capacity and consent of the parties, applicable law, formalities requirement are always relevant to solve the problem. However, it is also found that arbitration agreement is not assignable where the main agreement *per se* is deemed *intuitu personae*.

Further, it is found that there is no uniformity of rules, with respect to the assignability of arbitration agreements. Different courts and tribunals apply different rules and take in consideration different factors. Case law shows that even within one jurisdiction the approach evolves from time to time. US has established two different rules, the Lachmar rule and Hosiery Rules. The first one accepts that the assignee is bound by the arbitration agreement if he has agreed in an expressed way. The second favors the automatic transfer of the arbitration agreement because it is considered incidental to the main agreement. The Irish High Court has

held that the assignee of an insurance policy is not bound by the arbitration agreement but he may either choose to proceed with arbitration or bring suit before the court. The non-uniformity is affected also by the specific nature of some contracts like assignment of ICSID Arbitration Agreements and assignment of labour arbitration.

5.2 Conclusion

Having in mind the principle of the autonomy of the arbitration agreement, the principle of separability, the different approaches and solutions, it is deduced that the lack of uniformity leads to different interpretation. Thus, parties must predict and provide in their contract explicitly, whether the arbitration clause can be transferred or not. The arbitration agreement binds the third party/assignee depends directly on the validity of the assignment. The validity of the assignment is scrutinized under the applicable law and if valid, the assignee has the right to commence arbitration in accordance to the agreement.

There is a policy choice behind the automatic transfer of the arbitration agreement. Arbitration agreement or clause cannot stand apart from the mere assignment because loses its purpose to serve to the possible disputes of the main agreement. Furthermore the legal argument of the automatic transfer is that the arbitration agreement or clause is accessory to the assigned right and obligation.

The principle of separability is not absolute and assignment is one of its limitations. Other limitations are incorporation by reference, assumption, agency, veil piercing/alter ego and estoppels. Separability is just a legal fiction to be used in arbitration when needed. The structure of the arbitration agreement and assignment clause are crucial to avoid unnecessary issues and additional costs when disputes arise. Parties of a contract want certainty, protection, economic benefit and fast proceedings; but they are not able to predict all possible future scenarios. For

these reasons they must be careful when drafting contracts and specific clauses. The most reasonable solution is to include the clauses in the contract.

Further to the findings of this thesis, this thesis concludes that there is growing consensus on the assignability of the arbitration agreements in the leading jurisdictions where international commercial arbitrations are conducted and decisions enforced. The lack of uniform rules however is an indication of the different perspectives and approaches taken. The critical question is whether the non-uniformity of the rules will inhibit the enforcement of arbitral awards in jurisdictions practicing different approaches. How this may affect enforcement (if possible) under the NYC is outside the scope of this thesis. Further research in that area will develop the scholarship on international commercial arbitration. It will be useful to also see how further research will link the role of UNCITRAL and the attainment of uniformity through the use of legislative guidelines. For the purposes of the objectives of this thesis, it is important to note that assignability of arbitration agreement is a fixture in the field of international business transactions and in long term agreements. Thus, the thesis findings are useful, as they show that indeed arbitration agreements are assignable. This is the critical first step.

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