Assignment Of Contractual Rights And Its Impact On Arbitration Agreements

Mertcan İPEK*

ÖZET

Sözleşmesel hakların devredilebilirliği, sözleşmenin şahsiligi yönünden uzun süre tartışılmıştır. Modern hukuk sistemlerinde, sözleşmesel hakların serbestçe devredilebileceği geniş ölçüde kabul edilmiştir. Fakat, sözleşmelerdeki devir yasağı maddeleri ve sözleşmesel hakların sahşa bağlı karakteri gibi durumlar, bu kuralın istisnasını olusturmaktadır. Sözleşmesel hakların devrine ilişkin en önemli hususlardan biri de, dava açma hakkıyla doğrudan bağlantılı olan ve dolayısıyla devredilen hakkın ayrılmaz bir parçasını teşkil eden tahkim sözleşmelerinin akibetidir. Bu konudaki tartışma, tahkim sözleşmelerinin, sözleşmesel hakların devriyle beraber otomatik olarak devredilip devredilmediği sorusu üzerinde yoğunlaşmaktadır. Otomatik devir prensibinin taraftarlarının ve karşıtlarının öne sürdügü görüşler, bu makalede ayrıntılı olarak incelenmektedir.

Anahtar Kelimeler: *Devir, sözleşmesel hak,* şahsilik*, tahkim sözleşmesi, otomatik devir.*

ABSTRACT

The assignability of contractual rights has long been discussed in terms of the privity of contract. In modern legal systems, it is widely accepted that contractual rights can freely be assigned. However, there are also exceptions to this rule, such as non-assignability clauses in the contracts and personal nature of contractual rights. One of the most important issues as regards the assignment of contractual rights is the fate of arbitration agreements, which are directly related to the right to sue and therefore constitute an accessory of the assigned contractual right. The discussion is focused on the question whether arbitration agreements are automatically transferred through the assignment of contractual rights. The arguments raised by the advocates and opponents of the automatic transfer rule are further analyzed in this article.

* Candidate for LL.M. in International Business Regulation, Litigation and Arbitration at New York University

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Introduction

Privity is one of the pillars of contract law, which requires that mutual rights and obligations arising under a contract shall only be binding upon the parties to it. In Ancient Roman law and medieval Common Law, a contractual right was construed as highly personal and it could not be separated from the underlying relationship between the creditor and the obligor.[1] In Common Law, the benefit of a contract was not assignable, if such assignment would enable the assignee to sue the obligor in its own name and this rule was based on the principle that "a chose in action is not assignable", as it refers to intangible personal property.[2] The reason for the non-recognition of assignments was associated with the fear of Common Law judges that "to permit assignments would both undermine the doctrine of privity of contract and encourage unnecessary litigation, maintenance and champerty".[3] However, the developments in the financial sector created the necessity to overcome the strict interpretations of the privity doctrine in order to facilitate the transfer of money and entitlements.[4] The freedom of contract gained a wider scope that also covers the assignment of contracts and the legal systems followed the business practice, which required "the objectification of the promise"[5] given in the underlying contract. The assignment of contractual rights is a legal institution accepted by modern jurisdictions, which fulfills the objective of this objectification. As legal remedies and the right to sue are integral parts of a contractual right, the assignment of the latter generated the question what legal consequences it would have on arbitration agreements or clauses between the original parties of the underlying contract.

This article will firstly give a short overview about the assignment of contractual rights and then focus on its impacts on the arbitration agreements or clauses. Throughout the article, the term "arbitration agreement" will mostly be used in its broad sense, i.e. including arbitration clauses involved in the main contract and arbitration agreements concluded separately.

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1 Kötz, H. *European Contract Law: Volume One* (originally published in German and translated by Weir, T.), New York 1997, p. 264.

2 Beatson, J. et al., *Anson's Contract Law*, New York 2010, p. 661.

3 *Id*, p.661,662.

4 Hatzis, A. N., *Rights and Obligations of Third Parties*, p. 202, *available at* http://encyclo.findlaw.com/4800book.pdf (last visited 2 February 2016).

5 *Id*. p. 202.

Assignment of Contractual Rights

Most legal systems allow the parties of a contract to transfer their rights and even the contract in its entirety.[6] Transfers of rights are often made for value, allowing a debtor to "assign to his creditor 'by way of payment' a debt owed to him by a third party".[7] The transfer of contractual rights can also be seen in everyday business transactions, such as merger and acquisitions[8], factoring contracts[9] and credit security contracts[10].

Assignment is described as "a transaction whereby a right is transferred by its owner, called the assignor, to another person, called the assignee, as a result of which the assignee becomes entitled to sue the person liable, called the [obligor]".[11] When the possessor of a contractual right assigns his right to the assignee, the obligor is still under the same duty as before, however the holder of that right is not the assignor any more, but the assignee.[12] Accordingly, the assignment is also defined as "an expression of intention by the assignor that his right shall pass to the assignee".[13]

An agreement between the old and new creditor (respectively the assignor and the assignee) on the transfer of the right is the *sine qua non* requirement of a valid assignment.[14] It will vary according to the jurisdiction whether this agreement must be in writing or if an oral agreement would suffice for a valid assignment. Many legal systems do not impose such a formal requirement for an effective assignment.[15] This is the case in German and French law. On the other hand, Article 165(1) of

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6 Nwoye, I. S., *Assignment of Contracts, Contractual Rights and Obligations: A Re-Engineering Tool in International Business Transactions*, p. 2, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603790 (last visited 2 February 2016).

7 Kötz, H., p. 263.

8 Dykes, T. et al., *Assigning Contracts in the Context of M&A Transactions*, *available at* https://www.theventurealley.com/2012/10/assigning-contracts-in-the-context-of-ma-transactions/ (last visited 2 February 2016).

9 Ringe, W-G., 'The Law of Assignment in European Contract Law' in *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (edited by Gulifer, L., Vogenauer, S.), Portland 2014 p. 251.

10 Kötz, H., p. 264.

11 Beale H. et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, Portland 2010, p. 1293.

12 Corbin, A., *Assignment of Contract Rights*, p. 209, *available at* http://digitalcommons.law.yale.edu/fss_papers/2858/ (last visited 2 February 2016).

13 *Id.*, p. 210.

14 Kötz, H., p. 266; Beale et al., p. 1295.

15 Beale H., et al., p. 1295.

the Swiss Code of Obligations prescribe that an assignment will be valid, only if it is done in writing.[16] Unlike other jurisdictions, English law contains a distinction between legal and equitable assignments. The requirements for a legal assignment, which are defined in Section 136 of the Law of Property Act 1925[17], include that the assignment shall be absolute and in writing by the assignor and that an express notice shall be given to the other party, i.e. the obligor.[18] Under English law, it is a prerequisite of the validity of legal assignments that there is a written assignment agreement; whereas such agreement does not have to be in writing for the validity of equitable assignments.

The mutual consent of the assignor and the assignee is sufficient for the assignment, neither consent of nor notice to the obligor is a requirement for its validity because the obligor is adequately protected in spite of the change of the creditor, since all the defenses he had against the assignor can also be claimed against the assignee, as long as these defenses existed before the notice to the obligor.[19] Therefore, the notice to the obligor would rather serve as a protection for the assignee so that the obligor will not be able to validly discharge his debt to the assignor upon the notification of the assignment.[20] However, under English law, the notice to the obligor is a requirement for the validity of a legal assignment; whereas such notice is not necessary for equitable assignments.[21]

Assignability of Arbitration Agreements

It has become a common business practice that the parties to a contract refer the disputes arising under such contract to arbitration, especially in the international context. When the assignment of contractual rights is at stake, it constitutes an important question whether the arbitration agreements related to that right are also transferred automatically to the assignee, so that such arbitration agreements become effective and binding in the relationship between the obligor and the assignee.

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16 Swiss Code of Obligations, Article 165, *available at* https://www.admin.ch/opc/fr/classified-compilation/19110009/201401010000/220.pdf (last visited 2 February 2016).

17 Law of Property Act 1925, *available at* http://www.legislation.gov.uk/ukpga/Geo5/15-16/20/section/136 (last visited 2 February 2016).

18 Hosking, J. M., 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent' in *Pepperdine Dispute Resolution Law Journal, Volume: 4, Issue: 3*, p. 492, *available at* http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1138&context=drlj (last visited 2 February 2016).

19 Landrove, J. C., *Assignment and Arbitration: A Comparative Study*, Zürich – Basel – Genf 2009, p. 152.

20 Tolhurst, G., *The Assignment of Contractual* Rights, Portland 2006, p. 81.

21 Beatson, J. et al., p. 665, 667.

Despite controversial opinions about the issue, the principle of automatic transfer is recognized by civil law and common law jurisdictions.[22] According to this principle, the arbitration agreement is transferred through the assignment of the main contract or related contractual right in the absence of a contrary provision in the original contract or factual circumstances showing that the agreement between the initial co-contractors was of a personal nature.[23] However, the question is not limited to the automatic transfer of arbitration agreements, but also extend to the law applicable to the issue and the determination of the authority (arbitrator or domestic court) to rule on the matter.[24] It would be useful to analyze the legal nature and particularities of the arbitration agreement in order to answer the questions concerning its transferability through the assignment of contractual rights.

The Characterization of Arbitration Agreements: Procedural or Substantive

The characterization of arbitration agreements as substantive or procedural is important as regards the question whether it will be subject to automatic transfer, since the rules governing the assignment of substantive rights will also apply to the transfer of the arbitration agreement in the case that it is qualified as substantive; whereas its transfer will be governed by the applicable procedural rules when characterized as procedural.[25] The advocates of the latter view rely their arguments on the decisions rendered in some civil law jurisdictions, such as Austria, France and Switzerland.[26] For example, the Swiss courts found that "arbitration agreements have a procedural nature and they are subsequently subject to cantonal procedural law"[27]. However, again the Swiss courts state that substantive law rules apply to procedural contracts by analogy, when procedural law does not contain any specific rules governing the conclusion of

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22 Vincze, A., 'Arbitration Clause – Is It Transferred to the Assignee?' in *Nordic Journal of Commercial Law, Issue: 2003 Volume: 1*, p. 2, *available at* http://www.njcl.utu.fi/1_2003/article4.pdf (last visited 2 February 2016).

23 Hosking, J. M., p. 500. *available at U.S. 1 (U.S. 1983), ecision also yope: mmercial Law: Essays in Honour of Hugh Bealeaw to be applied to the arbitrat*

24 Girsberger, D., Hausmaninger, C., *Assignment of Rights and Agreement to Arbitrate*, p. 122, *available at* http://arbitration.oxfordjournals.org/content/arbint/8/2/121.full.pdf (last visited 2 February 2016).

25 Landrove, J. C., p. 12.

26 *Id.*, p. 11.

27 See: BGE 101 II 168, 170: "Schiedsabreden sind prozessualer Natur und unterstehen daher dem kantonalen Verfahrensrecht", *available at* http://relevancy.bger.ch/php/clir/http/index.php?lang=de&zoom=&type=show_document&highlight_docid=atf%3A%2F%2F101-II-168%3Ade (last visited 2 February 2016), decision also referring to other Swiss court decisions: BGE 41 II 537 ff., BGE 59 I 179, BGE 59 II 188, BGE 60 II 60, BGE 67 II 148, BGE 71 II 116 und 179, BGE 78 II 395, BGE 85 II 150, BGE 88 I 103.

the arbitration agreement.[28] Besides other civil law jurisdictions, this approach is also followed by the US courts, which state that "courts generally should apply ordinary state-law principles that govern the formation of contracts, when deciding whether the parties agreed to arbitrate a certain matter, including arbitrability".[29] From these statements follows that the characterization of arbitration agreements does not make a difference as regards the automatic transfer rule.

Autonomy and Severability of Arbitration Agreements

The proponents and opponents of the automatic transfer of arbitration agreements infer different results from the principles of autonomy and severability of arbitration agreements, which prescribe that "the invalidity of either the main contract or the arbitration agreement does not affect the validity of the other"[30]. The view against the automatic transfer of the arbitration agreement emphasize that the latter leads a distinct legal life, it is totally independent from the main contract and therefore, it cannot be automatically transferred with the assignment of a contract, unless the assignee expressly and separately consents to its transfer.[31] On the other hand, the counter-argument is based on the acceptance that the arbitration agreement between the original parties of the contract, i.e. the assignor and the debtor, is an "integral part" of the rights arising under that contract, since the substantive right and the right to sue cannot be separated from each other and thus, whenever such rights are transferred to a third party (assignee) through an assignment agreement, the arbitration agreement will automatically travel with them.[32]

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28 See: BGE 96 I 334, 340: "[Die Gültigkeit des Schiedsvertrages] beurteilt sich nach den Bestimmungen des anzuwendenden Prozessrechtes über den Abschluss des Schiedsvertrages. Soweit solche fehlen, kommen die Normen des Privatrechts analog zur Anwendung.", *available at* http://relevancy.bger.ch/php/clir/http/index.php?lang=de&zoom=IN&type=show_document&highlight_docid=atf%3A%2F%2F96-I-334%3Ade (last visited 2 February 2016).

29 See: *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (U.S. 1995), *available at* https://advance.lexis.com/search/practicepagesearch/?pdmfid=1000516&crid=9933a26f-09c4-4987-bebb-8770767c58f7&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=514+U.S.+938&pdsearchtype=SearchBox&pdqttype=and&pdpsf=&ecomp=ht5hk&earg=pdpsf&prid=8c24decef9b8-4810-b6c6-81de240ea119 (last visited 26 December 2015), decision also referring to other US Supreme Court Decisions: *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (U.S. 1989), *Perry v. Thomas*, 482 U.S. 483 (U.S. 1987). Also see: *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (U.S. 1983), *available at* https://advance.lexis.com/search/?pdmfid=1000516&crid=9966ca00-6239-4d74-8361-3f66acb7d709&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=460+U.S.+1&pdsearchtype=SearchBox&pdqttype=and&pdpsf=&ecomp=4Jyfk&earg=pdpsf&prid=9933a26f-09c4-4987-bebb-8770767c58f7 (last visited 2 February 2016).

30 Girsberger, D., Hausmaninger, C., p. 138

31 Landrove, J. C., p. 54.

32 *Id.* p. 23, 25.

When analyzing the effect of the autonomy and severability of the arbitration agreement on its automatic transfer, it should always be kept in mind that the main goal of these principles is to uphold the arbitration agreement as much as possible vis-à-vis the invalidity of the main contract.[33] The autonomy concept has been adopted to avoid the parties' bad faith to escape the arbitration proceedings on the basis of the main contract's nullity and therefore, it should not be evaluated as antinomic to the legal rule that the arbitration agreement is the accessory of the principal contract that should follow the latter.[34] An interpretation that deprives the parties of the right to have recourse to arbitration by preventing the automatic transfer of the arbitration agreement does not comply with this ultimate goal. Besides that, there are two general principles of assignment, which are directly related to this issue: One of them prescribes that the assignment shall not allow the assignee to be in a better position than the assignor would be, had such assignment never realized; whereas the other principle sets forth that the assignment shall not aggravate the burdens and obligations of the obligor.[35] It is clear that requiring that the assignee consents to the arbitration agreement separately (apart from his consent to the assignment of the main contract) and depriving the obligor to have recourse to arbitration against the assignee without such consent would violate both of these principles, without serving any purpose aimed by the autonomy and severability of the arbitration agreement. Therefore, its autonomy vis-à-vis the main contract should not be seen as an obstacle to the automatic transfer of the arbitration agreement.

Do Arbitration Agreements Involve Duties That Prevent Their Automatic Transfer?

Another characterization of arbitration agreements, which is applied to decide on the issue of their automatic transfer, is mainly adopted by English and US courts and relies on the question whether arbitration agreements are deemed merely a remedy or a cluster of rights and obligations.[36] In the first case, there would be no doubt that it is automatically transferred with an assignment, as it would not be possible to separate the legal remedy from the substantive right; however if it is

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33 *Id.* p. 391.

34 Gélinas, P. A., 'Arbitration Clauses: Achieving Effectiveness' in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (edited by van den Berg, A. J.), ICCA Congress Series Volume: 9, The Hague 1999, p. 62, *available at* http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn17571 (last visited 2 February 2016).

35 Tolhurst, G., p. 4.

36 Girsberger, D., 'The Law Applicable to the Assignment of Claims Subject to an Arbitration Agreement' in *Conflict of Laws in International Arbitration* (edited by Ferrari, F., Kröll, S.), Munich 2011, p. 385.

accepted that the arbitration agreement also involves obligations, the consent of the assignee would be required for the assignment of the arbitration agreement, so that the obligor can have recourse to arbitration against the assignee.[37] The duties that are allegedly involved by arbitration agreements are listed as "to refrain from instituting ordinary, court proceedings, waive some guarantees of the State court proceedings, adhere to an administered arbitration scheme excluding any appeal, nominate an arbitrator, pay advance on costs and pay substantial fees and expenses".[38]

The rationale behind the view that arbitration agreement should not be transferred automatically because of the duties attributed to it, is the principle that it is not possible to assign obligations, whereas rights can freely be assigned.[39] However, this rationale loses its relevance, when the whole contract is assigned as opposed to single contractual rights because the former assignment must include the transfer of rights and obligations as a whole. Besides that, in the assignment of specific rights, it is disputable whether the duties listed above would constitute contractual burdens upon the assignee that are sufficient to prevent the automatic transfer of the arbitration agreement or if they are merely incumbencies (Obliegenheiten) that should be fulfilled by the assignee who wants to exercise his right to sue. The proponents of the automatic transfer, claim that it should not be possible for the assignee to avoid the application of the arbitration agreement related to the original contract, while he enjoys the benefit of the rights assigned.[40] The UK courts have a uniform approach concerning this issue, which allows the automatic transfer of the arbitration agreement through the assignment of rights and this approach is summarized in the ruling of Hobhouse J in *The Jordan Nicolov*: "[The assignee] is bound by the arbitration clause in the sense that he cannot assert the assigned right without also accepting the obligation to arbitrate."[41] French courts also generally favored the automatic transfer rule and rejected the view that stipulates the the assignee's consent to the arbitration agreement because of the duties involved by the latter. The Paris Court of Appeals held that "an arbitration clause appearing in an international contract has a validity

37 *Ibid.*

38 Landrove, J. C., p. 26.

39 Tolhurst, G., p. 4.

40 Gaillard., E., Savage, J. (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, The Hague 1999, p. 426, *available at* http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn20056 (last visited 2 February 2016).

41 Sinclair, A. C., *The Assignment of Arbitration Agreements*, p. 25: referring to *Montepide SpA v. v. JTP-RO Jugotanker*, 'The Jordan Nicolov' [1990] 2 Llloyd's Rep. 11, 15, *available at* http://www.giur.uniroma3.it/materiale/didattico/International_arbitration/Sinclair%20on%20assignment%20of%20arbitration%20agreements.pdf (lastvisited 2 February 2016).

and effectiveness of its own, such that its application must be extended to a party succeeding –even partially– to the rights of one of the initial parties".[42] In the United States, Section 2-210 of the Uniform Commercial Code prescribes a rule that would favor the automatic transfer of arbitration agreements as well:

An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

However, it is hard to say that the US courts have adopted a uniform approach pursuant to this rule. On the one hand, the *Hosiery* ruling states that the assignee shall be bound by the arbitration agreement because the latter "would be of no value if either party thereto could escape the effect of such a clause by assigning a claim subject to arbitration between the original parties to a third party".[43] On the other hand, in the *Lachmar* ruling, the court found that "the assignee of rights under a bilateral contract was not bound to perform the assignor's duties under the contract unless he expressly assumed to do so".[44]

In order to decide whether the assignee should be entitled to escape the arbitration agreement concluded between the assignor and the obligor, we must refer to one of the basic principles of the assignment of contractual rights, which stipulates that "an assignee can be in no better position than the assignor was prior to the

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42 Gaillard., E., Savage, J. (eds.), p. 426: referring to Cass. civ., July 12, 1950, *Montané v. Compagnie des chemins de fer portugais*, 77 J.D.I. 1206 (1950).

43 *Hosiery Mfrs' Corp. v. Goldston*, 238 N.Y. 22 (N.Y.1924), *available at* https://advance.lexis.com/search/praticepagesearch/?pdmfid=1000516&crid=515ebb2f-a077-40c8-810e-adad43d076f9&pdstartin=hlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=238+N.Y.+22&pdsearchtype=SearchBox&pdqttype=and&pdpsf=&ecomp=ht5hk&earg=pdpsf&prid=a7a37387-6881-4534-a333-9b49d485e4cc (last visited 2 February 2016). Also see: *Banque v. Amoco Oil Co.*, 573 F. Supp. 1464 (S.D.N.Y. 1983), *available at* https://advance.lexis.com/search/?pdmfid=1000516&crid=0680ae02-5a89-4bc3-9f7e-db17c53a25f1&pdstartinhlct%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchterms=573+F.+Supp.+1464&pdsearchtype=SearchBox&pdqttype=and&pdpsf=&ecomp=4Jyfk&earg=pdpsf&prid=515ebb2f-a077-40c8-810e-adad43d076f9 (last visited 2 February 2016).

44 *Lachmar v. Trunkline LNG Co.*, 753 F.2d 8 (2d Cir. N.Y.1985), *available at* https://advance.lexis.com/document/?pdmfid=1000516&crid=3f682142-9848-4db7-b1b1-5e23ea746798&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3S4X-JT70-0039-P0H5-00000-00&pddocid=urn%3AcontentItem%3A3S4X-JT70-0039-P0H5-00000-00&pdcontentcomponentid=6386&pdshepid=urn%3AcontentItem%3A7XWP-RV81-2NSD-M2GX-00000-00&pdshepcat=initial&pdteaserkey=sr0&ecomp=_thhk&earg=sr0&prid=c725c42a-2b56-466d-96d5-e6f31f2d1708 (last visited 2 February 2016).

assignment" (*nemo plus iuris potest quam ipse habet*).[45] As the assignor would be bound by the arbitration agreement had he not assigned his contractual right to the assignee, the assignee shall not be in a better position than him by being entitled to escape the arbitration agreement.[46] Therefore, even if it is accepted that the arbitration agreement involves duties in addition to rights, these duties are an indivisible part of the right to sue, which is deemed as an accessory of the substantive right assigned and they should not be an obstacle to the automatic transfer of the arbitration agreement.

Intuitu Personae Character of Arbitration Agreements

Another argument raised against the automatic transfer of the arbitration agreement is based on the claim that the latter has an *intuitu personae* character, i.e. the parties of the original contract concluded the arbitration agreement in consideration of each other's identities.[47] The general principle underlying this argument is that the personal contractual rights may not be assigned without the consent of the obligor.[48] If it is accepted that the obligor has a reasonable expectation not to be bound by the arbitration agreement, unless the counter-party of the arbitration is the assignor with whom he entered into the arbitration agreement; the latter will be deemed as non-transferable by the courts.[49] This expectation may be grounded on the relationship of personal confidence between the initial co-contracting parties[50], to the extent that such personal confidence played a significant role in the conclusion of the arbitration agreement.

There is no uniformity among jurisdictions on the question whether the arbitration agreement should be characterized by its nature *intutitu personae* or not. In England, the court in *Cottage Club Estates v. Woodside Estates Co.* held that the assignment did not give rise to the transfer of the arbitration clause contained in the main contract to the assignee because the arbitration clause was defined by the court as a "personal covenant".[51] On the other hand, in *Shayler v. Woolf*, the court did not follow the above mentioned precedent and concluded that the arbitration clause was transferable and the assignee would be bound by it.[52] The lack of uniformity can also

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45 Tolhurst, G., p. 7.

46 Landrove, J. C., p. 34.

47 Gaillard., E., Savage, J. (eds.), p. 432.

48 Tolhurst, G., p. 212.

49 Kötz, H., p. 269.

50 Beatson J. et al., p. 674.

51 Girsberger, D., Hausmaninger, C., p. 125: referring to [1928] 2 KB 463, 466; 97 L.J.K.B. 72, 74.

52 *Id.*: referring to [1946] Ch. 320; 115 LJ.Ch.D. 131.

be seen in the civil law jurisdictions. In France, in *CIMAT* judgment, the Court of Cassation first set forth the general principle of transferability of the arbitration clause but then pointed to the *intuitu personae* character of the latter that would justify the finding that it is not transferred to the third party through an assignment.[53] However, the German Federal Supreme Court stated that such a personal dimension would rarely be found in the commercial context because the reasons, that lead parties to refer the disputes arising under commercial transactions to arbitration, are mostly objective rather personal: celerity, cost-efficiency, flexibility, expertise of arbitrators etc.[54] On the other hand, it is always possible, albeit very rare in practice, that the initial co-contractors clearly state in the arbitration agreement that the latter shall not be assignable to a third party.[55]

Apart from such an express statement, the personal character of the arbitration agreement can also be inferred from the given facts and circumstances. The *intuitu personae* character of the arbitration agreement would come into question, when the arbitrator is already appointed in the arbitration agreement by the initial co-contractors.[56] The selection of arbitrators is of critical importance because the value of arbitration is directly proportional to the determination of qualified and neutral arbitrators.[57] If the assignee does not get involved in the selection of arbitrators, he could argue that he shall not be bound by such arbitration agreement, as his deprivation of involvement in the appointment process would endanger his right to a fair trial. However, even if such argument is accepted, it should not give the assignee the right to refuse arbitration as a method of dispute resolution; but should grant him merely the right to maintain the nomination of a new arbitrator or a new arbitral tribunal.[58]

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53 Cour de cassation, Chambre civile 1, 28 mai 2002, 00-12144;99-10741: "Mais attendu qu'en matière internationale, la clause d'arbitrage, juridiquement indépendante du contrat principal, est transmise avec lui, quelle que soit la validité de la transmission des droits substantiels ; que la cour d'appel, qui a souverainement relevé que la convention d'arbitrage stipulée dans le contrat initial n'avait pas été contractée par la CIMAT en considération de la personne de la société Pragoinvest ce qui eût pu faire obstacle à sa transmission à un tiers a légalement justifié ses décisions sur ce point", *available at* http://www.juricaf.org/arret/FRANCE-COURDECASSATION-20020528-0012144 (last visited 2 February 2016).

54 Landrove, J. C., p. 37: referring to 68 BGHZ 356, 365 (1977).

55 Gaillard., E., Savage, J. (eds.), p. 433.

56 Boisséson, M. de, *Le Droit Français de L'arbitrage: Interne et International*, Paris 1990, p. 546.

57 Gélinas, P. A., p. 63.

58 Landrove, J. C., p. 40.

Privity and Its Effects on Assignability of Arbitration Agreements

The doctrine of privity requires that mutual rights and obligations arising under a contract shall only be binding upon the parties to it. According to the principle of privity, the arbitration agreement becomes effective and binding in the obligor-assignee relationship, only if the assignee can be deemed as a "privy" of the obligor. At this point, the assignment of contractual rights must be distinguished from third party beneficiary cases because unlike the latter, in the assignment, the assignee is not evaluated as a "third party" to the contract between the obligor and the assignor, but he replaces the assignor partly or totally in this contractual relationship.[59] The total replacement would be the case, when the contract is assigned as a whole; whereas the assignment of a specific contractual right would give rise to a partial substitution. Therefore, the doctrine of privity will not prevent the arbitration agreements from being binding upon the assignee.

The privity of contracts would play a significant role in the context of a chain of successive contracts because in such cases, the arbitration agreement will not circulate, unless the parties have expressly provided otherwise.[60] In the *Fraser* case, there was a successive sale of diesel fuel and the question was whether the intermediate seller could rely on the arbitration clause included in the contract of another intermediate seller and its buyer. The French Court of Cassation's answer to this question was negative because there was no contractual assignment to justify such reliance.[61]

Consent of the Assignee and the Obligor

In the assignment of arbitration agreements, there are two basic rules concerning the consent of the assignee: The first rule prescribes that the assignee's consent is a *sine qua non* requirement for the assignment of the arbitration agreement and the second rule is that the latter is presumed to exist, if the assignee has accepted the assignment of the main contract underlying the arbitration agreement.[62] The rationale behind this presumption is that the arbitration agreement is an attribute of the claim, which travels automatically with the main contract.[63] This is called "the

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59 *Id.*, p. 163.

60 Gaillard., E., Savage, J. (eds.), p. 424, 425.

61 *Id.*, p. 424: referring to Cass. 1e civ., Nov. 6, 1990, *Fraser v. Compagnie européenne des Pétroles*, *decision also available at* http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007025255 (last visited 2 February 2016).

62 Gaillard., E., Savage, J. (eds.), p. 424.

63 Girsberger, D., Hausmaninger, C., p. 127: referring to Stein et al., *Kommentar zur Zivilprozessordnung*§ 1025 BGB, Nr. 40-41; § 1027 BGB, Nr. 7 (20th ed. 1987).

automatic transfer rule". The contrary of this rule is "the express assignment rule", which requires that the assignee clearly consents to the arbitration agreement to be bound by it.[64] The express assignment rule is based on an erroneous interpretation of the principle of autonomy and severability of arbitration agreement.[65] Most jurisdictions and arbitral tribunals accept the automatic transfer rule, which is also adopted by some national legislative authorities, as can be seen in the Norwegian Arbitration Act. The Act prescribes the automatic transfer with the following statement[66]:

> Unless otherwise agreed between the parties in the arbitration agreement, the arbitration agreement shall be included in case of assignment of the legal relationship to which the arbitration agreement applies.

Landrove argues that the frequency of arbitration clauses in international transactions renders them a part of the *naturalia negotii*, i.e. a part of the legal nature of the contract, and therefore, it becomes legitimate not to require the express consent of the assignee for the transfer of the arbitration agreement.[67]

Arbitration agreements require a mutual consent but as regards the relationship between the obligor and the assignee after the assignment of the contractual right, the consent of the obligor is not a requirement for the arbitration agreement to be effective. Bilateral consent between the assignor and the assignee is sufficient for the assignment of rights, which has, on the other hand, trilateral effects by being effective also vis-à-vis the debtor.[68]

Actually, the consent is also trilateral but as the obligor already accepted to be bound by the arbitration agreement when he entered into such agreement (or when he concluded the main contract, if there is an arbitration clause instead of a separate arbitration agreement), it is not required that he repeats his consent at the time of the assignment.[69] At that point, the validity of assignment should not be affected by the obligor's state of mind.[70] The consent of the obligor is required

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64 *Id.*, p. 136.

65 Landrove, J. C., p. 153.

66 Act of 14 May 2004 No. 25 relating to Arbitration, Chapter 3, § 10, para. 2, *English translation available at* http://www.chamber.no/wp-content/uploads/2014/02/Norwegian_Arbitration_Act.pdf (last visited 2 February 2016).

67 Landrove, J. C., p. 155.

68 Girsberger, D., p. 381.

69 Landrove, J. C., p. 157.

70 Hatzis, A. N., p. 206.

only in exceptional cases, such as *intuitu personae* claims, specific legal provisions prohibiting the assignment of specific claims and non-assignability clauses in the contracts.[71] Another exception, where the obligor should be considered not bound by the assigned claim in absence of his consent, would be the case, in which the obligor is harmed by the assignment.[72] The rationale behind this exception is the rule that "an obligor should be no worse off by virtue of an assignment"[73], which is also reflected in the Uniform Commercial Code of the United States as follows[74]:

> Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance.

Since the mutual consent of the assignor and the assignee is sufficient for the validity of the assignment, neither consent of nor notice to the obligor is a requirement for validity.[75] The notice of the assignment can even be given to the obligor simultaneously with the initiation of the arbitral proceedings, in which case the request for arbitration would also serve as a sufficient notice to the obligor.[76]

Non-Assignment Clauses

An original contracting party is allowed to transfer his contractual rights to third parties without the consent of the other original contracting party.[77] However, the parties may prefer to prohibit the assignment of contractual rights to prevent a third party to intervene in their legal relationship. The motive of such preference is in most cases based on the fear that there could be additional burdens on the obligor because of the assignment.[78] Although the general principle governing the law of assignment prescribes that "an obligor should be no worse off by virtue of

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71 Roels, W., 'La Cession et la Mise en Gage des Créances en Droit Belge Suite à la Loi du 6 Juillet 1994' in *Revue de Droit des Affaires Internationales, International Business Law Journal, Issue: 1995 Volume: 1*, p. 32, *available at* http://heinonline.org/HOL/Page?handle=hein.journals/ibuslj11&div=3&g_sent=1&collection=journals (last visited 2 February 2016).

72 Girsberger, D., Hausmaninger, C., p. 147.

73 Tolhurst, G., p. 7.

74 Uniform Commercial Code, § 2-210, *available at* https://www.law.cornell.edu/ucc/2/2-210 (last visited 2 February 2016).

75 See supra note 13 and 14.

76 Landrove, J. C., p. 152.

77 Girsberger, D., p. 381; Landrove, J. C., p.127.

78 Epstein, R. A., 'Why Restrain Alienation?' in *85 Columbia Law Review 970 (1985)*, p. 982, *available at http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2380&context=journal_articles* (last visited 2 February 2016).

an assignment"[79], the parties might want to bar the possibility of an assignment at the time of the conclusion of the contract because they are reluctant to face an unknown and unfavorable assignee.[80] Epstein expresses that "the obligor may not have any informal leverage against the assignee that he has vis-à-vis the assignor, or the assignee may have a greater willingness to breach in the hope of getting some collateral gain" and therefore it could be advantageous for the obligor to prohibit the assignment.[81] It could also be a reason of such prohibition that the obligor wants to avoid the possibility that the creditor assigns his right to a competitor of the obligor. When a contract is assigned as a whole, it will not be only the rights that are assigned but also the duties under the contract, towards which case the parties would be more reluctant, as they chose the other contracting party in consideration of confidence, its capacity and personal qualities to perform. Taking into consideration the above mentioned risks and other possible drawbacks of a future assignment, the parties can include a non-assignment clause to their contract, whereby they clarify in writing precisely that the contract would only be effective and binding between themselves.[82] Such a clause would read as follows[83]:

> Neither party may assign any of its rights under this agreement, either voluntarily or involuntarily, whether by merger, consolidation, dissolution, operation of law, or any other manner, except with the prior written consent of the other party. Neither party may delegate any performance under this agreement, except with the prior written consent of the other party. Any purported assignment of rights or delegation of performance in violation of this section is void.

Besides a general non-assignment clause, it is also possible for the parties to expressly limit the transferability of the arbitration agreement. In so doing, the arguments in favor of transferability of the arbitration agreement due to its autonomous and separable character or on other grounds can be eliminated. A sample non-assignment clause prohibiting specifically the assignment of the arbitration agreement would be as follows[84]:

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79 Supra note 65.

80 Vincze, A., p. 4.

81 Epstein, R. A., p. 982.

82 Vincze, A., p. 4.

83 Adams, K., *Rethinking the "No Assignment" Provision*, posted on: 20 November 2012, *available at* http://www.adamsdrafting.com/rethinking-the-no-assignment-provision/ (last visited 2 February 2016).

84 Born, G., *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, p. 107, *available at* http://www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-1320005-n (last visited 2 February 2016).

> This agreement to arbitrate is binding only upon the signatories hereto and not, unless otherwise agreed in writing by the signatories hereto, their successors, assigns, or affiliates.

However, as such a specific clause directly addressing the assignability of the arbitration agreement would be concluded in rare circumstances in practice, it is critical to answer the question whether a general non-assignability clause in the contract would apply to the arbitration agreement. The answer will vary according to the approach towards non-assignability clauses in a given jurisdiction. In most jurisdictions, a great deference is given to non-assignment clauses, which have an absolute effect and in these jurisdictions, arbitration agreements will share the same fate with other contractual rights, which are strictly forbidden to be assigned.[85] On the other hand, there are also jurisdictions, in which non-assignability clauses are not given any effect (absolute invalidity); or a relative effect, whereby the assignor will be responsible vis-à-vis the obligor for his breach, although the assignment will be valid (relative invalidity).[86] In these cases, the arbitration agreement will travel with the assigned right; however in the case of relative invalidity, the assignor will be held liable towards the obligor due to his breach of contract.[87]

Form of the Arbitration Agreement and Assignment

Incompliance with formal requirements can give rise to the invalidity of a legal transaction and therefore it constitutes an important question whether the formal requirements applied to arbitration agreements will have any effect on their automatic transfer through the assignment of contractual rights. Would it be enough that the initial co-contractors have fulfilled the formal requirements concerning the arbitration agreement or should the assignee's consent also include such formalities so that the arbitration agreement is transferred? The main focus of this analysis is on the "in writing" requirement of the arbitration agreement.

The worldwide accepted rule in international arbitration stipulates that it is a *sine que non* requirement that the arbitration agreement be "in writing". The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) clearly states the "in writing requirement" in Article II. The first two paragraphs of this article read as follows[88]:

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85 See: Landrove, J. C., p. 134, 135, note 695.

86 Girsberger, D., p. 389.

87 *Id.*, p. 389.

88 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II., *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (last visited 2 February 2016).

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

If the parties do not comply with the "in writing" requirement, it may be a valid ground for the state courts to refuse the recognition and enforcement of the award according to the Article V of the New York Convention.

The 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) also stipulates that the arbitration agreement shall be "in writing"[89]. Accordingly, national legislatives in many countries have adopted the same principle in their laws governing international arbitration.[90]

The opponents of the automatic transfer principle claim that the arbitration agreement shall not travel with the assigned right, unless the assignee consents to the arbitration agreement in compliance with the "in writing" requirement of the arbitration agreement; whereas the proponents of the automatic transfer rule argue that the initial co-contractor's compliance with such requirement would be enough and they would not apply to the subsequent transfer of the arbitration agreement.[91] The rationale behind the view opposing the automatic transfer is to protect the assignee because the advocates of this view are convinced that the objective of the "in writing" requirement is "to ensure that a party entering into an arbitration agreement is sufficiently put on notice of the consequences which flow from an agreement to submit a dispute to arbitration".[92] However, as stated by the German Federal Supreme Court, in the transfer of an already existing arbitration agreement, it should be accepted that the assignee is adequately warned, since the latter would have the chance to examine the arbitration agreement before accepting the assignment.[93]

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89 1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006, Article 7, *available at* https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited 2 February 2016).

90 Landrove, J. C., p. 177, note 895.

91 Girsberger, D., Hausmaninger, C., p. 142.

92 *Id.*, p. 144.

93 Habegger, P. A., *Note - Federal Tribunal (1st Civil Court), 16 October 2003 (4P.115/2003); Extension of Arbitration Agreements to Non-Signatories and Requirements of Form*, note 49, available at http://www.kluwerarbitration.com/CommonUI/document.aspx?id=ipn25742#footnote-ref-a0073 (last visited 2 February 2016), referring to: 71 BGHZ 162, 166 (1978): "[A]uch der Erwerber eines mit einer

Moreover, the assignor does not have a duty to inform the assignee about the existence of an arbitration agreement related to the initial contract between him and the obligor; on the contrary, the obligation of the assignor is limited to behave in good faith during the negotiations and not to distort the assignee's consent by erroneous or ambiguous declarations.[94]

On the other hand, in some instances the arbitration agreement may be concluded between the initial co-contractors with an incorporation by reference, i.e. with the reference in the contract to another document involving an arbitration clause. Article 7(6) of the UNCITRAL Model Law recognizes this method as an equivalent of a written arbitration agreement.[95] If such a reference is made to a document, which is unknown by the assignee or to which the assignee cannot be expected to have access (e.g. a framework agreement between the assignor and the obligor), then it should be presumed that the arbitration agreement should not be transferred automatically through the assignment of the contractual right and the assignee should consent to the arbitration agreement separately, in compliance with the "in writing" requirement. This requirement can be extended to other circumstances, whereby the assignee cannot be deemed to be aware of the existence or the content of an arbitration agreement at the time of the assignment.

However, as a general rule, the "in writing" requirement should not prevent the automatic transfer of the arbitration agreement and it should be accepted that the formal requirements stipulated for the arbitration agreement should apply merely to the initial conclusion of such agreement but not to its assignment[96] because in the assignment of contractual rights, the assignee only replaces the original position of the assignor[97] and therefore shall be bound by the arbitration agreement, which forms the accessory of the initial contract[98].

Schiedsklausel verbundenen Rechts [bedarf] der Warnung vor einem nicht hinreichend bedachten Verzicht auf den gesetzlichen Richter … Dieser Schutz ist jedoch hinreichend gewährleistet, wenn – wie hier – bereits eine in einer gesonderten Urkunde vereinbarte Schiedsklausel besteht. Da sich die Schiedsklausel als eine Eigenschaft des abgetretenen Rechts darstellt, es also nicht in das (einseitige) Belieben des Erwerbers des Rechts gestellt ist, ob er dieses mit oder ohne diese Eigenschaft erwerben will [citation omitted], ist es ihm grundsätzlich zuzumuten, sich über den Inhalt dieses Rechts, also auch über eine möglicherweise mit ihm verbundene Schiedsklausel, zu informieren. Ein schutzwürdiges Interesse, das Recht unter Wegfall der Bindung an die Schiedsklausel ohne Zustimmung der anderen Vertragspartner zu erwerben, ist grundsätzlich nicht anzuerkennen."

94 Landrove, J. C., p. 185.

95 UNCTAD/EDM/Misc.232/Add.39, *available at* http://unctad.org/en/Docs/edmmisc232add39_en.pdf (last visited 2 February 2016).

96 Sinclair, p. 8.

97 Supra note 51.

98 Supra note 24.

Authority to Decide on the Issue of Transfer of Arbitration Agreements

The question whether arbitrators or courts will be competent to solve the issue of transfer of the arbitration agreement is of paramount importance, since arbitrators may apply different conflict-of-laws rules and thus the findings could vary according to the authority to rule on the issue.[99] According to the doctrine of Kompetenz-Kompetenz, the arbitral tribunal has the authority to rule on its own jurisdiction.[100] Kompetenz-Kompetenz is a worldwide accepted principle that is adopted by most national legislations and prescribed by international conventions and institutional arbitration rules.[101] Gaillard expresses that it has been largely accepted in comparative law and thus has become a transnational principle of international arbitration.[102] On the other hand, the US courts are reluctant to recognize the doctrine of Kompetenz-Kompetenz as widely as in civil law countries and require that the parties consensually agree on such power of arbitrators in the arbitration agreement.[103]

The advantages of the arbitral competence are listed as the higher level of confidentiality in comparison to the proceedings before state courts, from the initial co-contractors' perspective and the avoidance of the risks that the resort to foreign courts would bring, from the assignee's perspective; whereas the most significant drawback would be the burden on the parties in the case of a possible review by state courts, since the the arbitrator's competence is in general not final.[104] However, the arbitrators reduce the effect of such drawback in practice, whereby they rule on the question whether the arbitration agreement was validly transferred through the assignment in the form of an interlocutory award, which can be appealed by parties to domestic courts without having to wait for the final award.[105]

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99 Girsberger, D., Hausmaninger, C., p. 161.

100 Weigand, F-B. (ed.), *Practitioner's Handbook on International Commercial Arbitration*, Oxford 2010, p. 363, *available at* https://books.google.com/books?id=Z-Bbba13DZAC&pg=PA954&lpg=PA954&dq=UNCITRAL+Model+Law+on+International+Commercial+Arbitration+25+years&source=bl&ots=p-sVgSoEzq&sig=_bnWOsKe3biU3x__CYXqV-HEDtZA&hl=en&sa=X&ved=0ahUKEwjXqunZ0PDJAhWMox4KHRQ2DAIQ6AEISTAH#v=onepage&q=kompetenz&f=false (last visited 2 February 2016).

101 Landrove, J. C., p. 70.

102 Gaillard, E., 'La Reconnaissance, En Droit Suisse, de la Seconde Moitie du Principe d'Effet Négatif de la Compétence-Compétence' in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (edited by Aksen, G. et al.), Paris 2015, p. 312, *available at* http://www.shearman.com/~/media/Files/NewsInsights/Publications/2005/01/La-reconnaissance-en-droit-suisse-de-la-seconde-__/Files/IA_Competence-competence_Mel-Briner_040308_27/FileAttachment/IA_Competence-competence_Mel-Briner_040308_27.pdf (last visited 2 February 2016).

103 Landrove, J. C., p. 71, note 344.

104 Girsberger, D., Hausmaninger, C., p. 163.

105 *Id.*, p. 163.

Applicable Law Governing the Assignment of Arbitration Agreements

The substantive law rules governing the assignment of arbitration agreements show diversity in different jurisdictions, which creates unpredictability in the international context.[106] There is no uniform rule adopted by international instruments such as the New York Convention, the European Convention on International Commercial Arbitration (1961) or the UNCITRAL Model Law and the issue will be resolved by the domestic law or set of rules to be applied according to the conflict of law rules.[107]

The conflict of law rules to apply will be determined according to the characterization of transfer of the arbitration agreement, which depends on whether the issue constitutes a question of assignability or arbitrability or a combination of both.[108] Another aspect of the characterization will rely on the evaluation of arbitration agreements as procedural or substantive.[109] These characterizations would help the courts or arbitrators to decide which law to apply among the alternatives of the *lex fori* (the law of the forum), the *lex arbitri* (the law of the seat of arbitration), the *lex compromissi* (specific law selected by the parties to be applied to the arbitration agreement)[110] or the *lex contractus* (the law of the main contract concluded between the assignor and the obligor).[111] According to a second approach, the courts or arbitrators are not obliged to choose one of the above mentioned laws and may also apply a combination of them.[112] The application of the law governing the assignment agreement between the assignor and the assignee would not be at stake at all because otherwise the expectations of the obligor, who is totally unfamiliar to the assignment agreement, would be excluded and thus the principle that "an obligor should be no worse off by virtue of an assignment"[113] would be violated.

Firstly, we should analyze which law would be the most appropriate one to apply, according to the approach that accepts the exclusive application of one law to the dispute. The application of the *lex fori* would come into question in the case that the issue of the assignment of the arbitration agreement is characterized

106 Landrove, J. C., p. 97.

107 Hosking, J. M., p. 499.

108 Girsberger, D., Hausmaninger, C., p. 150.

109 *Id.*, p. 150.

110 If the parties do not express any specific law governing the arbitration agreement, the law applicable to the arbitration agreement will be the law governing the main contract (*lex contractus*).

111 Landrove, J. C., p. 99.

112 Girsberger, D., p. 395.

113 Supra note 65.

as procedural.[114] However, it is hard to advocate for the application of the *lex fori* because it would encourage forum shopping, since the assignee or the obligor would choose the most favorable forum for their purposes and it may well be the case that the forum does not have any relation with the parties or the dispute and thus its application would not comply with the expectation of the parties.[115] The application of the law of the seat of the arbitration (*lex arbitri*) or the *lex compromissi* would also be inadequate because they only govern the issues related to the arbitration agreement but do not have any relation with the impacts of the assignment of the contractual right underlying the arbitration agreement.[116] On the other hand, the *lex contractus* would be appropriate to resolve the issue of the validity of the assignment of the contractual right as well to decide on the transfer of the arbitration agreement.[117]

The application of the *lex contractus* would definitely protect the initial co-contractors, as their expectation would be satisfied by deciding the issue pursuant to the law applicable to their contractual relationship. The assignee would also be aware of the *lex contractus* at the time of the assignment agreement he concludes with the assignor and the application of the law governing the underlying contract could not be evaluated as a surprise to him. However, the advocates of a combined application of different laws raise the argument that in rare circumstances such as the choice of a specific *lex compromissi* other than the *lex contractus*, the obligor's expectations would be harmed through the exclusive application of the *lex contractus*, since the assignor would be able to circumvent his obligation to be bound by the arbitration agreement by assigning his contractual right to a third person.[118]

One method of applying various laws is based on the approach favoring the validity of the arbitration agreement ("*in favorem validitatis*" approach), which can be seen in the Swiss Private International Law that prescribes an alternative application of different laws to increase the possibility of upholding the arbitration agreement[119]:

> [A]n arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

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114 Girsberger, D., Hausmaninger, C., p. 154.

115 Landrove, J. C., p. 108, 109.

116 Girsberger, D., p. 397; supra note 24.

117 Landrove, J. C., p. 125.

118 Girsberger, D., p. 400.

119 Swiss Private International Law, Article 178(2), *English translation available at* https://www.swissarbitration.org/sa/download/IPRG_english.pdf (last visited 2 February 2016).

The most significant drawback of such an approach would be to create the risk of the assignment of a "naked arbitration agreement" by the application of one of the alternatively listed laws, although the underlying contractual right is not validly transferred due to the incompliance of such transfer with the *lex contractus*.[120] However, the Swiss Federal Supreme Court refused such a possibility by holding that the fate of the arbitration agreement would be bound to the assignability of the main contract and an assignment prohibition governing the latter would also prevent the transfer of the related arbitration agreement.[121]

Another form of applying various laws is based on a gradual approach, which can be justified with the principle of *dépeçage* that allows different issues within one case to be governed by different laws. Firstly, the *lex contractus* will apply to the question whether the contractual right was validly assigned and if the answer to this question is affirmative, the *lex compromissi* will govern the issue of the extension and effect of this assignment to the arbitration agreement.[122] Such a gradual approach would come into question, only when the initial co-contractors have agreed on the application of a specific *lex compromissi* to the arbitration agreement instead of the *lex contractus* governing the underlying contract. However, if the assignee is unaware of the choice of *lex compromissi* by the initial co-contractors and if he cannot be expected to know such a choice; his expectations would not be protected in the application of the *lex compromissi* to the assignment of the arbitration agreement.[123] In such a case, the *lex contractus* should be applied to both the assignment of the contractual right and the arbitration agreement because otherwise the assignee would be forced to be subject to a law, the existence of which was unknown to him at the time of the assignment agreement. At this point, it may be discussed whether the assignee has the burden of proof to show that he did not know and could not be expected to know about the choice of the law governing the arbitration agreement by the initial co-contractors or whether the obligor shall be obliged to prove the contrary. Girsberger rightly states that the burden of proof should be upon the obligor according to the principle known as "*negative non sunt probanda*", i.e. the negative facts cannot be proven.[124]

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120 Landrove, J. C., p. 103.

121 BGE 117 II 94, 100, *available at* http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm (last visited 2 February 2016).

122 Girsberger, D., p. 403.

123 Girsberger, D., Hausmaninger, C., p. 159.

124 Girsberger, D., p. 405.

Conclusion and Summary

Most legal systems used to refuse the assignability of contractual rights because it was accepted that an assignment would violate the privity of contract. However, as the transfer of money and entitlements has been indispensable for the maintainability of the financial system, it became a worldwide accepted rule that contractual rights can freely be assigned. The most known exceptions to the assignability of contractual rights are circumstances, whereby the parties include non-assignability clauses to the contracts or the contractual right is of a personal nature, which does not allow a third party to intervene in the contractual relationship between the parties. For an assignment to be valid, there must be an assignment agreement between the assignor and the assignee; however, the consent of the obligor or a notice to the him is not needed for an effective assignment. Despite that, the notification of the obligor would be important for the protection of the assignee, since the obligor will not be able to discharge his debt to the assignor after such notice. It would depend on the jurisdiction whether it is required that the assignment agreement be in writing. In some jurisdictions, the written form is a prerequisite for the validity of assignment; where in others there is no such requirement. At this point, the English law shows a particularity and prescribe that legal assignments shall be in writing; whereas the validity of equitable assignments does not rely on a written form.

The popularity of arbitration as a method of dispute resolution in commercial transactions, especially in the international context, raises the issue of assignability of arbitration agreements related to the assigned right. Arbitration agreements are directly related to the right to sue, which is deemed as an accessory of the assigned contractual right. Therefore, the widely accepted principle is that arbitration agreements are automatically transferred through the assignment of contractual rights.

The opponents of such automatic transfer set forth various arguments based on the particularities of arbitration agreements. The first argument makes a distinction between procedural rules and substantive rules, whereby it is claimed that arbitration agreements are of procedural nature and therefore they should be subject to a different law than the substantive law governing the assignability of contractual claims. However, such a distinction would be artificial in most cases, as substantive law rules apply to procedural contracts by analogy, when procedural law does not contain any specific rules governing the conclusion of the arbitration agreement.

Another argument of the opponents of the automatic transfer relies on the principles of autonomy and severability of arbitration agreements. According to this argument, arbitration agreements are independent from the main contract, they

have a distinct legal life and therefore, it cannot be presumed that they travel with the assigned right. The proponents of the automatic transfer rule successfully refute this argument, whereby they state that the ultimate purpose of the autonomy and severability is to uphold the arbitration agreement as much as possible vis-à-vis the invalidity of the main contract and that the view preventing its automatic transfer would harm this purpose instead of serving it. Besides that, the autonomy principle does not fit in this context, as the arbitration agreement is directly related to the right to sue, which cannot be separated from the assigned substantive right.

It is also argued that arbitration agreements do not only involve rights but also duties, which are non-assignable through the assignment of contractual rights, unless the assignee shows express consent to it. However, arbitration agreements should be defined as a legal remedy rather than a combination of rights and obligations. Besides that, in general, the duties attributed to arbitration agreements are actually mere incumbencies (Obliegenheiten) that should be fulfilled by the assignee who wants to exercise his right to sue. Even if it is accepted that arbitration agreements involve duties, they should bind the assignee in the assignment of a contractual right, as the latter cannot assert the assigned right without also accepting the obligation to arbitrate.

The personal character of arbitration agreements (*intuitu personae* character) is also set forth as an obstacle to their automatic transfer. According to this argument, the parties of the original contract concluded the arbitration agreement in consideration of each other's identities. This conclusion is based on the analogy with the rule that personal contractual rights may not be assigned without the consent of the obligor. Although there are court decisions that approved this approach by defining the arbitration agreement as a "personal covenant"; the prevailing view is that such a personal dimension would rarely be found in the commercial context because the reasons, that lead parties to refer the disputes to arbitration, are mostly objective rather personal. If the arbitrators are already selected in the arbitration agreement, the assignee could validly claim that it would violate his right to a fair trial, if he were bound by the selection of arbitrators. In such a case, although the assignee would still be bound by the arbitration agreement, he should be entitled to maintain the nomination of a new arbitrator or a new arbitral tribunal.

The doctrine of privity should not prevent the assignment of arbitration agreements either because in the assignment, the assignee is not evaluated as a "third party" to the contract between the obligor and the assignor, but he replaces the assignor in this contractual relationship. On the other hand, the privity of contracts would be important in the context of a chain of contracts because in such cases, the

arbitration agreement will not circulate, unless the parties have expressly provided otherwise.

In the assignment of arbitration agreements, the assignee's consent is a *sine qua non* requirement and if the assignee has accepted the assignment of the main contract underlying the arbitration agreement, it is presumed that he also consented to the assignment of the arbitration agreement. This is defined as "the automatic transfer rule". The contrary of this rule is "the express assignment rule", whereby the assignee's express consent to the assignment of the arbitration agreement is required. The automatic transfer rule is accepted by most jurisdictions and arbitral tribunals because the arbitration agreement is accepted as an attribute of the assigned claim. Bilateral consent between the assignor and the assignee is sufficient for the assignment of the arbitration agreement, the obligor's consent is not required. As the obligor already consented to the arbitration agreement when concluding such agreement with the assignor, he does not have to repeat his consent at the time of the assignment. The consent of the obligor is required only in exceptional cases, such as *intuitu personae* claims, non-assignment clauses and circumstances where the obligor is accepted to be harmed by the assignment.

Non-assignment clauses are very frequent in practice, as parties want to avoid the possibility of additional burdens upon the obligor in the case of an assignment. Non-assignment clauses may prohibit the assignment of any right in the contract or specifically address the assignability of the arbitration agreement. In most jurisdictions, an absolute effect is given to non-assignment clauses, whereby the latter would strictly prohibit the assignment of the arbitration agreement. On the other hand, in other jurisdictions, there can be a hostile approach towards non-assignability clauses, whereby they are not granted any effect (absolute invalidity). The compromise of these two approaches would be the case of the relative effect of non-assignment clauses (relative invalidity). When the absolute or relative invalidity of non-assignment clauses is accepted, the arbitration agreement will travel with the assigned right; however, in the case of relative invalidity, the assignor will be held liable towards the obligor due to his breach of contract.

As regards the formal requirements of the assignment, the question of paramount importance is whether it would be enough that the initial co-contractors have fulfilled the formal requirements of the arbitration agreement or should the assignee's consent also include such formalities so that the arbitration agreement is transferred. The discussions are focused on the "in writing" requirement of arbitration agreements. The prevailing view is that the assignee would have the chance to inquire on the arbitration agreement before consenting to the assignment and therefore, he should be bound by the arbitration agreement, if there is a valid

arbitration agreement at the time of the assignment. However, in the presence of special circumstances, whereby the assignee is not and cannot be expected to be aware of the existence or the content of an arbitration agreement at the time of the assignment, the arbitration agreement shall not be transferred automatically and the assignee should consent to the arbitration agreement separately, in compliance with the "in writing" requirement.

The competent authority to decide on the transferability of the arbitration agreement and the applicable law are the last but not least important issues to be solved within the scope of this article. According to the doctrine of Kompetenz-Kompetenz, arbitrators have the authority to rule on their own jurisdiction and should decide whether the arbitration agreement was validly transferred through the assignment. When deciding about the issue, arbitrators should render an interlocutory award so that the parties can appeal it to domestic courts without having to wait for the final award. In order to determine the applicable law, the conflict of law rules will depend on the characterization of the issue. According to the view supporting for the exclusive application of one law to all issues concerning the assignment of the arbitration agreement, there are four alternative laws to be applied: the *lex fori* (the law of the forum), the *lex arbitri* (the law of the seat of arbitration), the *lex compromissi* (specific law selected by the parties to be applied to the arbitration agreement) and the *lex contractus* (the law of the main contract concluded between the assignor and the obligor). The prevailing view supports the application of the *lex contractus*, as it would protect the expectations of all parties. The initial co-contractors' expectations would be satisfied, as the issue will be resolved pursuant to the law applicable to their contractual relationship. The assignee's expectation would also be protected, as he is accepted to be aware of the *lex contractus* at the time of the assignment agreement.

On the other hand, the opponents of the exclusive application of one law developed different approaches. One of these approaches is based on an alternative application of different laws to increase the possibility of upholding the arbitration agreement; whereas the other one adopts a gradual and complementary application of the *lex contractus* and the *lex compromissi*. The latter case will only come into question, if the initial co-contractors have chosen a specific law to be applied to the arbitration agreement other than the *lex contractus*. The *lex contractus* will apply to the question whether the contractual right was validly assigned and if the answer to this question is affirmative, the *lex compromissi* will govern the issue of the extension and effect of this assignment to the arbitration agreement.

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