



## Multiple and changing parties – who is bound by the agreement to arbitrate?

The impact of assignments and other transfers of rights and/or obligations

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# Agenda

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Three case studies

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Contractual assignment

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Other types of transfer

# Three case studies

## Case study 1: Contractual assignment of a right

- Buyer purchased a company from seller. The share purchase agreement contains an arbitration clause. There is no explicit prohibition of transferring rights arising under the share purchase agreement to third parties.
- Buyer assigns its rights against seller for violations of representations & warranties partly to A and partly to B.
- Are seller, A and B bound by the arbitration clause? If yes: Do the assignments have any consequences for future arbitrations?

# Three case studies

## Case study 2: Assignment of a right by statutory subrogation

- An insurer has indemnified an insured party against wrongful acts of a carrier. The carrier contract contains both an arbitration clause and a confidentiality provision.
- The law applicable to the insurance contract provides that any claims the insured party may have against third parties out of the insured incident are assigned to the insurer by statutory subrogation.
- Is the insurer bound by the arbitration clause when pursuing claims against the carrier arising out of the carrier contract?

# Three case studies

## Case study 3: Transfer of a contract by universal succession

- A sub-contractor agreement contains an arbitration clause submitting all disputes to a tribunal belonging to an association of building companies to which both sub-contractor S and general contractor G belong.
- G merges with F, a foreign building company which belongs to a different association of building companies.
- Are S and F still bound by the arbitration agreement?

# Contractual assignment

The applicable law to determine the effect of the assignment

- Prevailing opinion:

The effect of a contractual assignment of the underlying right on the arbitration agreement is determined by the law applicable to the arbitration agreement.

- Alternative view: Law applicable to the assignment.

# Contractual assignment

## Typical legal regimes (1)

- German, English, French and Swiss law seem to differ only in nuances.
- Principle: Arbitration agreement follows transferred right *ipso iure*
  - unless prohibited by law, or
  - unless the arbitration agreement explicitly or impliedly stipulates that it only binds the original parties.

# Contractual assignment

## Typical legal regimes (2)

- Legal arguments for transfer *ipso iure*:
  - Arbitration agreements are accessory to the assigned right, which justifies to bind the assignee without his consent.
  - Presumed consent of the original parties, which justifies to bind the obligor although he is not a party to the contractual assignment.
- Policy argument for transfer *ipso iure*:

Arbitration agreements would be of little value if they could be “escaped” by mere assignment.



# Contractual assignment

## Explicit & implied exceptions (1)

- Explicit prohibition of transfer: Arbitration agreement stipulates that it cannot be transferred. Seems to be of rather little practical relevance.
- Examples for implied prohibitions of transfer:
  - Contract prohibits assignment of rights. Generally interpreted as to apply as well to the arbitration agreement.
  - Contract contains a confidentiality provision. Has sometimes been interpreted as prohibiting transfer. Justified?
  - Arbitration agreement was concluded *intuitu personae* = in consideration of the identity of the co-contractor.

# Contractual assignment

## Explicit & implied exceptions (2)

- Examples for implied prohibitions (continued):
  - *Intuitu personae* (continued):
    - *Fouchard/Gaillard/Goldman*: “If identity of co-contractor was of fundamental consideration”, *i.e.* “if co-contractor, unlike new party, possesses good faith and procedural loyalty necessary for arbitration to run smoothly.”
    - Scenarios mentioned: (1) Particular relationship of trust between the original parties. (2) Arbitration is administered by professional association to which both original parties belong.
    - Is this exception justified in a world where arbitration is *the* dispute resolution mechanism of choice in international commerce?

# Contractual assignment

## Explicit & implied exceptions (3)

- Examples for implied prohibitions (continued):
  - Assignment leads to a deterioration of the original debtor's position.  
Scenarios mentioned:
    - Creditor makes partial assignments to several assignees. Some authors argue that the latter must agree to proceed jointly since they may not impose more than one procedure on the obligor without rendering the arbitration clause inoperative.
    - Some authors argue that an implied prohibition may exist where due to the financial situation of the assignee the reimbursement for costs may be endangered.

Is this exception practical from a legal certainty point of view, or does it lend itself to being abused?

# Contractual assignment

## “The Italian exception” – or: How to reconcile theory and practice?

- Corte di Cassazione (1998 / 2003) on the basis of the doctrine of severability and deviating from Italian arbitral practice: Assignee only becomes party to the agreement where he explicitly consents thereto.
- Indeed: How to combine the principle of automatic transmission of the arbitration agreement with the generally accepted doctrine of autonomy? The higher the degree of autonomy, the lesser the arbitration agreement can be qualified as an accessory right!
- *Leboulanger*: “In this sense, it should be admitted that a difficult task rests with courts and scholars.”

# Other types of transfers

## Similar principles apply

- Contractual transfer of a contract does not present particular problems, as all parties have to consent thereto.
- Assignment by operation of law and universal succession:
  - Transferability seems to be recognised at least to the same extent as in cases of contractual assignment.
  - The same explicit and implied restrictions as with contractual assignment apply.

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