

# ASSIGNMENT OF ARBITRATION AGREEMENT: MAKING A CASE FOR AUTOMATIC TRANSFER APPROACH IN INDIA

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## ABSTRACT

*In domestic and international business transactions, the assignment of contracts containing an arbitration agreement is a routine practice where third-party interest is created by the original parties to the contract. In such an assignment of the contract, an issue arises when the assignor tries to rely on the arbitration agreement to compel the obligor to arbitrate or vice versa. No uniformly accepted conflict of law rules or substantive rules exist to guide the arbitrators or the courts while adjudicating on such an issue. The jurisprudence of several popular arbitration nations indicates two broad approaches to the issue: automatic transfer and express assignment approach. This paper traces the Indian position on such assignment of arbitration agreements and argues for the automatic transfer of an arbitration agreement upon assignment of the contract. It starts by fleshing out the relationship between a contract and an arbitration agreement which is necessary to understand the underlying basis for the two approaches. It contends for limited autonomy of arbitration agreement from the contract. It argues that it forms a part of the contract that is transferred along with other rights and obligations during the contract. It carves out and defends the legal doctrines that have been utilised by the courts to allow the automatic transfer of arbitration agreements during the assignment of the contract.*

## 1. INTRODUCTION

In domestic and international business transactions, the assignment<sup>1</sup> of contracts containing an arbitration agreement is a routine practice where

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1. Assignment has been defined as a transfer of rights or interests in a contract from one person to the other. The consists of three parties: the party assigning the contract (assignor), the party who gets assigned the contract (assignee), and, the other party to the original contract (obligor).

third-party interest is created by the original parties to the contract. In the context of contract assignment, a legal issue arises when the assignor seeks to invoke the arbitration agreement to compel the obligor to arbitrate, or conversely, when the obligor attempts to enforce arbitration against the assignor. There is no universally established set of conflict-of-laws principles or substantive legal rules that uniformly guide arbitrators or courts in resolving such disputes.<sup>2</sup> Such lacunae in leading international instruments such as the New York Convention, the UNCITRAL Model Law, and the European Convention on International Commercial Arbitration has led several commentators to suggest that such issues have been left to be resolved by the national legal systems.<sup>3</sup> These Conventions ought to have been resolved by these International instruments as they seek to promote uniformity and certainty in International arbitration.

Indian courts have previously found that the assignment of the arbitration agreement is governed by the contractual provisions of assignment and the Indian Contract Act, 1872.<sup>4</sup> However, Indian courts are yet to conclusively decide questions arising from the law applicable to assignment of contracts in cases of international commercial arbitration.<sup>5</sup> The scope of this paper has been limited to domestic arbitration where the 'entire' contract is assigned voluntarily (not statutorily) and consent has been taken from the assignor, assignee, and obligor.<sup>6</sup>

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2. Daniel Girsberger and Christian Hausmaninger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 *Arbitration International* 121.
  3. Albana Karapanco, 'Assignment of the Arbitration Agreement: Perspectives of Leading Jurisdictions' (2015) *Central European University* 39, 11.
  4. *Kotak Mahindra Prime Ltd v Sanjeev Sadaram Chavare* 2008 SCC OnLine Bom 1004, 21.
  5. There exists no uniformly accepted substantive rule or conflict of laws governing the issue of assignment of the arbitration agreement. Therefore, it requires determination of the applicable law. Such determination may be made, depending on whether the case is considered by the State court or by the Arbitral Tribunal, on the basis of a statutory conflict of laws rule or on the basis of the conflict of laws rule which the arbitrators deem the most appropriate. For the debate, See Anita Garnuszek, 'The Law Applicable to the Contractual Assignment of an Arbitration Agreement' (2016) 82 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* <<https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AMDM\AMDM2016054.pdf>> accessed 4 August 2024.
  6. Statutory assignments requires the party to abide by the terms of the statute and would involve entirely different principles. Whereas, voluntary assignments are private agreements between the parties that does not need compliance with any statutory formalities.

The jurisprudence of several leading nations in the practice of arbitration indicates two broad approaches to the issue: *first* is the ‘automatic transfer’ approach where the assignee is automatically bound by the arbitration agreement upon the assignment of the contract, and *second* is the ‘express assignment’ approach where the assignee needs to provide express consent to be bound by the arbitration agreement.<sup>7</sup> This paper traces the Indian position on such assignment of arbitration agreements and argues for the automatic transfer of an arbitration agreement upon assignment of a contract. The paper has been broadly divided into two parts: the *first* part describes the relationship and interplay between an arbitration agreement and a contract where it refutes several arguments presented against the automatic transfer approach, and the *second* part carves out the legal principles involved in such automatic transfer of arbitration agreements.

## **2. RELATIONSHIP BETWEEN THE CONTRACT & ARBITRATION AGREEMENT**

The root of this issue, which is often ignored by the authors writing on this subject area, is based on the perceptions on the location of the arbitration agreement in the contract.<sup>8</sup> The proponents of the two approaches mentioned above locate the arbitration agreement in two different manners, leading to two different conclusions. The supporters of the ‘automatic transfer’ approach argue for lesser autonomy to the arbitration agreement within a contract whereas the supporters of the ‘express assignment’ approach argue for a higher degree of autonomy to the arbitration agreement within a contract.<sup>9</sup> This part highlights and refutes three arguments presented by the Indian courts in support of the ‘express assignment’ approach indicating the manner in which they see the arbitration agreement in a contract.

Indian courts have focussed on three key principles justifying the requirement of express consent while assigning the contract: (i) Arbitration agreement is a distinct clause in the contract that is personal to the parties, (ii) Arbitration agreement is autonomous from the contract, and (iii) Arbitration agreement is an obligation that cannot be assigned. This part of the paper shows that all three arguments are misplaced and limited in nature.

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7. Daniel Girsberger (n 2) 136.

8. *ibid.*

9. *ibid.*

### A. Arbitration Agreement is a Distinct Clause in the Contract

The Delhi HC in *Delhi Iron & Steel Co Ltd v U.P. Electricity Board* held that there is no automatic transfer of arbitration agreement in assignment of the contract as the arbitration agreement is personal to the parties.<sup>10</sup> Such a clause is catered to personal needs and individual differences and cannot be assigned to some other party.<sup>11</sup> This argument finds its support in leading commentaries such as Russel on Arbitration where an arbitration agreement is defined as a personal covenant incapable of assignment.<sup>12</sup> Therefore, it is argued that such a clause cannot be assigned due to its personal nature.

The said argument regarding the personal nature of the arbitration agreement was negated by the Supreme Court in *Khardah Co Ltd v Raymon & Co (India) (P) Ltd.*<sup>13</sup> The Supreme Court was dealing with the scope of assignability of a contract. It held that a contract can be assigned unless it is personal in nature or is incapable of assignment under the law. The Court relied on the English Court of Appeal case of *Shayler v Woolf*<sup>14</sup> where the argument about the personal nature of an arbitration agreement was negated. The Court of Appeal in this case was dealing with the issue as to whether presence of an arbitration clause in a contract would render the contract unassignable. It held that if there is nothing barring the assignment of the contract, the argument that the arbitration agreement is personal in nature cannot be accepted. Therefore, the court concluded that arbitration agreement is not personal in nature and cannot prevent the assignment of a contract.

The findings of the Supreme Court in *Khardah* are defensible as an arbitration agreement deals with the dispute arising out of the contract. The arbitration agreement cannot be seen in isolation as it does not have an independent existence. As highlighted by the court in *Khardah*, the arbitration clause is a non-personal clause that forms a part of the contract. Therefore, if there is no legal bar on the assignment of a contract due to its non-personal nature, then there should be no bar on the assignment of the arbitration agreement which deals with disputes arising out of the contract. Further, even if we accept that the arbitration agreement is concluded *intuitu personae*; i.e., tailored to original contracting parties, the parties enter

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10. 2001 SCC OnLine Del 491, 15.

11. *ibid.*

12. David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn Sweet & Maxwell 2015) 65.

13. 1962 SCC OnLine SC 28, 11.

14. 1946 Ch 320, 322-323.

into an agreement to arbitrate because of reasons that extend beyond their personal benefit. These reasons are less cost, efficiency, party autonomy, and other added advantages of arbitration.<sup>15</sup> It is correct that certain aspects of arbitration agreements such as governing law, arbitrator's appointment, seat, *et cetera* are chosen by the original parties based on their preferences. However, such choices do not necessarily make the agreement entirely *intuitu personae*. The key distinction lies in the fact that party autonomy allows parties to decide whether these elements remain strictly personal or can extend beyond the original signatories. For instance, while governing law may be chosen by the original parties, these aspects often reflect commercial convenience or neutrality rather than a personal relationship. Many arbitration agreements survive corporate mergers, assignments, or restructuring without affecting the validity of these choices. In exceptional circumstances where a particular condition is inherently personal in nature, the court may recognize it as an anomaly and deviate from the automatic transfer approach, refusing to enforce it in such rare instances. Thus, while some elements of arbitration agreements may have a personal component, the broader purpose of arbitration extends beyond the individuals involved, making it more than just an *intuitu personae* arrangement. Consequently, the focus shifts from the parties to the inherent advantages arbitration brings to the resolution of the dispute.

A very similar view to *Delhi Iron & Steel Co Ltd case* was taken by the Bombay High Court in *Vishranti CHSL v Tattva Mittal Corpn (P) Ltd*<sup>16</sup> on the distinct nature of the arbitration agreement, where it held against the automatic assignment of the arbitration agreement. The High Court held that an arbitration agreement is separate from other clauses in the contract as it has nothing to do with the performance or obligations in the contract. It is an optional clause that has been made mandatory after its insertion in the contract by the parties. Therefore, it held that specific consent is required to be bound by an arbitration agreement due to its distinct nature.

The finding of the High Court is misplaced as an arbitral clause is like any other clause in a contract that is discussed, deliberated, and negotiated between the parties. The separability of arbitration agreement from the contract has been dealt with by the author in Section B of this paper. In the 21st century where contracts are regularly assigned, it can be reasonably inferred that the original parties can foresee the assignment of the contract. Further, it is reasonable for the parties to contemplate assignment of the

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15. Daniel Girsberger (n 2)141.

16. 2020 SCC OnLine Bom 7618, 17.

contract during the stage of its drafting. Most of the commercial contracts contain the ‘assignment’ clause. If the parties do not provide the need for ‘explicit’ consent to be provided by the assignee to be bound by the arbitration agreement, a different and higher standard of consent cannot be read into the contract as it would go against the intent of the parties. The Supreme Court in *Nabha Power Ltd v Punjab State Power Corpn Ltd*,<sup>17</sup> while explaining the doctrine of business efficacy, has held that the contract should not be read in a manner which the parties as reasonable businessmen could not have intended. Applying the contractual principle to this case, if the parties as reasonable businessmen do not provide for the requirement of explicit consent for the assignment of arbitration agreement even after providing for an ‘assignment’ clause, the doctrine of business efficacy dictates that such a requirement of explicit consent cannot be read down in the contract.

Additionally, such an understanding of the arbitration agreement by the Bombay High Court in *Vishranti* is incomplete as it fails to tell us why we need explicit consent for it to be assigned even if it is distinct. The distinct nature of a clause, that is not related to performance and obligation in a contract *per se*, cannot be a ground for explicit consent to be provided by the assignee.

### **A. Arbitration Agreement is Autonomous of the Contract**

The Delhi High Court in *Delhi Iron & Steel* has held that the consent to the assignment of the contract would not amount to the consent to be bound by the arbitration agreement due to the independent nature of the latter.<sup>18</sup> The principle has been adopted in leading arbitral institution rules<sup>19</sup> as well as the Indian Arbitration and Conciliation Act, 1996 which provides 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.”<sup>20</sup> The principle of separability was explained by the Supreme Court in *NN Global* where it stated that an arbitration agreement is a collateral term to the contract and is autonomous in nature.<sup>21</sup>

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17. (2018) 11 SCC 508, 34-49.

18. *Delhi Iron & Steel* (n 10) 13.

19. See ICC Arbitration Rules, art 6(9).

20. Arbitration and Conciliation Act 1996, s 16(1)(b).

21. *Interplay between Arbitration Agreements under Arbitration and Conciliation Act 1996 & Stamp Act 1899, In re* (2024) 6 SCC 1, 98-100.

This argument of separability is considered one of the strongest arguments for the ‘express assignment’ approach. The proponents argue that the autonomous and distinct nature of the arbitration agreement makes the clause different from other clauses in the contract. Due to the nature of the arbitration clause, it cannot be assigned along with the contract. It requires express consent from the parties as it is considered autonomous of the contract.

However, the argument is based on an incorrect understanding of the principle. The principle was adopted to prevent termination of the arbitral clause upon the termination or invalidity of the underlying contract.<sup>22</sup> The principle protects the arbitration agreement and ensures its survivability which might have been affected had it not been seen as independent of the underlying contract. It ensures that even if the main contract is found to be void, voidable, or terminated, the arbitration clause remains valid and enforceable. It prevents parties from evading their obligation by merely disputing the validity of the main contract. Therefore, the principle creates a legal fiction where the arbitration agreement is deemed as independent from the contract. However, it needs to be understood that such deeming fiction is created only for the purposes of survival of the arbitration agreement stemming from the invalidity of the contract.<sup>23</sup>

The cases where this principle has been used by the courts are to preserve the arbitration agreement from the invalidity of the contract. The arbitration agreement has been considered to be autonomous of the contract only to preserve the same from the invalidity of the contract. The usage of such a principle indicates that the deeming fiction has been created for a limited purpose. In essence, the principle of separability cannot be used beyond the limited purpose for which it was created. Apart from this limited deeming fiction, the arbitration agreement clause is just like any other clause in the contract. Therefore, in cases of transfer of contract such as assignment, such a principle cannot be applied.

It is also argued that the separability of the arbitration agreement is not sacrosanct and can be diluted in certain circumstances.<sup>24</sup> The courts have created several exceptions where third parties or non-signatories can take

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22. *ibid.*

23. Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn Oxford University Press 2015), 158.

24. Jim James and Ben Ridgeon, ‘Arbitration Agreements — Becoming Involved Despite Not Being a Party’ (*Lexology* 7 October 2014) <<https://www.lexology.com/library/detail.aspx?g=a63956e7-31e5-48cb-b291-6f0ddd619462>> accessed 4 August 2024.

recourse to arbitration even when they have not expressly consented to the arbitration agreement. One such instance was the development of the Group of Companies Doctrine where the courts have allowed the joinder of non-signatories based on their mutual intention to be bound by the arbitration agreement.<sup>25</sup> Similarly, assignment presents an exception where a third party is allowed recourse to arbitration even if it has not expressly consented to the arbitration agreement.

Further, the principle of separability was adopted for two reasons: (i) party autonomy as parties expect to resolve the dispute through arbitration arising from the contract, and (ii) promoting arbitration.<sup>26</sup> The use of this principle in cases of assignment would render the two objectives redundant as parties expect the arbitration agreement along with the contract to be carried forward when they assign the same. Similarly, if the arbitration agreement requires a higher threshold of explicit consent, it can enable the assignee to escape arbitration even when the contract has been assigned to them. It would go against the objective of promoting arbitration because providing express consent whenever a contract is transferred would make it burdensome and difficult for the parties, especially in situations where there is a chain of contracts.

It is because of these reasons this argument has been explicitly rejected by French courts.<sup>27</sup> It has been held that the autonomy of arbitration agreements does not mean that arbitration clauses should necessarily be accepted separately.<sup>28</sup> This is because the principle of autonomy does not require the parties to showcase two distinct intentions. A similar approach has been endorsed by the Swedish Supreme Court.<sup>29</sup> Indian courts should follow a similar approach as that of leading arbitration jurisdictions because of the acceptance of arbitration as a widespread mechanism for resolving a dispute. In commercial transactions, it is efficacious to presume that the consent of the parties to the assignment of a contract amounts to consent

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25. *Cox & Kings Ltd v SAP India (P) Ltd*, (2024) 4 SCC 1.

26. *Albana Karapanco* (n 3) 43.

27. *Montané v Compagnie des chemins de fer portugais* (Cass civ, 12 July 1950) 77 JDI 1206; *Soules v Henry* (Cass com, 4 February 1986) 1988 Rev Arb 718.; Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) ch 4, 417-446, 427.

28. Frédéric Leclerc, 'Les Chaînes De Contrats En Droit International Privé' (1995) 122 JDI 267, (408)-(492).

29. *MS Emja Braack Schiffahrts KG v Wärtsilä Diesel Aktiebolag*, 1998 REV. ARB. 431 (Sweden).



to be bound by an arbitration agreement as the parties expect to assign the contract as a whole.

## **B. Arbitration Agreement Amounts to an Obligation Requiring Express Consent**

A contract can be assigned by either transferring rights or obligations under a contract. However, the Supreme Court in *Khardah Co.*<sup>30</sup> has distinguished the assignment of rights from the assignment of obligations under the contract. It stated that obligations under a contract cannot be assigned without the consent of the assignee (the party receiving the assigned obligation). It further stated that when such consent is given by the assignee, the contract would amount to a novation resulting in the substitution of liabilities. It would amount to novation as it assigns an obligation to the assignee. An arbitration agreement is seen as an obligation as the parties can be compelled to arbitrate after they have provided their consent to be bound by the arbitration agreement initially. Therefore, it is argued that the assignment of the arbitration agreement would amount to the novation of a contract under Section 62 of the Indian Contract Act 1872, and would require ‘express consent’ from the assignee as it amounts to an obligation. The argument also derives support from the common law principle which considers that arbitration agreement gives rise to an ‘obligation’.<sup>31</sup> Similarly, the French Court of Appeal in *SMABTP v Statinor*<sup>32</sup> has held that the assumption of obligations, in contrast to a right, requires knowledge of such obligations on the assignee because of the view that arbitration agreements create mostly duties and not rights.

It is clear that the Supreme Court in *Khardah Engineering* was discussing the ‘obligation of performance of the contract and not the ‘obligation to arbitrate’. In *M. Dayanand Reddy v A.P. Industrial Infrastructure Corpn Ltd*<sup>33</sup>, the Supreme Court hinted that the arbitration clause does not impose any obligation on the other party. A similar indication was provided by the Bombay High Court in *Vishranti CHSL v Tattva Mittal Corpn (P) Ltd*<sup>34</sup>. However, we have yet to come across a case where such a detailed

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30. *Khardah Co Ltd v Raymon & Co (India) (P) Ltd* 1962 SCC OnLine SC 28, 7; *Kapilaben v Ashok Kumar Jayantilal Sheth* (2020) 20 SCC 648, 30.

31. *GMAC Commercial Credit LLC v Springs Industries* 171 F Supp 2d 209 (SDNY 2001) 214.

32. *SMABTP v Statinor* (Cour d’appel de Paris 22 March 1995), reprinted in (1997) Rev Arb 550, 552.

33. (1993) 3 SCC 137, 8.

34. 2020 SCC OnLine Bom 7618.

discussion on whether the arbitration agreement amounts to an ‘obligation’ has been made by the Supreme Court. Therefore, there is a need to look into the policy reasons and discussions that have been held in the foreign jurisdictions on this issue where they have moved away from treating an arbitration agreement as an obligation.

The treatment of an arbitration agreement as an obligation makes it difficult for the parties to enter into a series of contracts and ensure that every time an assignment occurs, express consent is taken from the assignee to make him bound by the arbitration agreement. It is because of such commercial hardship and to increase business efficacy, that leading jurisdictions such as the USA, France, and Singapore have moved away from the idea of arbitration as an obligation. The New York City Court in *GMAC Commercial Credit LLC v Springs Industries*<sup>35</sup> was dealing with the issue of whether a financial assignee can be exempted from contractual arbitration as it amounts to an obligation. It emphasised that the common law view of arbitration as an ‘obligation’ has been replaced in recent times.<sup>36</sup> It is because this view was based on the idea that the assignee never stands in any better position than the assignor and is thus subject to all equities and burdens that the assignor had to bear.<sup>37</sup> The court held that such an idea is based on an elementary ancient understanding and is sensible only to the extent that ‘obligations’ refers to performance obligations in a contract, and not to the obligation to arbitrate.<sup>38</sup> It stated that the underlying basis for the arbitration agreement as an obligation does not hold true in the current context as the assignee can be in a better position than his assignor and need not take all rights and burdens through the assignment. The concern of the court was that if the arbitration agreement is treated as an obligation requiring specific consent, the parties can escape arbitration by selective assignment where only rights or partial obligations are transferred.<sup>39</sup> Therefore, it stated that an arbitration agreement should be seen as a contractual ‘remedy’ and not as an obligation. A contractual remedy has been defined as a right that is available to an aggrieved party to which they are entitled with or without

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35. *GMAC Commercial Credit LLC* (n 31).

36. *ibid.*

37. *ibid.*

38. To better understand this argument, it is necessary to appreciate that there exist two types of obligations arising from the contract containing an arbitration agreement: (i) obligation of performance of the contract; and (ii) obligation to arbitrate.

39. *GMAC Commercial Credit LLC* (n 31); also See *Banque De Paris Et Des Pays-Bas v Amoco Oil Co* 573 F Supp 1464 (SDNY 1983); *Hosiery Manufacturers’ Corp’n v Goldston*, 238 NY 22, 28, 143 NE 779 (1924).

resorting to a tribunal.<sup>40</sup> Justice Sofaer in *Banque De Paris Et Des Pays-Bas v Amoco Oil Co*<sup>41</sup> stated that “an assignee or other party whose rights are premised on a contract is bound by the remedial provisions bargained for between the original parties to the contract.” Leading commentaries also consider an arbitration agreement as a legal remedy that does not require specific consent of all the parties involved in the assignment contract.<sup>42</sup>

Recently, a similar position has been taken by the Singapore High Court in *Cassa Di Risparmio Di Parma e Piacenze SpA v Rals International Pte Ltd*<sup>43</sup> where it discussed whether an assignee is bound by an arbitration agreement entered into between the assignor and the obligor. The judge explained that an arbitration agreement is a ‘procedural right’ that provides an opportunity for the parties to enforce the rights and obligations arising from the contract. Therefore, a transfer of benefits/rights would necessarily carry the “procedural fetter” of the obligation to arbitrate. It held that there is no need for express consent as the parties cannot break apart the right and the remedy provided in the contract as they are seen as an indivisible whole.

Although the French courts have seen arbitration agreements as an obligation, they have also diluted the need for express consent by interpreting it in a different manner. They have held that in circumstances where the assignee has accepted the underlying contract as a whole, there is a presumption that they have expressed their consent to be bound by the arbitration agreement.<sup>44</sup> Therefore, even if the arbitration agreement is seen as an obligation, there is no need for specific consent as there is a presumption of consent to be bound by the arbitration agreement upon the assignment of the contract.

Therefore, Indian courts should seek guidance from the leading arbitration jurisdictions mentioned above in this paper. It should either treat the arbitration agreement as a remedy (USA and Singapore) that compulsorily goes along with the rights assigned or treat them as an obligation with a

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40. *GMAC Commercial Credit LLC* (n 31) 216.

41. *Pays-Bas* (n 39).

42. Daniel Girsberger, ‘The Law Applicable to the Assignment of Claims Subject to an Arbitration Agreement’ in Franco Ferrari and Stefan Kröll (eds), *Conflict of Laws in International Commercial Arbitration* (1st edn January 2019).

43. *Cassa Di Risparmio Di Parma e Piacenze SpA v Rals International Pte Ltd* (2016) 1 SLR 79.

44. Nelson GOH, ‘An Assignee’s Obligation to Arbitrate and the Principle of Conditional Benefit’ (2016) 28 Singapore Academy of Law Journal 262, 271.

presumption that consent to the assignment of contract amounts to the consent to be bound by the arbitration agreement (France).

### 3. PRINCIPLES GOVERNING AUTOMATIC TRANSFER OF ARBITRATION AGREEMENT

Part I of this paper has shown that an arbitration agreement is an integral (not distinct and autonomous) part of the contract and is seen as a remedy (not an obligation) that goes along with the rights assigned in the contract. It also showed that the premises on which 'express assignment' theory is based do not hold true. Once such a relationship between the contract and the arbitration agreement is established, this part proceeds to deal with the legal principles and doctrines that govern the automatic transfer of arbitration agreement upon the assignment of the contract.

The advocates of the 'automatic transfer' approach do not negate the idea that consent and privity of contract are involved in the assignment of the arbitration agreement. They differ from the 'express assignment' approach in the nature and extent of consent that is required by the parties involved in the assignment of a contract. They argue that it is more pragmatic and efficient to infer the consent of the parties rather than looking for express consent to be bound by the arbitration agreement. Such an understanding is in line with the broadening ambit of consent in the Indian arbitration jurisprudence. The position of such a wide understanding of consent was summarised by the Supreme Court in *Cox & Kings Ltd v SAP India (P) Ltd*<sup>45</sup>, where the Court discussed the issue of consent and privity in multi-party or chain contracts. It was held that in view of commercial reality, a third party or a non-signatory can be bound by an arbitration agreement through means other than signature. The only consideration is to figure out whether the third party intended to effect legal relations with the signatory parties and be bound by the arbitration agreement.<sup>46</sup> This paper presents three legal principles through which the assignee can exercise a right or be compelled to arbitrate.

#### C. Doctrine of Implied or Constructive Consent

The doctrine of implied consent is the most widely used doctrine to bind third parties to an arbitration agreement in India.<sup>47</sup> This doctrine is used

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45. *Cox & Kings* (n 25).

46. *ibid.*

47. *Cox & Kings* (n 25), 71.

to bind the parties to the arbitration agreement in an independent capacity. The underlying basis for this theory is based on the theory of implied consent by conduct which has been accepted by the Supreme Court.<sup>48</sup> The doctrine looks into the conduct or omission of the parties while entering into the contract to determine their consent. In the context of the arbitration agreement assignment, it will look into the conduct of the involved parties during and after the contract assignment to determine their intention. Part I of the paper has argued that the arbitration agreement is a part of the contract which is a relevant starting point for this doctrine. According to this doctrine, the consent provided to the assignment of the contract would amount to the consent to be bound by an arbitration agreement because the latter forms a part of the former. Therefore, there lies a rebuttable presumption that parties have impliedly consented and intended to be bound by the arbitration agreement unless there is an indication to the contrary. Several High Courts have applied this doctrine to shift the right and burden of arbitrating on the assignee after the assignment of the Contract. The Bombay HC in *DLF Power Ltd v Mangalore Refinery & Petrochemicals Ltd*<sup>49</sup> held that the respondent has treated the petitioner as the successor of DLF Industries Limited who has taken all other rights, obligations, and benefits through assignment. Therefore, the respondent cannot say that all other rights and obligations have been transferred except the right to arbitrate. The court has held that the respondent has provided implied consent through their conduct providing the petitioner with the right to arbitrate. Similarly, the Delhi HC in *Rajesh Gupta v Mohit Lata Sunda*<sup>50</sup> held that the assignee would be bound by the arbitration agreement as it was 'aware' of the arbitration agreement present in the main contract. Therefore, if it has undertaken entire rights and obligations and not specifically excluded the arbitral clause through assignment despite being aware of the same, it is presumed that it has impliedly consented to the same.

It is reasoned that the assignee has the opportunity to review the terms of the contract before the assignment of the contract and decide what commercial risks it wishes to take. If they enter into an assignment contract after knowing the existence of the arbitration agreement between the original contracting parties, there lies a strong rebuttable presumption against them.<sup>51</sup> The doctrine of implied consent takes into account the needs of

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48. *Haji Mohammed Ishaq v Mohd Iqbal and Mohd Ali & Co* (1978) 2 SCC 493.

49. 2016 SCC OnLine Bom 5069.

50. 2020 SCC OnLine Del 2563, 35.

51. Emmanuel Gaillard (n 27) 428.

modern commerce and trade and ensures that there is a presumption of consent to be bound by the arbitration agreement in a contract inferred through the conduct or omission of the parties. This is crucial in modern commerce, where transactions are increasingly complex, involving multiple parties and regular assignment of contracts. Such a presumption allows parties to enter into multi-party and chain of contracts without worrying about the requirement of specific consent for the arbitration agreement. It states that the obligor or the assignee would be bound by the arbitration agreement after assignment if the circumstances demonstrate that they have impliedly consented to be bound by the agreement.

#### **D. Doctrine of ‘Claiming Through or Under’**

Section 8 of the Arbitration and Conciliation Act, 1996 states that a party can be referred to arbitration by the courts if they are parties to the contract or are claiming through or under them. In contrast to the ‘implied consent’ doctrine, this doctrine is used to bind the parties in a derivative capacity. The Supreme Court in *Chloro Control India (P) Ltd v Severn Trent Water Purification Inc*<sup>52</sup> held that a third party can be bound by the arbitration agreement if it is claiming through or under the signatory. The court in *Cox & Kings*<sup>53</sup> also held that the typical scenarios where this doctrine is used are “assignment, subrogation, and novation.” Through this doctrine, a third party does not become a ‘party’ to an arbitration agreement but claims in a derivative capacity on behalf of the signatory. In these circumstances, the original contract is not diminished but assigned to a new party who steps into the shoes of the assignor. The assignee is a third party who has the right to compel the obligor to arbitrate in a derivative capacity.

In an assignment contract, the assignee enters into the shoes of the assignor and can bring a claim for arbitration on behalf of the assignor. The assignee derives the right to arbitrate from the assignor as they become the successor of the signatory party. This doctrine can be described as one of the subsets of the implied consent doctrine where consent is inferred from the contractual relationship that exists between the parties. It is presumed that when a contract of assignment occurs, the parties intend to transfer every right including the right to arbitrate to the assignee. Although the courts in India have yet to make explicit use of this doctrine to allow the assignee to exercise the right to arbitrate in a derivative capacity, they have allowed the assignee to arbitrate independently on similar reasoning. For

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52. *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641.

53. *Cox & Kings* (n 25), 8.5.

instance, the Bombay High Court in *DLF Power Ltd*<sup>54</sup> has held that if a party has stepped into the shoes of the other through the assignment of the contract and has taken rights, obligations, and duties, it cannot exclude the arbitration agreement unless expressly provided. Similar reasoning has been provided by the Delhi High Court in *Bestech India (P) Ltd v MGF Developments Ltd*<sup>55</sup> where they held that an assignee can exercise the right to arbitrate if it has stepped into the shoes of the assignor. Thus, there is no need for specific consent to the arbitration agreement if the assignee claims in a derivative capacity under this doctrine.

Several authors have argued that even when the assignee claims in a derivative capacity, it is possible to submit the claims to arbitration under its own name.<sup>56</sup> In such circumstances, it would not be necessary for the assignor to be joined in the arbitration proceedings. However, the doctrine in itself is limited as it only speaks about a ‘right’ and not the duty to arbitrate; i.e., the assignee has a ‘right’ to compel the obligor to arbitrate but cannot be compelled to arbitrate. Therefore, this doctrine is seen with the doctrine of estoppel and conditional benefit where the duty is said to accompany the right to arbitrate.

### **E. Doctrine of Estoppel & Conditional Benefit**

The doctrine of estoppel was used by the Delhi HC in *Tomorrow Sales Agency*<sup>57</sup> to bind the assignee to an arbitration agreement where it was held that an “assignee of a contract who enjoys the benefit of the rights assigned cannot avoid the application of the arbitration clause contained in that contract.” Further, the same court, in *Shapoorji Pallonji and Co. (P) Ltd v Rattan India Power Ltd*<sup>58</sup> has noted that deriving benefits from the contract containing an arbitration clause is an important factor in compelling the said beneficiary to arbitrate. Recently, the theory of estoppel was properly explained and applied by the Delhi High Court in *Gaurav Dhanuka v Surya Maintenance Agency (P) Ltd*<sup>59</sup> where it explained the ‘direct benefits’

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54. *DLF Power* (n 49).

55. *Bestech India (P) Ltd v MGF Developments Ltd* 2009 SCC OnLine Del 698.

56. *Rumpuz (Panama) SA and Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines*, The “Leage” (1984) 2 Lloyd’s Rep 259; Stephen Jagusch and Anthony Charles Sinclair, ‘The Impact of Third Parties on International Arbitration – Issues of Assignment’ in Loukas A Mistelis and Julian D M Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 291-319.

57. *Tomorrow Sales Agency (P) Ltd v SBS Holdings Inc* 2023 SCC OnLine Del 3191.

58. 2021 SCC OnLine Del 3688.

59. (2023) 7 HCC (Del) 53.

estoppel. It stated that it is an equitable doctrine that prohibits a party from taking an inconsistent position or “having it both ways by relying on it when it works to its advantage and ignoring it when it works to its disadvantage.” It is based on the idea of fairness that the burden and rights of the parties go together. The doctrine was also explained by the English Court of Appeal in *Jay Bola*<sup>60</sup> case, where it held that the company cannot enforce its right, obtain through enforcement without also recognising the obligation to arbitrate. Similarly, the English court while dealing with subrogation has held that it would be inconsistent to enforce contractual rights without accepting the obligation to arbitrate.<sup>61</sup>

Along the same line, the doctrine of conditional benefit has been explained by the court in *Tito v Waddell*<sup>62</sup> where it was held that the right and burden to arbitrate are intrinsic in nature where they have been annexed to each other *ab initio*. Therefore, one cannot pick out the good and reject the bad and hence the benefit/right to arbitrate is only a conditional benefit that cannot exist without the burden. The courts have also stated that an assigned benefit can be a conditional benefit only in conditions where the burden cannot exist independently of the relevant benefit.<sup>63</sup> In cases of arbitration agreements, it is clear that the burden to arbitrate is intrinsic to the right to arbitrate. Therefore, it fulfils and is covered by the conditional benefit principle. Such an approach has also been statutorily incorporated in legislations such as the English Contract (Right to Third Parties) Act, 1999 which mentions that a party expecting to enforce his contractual rights through arbitration should also be bound by arbitration. Hence, if the assignee steps into the shoes of the assignor and claims the right to arbitrate ‘through or under him’ or even in an independent capacity, they would be bound by the arbitration agreement as they are deriving the benefit from the contract through the assignment of rights.

#### 4. CONCLUSION

The automatic transfer approach is widely recognised and followed in major jurisdictions like USA, UK, France, and Singapore. Most of these jurisdictions have shifted to this approach because of its pragmatic nature

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60. *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* (The Jay Bola) (1997) 2 Lloyd’s Rep 279 (16 April 1997).

61. *West Tankers Inc v Ras Riunione Adriatica Di Sicurtà* (2005) 2 All ER (Comm) 240 : (2005) 2 Lloyd’s Rep 257, 261-62.

62. *Tito v Waddell* 1977 Ch 106.

63. *ibid.*



and the need arising from the rise in commercial transactions. Most of these contracts contain an arbitration agreement where the parties expect their dispute to be resolved through arbitration. The automatic transfer approach promotes arbitration and preserves party autonomy by ensuring that the other parties don't escape obligation during the assignment of the contract. India needs to follow this approach as it is pro-arbitration and is in line with the broad idea of consent provided by the Supreme Court in *Cox & Kings*. Until clarity is achieved on this issue, the parties should explicitly state in the assignment contract whether or not the right and burden to arbitrate is transferred to the assignee.