Assignment of Rights and Agreement to Arbitrate

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IN the context of domestic and international business transactions, parties routinely assign to third parties legal rights arising from their contractual relationships. While the assignment of such contractual rights and their eventual enforcement by third parties usually pose no specific procedural problems, several issues are likely to emerge in case the contract concluded between the original parties (the 'main contract') contains an arbitration clause. Questions arising in this instance are not only whether the arbitration clause travels automatically with the assigned contractual right to the assignee, but also what law is applicable to this issue, and who – arbitrator or domestic court – is competent to rule on the matter.

Despite the practical importance of these questions, there is only sparse commentary and case law addressing these issues on a domestic level, and even less analysis addressing international perspectives. Existing studies generally focus on the less problematic aspect of transferring (assigning) entire contracts[1]

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[1] Although the terms 'transfer' and 'assignment' are often used interchangeably, it is preferable to speak of assignment only in the context of contractual rights, because the legal effects of the transferral of entire contracts as opposed to individual contractual rights are different. See Farnsworth, III *Farnsworth on Contracts*, § 11.1 (1990).

in the presence of an arbitration clause and seldom distinguish the assignment of individual contractual rights.

The purpose of this article is a comparative analysis and critique of solutions offered to the question of transfer of the arbitration clause with a view to establishing uniform rules on this subject for international arbitration. To this end, the article will first present an overview of solutions developed by common law and civil law jurisdictions as well as by international arbitration conventions and institutional arbitration rules. It will then turn to an analysis and evaluation of the various factors which should be taken into consideration in establishing a rule for the transfer of the arbitration clause. The article will also analyze and assess the law applicable to the question of transfer in a conflict-of-law situation. It will conclude with a proposal for uniform substantive and conflict of law rules on the transfer of arbitration agreements in international commercial arbitration.

I. EFFECTS OF ASSIGNMENTS OF CONTRACTUAL RIGHTS ON ARBITRATION AGREEMENTS – A JURISDICTIONAL OVERVIEW

(a) *Common Law Countries*

(*i*) *United States*

Most cases addressing the issue of transfer of arbitration clauses under U.S. law deal with this question in the context of transfer of entire *contracts*. In case an entire contract is transferred, U.S. courts have held that the arbitration clause passes along with the contract and that the arbitration provision of the main contract is both available to and may be invoked against the assignee.[2] Courts have reached this result by applying general principles of the law of assignment. Under these principles, an assignment ordinarily passes whatever is necessary to make it completely effectual, and vests in the assignee all rights, remedies and benefits which are incidental to the contract transferred, except those which are personal to the assignor and for his benefit only.[3] U.S. courts have allowed for exceptions to this rule in cases of an express or implied

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[2] See, e.g., *Lipman* v. *Haeuser Shellac Co.*, 289 N.Y. 76, 81 (1943); *S & L Vending Corp.* v. *52 Thompkins Avenue Restaurant, Inc.*, 274 N.Y.S.2d 697, 26 A.D.2d 935 (2d Dept. 1966) (cases stating the availability of the arbitration agreement *to* the assignee), *as well as Blum's Inc.* v. *Ferro Union Corp.*, 318 N.Y.S.2d 414, 415 (1971); *Star-Kist Foods, Inc.* v. *Diakian Hope, S. A.*, 423 F. Supp. 1220, 1222–23 (C.D. Ca. 1976); *Asset Allocation and Management Co.* v. *Western Employers Ins. Co.*, 892 F.2d 566, 574 (7th Cir. 1989) (cases stating that the arbitration agreement may be invoked *against* the assignee). See also Annotation, Arbitration Provisions of Contract as Available To or Against Assignees, 142 A.L.R. 1092 (1943); 6 Am.Jur.2d § 119 (1963); 6A C.J.S. § 76 (1975); A. Corbin, 4 *Corbin on Contracts* § 892 (1951 & Supp. 1991); *Domke on Commercial Arbitration*, § 10.05, p. 128 (1984 & Supp. 1990).

[3] 6A C.J.S. § 76 (1973) *citing Kintzel* v. *Wheatland Mut. Ins. Ass'n*, 203 N.W.2d 799, 806 (Iowa 1973).

provision to the contrary,[4] or in cases of contracts which involved duties of a personal nature or whose assignment was prohibited by statute.[5]

Few cases address the issue of transfer of the arbitration clause in case only contractual *rights*, not entire contracts or duties, are assigned.[6] Early cases have held that the assignee is bound by an arbitration clause contained in the main contract. Thus, in *Hosiery Mfg. Corp.* v. *Goldston*[7] the court referred an assignee of trade acceptances who had brought action against the acceptor in court to arbitration because '[a]rbitration contracts 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.[8]

More recent cases, however, have held that an assignee of rights is generally not bound to arbitrate. Thus, the court held in *Kaufman* v. *William Iselin & Co., Inc.*[9] that a factor who had been assigned invoices by the seller was not compelled to arbitrate when the purchaser tried to assert a claim for defective goods against him by way of arbitration. The court found that '[a] mere assignment of an invoice ... for purposes of securing a loan made by a commercial banker is not a situation in which it may be said that it was the intention of the parties that the factor should assume performance of the basic contract.'[10] Similarly, the court held in *Lachmar v. Trunkline LNG Co.*[11] that since, under applicable New York State law, an assignee was not bound to perform the assignor's duties, and since the duty to arbitrate was considered one of these duties, the assignee was not bound to arbitrate.[12]

Both those decisions that advocate that an assignee of rights is bound (*Lachmar*) and those decisions that hold that the assignee is not bound by the arbitration agreement (*Hosiery*) allow exceptions to their rules. Under the *Lachmar* rule, an assignee is considered bound by the arbitration agreement in case he has, either expressly or by implication, indicated his willingness to be

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4 See *Service, Hospital Nursing Home and Public Employees Union* v. *Commercial Property Services*, 755 F.2d 499 (6th Cir. 1985); *I. S. Joseph Co., Inc.* v. *Michigan Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986).

5 *S & L Vending Corp.* v. *52 Thompkins Ave. Restaurant*, 15 A.D.2d 935, 936, 274 N.Y.S.2d 697, 698 (2d Dept. 1966): 'In the absence of an express or implied provision to the contrary, a contract, other than one which involves duties of such a personal or unique character as cannot be delegated, or of which assignment is prohibited by statute, may be assigned...' *See also Maritime Co. 'Spetsai,' S. A.* v. *International Commodities Export Corp.*, 348 F. Supp. 258, 259 (S.D.N.Y. 1972), where the court held a contract to be non-assignable in the event it would constitute a personal contract.

6 Virtually all cases addressing the issue have been decided under New York law.

7 238 N.Y. 22, 143 N.E. 779 (1924).

8 *Ibid.*, 143 N.E. at 780. See also *Crompton-Richmond Co.* v. *William Nelligan, Inc.*, 151 N.Y.S.2d 154, 157 (1956).

9 74 N.Y.S.2d 23 (App. Div. 1947).

10 *Ibid.*, at 26.

11 753 F.2d 8, 9–10 (2d Cir. 1985): 'Under New York law,...the assignee of rights under a bilateral contract is not bound to perform the assignor's duties under the contract unless he expressly assumes to do so [cite omitted]. Included among the duties to which this rule has reference is the duty to arbitrate.'

12 *Ibid.*

bound by the arbitration agreement.[13] Under the *Hosiery* rule, the assignee is considered not bound by the arbitration clause in cases of statutory or contractual non-assignability of the assigned right or arbitration agreement.[14] Furthermore, an assignee has been considered not to be bound when it is clear that either the arbitration agreement or the *receptum arbitri* is personal in character. Thus, if the terms of an arbitration agreement provided for the personal appointment of an arbitrator by the assignor, an appointment by the assignee has been deemed to be ineffective.[15] Finally, in a case where an arbitration agreement was entered into *after* a dispute or difference had arisen between the parties, the court found that such an agreement was purely personal with the sole purpose to settle existing differences between specific individuals.[16]

Academic commentators are practically silent on the issue. They usually do not distinguish between the transfer of contracts and the assignment of rights. And those few commentators that make the distinction adopt without further commentary the courts' holdings.[17]

(ii) *United Kingdom*

In England, the cases which have been decided on the issue of transfer of the arbitration clause in case of assignment of contractual claims do not show a clear rule. In *Cottage Club Estates* v. *Woodside Estates Co.*[18], which involved the assignment by certain contractors of moneys due or to become due under a contract with certain property owners for the erection of houses, the court held that the assignment did not transfer to the assignee any right in an arbitration clause contained in the contract, because it considered the arbitration clause to be 'a personal covenant'.[19] The court concluded that the arbitration clause remained 'in full force and effect as between the original parties'.[20] In contrast, the court held in *Shayler* v. *Woolf*[21] that the arbitration

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[13] See *Lachmar* v. *Trunkline LNG Co.*, *supra*, note 11, at 753 F.2d 9–10: 'Under New York law, made applicable by the parties, the assignee of rights under a bilateral contract is not bound to perform the assignor's duties under the contract *unless he expressly assumes to do so*... Included among the duties to which this rule has reference is the duty to arbitrate.' (Emphasis added.) *See also United States* v. *Panhandle Eastern Corp.*, 672 F.Supp. 149 (D.Del. 1987).

[14] See *Hosiery*, *supra*, note 7, at 143 N.E. 780. It should be noted, however, that under the terms of the Uniform Commercial Code (UCC) – which has been adopted in its basic form by all US States – a non-assignability clause between the assignor and the debtor (obligor) is non-binding upon the assignee with respect to an assignment of multiple claims. Thus, UCC Section 9–318(4) states, in relevant part: 'A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account...or requires the account debtor's consent to such assignment.'

[15] Corbin, *supra*, note 2, at § 892.

[16] *In Re Lowenthal*, 199 App. Div. 39, 191 N.Y.S. 282 (1921), *aff'd without opinion* in 233 N.Y. 621, 135 N.E. 944 (1922): '...[A]n arbitration entered into after a dispute or difference has arisen between the parties...[arguably]...is purely a personal agreement to settle existing differences.'

[17] See Corbin, *supra*, note 2; Annotation, *supra*, note 2.

[18] [1928] 2 KB 463, 466; 97 L.J.K.B. 72, 74.

[19] *Ibid.*: 'The arbitration clause is a personal covenant, and...cannot be transferred...'

[20] *Ibid.*

[21] [1946] Ch. 320; 115 L.J.Ch.D. 131.

clause may be transferred to and thus bind the assignee. The court interpreted *Cottage Club* as meaning that an arbitration clause could be transferred in case the other original party agreed to such transfer.[22] The court found that a rule to the contrary would be a 'far-reaching conclusion.'[23]

Academic commentators are divided on the issue. While some argue that the assignee should not be bound by an arbitration clause contained in the main contract, others think that the assignee should be bound.[24]

(b) *Civil Law Countries*

(i) *Germany*

German courts have on a number of occasions dealt with the question whether arbitration agreements are transferred together with the assignment of a claim originating from the main contract.[25]

The first German court to address the issue, the *Reichsgericht* (RG), held that arbitration agreements are in general automatically transferred together with the assigned claim, because parties generally intend to transfer the arbitration agreement when they assign a claim.[26] Only in those instances where the original parties expressly prohibited the transfer of the arbitration agreement[27] or where its interpretation revealed that the agreement was concluded *intuitu personae*, i.e. specifically because of the identity of the other party to the main contract, would there be no automatic transfer.[28]

The German Federal Supreme Court (*Bundesgerichtshof*, 'BGH'), successor of the RG, has similarly insisted on an automatic transfer of the arbitration

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22 *Ibid.*, at 135: '[The judge] did say, in the Cottage Club Case, that the arbitration clause was a personal covenant and could not be transferred (citation omitted), but the facts of the case show that, in my judgment, he meant that the rights under the arbitration clause could not be transferred from the assignor to the assignee without the concurrence of the other party to the contract...'

23 *Ibid.*

24 Compare Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* 106–07 and n.8 (1982) (arguing that although the presence of the arbitration clause does not prevent the assignee from obtaining a valid right of claim, he has to enforce his claim by action rather than arbitration, on the basis that the respondent agreed to arbitrate with the claimant, but not with some outsider) *with* Walton & Vitoria, *Russell on the Law of Arbitration* 169 (20th ed. 1982) (apparently arguing that an arbitration clause will bind a valid assignee).

25 See Reichsgericht (RG) in 56 RGZ 182 (1904); 146 RGZ 52 (1935) and Bundesgerichtshof (BGH) in 68 BGHZ 356 (1975); WM 331 (1976); WM 999 (1978); 32 NJW 2567 (1979); 77 BGHZ 32 (1980).

26 56 RGZ 182, 183 (1904): 'Es ist nun aber auch der Vorinstanz darin beizutreten, daß bei der hiernach rechtsgültig erfolgten Cession jener Forderung...die solchen Anspruch umfassende Schiedsgerichtsklausel in Gemäßheit des vermutlichen Willens jener Personen auf den Cessionar sich erstreckt.' See also 146 RGZ 52, 55 (1935).

27 56 RGZ 182, 183 (1935). With respect to non-assignability clauses concluded between the assignor and the obligor, the German Civil Code (BGB), like most other European civil codes, gives effect to such clauses even against a *bona fide* assignee (see § 399 BGB).

28 56 RGZ 182, 183 (1904): 'Dies würde nur dann anders sein, wenn aus dem unter den erstgedachten Personen geschlossenen Vertrage oder den Umständen, unter welchen derselbe zustandegekommen, entnommen werden könnte, daß der Schiedsvertrag wegen besonderen Vertrauens, welches die Kontrahenten ineinander in Rücksicht auf die Ausübung der daraus sich ergebenden Rechte gesetzt haben, an die Person geknüpft sein sollte.'

clause. Contrary to the RG, however, the BGH has not justified this rule by presuming a hypothetical party intent, but by drawing an analogy to §401 of the German Civil Code (BGB) which governs the scope of assignments of contractual claims. According to §401 BGB '[t]he assignment of a claim includes the transfer of ordinary mortgages, mortgages on ships, liens securing the claim, as well as rights arising from a surety agreement entered to secure the claim.'[29] Comparing the arbitration clause with the security interests listed in §401 BGB, the BGH has considered the arbitration agreement to be an attribute of the claim (*'Eigenschaft des abgetretenen Rechts'*) which as such is assigned automatically together with the claim itself, without requiring the assignee's separate consent to the arbitration agreement.[30] Similar to the *Reichsgericht*, the BGH has allowed exceptions to the rule of automatic transfer, namely when it is clear – either expressly or by implication – from the initial arbitration agreement that the parties wished to exclude the arbitration agreement having an effect on assignees.[31]

The majority of German commentators agree with the decisions of the RG and the BGH.[32] Only a minority of authors have argued – so far unsuccessfully – that the transfer of arbitration agreements cannot occur automatically, but rather requires the separate consent of the assignee in order to be binding on the latter.[33]

(ii) *Austria*

In Austria courts have, with a few early exceptions, consistently resolved the question whether arbitration agreements are transferred along with the assigned claim in favour of an automatic transfer.[34] In doing so, they have looked towards §1394 of the Austrian Civil Code (ABGB) dealing with the scope of the assignment of contractual claims. §1394 states that 'the assignee's rights are identical to the assignor's rights with respect to the assigned claim'.[35] Similar to the German courts, Austrian courts have viewed the right to arbitrate as a right passing automatically as incident to the assigned claim under §1394. Austrian courts have allowed exceptions to this rule in those

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[29] §401 BGB: 'Mit der abgetretenen Forderung gehen die Hypotheken, Schiffshypotheken oder Pfandrechte, die für sie bestehen, sowie die Rechte aus einer für sie bestellten Bürgschaft auf den neuen Gläubiger über.'

[30] See Stein, Jonas & Schlosser, *Kommentar zur Zivilprozeßordnung* § 1025 BGB, Nr. 40–41; § 1027 BGB, Nr. 7 (20th ed. 1987).

[31] See BGH in NJW 1976, 852; 71 BGHZ 162, 164–65 (1978).

[32] Schwab, *Schiedsgerichtsbarkeit* 47 (3d ed. 1979); Glossner, *Das Schiedsgericht in der Praxis* § 49 (2d ed. 1978); Schütze, Tscherning & Wais, *Handbuch des Schiedsverfahrens* § 63 (1985).

[33] Schopp, *Die Abtretung im Schiedsgerichtsverfahren*, Konkurs, Treuhand und Schiedsgerichtswesen [KTS] 255 (1979); Schricker, *Zur Geltung von Schiedsverträgen bei Anspruchsabtretung*, Festschrift für Karlheinz Quack 99, 103 (1991).

[34] See OGH in JBl 1913, 215=GlUNF 5796=ZBl 1913/210; SZ VII/279 (1925); SZ XV/43 (1933); SZ XVIII/12 (1936). See also GlUNF 618=ZBl 1900/158; Rsp 1935/282; OLG Wien in EvBl 1935/657 and EvBl 1938/474. But see OGH in ZBl 1920/177 (1912).

[35] § 1394: 'Die Rechte des Übernehmers sind mit den Rechten des Überträgers in Rücksicht auf die überlassene Forderung ebendieselben.'

cases in which an interpretation of the arbitration agreement reveals that it was concluded *intuitu personae*.[36]

While most commentators agree with the solution offered by Austrian courts,[37] some scholars have recently started to criticize the courts' decisions on methodological grounds.[38] Indeed, all court decisions supporting the automatic transfer of the arbitration agreement date back to a pre-World War II era when arbitration agreements were viewed by the courts as common contracts subject to the provisions of the Civil Code with respect to their formation, interpretation and transfer.[39] Ever since, however, views about the nature of the arbitration agreement have changed. Arbitration agreements are no longer looked upon as contracts of substantive law (*Verträge des materiellen Rechts*), but rather as procedural law contracts (*Prozeßverträge*), which do not fall under the general provisions of the Civil Code.[40] Consequently, it is argued, §1394 ABGB cannot provide a valid basis for the transfer of the arbitration agreement.[41]

(iii) *Switzerland*

Under Swiss law, the arbitration agreement is considered a contract of procedural law which is governed by the law of the respective member state of the Federation (Canton) where the arbitral tribunal is or was intended to be located.[42] The law of assignment is governed by the Swiss Federal Code of Obligations ('code des obligations', CO).[43]

The *Bundesgericht* (Federal Tribunal), the highest court of the land, has not clearly resolved the issue whether an arbitration clause passes as incident to the assigned claim. In *Müller* v. *Bossard*,[44] a purely domestic case, the Federal Tribunal has pointed out that the question is one for the Cantonal law to resolve, which should take into consideration the intent of the parties.[45] In *Clear Star Ltd.*

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36 See, e.g., 56 RGZ 183 (1904).

37 Wolff in Klang (ed.), VI *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* 312 (2d ed. 1951); Matscher, *Zuständigkeitsvereinbarungen im österreichischen und internationalen Zivilprozeßrecht* 55 (1967); H. W. Fasching, IV *Kommentar zu den Zivilprozeßgesetzen* 730 (1971); H. W. Fasching, *Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht* 27 *et seq.* (1973); Ehrenzweig & Mayrhofer, II/1 *System des österreichischen allgemeinen Privatrechts* 503 (3d ed. 1986); Honsell in Schwimann (ed.), V *Praxiskommentar zum Allgemeinen Bürgerlichen Gesetzbuch* Rz 7 zu § 1394 (1987).

38 Rummel, *Schiedsvertrag und ABGB*, Österreichische Richterzeitung [RZ] 146, 151 (1986); G. Backhausen, *Schiedsgerichtsbarkeit unter besonderer Berücksichtigung des Schiedsvertragsrechts* 57–66 (1990).

39 See, e.g., Böhm, *Zur Rechtsnatur des Schiedsvertrages unter nationalen und internationalen Gesichtspunkten*, ZfRV 262 *et seq.* (1968).

40 See Böhm, *supra*, note 39. But see *infra*, at IIIb iii.

41 See Rummel, *supra*, note 38; Backhausen, *supra*, note 38.

42 See BGE 101 II 168, 170 (1975); Sträuli & Messmer, *Kommentar zur zürcherischen Zivilprozessordnung* § 238 No 6 (2d ed. 1982); Rüede & Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht* 69 (1980), and references therein.

43 See Arts. 164–174 CO.

44 BGE 103 II 75, 79–80 (1977).

45 The decision has been interpreted, however, to mean that as a matter of Federal law, an arbitration clause is presumed to be transferred to the assignee together with the assigned claim, except to the extent that the Cantonal *lex fori* declares it inseparable from the person of the assignor. See Kummer, Die privatrechtliche Rechtsprechung des Bundesgerichts im Jahre 1977, 115 Zeitschrift des bernischen Juristenvereins [ZbJV] 321, 322 (1979).

v. *Centromor*,[46] which dealt with an international setting, the Federal Tribunal held that a clause in which the parties to the main contract agreed not to assign rights arising from the contract[47] also prevented the transfer of the arbitration clause.[48]

The courts of the Cantons have regularly – either directly, or by way of analogy – applied the general rule governing assignments of claims to the question of transfer of an arbitration agreement. This rule, which is contained in Art. 170(1) CO, states that '[t]he assignment of a claim includes the transfer of the privileges and accessory rights, except those which cannot be separated from the assignor.[49] While some courts have held that the arbitration clause is a 'privilege', others have characterized it as an 'accessory right' to the claim within the meaning of Art. 170 CO. They have held that as a rule, an arbitration clause may be presumed to have been transferred together with the assigned claim. Only in those cases in which the arbitration agreement 'cannot be separated from the assignor', e.g. because it has been concluded with respect to an individual assignor, would the clause not be transferred along with the principal claim.[50]

So far, the majority of legal scholars have supported this court practice.[51] Most scholars have further elaborated on the determination of party intent, arguing that in case of doubt, it can be presumed that it is the intention of the parties to transfer the arbitration clause together with the assigned claim.[52] One commentator has expressed the view that an arbitration clause is automatically transferred with the claim to the extent that it confers a duty, and that to the

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46 Swiss Federal Tribunal, 1st Civil Division, decision of April 9, 1991, reprinted and translated in 8 J.Int'l Arb. 21–22 (1991).

47 With respect to non-assignability clauses concluded between the assignor and the obligator in general, the CO, like the German BGB, generally gives effect to such clauses even against a *bona fide* assignee. *See* Art. 164(1) CO which states:

> (1) A creditor may assign his claim to another person without the obligator's assent, unless the assignment is forbidden by law, *agreement* or the nature of the legal transaction.
> (2) Where a third person has become creditor on the faith of a written acknowledgment of debt which does not mention that the claim is non-assignable, the debtor cannot set up the defense against such third person that the non-assignability was agreed upon. (Emphasis added).

48 Swiss Federal Tribunal, *supra*, note 46, at 21–22.

49 'Mit der Forderung gehen die Vorzugs- und Nebenrechte über, mit Ausnahme derer, die untrennbar mit der Person des Abtretenden verknüpft sind.'

50 See, e.g., Appellationshof of the Canton of Berne, May 4, 1973, 111 ZbJV 200, 202 (1975); Obergericht of the Canton of Zürich, May 10, 1977, 76 Blätter für zürcherische Rechtsprechung [ZR] 157, 158 (1977); Obergericht of the Canton of Zürich, March 2, 1981, 80 ZR 191, 192 (1981); Handelsgericht St. Gallen, November 14, 1956, 54 Schweizerische Juristenzeitung [SJZ] 310, 311 (1958).

51 See Becker, VI *Berner Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht*, I. Abteilung, Art. 170 Nr. 1 (1941); Gauch, Schluep & Jäggi, II *Schweizerisches Obligationenrecht, Allgemeiner Teil* No. 2214 (3rd ed. 1983); Guldener, *Schweizerisches Zivilprozessrecht* 213 (2d ed. 1979); Keller & Schöbi, IV *Das Schweizerische Schuldrecht* 67–68 (1984); Leuch, *Kommentar zur ZPO für den Kanton Bern* 49 (3rd ed. 1956); Sträuli & Messmer, *Kommentar zur Zürcherischen Zivilprozessordnung* § 238 No. 15 (2d. ed. 1982). Bucher, *Schweizerisches Obligationenrecht, Allgemeiner Teil* 572 n.142 (2d ed. 1988), expresses the view that an arbitration clause follows the claim, because it is connected with it as a built-in element. See also Kummer, *supra* note 45, at 322; von Tuhr & Escher, II *Allgemeiner Teil des Schweizerischen Obligationenrechts* 357 (1974 & Supp. 1984); Engel, *Traité des obligations en droit suisse* 590 (1973).

52 See Rüede & Hadenfeldt, *supra*, note 42, at 70, with further references.

extent it confers rights, it should be found to be transferred only in case of doubt.[53] Other commentators have pointed out that a transfer should not be presumed in the event that the arbitration clause was based on personal, rather than objective reasons.[54]

(iv) *France*

Similar to the German, Austrian and Swiss legal orders, there is no explicit provision on the transfer of the arbitration clause ('clause compromissoire') in the case of assignment of entire contracts or individual contractual rights under French law. In case entire *contracts* were transferred, French courts have held that the assignee is bound by the arbitration clause by virtue of an analogous application of article 1122 of the French civil code (Code civil).[55]

In case of assignment of individual contractual rights, courts have usually looked to Art. 1692 Code civil which governs the assignment of contractual claims to determine whether the arbitration clause should be transferred automatically together with the assigned right. Art. 1692 stipulates that '[t]he sale or assignment of a claim includes all accessories attaching thereto, such as a right against the surety and any right of property or mortgage securing the same'.[56] Characterizing the arbitration agreement as an accessory right attaching to the claim under Art. 1692, courts have usually held that the arbitration agreement travels automatically with the assigned contractual right and that, as a consequence, the assignee has the benefit of and is bound by the arbitration agreement.[57]

So far, most academic commentators have agreed with the automatic assignment rule adopted by French courts.[58] Recently, however, legal scholars

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53 Von Büren, *Schweizerisches Obligationenrecht, Allgemeiner Teil* 327 (1964).

54 See Rüede & Hadenfeldt, *supra*, note 42, at 70, with further references in nn. 54–57; Jolidon, *Commentaire du Concordat suisse sur l'arbitrage* 141 (1984).

55 Art. 1122 Code civil reads: 'On est censé avoir stipulé pour soi et pour ses héritiers et ayants cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention.' See, e.g., Paris, 28.1.1988, 1988 Revue de l'arbitrage [Rev. arb.] 565. See also Paris, 15.3.1966, 1966 Rev. arb. 10: '[L]a cession de l'integralité des droits subsistant au profit du cédant et découlant d'un contrat comportant une clause d'arbitrage implique nécessairement transmission au cessionnaire du bénéfice de cette clause, indissociable de l'économie de la convention,' and Robert, *Arbitrage civil et commercial* 184 (§ 145) (4th ed. 1967).

56 Art. 1692 Code civil: 'La vente ou cession d'une créance comprend les accessoires de la créance, tels que caution, privilège et hypothèque.'

57 See Cass com., 12.7.1950, 77 J.D.I. 1206 (1950) [note Goldman]; Cass. com., 28.1.1958, D. 1958.531; *Société C.C.C. Filmkunst Gmbh c/Société Etablissement de Diffusion Internationale de Films* (Paris, 28.1.1988), 1988 Rev. Arb. 565, 568: '[U]ne...cession implique nécessairement transmission par le cédant au cessionnare du bénéfice de la clause d'arbitrage indissociable de l'économie du contrat,' and *Société Clark International Finance c/Société Sud matériel Service et autre* (Paris, 20.4.1988), 1988 Rev. Arb. 570, 571: '[L]a clause compromissoire insérée dans un contrat international a une validité et une efficacité propres qui commandent d'en étendre l'application à la partie venant – même partiellement – aux droits de l'un des contractants, à condition que le litige entre dans les prévisions de la convention d'arbitrage.'

58 See Gide, Loyrette & Nouel, *Le droit français de l'arbitrage* 126 (1983); de Boisséson, *Le droit français de l'arbitrage* 545–546 (1990); Goutal, *L'arbitrage et les tiers: Le droit des contrats*, 1988 Rev. arb. 439, 455; Delebecque, *La transmission de la clause compromissoire*, 1991 Rev. Arb. 19, 26; Mayer, Note sous Cass. civ. 1re (25.6.1991), 1991 Rev. arb. 453, 455.

have started to criticize the courts' holdings. Specifically, it has been argued that the autonomous nature of the arbitration agreement, a concept strongly embedded in French case law,[59] speaks against an automatic transfer of the arbitration agreement.[60]

(c) *International Arbitration Conventions and Institutional Rules*

(i) *New York Convention*

The New York Convention does not specifically address the issue whether an arbitration clause is automatically transferred together with an assigned claim. In the absence of an explicit rule, one can either argue that the issue is implicitly addressed by the Convention, or that the issue is left to regulation by the member states.

The first view has been taken by the Italian Supreme Court in *Zimmer* v. *Cremascoli*,[61] where the court held that the issue is implicitly addressed in art. II of the New York Convention.[62] *Zimmer* involved the assignment of a distributorship agreement containing an arbitration clause. The assignment, however, did not specifically mention the arbitration clause. When the assignee brought suit against the obligor in court, the obligor objected on the grounds that the assignee was bound to arbitrate by the clause contained in the original contract. The Italian Supreme Court held that, under the applicable New York Convention, the assignment was not sufficient to be treated as acceptance of the arbitration clause. It stated that a general reference in the assignment contract to standard conditions of sale without mentioning the arbitration clause did not meet the requirement of Art. II of the Convention, which the court interpreted as requiring that the consent to arbitration be 'evincible, clear and unambiguous.'[63]

The second view argues that no inference can be made from the text of the Convention and that the issue is consequently left to the regulation by

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[59] See the *Gosset* decision (Cass. civ. 1re, 7.5.1963, 91 J.D.I. 82 (1964)) and the *Hecht* decision (Cass. civ. 1re, J.D.I. 843 (1972)). See also Franceskakis, *le principe jurisprudentiel de l'autonomie de la clause compromissoire*, 1974 Rev. arb. 67, as well as Cass. civ. 1re (6.12.1988), 117 J.D.I. 134 (1990) (with annotation by Niboyet-Hoegy) and 1989 Rev. arb. 641 (with annotation by Goldman).

[60] See statements of professors Level, Fouchard and Loquin in *L'arbitrage et les tiers*, 1988 Rev. arb. 429 at 460, 469–70 and 472. For an analysis of this aspect see *infra* at III(a).

[61] *Zimmer (USA) Europe S. A. (Belgium)* v. *Giuliana Cremascoli (Italy)*, Corte di Cassazione (June 3, 1985), 54 Il Massimario del Foro Italiano 611 (1985), reprinted in XI YB. Comm. Arb. 518 (1986).

[62] Art. II of the Convention, 330 U.N.T.S. 38 (No. 4739) (1959) reads:

> 1. 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.
>
> 2. 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.

[63] *Zimmer*, *supra*, note 61.

domestic legal orders. A similar view has been expressed with respect to the question whether the question of separability of the arbitration agreement is addressed under the Convention.[64]

The views expressed with respect to the issue of assignment are the views usually taken by courts and commentators when the Convention does not address a particular problem. Finding a solution to a controversial issue in the text of the Convention has the advantage of establishing a uniform substantive rule on the subject, which facilitates international legal transactions and establishes legal certainty.[65] Such an endeavour is, however, quite difficult if, as in the present case, there is no clear evidence that the Convention intended to address the issue and member States of the Convention have developed different rules on the subject.[66] Provisions of international treaties such as the New York Convention should be restrictively interpreted in order not to unduly broaden the commitments which have been made by the participating sovereigns.

(ii) *European Convention*

The European Convention on International Commercial Arbitration of 1961[67] was enacted to complement the New York Convention.[68] Just like the New York Convention, however, the European Convention contains no express provision addressing the question whether the arbitration agreement travels with the assignment of a contractual right. Similar to the New York Convention, the question arises whether a rule may nevertheless be inferred by implication from the provisions of the Convention. So far, courts and commentators have not expressed an opinion on this issue. It is suggested that the same concerns advanced in the foregoing subsection which speak against finding at present a uniform solution to the question under the New York Convention equally speak against finding a uniform solution to the question under the European Convention.

Unlike the New York Convention, however, the European Convention contains a rule as to who, court or arbitrator, would be competent to rule on the issue of transfer.[69] From Article V(3) of the Convention one can infer that

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64 See van den Berg, *The New York Arbitration Convention of 1958*, 146 (1981).

65 See Zweigert & Kötz, I *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* 24 (1971); Kropholler, *Internationales Einheitsrecht* 9–17 (1975).

66 See van den Berg, *supra* note 64, at 4–5 (stating that overly sophisticated interpretations, in particular those which read more into the Convention than can be safely said to be provided by it, should be avoided). See also Bonell, *Commentary on the International Sales Law* 85–86 (Bianca & Bonell eds. 1987); Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 Am. J. Comp. L. 333 (1983); Farnsworth, *The Convention for the International Sale of Goods from the Perspective of the Common Law Countries*, in: La vendita internazionale 5, 18 (1981) (all commenting on the Vienna Convention for the International Sale of Goods).

67 European Convention on International Commercial Arbitration, 484 U.N. Treaty Series 364 (1963–64).

68 See Maier, *Europäisches Übereinkommen über die internationale Handelsschiedsgerichtsbarkeit und UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche* 1 *et seq.* (1966).

69 This question will be discussed more generally *infra* under section IV.

the arbitrator is, subject to subsequent judicial review, competent to rule on the question.[70]

(iii) *ICC Arbitration Rules*

The ICC Rules of International Arbitration[71] do not address the issue of transfer either. In the absence of any specific guidance from the Arbitration Rules, arbitral tribunals have decided the issue by pointing to the law found to be applicable to the dispute. Thus the arbitral tribunal held in ICC proceedings No. 1704 (1977)[72] that the assignee was bound by the arbitration clause contained in the original contract under governing French law.[73] Likewise, the tribunal held in ICC proceedings No. 2626 (1977)[74] that the assignee was bound by an arbitration agreement concluded by the original parties under governing German law.[75] Depending on the law found to be applicable to the arbitration agreement, ICC tribunals have acknowledged several exceptions to the general rule that the assignee is bound by the arbitration clause. Thus the tribunal held in proceeding No. 2626 that the original parties may contractually prohibit the transmittal of the arbitration clause[76] and that a confidential relationship between the original parties and the arbitrator might prevent the assignee from being bound.[77]

Most commentators address only the issue of assignment of *contracts*, i.e. rights and duties, in the context of ICC arbitration.[78] Those addressing the specific issue of transfer of *rights* seem to agree with the result reached by the reported cases.[79] One commentator, however, wants to infer from Arts. 7 and 8 of the ICC Rules and from the Guide to ICC Arbitration (1972) that the arbitration clause cannot bind the assignee without his express consent.[80]

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70 Art. V(3) states in part: 'Subject to any subsequent judicial control provided for under the *lex fori*, the arbitrator whose jurisdiction is called in question shall be entitled to ... rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement ...'

71 ICC Publication No. 447 (1.1.1988).

72 105 Journal du Droit International [J.D.I.] 977 (1978).

73 *Ibid.*: '[D]ans la mesure ... où le subrogé exerce en lieu et place de celui-ci l'action de son créancier, il est lié par la clause compromissoire régissant cette action et peut s'en prévaloir.' ('When the party acting in subrogation exercises the right of his creditor, instead of the latter, he is bound by the arbitral clause which governs that action and may institute arbitral proceedings under it').

74 105 J.D.I. 981 (1978); Jarvin & Derains, *Collection of ICC Arbitral Awards* 1974–1985 = *Recueil des sentences arbitrales de la CCI* 316–317 (1990).

75 *Ibid.*: '... Selon la doctrine juridique dominante, une convention d'arbitrage n'est pas valable entre les parties seulement, mais s'impose également à leurs ... cessionnaires.' (... According to the prevailing opinion, an arbitration agreement is not valid only between the parties, but imposes itself also on ... their assignees.)

76 *Ibid.*: 'Ne font exception que les cas où la convention d'arbitrage est rédigée de façon à écarter les ... cessionnaires.'

77 *Ibid.*, at 317: '... l'arbitre n'était pas désigné dans le contrat et ... en conséquence aucune relation de confiance n'existait entre les co-contractants et un arbitre de leur choix.' ('[T]he arbitrator was not named in the arbitration agreement and ... as a consequence no confidential relationship existed between the co-contractors and an arbitrator of their choice.')

78 Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* § 5.09 (2d ed. 1990).

79 Rubino-Sammartano, *International Arbitration Law*, 182–84 (1990); Jarvin & Derains, *supra*, note 74, at pp. 317–20, 454.

80 See Schricker, *supra*, note 33, at p. 106.

(d) *Conclusion of Section I: A Lack of Uniform Rules*

Common law and civil law systems have no specific statutory provisions dealing with the issue of transfer of arbitration agreements in case of assignment of contractual rights. In the absence of distinct provisions, courts and academic commentators have expressed conflicting views on the issue.

In civil law systems courts and commentators usually look to statutory provisions dealing with the scope and effects of assignments of contractual rights to resolve the issue. Under these provisions, an arbitration clause is considered to pass on automatically as incident to the assigned claim, thus binding the assignee to the arbitration agreement. Only in instances where there is a statutory prohibition or clear proof of an express or implicit intent of the original parties to the main contract that the arbitration clause should not be transferred do civil law courts take exception to this rule. Statutory prohibitions may either concern the arbitration agreement itself[81] or the contractual right to be assigned.[82] Examples of express party intent are non-assignment clauses with respect to the contractual right or with respect to the arbitration agreement itself.[83] A non-assignment provision with respect to the contractual right arguably also affects the arbitration clause relating to the right, since the latter cannot be transferred without the underlying claim.[84] Examples of implicit party intent are cases in which there is evidence of a confidential relationship between the parties[85] or between the parties and the arbitrator.[86] While the rule of automatic transfer of the arbitration clause appears to enjoy undivided support from the courts, however, there is mounting criticism of the approach chosen by the courts among academic commentators.[87]

In common law systems, the law on the issue is much less settled than in civil law systems. Thus, in common law jurisdictions such as that of the State of New York, early court decisions and commentary indicated that the arbitration agreement passes automatically as incident to the assigned claim and binds the

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[81] Thus, under the statutory Arbitration Rules of the Austrian Stock Exchange (Art. XIV(1) EGZPO), only members of the Stock Exchange are entitled to arbitrate securities claims among themselves. If a member assigns a contractual right to a non-member, this non-member cannot take advantage of an arbitration clause which is part of the main contract. See JBl 1913, 215.

[82] Most legal systems prohibit the assignment of contractual rights if they are attributed to a specific individual, arise out of personal relationship such as a labour contract, or are conflicting with public policy. See, e.g., Art. 164 of the Swiss CO or § 1393 of the Austrian ABGB; Allcock, *Restrictions on the Assignment of Contractual Rights*, 42 Cambridge L. J. 328 (1983); Farnsworth, *supra*, note 1, at § 11.4. In many cases claims whose assignability is limited are not arbitrable either.

[83] See H. W. Fasching, IV *Kommentar zu den Zivilprozeßgesetzen* 730 (1971); Jarvin & Derains, *supra*, note 74, at p. 319; *Clear Star* v. *Centromor*, *supra*, note 46. Note, however, that some legal systems such as the US legal system construe anti-assignment clauses narrowly or even make them ineffective, thus questioning the effect of this exception: see, e.g. Farnsworth, *supra*, note 1, at § 11.4.

[84] See *Clear Star Ltd.* v. *Centromor*, *supra*, note 46, at p. 22: '[I]f the original contracting parties did not wish to be confronted with a different party without their written permission, they did not wish this to be the case in an arbitral proceeding either.'

[85] See *supra*, note 77.

[86] See *supra*, note 74 (ICC 2626); Fasching, IV *Kommentar zu den Zivilprozeßgesetzen* 730 (1971). See also Jarvin & Derains, *supra*, note 74, at p. 319.

[87] See *supra*, note 80.

assignee,[88] while more recent decisions, presumably under the influence of the traditional common law rule of assignment,[89] suggest a trend towards recognizing a theory of express assignment that rejects the concept that the assignee is automatically bound by the arbitration clause.[90] The English legal system does not offer clarifying guidance on this point, for the cases which have been decided on the issue do not show a clear rule. Those courts that favour the view that the assignee is bound to arbitrate basically allow for the same exceptions espoused by civil law courts, i.e. proof of a contrary intent of the original parties to the main contract.[91] Those courts, however, that hold that the assignee is not bound by the arbitration agreement focus on the relationship between assignor and assignee, not between the original parties, to determine whether the assignee should be bound by the arbitration agreement.[92]

International arbitration conventions, such as the New York Convention or the European Convention, and institutional arbitration rules like the ICC Arbitration Rules do not address the issue of transfer of the arbitration agreement. In the absence of uniform rules on an international level, arbitrators and commentators have looked to domestic legal orders for a solution to the question of transfer. Most arbitral tribunals that have decided the issue, especially those operating under the auspices of the ICC, have held that the assignee is bound by the arbitration clause.[93] This conformity might lead to the conclusion that a substantive rule of international commercial arbitration has emerged which sanctions the transfer of the arbitration clause independently of any reference to national laws. Although some of the reported ICC cases could be interpreted in such a way,[94] one must bear in mind that the decided cases all involved the application of laws from civil law countries which, as was pointed out above,[95] reach coinciding solutions on the issue of transfer, whereas some common law systems reach quite a different result. Because of this difference in approach between common law and civil law systems, it would, for the time being, be misleading to assume the existence of a uniform substantive rule for international commercial arbitration on the issue of transfer of the arbitration clause.[96]

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88 See *supra*, notes 7 & 8.

89 The traditional common law rule of assignment required that, to assign his rights effectively, a party clearly must evidence his intent to assign his rights. See Farnsworth, *supra*, note 1, § 11.2.

90 See *supra*, text accompanying notes 9–12.

91 See *supra*, text accompanying notes 9–12.

92 See *supra*, text accompanying notes 13–14, 27–28, 36 and 50–54.

93 See *supra*, text accompanying notes 72–77.

94 In proceeding No. 1704, the arbitral tribunal not only held that the assignee was bound by the arbitration clause under applicable French law, but also under Belgian law, the law of the site of the arbitral tribunal. While this reference to Belgian law might be seen as supportive of the proposition that the arbitrator's conclusion in the specific case was detached from a particular national law, the more convincing view is that the arbitrator merely wanted to emphasize that his conclusion *also* complied with the law of the forum where the arbitral award would be rendered and enforced.

95 See *supra*, notes 75–77.

96 Increasing use of the automatic assignment rule in international settings is, however, likely to lead to a polarisation of views on the question.

In summary, there are no uniform standards concerning the issue of transfer of the arbitration clause, neither with respect to domestic, nor with respect to international transactions. Rather, there seem to be two competing rules on the question, one stating that the assignee is automatically bound to arbitrate with the obligor any dispute arising in connection with the assigned right (the automatic assignment rule), the other one holding on the contrary that the assignee is not bound by the arbitration agreement unless he clearly consents to be bound by it (the express assignment rule). A review of common law and civil law jurisdictions has shown that the choice between those two rules is usually not well substantiated, but rather the result of formal as opposed to policy-oriented reasoning. In the jurisdictions under review, courts and commentators fail in general to duly analyze and balance all factors which need to be considered in resolving the issue of transfer.

This absence of well-reasoned analysis calls for a closer scrutiny of the automatic and the express assignment rules. The following section will evaluate those two rules in light of the factors that should be considered in resolving the issue of transfer of the arbitration agreement. The presence of two conflicting rules also raises difficult conflict-of-law questions. Section III will deal with these questions. The analysis of existing substantive law rules and conflict-of-law rules in the following sections will lay the groundwork for a subsequent attempt to formulate viable and equitable rules on the issue of transfer in the context of international commercial arbitration (*see infra* at V.).

II. FACTORS TO BE CONSIDERED IN RESOLVING THE ISSUE OF TRANSFER OF THE ARBITRATION AGREEMENT

(a) *Formal Relationship of the Arbitration Agreement with the Main Contract: Autonomy or Dependency?*

A first factor to be considered in resolving the issue of transfer of the arbitration clause is the formal relationship between the arbitration agreement and the main contract. Although this relationship is quite relevant to the issue at hand, it is generally ignored by courts and commentators. A high degree of autonomy of the arbitration agreement would suggest that the arbitration agreement leads a distinct legal life of its own and consequently cannot be qualified as an accessory right presumed to be automatically transferred to the assignee, but rather requires that assignor and assignee separately and expressly consent to its transfer. A lesser degree of autonomy, i.e. a greater degree of interdependency with the main contract would on the contrary support the presumption that the arbitration agreement is an accessory right automatically transferred with the assigned claim.

(i) *The Case for Autonomy of the Arbitration Agreement*

Several indicators suggest that the arbitration agreement leads a distinct legal life of its own and consequently requires the separate express consent of the assignee to be validly transferred.

A first indicator of the proposition that the arbitration agreement leads a legal life distinct of the main contract is the concept of severability or separability, which is expressed in numerous court decisions, domestic and international arbitration legislation[97] as well as in rules of international arbitration institutions and associations.[98] According to this concept, the invalidity of either the main contract or the arbitration agreement does not affect the validity of the other.[99]

A second indicator of the autonomous nature of the arbitration agreement is the fact that courts and arbitration tribunals have recurrently recognized that, in international situations, the main contract and the arbitration agreement may be governed by a different law.[100]

A third indicator of autonomy is the fact that the validity of the arbitration agreement is not influenced by the discharge of the main contract. In most legal systems, the arbitration agreement survives the termination of the main contract in order to resolve remaining issues arising therefrom.[101]

(ii) *The Case for Dependency of the Arbitration Agreement*

The main argument which may be advanced for the proposition of dependency of the arbitration agreement is that arbitration agreements are generally incorporated into the main contract and exist for the sole purpose of

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97 See, e.g., Art. 178(3) of the 1987 Swiss Code on Private International Law, 27 I.L.M. 44 (1988): 'The validity of an arbitration agreement cannot be challenged on the basis that the main contract is invalid,' or art. 1053 of the 1986 Dutch Arbitration Act, 26 I.L.M. 921 (1987): 'The arbitration agreement shall be considered and judged upon as a separate agreement. The arbitral tribunal shall be empowered to judge upon the legal validity of the main agreement of which the arbitration agreement forms part or to which it relates.'

98 See Art. 21.3. UNCITRAL Arbitration Rules: 'A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause;' Art. 14.1 second sentence of the Arbitration Rules of the London Court of International Arbitration (1985), reprinted in X YB. Comm. Arb. 157, 162 (1985): '[A]n arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.' See also Art. 8(4) of the ICC Arbitration Rules.

99 See, e.g., Prima Paint Corp. v. *Flood & Conklin Mfg. Co.*, 388 US 395, 18 L.Ed. 2d 1270, 87 S.Ct 1801 (1967).

100 This fact has at times been advanced as a *reason for* the separability of the arbitration agreement (see Sauser-Hall, *L'arbitrage en droit international privé, rapport et projet de résolutions*, 44/1 Annuaire de l'Institut de Droit International 558–63 (1952); Resolutions Adopted by the Institute of International Law, Arbitration in Private International Law, Article 6, 47 Annuaire de l'Institut de Droit International (1957), Vol. II p. 494; Klein, *Du caractère autonome de la clause compromissoire, notemment en matière d'arbitrage international*, 50 Revue Critique de Droit International Privé [Rev. Crit.] 500–08 (1961)). The more convincing view, however, holds that it is rather *a consequence* of it (see Sanders, *L'autonomie de la clause compromissoire*, in ICC (ed.), Hommage a Frédéric Eisemann, Liber Amicorum 34 (1978); Van den Berg, *supra*, note 64, at p. 146).

101 See, e.g., *Nat. R. R. Passenger Corp.* v. *Boston & Maine Corp.*, 850 F.2d 756, 762 (D.C.Cir. 1988) and Domke, *supra*, note 2, at § 9:01.

resolving disputes arising from this particular contract. This closeness has led courts in civil law countries to analogize arbitration agreements to security interests or accessory rights which attach to the claim they relate to. Because of this closeness, it is argued, arbitration agreements cannot be said to be autonomous for the purpose of transfer, but are rather strongly intertwined with the main contract.[102]

(iii) *Evaluation*

Historically, arbitration clauses have been treated as integral parts of the main contract whose legal fate they have shared. Over time, however, there has been a growing tendency to acknowledge instances in which the arbitration agreement is autonomous and does not share the legal fate of the main contract. Thus, it is widely accepted today that the invalidity of either the main contract or the arbitration agreement does not affect the validity of the other, that the main contract and the arbitration agreement may be governed by a different law, and that the discharge of one agreement does not necessarily affect the validity of the other. And there is a trend in several jurisdictions to recognize the arbitration agreement as fully autonomous in all instances. One example for this trend is provided by article 1053 of the Dutch Arbitration Act which generally states that the arbitration agreement shall be considered and judged upon as a separate agreement.[103] Another example is the tendency of French courts and commentators to draw increasingly widespread conclusions from the autonomy of the arbitration agreement.

Despite a general tendency to view the arbitration agreement as a fully autonomous agreement, however, most jurisdictions still treat the arbitration clause as an integral part of the contract when it comes to the issue of transfer. Treating the arbitration agreement at the same time as autonomous and as an integral part of the main contract is somewhat inconsistent and calls for justification. Courts and commentators fail, however, to justify this disparate treatment of the arbitration agreement.

One possible way of distinguishing the instance of transfer from those instances in which courts do respect the autonomous character of the arbitration agreement would be to look at the purpose the autonomous nature of the arbitration clause serves in those instances. Those instances in which courts have acknowledged an autonomous identity of the arbitration agreement are instances in which they wanted either to preserve the orderly functioning of the arbitration proceeding or respect the parties' expectations. Thus, the concept of separability was developed to ensure a smooth initiation of arbitration proceedings, and the concept of survival of the arbitration clause was developed to ensure a smooth conclusion of the arbitration

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[102] See, e.g., *Société C.C.C. Filmkunst Gmbh c/Société Etablissement de Diffusion Internationale de Films* (Paris, 28.1.1988), *supra*, note 57, at p. 568 (stating that the arbitration agreement is 'indissociable de l'économie du contrat' ['inseparable from the economic substance of the contract'].)

[103] See *supra*, note 97.

proceedings. And the concept that the main contract and the arbitration agreement may be governed by a different law was developed in order to meet the parties' expectations. Treating the arbitration agreement as autonomous for purposes of its transfer arguably does not meet either one of these objectives. On the contrary, the possibility that both assignor and assignee could escape arbitration rather suggests that an autonomous treatment of the arbitration agreement would run counter to these objectives.

In legal systems where the autonomy of the arbitration clause is still considered to be an exception rather than the rule, limited to specific instances and serving a specific purpose, a valid argument could thus be made that, in light of the limited purpose of the autonomy concept, the arbitration agreement is not autonomous in the instance of transfer, but rather automatically follows the legal fate of the contract or contractual claim as an integral part thereof. In legal systems which recognize the arbitration clause as a fully autonomous agreement in more and more instances, however, such a distinction would be difficult to make. In those legal systems the autonomous character of the arbitration agreement rather speaks against the current approach adopted by most courts in civil law countries which consists in applying (by analogy) statutory rules governing the transfer of accessory rights to the transfer of the arbitration agreement.[104] It would leave open, however, the question whether a rule favouring the automatic transfer of the arbitration agreement could be justified on the basis of implicit party consent.[105]

Because of the varying degree of autonomy of the arbitration agreement in different legal systems, it is impossible to draw a general conclusion with respect to the question whether the nature of the relationship between the arbitration agreement and the main contract favours a rule presuming that the arbitration agreement automatically binds the assignee, or rather a rule which requires the separate consent of the assignee for a transfer to be effective. Depending on the degree of autonomy a legal system grants the arbitration clause, the answer to this question will vary.

(b) *Substantive Legal Nature of the Arbitration Agreement*

A second, equally important factor to be considered in deciding whether or not an arbitration agreement should travel automatically with the assigned contractual right is the substantive legal nature of the arbitration agreement. Opponents of the rule of automatic transfer advance three independent arguments for their contention that the arbitration agreement cannot be subjected to the rules applicable to the assignment of contractual claims, namely that the right to arbitrate is a procedural right, a personal right, and a right which also generates duties. Proponents of the automatic transfer rule

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[104] See *supra*, text accompanying notes 29–31, 34–35, 49–50 and 56–57.

[105] This question was answered in the affirmative in an early decision of the German Reichsgericht, *supra*, note 26.

argue in return that the right to arbitrate is an accessory to the assigned contractual right, which transforms the contractual right to the extent that it shares its legal fate, including the rules governing its transfer.

(i) *Legal Nature Prohibits Automatic Transfer*

Those who advocate that the legal nature of the right to arbitrate prohibits an automatic transfer of the arbitration agreement base their position on several contentions.

A first argument, especially found in civil law systems, claims that the right to arbitrate is a procedural, not contractual right and hence cannot be subject to the rules governing the assignment of contractual claims. Indeed, several civil law countries consider arbitration agreements to be contracts of procedural law or of mixed substantive and procedural elements.[106] And as a rule, contracts of procedural law are not subject to the rules governing contracts of substantive law, but rather to specific rules that take into account the procedural nature of the agreement.

A second argument sometimes found in court decisions and legal commentary is that, irrespective of the procedural or substantive classification of the arbitration agreement, the right to arbitrate is basically a personal right, and hence cannot be subjected to the general rules of transfer.[107] Thus it was held in an early English decision, *Cottage Club Estates* v. *Woodside Estates Co.*[108] that the assignment did not transfer to the assignee any right in an arbitration clause contained in the main contract because the arbitration clause was 'a personal covenant'.[109]

A third argument advanced against the application of the rules of assignment of contractual claims to the transfer of the arbitration agreement has been that the arbitration agreement not only contains rights, but also duties (e.g. to refrain from instituting ordinary court proceedings). While some have argued that the presence of these duties in the arbitration agreement precludes any valid transfer of the arbitration clause to the assignee unless the latter expressly agrees to be bound by those duties,[110] others have gone so far as to argue that, similar to the transfer of an entire contract, the transfer of the arbitration agreement requires the explicit consent of all parties involved, i.e. the assignee and the obligor.[111]

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[106] For Austria see *supra*, note 40; for Switzerland see *supra*, note 42; for Germany see 23 BGHZ 200 (1957).

[107] OGH ZBl 1920/177: 'Der Anspruch auf die schiedsgerichtliche Entscheidung ist keine Eigenschaft der eingeklagten Forderung, sondern ein persönliches Recht und eine persönliche Verpflichtung des Zedenten.'

[108] *Supra*, note 18.

[109] *Ibid.*: 'The arbitration clause is a personal covenant, and...cannot be transferred...The arbitration clause remains in full force and effect as between the original parties.'

[110] See *Lachmar* v. *Trunkline*, *supra*, note 11.

[111] Schricker, *supra*, note 33, at pp. 103–05; Schopp, *supra*, note 33, at p. 259.

(ii) *Legal Nature Permits Automatic Transfer*

Those favouring an automatic transfer of the arbitration agreement argue that the arbitration agreement is an accessory or auxiliary right, which, similar to a forum selection clause, attaches to the contractual right, transforms its character, and has contractual consequences.[112] Consequently, it is argued, the right to arbitrate should be treated analogously to other accessory rights and subject to the substantive rules governing the assignment of accessory or auxiliary rights which, as shown above, provide for the automatic transfer of accessory rights together with the assigned contractual right.

(iii) *Evaluation*

The classification of the arbitration agreement as procedural does not necessarily speak against an automatic transfer of the arbitration agreement. While it is true that substantive law rules are not directly applicable to procedural contracts, they may be applicable *per analogiam* in those instances where no specific rules govern a particular issue, and where sound reasons speak in favour of such an analogous application.[113]

The same is true with respect to the allegedly personal nature of the right to arbitrate. While arbitration agreements are indeed sometimes concluded *intuitu personae*, i.e. tailored to the original contracting parties, or with the expectation that a specific arbitrator will resolve a potential dispute, the prevailing rule today is rather that they are entered into because of non-personal reasons, such as expediency, cost-efficiency and other perceived advantages of the arbitration process.[114]

However, the fact that the arbitration agreement is a compound of rights and duties is a strong argument speaking against treating the arbitration agreement analogously to an accessory right subject to the rules applicable to the transfer of contractual rights.[115]

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[112] See OGH in SZ 7/279: '[D]ie der Sache zugesicherte Art der Geltendmachung der Ansprüche [verleiht] diesen einen besonderen Charakter, womit auch materiellrechtliche Folgen Hand in Hand gehen.'; Obergericht Luzern, cited in BGE 103 II 76 (1977), *supra*, note 44: '[D]ie Forderung [erlangt] durch die Unterstellung unter die Zuständigkeit eines vertraglichen Schiedsgerichtes eine Eigenschaft, die bei einer Abtretung in der Regel auf den Erwerber übergeh[t].' For an opinion that *forum selection clauses* pass together with the assigned claim under Art. 17 of the EC Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments (September 27, 1968, 1978 O. J. (L 304) 36), which is silent on the issue, see decision of the E. C. J. of 19.6.1984, *Russ* v. *Nova*, Comm. Mkt. L. Rev. 499 (1984), Revue Critique de Droit International Privé [Rev. Crit.] 383 (1985), note Gaudemet-Tallon.

[113] See Swiss Federal Tribunal, BGE 96 I 340 (1970); BGH, *supra*, note 30; OGH, *supra*, note 36.

[114] This is especially true in commercial transactions. *See*, e.g., 68 BGHZ 356, 365 (1977): 'Schiedsabreden sind im Handelsverkehr im besonderen Maße sachbezogen, weil sie nicht wegen eines besonderen Vertrauensverhältnisses der Parteien vereinbart werden, sondern wegen eines allgemeinen Bedürfnisses nach schneller und sachkunder Streitentscheidung.' See also *Maritime Co. 'Spetsai', S. A.* v. *International Com. Exp. Corp.*, 384 Fed. Supp. 258, 259 (S. D. N. Y. 1972).

[115] Falkner, *Geltungsbereich der Schiedsvereinbarung einer OHG*, Wirtschaftsrechtliche Blätter [WBl] 173, 175 (1989).

(c) *Protection of the Assignee: Written Form Requirement of the Arbitration Agreement*
A third factor to be considered in formulating an adequate rule for the transfer of the arbitration agreement is the protection of the assignee's legal position. Opponents of the proposition that the arbitration agreement is automatically transferred argue that such a rule would violate the requirement espoused in most legal systems that in order to be enforceable an arbitration agreement must be in writing. It is contended that a rule favouring an automatic transfer of the agreement would violate the purpose of this form requirement which is to ensure that a party, in this case the assignee, is unmistakenly aware that he is agreeing to arbitrate. Supporters of an automatic transfer argue in return that the in writing requirement applies merely to the initial conclusion of the arbitration agreement, but not to any subsequent transfer of it, and that its purpose does not require protection of the assignee.

(i) *Necessity to Comply With the Written Form Requirement*

Most domestic arbitration laws and international arbitration conventions require that the arbitration agreement be in writing.[116] The purpose of the written form requirement, sometimes referred to as the arbitration's special statute of frauds,[117] is *inter alia*[118] to ensure that a party entering into an arbitration agreement is fully aware of the fact that he is agreeing to submit a dispute to arbitration.[119] Indeed, agreeing to arbitrate means to forego the possibility to bring a complaint in a judicial forum, a possibility recognized as fundamental right in most legal orders.[120] Requiring evidence of a written agreement serves to protect the litigant from being unwillingly deprived of a judicial forum in which to bring his complaint or defense.

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[116] H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* 260 (1989), citing a survey of national laws undertaken by the UNCITRAL Working Group on the Model Law. Examples are § 577(3) Austrian CCP ('Der Schiedsvertrag muß schriftlich errichtet werden.'), § 1027 of the German Code of Civil Procedure ('ZPO'), Art. 178(1) of the Swiss CO ('An arbitration agreement is formally valid if it is made in writing...'), art. 1021 of the Dutch Law on Arbitration ('The arbitration agreement shall be proven by a writing'). Written form is also required by the United States Arbitration Act (§ 2: 'A written provision...') and the statutes of most US States (*see* jurisdictions cited by Domke, *supra*, note 2, at § 6:01). Art. 7 of the UNCITRAL Model Law also requires the arbitration agreement to be in writing. Likewise, art. II of the New York, Convention requires that '[e]ach Contracting State shall recognize an [arbitration] agreement in writing.'

[117] Domke, *supra*, note 2, at § 6:01.

[118] A second purpose of the in writing requirement is to witness the existence of the agreement.

[119] See, e.g., Fasching, *Die Form der Schiedsvereinbarung*, 44 Österreichische Juristen-Zeitung 289 (1989); Rummel, *supra*, note 38, at p. 150.

[120] See, e.g., BGH in 68 BGHZ 356, 360; '[D]ie Unterwerfung unter einen Schiedsvertrag [bedeutet] den Verzicht auf den gesetzlichen Richter und damit das wichtige Grundrecht des Art. 101 Abs 1 Satz 2 GG...' (accord: 74 BGHZ 162, 166 (1978)). See also *Matter of Presbyterian Hospital of New York City*, N. Y. L. J. 21 (April 13, 1990): 'The rule is that a party is not to be compelled to surrender his right to resort to the courts, with all of their safeguards, unless he has agreed in writing to do so,' and BGE 102 I a 582 (1976) (stressing that nobody can without his consent be deprived of his own natural judge (Art. 58 Swiss Constitution)).

Arbitral clauses which are orally concluded or tacitly accepted are generally invalid.[121] A breach of the writing requirement entitles the parties to have the arbitration agreement invalidated or declared void and constitutes a ground for vacating the award. Only in those circumstances where a party is, by reason of his profession or because of a prior history of transactions, sufficiently warned, do some legal systems allow for exceptions to the rule.[122]

The written form requirements cited above do not, on their face, differentiate between the initial conclusion of an arbitration agreement and a subsequent transfer of the agreement to a third party. It would thus seem that, in order for a transfer to be valid, an assignee would have to consent in writing to the transfer of the clause.

(ii) *Dispensability of the Written Form Requirement*

Most courts hold, however, that an automatic transfer of the arbitration clause does not violate the in writing requirement. They argue that the requirement addresses merely the initial conclusion of the arbitration agreement, but not subsequent transfers.[123] Furthermore, it is argued, the purpose of the in writing rule does not warrant its application in the case of transfer of the arbitration agreement.[124] Unlike a party entering into a newly created arbitration agreement it is argued, an assignee is sufficiently warned in the case of a transfer of an already existing arbitration agreement, because he has the possibility to inquire about the existence of an arbitration clause.[125]

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[121] *Matter of Presbyterian Hospital of New York City*, *supra* note 120, citing *Matter of Waldron*, 61 N.Y.2d 181: 'A party will not be compelled to arbitrate and thereby surrender its right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their dispute; the agreement must be clear, explicit, and unequivocal, and must not depend upon implication or subtlety.'

[122] See, e.g., § 1027 (2) German ZPO.

[123] GIUNF 5796; OGH in SZ 7/279; SZ 18/12; BGH in 71 BGHZ 162, 166 (1978). See also *Fisser* v. *International Bank*, 282 F.2d 231, 233 (2d Cir. 1960): 'It is true that... a 'written provision...' is the *sine qua non* of an enforceable arbitration agreement. It does not follow, however, that under the [Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'

[124] See 71 BGHZ 162, 166 (1978).

[125] *Ibid.*, at p. 166:

> [A]uch der Erwerber eines mit einer 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 gesonderter 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.

(iii) *Evaluation*

The written form requirements for the arbitration agreement established in most legal systems do not, on their face, differentiate between the initial conclusion of an arbitration agreement and a subsequent transfer of the agreement to a third party. A rule under which an assignee would be bound by the arbitration clause without giving his consent in writing would thus violate the plain language of this requirement. Contrary to most court opinions, such a rule would furthermore violate the purpose of the in writing requirement which 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. In light of this specific purpose, it is difficult to see why an assignee should be less protected than the original party entering into the arbitration agreement. The fact that the assignee has the possibility to inquire about a pre-existing arbitration clause[126] is, in fact, immaterial because the mere awareness of the arbitration clause is not the factor determining whether a party should or should not have the benefit of the protection of the written form requirement. Were this the case, it would be difficult to explain the form requirement in the first place, since nobody could claim that a party to an oral agreement to arbitrate was insufficiently aware of the existence of an agreement. The purpose of the written form requirement is rather to inform a party about the extent of the commitment to arbitrate.

While it is true that the law allows exceptions to the written form requirement, those exceptions have in common that the party entering into the arbitration agreement is, either because of the nature of his profession or prior dealings,[127] well informed about the extent of his upcoming duty to arbitrate. None of these exceptions bear in general any similarities to the situation of the assignee. Analogizing his situation to exceptions is thus unwarranted based on the purpose of the in writing requirement. Only when the assignee falls under exceptions should there be a waiver of the in writing requirement.

In conclusion, the purpose of the written form requirement set out in various domestic and international arbitration rules speaks against a rule permitting the arbitration clause to bind the assignee to arbitrate without his written consent. Arguments trying to distinguish the situation of the assignee based on textual interpretation or the purpose of the provision must fail. Justifications for such a rule thus cannot lie in statutory interpretation. Rather, the rule of in writing can only be overcome by other, overriding interests, such as the need to protect the obligor, or a strong public policy favouring arbitration.

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[126] *Id.*

[127] Thus, most legal orders allow exceptions to the written form requirement in case a party is a merchant, who may expect that his claims are subject to arbitration, or in case a party has had a continuing business relationship with another party which involved the previous signing of an arbitration agreement.

(d) *Protection of the Obligor*

A fourth consideration which must be taken into account is the protection of the obligor. It has been argued that the automatic assignment rule effectively protects the obligor's interests while the express assignment rule may considerably harm the obligor insofar as it would allow the contractual right to be transferred without securing the original parties' obligation to submit it to arbitration and would thus amount to allowing the assignor unilaterally to change his contractual position. However, as will be shown, it is generally overlooked that there are certain instances where the automatic assignment rule may indeed harm the obligor.

(i) *Automatic Transfer Protects the Obligor*

The argument most commonly made in support of an automatic transfer of the arbitration agreement is the necessity to protect the legal position of the obligor. The arbitration agreement, it is argued, creates rights for the obligor which cannot unilaterally be removed by the assignor.[128] Allowing the assignor to transfer his claim without the underlying arbitration clause would violate a fundamental principle of contract law according to which the legal position of one party to a contract may not be changed by a unilateral act of the other party.[129] Permitting the assignee to litigate, rather than arbitrate, the assigned claim would impose on the obligor a more costly method of dispute resolution which he wanted to avoid in the first place.[130] It would also present a party the opportunity to escape the effect of an arbitration clause by simply assigning to a third party a claim subject to arbitration between the original parties.[131]

(ii) *Automatic Transfer Harms the Obligor*

Those arguing that the rule of automatic transfer best protects the legal position of the obligor overlook three facts.

First, they disregard that there might be situations where an automatic transfer of the arbitration agreement with an ensuing obligation of the obligor to arbitrate can very well turn out to be to the disadvantage of the obligor. Especially in international settings, it is not unusual for parties to agree in advance on a neutral, foreign site for the arbitration proceedings, on the

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[128] See, e.g., OGH in SZ 7/279: '[D]ie Schiedsgerichtsvereinbarung (begründet] auch für den Gegenteil Rechte, die ihm durch einseitige Verfügung eines Vertragsgenossen nicht entzogen werden dürfen.'

[129] GIUNF 5796; SZ 7/279; SZ 18/12. See also *Hosiery Mfg. Corp.* v. *Goldston*, *supra*, note 7.

[130] SZ 7/279; GIUNF 618.

[131] See *In Re Lowenthal*, *supra*, note 16, at 135 N. E. 944: 'If the arbitration clause of an assignable contract of sale is not available, except as to the parties to such a contract, it would then be a simple matter, if either party sought to escape the effect of such a clause to assign the contract to a third party.' See also *Hosiery Mfg. Corp.* v. *Goldston*, *supra* note 7, at 143 N. E. 780: 'Arbitration of contracts would be of no value if either party thereto could escape the validity of such a clause by assigning a claim subject to arbitration between the original parties to a third party.' (Both cases argue in the context of transfer of contracts).

application of a foreign law, or on the person of the arbitrator. This balanced neutrality may very well turn against the obligor once the arbitraton agreement is transferred to the assignee. Thus the assignee may turn out to be domiciled in the neutral site indicated in the arbitration agreement, may be a national of the country whose laws have been chosen by the parties to be applicable to the dispute, or may have close ties to a pre-chosen arbitrator.

Second, they fail to acknowledge that, because the arbitration agreement is a compound of rights and duties, the obligor of the main contract is at the same time obligee with respect to the assignor's duties arising from the arbitration agreement. For duties to be validly delegated, however, the law generally requires the consent of the obligee, the rationale being that a substitution in the person of the obligor without the obligee's consent might weaken the obligee's chances of financial recovery.[132] This rationale may apply equally to the delegation of duties arising from the arbitration agreement.

Thus, a financially weaker assignee might for instance be unable to meet his duty to reimburse the obligor for costs advanced or fees paid on his behalf in connection with an arbitration agreement.[133]

Third, they ignore that binding the assignee to the arbitration clause is not the only possible way of protecting the obligor's legal position. Thus a rule under which an assignor would be prohibited from assigning his right altogether, or would be allowed to assign his right only if the assignee expressly agreed to assume the duty to arbitrate, would similarly protect the obligor insofar as he retains his right to arbitrate, in this case with the assignor.[134]

(iii) *Evaluation*

Obligor protection is a strong argument in support of a rule which guarantees that the assignment of a contractual right does not infringe upon the obligor's right to arbitrate. The rule of automatic transfer preserves the obligor's right to arbitration insofar as the assignee is necessarily bound by the arbitration agreement. The possibility that the transfer of the arbitration clause to the assignee might, under the circumstances pointed out above, impair the legal position of the obligor, does not speak against the rule of automatic transfer.

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[132] See, e.g., Farnsworth, *supra*, note 1, at § 11.10: 'While an obligee can rid itself of a right merely by making an effective assignment, an obligor cannot rid itself of a duty merely by making an effective delegation. If obligors could do so, they could discharge their duties simply by finding obliging insolvents to whom performance could be delegated.'

[133] Under Article 9 of the ICC Arbitration Rules, for example, the advance on costs of arbitration is payable in equal shares by the parties (art. 9(1)). The Secretariat may make the transmission of the file to the arbitral tribunal conditional upon the payment of the advance on costs (art. 9(3)). To avoid that the procedure is stalled even before it starts, a party may pay the whole of the advance on costs in case the other party refuses to do so (art. 9(2)). Although the Rules provide for eventual reimbursement of the other party's amount due, recovery will depend on the other party's financial ability.

[134] However, such a solution, which would curtail the mobility of contractual rights, is contrary to modern commercial practices.

Thus, under general principles of the law of assignment, the obligor must be considered not bound by the arbitration agreement in those instances. General principles of the law of assignment allow the assignor to assign his rights without consent of the obligor because the obligor is generally not harmed by such assignment. In those instances, however, where the obligor is harmed by the assignment, he should be considered not bound by the assigned claim.[135]

However, it must be noted that the rule of automatic transfer of the arbitration agreement is only one possible construction which ensures obligor protection. Indeed, the arguments advanced in support of the rule of automatic transfer, i.e. that the assignor should not be able to change by unilateral act the legal position of the obligor, do not, by themselves, imply that the assignee should be bound to arbitrate. Other conceivable ways of protecting the obligor would either be to continue to bind the assignor to arbitrate the assigned claim, or to provide that the assignor remains bound to arbitrate, but can transfer the claim together with the arbitration agreement if the assignee agrees to be bound to arbitrate, or to give the obligor an indemnity claim against the assignor if he loses his right to arbitrate.

(e) *Legal Position of the Assignor*

A fifth factor to be considered is the legal position of the assignor. Under the rule of automatic transfer, the assignor is no longer bound by the arbitration clause, if he has validly transferred his right to the assignee. Arguably, his legal position may even improve under this rule. The possibility to escape the duty to arbitrate by simply assigning his rights to a third party is certainly advantageous. The assignor's position may improve even more if, as held in some court decisions, he is no longer bound, but nevertheless retains the right to arbitrate.[136]

In contrast, the assignor's legal position may be encroached upon under a rule which requires the separate consent of the assignee for his right to be assigned together with the arbitration clause. Arguably, the assignor's freedom to assign contractual rights would be limited under such a rule, because not all potential assignees might want to assume rights that bring with them the duty to arbitrate. Some legal systems may view this restriction as an undue constraint on the overall mobility and transferability of contractual claims.

(f) *Domestic Policy vis-à-vis Arbitration*

A sixth important factor to be considered in resolving the question of transfer of the arbitration agreement is the overall importance of arbitration as a

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[135] This principle is spelled out for example in UCC 2-210(2) which provides that a purported assignment of rights under a contract for the sale of goods is ineffective if it would (1) 'materially change the [obligor's] duty,' (2) 'increase materially the burden or risk imposed on him by his contract' or (3) 'impair materially his chance of obtaining return performance.' See also Restatement (Second) of Contracts § 317 (1981); Farnsworth, *supra*, note 1, at § 11.4.

[136] See, e.g., *Vainqueur Corp.* v. *Lamborn & Co.*, 305 F.Supp. 1007 (S.D.N.Y. 1969).

means of alternative dispute resolution in the respective legal system. Arguably, a rule which provides for the automatic transfer of the arbitration agreement encourages the use of arbitration while a rule which requires the separate consent of the assignee may discourage parties from agreeing to arbitrate in the first place. Indeed, the fact that a party must fear that it may lose his right to arbitrate by another party's unilateral act will discourage him from agreeing to arbitrate in the first place.[137]

(g) *Conclusion of Section II: Critique of Existing Substantive Law Rules*

This section has shown that a variety of factors must be considered in formulating a practicable and at the same time equitable rule for the transfer of the arbitration agreement in case of assignment of contractual rights. These factors include the degree of autonomy of the arbitration clause, the legal nature of the arbitration agreement, the protection of the legal positions of assignee, obligor and assignor, and the importance of arbitration as a means of dispute resolution.

An analysis of all these factors has revealed both strengths and weaknesses of the automatic assignment rule and the express assignment rule. Thus, the automatic assignment rule supported by courts in civil law countries, while protecting the obligor's and the assignor's legal positions and encouraging the use of arbitration, tends to disregard the autonomous nature of the arbitration clause and the fact that the arbitration agreement is a compound of rights and duties, and it entirely neglects the interests of the assignee insofar as the latter is bound to arbitrate without proper notice. In contrast, the express assignment rule favoured in some common law jurisdictions protects the assignee's legal position insofar as he is not bound to arbitrate in the absence of his express consent, thereby implicitly respecting the autonomous nature of the arbitration clause and also the purpose of the writing requirement, but it disregards the obligor's interests insofar as the obligor foregoes his right to arbitrate the assigned claim. In addition, the express assignment rule might restrict the use of arbitration and encroach upon the assignor's possibility freely to assign his contractual rights.

It is suggested that both civil law and common law systems re-evaluate their current approach to the question of transfer of the arbitration agreement in light of the strengths and weaknesses of the rules pointed out in this section. In both systems, there is a need for legislative action, since the question cannot be resolved satisfactorily through judicial interpretation of existing statutory rules or contractual agreements, or through judicial law-making. In formulating clear standards, civil law systems should take more strongly into account the legal position of the assignee, the autonomous

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[137] But see Werner, *Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause*, 8 J.Int'l Arb. 13 (1991), at 17, arguing that limitations on the assignability of the arbitration clause will reinforce the institution of arbitration rather than weaken it.

nature of the arbitration clause and the fact that the arbitration agreement is a compound of rights and duties. And common law systems such as the law of New York should realize that the express assignment rule runs counter to public policy favouring arbitration and neglects to take into account the interests of the obligor. It is proposed that these new standards to be formulated take into consideration the changes suggested below with respect to international commercial arbitration.

III. THE QUESTION OF APPLICABLE LAW

As shown above, jurisdictions have taken different approaches in resolving the question whether, and if so, to what extent an arbitration agreement is transferred together with an assigned claim. While in civil law countries the presumption is made that the arbitration agreement automatically passes as incident to the assigned claim, in some common law jurisdictions, such as New York, the arbitration clause is presumed to pass only if the assignee specifically agrees to be bound by it. Furthermore, those jurisdictions which adopt one or the other rule differ with respect to the extent to which exceptions to the presumption of automatic transfer should be allowed.[138]

Different standards on the question of transfer of the arbitration clause do not create a problem as long as arbitration proceedings remain confined to purely domestic settings. Once arbitration proceedings acquire an international dimension, however, complications are likely to arise. Because of the absence of a unified substantive rule regulating the question of transfer in international commercial disputes,[139] the competent jurisdiction, domestic court or arbitral tribunal, will most likely be required to choose between conflicting rules on the subject. From a party's perspective, this possibility brings about a certain degree of legal uncertainty which should be eliminated.

The question of applicable law is thus of considerable importance for the parties to a dispute involving the question of transfer of the arbitration agreement. The law applicable depends on the conflict-of-law rule which governs the question of transfer of an arbitration agreement. This conflict-of-law rule in turn depends primarily on the characterization (or classification) of the issue.[140] The purpose of this section is to examine the different characterizations which may be made in this respect, and to critically evaluate the choice-of-law rules which have traditionally been based on these characterizations.

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[138] See *supra*, text accompanying notes 13–17, 27–28, 31, 36 and 50–54.

[139] See *supra* at I(c). But *see* the rule proposed in this article, *infra*, at V(a).

[140] See, e.g., Scoles & Hay, *Conflict of Laws* 52 (1984 & Supp. 1989). The Civil Law term for characterization is 'qualification.' *Ibid.*, at p. 53.

(a) *Characterization of the Issue of Transfer of the Arbitration Agreement*

Some jurisdictions characterize the question of transfer of an arbitration agreement by way of assignment of contractual rights as a question of assignability, or of the scope and effects of an assignment.[141] Other jurisdictions characterize the issue as one of arbitrability or of the scope and effects of the arbitration agreement.[142] Yet other jurisdictions characterize the question as a combination of the effects of the assignment and of the interpretation of the arbitration agreement.[143] Those jurisdictions which characterize the question as one of the arbitrability or of the scope and effects of the arbitration agreement in turn treat this question either as a matter of procedural law[144] or as a matter of substantive law.[145]

(b) *Conflict-of-Law Analysis*

(i) *The Different Approaches*

Because the issue of transfer may be characterized in different ways, there are several conflict-of-law approaches to the issue. If a court or arbitral tribunal characterizes the question of arbitrability or of the scope and effects of an arbitration agreement or its interpretation as a procedural matter,[146] it may apply the *lex fori*, based on the general conflict-of-law principle that the forum applies only the foreign substantive law, but uses its own procedural law.[147] If it characterizes those questions as a substantive matter,[148] it may apply the conflict of law rules applicable to contractual matters. In this case, the chosen conflict-of-law approach may still differ, depending on whether the issue is considered to be one of assignability or scope and effects of the assignment, or one of arbitrability or scope and effects of the arbitration agreement. Finally, if a combination of the procedural and the substantive approaches is applied,[149] the competent jurisdiction may use either one of these conflict-of-law approaches, or a combination thereof.

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[141] See Rubino-Sammartano, *International Arbitration Law* 182 (1990); for Germany, see Reithmann, Martiny & Hausmann, *Internationales Vertragsrecht* (4th ed. 1988, Arbitration by Reithmann & Hausmann), at p. 1149 No. 1409.

[142] See, e.g., *Apollo Computer, Inc.* v. *Berg*, 886 F.2d 469, 472 (1st Cir. 1989). For further discussion of this case, see *infra*, text accompanying note 150.

[143] See, e.g., Swiss Federal Tribunal, *supra*, note 44.

[144] See, e.g., Swiss Federal Tribunal, BGE 101 II 168, 170 (1975).

[145] See, e.g., *I.S. Joseph Co., Inc.* v. *Michigan Sugar Co.*, *supra*, note 4, at 803 F.2d 400: 'Absent some indication in the original agreement that the parties at that time provided for assignment of their interests under the agreement or otherwise intended to bind themselves to entities not then in existence, the validity of the assignment must be determined under the common law of contract;...'

[146] See, e.g., Swiss Federal Tribunal, BGE 101 II 168, 170 (1975).

[147] See Scoles & Hay, *supra*, note 140, at p. 53; Siehr, *Die lex-fori-Theorie heute*, in: Albert A. Ehrenzweig und das internationale Privatrecht 113 (Serick, Niederländer & Jayme eds. 1986); Szaszy, *International Civil Procedure* 219 (1967). For a history of the '*lex fori*' principle, see Keller & Siehr, *Allgemeine Lehren des Internationalen Privatrechts* 215, 586 (1986).

[148] See, e.g., *I.S. Joseph Co., Inc.* v. *Michigan Sugar Co.*, *supra*, note 4.

[149] See, e.g., *Müller* v. *Bossard*, *supra*, note 44, at pp. 79–80 (applying to Swiss domestic matters).

Two recent cases, one decided by a United States federal court,[150] and the other by the Swiss Federal Supreme Court,[151] illustrate the problem of selecting the most appropriate choice-of-law approach. Both cases involved a contract between a Swedish party and a non-Swedish party which contained a non-assignment clause with respect to the main contract. Also, both agreements contained a clause providing for ICC arbitration and a choice-of-law clause. After a dispute arose, the Swedish party filed for bankruptcy, and in both cases, the Swedish bankruptcy trustee assigned to a third person the Swedish party's right to bring claims against the other party.[152] In the Swiss case, the court applied an 'autonomous' interpretation to the main contract and concluded that, based on the mutual agreement of the parties to this contract, the arbitration clause was made non-assignable as well.[153] The court also held that in the absence of a non-assignability clause, the question which parties are bound by an arbitration clause is governed by the same law that governs the question of the 'validity, content and scope of an arbitration agreement'[154] under Swiss conflict-of-law rules.[155] In the US case, the Court of Appeals did not decide the issue which law should apply to the question of whether the assignee could arbitrate its claim based on the arbitration clause concluded by the assignor and the obligor. Instead, it referred the question to the ICC arbitration which was chosen by the parties of the main contract.[156] The lower court, however, had characterized the question as one of

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150 *Apollo Computer, Inc.* v. *Berg*, *supra*, note 142.

151 See Swiss Federal Tribunal, *supra*, note 46.

152 For purposes of this analysis, it will be assumed that the assignment by the bankruptcy trustee constituted an assignment of the claim itself, and not merely of the (procedural) right to bring action on behalf of the bankruptcy estate.

153 The Swiss court, however, neglected the fact that under the different jurisdictions whose rules might have governed the main contract, the interpretation of the party intent could have led to a different outcome.

154 *Ibid.*, at p. 21, citing Lalive, Poudret & Raymond, *Le droit de l'arbitrage interne et international en Suisse*, and A. Bucher, *Die neue internationale Schiedsgerichtsbarkeit in der Schweiz*.

155 Art. 178(2) of the Swiss Code on Private International Law (CPIL) states that the arbitration agreement is valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute, in particular, the law applicable to the principal contract, or with Swiss law. The Tribunal found that based on this provision, Swiss law was applicable to the arbitration agreement, because the parties to the main contract had not chosen any particular law for the arbitration clause which would differ from the law that was applicable to the main contract, and that therefore, Swiss law controlled, which was chosen to govern the main contract (and would have governed even in the absence of such choice). *Id.*, at 21–22.

156 The Court of Appeals found that the preliminary question was whether there was an arbitration agreement between the assignor and the obligor, and held that by submitting to the ICC rules, the parties had contracted to submit issues of arbitrability to the arbitrator and not to the court. The Court referred to Art. 8(3) of the ICC rules, which states that if one of the parties raises a plea concerning the existence or validity of the agreement itself, the question of arbitrability is to be decided by the arbitrator himself. The court also referred to Art. 8(4) of the ICC rules, which states that the arbitrator shall continue to have jurisdiction even though the contract between the parties may be inexistent or null and void. The Court found that based upon the agreement of the original parties, a *prima facie* agreement to arbitrate existed, and thus held that it was the arbitrator and not the court who should decide on the question of arbitrability. *Apollo*, *supra*, note 142, at 886 F.2d 473.

assignability and applied the *lex contractus* chosen by the parties of the main contract to govern their agreement.[157]

The fact that there are different conflict-of-law approaches may invite a plaintiff to shop for the forum which characterizes the issue, and takes a conflict-of-law approach, in a manner leading to the application of the law most favourable to him. Forum shopping should, however, be prevented, particularly in the context of arbitration, because an issue should be arbitrated or adjudicated based on a specific law which the parties have chosen, or which they can expect to be applied, and not on the unilateral choice of the forum by the plaintiff. In order to eliminate the possibility of forum shopping, two avenues are conceivable. The first would consist in unifying all existing substantive laws. Whether such a rule can be found for international settings will be discussed *infra* at V(a). A second avenue consists in individualizing a conflict-of-law rule which ideally should apply in all jurisdictions, and irrespective of the characterization of the transfer of an arbitration agreement. Whether such a rule can be found for international settings will be discussed *infra* at V(b).

(ii) *The Relevant Policies*

As in every conflict of law situation, several conflict-of-law principles have to be taken into account in determining which law (the law of the forum, the law governing assignability or the scope and effect of the assignment, or the law governing arbitrability or the scope and effect of the arbitration agreement) should govern the question whether, and if so, to what extent an arbitration agreement is transferred by way of assignment.

A first principle states that conflicting solutions should be avoided and thus requires that all or at least as many issues as possible arising in connection with the same legal situation should be governed by the same law.[158]

A second principle requires that, for an identical legal setting, the same law should be applied, no matter in which country or by which tribunal the issue is resolved. This may help to discourage the parties from forum shopping, and to encourage recognition and enforcement of an arbitral award or court decision in any other country.[159]

A third principle requires that a conflict-of-law rule should make it easy to determine and to apply the governing law.[160]

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[157] *Apollo*, *supra*, note 142, at 886 F.2d 472.

[158] In the German legal terminology this principle is commonly referred to as 'innerer Entscheidungseinklang' or 'innere Entscheidungsharmonie' ('inherent uniformity of decision'): see Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts* 164 (2d ed. 1976); Kropholler, *Internationales Privatrecht* 32, 200 (1990); Jayme, Betrachtungen zur 'dépeçage' im internationalen Privatrecht, Festschrift für G. Kegel 255 (1987); Keller & Siehr, *supra*, note 147, at 268–69.

[159] See Restatement of the Law (Second), Conflict of Laws § 6(2)(f), and *ibid.* comment i (1971 & Supp. 1989). In the German legal terminology, this principle has been referred to as 'äußerer Entscheidungseinklang' or 'äußere Entscheidungsharmonie' ('external uniformity of the decision'): see Kropholler, Internationales Privatrecht 32–38, 200–01 (1990).

[160] See Restatement, *supra*, note 159, at § 6(2)(g). The official comment to this provision stresses, however, that this policy should not be overemphasized. *Ibid.*, comment j (1971 & Supp. 1989).

Finally, and most importantly in the field of contractual relationships, the principle to be observed is that the expectation of the parties should govern. Thus, the law which the parties involved have chosen should control. If no such law has been chosen, the law whose application meets their justified expectations should apply.[161] In a multiple party situation, a conflict-of-law approach must in addition take into account that parties who are not directly participating in an agreement should be protected with regard to their expectation that the law applicable to their obligations will not change without their consent.[162]

In order to meet the principle of expectation of the parties, the obligor must have the right and the obligation to base his claim or defence against the assignee on the law anticipated by the obligor and the other party of the main contract (i.e. the assignor). Likewise, the assignee must be able to base his claim or defence on a law he can reasonably anticipate at the time of the assignment. Thus, the obligor should not be able to change the law governing the assigned contract or claim without the consent of the assignee, nor should the assignee be able to change the law governing the assigned contract or claim without the consent of the obligor. This goal can best be achieved if the relationship between the assignor and the obligor on the one hand is distinguished from the relationship of the assignee and the obligor on the other hand with respect to the applicable law. Thus, different laws may apply to the question whether an arbitration agreement has been transferred, depending on whether the dispute is between the assignor and the assignee or between the assignee and the obligor.

This so-called *dépeçage*[163] seems to conflict, however, with the principle that as many issues as possible arising from the same legal situation should be governed by the same law.[164] Also, a judge or arbitrator may have more difficulties in applying the *dépeçage* approach than in applying the law of the forum. However, it is a consequence of the principle that the parties' expectations should be met.[165]

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[161] See Restatement, *supra*, note 159, at § 6(2)(d), and *ibid.*, comment g (1971 & Supp. 1989).

[162] See, e.g., H. Keller, *Zessionsstatut im Lichte des Übereinkommens über das auf vertragliche Schuldverhältnisse anwendbare Recht vom 19. Juni 1980* 85 (1985); von Bar, *Abtretung und Legalzession im internationalen Privatrecht*, 53 Rabels Zeitschrift für ausländisches und internationales Privatrecht 471 (1989); Girsberger, *Übernahme und Übergang von Schulden im schweizerischen und deutschen IPR*, 88 Zeitschrift für vergleichende Rechtswissenschaft 35 (1989); Kropholler, *Internationales Privatrecht* 414 (1990).

[163] See Kropholler, *supra*, note 158, at p. 110; Keller & Siehr, *supra*, note 147, at p. 268; Scoles & Hay, *supra*, note 147, at p. 40 n. 7, p. 75 n. 4.

[164] *Supra*, text accompanying note 158; Kropholler, *supra*, note 158, at pp. 112–13; Keller & Siehr, *supra*, note 147, at p. 269.

[165] *Supra*, text accompanying note 161. See also *Intamin, Inc.* v. *Figley-Wright Contractors, Inc.*, 595 F.Supp. 1350, 1351–52 (N. D. Ill. 1984); Keller, *supra*, note 162, at p. 85; von Bar, *supra*, note 162, at p. 471; Girsberger, *supra*, note 162, at p. 35.

(iii) *Evaluation of the Possible Conflict-of-Law Approaches*

(1) *Law of the Forum* (Lex Fori)

The *lex fori*-approach may be taken in jurisdictions where the issue is characterized as a procedural matter.[166] It seems to have been applied by courts which characterize arbitration agreements as a contract of 'substantive law, dealing with procedural relations.'[167] Thus, the German Supreme Court (Bundesgerichtshof 'BGH') in a decision of 1980, seems to have applied the German *lex fori* in order to determine whether the arbitration clause extended to an assignee.[168]

The *lex fori* rule has several advantages. On the one hand, it clearly meets the principle of ease of determination and application of the law, because in applying the *lex fori*, the judge or arbitrator can apply the law he knows best.[169] On the other hand, no conflicts between procedural and substantive questions will arise, because the same law applies to all issues arising from a legal situation.[170]

However, the *lex fori*-approach has also considerable disadvantages. Specifically, it may interfere with the parties' expectations.[171] Why should the law of the state where the suit is brought, a forum the parties cannot always predict, govern the question whether the arbitration clause extends to an assignee? Not only does the *lex fori* approach frustrate the expectations of the parties, but it also neglects to take into consideration the geographic 'centre' of the question, which may be located in a country which is different from the country of the forum. In addition, the *lex fori* approach encourages forum shopping, because it offers the plaintiff (assignee or obligor) the possibility to choose a jurisdiction whose laws are either likely or unlikely to accept the extension of the arbitration clause to assignees, depending on whether the plaintiff seeks to compel or avoid arbitration.[172] The potential disadvantages of the *lex fori* approach are best illustrated in the *Apollo* case described above.[173]

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166 See *supra*, note 147.

167 See 23 BGHZ 198, 200 (1957) (characterizing the arbitration agreement as '...einen materiellrechtlichen Vertrag über prozeßrechtliche Beziehungen' ['a contract of substantive law governing procedural relations'].) Legal scholars, however, are divided on the issue of whether the arbitration agreement constitutes a contract of substantive or of procedural law. See, e.g., Stein, Jonas & Schlosser, Kommentar jur Zivilprazeßordnung § 1025 I, at nn. 1–19 (1970); 77 BGHZ 32, 35 (1980).

168 See Reithmann, Martiny & Hausmann, *supra* note 141, at No. 1409. Nevertheless, in considering whether the arbitration clause was valid, the BGH applied the law of the state where the arbitral award was to be made, and held: '[D]ie Wirksamkeit der Schiedsklausel [ist] nach französischem Recht zu beurteilen.' ('The validity of the arbitration clause must be decided under French law.'). It based its holding on Art. 6(2)(b) of the European Convention, *supra* note 67. However, the court seems to have limited the application of French law to the question of *formal* validity of the arbitration clause, as opposed to the question of its scope and effect. *Compare* 77 BGHZ 37 (1980) *with* 77 BGHZ 41 (1980).

169 See *supra*, note 160.

170 See *supra* text, accompanying note 159 and Scoles & Hay, *supra* note 147, at pp. 58–59.

171 *Supra* text, accompanying note 161.

172 Keller & Siehr, *supra*, note 147, at p. 231.

173 *Supra*, note 142.

Under this approach, the assignee could have instituted action in a court of a state under the laws of which a non-assignability clause is invalid,[174] although the parties to the original contract clearly chose another law to govern the contract (under which such clauses are valid at least to a limited extent), and the ICC rules to govern the arbitration. If such a court had accepted jurisdiction over the parties and applied its own law, (1) the expectations of the original parties that the chosen law would apply to their dispute would have been neglected, (2) the centre of the dispute could have been in another jurisdiction than in the country of the forum, and (3) the plaintiff would have been able to shop for the forum that neglected the non-assignability clause, although the assignors had previously agreed to choose a law allowing for an non-assignability clause.

These disadvantages of applying the *lex fori* to the issue of transfer of an arbitration agreement clearly outweigh the advantages its application would bring with it, because it neglects important conflict-of-law principles. Consequently, and irrespective of whether the issue is characterized as a matter of procedural or substantive law, the *lex fori* should not govern the question of transfer of the arbitration agreement.

(2) *Law Governing Assignability or Scope and Effects of the Assignment*

As pointed out earlier, the issue of transfer may also be characterized as a question of assignability or scope and effects of the assignment. This characterization is based on the understanding that the arbitration agreement is an accessory right or even a built-in element of the assigned contract or claim.[175] Based on this characterization, some authors have suggested that the law governing assignability, or the law governing the scope and effects of an assignment should also govern the question of transfer of an arbitration agreement.[176]

When characterizing the issue of transfer as one of assignability or of the scope and effects of an assignment, the party whose expectations should be protected in particular is the obligor, insofar as he does not participate in the transfer of the claim to which the arbitration clause relates. The obligor's expectation can only be protected if the issue of transfer of an arbitration agreement is governed by the law that already governed his claim or defence before the assignment took place, without considering the law governing the act of assignment itself. In case the assignor and the obligor have chosen a specific law to govern the main contract, this purpose can be achieved if

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[174] The lower court in *Apollo*, *supra*, note 142, at 886 F.2d 472, had found that, under governing Massachusetts law, a general non-assignment clause should be construed as barring only the delegation of duties, not the assignment of rights.

[175] See *supra*, text accompanying notes 30–32, 49, and 57–58.

[176] See Rubino-Sammartano, *supra*, note 79, at p. 182; Reithmann, Martiny & Hausmann, *supra*, note 141, at p. 1149 No. 1409.

the same choice of law is applied to the question of the transfer of contractual rights arising from it as well. If no specific law has been chosen, the law having the closest relationship to the assigned contract or claim should control in order to meet the obligor's expectation. The assignee's expectations do not interfere with this approach, because the assignee cannot expect another law to govern the question of transfer of the arbitration agreement than the law governing the assigned contract or claim.

Under both common law and civil law conflict-of-law principles, the question of assignability and the scope and effects of the assignment on the relationship between the asssignee and the obligor may be governed by a law which is different from the law governing the effects of an assignment on the relationship between the assignor and the obligor. Under US law, for example, this *dépeçage* is reflected in the Restatement (Second) of Conflict of Laws.[177] Courts have held that the law governing assignability should determine also whether, and if so, to what extent there must be consent to the assignment by the obligor or by a third person.[178] In addition, a choice of law clause in an agreement between the assignor and the assignee has been held to have no binding effect on third persons such as the obligor.[179] Similarly, the European Convention on the Law Applicable to Contractual Obligations[180] distinguishes between the law applicable to the 'mutual obligations of assignor and assignee under a voluntary assignment of a right against the obligor' on the one hand, and the law applicable to assignability and to the relationship between the assignee and the obligor on the

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[177] *Supra*, note 159. § 210 of the Restatement (Second), Conflict of Laws reads:

> Payment or other performance of a contractual right not embodied in a document, to the assignor or assignee, following its assignment, will discharge the obligor, if this payment or other performance would have such effect under
> (a) the law selected by application of the rule of § 208, or
> (b) the law selected by application of the rule of § 209 as against the assignor and the assignee, if the right is assignable under the law selected by application of the rule of § 208.
>
> The law governing the scope and effects of an assignment, other than those effects mentioned in § 210, and against third parties, is not clearly addressed in the Restatement.
> § 208, to which § 210(b) relates, states:
>
> 'Whether, and under what conditions, a contractual right, which is not embodied in a document, can be effectively assigned is determined by the local law of the state which has the most significant relationship to the contract and the parties with respect to the issue of assignability.'
>
> § 209, to which § 210(b) relates also, refers to the rights between the assignor and the assignee.

[178] See Restatement, *supra*, note 159, § 208, comment a (1971 & Supp. 1989); Scoles & Hay, *supra*, note 147, at p. 691.

[179] See *In Re Kokomo Times Publishing & Printing Corp.*, 301 F.Supp. 529, 536, 5 UCC Rep. 954, 963 (S. D. Ind. 1968); *In Re Automated Bookbinding Service, Inc.*, 336 F.Supp. 1128, 1132, 10 UCC Rep. 209, 214 (D.Md.), rev'd on other grounds, 471 F.2d 546, 11 UCC Rep. 897 (4th Cir. 1972); *Intamin, Inc.* v. *Figley-Wright Contractors, Inc.*, 595 F.Supp. 1350, 1351–52 (N. D. Ill. 1984); Scoles & Hay, *supra*, note 147, at p. 761, n. 4.

[180] 23 Eur. Com. L 266/1980, hereinafter EECC. Most EC member-states, including France, Germany, and most recently, the United Kingdom have ratified the EECC. See 1991 European Report, April 16, 1991. Germany has implemented the EECC by statute (*see* Art. 33 of the 'Einführungsgesetz zum Bürgerlichen Gesetzbuch' (EGBGB), as amended.)

other hand.[181] Based on this rule, all questions of assignability and of the scope and effects of the assignment which affect the relationship between the assignee and the obligor are governed by the law to which the assignment relates, *i.e.* the law governing the assigned contract or claim. Questions affecting only the relationship between the assignor and the assignee are governed by the law of their contract.[182]

Unlike the *lex fori* rule, the approach just analyzed prevents forum shopping, because it is applied irrespective of the forum where the claim is brought. It also complies with the principle that it should not matter for the outcome of a case in which forum a legal action is brought.

(3) *Law Governing Arbitrability or Scope and Effects of the Arbitration Agreement*

Lastly, the issue of transfer of the arbitration agreement may also be viewed as a question of arbitrability or scope and effect of the arbitration agreement. This characterization is used specifically in jurisdictions where the arbitration agreement is considered to be separable from the underlying contract.[183] The law governing the arbitration agreement will often be the same as the law governing the main contract,[184] unless the centre of gravity of the underlying agreement is different from that of the arbitration agreement.[185] Cases in

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[181] Art. 12 EECC reads:

(1) The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

(2) The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

[182] Although these two laws may be different, they must both be found on the basis of the conflict-of-law rules governing contracts, which can be found in Arts. 3 and 4 of the EECC. Art. 3 EECC, which lays down the principle of party autonomy, allows the parties to choose the proper law of the contract. To the extent that the law has not been chosen in accordance with this provision, the contract is governed by the law of the country with which it is most closely connected. Art. 4(2) EECC presumes that a contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence, or, in the case of a corporation, its central administration or its place of business. See Giuliano & Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 1980 Eur.Com. C 282, at 34–35 (October 31, 1980). For Switzerland, see Art. 145 of the Swiss Code on Private International Law (CPIL): According to Art 145(4), questions relating exclusively to the parties of an assignment agreement are governed by the law which is applicable to the contract or other legal relationship underlying the assignment. All other questions relating to the assignment (including its form) are governed by the law chosen by the parties and, in the event that the parties have not so chosen, by the right to which the assignment relates. Art. 145(1) and (3) CPIL. However, a choice of law has no binding effect on the obligor without his consent. Art. 145(2) CPIL.

[183] See also van den Berg, *supra*, note 64, at p. 145.

[184] See, e.g., Swiss Federal Tribunal, *supra*, note 46.

[185] See Comment in Jarvin & Derains, *supra*, note 74, at p. 318; Robert & Carbonneau, II *The French Law of Arbitration*, 2–8, 9 n. 17 (1983) (suggesting that the arbitration agreement can be transferred along with the rights in the main agreement, 'provided the law governing the arbitration agreement does not prohibit such transfers.'); Stein, Jonas & Schlosser, *supra*, note 167, § 1025 I, at nn. 20—21 (1970).

which the arbitration agreement has a close relationship to a jurisdiction which is clearly different from the jurisdiction whose law governs the main contract involve primarily situations where the parties have chosen a specific law for the arbitration agreement which is different from the law governing the main contract.[186] This leads to the question whether the choice of an institutional arbitration or of a specific set of arbitration rules should be regarded as such a separate choice of law governing the arbitration agreement.[187] The answer to this question again should depend on the expectation of the parties. To the extent that the chosen set of arbitral rules does not only constitute a body of procedural rules, but also incorporates rules of a substantive nature governing the issue examined here, the parties should be deemed to have chosen that these separate rules should apply to the arbitration agreement. If, however, the parties have chosen a set of procedural rules only, no substantive rules governing the extension to third parties should be imposed on them. This principle is expressed in most arbitration rules, such as the ICSID or the UNCITRAL arbitration rules, where the rules of procedure at the seat of the arbitration are chosen; and where the determination of the procedural rules has been delegated to the arbitrator. In the case of ICC arbitrations, however, the situation is less clear. At a first glance, ICC arbitral tribunals seem to have developed a constant practice with respect to the question of extension of an arbitration agreement to third parties. Thus, in two awards rendered in 1977, ICC arbitral tribunals have found that an assignee is both bound by and entitled to invoke an arbitration clause which was concluded between the assignor and the obligor.[188] This rule has been confirmed in a more recent award.[189] Nevertheless, in all these cases, the ICC tribunals have found the presumption of transfer to be part of the law which they

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[186] See, e.g., Art. VI(2) of the European Convention, *supra*, note 67, which states:

> In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such an agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions
> (a) *under the law to which the parties have subjected their arbitration agreement*; [emphasis added]
> (b) failing any indication thereon, under the law of the country in which the award is to be made;
> (c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

See also Art. 178(2) of the Swiss CPIL, *supra*, note 97.

[187] The *Apollo* court seems to have taken this position with respect to the ICC rules. *Apollo*, *supra*, note 142, at 886 F. 2d 479.

[188] See *supra* text accompanying notes 71 *et seq.* (ICC Award 1704/1977 and ICC Award 2626/1977).

[189] See ICC Award 3281/1981, 109 Journal de Droit International [J.D.I.] 991 (1992), *reprinted in*: Jarvin & Derains, *supra*, note 74, at pp. 453, 454.

found applicable in the specific cases,[190] and they have not raised the rule to a supranational level. Commentators have generally followed these decisions without clearly distinguishing the question whether they were justified under a specific national law, or as a matter of supranational law.[191]

The question remains – even in cases where two different choices of law have been made for the arbitration agreement and for the main contract – whether the application of the law governing arbitrability or scope and effects of the arbitration agreement complies with the main policies for conflict-of-law approaches enunciated above, namely the expectations of all the parties involved. While the assignor and the obligor are sufficiently protected, because they can be deemed to have participated in the arbitration agreement and the underlying contract, the assignee may not be protected in cases where he did not know and could not be expected to know that an arbitration agreement existed at the time when the assignment became effective against him. In such cases, the law governing the arbitration agreement should not be effective against the assignee if it is different from the law of the main contract. In this respect, the considerations for a choice-of-law rule are the same as those for a substantive rule. If, however, the assignee knows or should know about the arbitration agreement including a specific choice-of-law clause for the arbitration agreement, he is sufficiently protected. In those cases, a specific law governing the arbitration agreement may apply to the question of transfer as well. If the assignee does not know (and cannot be expected to know) about the arbitration agreement or a choice-of-law clause affecting it, he should be protected in his expectation that the same law applies to the question of transfer which would apply without an arbitration agreement. This may be either the law governing the main contract between the assignor and the obligor, or the law governing assignability or the scope

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[190] In ICC Award 1704/1977, *supra*, note 72, the arbitral tribunals's seat was in Belgium, and the dispute was between a French and an Indian company. The arbitrator held that under both the law of France (which apparently governed the promissory note on which the claim was based) and the law of Belgium (where the arbitration was located), a subrogee is bound by and entitled to invoke an arbitration clause concluded by the subrogor and the obligor. In ICC Award 2626/1977, *supra*, note 74, the tribunal held that '[i]l est communément admis que le choix du droit applicable au contrat principal règle aussi tacitement la situation de la clause d'arbitrage, en l'absence de dispositions particulières.' ('It is commonly admitted that a choice of the law applicable to the main contract governs also, by implication, the arbitration clause, in the absence of a specific choice for the latter.') In this specific case, the chosen German law was found to be applicable. 105 J.D.I. at 981. In ICC Award 3281/1981, *supra*, note 189, the arbitral tribunal held that French law applied to both substance and procedure. 109 J.D.I. at 991.

[191] Craig, Park & Paulsson, *supra*, note 78, at p. 100. The cases cited by Craig, Park & Paulsson do not clearly confirm this assumption. However, at least one of the cases cited by these authors deals with a negotiable instrument (i.e. a bill of lading), the transfer of which may have different effects with respect to the arbitration clause from those of an assignment of claims which are not embodied in a negotiable instrument. Schricker, *supra*, note 33, at 106–08 expresses the opinion that the rules of the ICC may be interpreted in an autonomous manner, and that there should be a presumption against an automatic transfer in cases of an assignment of rights, as opposed to assignments of entire contracts.

and effects of the assignment.[192] In most instances, these two laws are identical.

(c) *Conclusion of Section III: Critique of Existing Conflict-of-Law Approaches*

In formulating an equitable conflict-of-law approach to the question of transfer of the arbitration agreement, the most important policy which should be taken into consideration should be to respect the expectations of all parties involved.

The application of the law of the forum to the question of transfer of the arbitration agreement clearly violates this policy, because in this case the issue of transfer of the arbitration agreement would be governed by a law which may be different from the law governing the question before the assignment took place, depending on the place where an action is brought. Thus, the *lex fori* approach may encourage forum shopping. Courts and arbitral tribunals should therefore refrain from taking the *lex fori* approach.

The application of the law governing assignability or the scope and effects of the assignment meets the expectation of both the assignor and the assignee, but meets the expectation of the obligor only if the law to which the assignment relates, i.e. the law governing the assigned contract or right, is applied.

The application of the law governing arbitrability or the scope and effects of the arbitration agreement meets the expectations of both assignor and obligor. It meets the expectation of the assignee only if he knows or can be expected to know about the arbitration agreement, as well as about a specific choice of law governing this agreement at the time when the underlying contract or claim was assigned. If this requirement of knowledge is met, the application of the law governing arbitrability and the scope and effects of the arbitration agreement is more fit to meet the purposes of a conflict-of-law approach than the application of the law governing assignability and the scope and effects of an assignment, because it takes into account both the parties' expectations and the separability of the arbitration agreement.[193]

The differences in result between the two latter approaches are, however, minor. Thus, if the assignor and the obligor have chosen a specific law to apply to a dispute, this law will generally apply to the question of the scope and effects of both the assignment and the arbitration agreement. Only in those rare instances in which the parties have chosen a different law to apply to the arbitration agreement (as opposed to the main contract), the two rules

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[192] See, e.g., the Swiss provision governing choice-of-law clauses laid down in Art. 116(3) CPIL, *supra*, note 97, which states:
The choice of law may be made or modified at any time. If made or modified following the conclusion of the contract, it shall be retroactive to the time the contract was concluded. *The rights of third parties shall take precedence.* (Emphasis added.) See also Art. 145(1) of the Swiss CPIL which contains the same rule with respect to the effect of an assignment on the obligor.

[193] As has been shown above, the vast majority of jurisdictions has meanwhile accepted separability. See *supra*, text accompanying notes 97–99.

may lead to the application of different laws.[194] Thus, the law governing the scope and effects of the arbitration agreement should apply to the question of transfer to all situations in which the assignee cannot show that he does not know and cannot be expected to know that the parties to the main contract have concluded an arbitration agreement or agreed to a specific choice-of-law clause for the arbitration. In case the knowledge requirement is not met, however, the law governing assignability and the scope and effects of the assignment may apply.

IV. COMPETENCY TO RESOLVE THE ISSUE OF TRANSFER: COURT OR ARBITRAL TRIBUNAL?

The question who, arbitrator or court, is competent to solve the question of transfer of the arbitration clause is of considerable importance. Because arbitrators may apply a different set of rules and laws to the issue whether the assignee is bound by the arbitration agreement (see *supra* III), courts and arbitral tribunals may reach a different conclusion on this particular issue. The solution to the question of competency depends on the general jurisdictional relationship between arbitral tribunals and domestic courts as well as on the characterization of the issue of transfer.

In civil law countries, modern arbitration legislation tends to convey broad 'Kompetenz-Kompetenz' on the arbitrator.[195] As a consequence, the arbitral tribunal is – irrespective of the characterization of the issue of transfer – competent to rule on the issue whether the assignee is bound by the arbitration agreement.[196] The arbitrator's ruling on his jurisdiction is, however, limited insofar as courts are considered not bound by the arbitral tribunal's finding.[197] Only if the parties explicitly agree that the arbitral tribunal should have competence to reach a final decision on the matter does the arbitrator have final authority to rule on the issue.[198] In this instance, however, the further question arises whether the assignee is bound by the

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[194] But see Art. VI(2)(b) of the European Convention, *supra*, note 67, under which the *lex arbitri* (i.e. the *lex fori* of the arbitrator) applies if no choice of law has been made for the arbitration agreement. For the reasons stated above against the application of the *lex fori*, this law should be neglected with respect to the question of transfer.

[195] See, e.g., Art. 186 of the Swiss CPIL, *supra*, note 97: 'The arbitral tribunal shall rule on its own jurisdiction,' or art. 1052(1) of the Dutch Arbitration Act, *supra*, Note 97: 'the arbitral tribunal may rule on its own jurisdiction.'

[196] See, e.g., Netherlands Arbitration Institute, Interim Award of August 31, 1978, reprinted in V Y.B.Comm. Arb. 194 (1980).

[197] The tribunal's ruling will in general be subject to review by the courts, either immediately or after the conclusion of the arbitration proceedings. *See* Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* No. 546 *et seq.* (2d ed. 1989).

[198] *Ibid.*, at No. 555–58. For a case holding specifically that the arbitrator has final authority to rule on the issue of transfer of the arbitration clause in case of assignment of rights, *see* 68 BGHZ 356, 366 (1977).

agreement of the original parties with respect to the binding nature of Kompetenz-Kompetenz.[199]

In common law systems, it is generally held that the court, not the arbitrator, is competent to rule on the issue of transfer, absent an express or implied party agreement to the contrary.[200] Although common law systems also recognize that an arbitrator has Kompetenz-Kompetenz,[201] it is more limited than Kompetenz-Kompetenz in civil law systems. Courts in the US have repeatedly held that the question as to whether the assignee has in fact acquired the right to enforce the arbitration agreement against the other original party is for the courts, and not for the arbitral tribunal, to decide.[202] Furthermore, it has been held that if arbitrators have decided on the issue although domestic law provides for the courts to decide, the court gets to rule on the issue again.[203] If, however, the court upholds the arbitral tribunal's decision, the arbitration process need not be repeated.[204]

International arbitration conventions and institutional rules, similar to modern arbitration legislation in civil law countries, convey broad Kompetenz-Kompetenz to the arbitrator. Consequently, the arbitrator is also competent to decide the issue of transfer of the arbitration clause.[205]

Granting the arbitrator rather than the court the competence to resolve the issue may have considerable advantages for both the original parties to the main contract and the assignee. Arbitral competence to rule on the

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199 *Ibid.*, at pp. 366–68 (holding that the same reasons that speak in favor of binding the assignee to the arbitration clause also speak in favor of binding the assignee to the original parties' agreement as to the binding nature of arbitral Kompetenz-Kompetenz).

200 See *Joseph*, *supra*, note 4, at 803 F.2d 399 n. 2 (holding that the parties may, by express agreement, empower the arbitrator to resolve the question); *Apollo*, *supra* note 142, at 886 F.2d 473–74 (holding that reference to Arts. 8.3 and 8.4 of the ICC arbitration rules constitutes implicit agreement to empower the arbitrator to decide the issue).

201 See, e.g., § 684.06(2) of the Florida International Arbitration Act, 26 I.L.M. 949, 971 (1987): 'The arbitral tribunal shall have the power to rule on all challenges to its jurisdiction. This shall include, without limitation, challenges based on the claim that the written undertaking to arbitrate does not exist or does not give rise to a valid and enforceable agreement, challenges asserting that the dispute is not within the scope of the questions referable to arbitration or is otherwise nonarbitrable, and challenges to the composition of, or method used in forming, the tribunal.' See also 15 Okl. St. § 803 (1990), and Tenn. Code Ann. § 29-5-303 (Michie 1990).

202 Federal courts have characterized the question as one going to the *existence* of a contract to arbitrate and as a question of substantive arbitrability, bearing directly on the party element and thus to be decided by the courts under § 4 of the Federal Arbitration Act. *Joseph*, *supra*, note 4, at 803 F.2d 400. See also *Necchi* v. *Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 696–97 (2d Cir. 1965, cert. denied, 383 US 909, 86 S.Ct. 892).; *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821, 828–29 (2d Cir. 1968). State courts in general have not addressed the issue specifically, but have held that it is for the courts to decide which parties are bound by the arbitration agreement. See *Nicholas A. Califano, M.D., Inc.* v. *Shearson Lehman Bros., Inc.*, 690 F.Supp. 1354 (S.D.N.Y. 1988); *Matter of Reyes Compania Naviera S. A.*, 649 F.Supp. 789 (S.D.N.Y. 1986).

203 *Joseph*, *supra*, note 4, at 803 F.2d 400.

204 *Ibid.*

205 See, e.g., Art. V(3) of the European Convention, *supra* note 70, or Art. 8(3) ICC Rules of Arbitration: 'Unless othewise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction ... to determine the respective rights of the parties and to adjudicate upon their claims and pleas.'

question of transfer is in the original parties' best interest insofar as the existing dispute will remain confidential. Competency of the court is, on the contrary, likely to have the undesirable effect of revealing to the public the existence of an ongoing dispute which in turn may reveal a confidential business relationship, disclose important trade secrets, or damage a party's commercial reputation. Arbitral competence may also be in the assignee's interest who seeks to compel the obligor to arbitrate insofar as he avoids the risk of having to resort to foreign courts and the vagaries of foreign laws.

Arbitral competence to decide the issue of transfer has, however, also certain disadvantages. Thus, it may turn out to be less efficient and more costly for all parties involved to have an arbitrator, rather than a court, rule on the issue. Because the arbitrator's competence is in general not final, but subject to review by courts,[206] parties run the risk that, even after an award has already been rendered, the proceedings have to be repeated, because the court reaches a different conclusion on the question than the arbitrator. Arbitral competence may also be considered problematic insofar as a third party is involved which has not participated in the initial conclusion of the arbitration agreement and which may claim that it is extraneous to the arbitration agreement.

Overall, these disadvantages do not outweigh the advantages of arbitral competence to rule on the issue of transfer. They mandate, however, that the arbitrator rule on the question in the form of an interim award which is immediately appealable to the competent domestic court. This solution has already been adopted as a general rule by modern arbitration legislation such as the Swiss Code on Private International Law.[207]

V. CONCLUSION: PROPOSAL FOR UNIFORM RULES IN THE CONTEXT OF INTERNATIONAL COMMERCIAL ARBITRATION

This article has shown that there are no uniform rules on the issue of transfer of the arbitration agreement in international commercial arbitration. For several reasons, such uniform rules would, however, be highly desirable, namely to avoid forum shopping, to facilitate international commercial transactions and to ensure the foreseeability and uniformity of solutions to international disputes. In order to avoid the difficult conflict-of-law problems created by the existence of different standards under different legal systems,[208] it would be highly desirable to adopt a uniform substantive

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[206] See *supra*, text accompanying notes 197 and 201.

[207] Art. 186(3) CPIL, *supra*, note 97, reads:

> In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision.

[208] See *generally* Zweigert & Kötz, I *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* 24 (1971); Kropholler, *Internationales Einheitsrecht* 9–30 (1975).

rule regulating the issue. In the absence of such a possibility, it is strongly recommended that existing conflict-of-law approaches be harmonized. In either case, the arbitrator should be competent to rule on the issue.

(a) *Proposal for a Uniform Substantive Law Rule*

The formulation of a viable as well as equitable rule for the transfer of the arbitration agreement in the case of assignment of contractual rights must involve a careful balancing and weighing of all the factors listed in section II. Such a rule, which at present cannot be inferred from international arbitration conventions,[209] but which should be introduced either in a revision of the New York Convention or in a revision of the UNCITRAL Model Law, could be formulated as follows:

> 1. Absent a mutual intent to the contrary of the original parties to the contract, an arbitration clause is transferred together with a validly assigned contractual claim. It entitles and binds both assignee and obligor to arbitrate any dispute arising from such contractual claim.
> 2. The assignor has a pre-contractual duty to notify the assignee that the assigned claim is subject to a duty to arbitrate. Should the assignor fail to do so, he is liable to the assignee for every damage caused thereby.
> 3. The obligor is released from his duty to arbitrate if he can show that the substitution of the assignor by the assignee in the arbitration agreement curtails his legal rights.

The proposed rule presents a more equitable rule than the common law and civil law rules analyzed in this article and at the same time constitutes a compromise between the two approaches. It optimally protects the obligor's position insofar as he retains the right to arbitrate any dispute pertaining to the assigned right and is under no duty to arbitrate if such a duty is either against the original parties' intent or would present a greater burden than to arbitrate with the assignor.[210] It also protects the assignee's legal position insofar as he must be given due notice of the fact that the assignment of the contractual right brings with it an obligation to arbitrate any dispute arising from the enforcement of that right.[211] It fosters the use of arbitration, because the arbitration agreement passes with the assigned claim.[212] Although the written form requirement is outweighed by other policy considerations, adequate notice of the existence of an arbitration clause prior to the assignment of the claim, combined with an assignee's right to claim any damages he incurs by involuntarily waiving his fundamental right to bring action in court serves the same purpose. Compared with an assignee's involuntary waiver of his right to litigate, the assignor's (pre-contractual) duty to inform the assignee of the existence of an arbitration agreement is the lighter burden.

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209 See *supra*, text accompanying note 96.
210 For discussion of the obligor's position see *supra*, at II(d).
211 For discussion of the assignee's legal position see *supra*, at II(c).
212 For discussion of this aspect, see *supra*, at II(f).

(b) *Proposal for a Uniform Conflict-of-Law Rule*

In the absence of international agreement on a uniform substantive law rule, there should be agreement on a uniform conflict-of-law rule. The predictability of the outcome by the parties can only be guaranteed, and forum shopping can only be avoided, if all courts and arbitral tribunals strive to apply the same conflict-of-law rule with respect to the question of transfer of the arbitration agreement. With the exception of the unacceptable *lex fori* approach, the approaches described in section III(b) do not differ significantly. Thus, an equitable rule may be formulated which could be applied irrespective of whether the issue is characterized as one of assignment or one of arbitration. Such a rule could read as follows:

> 1. The question whether an assignee is entitled or compelled to invoke an arbitration agreement relating to the assigned contract or claim in a dispute with the obligor is governed by the specific law chosen by the assignor and the obligor to apply to the arbitration agreement. Absent such choice, the question is governed by the law chosen by the assignor and the obligor to apply to the assigned contract or contractual right.
> 2. If, however, the assignee did not know or could not be expected to know about such a choice of law before the assignment took place, or no such choice has been made, the question of transfer is governed by the law which is applicable to the assigned contract or contractual right.

This rule prevents the application of the law of the forum which would conflict with important conflict-of-law policies and encourage forum shopping. It takes into account the predominant interests of both the obligor and the assignee, because it meets their expectations that a law will apply to the issue of transfer which they can foresee at the time the contract or contractual right is assigned. At the same time, it avoids a characterization of the issue which would lead to the application of a conflict-of-law rule that may not take into account the interests of either the obligor or the assignee.

(c) *Proposal for a Uniform Rule Regarding the Competence to Decide the Question of Transfer*

Irrespective of the adoption of a uniform substantive law rule or conflict-of-law rule, there should be a uniform rule regarding the competence to decide whether the arbitration agreement travels with the assigned contractual right or not. The reasons which have been advanced in support of a broad Kompetenz-Kompetenz of the arbitrator also speak in favour of arbitral competence to rule on the question of transfer. However, the fact that a third party is involved which has not participated in the initial conclusion of the arbitration agreement warrants a speedy review of the arbitrator's decision by the courts. Thus, it is suggested that the arbitrator rule on the question in the form of an interim award which is appealable to domestic courts.