



**DOES THE ARBITRATION AGREEMENT
AUTOMATICALLY ASSIGN UPON ASSIGNMENT OF A
CONTRACT: THE CONUNDRUM FINALLY SETTLED?**

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Does the Arbitration Agreement automatically assign upon Assignment of a Contract: The Conundrum finally settled?

While considering the recommendations of a High Powered Committee, the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Bill, 2019 (passed to become an Act on 9th August 2019) states as follows:

“After examination of the said recommendations with a view to make India a hub of institutional arbitration for both domestic and international arbitration, it was decided to amend the Arbitration and Conciliation Act, 1996.”

This shows that there is a legislative intent to push arbitration as a viable method of alternative dispute resolution for commercial disputes.

Hence, in the realm of commercial transactions, arbitration agreements often play a critical role in resolving disputes efficiently.

However, the question arises: does an arbitration agreement automatically assign when the underlying contract is assigned? In this article, we delve into the Indian judiciary's approach to this issue, exploring key rulings and legal principles.

¹ [Arbitration and Conciliation Amendment Bill, 2019](#)

UNDERSTANDING ASSIGNMENT OF CONTRACTS AND ARBITRATION AGREEMENTS

Assignment of Contract refers to the transfer of rights and obligations from one party to another. The original party (assignor) transfers the contractual rights to a new party (assignee), who then assumes the benefits and burdens of the contract.

The Arbitration Agreement is an agreement or a clause within a contract which stipulates that disputes arising from a main or 'mother contract' will be resolved through arbitration. In law an Arbitration Agreement, or such a clause providing for resolution of disputes through arbitration, is considered a separate agreement. even though it is embedded within the main contract.²

This understanding of the Assignment of contract and the consideration of arbitration agreement is in light of a few established legal principles in the Indian Context. They're listed as below for the reader's reference.

KEY LEGAL PRINCIPLES IN INDIAN CONTEXT

1. Doctrine of Separability: This doctrine, recognized in Indian legal parlance, posits that an arbitration clause is independent of the mother contract. It essentially means that even if the main contract is found to be invalid, the arbitration clause can still be enforceable. This position is now statutorily recognized under Section 16 of the Arbitration & Conciliation Act, 1996 ("**A&C Act**") and has been elaborately dealt with by the Hon'ble Supreme Court in *National Agricultural Coop. Marketing Federation India Ltd. v. Gains Tradings Ltd.*, (2007) SCC OnLine SC 800.
2. Consent to Arbitration: The foundation of any agreement is the mutual consent of the parties involved. For an arbitration agreement to bind a party or its assignee, there must be clear evidence towards the consent to arbitrate disputes. This aims to infer consent from the conduct of the parties in case the principal agreement is not self-evident. In fact, the Hon'ble Supreme Court has, in certain cases, went ahead to imply the consent of parties to arbitration basis their conduct under the main contract.

² *Vidya Drolia V. Durga Trading Corporation*, (2021) 2 SCC 1

INDIAN JUDICIAL APPROACH VIS A VIS ASSIGNMENT OF CONTRACT AND ARBITRATION AGREEMENT

With a push of Legislative intent to make India a “hub for arbitration” as highlighted above, the Indian courts have come to make more specific clarifications of whether arbitration agreements automatically assign with the underlying contract through several rulings, some of which have been summarized here:

1. *Khardah Company Ltd. v. Raymon & Co (India) Private Ltd., AIR 1962 SC 1810*

A 5 Judge Constitutional Bench in this Judgment held that an assignment of a contract can result by transfer either of the rights or of the obligations thereunder, however, there is a well-recognized distinction between these two classes of assignments. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is essentially a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature, or the rights are incapable of assignment either under the law or under an agreement between the parties.

2. *Kapilaben & Ors. v. Ashok Kumar Jayantilal Sheth, Civil Appeal Nos. 10683-86 of 2014*

The pivotal question here was whether an arbitration agreement is also novated when the principal contract is assigned to a third party. The Hon'ble Supreme Court clarified that such an assignment, encompassing the obligation to refer disputes to arbitration, necessitates fresh consent from the involved parties. This ruling underscores the requirement for explicit agreement to arbitration by the assignee, ensuring that all parties are unequivocally committed to the arbitration process.

3. *DLF Power Ltd. v. Mangalore Refinery & Petrochemicals Ltd. 2016 SCC OnLine Bom 5069*

The Hon'ble Bombay High Court has taken a different view in comparison to the erstwhile views taken by the Supreme Court and other High Courts. It observed that the conduct of the parties post assignment of the contract shall play a pivotal role and held that no separate execution of the arbitration agreement was required between the parties as the arbitration agreement contained in the principle contract shall be stood assigned in favor of the assigned party.

4. *Cox and Kings Ltd. v. SAP India Pvt. Ltd. and Another (2023) SCC OnLine SC 1634*

In this recent decision, although the Hon'ble Supreme Court has not expressly delved into the aspect of assignment of the arbitration agreement, it has been acknowledged that arbitration agreements can extend to third parties who have not directly signed the agreement but have become involved through the assignment of the principal contract.

CONCLUSION

A study of the above decisions not only highlights the binding nature of arbitration agreements to non-signatories but also shows that the aspect of assignment of arbitration agreement now also stands well recognized in the judicial parlance. The recent view taken in *Cox and Kings (Supra)* indicates that specific consent may not be required for the arbitration agreement to be binding when the principal contract is assigned. This landmark ruling broadens the scope of arbitration agreements, implying that assignees can be bound by the arbitration clause embedded in the original contract without the need for a separate agreement or explicit consent. Consequently, this judgment provides greater certainty and enforceability of arbitration clauses in the context of contract assignments, reinforcing the intention to arbitrate disputes as originally agreed upon by the contracting parties.