

**ASSIGNEE’S RIGHT AND OBLIGATION TO ARBITRATE UNDER CIVIL
LAW AND THE PERUVIAN LONG ARM RULE**

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Abstract

In civil law countries,¹ the assignment of a contract changes the parties to the contract without resulting in novation. The assignee takes the position of the assignor but the original contract continues to exist, along with provisions relating to choice of law and jurisdiction. Therefore, in many civil law jurisdictions, an agreement to arbitrate contained in the assigned contract is binding on the assignee. This conclusion is supported by the rules on assignment of contract, which are now followed in most civil law jurisdictions and recently adopted in the new French Civil Code of 2016. Further, the Colombian Arbitration Statute of 2012 has an express rule regarding transfer of the arbitration clause in the event of assignment. Furthermore, Article 14 of the Peruvian Arbitration Law incorporates the principle whereby the arbitration clause applies to all the parties which have participated in any way in the performance of the

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¹ The reference to civil law is basically to countries that follow the French civil law tradition which include, in Europe, France, Italy, Portugal, Belgium and Spain and, to some extent, Switzerland. The French civil law is followed in West Africa, parts of Southeast Asia, most of Latin America, Quebec in Canada, and Louisiana in the United States. For this note, we are using the civil law of Venezuela, Argentina, Panama and Peru, for Latin America. See JAMES OTIS RODNER, LA TRANSFERENCIA DEL CONTRATO (THE TRANSFER OF CONTRACT) (UNIDROIT ART. 9) (2014) [*hereinafter* “Rodner”].

obligations arising out of the contract in good faith. This is a “long-arm” provision covering the difficult cases of assignment.

I. Assignment of Contract in Common Law

A recent comment in this journal² regarding a decision of the Singapore Court of Appeals in *Rals International Pte Ltd v. Cassa di Risparmio di Parma e Piacenza SpA*³ dealt with the common law approach regarding the effects of an assignment on the arbitration clause contained in the original assigned agreement. Although the High Court in Singapore held that the assignee was not a party to the arbitration agreement for the purpose of Article 6 of the International Arbitration Act (Singapore), the assignee could nonetheless be considered a person claiming “through or under” the contract and therefore has a right to the arbitration clause.

A different approach was adopted in a recent decision of the Irish High Court⁴ wherein it was held that in case of assignment of the benefits of the insurance policy, which included an arbitration clause, the assignees could choose whether to participate in the pending arbitration or not.⁵ Essentially, the Irish High Court seems to hold that the right to arbitrate can be transferred to the assignee, but not the obligation to submit to arbitration.

² Oomen Mathew & Alvin Yap, Assignee’s Right and Obligation to Arbitrate under Singapore Law: A Missed Opportunity by the Court of Appeal of Appeal?, 5(2) INDIAN J. ARB. L. 177 (2017).

³ *Rals International Pte Ltd v. Cassa di Risparmio di Parma e Piacenza SpA* [2016] SGCA 53 (Sing.).

⁴ *Stewart v. McKenna* [2014] IEHC 301 (Ir.).

⁵ A&L Goodbody, *Irish High Court Rules on Effect of an Assignment on Agreement to Arbitrate* (July 29, 2014), LEXOLOGY, available at <https://www.lexology.com/library/detail.aspx?g=b4105180-347d-4eda-8770-fd9b87e600af>.

In common law, the assignment of a contract results in novation, that is, “the replacement of the contract entirely with a new contract”.⁶ In fact, “novation is now usually employed to denote a change of parties”.⁷ The result of the assignment is that there is a new contract;⁸ the effect is to “extinguish the original contract and replace it by another”. If the original contract is extinguished, you need the consent of both contracting parties,⁹ which implies that you need the consent of the assignee to the arbitration agreement.

In the United States, “*unless the language or circumstances indicate the contrary, such as in case of an assignment for security, an assignment of ‘the contract’ or of ‘all of my rights under the contract’ or an assignment in similar general terms, is an assignment of the assignor’s rights and a delegation of his unperformed duties under the contract*”.¹⁰ When there is an assignment of a duty, which occurs in the assignment of a contract, the intention of the assignor “is not completely effective unless the obligor of the assigned right joins in a novation”.¹¹ Therefore, in the United States, in order to have a full assignment, the parties must agree to a novation of the original agreement. Nonetheless, it appears that the American cases favour the survival of the agreement to arbitrate after the assignment of the contract is complete.

Under Article 9 of the Uniform Commercial Code of the United States [“UCC”], the assignee of a right takes the right subject to agreement between the account debtor and the assignor.¹² The Federal Courts have

⁶ Ewan McKendrick, *Goode on Commercial Law* 114, § 3.89 (5th ed. 2016).

⁷ *Id.*

⁸ JOSEPH CHITTY, *CHITTY ON CONTRACTS* 990, § 19-050 (Anthony Gordon Guest ed., 27th ed. 1996) (1826).

⁹ *Id.*

¹⁰ Restatement (Second) of Contracts § 328 (Am. Law Ins. 1979).

¹¹ *Id.* at cmt. (a).

¹² U.C.C. § 9-404 (a)(i) (Am. Law Inst. & Unif. Law Comm’n 1977).

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held that “a finance assignee suing on an assigned contract is bound by that contract’s arbitration clause unless it secured a waiver”.¹³ An important caveat is that Article 9 of the UCC, where we find that the rule of Section 9-404 only applies to secured transactions, that is, to assignments as security.¹⁴

In the United States, though the assignment of the contract produces novation, it appears that the arbitration agreement in the assigned contract passes to the assignee with the assignment.¹⁵ In *Bank of America, N.A. & Platinum Indemnity Limited v. Diamond State Insurance Company*,¹⁶ the defendant argued that a “novation agreement extinguished any agreement between the parties to arbitrate”.¹⁷ The Court, however, granted the motion to compel arbitration. When determining whether a matter is to be arbitrated, the Court must first determine whether the arbitration agreement is broad or narrow. The Court, in *Bank of America v. Diamond State Insurance Company*, concluded that “the parties clearly manifested an intent to arbitrate issues under the contract, even after its termination”.¹⁸ Therefore, one concludes that even if the assignment had produced a novation, thus terminating the agreement, the issues were still subject to arbitration.

¹³ GMAC Commercial Credit LLC v. Springs Industries, 171 F.Supp.2d 209, 215 (S.D.N.Y. 2001), cited in NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.55 (6th ed. 2015) [hereinafter “REDFERN & HUNTER”]; See also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1188 n. 244 (2d ed. 2009) [hereinafter “BORN”].

¹⁴ U.C.C. § 9-101 (Am. Law Inst. & Unif. Law Comm’n 1977).

¹⁵ BORN, *supra* note 13, at 1518. Gary Born cites several cases decided in Federal Courts. See, e.g., Asset Allocation & Mgt. Co. v. Western Employers Ins. Co., 892 F.2d 566 (7th Cir. 1989).

¹⁶ Bank of America, N.A. v. Diamond State Ins. Co. Ltd., 2002 U.S. Dist. LEXIS 23225, 2002 WL 31720328 (S.D.N.Y. 2002).

¹⁷ *Id.* at 9.

¹⁸ *Id.*

II. Assignment of Contract in Civil Law

In civil law, the right of the assignee to rely on the arbitration clause in case of assignment of a contract is based on the effect that the assignment produces on the parties to the contract. In civil law, the assignment of a contract is not the transfer of all the rights and delegation of all the duties of the assignor. An assignment of a contract entails one of the parties transferring his condition as a party to the contract to a third party. The assignment, in effect, puts the assignee in the position of the assignor, prior to the assignment. However, the original contract remains. There is no novation, only a change in one of the parties to the contract. Therefore, the assignee, as the new party to the contract, is bound by the arbitration clause in the contract and has the right, as well as the obligation, to submit to arbitration.

Assignment of contract resulting in the substitution of a party to a contract is recognized in most civil law jurisdictions. The rule on assignment of contract appears in the French Civil Code of 2016, which provides that the assignor can assign his condition as a party to the contract to a third party, the assignee, with the consent of the assigned other party to the contract, i.e., the co-contractant.¹⁹ The first civil code to adopt an express rule regarding assignment of contract, as a substitution of a party, was the Italian Civil Code of 1942²⁰ followed by the Portuguese Civil Code of 1966.²¹ In Latin America, the rules regarding assignment of contract are covered in the Peruvian Civil Code,²² the Civil Code of

¹⁹ CODE CIVIL [C. Civ.] [CIVIL CODE] art. 1216 (Fr.). The term ‘the other party’ to translate co-contractant is contractant is taken from the International Institute for Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts 2016, art. 9.3.1, *available at* <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> [*hereinafter* “UPICC”].

²⁰ CODICE CIVILE [C.c.] art. 1406 (It.).

²¹ Código Civil [C.c.] [Civil Code] art. 424 (Port.).

²² Código Civil [C.c.] [Civil Code] art. 1435 (Peru).

Bolivia,²³ the Colombian Commercial Code,²⁴ and in the new Civil Code of Argentina.²⁵ In jurisdictions where there is no express rule regarding assignment of contract, doctrine (legal literature)²⁶ and some court decisions have held that assignment of contract produces the substitution of a party.²⁷

Assignment of contract has also been adopted in the UNIDROIT Principles of International Commercial Contracts [“UPICC”],²⁸ which define “assignment of a contract” as “*the transfer by agreement from one person (“the assignor”) to another person (“the assignee”) of the assignor’s rights and obligations arising out of a contract with another person (“the other party”).*”²⁹ The UPICC, unlike civil law, do not refer to the substitution of a party to the

²³ Código Civil [C.c.] [Civil Code] art. 539 (Bol.).

²⁴ Código Civil [C.c.] [Civil Code] art. 887 (Colom.).

²⁵ Código Civil [Cód. Civ.][Civil Code] art. 1637 (Arg.).

²⁶ Legal literature, or better known by its French term “doctrine”, is a reference to the opinion by scholars in a particular country. Referred to in Spanish as “doctrina”, in Italian “dottrina”, as such, the term does not exist in the common law. Doctrine in common law is more a reference to a rule taken from court decisions. *See, e.g.*, FRANCESCO DE FRANCHIS, DIZIONARIO GIURIDICO ITALIANO-INGLESE (LEGAL DICTIONARY ITALIAN-ENGLISH) 716 (1996). In international arbitration, however, the use of opinions by scholars is frequently used on both opinion articles as well as in awards. This is probably the result that the legal principles are still developing and further because of its international scope, there is a strong influence from civil law.

²⁷ Doctrine in Spain recognizes that an assignment of a contract is valid, based on the principle of freedom of contract. *See* CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1255 (Spain); 2 LUIS DIEZ-PICAZO, FUNDAMENTOS DE DERECHO CIVIL PATRIMONIAL (BASIC PRINCIPLES OF CIVIL LAW) 1044-1045 (8th ed. 2008). This recognition has been confirmed by the Spanish Supreme Court (S.T.S., June 2011, R.J. 2011, 45229), *quoted in* FRANCISCO HERNÁNDEZ URZAINQUI, CÓDIGO CIVIL (CIVIL CODE) 1613 (11th ed. 2015). For Venezuela and Spain, *see* ÁNGEL CRISTÓBAL MONTES, ESTUDIOS DE DERECHO CIVIL (STUDIES OF CIVIL LAW) 100-101 (1970).

²⁸ UPICC, *supra* note 19.

²⁹ *Id.*

contract with the assignee. However, the official comment to Article 9.3.1 refers to the replacement of one of the parties.³⁰

To complete the assignment of a contract in civil law, the consent of the assignor, the assignee and of the assignor's counterpart is required.³¹ The consent of the counterpart can be given prior to the assignment, at the time of the assignment, or later.

According to legal literature, in Portugal, the principal effect of the assignment is to “substitute the assignor for the assignee as a party to the assigned contract.”³² Further, as has been held in Peru, the assignor is no longer the holder of the relation under the assigned contract.³³ The assignee, as the new party to the contract, is bound by all the terms and conditions of the contract, except for those which were expressly excluded in the assignment agreement. This also includes the agreement to submit to arbitration. A transfer of the arbitration clause to the assignee, when there is an assignment of the contract, is recognized in most civil law countries without major discussion.³⁴ The arbitration clause applies to the assignee not because the assignee may be “claiming through or under” the contract, but rather, because it is a party to the contract. The assignee is not considered a third party to the arbitration. According

³⁰ *Id.* at cmt. to art. 9.3.1.

³¹ Código Procesal Civil [C.c.] [Civil Code] art. 1435 (Peru).

³² 2 João de Matos Antunes Varela, *Das Obrigações em Geral* (The General Obligations) 404, § 430 (7th ed. 2004).

³³ Affirmation taken from doctrine in Peru, which follows the same doctrine as that of Portugal. *See* 2 MANUEL DE LA PUENTE Y LAVALLE, *EL CONTRATO EN GENERAL* (THE GENERAL CONTRACT) 539 (2011).

³⁴ REDFERN & HUNTER, *supra* note 13, at 89, ¶ 18, § 2.55. According to Redfern & Hunter, there is a presumption that the clause was assigned with the contract. *See also* BORN, *supra* note 13, at 1467.

to the Italian Court of Cassation,³⁵ the arbitration clause that was binding upon the original party now automatically binds the assignee without the requirement of an agreement between the assignor and the assignee. The assignment “automatically transfers the arbitration agreement.”³⁶

A. Colombian Arbitration Law

Most arbitration laws in Latin America, which are heavily influenced by the UNCITRAL Model Law on International Commercial Arbitration, 1985 [“**Model Law**”],³⁷ do not have a rule on the assignment of contracts. The one notable exception is the Colombian Arbitration Law of 2012 [“**CAL**”],³⁸ which provides that “the assignment of a contract that has an arbitration agreement entails the transfer of the arbitration clause”.³⁹ This provision was added to the 2012 law, following discussions on the effect of assignments on the arbitration clause, which was considered by some as separate from the contract and, thus, not part of the assignment agreement. In fact, this article was not necessary in Colombia since the Colombian Commercial Code (Article 887),⁴⁰ which regulates the assignment of contracts, provides for the substitution of a party to the contract. In Colombia, an assignment of a contract puts the assignee in the same position as that of the assignor prior to the assignment.⁴¹

³⁵ Cass., sez. un., 17 settembre 1970, n. 1525, Foro it. I (It.); Cass., sez. un., 21 giugno 1996, n. 5761, Foro it. I (It.), *quoted in* G. PESCATORE & C. RUPERTO, CODICE CIVILE ANNOTATO CON LA GIURISPRUDENZA CORTE COSTITUZIONALE, DELLA CORTE DI CASSAZIONE E DELLE GIURISDIZIONI AMMINISTRATIVE SUPERIORI (ANNOTATED CIVIL CODE) (2010).

³⁶ BORN, *supra* note 13, at 1518.

³⁷ United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006), [*hereinafter* “Model Law”].

³⁸ L. 1563/2012, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.), *translation available at* <https://www.wipo.int/edocs/lexdocs/laws/es/co/co100es.pdf>.

³⁹ *Id.* at art. 5.

⁴⁰ Código de Comercio [C. Com.] [Commercial Code] art. 887 (Colom.).

⁴¹ 1 Fernando Hinestrosa, Tratado de las Obligaciones (Treaty of Obligations) 530 (3d ed. 2007).

Therefore, the assignee is bound by the agreement to arbitrate. Nonetheless, by regulating the effects of assignment in the CAL, the arbitration agreement will survive an assignment independently of the law of the contract.

Article 5 of the CAL is considered applicable to national arbitration⁴² but also extends by analogy to international arbitrations in Colombia. The rule included in Article 5 of the CAL could be considered in the future for any amendment of the Model Law.⁴³

B. Separability

The principle of separability of the arbitration clause, otherwise known as the independence of the agreement to arbitrate from the main contract,⁴⁴ is found in most Latin American arbitration laws. The principle is adopted from the Model Law, which provides that “*an arbitration clause which forms part of a contract shall be treated as an agreement, independent of the other terms of the contract*”.⁴⁵

The separability of the arbitration agreement, however, does not mean that the agreements are not related, and does not in any way limit or prevent the transfer of the arbitration agreement at the time of assignment

⁴² The Colombian Arbitration Law covers national and international arbitrations under two different chapters. None of the rules for international arbitration, refer to the assignment of contract, or to the effects of the assignment on the agreement to arbitrate. An arbitration in Colombia is considered international if the parties are of different nationalities or if the contract has to be performed in two or more different countries.

⁴³ Model Law, *supra* note 37.

⁴⁴ JEAN ROBERT, L'ARBITRAGE-Droit Interne, DROIT INTERNATIONAL PRIVÉ (ARBITRATION IN MUNICIPAL LAW AND IN PRIVATE INTERNATIONAL LAW) ¶ 282 (1983).

⁴⁵ A similar rule is found *inter alia* in the Venezuelan Commercial Arbitration Law, art. 7 (Ven.); Peruvian Arbitration Law, art. 41(2) (Peru); Panama Arbitration Law, art. 30; CÓDIGO CIVIL [COD. CIV.] [CIVIL CODE] art. 1653 (Arg.).

of the contract. In fact, separability does not mean that the arbitration clause has to be assigned in a separate agreement.⁴⁶

According to Venezuelan doctrine, separability is a legal fiction used to allow the jurisdiction of the arbitral tribunal to survive a request to declare the contract void.⁴⁷ It does not mean that the agreement to submit to arbitration is not related to the underlying contract. An agreement to submit to arbitration must always refer to a particular contract or claim as it does not live on its own. Therefore, the arbitration agreement is not, at least in civil law, transferred separately from the underlying contract.

The simple method for transfer of the arbitration clause is for the assignment agreement to expressly state that along with the assignment of the contract, the agreement to arbitrate is also being assigned. Therefore, when the assignee gives its consent to the transfer of the contract, it is also giving consent to the arbitration clause. However, even if the assignment agreement does not state that the arbitration clause is being assigned, as long as the arbitration clause is included in the same agreement together with the basic contract (underlying contract), the arbitration clause passes to the assignee upon assignment.

At times, the arbitration clause is not in the body of the main contract. If the arbitration clause is contained in a separate agreement, but the

⁴⁶ In France, the decisions of the courts since 1950 have held that the arbitration clause passes with the assignment of the contract. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., July 12, 1950, Bull. civ. II No. 77 (Fr.), *cited in* P. FOUCHARD ET AL., TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL (INTERNATIONAL COMMERCIAL ARBITRATION) 427, ¶ 712 (1999); *See also* JEAN BILLEMENT, LA LIBERTÉ CONTRACTUELLE À L'ÉPREUVE DE L'ARBITRAGE (FREEDOM OF CONTRACT UNDER THE TEST OF ARBITRATION) 231, ¶ 323 (2013).

⁴⁷ Ramón Escovar Alvarado, La facultad de los tribunales arbitrales para determinar su propia jurisdicción, 18 ARBITRAJE COMERCIAL INTERNO E INTERNACIONAL 435 (2005).

assignment agreement makes a reference to this separate agreement or wherever the assignee had knowledge of its existence, the arbitration clause will be binding on the assignee.

Most civil law countries provide that contracts must be performed in good faith.⁴⁸ If the assignee knows of the existence of an arbitration clause and does not make a reference in the assignment to the effect that he is not accepting the arbitration clause, it would violate the principle of performance of contracts in good faith, if he were to later claim that the arbitration clause is not applicable to him. Similarly, the Peruvian doctrine has held that it would be contrary to good faith if the assignee who has accepted the assignment, tried to refuse the application of the arbitration clause, except in those cases where the assignee had no knowledge, and could not have known of the existence of the separate arbitration agreement.⁴⁹

III. Assignment of a Right⁵⁰

In civil law, assignment of a contract is different from assignment of a right under the contract, but in both cases, if the contract contains an arbitration clause, the assignee will normally be bound by the agreement to arbitrate.

The assignment of a right is defined in the UPICC as “*the transfer by agreement from one person (“the assignor”) to another person (“the assignee”), including*

⁴⁸ CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1160 (Venez.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1109 (Pan.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1362 (Peru).

⁴⁹ 1 Carlos Soto Coaguila & Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje* (Comments to the Peruvian Arbitration Law) 173 (2011).

⁵⁰ Referred to in some civil law countries as the assignment of a credit. *See* CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1550 (Venez.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1278 (Pan.). Common law uses the term assignment of rights; *See also* UPICC, *supra* note 19, art. 9.1.1; CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1206 (Peru); CÓDIGO CIVIL [COD. CIV.] [CIVIL CODE] art. 1614 (Arg.).

*transfer by way of security, of the assignor's rights to payment of a monetary sum or other performance from a third person ("the obligor")."*⁵¹ Similar definitions are found in most civil law countries.⁵² An assignment of a credit in civil law does not require the consent of the assigned debtor and is completed prior to the giving of notice to the assigned debtor. To complete the assignment of a right in civil law, it is necessary to give notice to the assigned debtor of the assignment.⁵³ However, the assignment does not require the consent of the assigned debtor.⁵⁴

If the assigned right was contained in a contract which had an arbitration clause, the question then is, whether the arbitration clause binds the assignee. If the assignee were to enforce his right, would he be obliged to submit to arbitration according to the arbitration clause in the contract? The answer to this, though it has not been extensively discussed, is that in fact, the assignment of a right transfers to the assignee both the duty and the right to submit any dispute to arbitration. The reason is that the assignee of a right is claiming through the contract.

A. The Peruvian Long Arm Rule

The extension of the arbitration clause to the assignee of a contract as well as the assignee of a right is supported in Peru by the Arbitration Act of 2008. Article 14 of the Peruvian Arbitration Law [**"PAL"**] expressly provides: *"The arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, as is determined from their active and decisive participation in the negotiation, performance or termination of the contract that includes the arbitration agreement or to which the arbitration agreement relates. It also extends*

⁵¹ UPICC, *supra* note 19, art. 9.1.1.

⁵² CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1549 (Venez.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1278 (Pan.); CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1215 (Peru).

⁵³ CÓDIGO CIVIL [C. C.] [CIVIL CODE] art. 1550 (Venez.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] arts. 1278, 1279 (Pan.); CÓDIGO CIVIL [C.c.] [CIVIL CODE] art. 1215, 1216 (Peru).

⁵⁴ In Panama, *see* 1 Dulio Arroyo Camacho, *Contratos Civiles* (Civil Contracts) § 179 (1974).

to those who aspire to derive rights or benefits from the contract, according to its conditions.”⁵⁵ This provision applies to arbitrations that take place in Peru or to arbitrations outside of Peru but which have some connection with Peruvian law.⁵⁶

The Peruvian doctrine stresses that this provision of the PAL⁵⁷ refers to an extension of the agreement to arbitrate to non-signatory parties. The PAL does not permit the inclusion of third parties to the arbitration. However, the arbitration clause extends to those that are parties (referring to those that have expressed their consent to be bound by the arbitration clause) to the arbitration agreement but have not signed it.⁵⁸ When express consent does not exist through the execution of the arbitration agreement or the contract where it is included, and *implied* consent exists through the performance of the contract, the party is bound to the arbitration agreement. However, consent (implied or express) is always necessary.⁵⁹ Thus, consent to submit to arbitration continues to be the cornerstone of this institution.

⁵⁵ Translation for informational purposes. See Peruvian Arbitration Law, art. 14, *quoted in* COAGUILA & GONZÁLEZ, *supra* note 49, at 200, 201.

⁵⁶ Peruvian Arbitration Law, arts. 1.1-1.2. Article 1.2 of Peruvian Arbitration Law states that Article 14 (long arm rule) applies even in those cases where the arbitration takes place outside of Peru. If the arbitration takes place outside of Peru, the connection with Peru exists if the contract is subject to Peruvian substantive law. This assumes that in Peru the law of the contract is the law that governs that agreement to arbitrate. Also, in those cases of the enforcement of an award rendered outside of Peru, in Peru, the law assumes that the tribunal had jurisdiction over a party that participated in the performance of the contract though not a party to the original agreement, i.e. an assignee of the contract.

⁵⁷ See COAGUILA & GONZÁLEZ, *supra* note 49 at 202.

⁵⁸ *Id.*

⁵⁹ See Pablo Mori Bregante & Giuseppe Galluccio Tonder, *Aplicación del Artículo 14 de la Ley Peruana de Arbitraje al Caso de los Grupos de Sociedades (Application of Article 14 of the Peruvian Arbitration Law to Company Groups)*, in ANUARIO LATINOAMERICANO DE ARBITRAJE, ACUERDO DE ARBITRAJE A PARTES NO SIGNATARIAS E INTERVENCIÓN DE TERCEROS EN EL ARBITRAJE 234-235 (2012).

There is no question that the assignee of a contract has an active participation in the performance of the assigned contract. Further, the assignee of rights under a contract derives benefits from the assigned contract. Thus, it can be concluded that under the long arm rule in Article 14 of the PAL, the assignee of the contract is bound by an arbitration clause in the original contract.

The principle contained in Article 14 of the PAL appears to be taken from the award in the case of Dow Chemical France against Isover Saint Gobain [“ISG”], in 1983.⁶⁰ The arbitration was commenced by four claimants, of which two were parties to contracts with ISG that is, Dow Chemical AG and Dow Chemical Europe. The others, including Dow Chemical France, were not. These agreements contained International Chamber of Commerce arbitration clauses. The defendant alleged that the arbitral tribunal did not have jurisdiction to issue an award in the proceeding between Dow Chemical France and Dow Chemical Company against ISG on the grounds that it had not signed any agreement with these parties that included an arbitration clause. In an interim award, the arbitral tribunal held that it had jurisdiction to decide the dispute, including the claim from Dow Chemical France, although it was not a party to the contracts. The arbitral tribunal *inter alia* reasoned that Dow Chemical France had participated “*effectively and individually*” in the “*conclusion, performance and termination*” of the contracts.

⁶⁰ Case No. 4131 of 1982, Dow Chemical France et. al. v. Isover Saint Gobain, Interim Award on Jurisdiction, 9 Y.B. Comm. Arb. 131 (ICC Int’l Ct. Arb. 1984). Against this award, an action for setting aside was filed and was rejected by the Court of Appeals of Paris in a decision dated October 21, 1983. Dow Chemical Venezuela entered into a contract initially with the Company Boussois-Isolation. Later, Boussois-Isolation assigned the contract to a company called Isover Saint Gobain (ISG). Dow Chemical Venezuela subsequently assigned its condition as party to the contract to Dow Chemical AG (Switzerland), Claimant No. 3. Because of the chain of assignments, the parties to the arbitration were not the same as the parties to the contract.

IV. Conclusion

In civil law, the agreement to arbitrate will always bind the assignee of a contract as long as the arbitration clause is contained in the text of the contract or in a separate agreement that is known by the assignee. In addition, in countries like Peru, the PAL picks up the concept of decisive participation in the performance of the contract as a form of implied consent to be bound by the arbitration clause. When a contract is assigned, the assignee participates in the performance of the contract and, thus, gives its implied consent to be bound by the arbitration clause. The rule in Article 14 of the PAL is not necessary to bind an assignee in the case of an assignment under civil law since the arbitration clause passes automatically with the assignment of the contract. However, it helps to explain the assignment of the arbitration clause in the case of an assignment of a right under the contract.

International arbitration frequently involves several legal systems. It is typical for an arbitration, under a contract subject to civil law, to take place in a common law jurisdiction or where the assignment was made in a common law country. Regardless, the survival of the agreement to arbitrate should be a clear principle. One approach is to adopt in the corresponding arbitration law a rule similar to Article 5 of the CAL, which makes it explicit that transfer of the agreement containing the arbitration clause would include transfer of the arbitration clause. Further, it would be useful that the Model Law adopts a rule similar to Article 5 of the CAL so as to eliminate doubts of the effects of an assignment on the agreement to arbitrate. The CAL only refers to assignment of contracts.⁶¹ It should be extended to the assignment of rights.

⁶¹ L. 1563/2012 art. 5, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.).