



UPPSALA
UNIVERSITET

Department of Law
Fall Term 2014

Master's Thesis in Arbitration
30 ECTS

Singular Succession and Arbitration Agreements

A Study of the Remaining Party's Duty to Arbitrate with a Successor
in Light of the *Emja* and *Electrolux* Judgments

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Abstract

The consequences of singular succession on arbitration agreements has for long been a debated topic in Swedish arbitration law. Party substitution is commonplace in the economy, and predictability and certainty in the economy demands clarification of the consequences of transfers and restructurings on arbitration agreements. The issue is unregulated in the SAA and has so far been decided on the basis of a concise statement in the preparatory works and the succinct Supreme Court judgment NJA 1997 p 866 *Emja*.

This thesis investigates to what extent the remaining party (A) is bound by the arbitration agreement in a mutually binding contract *vis-à-vis* the transferee (C) when the whole contract, with both rights and obligations, has been transferred from B to C. It further examines to what extent A is bound to arbitrate with C in cases where a right only has been transferred. The study is conducted in light of the currently pending Supreme Court case T 4816-12 *Electrolux* and therefore seeks to identify what that case has provided so far and what the Supreme Court judgment can clarify.

It is found that where both rights and obligations are transferred, A's consent to transfer the main contract results in a presumption that the arbitration agreement follows with it. The presumption can be rebutted through an explicit qualification regarding the arbitration agreement or a transfer restriction in the main contract. When rights only are transferred to C, the state of the law is more uncertain. It is found that the rule pronounced in *Emja*, that A remains bound by the arbitration agreement against C absent "special circumstances", is the state of the law concerning remaining parties. The rule is motivated by pressing policy arguments, and need not be supported by strict contract law mechanisms. The *Emja* rule can be avoided through the use of transfer restrictions contained in the main contract.

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Abbreviations

Act on Arbitrators	Previous Act, Lag (1929:145) om skiljemän
The Arbitration Committee	Skiljedomsutredningen, committee preparing the current SAA
Companies Act	Aktiebolagslag (2005:551)
Contracts Act	Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område
Law of Obligations	Lag (1936:81) om skuldebrev
NJA	Nytt juridiskt arkiv (Archive of Swedish Supreme Court cases)
NYC	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
Procedural Code	Rättegångsbalk (1942:740)
Prop.	Proposition (Government Bill)
SAA	Current Swedish Arbitration Act, Lag (1999:116) om skiljeförfarande
SCC Institute	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2010)
SOU	Statens Offentliga Utredningar (Official Swedish Government Reports)
SPA	Share Purchase Agreement
UNCITRAL	United Nations Commission on International Trade Law

Chapter 1 – Introduction

“The agreement to arbitrate is the foundation stone of international arbitration. It records the consent of the parties to submit to arbitration – a consent which is indispensable to any process of dispute resolution outside national courts.”¹

“ [...] Reliance on the merely formalistic argument [...] that no arbitration clause had been signed by a particular party [...] would result in such a manifestly wrong and unjust solution that more subtle and more appropriate thoughts had to be given to appropriately consider the situations as they occur in international business practice.”²

The quotes above capture a tension inherent in arbitration. It can be roughly divided into a conflict between the judicial and practical aspects of arbitration law. The judicial aspects, emphasized in the first quote above, include the fundamental principles of arbitration – it is based on contract, is consensual in nature and requires legal certainty like any other legal procedure.³ The second quote seeks to maintain some of the unique practical advantages of arbitration – flexibility, pragmatism and adherence to business realities.⁴ Despite the apparent conflict it is likely the mix of these ingredients that make arbitration the most preferred dispute resolution mechanism between commercial parties.⁵ Therefore, arbitration practitioners and scholars have taken on the challenge to reconcile these sometimes-conflicting interests of arbitration law.

One question that has been the topic of much discussion is if and when a party that has not signed the arbitration clause can nevertheless be bound and benefitted by the arbitration agreement. These so-called non-signatory problems⁶ arise when A (promisor) and B (promisee) enter into a contract containing an arbitration agreement. When B subsequently transfers rights and/or duties to C, the problem is to determine if

¹ Redfern, Hunter p 85.

² Blessing, p 19.

³ Hobér p 90, Brekoulakis p 3, Redfern, Hunter p 85.

⁴ Brekoulakis p 3-5.

⁵ PWC, 2013 International Arbitration Survey: Corporate Choices in International Arbitration – Industry Perspectives p 6, Redfern, Hunter p 1.

⁶ In order not to confuse the reader the “new” party will consistently be referred to as a “non-signatory” as opposed to “third party”, see Key Terms in section 1.3 below.

C is bound and/or benefitted by the arbitration agreement in C's disputes with A.⁷ A number of different non-signatory issues have been identified over the years⁸, only one of which will be the focus of this essay – namely the extent to which the remaining party (A) is bound to arbitrate with a new counterparty (C) after singular succession has taken place.

Since the *Emja*⁹ case was decided in 1997 no more precedents concerning singular succession and arbitration agreements have been decided. One could expect that nearly 20 years after *Emja* was decided, its actual meaning and consequences for non-signatories would be established. Instead, opposite views and interpretations have been presented. Most uncertain is the scope and construction of the *Emja* precedent regarding the standing of remaining parties *vis-à-vis* a non-signatory transferee. Rather than gradually reaching consensus, commentators have remained locked-in with opposing views.

An opportunity to clarify the rule on the original party's duty to arbitrate with a transferee is presented by the currently pending Supreme Court case *Electrolux*.¹⁰ The case motivates a re-examination of the discussion and an inquiry into what answers the case has provided so far, and the Supreme Court decision might bring. Therefore, *Electrolux* will serve as the point of departure in this essay's discussion on the remaining party's (A) duty to arbitrate with a new counterparty (C) after singular succession has taken place.

1.1 Purpose and Research Inquiries

Party substitution is commonplace in the economy. Contracts and claims are assigned, bought and sold repeatedly everyday. Corporate restructurings are also recurring events, and mergers and acquisitions result in party substitution in a wealth of contracts. Many of these contracts and agreements contain arbitration clauses. Therefore, in order to provide predictability and certainty in the economy, the consequences of such transfers and restructurings on arbitration agreements need to be clarified.

⁷ This definition of the problem is seen in Hosking p 472 note 7.

⁸ For comprehensive studies of non-signatory issues see Hanotiau – *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions*, Brekoulakis – *Third Parties in International Commercial Arbitration*, Permanent Court of Arbitration – *Multiple Party Actions in International Arbitration*, and Hosking – *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*.

⁹ NJA 1997 p 866, the case is presented in more detail in section 2.1 below.

¹⁰ Case no T 4816-12, the case is presented in more detail in section 2.2 below.

The purpose of this thesis is to identify and analyse the position of the remaining party (A) *vis-à-vis* a new counterparty (C) after singular succession has taken place. The main focus is thus on cases where it is the non-signatory (C) compelling arbitration against the original party (A). The study is focused on the state of Swedish law and practice, but reference is made to international arbitration law where pertinent.

To achieve its purpose, the inquiry has been divided into two main research questions, which can be formulated and distinguished as follows;

1. To what extent is the remaining party (A) bound by the arbitration agreement contained in a mutually binding contract *vis-à-vis* the transferee (C) when the whole contract, with both rights and obligations, has been transferred?
2. To what extent is the remaining party (A) bound to arbitrate with the transferee (C) in cases where a transfer of rights only has occurred?

The two research questions will be treated in chapters 4 and 5 respectively, and discussed in relation to the primary¹¹ and secondary claims¹² made in *Electrolux*. In order to answer the research questions they will be dealt with in two steps: first, potential issues of a legal and practical nature are identified. Second, possible solutions are presented, analysed and evaluated. The goal is to clarify the contents of the law and seek to ascertain what the standing of the remaining party is. This will be done in light of the currently pending *Electrolux* case and an additional goal will therefore be to identify what the case has established so far and what the Supreme Court decision might clarify.

1.2 Method and Materials

This thesis is focused on practical problems, and arguments and solutions of the same kind are considered. Yet, this being an academic essay, the overarching method applied is a traditional legal dogmatic approach. This means the regular sources of Swedish law have been considered. These include statutes and regulations, legal precedents, preparatory works and scholarly works, roughly in that order.¹³

Consequently, the starting point is the SAA. However, the lack of statutory regulation and sparse case law on the topic of this thesis means preparatory works and doctrine are

¹¹ *Sw. förstahandsyrkande.*

¹² *Sw. andrahandsyrkande.*

¹³ Bernitz p 29-30.

more prominently used than usual. Where a stance is taken beyond the conclusions of the consulted materials, or where consulted materials conflict, the practical nature of the problems discussed is taken into account and practice-driven solutions preferred.

In addition, international rules and conventions, case law and doctrine have been consulted. This is a consequence of the nature of the subject. There is an ambition, inherent in Swedish arbitration law, to stay coherent with trends in international arbitration law and practice.¹⁴ Therefore, even if this thesis makes no claim to provide a comparative study, reference is made to internationally prevailing views where pertinent. This is done to put the Swedish position in its context and to support universally accepted principles and practices in international arbitration.

The international nature of the subject is also the reason the thesis is written in English.

The state of the law *de lege lata* is sought and presented for each aspect of the problems discussed. In parallel, analysis and discussion is continuously intertwined throughout the essay. For the sake of clarity, the analyses made and positions taken throughout the text are summarized and discussed in a final chapter with concluding remarks.

The referenced materials have been consulted in their original printed versions as far as possible. Two exceptions have been made. First, even if arbitral awards are published to an increasing extent, original versions are often hard to find.¹⁵ As a result, awards are often referred to in secondary sources, but this is noted where applicable. Second, Lindskog's comprehensive commentary to the SAA has been consulted in its digital version and references are made to the same. The reason is that the digital version is the most recent and up-to-date.¹⁶

1.3 Key Terms

In this section some of the key terms frequently used in the essay are briefly explained. First, two key legal concepts are explained. Since the essay is written in the English language this is necessary to avoid any confusion with similar but distinct concepts in English (or common-) law. Second, a matter of terminology central to the topic of the thesis is clarified in section 1.3.3.

¹⁴ Prop 98/99:35 p 42.

¹⁵ Cf Redfern, Hunter p 140.

¹⁶ The last printed edition dates back to 2012 whereas the digital version on Zeteo has been updated as of May 1 2014.

1.3.1 Singular and Universal Succession

This essay is focused on cases of singular succession, as opposed universal succession. The intended distinction between these two concepts is the same as in general Swedish law. Hence, universal succession refers to cases where the successor takes over all rights and obligations of the predecessor.¹⁷ In these cases the law dictates the consequences of the succession. Examples of universal succession include death, bankruptcy and mergers.

Singular succession on the other hand concerns cases where only specifically identified rights and obligations are voluntarily transferred to a new party.¹⁸ The thesis is only concerned with cases of singular succession.

1.3.2 Transfer and Assignment

The practically important concept of assignment hails from the common law system, and bears many similarities with singular succession.¹⁹ Assignment is however a specific common law concept that entails legal requirements and specifics unknown to Swedish law.²⁰ Therefore, in order to avoid confusion and unintended reference to the English legal concept the term transfer will be used. Wherever the term transfer is used, it refers to singular succession of contracts or rights according to Swedish law.

1.3.3 “Non-Signatories” and “Third Parties”

Problems of the kind discussed in this thesis are often referred to as “third party problems” and the new party, C in the constellation described above, falls into this category. This description of C is often used interchangeably with the term “non-signatory”.

The two concepts, “third party” and “non-signatory”, are not identical however.²¹ For the sake of clarity and consistency, the two concepts can be distinguished as follows. “Third party” refers to a wider concept including two different groups of parties.

¹⁷ Bergström, Andersson, Håstad, Lindblom p 194, Hobér p 127, Heuman (1999) p 101 and 109.

¹⁸ Bergström, Andersson, Håstad, Lindblom p 194.

¹⁹ Furnston p 634-635.

²⁰ Such as the distinction between absolute and non-absolute assignments, notice requirements and written form requirements, see Furnston p 635 et seq and 645 et seq.

²¹ The distinction is made in a similar fashion by Born p 1413, Brekoulakis p 2 and Hosking p 472 note 7.

1. First is the group of *non-signatories*. These parties have not actually signed the arbitration agreement, but they are otherwise deemed to be bound by it.²² This is usually due to their consent to the arbitration agreement, found either on the basis of legal theories used to establish consent, or explicitly.
2. Second is the group who have neither signed the arbitration agreement, nor at any point consented to be bound by it, whether explicitly or by application of the established theories. This group can be referred to as third parties *stricto sensu*.²³

As seen from the above, the third party *stricto sensu* is perceived as being further away from the arbitration agreement than the non-signatory.²⁴ In this essay the focus is strictly on the first category above – non-signatories. The issues discussed in this thesis are when, and on what basis, non-signatories may be bound and benefitted by the arbitration agreement. The remaining party has signed and consented to the arbitration agreement, and the non-signatory has taken over the contract or right knowingly and is seeking to invoke the arbitration clause. The matter is rather one of determining the scope of the parties' consent.²⁵ Therefore, the term non-signatory is more accurate and will be used throughout this thesis.

1.4 Delimitations

The possible scenarios that give rise to non-signatory issues are numerous, and a wide range of problems falls into this category. Naturally, in an essay of this format a comprehensive study of non-signatory problems is not possible. Consequently, delimitations have been made, and they are pointed out below.

²² Brekoulakis p 2.

²³ This term is taken from Brekoulakis, p 2.

²⁴ A related and interesting discussion concerns whether third parties *stricto sensu* can ever be bound by an arbitration agreement at all. Born argues that third parties *stricto sensu* are not worth considering at all since it would necessarily imply that they are bound by the arbitration agreement "by virtue of something other than the parties' consent", p 1413. Brekoulakis on the other hand has introduced the argument that what he refers to as the "contractual paradigm" of arbitration can no longer accommodate for modern transactions, corporate structures and business needs, p 3-4. As a response, arbitral tribunals should be allowed to assert jurisdiction also where contractual theories are exhausted, on the basis of the scope of the dispute and the legitimate interests of the third party. Brekoulakis argues that where third parties are crucially involved in the dispute before the tribunal, but the contractual bases are insufficient to allow for legitimate interests of the third party "arbitration effectively reaches its adjudicatory limitations in the confines of consent", p 5 and 200 et seq. Since this essay proceeds on the basis of the *Electrolux* case and is concerned with parties that fall into the group of non-signatories a closer examination of this discussion is left aside.

²⁵ Cf Born p 1416.

The first and most obvious delimitation is that from universal succession. The effects of universal succession on arbitration agreements is fairly settled law in Sweden.²⁶ Generally, a universal successor is bound and benefitted by the arbitration agreement except where rights *in rem* are concerned.²⁷ Especially the consequences of bankruptcy on the arbitration agreement is an area of universal succession that has been thoroughly discussed.²⁸ Therefore it will not be examined further in this essay.

The exclusion of cases of resale further narrows the topic of this thesis. Generally, where an agreement of resale makes no reference to the original sales contract containing the arbitration clause, that arbitration clause is not binding between the second purchaser and the reseller.²⁹ A second purchaser is normally not bound by an arbitration clause contained in the original sales contract, even if he buys the property on the same substantive terms as used previously.³⁰

Further, the focus is purely on singular succession that takes place *before* arbitration proceedings are initiated, even if succession during proceedings is possible and does occur. As a result, questions concerning the transferee's potential right to intervene in the proceedings or issues of joinder will not be discussed.³¹

As a consequence of the *Electrolux* case being the starting point of this thesis, it leaves out a couple of possible justifications for binding non-signatories to arbitration agreements that have developed in arbitration practice. These include the group of companies doctrine and veil piercing, guarantee agreements (surety), arbitral estoppel, subrogation, agency and apparent authority.³² None of these are relevant in *Electrolux* as possible legal bases.

Lastly, two final delimitations need to be observed. The thesis concerns only the subjective scope of the arbitration agreement, i.e the issue of who the parties to it are. It does not discuss the objective scope of arbitration agreements, referring to what substantive aspects and disputes are covered by the agreement. The thesis also focuses

²⁶ NJA 1993 p 641, NJA 1997 p 866, prop 98/99:35 p 65, Dillén p 245 et seq, Lindskog I:0-5.3.1, Hobér p 130, Heuman (1999) p 101.

²⁷ Håstad (1990) p 177 et seq, Hobér p 131.

²⁸ For an in-depth discussion see Lindskog I:0-5.3.1-5.3.3.

²⁹ Heuman (2003) p 95-96.

³⁰ Heuman (2003) p 96.

³¹ A comprehensive study of issues of this kind can be found in Hanotiau – Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions. For Swedish purposes see Heuman JT 03/04 p 146.

³² For a review of these theories see Born p 1417 et seq.

on Swedish law and practice. Where reference is made to other jurisdictions or international practice, this is not to be seen as a comparative approach, but rather as an attempt to nuance the Swedish position and put it in its context.

In sum, with these delimitations the thesis will focus solely on the duty of the remaining party (A) to arbitrate with a new counterparty (C) when a whole contract or rights only, covered by an arbitration clause, have been transferred to C. The range of possible scenarios and problems that are analysed is dictated by what is relevant in relation to the *Electrolux* case, which serves as the starting point of this study.

1.5 Thesis outline

The second chapter will introduce the two cases that make up the foundation and starting point for the discussion of this thesis, *Emja* and *Electrolux*. The chapter will also provide an introduction and background to how non-signatory problems arise in arbitration.

In chapter three some general issues concerning singular succession and arbitration agreements are examined. These issues are applicable both where an entire contract is transferred and where rights only are transferred. They are therefore dealt with initially and separately from the issues that are specifically related to the primary and secondary claims in *Electrolux*.

Chapters four and five make up the core part of the thesis. They discuss the primary and secondary claims made in *Electrolux* respectively. In these chapters the duty of the remaining party (A) to arbitrate with the new counterparty (C) is analysed. Thus, chapter four provides a discussion of the impact on arbitration agreements by transfer of both rights and obligations. In chapter five the focus is shifted to the transfer of rights only and the consequences for arbitration agreements. Both of these chapters seek to establish the state of the law and include analyses on available solutions.

In chapter six the findings from the previous chapters are summarized together with some concluding remarks.

Chapter 2 – The Non-Signatory Problem, A Brief

Introduction

This chapter will provide an introduction to the Supreme Court case that has defined the Swedish position on singular succession and arbitration agreements so far, *Emja*³³ (2.1). In the following section (2.2) the currently pending *Electrolux*³⁴ case is presented. This is followed by a more general discussion of the nature of the non-signatory problem displayed in these cases, why it is an issue and how such problems can arise (2.3).

2.1 NJA 1997 p 866 – The *Emja* Case

In 1997 the Supreme Court decided the first leading case addressing singular succession and arbitration agreements, NJA 1997 p 866 (*Emja*). Before *Emja* there was no leading authority on singular succession and arbitration agreements, and the issue had only been discussed in legal commentary. Leading authors had expressed different views.³⁵ The case was decided under the old Act on Arbitrators but the case retains its relevance. This is because the matter of singular succession and arbitration agreements is still unregulated in the current SAA, and *Emja* was explicitly noted in the preparatory works.³⁶

In *Emja* a Dutch shipyard (Ferus) undertook to build a ship, later called the MS *Emja*. The ship was to be delivered to the German company MS “*Emja*” Braack Schiffahrts KG (*Emja*). In constructing the ship, Ferus hired another shipyard, Bijlsma, as a subcontractor. Bijlsma, in turn, entered into an agreement for supply of a diesel engine for the ship with Wärtsilä Diesel Aktiebolag. After delivery of the ship problems with the diesel engine were discovered.

In order to allow the German buyer, *Emja*, to initiate proceedings against Wärtsilä, Ferus and Bijlsma transferred their rights under the agreement with Wärtsilä to the German company under a contract called “Deed of Transfer and Assignment”. *Emja* subsequently brought an action against Wärtsilä in a Swedish district court.

³³ NJA 1997 p 866.

³⁴ Supreme Court case no T 4816-12.

³⁵ Edlund SvJT 1993 p 905, Hassler p 38 note 17, Hobér (1983) p 47 et seq, cf opposite Heuman (1987) p 248.

³⁶ Prop 98/99:35 p 64.

Wärtsilä raised the objection that the case should be dismissed because of the arbitration agreement contained in the delivery contract between the original parties. The question before the courts was thus whether the transferee, Emja, was bound by the arbitration agreement entered between the original parties Wärtsilä and Bijlsma.

As seen from the circumstances the case ties in well with the non-signatory problem outlined in chapter one. Emja (C) never signed the arbitration clause but took over rights under a contract containing an arbitration agreement, and the case concerned C's duty to arbitrate with the remaining party, Wärtsilä (A).

The Supreme Court found that Wärtsilä's (A) jurisdictional objection was well founded. Emja (C) was bound by the arbitration agreement despite never signing it. Initially, the court made reference to Dutch and German law where the prevailing view seemed to be that the new party (transferee) was bound by the arbitration clause.³⁷ More importantly, the court stated that the transferee should be bound by the arbitration clause since the remaining party would otherwise be put in a worse situation than before the transfer.³⁸ It would have to be assumed that the remaining party had an interest in disputes under the contract being resolved through arbitration. It would also be unreasonable if the transferor had the opportunity unilaterally to relieve himself of an arbitration agreement through transfer.³⁹ In addition, the transferee had the opportunity to review the contents of the agreement – if he was unhappy with the arbitration clause he could always refrain from entering into the contract.⁴⁰

The court also noted the interests of the remaining party (A). These included the ability to appoint arbitrators with specific experience and increased confidentiality.⁴¹ The remaining party (A) had no way to prevent the transfer and as a result A's interests required protection. Lastly, the Supreme Court found that there were strong reasons to apply the general principle embodied in § 27 of the Law of Obligations also to arbitration agreements.⁴² According to this principle a new creditor (C) cannot obtain a better right against the debtor (A) than the transferor (B) had.⁴³

³⁷ NJA 1997 p 866 on 872.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² NJA 1997 p 866 on 873.

⁴³ Mellqvist, Persson p 154.

With regard to the topic of this essay, an additional statement made by the Supreme Court must be noted. The court discussed briefly to what extent the remaining party (A) would be bound by the arbitration clause if it were the transferee (C) compelling arbitration. On balance the court found that the arguments in favour of holding the remaining party bound by an arbitration clause prevailed.⁴⁴ This was mainly in order to avoid a limping binding effect⁴⁵, which would allow the remaining party to speculate on the type of procedure.⁴⁶ The court provided a safety valve for the remaining party (A) according to which he would not be bound by an arbitration agreement where “special circumstances” were at hand.⁴⁷

2.2 T 4816-12 – The *Electrolux* Case

Currently pending in the Supreme Court is case T 4816-12 (*Electrolux*).⁴⁸ *Electrolux* is the first Supreme Court case concerning singular succession and non-signatories since *Emja* was decided nearly 20 years ago.⁴⁹ It is also the first case that specifically deals with the binding effect of the arbitration agreement on the remaining party (A) after singular succession has taken place. Just like the focus of this essay, *Electrolux* thus treats the non-signatory issue where the standing of the parties is inverted as compared to *Emja* – in *Electrolux* it is the non-signatory transferee (C) that seeks to rely on the arbitration agreement against the remaining party (A).

The facts of the case are as follows.⁵⁰ In 1991 the Danish company Sophus Berendsen A/S entered into a share purchase agreement (SPA) with *Electrolux*. Through the agreement Sophus Berendsen acquired *Electrolux*’s Swedish dry cleaning operations. The SPA contained three crucial provisions – a warranty concerning environmental contamination, a transfer restriction requiring the counterparty’s consent, and an arbitration agreement providing for arbitration at the SCC Institute in Stockholm.

Years after the acquisition, from 1998-2005, three restructurings took place in Sophus Berendsen A/S. The restructurings were all governed by Danish law.

⁴⁴ NJA 1997 p 866 on 873.

⁴⁵ *Sw. haltande bundenhet*.

⁴⁶ NJA 1997 p 866 on 873.

⁴⁷ A closer examination of the rule on remaining parties proposed in *Emja* follows in chapters 4 and 5.

⁴⁸ *Certiorari* was granted on 27 June 2013, see appendix 4 in the Supreme Court file. As of 15 January 2015 the Supreme Court is still to publish its decision.

⁴⁹ Hobér p 128.

⁵⁰ See District Court judgment p 2 et seq.

1. In 1998 Sophus Berendsen A/S went through a procedure similar to a demerger.⁵¹ Assets were transferred and divided between two new entities, Ratin A/S and a new entity with the same name as the predecessor – Sophus Berendsen.
2. In August 2005 the new Sophus Berendsen entity went through another procedure similar to a partial demerger.⁵² In this case the shares owned in the Swedish entity S. Berendsen AB were all transferred to a new entity called Danish Co 2005 ApS.
3. In October 2005, Berendsen Finance Limited (BFL)⁵³ who had owned Danish Co since 2004, decided to liquidate Danish Co through a procedure that can be described as a simplified liquidation procedure.⁵⁴ It was this third disposition that was classified as a singular succession by the courts.⁵⁵ The reason was that BFL did not show that the Danish legal institute amounted to universal succession, which would require a procedure where one entity, by operation of law, succeeds another entity and automatically assumes rights and obligations of the predecessor.⁵⁶ Consequently, the Danish disposition was construed as a singular succession.

Subsequently, environmental damage that could be covered by the warranty was discovered. BFL initiated arbitration proceedings against Electrolux at the SCC Institute. Electrolux objected in the arbitration that there is no valid arbitration agreement between the parties since BFL is not party to the SPA or the arbitration clause. It is undisputed that Electrolux's consent has not been obtained prior to the restructurings. As a response to this BFL initiated a declaratory action in the Stockholm District Court to ascertain their standing as a party to the SPA and the arbitration agreement.

⁵¹ The procedure is an institute of Danish law called *fullständig spaltning*.

⁵² The procedure is another institute of Danish law called *partiell spaltning*.

⁵³ BFL were called Davis Finance Limited at the time but have changed their name during the procedure. For the sake of simplicity the party will be referred to as Berendsen Finance Limited or BFL throughout.

⁵⁴ The Danish legal institute is known as *betalningserklaering*.

⁵⁵ District Court judgment in *Electrolux* case no T 15224-10 p 18 et seq (referred to only as the District Court judgment in the following), Svea Court of Appeal judgment in *Electrolux* case no T 9588-11 p 5 (referred to as the Court of Appeal judgment in the following).

⁵⁶ District Court judgment p 21.

BFL have made two claims, where the *primary* claim⁵⁷ is based on the assertion that BFL have succeeded the original party Sophus Berendsen A/S in the SPA and the arbitration agreement as a whole. Through the Danish dispositions the whole SPA was transferred to the new entity, and the transfer restriction did not prevent corporate restructurings. Electrolux have objected to the claim in its entirety.

The *secondary* claim⁵⁸ is based on the assertion that if not the whole contract, then at least the warranty claim has been transferred to BFL. This includes the obligation and the benefit of the arbitration agreement. The transfer restriction does not prevent the transfer of a right emanating from the contract, only the transfer of the contract as a whole. Electrolux have objected to this claim in its entirety as well.

The first claim is not included in the Supreme Court's *certiorari* and has thus been decided by the Svea Court of Appeal. It was found that the first two dispositions were to be classified as cases of universal succession, taking place by operation of law.⁵⁹ With regard to how the court construed the transfer restriction, it was found that the first two dispositions had validly been carried out despite the lack of consent. Danish Co 2005 thus succeeded Sophus Berendsen as a party to the SPA, but the Court of Appeal does not state whether this also means Danish Co 2005 became a party to the arbitration agreement.⁶⁰ The third disposition on the other hand, from Danish Co 2005 to BFL, could not be understood as a universal succession or as being required by operation of law. On the contrary, it would have to be classified as a voluntary procedure, which according to the transfer restriction would have required Electrolux's consent. It was also disputed whether the procedure as such could lead to rights being transferred and divided between existing shareholders.⁶¹ Therefore, BFL did not succeed Danish Co as a party to the entire contract or the arbitration clause.

Even if decided, the first claim gives rise to a number of more arbitration specific questions that were not explicitly addressed by the courts. The primary claim and its consequences for arbitration law are dealt with in chapter 4 below.

The secondary claim is currently pending in the Supreme Court and is therefore still an open question. The lower courts both found that the SPA was still to be considered a

⁵⁷ *Sw. förstahandsyrkande.*

⁵⁸ *Sw. andrahandsyrkande.*

⁵⁹ Court of Appeal judgment p 5.

⁶⁰ Court of Appeal judgment p 5.

⁶¹ See District Court judgment p 20-21.

mutually binding agreement.⁶² As a consequence, a right, in this case the warranty claim, could not be severed from the contract as a whole and transferred individually.⁶³ According to both courts this in turn ruled out the possibility for BFL to benefit from the arbitration agreement contained in the main contract.⁶⁴ This claim and its specific arbitration-related issues are dealt with in chapter 5 below.

As seen from the circumstances it is apparent that the *Electrolux* case also ties in with the non-signatory problem that is the focus of this essay. BFL claim to be party to an arbitration agreement they never signed, either by succeeding an original party in the contract as a whole or by taking over a right emanating from a contract containing an arbitration clause. As opposed to *Emja*, BFL is a non-signatory transferee (C) invoking arbitration and the issue is whether the remaining party (A, Electrolux) is bound to accept a new counterparty. As such, the *Electrolux* case provides the opportunity to clarify what was left unanswered in *Emja*. *Electrolux* will therefore serve as the point of departure and is referenced through the following chapters.

2.3 The Nature of the Non-Signatory Problem

Both *Emja* and *Electrolux* deal with one of the typically recurring issues in commercial arbitration – ascertaining the identity of the parties to the arbitration agreement. Any monograph on the subject of arbitration will include a discussion on who the parties to the agreement are.⁶⁵ This is vital to determine since the most fundamental concepts of arbitration are that it is consensual in nature, based on agreement between the parties, and consequently cannot bind others to the arbitration agreement.⁶⁶ It is common ground in commentaries on the subject that the starting point, in the words of Gary Born, needs to be that

“whatever terminology is employed, the principle that only the parties to an international arbitration agreement are either bound or benefitted by that agreement is fundamental to international arbitration”.⁶⁷

⁶² See District Court judgment p 14 et seq, Court of Appeal judgment p 6.

⁶³ Court of Appeal judgment p 6-7.

⁶⁴ District Court judgment p 22, Court of Appeal judgment p 7.

⁶⁵ Cf Heuman (1999) ch 2, Hobér ch 3, and internationally Born ch 10, Fouchard, Gaillard, Goldman part 2 ch 4, Redfern, Hunter ch 2, Girsberger, Voser ch 2.

⁶⁶ SAA § 1, Hassler p 38, Hobér p 90, Redfern, Hunter p 85.

⁶⁷ Born p 1406.

Indeed, such a principle is embodied in a number of legal sources including conventions, legislation, court cases and awards.⁶⁸ This follows from the contractual basis of arbitration.⁶⁹ Yet, in daily business life, situations frequently arise that challenge the fundamental concept referred to above. Subcontractors might be responsible for damage, an insurance company takes over a claim, a subsidiary has entered a contract that binds the parent, an employee enters into a contract on behalf of a company or a contract might be transferred to another party. All of these examples give rise to situations where a party who has not signed the arbitration clause might nonetheless be bound or benefitted by it.

There is ample proof from both common law and civil law jurisdictions, including Sweden⁷⁰, that such non-signatory parties may under certain circumstances be bound by an arbitration agreement.⁷¹ In a Civil Law context, this has been formulated as follows;

*“in principle, an arbitration clause is binding only on those parties which have entered into a contractual agreement to submit to arbitration, whether directly or indirectly through their representatives. Exceptions to this rule arise in cases of legal succession, retroactive approval of an arbitration clause or attempts to pierce the corporate veil of a legal entity in the case of abusive objections to the clause”.*⁷²

The bases used for binding non-signatories are commonly concepts taken from general contract law, corporate law or principles of agency.⁷³ Specifically in the arbitration context, additional ways of finding consent have developed. These include the group of companies doctrine and theories for binding corporate employees.⁷⁴ Common for all these legal bases for binding non-signatories is that they are generally not regulated by statute.⁷⁵ Another aspect that these theories have in common is that they are used to justify what is often characterized as an exceptional act.⁷⁶ It is important to bear in mind

⁶⁸ See for example Art II(1) NYC, Art 7(1) of the UNCITRAL Model Law, SAA § 1, Art 1(1) of the 2010 UNCITRAL Rules, § 2 (iv) of the SCC Rules 2010.

⁶⁹ Hobér p 90, Heuman (2003) p 93, Redfern, Hunter p 85, Brekoulakis p 3.

⁷⁰ NJA 1997 p 866, *Emja*, presented in 2.1 below.

⁷¹ Born p 1410.

⁷² *X S.A., A v Y A.G.*, Swiss Federal Tribunal, judgment of 19 May 2003, in vol 22 issue 2 ASA Bulletin p 344 on 347 under 4.1, translation taken from Born p 1410.

⁷³ Born p 1411, Brekoulakis p 10.

⁷⁴ Cf Born p 1444 and 1477.

⁷⁵ Born p 1411, one notable exception is § 10 of the Norwegian Arbitration Act concerning transfer of arbitration agreements.

⁷⁶ Born p 1414.

that binding non-signatories is to depart from the universally accepted principle mentioned above – only parties to the arbitration agreement are bound by it.

Swedish arbitration law fits in fairly well with the general picture presented above. In the previous Act on Arbitrators (1929:145) the issue of party substitution was unregulated.⁷⁷ Also the current SAA lacks provisions on party substitution.⁷⁸ However, the lack of statutory regulation is not to be understood as a barrier to party substitution in arbitration agreements.⁷⁹

In this essay, the focus will be on singular succession and the impact on arbitration agreements. Transfers of contracts or rights, and their impact on the arbitration agreement, are among the most debated non-signatory issues in Swedish arbitration law.⁸⁰ Much of the debate has focused on whether the transferee (C) is bound by an arbitration agreement that was entered by the original parties (A and B) to the contract.⁸¹ However, in this essay the focus has been inverted and turned to the question whether, and under what circumstances, the *remaining party* (A) is bound by the arbitration agreement after singular succession has taken place.

A number of reasons motivate this focus. No leading authority existed on singular succession and arbitration agreements until *Emja* was decided in 1997.⁸² In the preparatory works leading up to the current SAA the issue of singular succession and arbitration agreements was addressed.⁸³ In the end, the issue remained unregulated in the new SAA as well, and was left for case law to decide.⁸⁴ *Emja* and legal commentary is thus what has been available on issues of singular succession and arbitration agreements. However, *Emja* primarily concerned to what extent the transferee (C) was bound to arbitrate. The reverse issue, discussed in this essay, was only mentioned briefly and this aspect of party substitution has remained uncertain. Leading authors still

⁷⁷ SOU 1994:81 p 92, Prop 98/99:35 p 63-64.

⁷⁸ Olsson, Kvarn p 140, Hobér p 127. During preparation of the current SAA the Arbitration Committee proposed a statutory provision on party substitution to the effect that the arbitration agreement would apply in the new relationship (A-C) only where the remaining party (A) and the transferee (C) could be deemed to have agreed it should, SOU 1994:81 p 23. The government rejected the suggested rule however, see prop 98/99:35 p 64-65 and section 5.1.1 below.

⁷⁹ NJA 2000 p 202.

⁸⁰ Hobér p 127.

⁸¹ Hobér p 127.

⁸² NJA 1997 p 866.

⁸³ SOU 1994:81 p 91 et seq.

⁸⁴ Prop 98/99:35 p 64.

maintain opposite views on the remaining party's duty to arbitrate with a new counterparty.⁸⁵

After years of silence the currently pending Supreme Court case *Electrolux*⁸⁶ brings about renewed interest to this topic, and motivates revisiting the discussion. Different lines of reasoning have been presented over the years on a multitude of issues related to the standing of the remaining party. The *Electrolux* case presents an opportunity to get some much-needed clarification to some of these issues.

⁸⁵ Cf Olsson, Kwart p 140, Runesson p 401, different see Lindskog I:0-5.2.2.

⁸⁶ Supreme Court case T 4816-12.

Chapter 3 – General Issues of Singular Succession and Arbitration Agreements

Before the analysis is directed specifically to the primary and secondary claims made in *Electrolux* (chapters 4-5), some generally applicable issues related to singular succession and arbitration agreements will be discussed in the present chapter. This includes what legal bases are available to establish a binding effect of the arbitration agreement between A-C, whether arbitration agreements are transferrable at all⁸⁷ and issues that may arise in light of the doctrine of separability.⁸⁸ The doctrine of separability prompts questions regarding the possibility of automatic transfer of the arbitration agreement and the need for explicit consent to transfer the arbitration agreement with the substantive contract. Another issue dealt with in this chapter is whether there is reason to apply a more permissive stance towards the transfer of arbitration agreements when the singular successor (C) acts as claimant.⁸⁹

3.1 Legal Bases Used to Establish the Standing of the Remaining Party

Problems of the character discussed here can be approached on different legal bases. Common justifications for binding non-signatories to the arbitration agreement include a variety of typical contract law based arguments, such as representation (agency, apparent authority), transfer of debt, subrogation, or succession.⁹⁰ Other justifications that have developed in case law are more arbitration specific, such as the group of companies doctrine and theories for binding corporate employees.⁹¹ In the Swedish context, an outspoken reliance on policy arguments can also be seen.⁹²

In this essay the focus is on the Swedish rules of contract law and singular succession that are relevant to the *Electrolux* case.⁹³ Despite being available under Swedish law,

⁸⁷ Born 1465, Brekoulakis p 29.

⁸⁸ Referring to the well established principle that the agreement to arbitrate constitutes a separate and independent agreement even if contained as a clause in the substantive contract. The principle is historically recognized in Swedish law, NJA 1936 p 521, NJA 1976 p 125 and now 3 § SAA.

⁸⁹ Born 1415, Brekoulakis p 187 et seq.

⁹⁰ Born p 1417 et seq, Brekoulakis p 10.

⁹¹ Born p 1411.

⁹² NJA 1997 p 866 *Emja*, Heuman (1999) p 110.

⁹³ The term “assignment” is not used to avoid confusion with the term and its legal consequences in common law systems. “Singular succession” is used throughout, referring to the Swedish concept. See ch 1.3 Key Terms.

some contract law based arguments are not discussed, such as agency, apparent authority and implied consent.⁹⁴ This is a consequence of the *Electrolux* case being the starting point for this study, where such bases are not tried by the courts. In addition, policy arguments such as those seen in *Emja* will be discussed as possible justification for binding non-signatories to arbitration.

3.2 General Issues Related to the Arbitration Agreement

3.2.1 Arbitration Agreements Are Transferrable

There is today universal acceptance of arbitration agreements being transferrable.⁹⁵ This is also the case under Swedish law.⁹⁶ Historically however, international case law displayed an initial reluctance towards allowing the transfer of arbitration agreements.⁹⁷ The argument was that an arbitration clause was a personal obligation, binding only the original parties.⁹⁸ Nowadays however, parties are generally free to transfer arbitration agreements just as any other type of contract. This is a logical standpoint in view of the frequent transfer of contracts in modern commercial contexts, as well as the need for arbitration as a flexible dispute resolution mechanism. The issue has not been addressed in *Electrolux*.

3.2.2 The Doctrine of Separability and Transfer of Arbitration Agreements

When discussing issues of singular succession and arbitration agreements, the doctrine of separability must be borne in mind.⁹⁹ When binding a non-signatory it is easy to confuse the binding effect of the arbitration agreement with that of the underlying contract. The focus should be on the effect of the arbitration agreement on the non-signatory, regardless of the obligations of the non-signatory under the substantive contract.

At the same time however, the above is not to be taken as a barrier to the automatic transfer of arbitration agreements with substantive contracts. It has been argued that an automatic transfer would violate the doctrine of separability and that a separate transfer

⁹⁴ Born p 1417 et seq, Brekoulakis p 10, Hobér p 127 et seq, Andersson et al p 74 et seq.

⁹⁵ Born p 1465, Brekoulakis p 29.

⁹⁶ NJA 2000 p 202, Hobér p 127.

⁹⁷ See English case *Cottage Club Estates Ltd. v. Woodside Estates Co. Ltd.* (1928).

⁹⁸ Born p 1465, Hosking p 491, Brekoulakis p 29.

⁹⁹ Born p 1412.

of the arbitration agreement is required.¹⁰⁰ However, such an application of the doctrine of separability contradicts the very essence of transferring contracts – namely to put the transferee in the shoes of the transferor on the same terms.¹⁰¹ The automatic transfer of arbitration agreements with substantive contracts is better understood as the consequence of a presumption regarding the will of the parties. A presumption that the parties intended to transfer the arbitration agreement as well can be rebutted, and consequently does not violate the doctrine of separability.

A presumption that the parties intended to transfer both the substantive contract and the arbitration agreement is also supported by the primary rationale of the doctrine of separability – to *create* arbitral competence and avoid dilatory tactics, and not to remove the competence of the tribunal.¹⁰² The arbitration agreement is also attached to the main agreement in the sense that it is an accessory right that provides the procedural mechanism available to the parties to enforce the substantive rights in the contract.¹⁰³ As in general contract law and law of obligations, such accessory rights generally follow with transfers of the main contract.¹⁰⁴

Indeed, in most jurisdictions, the arbitration agreement automatically follows when the substantive contract is transferred.¹⁰⁵ Decisions confirming this view can be found from both common law¹⁰⁶ and civil law jurisdictions.¹⁰⁷ This presumption prevails under Swedish law as well, and seems to have been upheld in *Electrolux*.¹⁰⁸

A closely related issue concerns the scope of the parties' consent to transfer the main contract. It follows from the above that where consent to transfer the main contract is

¹⁰⁰ Moscow District Court, 21 April 1997, *IMP Group Ltd v Aeroimp* in Yearbook Commercial Arbitration vol 23 p 745-749, Born p 1467-1468.

¹⁰¹ Brekoulakis p 32.

¹⁰² Cf Heuman JT 97/98 p 546-547.

¹⁰³ Brekoulakis p 33, cf also Girsberger, Hausmaninger p 137 who point out that the accessory character of the arbitration agreement is promoted mainly in civil law jurisdictions. Similar reasoning is expressed in Art 9.1.14 (b) UNIDROIT Principles 2004.

¹⁰⁴ Runesson p 396.

¹⁰⁵ This is the main rule in England, the US and France, Hosking p 500, Born p 1465 et seq, Fouchard, Gaillard, Goldman p 426, Brekoulakis p 29 et seq.

¹⁰⁶ From the United States see case *Asset Allocation & Mgt Co. v. W. Employers Ins. Co.* 892 F 2d 566, 7th Cir 1989, from England see case *West Tankers Inc. v. Ras Riunione Adriatica Di Sicurtà SpA* (2005) EWHC 454, English High Court.

¹⁰⁷ From Switzerland see Swiss Federal Tribunal judgment of 9 May 2001 in ASA Bulletin vol 20 issue 1 p 80-87, from Germany see Bundesgerichtshof judgment of 2 October 1997, 1998 NJW 371.

¹⁰⁸ Hobér p 129, Heuman JT 09/10 p 346, Andersson et al p 74. The issue is not explicitly addressed by the lower courts in *Electrolux* but the District Court reaches the conclusion that at least the first two transfers were valid and that consequently the arbitration agreement was transferred with them to Danish Co 2005, cf District Court judgment p 18. This is not further developed by the Court of Appeal, cf p 5.

given, there is a presumption that such consent extends to the arbitration agreement contained in the substantive contract as well.

3.2.3 *Same Standards of Binding Non-signatory Claimants and Respondents*

In seeking to bind non-signatories to arbitration agreements it has been argued that particular caution should be exercised when the non-signatory (C) acts as respondent.¹⁰⁹ In the opposite situation, as in *Electrolux*, the non-signatory's consent to arbitrate is arguably evidenced by the fact that the non-signatory compels arbitration. The remaining original party on the other hand is not considered a problem. The remaining party (A) has, at least at some point, agreed to arbitrate disputes arising out of the contract.

This line of reasoning is questionable. Arbitration is based on consent also when non-signatories are considered. Binding non-signatories is a matter of ascertaining who the real parties to the arbitration agreement are.¹¹⁰ In cases where singular succession provides a basis for binding the parties to the arbitration agreement, the parties are deemed to have consented to the arbitration agreement through their actions, even if their signature is not in the original arbitration agreement.¹¹¹ This means parties have agreed to arbitrate a specified contract with a specified counter-party, not to arbitrate in general or with anyone.¹¹²

On this basis, there is nothing that motivates treating the non-signatory claimant any different than the respondent. Thus as regards *Electrolux*, arguments for binding Electrolux to arbitrate with BFL will have to be shown with the same strength regardless of the fact that BFL (non-signatory) is acting as claimant. Although not explicitly, so far, the courts seem to have adhered to this principle not allowing the non-signatory claimant, BFL, to invoke the arbitration agreement against Electrolux.

The matter of what standards to apply when binding non-signatory claimants and respondents to an arbitration agreement, together with the issues discussed previously in

¹⁰⁹ Born p 1415, Brekoulakis p 187.

¹¹⁰ Born p 1413, see however Brekoulakis p 199 et seq who argues that even if ascertaining consent is the traditional approach to third party problems, it is not the only basis for binding third parties. In addition he introduces a "jurisdictional approach" for tribunals to assert jurisdiction over third parties based on the scope of the dispute at hand rather than the arbitration clause. This cannot yet be said to be the state of Swedish law, even if the Swedish doctrine of connection (*Sw. Anknytningsdoktrinen*) displays similarities. See for more on this note 24 in Chapter 1 above.

¹¹¹ Born p 1413, Brekoulakis p 189.

¹¹² Born p 1415, Brekoulakis p 188.

this chapter, represents the matters of a general character. As such, the considerations above apply to the analysis of both the primary and secondary claims in *Electrolux*. In the next chapter the focus will be shifted to issues specifically related to BFL's primary claim and the binding effect of arbitration agreements after the whole contract has been transferred, including rights *and* obligations. This is followed by a discussion on the matters specifically related to the secondary claim and arbitration agreements after transfers of rights only in chapter 5.

Chapter 4 – Arbitration Agreements after Singular Succession of Rights and Obligations

This chapter will discuss arbitration issues that arise in connection with BFL's primary claim in *Electrolux*, which is based on the argument that BFL has succeeded as a party to the SPA and its arbitration agreement and assumed both rights and obligations under the agreements.¹¹³ When a mutually binding contract¹¹⁴ is transferred, the transferee (C) assumes both rights and duties under the contract. If the transferred contract contains an arbitration clause the question arises whether, and under what circumstances, the remaining party (A) is bound to arbitrate with the transferee (C). BFL's primary claim is not included by the *certiorari* granted by the Supreme Court, and issues discussed below are thus decided in *Electrolux*.¹¹⁵

Specifically for mutually binding contracts, general contract law principles require consent to validly transfer a mutually binding agreement.¹¹⁶ The impact of that principle on arbitration agreements will be discussed. In connection with this, the character of the arbitration agreement itself as a mutually binding agreement and what that means in terms of transferability is a potential issue. Effects of a boilerplate transfer restriction in the main contract will also be touched upon.¹¹⁷ Further, the possibility of transferring the arbitration agreement in spite of invalid transfer of the main contract, possibly due to lacking consent, will be considered. Lastly, the importance and applicability of policy arguments in relation to arbitration agreements in mutual contracts is discussed.

¹¹³ See BFL's claims in the District Court judgment p 4 and Court of Appeal's judgment p 2. BFL's secondary claim (*Sw. andrahandsyrkande*), and issues relating to the transfer of a *right* are discussed in ch 5 below. Note that the focus here is on the transfer of whole contracts and leaves out the issue of rights charged with conditions (*Sw. villkorade rättigheter*), especially conditions advantageous to the transferor. The transfer of such rights generally requires consent as well but even if arguments discussed here may be relevant to such rights-transfers they are not examined closer, cf Heuman JT 97/98 p 538.

¹¹⁴ The term is used to describe a contract containing both rights and obligations incumbent on both parties to the contract.

¹¹⁵ Unfortunately however, the scope of the *certiorari* has been disputed, and to some extent it is still uncertain what exactly the Supreme Court will try, Cf party submissions no 13 and 15 in the Supreme Court file. For the purposes of this chapter, the *certiorari* has been construed as not including the issues discussed here.

¹¹⁶ Mellqvist, Persson p 52.

¹¹⁷ The impact of transfer restrictions when only rights are transferred is discussed in chapter 5, as opposed to the current discussion on rights *and obligations*.

4.1 Issues Related to Singular Succession of Mutually Binding Contracts

4.1.1 Requirement of Consent Following General Principles of Contract Law

When a mutually binding contract is transferred, both rights and obligations become incumbent on the new party. It is a general principle of Swedish contract law that a party to a mutually binding agreement cannot put someone else in its place without the consent of the counter-party.¹¹⁸ This principle has also been upheld with regard to arbitration agreements.¹¹⁹ The principle is not least based on the rule that a debtor may not transfer a debt without the creditor's consent.¹²⁰ The rule is also recognized internationally.¹²¹

This general principle of contract law has been taken to apply *in dubio* also to arbitration agreements contained in a substantive contract. Commentators maintain that when both rights and obligations under a contract are transferred, the consent of the remaining party concerning the transfer of the substantive contract is required to bind the new parties to the arbitration clause.¹²² Where such consent is given and the transfer of the main contract is valid, the arbitration clause becomes binding on both parties.¹²³

The legal rationale for this rule, presented by Heuman, is based on the argument that when the transferee is aware of the arbitration clause and the remaining party gives his consent, there is concurrence of wills.¹²⁴ Following principles of contract law, this means a *new* arbitration agreement is entered between the remaining party and the transferee. This reasoning is in line with Heuman's view that contract law principles should be the sole basis for binding parties to an arbitration agreement.¹²⁵

Heuman's strict contract law justification is not entirely convincing however, and there is reason to refrain from talking of a new arbitration agreement. As Heuman contends,

¹¹⁸ Mellqvist, Persson p 52, Heuman (1987) p 237.

¹¹⁹ Arbitral award *Custos*, p 29 (Annex 1 in Court of Appeal case T 8032-00), judgment of the District Court p 16 in the pending *Electrolux* case, but not explicitly argued in *Emja* (NJA 1997 p 866) even if reference was made to the Law of Obligations.

¹²⁰ Mellqvist, Persson p 52, Rodhe p 642, Hobér p 129.

¹²¹ Art 9.2.3 UNIDROIT Principles 2004.

¹²² Heuman (1987) p 244, Reldén, Nilsson in Franke p 73.

¹²³ Andersson et al p 74, Heuman (1987) p 244. The same rule prevails in the US, Hosking p 494. In France, consent to transfer both rights and obligations of the main contract creates a presumption that the given consent included the arbitration clause, which can then be invoked against the remaining party as well, Fouchard, Gaillard, Goldman p 426 and 430. Cf for opposite view Hosking, p 501 and 516, who finds this approach "doctrinally questionable".

¹²⁴ Heuman (1987) p 238.

¹²⁵ Heuman (1999) p 111, see sections 4.1.5 and 5.3.1 below.

the new parties may also be bound to arbitrate where the remaining party has given a general consent to transfers in advance.¹²⁶ This is questionable in relation to the offer and acceptance model prevailing under contract law. Also, Heuman recognizes that in addition to the contractual approach, other justifications need to be considered where the remaining party (A) has *not* given its consent. Heuman finds that the remaining party is not bound to arbitrate under such circumstances due to the *justified interests of the remaining party*.¹²⁷ These interests include not being forced into a costly arbitration procedure, possibly with a counterparty that cannot afford the arbitration costs, and the fact that arbitration might have been chosen with regard to the identity of the parties.¹²⁸

None of these arguments fit in with the contract law model of offer and acceptance, or the view that a new arbitration agreement is required between the new parties. Arguably, it is preferable to stay at the conclusion that consent to transfer the whole main contract leads to the presumption that the transferee (C) is allowed to take over the right and duty to arbitrate as well.¹²⁹ Absent such consent, the remaining party (A) should not be bound to arbitrate with the transferee. Such a conclusion is in line with the clear and well-established general principle of contract law requiring consent. Upholding that principle also for arbitration agreements promotes predictability.

In *Electrolux* it should be noted that only the third transfer, from Danish Co to BFL, resembled a singular succession.¹³⁰ However, the circumstances were complicated by different views being expressed on the classification of the Danish simplified liquidation procedure that had been used (*betalningsserklaering*). That issue was not resolved and the case turned on the consequences of the liquidation procedure rather than an application of the Swedish rules of transfer of mutually binding contracts.¹³¹ The Svea Court of Appeal did not further elaborate on the issue¹³² and the *certiorari* granted by the Supreme Court does not include the claim relating to the transfer of the contract as a whole.¹³³

¹²⁶ Heuman (1987) p 244.

¹²⁷ Heuman (1987) p 241-244.

¹²⁸ Heuman (1987) p 242.

¹²⁹ Andersson et al p 74. Cf Lindskog I:0-5.2.1 note 2, and the discussion on the role of contract law and policy arguments where only transfers of rights are concerned in section 5.3.1 below.

¹³⁰ See chapter 2.2 above.

¹³¹ Stockholm District Court decision p 18 et seq.

¹³² Svea Court of Appeal decision p 5.

¹³³ Leave of appeal, annex 4 of the Supreme Court case file in T 4816-12 *Electrolux*.

The general contract law principle, requiring consent of the remaining party to validly transfer a mutually binding contract, thus affects the fate of the arbitration agreement as well. Absent any qualification, where the remaining party (A) has consented to the transfer of both rights and obligations, he is bound to arbitrate with the transferee (C). This rule looks to remain unaltered by the *Electrolux* case.

4.1.2 Arbitration Agreements Are Not Mutually Binding Contracts

The preceding section dealing with the requirement of consent for valid transfers of mutually binding contracts begs the question of how the arbitration agreement *in itself* ought to be construed. If classified as a mutually binding contract, the valid transfer of an arbitration agreement would according to Swedish law always require the consent of the remaining party. This raises a potential conflict with the presumption of the automatic transfer of arbitration agreements with substantive contracts discussed under 3.2.2 above, and with the main rule that rights are freely transferrable discussed in chapter 5 below.

It could be argued that an arbitration agreement entails both rights and duties for both parties.¹³⁴ Rights are normally freely transferrable, while obligations as noted above require the consent of the remaining party. An obvious obligation imposed by the arbitration agreement is to refrain from turning to state courts.¹³⁵ Other obligations include the duty to appoint an arbitrator and provide security for costs.¹³⁶

For arbitration agreements this would mean that where explicit consent is lacking from the remaining party, a limping binding effect¹³⁷ would be the consequence.¹³⁸ The remaining party would be entitled to compel arbitration, but not be bound to arbitrate with the transferee. This is exactly one of the consequences the Supreme Court disapproved of in *Emja*.¹³⁹

¹³⁴ Sinclair in Gaillard and Di Pietro. Note also the discussion on whether arbitration agreements are to be classified as procedural or substantive contracts, and how this might affect the automatic transfer of arbitration agreements, Girsberger, Hausmaninger p 140. The question is interesting but falls outside the scope of this study.

¹³⁵ Brekoulakis p 33.

¹³⁶ Runesson p 398, cf §§ 13 and 38 SAA.

¹³⁷ *Sw. haltande bundenhet*.

¹³⁸ Brekoulakis p 33.

¹³⁹ NJA 1997 p 866 on p 873.

Precisely this argument has prevented the automatic transfer of arbitration agreements in a number of international decisions.¹⁴⁰ However, making a distinction between the right and the obligation to arbitrate has been argued to be overly formalistic.¹⁴¹ It counters the economic rationale of transferring contracts, where the idea is to introduce a new party exactly in the shoes of his predecessor. It would also contravene the finding above that the remaining party and the transferee should in principle be treated equally.¹⁴² Further, obligations flowing from the arbitration agreement are generally not enforceable.¹⁴³ The SAA provides no basis for enforcing payment of security for costs, and turning to courts to demand payment to a third party, the tribunal, is generally not allowed.¹⁴⁴

The arbitration agreement is therefore better explained as a legal remedy attached to the substantive contract.¹⁴⁵ Further, Swedish law also accedes to the notion that arbitration agreements are automatically transferrable with the valid transfer of the main contract (3.2.2 above). It follows that arbitration agreements should not be classified as mutually binding agreements in the strict meaning of contract law. The consequence of this is that the general contract law principle requiring consent of the remaining party is not an obstacle to the automatic transfer of arbitration agreements.¹⁴⁶ This view is supported by the judgments of both instances in *Electrolux*, where specific consent to transfer the arbitration agreement is neither discussed nor asked for.

4.1.3 *The Impact of Boilerplate Transfer Restrictions in the Main Contract*¹⁴⁷

Commercial contracts often stipulate limitations on the parties' right to transfer the contract, in the form of a specific procedure that is to be observed in the event of a transfer, notification procedures, requiring consent or an outright ban.¹⁴⁸ This was also

¹⁴⁰ In the US *Lachmar v Trunkline* LNG753 F 2d 8 (2nd Cir, 1985), and Russia *All-Union Foreign Trade Association "Sojuznefteexport" v Joc Oil Limited*, award 9 July 1984, ICAC Case no 109/1980 printed in Yearbook Commercial Arbitration vol 18 (1993) p 92-110.

¹⁴¹ Brekoulakis p 34.

¹⁴² Gaillard, Fouchard, Goldman p 426, Brekoulakis p 34, see section 3.2.3 above.

¹⁴³ Runesson p 398.

¹⁴⁴ NJA 1984 p 215, note however that the arbitration agreement may be expanded to provide for a separate award on reimbursement of security for costs, for example by reference to SCC rules, cf sec 45 of the rules.

¹⁴⁵ Girsberger in Ferrari and Kröll p 387.

¹⁴⁶ Hobér p 129.

¹⁴⁷ Note that transfer restrictions are discussed in relation to BFL's first claim here, and the focus is the impact on transfers of *both* rights and obligations. Further discussion on transfer restrictions, and the impact on transfers of *rights*, follows in chapter 5 below.

¹⁴⁸ Heuman JT 09/10 p 335 on 345.

the case between Electrolux and BFL. The contract contained a clause requiring the counter-party's written consent in the event of a transfer.¹⁴⁹

How transfer restrictions affect rights *in rem* is uncertain under general contract law.¹⁵⁰ It is unknown whether the transferee (C) is bound by a transfer restriction entered between the original parties (A, B). It is likely that transfers made in violation of a contractual restriction are wrongful.¹⁵¹ This does not automatically make them invalid, but may only give rise to damage claims between the original parties (A, B), at least where the restriction was stipulated in the interest of the remaining party (A).¹⁵² If wrongful transfers are also invalid or not is uncertain, but it could be argued that where the transferee had at least constructive knowledge of the restriction he is also bound by it and valid transfers are not possible.¹⁵³ Therefore, principles of general contract law do not offer much guidance in determining the impact of transfer restrictions on the arbitration agreement.

Different considerations may apply where the impact on arbitration agreements is discussed, and authorities are divided as to the consequences of such provisions.¹⁵⁴ A majority of authors support the view that transfer limitations in the substantive contract are binding upon the transferee, and the remaining party cannot be compelled to arbitrate with a new party in violation of the contractual requirements. This includes transfer restrictions stipulated in the substantive contract, which are *in dubio* considered to apply to transfer of the arbitration agreement as well, in spite of the doctrine of separability.¹⁵⁵

In *Electrolux* the courts concluded that the provision in the share purchase agreement should be construed as requiring the written consent of the remaining party, at least for

¹⁴⁹ Section 8(D) in the share purchase agreement, reproduced in Svea Court of Appeal judgment p 3.

¹⁵⁰ Hessler p 463 et seq, Håstad (1996) p 449 et seq.

¹⁵¹ Håstad (1996) p 449.

¹⁵² Hessler p 468, Cf the legal position in the US where transfers are not necessarily invalid even if they are wrongful, see cases *Bel-Ray Co v. Chemrite Ltd*, 181 F 3d 435 (3d Cir 1999), *Cedar Point Apts, Ltd v. Cedar Point Inv. Corp.* 693 F 2d 748 (8th Cir. 1982), cf Born p 1469 who "argues strongly for a contrary result".

¹⁵³ Hessler p 467, Håstad (1996) p 451.

¹⁵⁴ Cf Heuman JT 09/10 p 346 note 21, (1999) p 150, Andersson et al p 73 note 130, Born p 1468, opposite view Lindskog I:0-5.2.2 note 17. In England the prevailing view is that where the main contract is not assignable due to a non-assignment clause, valid assignment of the arbitration clause is not possible, Hosking p 493.

¹⁵⁵ Andersson et al p 73 note 130, Heuman JT 09/10 p 345-346, Reldén, Nilsson in Franke p 72.

transfers paralleling singular succession.¹⁵⁶ As mentioned, the case turned on whether the third transfer could be classified as a succession required by law, since such transfers were not prohibited by the transfer restriction in the SPA according to the courts.¹⁵⁷ Since BFL failed to show that the third transfer was a consequence of the operation of the law, the whole contract had not been transferred.¹⁵⁸

Unfortunately, the findings of the court are primarily a consequence of how the Danish corporate restructurings were construed, rather than the impact of the transfer restriction.¹⁵⁹ However, the District Court adds, as something of an *obiter dictum*, that;

*“The District Court would like to add the following. [... If the Danish restructuring had been shown to be equivalent to a singular succession] Nothing else has been shown, than that the requirement of consent in p. 8(D) is applicable in such a situation.”*¹⁶⁰

The findings of the District Court were reasserted by the Court of Appeal in this part¹⁶¹, and not further elaborated. The *certiorari* of the Supreme Court excluded the matter of the transfer of the contract as a whole. The additional statement by the District Court indicates that the transfer restriction in the main contract would have been upheld.

Such a conclusion would be in line with previous case law. In the *Custos* case it was found that transfers made in violation of a procedure laid down in the main contract will not force the remaining party to arbitrate with the transferee.¹⁶² This case has been taken as proof of the effectiveness of transfer restrictions included in the main contract.¹⁶³ However, the precedent value of *Custos* is somewhat undermined by the fact that the Supreme Court never tried it. Further, it does not discuss the effectiveness of transfer

¹⁵⁶ Svea Court of Appeal judgment p 4 et seq. An interesting aspect for the discussion on transfer bans and how to construe commercial contracts is the weight lended by the court to the fact that the provision had been “drafted after an anglo-american pattern”, p 4. This was done by the court despite the fact that the contract provided for Swedish law to be applied. This may come as a surprise to commercial parties, especially since English and US law may well be different and it will hardly be inferred from the contract which legal system inspired the parties. Two judges wrote a dissenting opinion on this issue. However, a further inquiry into this issue falls outside the scope of this thesis.

¹⁵⁷ The transfer restriction in provision 8(D) of the contract reads “*This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto, but shall not be assignable by any party without the prior written consent of the other.*”, see Court of Appeal judgment p 3 et seq.

¹⁵⁸ Svea Court of Appeal judgment p 5.

¹⁵⁹ Stockholm District Court judgment p 20-21.

¹⁶⁰ Stockholm District Court judgment p 21-22, my translation.

¹⁶¹ Svea Court of Appeal judgment p 5.

¹⁶² Svea Court of Appeal case no T 8032-00.

¹⁶³ Reldén, Nilsson in Franke p 72.

bans in relation to the transferee but rather the fact that specific procedures laid down for transfer of the main contract need to be respected.

Even if *Electrolux* and *Custos* thus point in the same direction, it is still not entirely clear how a transfer ban in the substantive contract affects the arbitration agreement when both rights and obligations are transferred. For example, it could be argued that the result of this case would have been the same without the transfer restriction in the contract due to the general requirement of consent when both rights and obligations are transferred.¹⁶⁴ If so, one might ask what use there is for a provision requiring consent.¹⁶⁵ The courts did not address this. Neither did the courts outright discuss what consequences the transfer restriction had *on the arbitration agreement*, but the practical consequence is clearly that the parties are not bound by the arbitration agreement on the ground that the whole substantive contract was not transferred.

The District Court's additional statement and both courts' careful examination of the parties' restriction do however indicate that the transfer restriction was respected and would be upheld, even if the Danish restructurings had been construed differently. This is in line with statements in the literature.¹⁶⁶ It is also reasonable against the background of the fundamental arbitration principle of party autonomy and the general contract law principle – mutually binding contracts are not freely transferrable. The findings of the courts also imply that the transfer restriction is *in dubio* effective *vis-à-vis* the arbitration agreement as well.¹⁶⁷ It should be noted however that the effect of transfer restrictions on the transferee and the arbitration agreement is within the scope of the Supreme Court's examination of the secondary claim concerning the transfer of rights. A generally applicable rule on the impact of transfer restrictions, extending over both transfers of mutually binding contracts and rights, can perhaps be formulated.

Another question that remains unanswered in *Electrolux* is what the consequences of an outright transfer *ban* in the substantive contract would have been on the arbitration clause. In *Electrolux* the provision required consent of the remaining party but did not

¹⁶⁴ BFL admittedly did not obtain Electrolux's consent, Court of Appeal judgment p 3.

¹⁶⁵ Such a provision might of course be of use in relation to transfers of contractual *rights*, see further in chapter 5 below.

¹⁶⁶ See note 154 above.

¹⁶⁷ This is also in line with international practice on this issue. In the Swiss judgment *Clear Star* the Supreme Court described it as where "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" Swiss Federal Tribunal 9 April 1991, printed in *Journal of International Arbitration* vol 8 issue 2 p 18-22, on 21, see further Born p 1468.

prohibit transfers as such. In light of the general contract law principle that mutually binding contracts are not freely transferrable, it does not seem unduly burdensome to uphold transfer bans just like other restrictions.¹⁶⁸

In sum, boilerplate transfer restrictions appear to be effective against the transferee when mutually binding contracts are transferred. Transfer bans would also seem to be effective. This is reasonable in light of the general contract law principle requiring consent for valid transfers of mutually binding contracts. *Electrolux* so far seems to support the view expressed in the literature, that transfer restrictions in the main contract will, in spite of the doctrine of separability, *in dubio* apply to the arbitration agreement as well, at least regarding transfers of mutually binding contracts.

4.1.4 Independent Transfer of the Arbitration Agreement

It is sometimes argued that the arbitration agreement may very well have been transferred, even if the transfer of the substantive contract was invalid.¹⁶⁹ This would be the result if different requirements for valid transfer apply to the substantive contract as opposed to the arbitration agreement. Different requirements could be at hand either where the parties have laid down a specific procedure, or where different laws apply to the arbitration agreement and the substantive contract. This view can be seen as an outflow of the doctrine of separability.¹⁷⁰

The justification for allowing the arbitration clause to be transferred without the main contract is that one issue concerns the jurisdiction of the tribunal, whereas the other concerns the substantive merits of the dispute.¹⁷¹ These two issues can, and should, be decided by different legal standards.¹⁷² The reason for this is that there is no universally accepted standard for the transfer of substantive contracts, and domestic legal solutions differ.¹⁷³ Further, domestic contract law requirements for transfer are often quite

¹⁶⁸ Cf internationally Born p 1468 who includes absolute prohibitions. This should apply at least as far as mutually binding contracts are concerned. Transfer bans in relation to transfer of rights are discussed in section 5.3.4 below.

¹⁶⁹ Brekoulakis p 39 et seq, Born p 1469 who contends that it is "at least theoretically possible".

¹⁷⁰ This seems to be consequence of Lindskog's reasoning, who opposes the view that contractual restrictions on transfer of the main contract automatically apply to the arbitration agreement, I:0-5.2.2 note 17, Born also holds this door open, p 1468 et seq.

¹⁷¹ Brekoulakis p 40, cf however Fouchard, Gaillard, Goldman who support the view that a-national rules should regulate the effect of transfers, but also argue that "it would be inconceivable for an arbitration agreement to be assigned without the assignment of the underlying contract. If it were otherwise, the assigned arbitration agreement would have no object", p 426.

¹⁷² Brekoulakis p 40.

¹⁷³ Born p 1470.

technical in nature and have developed with regard to contract law needs that do not necessarily apply in an arbitration context.¹⁷⁴ On the contrary, it can be argued to follow from the commercial purpose of arbitration agreements, and the business need for predictability, that uniform standards for the transfer of arbitration agreements should apply.¹⁷⁵ This does not prevent the substantive law chosen by the parties, including its additional requirements for valid transfers, to be applied by the tribunal to the merits of the dispute and the transfer of the substantive contract.¹⁷⁶

What standards to apply to determine the validity of the transfer of the arbitration agreement can either be determined by applying a traditional conflict of laws approach, or sought in a-national arbitration rules. According to the conflict of laws approach, it is possible that different national laws apply to the arbitration agreement and to the substantive contract, and that these laws in turn provide different requirements for valid transfers.¹⁷⁷ The other school of thought is that universally accepted standards, a-national rules, of transferring arbitration agreements should be applied to the arbitration agreement regardless of what law applies to the substantive contract.¹⁷⁸ An application of a-national rules could further be argued to be especially close at hand in international cases.¹⁷⁹

The approach of applying a-national standards to transfers of arbitration agreements presupposes that universally accepted and uniform rules are available.¹⁸⁰ It has been argued that there are indeed international rules on the transfer of arbitration agreements that have emerged.¹⁸¹ Three deciding rules are claimed to be universally accepted¹⁸²; - consent of the transferee to enter into the main contract automatically includes the

¹⁷⁴ Brekoulakis p 38.

¹⁷⁵ Brekoulakis p 41.

¹⁷⁶ Brekoulakis p 40.

¹⁷⁷ Brekoulakis p 36 et seq.

¹⁷⁸ Fouchard, Gaillard, Goldman p 418 et seq who refer to the application of a-national rules as "substantive rules", Brekoulakis p 38-39. This school of thought ties in with a wider debate on the relationship between international arbitration law and domestic legal systems, spawned by enforcement decisions in national courts relating to arbitral awards that had been set aside in their country of origin, see cases *Hilmarton* and *Chromalloy*. A closer examination of the cases and this debate falls outside the scope of this thesis. For different views and closer examination of the territorialist vs internationalist debate see Hulbert in 14th ICSID/AAA/ICC Colloquium p 124 et seq, and Paulsson in *American Review of International Arbitration* vol 7 no 2 (1996) p 99 et seq.

¹⁷⁹ See judgment of the French Cour de Cassation of 28 May 2002 Civ 1e, referring specifically to "international matters". Despite this, in *Electrolux*, where the parties were indeed of different nationalities there was no mention of a different, more international approach.

¹⁸⁰ Brekoulakis p 38.

¹⁸¹ Brekoulakis p 38, note 58 especially.

¹⁸² Brekoulakis p 38 et seq, same requirements in Fouchard, Gaillard, Goldman p 423.

arbitration agreement; - if the first rule is satisfied the transferee is entitled to invoke the arbitration clause against the debtor as well, and; - there is no formal requirement, such as agreement in writing, on the arbitration agreement between the new parties.¹⁸³ The a-national approach has also been applied in international court decisions.¹⁸⁴

The internationalist view, proposing the application of a-national standards to validate transfers of arbitration agreements, has its merits. The application of universally accepted standards would indeed avoid technical, and widely differing, domestic legal rules of transfer.¹⁸⁵ This would improve international tribunals' ability to assert jurisdiction, increase predictability and in turn maintain arbitration as an effective dispute resolution mechanism. In addition, national rules on transfer were designed to function in a national context, and specific transfer rules have emerged with regard to their place within a pre-existing nexus of contract law rules. These considerations may not make sense when taken out of their context and applied on an international dispute, where possibly the fate of the substantive contract is decided by another legal system.¹⁸⁶

In spite of these advantages it has been disputed that such uniform and universally accepted standards have emerged.¹⁸⁷ International court decisions rejecting the independent transfer of arbitration agreements can also be found.¹⁸⁸ Thus the application of a-national standards would be a desirable development, but the prevailing view can still be said to be the conflict of laws approach.¹⁸⁹

A traditional conflict of laws approach is thus what remains. Unfortunately however, there is little consensus as to what that actually entails.¹⁹⁰ According to one view, the conflict of laws approach can be further refined by the so-called principle of

¹⁸³ The written signature of a party may still be a factor to take into consideration, but it is widely accepted that it is not a requirement capable of preventing a transferee from becoming a party to the arbitration agreement, cf Brekoulakis p 191 and Born p 1488.

¹⁸⁴ French Cour de Cassation civ 1e, Judgment of 28 May 2002 "in international matters, the arbitration clause, which is judicially independent from the principal contract, is assigned with it, whatever the validity of the assignment of the contract's substantial rights".

¹⁸⁵ Brekoulakis p 38 et seq.

¹⁸⁶ Brekoulakis p 38.

¹⁸⁷ Born p 1470 including note 350, Redfern, Hunter p 102.

¹⁸⁸ Swiss Federal Tribunal judgment of 16 October 2001, *Revue de l'Arbitrage* vol 2002 issue 3 p 753-763, where it was held that transfer of the arbitration agreement depends on the valid transfer of the substantive contract.

¹⁸⁹ This is also acknowledged by Brekoulakis, p 37.

¹⁹⁰ For an overview of different versions of the conflict of laws approach, see Brekoulakis p 37 et seq, cf also Born p 1470.

validation.¹⁹¹ The principle means the transfer of the arbitration agreement is accepted if it is valid *either* under the law governing the transfer agreement or the law governing the arbitration agreement.¹⁹² Support for this theory can also be found in international court decisions.¹⁹³

However, there is no evidence of the validation principle being applicable under Swedish law. Rather, the Swedish position has been held to be that the law of the arbitration agreement generally decides issues of its transfer.¹⁹⁴ Available case law gives no clear indication on independent transfer of arbitration agreements under Swedish law. First, it was found in the *Custos* case that where the procedural requirements for transfer of the main contract had not been complied with the arbitration agreement could not have been transferred either.¹⁹⁵ Second, in *Electrolux* the courts found that the substantive contract had not been validly transferred, and that automatically ruled out the transfer of the arbitration agreement without further inquiry. These cases have not opened for the possibility of independent transfer of the arbitration agreement, but the issue was not ruled on explicitly.

It is submitted that since the law of the arbitration agreement decides issues of its transfer under Swedish law, different transfer requirements may well apply where the substantive contract and the arbitration agreement are ruled by different laws. With respect to the doctrine of separability this means it is theoretically possible that the requirements of a valid transfer have been met for the arbitration agreement, regardless of the fate of the substantive contract. In such cases the practical consequence would be that the arbitral tribunal would be competent to try whether a valid transfer of the substantive contract has occurred.

In sum, as far as the Swedish position is concerned, the decisions of the courts in *Electrolux* indicate that the traditional conflict of laws approach applies to the transfer of arbitration agreements under Swedish law. This is in line with statements in legal doctrine.¹⁹⁶ The *Electrolux* judgments give no indication on the applicability of the

¹⁹¹ Born p 1470, Redfern, Hunter p 102, Brekoulakis p 37.

¹⁹² Born p 1470, Redfern, Hunter p 102.

¹⁹³ Judgment of 9 April 1991, Swiss Federal Tribunal in *Journal of International Arbitration* vol 8 issue 2 p 13 et seq.

¹⁹⁴ Andersson et al p 73, Landrove p 125.

¹⁹⁵ Svea Court of Appeal case no T 8032-00, commented by Reldén JT 03/04 p 930 and Magnusson JT 05/06 p 687.

¹⁹⁶ Andersson et al p 73, Landrove p 125.

validation theory, and there is no indication that a-national substantive rules could be applied to the transfer of the arbitration agreement. With respect to the doctrine of separability it is however theoretically possible that the arbitration agreement is transferred independently of the substantive contract.

4.1.5 *The Impact of Policy Arguments on Transfers of Mutually Binding Contracts*

As was mentioned in chapter 2.2 above, the *Emja* decision was based on a balancing of policy arguments for and against holding the parties bound to arbitrate.¹⁹⁷ In deciding the primary claim in *Electrolux*, which unlike *Emja* concerned the transfer of *both* rights and obligations, the courts have not proposed similar policy arguments. Instead, the decisions are purely based on a construction of the parties' agreement followed by thorough assessments of the consequences of the Danish dispositions. The judgments thus stay within the confines of general contract and corporate law. The result of this application has not been overridden by policy arguments applying specifically to the arbitration agreement.

This is an interesting observation in relation to the debate following the *Emja* decision. Some commentators criticized the application of policy arguments for violating the contractual foundation of arbitration.¹⁹⁸ This in turn was argued to give rise to difficulties at the enforcement stage since the New York Convention requires the tribunal's jurisdiction to be founded on contract.¹⁹⁹ It was also argued that *Emja* did not indicate the weighting between different policies.²⁰⁰

The policy arguments from *Emja* also leave other uncertainties. It is difficult to know in advance what kind of policy arguments are relevant, and to what degree they need to be present, in order to override a non-binding conclusion reached by an application of contract and corporate law. This issue is reinforced by the lack of guidance given by the Supreme Court in *Emja*.²⁰¹

¹⁹⁷ Cf Heuman (2003) p 93 who argues against this solution, different view Lindskog I:0-5.2.1 note 2.

The use of policy arguments to bind the remaining party to arbitrate is discussed further in ch 5 relating to the transfer of a right, which is what the *Emja* case concerned.

¹⁹⁸ See primarily Heuman in JT 97-98 p 533, (2003) p 92 et seq, Kadelburger p 24.

¹⁹⁹ Heuman JT 97/98 p 558, Kadelburger p 24.

²⁰⁰ Heuman (2003) p 93.

²⁰¹ NJA 1997 p 866, Cf Landrove p 126 and Heuman (2003) p 93.

The opposing view was that the arbitration agreement is of a special character, not least because of its procedural implications.²⁰² Any attempt to apply strict contract law based explanations to why the parties are indeed bound to arbitrate was argued to result in unrealistic legal fictions.²⁰³ Such fictions ought to be avoided.

Lindskog has formulated his view on policy arguments that was established by *Emja* as;

*“A duty to arbitrate presupposes either that the party has subjected itself to an arbitration agreement or that compelling policy arguments speak in favour of a binding effect anyway”.*²⁰⁴

For cases where both rights and obligations are transferred, Heuman has presented a possible policy argument in favour of binding the remaining party (A). He argues that when all rights and obligations are transferred it follows that it is most likely the same type of disputes that can arise with a new counterparty (C).²⁰⁵ The remaining party (A) has accepted to arbitrate such disputes with B, and he can still predict the type and scope of future disputes that may arise with C.

In *Electrolux* policy arguments were not discussed in relation to the alleged transfer of both rights and obligations. No reference was made to *Emja* in either instance. One possible explanation for this is that concerning mutually binding contracts there are clear and well established principles that need to be met for valid transfers. Arguably, it would take more to deviate from a clear rule applying to the main contract when deciding the fate of an arbitration agreement contained in the same. Another aspect is that, unlike transfers of rights, even a strict application of contract law principles on transfers of mutually binding contracts *does* afford the remaining party (A) appropriate protection. Since a valid transfer of rights and obligations requires the consent of the remaining party (A) the transferor (B) cannot unilaterally escape his duty to arbitrate.²⁰⁶ Thus, one of the main justifications for applying policy arguments that was proposed in *Emja* has no bearing on mutually binding contracts.

Through *Electrolux* the approach to policy arguments quoted above can be argued to have been defined somewhat. The starting point, that there needs to be a contract

²⁰² Lindskog I:0-5.2.1 note 2 and 5.2.2 note 9.

²⁰³ Lindskog I:0-5.2.1 note 2.

²⁰⁴ Lindskog I:0-5.2.2 note 9, my translation.

²⁰⁵ Heuman (1987) p 233.

²⁰⁶ Heuman (2003) p 95.

between the parties, has been reaffirmed. Through *Electrolux* we also know that, as far as mutually binding contracts are concerned, there are no policy arguments in favour of holding the new parties bound to arbitrate that are strong enough to override an invalid transfer of the main contract. Thus, when the transfer of both rights and obligations are tried, the indication given by *Electrolux* is that we can determine the duty to arbitrate using contract and corporate rules on singular succession of mutual contracts.

4.2 Chapter Summary

This chapter has focused on issues raised by BFL's primary claim in *Electrolux*. First, for transfers of both rights and obligations the general contract law principle requiring consent of the remaining party affects the arbitration agreement as well, but it does not prevent automatic transfers of arbitration agreements. *Electrolux* has indicated that transfer restrictions in the main contract are respected and likely to be upheld, in spite of the doctrine of separability. However, in relation to transfers of mutually binding contracts it can be questioned what a requirement for consent adds in light of the contract law principle.

This chapter also found that the independent transfer of arbitration agreements is theoretically possible even if the substantive mutually binding contract has not been validly transferred. Lastly, *Electrolux* has shown that policy arguments play a limited role for the fate of the arbitration agreement when both rights and obligations are transferred.

Chapter 5 – Arbitration Agreements after Singular Succession of Rights Only

The previous chapter circulated around issues related to BFL's primary claim in *Electrolux*. In this chapter the focus is shifted to the secondary claim. BFL's secondary claim is based on the argument that the rights under a warranty have been transferred to BFL, and with it the right to have warranty claims tried in arbitration.²⁰⁷ The question is thus whether the arbitration agreement still covers disputes pertaining to a *right* that has been transferred to a non-signatory of the original contract. Just like the previous chapter, the attention is directed at the position of the remaining original party (A) to the contract. BFL's secondary claim falls within the scope of the Supreme Court's *certiorari* and what follows in this chapter is still up for debate as far as *Electrolux* is concerned.

In chapter 4 it was argued that the main rule under Swedish law is that arbitration agreements are presumed to transfer with the substantive contract when rights *and obligations* are transferred, provided the substantive transfer is valid. Regarding transfer of *rights* discussed here, the general contract law principle is different; rights are freely transferrable, and obtaining consent is not necessary.²⁰⁸ However, despite the more lenient contract law principle, when only rights are transferred the Swedish position on the automatic transfer of arbitration agreements contains an important caveat. Since *Emja* it has been argued that arbitration agreements bind the transferee *and the remaining party* – unless “special circumstances” apply.²⁰⁹ Therefore, Swedish law on rights transfers and automatic binding effect of arbitration agreements has been said to “adopt a middle position”.²¹⁰ This chapter will further elaborate on what that middle position entails for the remaining party (A).

To begin with (5.1), this chapter will give an account of the debate leading up to the current state. What has already been established concerning the position of the remaining party after a rights transfer will be outlined. In the next section (5.2) there is a

²⁰⁷ See claims stated in District Court judgment p 4, the claims were unaltered in the appellate court.

²⁰⁸ Andersson et al p 73, Reldén, Nilsson in Franke p 72-73.

²⁰⁹ NJA 1997 p 866 on 873, NJA 2000 s 538 (*Bulbank*), Reldén, Nilsson in Franke p 73, Andersson et al p 73-74, Hobér p 129.

²¹⁰ Redfern, Hunter p 102 et seq.

discussion on what *Electrolux* might clarify and thoughts on what the Supreme Court could find. The main part of this chapter follows in the penultimate section (5.3), where the debated aspects of the current state of the law are discussed. The selection of issues has been guided by what has been deemed the most important questions with regard to the position of the remaining party (A). This is followed by a chapter summary in section 5.4.

5.1 The Remaining Party's Position After Singular Succession So Far

5.1.1 Debate Leading Up To the SAA of 1999

The position of the parties to an arbitration agreement after the transfer of a right accounted for much of the Swedish debate on party substitution in general already before the SAA.²¹¹ The views among authors were divided.²¹² During the preparation of the SAA the Arbitration Committee noted that the law was uncertain on this point.²¹³ With a view to clarify the law, and increase predictability for parties, the Arbitration Committee proposed a rule to the effect that arbitration agreements would be binding between the transferee and the remaining party only to the extent that the new parties could be deemed to have agreed on this.²¹⁴

In an international context, statutory regulation of this issue would have been an unusual solution.²¹⁵ The proposed rule would also have been contrary to the position in most other jurisdictions.²¹⁶

In the end, the Government opted for a different solution. Among the decisive arguments was the fact that it could be a significant disadvantage for the remaining party if the arbitration agreement no longer applied, and that it would open the door for abuse by simply transferring a right to extricate oneself from the arbitration agreement.²¹⁷ It was also submitted by the Government that, in view of the plurality of possible scenarios, it would be difficult to formulate one all-encompassing rule.²¹⁸ For

²¹¹ Hobér p 127.

²¹² Edlund SvJT 1993 p 907, Håstad (1990) p 184, opposite view Heuman (1987) p 248, Lindskog JT 93/94 p 827 note 5.

²¹³ SOU 1994:81 p 91.

²¹⁴ SOU 1994:81 p 23.

²¹⁵ Born p 1411 and 1467, Prop 98/99:35 p 64, although not unheard of – Cf Norwegian Arbitration Act § 10 where there is statutory regulation of this matter.

²¹⁶ Lew, Mistelis, Kröll p 146 et seq.

²¹⁷ Prop 98/99:35 p 64, Heuman (2003) p 92.

²¹⁸ Prop 98/99:35 p 65.

these reasons the Government left the matter of singular succession and arbitration agreements to be decided by case law, and there is no provision on this in the SAA.²¹⁹

*Emja*²²⁰ is thus the leading authority on singular succession and arbitration agreements. *Emja* predates the SAA and was taken into account by the Government. As mentioned, the rule that was formulated by the Supreme Court can be summarized as stating that the remaining party (A) and the transferee (C) are bound to arbitrate unless there are special circumstances indicating the contrary.²²¹

It can be argued that the Government's reasoning above displays an implicit acceptance of policy arguments in the current state of the law. Not least by the direct reference to *Emja*²²² but also since the arguments proposed in the *travaux préparatoires* reflect pragmatic and practical concerns.²²³ This is interesting to note since it possibly contradicts the argument for applying strict contract law principles to decide the binding effect of arbitration agreements discussed under 5.3.1 below.

5.1.2 Case Law Before Electrolux

As mentioned, *Emja* is the only Supreme Court decision available on singular succession and arbitration agreements.²²⁴ However, shortly after *Emja* the Supreme Court case NJA 2000 p 538 (*Bulbank*) was decided.

Among the issues in dispute before the District Court in *Bulbank* was the remaining party's duty to arbitrate with the transferee of a right.²²⁵ In *Bulbank*, unlike *Emja*, it was the transferee who initiated proceedings against the remaining party. In that sense the case displayed greater similarities with *Electrolux* than *Emja*. The remaining party, *Bulbank*, argued they were not bound *vis-à-vis* the transferee due to special circumstances – they opposed the transfer and by arbitrating with the transferee *Bulbank* would incur greater expenses.²²⁶ According to the District Court, these general arguments did not amount to “special circumstances”, which would require an

²¹⁹ Hobér p 127.

²²⁰ NJA 1997 p 866.

²²¹ NJA 1997 p 866 on 873. Note however that Lindskog still regards this issue as an open question, see 5.3 below.

²²² Prop 98/99:35 p 65.

²²³ Prop 98/99:35 p 64.

²²⁴ Hobér p 128.

²²⁵ See Stockholm District Court decision T 6-111-98.

²²⁶ Stockholm District Court judgment T 6-111-98 p 6.

“extraordinary character”.²²⁷ The meaning of an “extraordinary character” was not defined more specifically. Unfortunately, this issue was not included in the Supreme Court’s assessment and the District Court judgment is the only pronouncement of the rule concerning remaining parties formulated in *Emja*.²²⁸

5.1.3 General Contract Law on Rights Severed From Mutually Binding Contracts and the Effect of Transfer Restrictions Against the Transferee

A major aspect in *Electrolux* is the possibility to sever a right from a mutually binding contract and transfer it without the related obligations. The position on this under general contract law is uncertain.²²⁹ Most likely, mature claims²³⁰ can be severed and transferred.²³¹ Regarding non-due claims²³² the law is more uncertain. The main rule on non-due claims seems to be they cannot be severed at all, although it has been accepted under specific circumstances.²³³ However, these questions fall outside the scope of the present study and focus will remain on the arbitration aspects. Consequently, the analysis in 5.3 below is based on the assumption that a right can be transferred.

It is also uncertain under general contract law what effect a transfer restriction in the main contract has on the transferee.²³⁴ At least where a restriction is included to protect the transferor, it is effective *between the original parties* and may give rise to damage claims.²³⁵ Whether it is also effective *in rem*, i.e against the transferee, is more uncertain.²³⁶ Regarding non-due claims, transfer restrictions are most likely effective against the transferee, if such claims can be severed at all.²³⁷ This also falls outside the scope of the present study. However, the impact of transfer restrictions in the main

²²⁷ T 6-111-98 p 10-11.

²²⁸ The published award *Alpha S.p.A. / Beta Co Ltd*. SCC Case no. 12/2002 also treats the issue of the remaining party’s duty to arbitrate with the assignee. There was however some confusion whether the arbitrator treated the question as a transfer of the *whole contract* (cf ch 4 above) or transfer of a *right* (see last paragraph section 2 of the award). For this reason, and the fact that it was never tried by the courts, the award is left out from closer examination here. It can be noted that it has been argued that the arbitrator should have assumed jurisdiction based on *Emja* and *Bulbank*, see Landrove p 134.

²²⁹ See the additional statement by Lindskog in NJA 2009 p 570.

²³⁰ *Sw. fullgångna rättigheter*.

²³¹ Lindskog in NJA 2009 p 570.

²³² *Sw. ofullgångna rättigheter*.

²³³ Such as NJA 1966 p 97, which is most likely an unusual case with a slim scope of application. Not least due to the fact that neither the Court of Appeal or the Supreme Court provided any reasons of their own, Cf Court of Appeal p 6-7 in *Electrolux*.

²³⁴ Hessler p 463 et seq, Håstad (1996) p 449 et seq.

²³⁵ Hessler p 468.

²³⁶ Hessler p 467, Håstad (1996) p 450-451.

²³⁷ Cf NJA 2009 p 570 and Göta Court of Appeal case T 99-12.

contract will be discussed *in relation to arbitration agreements*, and their effect when rights are transferred (section 5.3.4).

5.2 An Outlook at What *Electrolux* Can Tell Us

Under 5.3, a selection of disputed issues relating to the standing of the remaining party (A) *vis-à-vis* the transferee (C) of a right will be discussed. The selected aspects are all to a greater or lesser extent present in *Electrolux*. However, most of them have so far not been mentioned explicitly in the judgments of the lower courts, with the possible exception of the impact of the transfer ban in the main contract.²³⁸

In their upcoming decision, the Supreme Court could potentially address all the issues discussed in the following.²³⁹ However, it is unlikely that they do. Hopefully, the Supreme Court will at least give clarifications on some of the overarching issues, such as the applicability of policy arguments as opposed to strict application of contract law (5.3.1) and whether the *obiter dictum* from *Emja* is the state of the law for remaining parties (5.3.2).

In view of the circumstances in the *Electrolux* case and the judgments of the lower courts there is an obvious opportunity for the Supreme Court to clarify what impact a boilerplate transfer ban in the main contract has on the arbitration agreement (5.3.4). This is also one of the aspects that the Supreme Court is likely to address. It is more difficult to predict whether the Supreme Court will look further into what “special circumstances” means (5.3.3), the standing of the transferor (B) (5.3.5) or a possible application of a third party beneficiary model (5.3.6).

5.3 The Disputed Aspects of the Current State of the Law

Emja provided important clarification to singular succession and arbitration agreements. Still, many questions remain unanswered and the case gave rise to questions of its own. Since the Government opted for a case law solution to this complex and multifaceted problem, many outstanding issues were left in the air also after the entry into force of the SAA. In this section some of these issues are discussed and related to *Electrolux*.

²³⁸ See section 5.3.4 above.

²³⁹ Note that the principle of *iura novit curia* is generally deemed to apply in Swedish civil litigation, as opposed to what seems to be the prevailing view in arbitration law, cf chapter 35 § 2 of the Procedural Code and Hóber p 213.

These issues include whether binding effect between A-C should be decided on the basis of a strict application of contract law principles (5.3.1), the impact of the *obiter* character of the *Emja* rule for remaining parties (5.3.2), what the “special circumstances” formulated in that rule entail (5.3.3), how transfer restrictions in the main contract affect transfer of the arbitration agreement (5.3.4), the relationship between A-B after singular succession and how that might affect A’s position *vis-à-vis* C (5.3.5), and lastly how a third party beneficiary model could be used to ascertain A’s position in relation to C (5.3.6). All of these issues affect how A’s relationship to C is defined and could all be possible arguments in the circumstances at hand in *Electrolux*.

5.3.1 Binding Effect Ought to be Based on Contract Law

As has been pointed out²⁴⁰, *Emja* was decided on a balancing of policy arguments rather than a strict application of contract law principles. This has been criticised as an inappropriate justification for binding effect.²⁴¹ The critics argue that the binding effect of the arbitration agreement ought to be based on contract law.²⁴²

Indeed, as noted in one comment

“[the] crucial difference between arbitration and courts lies in the fact that the basis of the jurisdiction of an arbitral tribunal is the will of the parties, while courts owe their competence to procedural norms of state or of an international convention”.²⁴³

Other important arguments in favour of applying a more fundamentalist contract law approach are that conceptually arbitration is founded on contract and its consensual nature is a fundamental aspect²⁴⁴, that international awards can only be enforced with the authority of the NYC if jurisdiction of the arbitrators was founded on contract²⁴⁵ and that it is necessary for commercial predictability.²⁴⁶

It has also been argued that one of the key aspects of the court’s argumentation in *Emja*, to avoid a limping binding effect that would give the remaining party the right to speculate on the type of procedure, was not achieved with the Supreme Court’s

²⁴⁰ Cf section 4.1.5 above where policy arguments are discussed in relation to transfers of both rights and obligations, also Heuman (2003) p 93.

²⁴¹ Heuman (1999) p 110 et seq, JT 97 p 533, (2003) p 94, Kadelburger p 22 et seq.

²⁴² Heuman (1987) p 235, (1999) p 111, (2003) p 94-95, Kadelburger p 24, cf also Born p 1485 who supports this view.

²⁴³ Varady, Barcelo, Von Mehren p 61.

²⁴⁴ Heuman (2003) p 77, Hobér p 127, Redfern, Hunter p 85, Hosking p 472.

²⁴⁵ Heuman JT 97/98 p 558. Kadelburger p 24-25.

²⁴⁶ Born p 1485, Hosking p 476.

solution.²⁴⁷ This is because, in Heuman's view, only the remaining original party is entitled to invoke the "special circumstances", thus in practice creating an option for the remaining party.²⁴⁸

On the other hand, the initial quote of this thesis made visible a tension with other vital interests, namely that

*"reliance on the merely formalistic argument that no arbitration clause has been signed by a particular party would result in such a manifestly wrong and unjust solution that more subtle and more appropriate thoughts had to be given to appropriately consider the situations as they occur in international business practice".*²⁴⁹

With regard to Swedish law, Lindskog has submitted the argument that any attempt to explain the binding effect solely with contract law tools will "inevitably lead to an untenable fiction".²⁵⁰ On this view, the use of policy arguments is necessary in order to defuse the transferor's opportunity to extricate himself from the arbitration agreement by transferring the right.²⁵¹ It has been suggested that the problem is better approached by trying to strike a workable balance between the contractual foundations and business needs for flexibility.²⁵²

An attempt to solve issues addressed in *Emja* with strict contract law rules can exemplify the above. Possibly, the risk for the remaining party (A) to be forced to arbitrate with a financially weaker opponent (C) and bearing the risk of the cost for the procedure could be remedied through an application of § 36 of the Contracts Act. It could also be argued that a binding effect between the new parties (A-C) could come about through the actions of the parties since agreements can be entered orally or through implicit acquiescence.²⁵³ In addition, as in general contract law there is no written requirement for arbitration agreements under the SAA.²⁵⁴ However, an application of general contract law will not afford the remaining party sufficient

²⁴⁷ Heuman JT 97/98 p 542.

²⁴⁸ This is a reasonable view, although it does not undermine the Supreme Court's solution to any extent since the "choosing" now lies with the courts who must either accept or dismiss the remaining party's request. That is arguably something quite different than a right for one party to freely speculate on the choice of procedure, cf Lindskog I:0-5.2.2 note 6.

²⁴⁹ Blessing p19.

²⁵⁰ Lindskog I:0-5.2.1 note 2, my translation.

²⁵¹ Lindskog I:0-5.2.1 note 2, cf prop 98/99:35 p 64.

²⁵² Hosking p 475 et seq.

²⁵³ As proposed by the Arbitration Committee in SOU 1994:81 p 91 et seq, Heuman (2003) p 94.

²⁵⁴ Cf SAA § 1, Hobér p 91, 95.

protection against the extrication problem – there is nothing in general contract law that prevents the counterparty to transfer a right in order to escape the arbitration.²⁵⁵

A strict application of contract law also results in a problematic contradiction. Contract law theories, and their indivisible focus on consent, require that implicit consent is clear and proven in full.²⁵⁶ Even the parties' actions must be construed using established principles and practices of interpretation.²⁵⁷ Consequently, efforts to accommodate the strict contract law theories to changing needs and business realities has forced the theory of *in favorem validitatis* to creep into these arguments.²⁵⁸ However, in the context of binding non-signatories, it has been resolutely stated that such principle of interpreting arbitration agreements ought not to be applied.²⁵⁹ If no presumption can be made regarding the intention to arbitrate, the alternative to the application of policy arguments when maintaining a strict application of contract law theories is to lower the threshold of consent.²⁶⁰ That is the opposite of what these theories aim to achieve. In addition, it is difficult to see why arbitration agreements would warrant a lower threshold of consent than prorogation agreements, or any other contract for that matter.²⁶¹

In contrast, a balancing of interests like that in *Emja* displays an example of how the balancing act between the consensual nature of arbitration and business realities can be handled. It is submitted that the policy arguments that the Supreme Court resorted to in *Emja* are not as controversial as they have been portrayed.²⁶² Even if clad in different clothes, arguments like those proposed in *Emja* are found in international case law as well.²⁶³

Despite the criticism levelled against it, the *Emja* decision stands for the proposition that policy arguments can be used to ascertain a binding effect between the new parties.

²⁵⁵ Lindskog I:0-5.2.1 note 2.

²⁵⁶ Brekoulakis p 196, Heuman (2003) p 94.

²⁵⁷ Brekoulakis p 196, Hosking p 475 and the quoted passage.

²⁵⁸ Cf Brekoulakis (2007).

²⁵⁹ Fouchard, Gaillard, Goldman p 260, Born 1487-1488, the reason being that even if arbitration is a common means of solving commercial disputes, in the words of Fouchard et al "it remains perfectly legitimate to choose to have one's international disputes settled by the courts".

²⁶⁰ Brekoulakis p 197.

²⁶¹ Brekoulakis p 197.

²⁶² For example by Heuman (1999) p 110 et seq.

²⁶³ Lew, Mistelis, Kröll p 147. In the US see case *Banque de Paris et des Pays-bas v Amoco Oil Company* 573 F Supp 1464, Southern District of New York 1983 where the court disapproved of the ability to unilaterally extricate oneself from the arbitration agreement. See also Brekoulakis p 36 where the transferee's "dire financial position" is recognized.

In contrast to what Heuman suggests²⁶⁴, it is submitted that the government's position as expressed in the preparatory works displays acquiescence to the use of policy arguments and an adherence to pragmatic and practical concerns.²⁶⁵ This is a reasonable view in a field of law that develops quickly and must be able to adapt to business needs and reality.²⁶⁶ It also follows from the discussion above that resorting to policy arguments is necessary to prevent the extrication problem. In the view proposed here, doing so openly rather than through a convoluted and untenable application of contract law, is straightforward and mitigates the worries for lacking predictability. It is another matter that "special circumstances" need to be further defined.²⁶⁷

Electrolux has not yet provided any indication as to how this will be dealt with in the future. In line with what has been argued above, it is submitted that policy arguments should remain a possible justification for a binding effect of arbitration agreements after singular succession.

5.3.2 *The Emja-rule for Remaining Parties is Only an Obiter Dictum*

In *Emja* it was the remaining party who initiated court proceedings against the transferee. The standing of the parties was thus the opposite of *Electrolux*, and the case concerned whether the *transferee* was bound by the arbitration agreement.²⁶⁸ In addition to the case before them, the Supreme Court added in *Emja* that if the standing of the parties was inverted the remaining party would also be bound to arbitrate unless "special circumstances" apply.²⁶⁹

It has been proposed that the rule concerning remaining parties, relevant in *Electrolux*, is only an *obiter dictum* and as such has low precedent value.²⁷⁰ According to this view, the *Emja* rule for remaining parties is only decisive to the extent that it is justified by its arguments. The court's main argument was that a limping binding effect would allow the remaining party to speculate on the type of procedure.²⁷¹

²⁶⁴ Heuman (2003) p 94 "in this way, the binding effect ... can be more extensively justified in the way which the Government has apparently been aiming for".

²⁶⁵ Cf prop 98/99:35 p 64 and section 5.1.1 above.

²⁶⁶ Brekoulakis p 3-5.

²⁶⁷ A discussion on the meaning of "special circumstances" can be found under 5.3.3 below.

²⁶⁸ See NJA 1997 p 866, Hobér p 128.

²⁶⁹ NJA 1997 p 866 on 873.

²⁷⁰ Lindskog I:0-5.2.2.

²⁷¹ NJA 1997 p 866 on 873, cf Lindskog I:0-5.2.2. The other arguments mentioned by the court, the problem with one party unilaterally escaping arbitration by transfer and the application of the general

Lindskog is of the opinion that the limping binding effect is not in fact an imperative argument to bind the remaining party to the arbitration agreement.²⁷² Instead, the fact that the new parties (A-C) actually have not entered a new arbitration agreement outweighs the arguments in favour of holding the remaining party (A) bound. Lindskog also points out that with regard to the contractual foundation of arbitration, and the fact that there is no arbitration agreement between the new parties, the dislike for a limping binding effect should more appropriately result in neither party being bound.²⁷³ However, since there are imperative arguments in favour of binding the transferee, a limping binding effect will have to be accepted.²⁷⁴ In addition, the court's opening for "special circumstances" in *Emja* implies that a limping binding effect is not essential to avoid. Consequently, Lindskog regards the issue of the remaining party's duty arbitrate, tried in *Electrolux*, as an open question.²⁷⁵

Other commentators maintain that the *Emja* decision is the state of the law also for remaining parties.²⁷⁶ It is submitted that much speaks in favour of regarding the *Emja* rule as the state of the law, including the *obiter dictum* relevant in *Electrolux*.

It is preferable to treat both parties equally and avoid the limping binding effect, since allowing one party the benefit of choosing seems unreasonable.²⁷⁷ In order to provide necessary business certainty and a rule that is in line with the expectations of both domestic and international parties, the starting point should be that both parties (A and C) remain bound by the agreement.²⁷⁸ This applies despite the argument that the *Emja* rule provides for an uncertain exception.²⁷⁹ In the view argued here, the contents of the exception from *Emja* are no more uncertain than the diverse rules on transfer applicable in other jurisdictions and the unpredictability associated with fictitious applications of contract law justifications commonly used.²⁸⁰ What is more, the main rule for remaining parties is quite certain and considering *Bulbank* the room for exceptions seems

contract law principles embodied in § 27 in the Law of Obligations, are all arguments *against* holding the remaining party (A) bound, this was the only real argument *for* holding A bound to arbitrate.

²⁷² Lindskog JT 93/94 p 826, on 827 note 5.

²⁷³ Lindskog I:0-5.2.2 note 7.

²⁷⁴ Lindskog JT 93/94 p 827 note 5, Lindskog I:0-5.2.2 note 7.

²⁷⁵ Lindskog I:0-5.2.2.

²⁷⁶ Olsson, Kvant p 140, Hobér p 128-129.

²⁷⁷ Heuman (1987) p 230 and 241.

²⁷⁸ Cf Brekoulakis p 34, prop 98/99:35 p 64, internationally the most common rule is that both parties remain bound, Lew, Mistelis, Kröll p 146, Redfern, Hunter p 102.

²⁷⁹ Lindskog I:0-5.2.2 note 7.

²⁸⁰ See section 5.3.1 above.

limited.²⁸¹ In addition, all this criticism means is that the exception requires further clarification, not that the solution as such is inappropriate. Hopefully, *Electrolux* can provide such clarification.

5.3.3 *The Meaning of “Special Circumstances”*

Assuming that the rule pronounced in *Emja* remains the state of the law for original parties after singular succession of rights, it is necessary to determine the contents of “special circumstances”. Unfortunately, the Supreme Court did not provide much guidance in this regard in the *Emja* judgment.²⁸²

As mentioned, the meaning of special circumstances has been considered at the court level once shortly after *Emja* was decided.²⁸³ In *Bulbank* the District Court found that the remaining party’s arguments²⁸⁴ were only of a general nature and did not amount to special circumstances. The court further noted that special circumstances need to be of an “extraordinary character”.²⁸⁵ This tells us that the scope of the exception has been construed to be quite narrow, but the statement has low precedent value and does not elaborate further on what circumstances might be of interest.

Special Circumstances from the Emja Judgment

A couple of relevant circumstances can be inferred directly from the Supreme Court’s statements in *Emja*. The arguments presented in the court’s discussion against keeping the original party bound to arbitrate are generally accepted as examples of “special circumstances”.²⁸⁶ These include cases where the identity of the original parties affected the choice of dispute mechanism, and where the transferee is in a dire financial position.²⁸⁷

²⁸¹ See the Stockholm District Court judgment preceding NJA 2000 p 538, case no T 6-111-98 where the court demanded circumstances invoked to be of an “extraordinary character”, it is also reasonable to provide for a safety valve in cases of apparent abuse such as procedural torpedoed, cf Supreme Court case T 2133-14 of 11 December 2014.

²⁸² NJA 1997 p 866 on 873, Heuman JT 97/98 p 533 et seq, Landrove p 132, Lindskog I:0-5.2.2 note 5.

²⁸³ *Bulbank*, see note 281 above.

²⁸⁴ The remaining party, *Bulbank*, opposed the transfer and argued they would incur greater expenses arbitrating with the transferee, T 6-111-98 p 6.

²⁸⁵ Stockholm District Court judgment T 6-111-98 p 10.

²⁸⁶ Cf Lindskog I:0-5.2.2 note 5, Hobér p 128-129, Reldén, Nilsson in Franke p 73.

²⁸⁷ Cf NJA 1997 p 866 on 872 et seq. Although, as the court noted in *Emja*, a strong personal connection is unusual in the commercial context. For similar reasoning in the international context see Fouchard, Gaillard, Goldman p 431.

The circumstance relating to the financial standing of the transferee (C) leaves two issues open – how grave must the financial position be? And bad finance compared to whom? It has been argued that the exception for special circumstances does not apply unless the transferee’s ability to pay is “clearly insufficient”.²⁸⁸ Regarding the second issue it makes sense to require the transferee’s financial position to be worse than the transferor’s standing.²⁸⁹ It would not be reasonable to apply the exception when the transferor was in equally bad shape as the transferee, the point of the exception is to relieve the remaining party from a material change in the duty incumbent upon him. Naturally, these two aspects, how grave the financial position must be and compared to whom, must be applied together. Grave financial standing is difficult to define *in abstracto*, and even if C’s standing is worse than the transferor’s/B’s it could still be sufficient to afford both parties’ costs of the proceedings. As seen the two questions must be answered in relation to each other and on a case-by-case basis.

Other Possible Special Circumstances

More difficult is the endeavour to find special circumstances not mentioned in *Emja*. Closely related to the notion of a special connection between the parties, is the case where the procedural arrangements of the agreement rule out a binding agreement with the transferee.²⁹⁰ For example, where the original parties are a Russian and a US company who agree to arbitrate in Stockholm, and the language of the arbitration is Swedish. If one party subsequently transfers the agreement to a Swedish company this could amount to a special circumstance that liberates the original party from its duty to arbitrate.²⁹¹

Further, it is possible that the assessment of “special circumstances” in a particular case could be affected by the wording of the arbitration agreement. Internationally, in both case law and doctrine, weight has been lent to the character of the arbitration clause and whether it is a general “catch-all” type agreement or a case-specific agreement.²⁹² The more of an open “all disputes” kind of clause there is, the more reason to hold the

²⁸⁸ Heuman JT 97/98 p 542. Note that Heuman has formulated his rule as ”undantagsregeln bör tillämpas så snart den nya partens betalningsförmåga är klart otillräcklig” (dubbel negation) – this must reasonably be a typo and Heumans view is interpreted as stated here.

²⁸⁹ Heuman JT 97/98 p 542.

²⁹⁰ This could also be construed as a variant of a transfer restriction, see section 5.3.4.

²⁹¹ Example taken from Brekoulakis p 36, a similar example can be found in Born p 1469.

²⁹² From the US see *Cedrela Transport Ltd v Banque Cantonale Vaudoise* 67 F supp 353 Southern District of New York 1999, from France see *CCC Filmkunst v EDIF* 1988 Court of Appeal Paris 28 January 1988, Fouchard, Gaillard, Goldman p 431, Brekoulakis p 35, Hosking p 498.

parties bound to it. Under Swedish circumstances there is no evidence of this type of reasoning.²⁹³ However, the more general the arbitration agreement the more difficult it would be to argue that the identity of the parties was a vital condition. Thus, the agreement's wording can affect the assessment of special circumstances at least indirectly.

Circumstances Specific to Electrolux

A couple of circumstances specific to *Electrolux* can also be considered. To begin with, all the restructurings that took place on BFL's side were intragroup dispositions.²⁹⁴ It could be argued that *Electrolux* is not really facing a new counterparty, and that intragroup restructurings should be expected and allowed – re-organizations are a necessity in business life. On the other hand, the principles of corporate identity and limited liability are widely recognized and ought to be respected as the main rule.²⁹⁵ Deviations should not be made light-heartedly, and generally some kind of misconduct or abuse is required to disregard principles of corporate identity and limited liability.²⁹⁶

Another circumstance in *Electrolux* worth considering is the subject of the dispute, i.e. a warranty claim.²⁹⁷ It is possible that the types of disputes that were envisaged affected the choice of dispute mechanism. Warranty claims is likely a typical issue. In contemplating why arbitration was chosen, it could be considered that arbitration was the natural choice for both parties because of its confidentiality. Neither party would benefit if it became public knowledge that Electrolux's dry cleaning operations had caused contaminations, or that they were sentenced to pay compensation for it. The contractual duties of the parties related to the warranty indicate that it was a sensitive issue, and could support the theory that arbitration was chosen for its confidentiality.²⁹⁸ It could be argued that it would be exorbitant if Electrolux could extricate themselves

²⁹³ To my knowledge. I have not encountered this type of reasoning in Swedish case law or doctrine. This does not preclude that it has been applied in arbitral awards outside my knowledge.

²⁹⁴ For an account of the restructurings leading up to BFL's claim see the District Court decision on p 2-3 and section 2.2 above.

²⁹⁵ Ch 1 § 3 Companies Act (2005:551), Supreme Court Case T 2133-14, Heuman (1999) p 96.

²⁹⁶ See Supreme Court case T 2133-14 of 11 December 2014 on issues of piercing the corporate veil, cf also the theories of "alter ego", "veil-piercing", and the "group of companies doctrine" in arbitration for example in Born p 1431 et seq. This is not the place to look further into these theories.

²⁹⁷ Not to be confused with guarantees (surety) which may give rise to the application of specific arbitration theories, see Hobér p 131-133.

²⁹⁸ Cf party submission number 9 in Supreme Court file in T 4816-12 p 14-15. The buyer was under a duty to give proper notice on *possible* contamination and limit any damage. Already in case of potential damage was the buyer under a duty to comply with instructions of the seller.

from arbitration when the contract shows it was in their interest to choose arbitration.²⁹⁹ Their main interest in choosing arbitration would thus not have changed. However, it is difficult to ascertain what the intentions and reasons for choosing arbitration were. There is also reason to be reminded of the main rule, that having entered an arbitration agreement does not automatically amount to consent to arbitrate neither about anything nor *with anyone*.³⁰⁰ The reasoning above is likely insufficient to deviate from that principle.

Procedural Issues

Lastly, a procedural issue related to the application of “special circumstances” deserves attention. It is not clear from *Emja* what is required of the remaining party to show that special circumstances are at hand. Since the special circumstances are formulated and defined by reference to what the court envisaged are average interests and reasons for choosing arbitration, it could be argued that simply invoking them would be enough. However, in the interest of predictability and to prevent the main rule from eroding into an exception, more should be required from the remaining party. It has been argued that the arbitral tribunal may not be refused jurisdiction unless a “well debated and thoroughly analysed aspect of the case” amounts to a special circumstance.³⁰¹ Since “special circumstances” are just a safety valve from the main rule, this is a sensible view. It is also supported by the construction of special circumstances in *Bulbank*.

5.3.4 The Impact of Boilerplate Transfer Restrictions in the Main Contract

In chapter 4 the impact of transfer restrictions on transfers of the whole contract was discussed. This section will further elaborate on restrictions in relation to rights transfers, like those in *Emja* and the secondary claim in *Electrolux*. An important difference to note here is that the starting point concerning *rights* is that they are freely transferrable.³⁰²

Different kinds of transfer restrictions are commonplace in commercial contracts. They take on many different forms, like specifying to whom transfers are allowed, require

²⁹⁹ This touches on the arbitration theory called “arbitral estoppel”, mostly applied in the common law jurisdictions, see for ex Born p 1471 et seq. The theory is less relevant under Swedish law and will not be analysed further here.

³⁰⁰ Born p 1415.

³⁰¹ Landrove p 127.

³⁰² Reldén, Nilsson in Franke p 72-73, Andersson et al p 73. As opposed to transfers of rights *and obligations* which generally require consent, see section 4.1.1 above.

consent or ban transfers altogether. Restrictions can also be inferred from the circumstances, for example when procedural arrangements are overturned.³⁰³ What has given rise to most controversy are transfer restrictions that strictly speaking apply only to the substantive contract, and no specific transfer regulation is included in the arbitration clause contained therein.³⁰⁴ This is also the case in *Electrolux*.

Heuman is of the opinion that a transfer ban in the main contract excludes a binding effect of the arbitration agreement between the new parties (A-C).³⁰⁵ According to Heuman, this follows from the principle that § 27 of the Law of Obligations is applicable to arbitration agreements *ex analogia*, which was established in *Emja*. A successor (C) may not obtain a better right than the previous rights-owner (B). A transfer ban is a legal condition that burdens the main contract.³⁰⁶ The transferee (C) cannot, according to the principles of § 27 of the Law of Obligations, acquire the right and escape the duty incumbent on the transferor – that the transferor (B) was not allowed to impose a contractual duty between the remaining party (A) and the transferee (C).³⁰⁷ Domestic and international commentators and case law support Heuman's view.³⁰⁸

Lindskog on the other hand holds that transfer restrictions concerning the substantive contract cannot offhand be taken to apply to the arbitration agreement.³⁰⁹ Lindskog also takes general principles of the law of obligations as his starting point, but draws different conclusions. In his view, on average the parties (A-B) cannot be assumed to have considered the arbitration agreement as well when constructing a transfer restriction for the main contract.³¹⁰ If they did they would simply have added a restriction to the arbitration agreement as well. As can be seen, Lindskog does however

³⁰³ Cf section 5.2.3 above and Brekoulakis p 35-36.

³⁰⁴ Heuman JT 09/10 p 345, Brekoulakis p 36.

³⁰⁵ Heuman JT 09/10 p 346.

³⁰⁶ *Sw. betingelse*, Runesson p 396.

³⁰⁷ Heuman JT 09/10 p 346.

³⁰⁸ Among Swedish commentators are Andersson et al. p 73 note 130, Reldén, Nilsson in Franke p 72, and Madsen p 88 note 245. Internationally see Born p 1468, Brekoulakis p 36 and the state of English law where valid assignment is not possible if it violates a non-assignment clause, Hosking p 493. In Swedish case law cf Court of Appeal case T 8032-00 (*Custos*), internationally see Swiss Federal Tribunal, 9 April 1991, *Clear Star* in Journal of International Arbitration vol 8 issue 2 p 18.

³⁰⁹ Lindskog I:0-5.2.2 note 17.

³¹⁰ Lindskog I:0-5.2.2 note 17.

agree with the view that a restriction in the arbitration agreement itself falls within party autonomy and should be effective against the transferee (C).³¹¹

Lindskog's position, that transfer restrictions in the main contract do not *in dubio* apply to the arbitration agreement as well, is perhaps best understood in relation to his view on the remaining party's duty to arbitrate in the first place. As was discussed above, Lindskog regards the remaining party's (A) position in relation to the transferee (C) as an open question despite the *Emja* rule.³¹² He advocates the view that the remaining party (A) ought not to be bound by the arbitration agreement *vis-à-vis* a new counterparty (C), despite the limping binding effect it leads to. If that view prevailed, there would arguably be less reason to give effect to a transfer restriction in the main contract in order to relieve the remaining party of his duty to arbitrate.

If on the other hand *Emja* is accepted as the state of the law also for remaining parties, much speaks in favour of Heuman's reasoning. The *Emja* rule for remaining parties is based on the assumption that, on average, the original party (A) prefers to stay bound by the arbitration agreement also against a new party. However, if that assumption is rebutted, for example because the original parties (A-B) find that the main rule from *Emja* is unduly burdensome, the principle of party autonomy requires that there is some contractual resort available.

Lindskog points out that the parties still have the opportunity to insert transfer restrictions in the arbitration agreement itself.³¹³ However, in spite of the doctrine of separability, the view proposed here is another. To require the restriction to be inserted in the actual arbitration agreement seems formalistic and it is based on the assumption that the parties have insight in the consequences of where in the contract the restriction is written. It is doubtful whether such insight can be expected, or should be required where there is a stringent main rule. Also, if the average preference of the remaining party (A) turns out to be wrong in the particular case, one of the *Emja* rule's main justifications falters, and it would counter the objective of protecting the interests of the

³¹¹ Lindskog I:0-5.2.2, Heuman JT 09/10 p 345, Brekoulakis p 35.

³¹² See section 5.3.2 above.

³¹³ Lindskog I:0-5.2.2 including note 17.

remaining party to hold such party bound to arbitrate anyway. As seen above, this view also has the most widespread support both domestically and internationally.³¹⁴

So far, *Electrolux* has clarified at least two aspects pertaining to transfer restrictions. To begin with, the District Court noted that even if the wording of the transfer restriction refers to “this agreement”, it is not only meant as a restriction on transfers of the contract as a whole, but includes transfers of rights only.³¹⁵ Thus, no specific mention of transfers of rights only is required in the transfer restriction. Next, the additional statement made by the District Court under the secondary claim amounts to an indirect acknowledgement of the transfer restriction’s effectiveness.³¹⁶ Even if the claim had been severable and transferrable, BFL (C) would still have been prevented from initiating arbitration proceedings due to the transfer restriction.

Currently *Electrolux* stands for the proposition that boilerplate transfer restrictions in the main contract are upheld in relation to rights transfers and do prevent the transfer of an arbitration agreement contained therein. This is in line with the prevailing view presented above. However, one proviso is necessary. The statement derives from the District Court judgment and has low precedent value. This aspect falls within the scope of the Supreme Court’s assessment, and could be overturned. Therefore, it remains to be seen where the law stands on this issue.

5.3.5 *Standing of the Transferor (Original Counterparty)*

The legal relationship between the transferor (B) and the remaining party (A) is not entirely clear after a right has been transferred.³¹⁷ The starting point would seem to be that the transferor (B) is no longer a party to the arbitration agreement, which is a natural consequence when he ceases to be a party to the substantive contract or right.³¹⁸ This is the prevailing view in international case law.³¹⁹

Yet, it could be argued that certain rights and duties remain between the original parties (A-B). To begin with, it has been argued that the transferor (B) will remain bound to

³¹⁴ See note 308 above, cf also the Swiss *Clear Star* judgment referred to above where it was stated that “if 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”.

³¹⁵ District Court judgment p 22.

³¹⁶ District Court judgment p 22.

³¹⁷ Cf discussion in SOU 1994:81 p 93 concerning responsibility for costs.

³¹⁸ Brekoulakis p 41.

³¹⁹ Brekoulakis p 41 and cases referred to.

arbitrate some issues even after a valid transfer has taken place.³²⁰ This could include events that took place before the assignment, or transfers made in violation of a specific procedure laid down in the contract.³²¹ Such issues fall outside of the scope of the arbitration agreement between the new parties (A-C).³²²

With regard to the legal standing of the remaining party (A) after a transfer of rights, a more interesting consequence of this reasoning is the transferor's (B's) responsibility for the remaining party's (A's) arbitration costs.³²³ According to § 42 SAA the parties bear the costs of the arbitration, and as mentioned above the inability of the transferee to pay his share can amount to a "special circumstance" relieving the remaining party (A) from his duty to arbitrate.³²⁴

It has been argued that under Swedish law the transferor (B) may have a continuing responsibility for the costs of the arbitration even after he has transferred the right.³²⁵ Different legal bases for this view have been presented.

First, an analogy to chapter 18 § 10 of the Procedural Code has been suggested as a justification for holding the transferor responsible for costs.³²⁶ The problem with this analogy is that the section in the Procedural Code relates to succession cases that occur during the procedure. What is discussed here, and in *Electrolux*, is a succession that took place before proceedings were initiated.³²⁷

Next, the original party's (B's) responsibility for costs has been justified with reasoning based on the principles of the law of obligations.³²⁸ The argument here is that the transferor (B) is obliged under the arbitration agreement until the transferee (C) has relieved the original party (B) of that duty.³²⁹ The problem with this argument is that the responsibility for costs cannot be enforced against either the transferor (B) or the transferee (C), unless the arbitration agreement provides for an extension of the duties

³²⁰ Born p 1469, Brekoulakis p 41-42.

³²¹ Born p 1469, Brekoulakis p 42.

³²² Lindskog I:0-5.2.2 including note 18.

³²³ Lindskog I:0-5.2.1 including note 13.

³²⁴ See section 5.3.3 above.

³²⁵ Lindskog I:0-5.2.1 note 13, Runesson p 403-404.

³²⁶ The relevant section in the Procedural Code states that where there is party succession on the part of the claimant, the original claimant and the successor are jointly responsible for the costs of the procedure pertaining to the time before the succession took place.

³²⁷ Lindskog I:0-5.2.1 note 13.

³²⁸ Runesson p 403-404.

³²⁹ Runesson p 404.

that makes the responsibility for costs enforceable.³³⁰ This could be the case where the agreement refers to the SCC rules, which provide for a specific procedure to obtain an enforceable award on costs (§ 45).³³¹ However, absent such an extension of the arbitration agreement, this view does not justify a general responsibility for costs on the transferor (B).³³²

Lastly, one view is that the responsibility for costs is simply a natural consequence that follows with the nature of the agreement to arbitrate (*naturale negotii*, cf § 42 SAA).³³³ On this view, the original party (B) cannot escape that obligation simply by transferring his rights under the contract. If that were the case, it would create an incentive for original parties with an uncertain claim to use procedural torpedoes and transfer the claim to an under-capitalized entity and then initiate proceedings, thus avoiding costs.³³⁴ With this reasoning it would also seem possible to extend the obligation to cover costs to include legal representation as well, at least where there is an element of abuse.³³⁵

The last view presented above can be criticised on the grounds that it imposes an extensive burden on the transferor (B). The transferor's position would closely resemble that of a guarantor, without any possibility to settle the claim with his original counterparty (A).³³⁶ The dispute between the transferee (C) and the remaining party (A), could also extend to issues not related to the transferor (B) and prolong the proceedings resulting in increased costs through no fault of the transferor.³³⁷ Despite these criticisms the last view, regarding the transferor's continued responsibility for costs as a *naturale negotii*, seems necessary to prevent incentives of disloyal conduct. Nor is the obligation incumbent on the transferor a surprise, it is a consequence of his choice to enter an arbitration agreement. One last argument for viewing the responsibility for costs as a *naturale negotii* is that the principles of the law of obligations will not provide an enforceable remedy.

With regard to *Electrolux*, and the remaining party's (A's) duty to arbitrate after a rights transfer, it must be considered how the ability to claim compensation for costs affects

³³⁰ Runesson p 404.

³³¹ Runesson p 404.

³³² Runesson p 404.

³³³ Lindskog I:0-5.2.1 note 13.

³³⁴ Lindskog I:0-5.2.1 note 13, cf also Supreme Court case T 2133-14 of 11 December 2014, which concerned this issue in the context of civil litigation.

³³⁵ Lindskog I:0-5.2.1 note 13, Runesson p 404 note 37.

³³⁶ Runesson p 404.

³³⁷ Runesson p 404.

the impact of the policy arguments proposed in *Emja*. As discussed above (5.3.3), one of the best-established “special circumstances” relieving the remaining party (A) from his duty to arbitrate relates to the risk of carrying all the costs of the arbitration when the transferee is in financial distress. If it were accepted that the remaining party (A) could claim full compensation from the transferor (B) this special circumstance would be undermined.

However, recoverable costs for the winning party normally include much more than the compensation paid to the arbitrators.³³⁸ One such expense is the counsel’s fees. As mentioned above, the ability to claim compensation from the transferor is more doubtful regarding fees of the counsel. If possible at all, this would require some element of disloyalty.³³⁹

Thus, there seems to be an opening for the remaining party to claim compensation for the tribunal’s remuneration from the transferor. If at all, the remaining party will only be able to claim compensation for his counsel’s fees from the transferor under exceptional circumstances. Consequently, the transferor’s possible liability will not alter the policy arguments presented in *Emja*, particularly the argument relating to the transferee’s financial position.

5.3.6 *Third Party Beneficiary*

One last issue worth mentioning in relation to Electrolux’s possible duty to arbitrate with BFL is the so-called third party beneficiary-doctrine. In its simplest version, this theory means that where a contract between A and B confers a right on C, an arbitration clause contained in the contract between A and B might bind C.³⁴⁰

There is little case law on this theory in Sweden.³⁴¹ There is at least one case that has been regarded as proof of the theory’s presence in Swedish law.³⁴² This has been interpreted as where C claims the benefits under the contract between A and B, C will also be deemed to have accepted the arbitration agreement contained therein.³⁴³

³³⁸ Hobér p 274.

³³⁹ Cf Lindskog I:0-5.2.1 note 13.

³⁴⁰ Born p 1454.

³⁴¹ Hobér p 136.

³⁴² AD 1976 no 54, cf Hobér p 136 and Lindskog I:0-5.5.2.

³⁴³ Hobér p 136-137.

Regarding the situation in *Electrolux*, where the third party beneficiary (BFL) initiates proceedings against A or B (Electrolux) there is no Swedish precedent.³⁴⁴

Lindskog has advocated the view that where C is entitled to invoke rights in the main contract, it is a reasonable consequence that C is also entitled to invoke the rights of the arbitration agreement contained in the same contract.³⁴⁵ The question is what is required of C to be entitled to invoke the arbitration agreement. Internationally, it has been accepted that where C has claimed a right under the main contract this is sufficient to be able to invoke the arbitration agreement in that same contract against A or B.³⁴⁶

It could perhaps be argued that BFL has claimed rights under the substantive contract by performing the duties incumbent upon them relating to the warranty provision in the share purchase agreement.³⁴⁷ For example, in order to claim compensation under the warranty provision, the buyer was under an obligation to give proper notice to the seller and to make reasonable efforts to limit the damage.³⁴⁸ In addition, in case of potential damage, the buyer was under an obligation to comply with the instructions of the seller in order to avoid future claims or duties.³⁴⁹

BFL could argue that by performing these duties, they have claimed the right to compensation under the warranty and consequently also the right to invoke the arbitration clause.

However, the problem with that line of reasoning is that both domestically and internationally it has been argued that the essential question in third party beneficiary cases concerns the intentions of A and B.³⁵⁰ It needs to be ascertained that A and B intended to confer a right on C, at least under the substantive contract.³⁵¹

In *Electrolux* it is difficult to see that the parties in the original contract intended to confer rights on anyone other than the buyer or seller. In addition, no such argument has

³⁴⁴ Hobér p 137.

³⁴⁵ Lindskog I:0-5.5.2 note 4.

³⁴⁶ Born p 1457.

³⁴⁷ Cf Kadelburger p 23.

³⁴⁸ Party submission no 9 in the Supreme Court file in T 4816-12 p 14, cf District Court judgment p 14-15.

³⁴⁹ Party submission no 9 in the Supreme Court file in T 4816-12 p 15, cf District Court judgment p 14-15.

³⁵⁰ Cf Hobér p 135 et seq, Born p 1456, Brekoulakis p 59.

³⁵¹ Born p 1457.

been made by BFL and this aspect is unlikely to receive any further consideration by the Supreme Court.

5.4 Chapter Summary

This chapter has focused on issues raised by BFL's secondary claim in *Electrolux*. First, the state of the law leading up to *Electrolux* was described and it was found that the remaining party's (A's) duty to arbitrate with the transferee (C) of a right is an area fraught with uncertainties and disagreement. What little there is can be found in a concise statement in the preparatory works to the SAA and one Supreme Court judgment, *Emja*. Which of these issues that may be resolved by the Supreme Court in *Electrolux* was also highlighted.

Next, a selection of disputed issues relating to the transfer of rights and the standing of the remaining party *vis-à-vis* the transferee was discussed. The selection was made with regard to what could be deemed relevant in relation to *Electrolux*. It was found that policy arguments, like those employed in *Emja*, can and should be used. It was also argued that the arguments presented in *Emja* represent the state of the law in spite of their *obiter* character. A related question that was reviewed next is the content of the special circumstances that make up the exception to the *Emja* rule. In this section a few additional propositions were made on what could constitute special circumstances not mentioned in *Emja* and how the exception should be applied.

This chapter has also argued that transfer restrictions contained in the main contract are, and should be, effective against the transferee. This follows from the acceptance of the main rule pronounced in *Emja*, that the remaining party is bound to arbitrate, and thus some contractual resort must be provided for parties who consider the main rule unduly burdensome. To require that restriction to be inserted into the arbitration agreement itself seems formalistic and expects the parties to have insight in the consequences of where in the contract the restriction is written. In this chapter it was also found that the transferor may be held liable for costs of the arbitration *procedure* but not counsel's fees unless an element of abuse is at hand. Further, it was discussed whether an application of the third party beneficiary doctrine could be relevant in *Electrolux*. It was found to be unlikely since there seems to be no indication that the original parties intended to confer a right upon a third party.

Lastly, an attempt should be made at the difficult task of predicting the outcome. With respect to what has been argued in this chapter the prediction must be that Electrolux (A) will not be bound to arbitrate with BFL (C). This will be either because a valid transfer cannot be established or, if it can, because the transfer restriction in the main contract will be upheld and taken to apply to the arbitration agreement as well.

Chapter 6 – Concluding Remarks

This essay has presented and analysed issues raised by non-signatories (C) invoking an arbitration agreement against the remaining party (A) after singular succession. The discussion has been divided between two different scenarios – *first*, where the whole contract has been transferred, including both rights and obligations, and *second* where only rights have been transferred to the non-signatory. In this chapter the focus will be directed back to the initial purpose set out for this thesis and the two research questions presented in chapter 1. Thus, the present chapter will summarize the findings on the position of the remaining party (A) *vis-à-vis* a new counterparty (C) after singular succession has taken place. The findings from each of the two scenarios discussed will be treated separately below. In view of the stated purpose, some additional comments will be made on what *Electrolux* has provided so far and what the Supreme Court decision might, and should, clarify.

6.1 Arbitration Agreements after Singular Succession of Rights and Obligations

In connection with the discussion on the first scenario, where both rights and obligations are transferred, it was first established that arbitration agreements are presumed to be transferred with valid transfers of the main contract. This applies in spite of the doctrine of separability.

It was also found that where both rights and obligations are transferred, the general contract law principle requiring consent of the remaining party (A) affects the fate of arbitration agreements as well. The principle does not prevent a presumption regarding the automatic transfer of arbitration agreements with the substantive contract, but does require explicit consent to be obtained at least for the main contract. As a consequence, transfer restrictions in the main contract that require consent seem to be of little added value in these scenarios. Regardless, *Electrolux* has given the indication that a transfer restriction contained in the main contract would be upheld and given effect in relation to the arbitration agreement as well. Further, the chapter found that as a consequence of the doctrine of separability and the fact that the law of the arbitration agreement decides issues of its transfer, the independent transfer of the arbitration agreement is theoretically possible. Lastly, *Electrolux* has underpinned the proposed view that policy

arguments play a limited role in determining the position of the remaining party (A) *vis-à-vis* the transferee (C) when both rights and obligations are transferred.

It follows from the above that the remaining party (A) is well protected against having to arbitrate with an undesired transferee (C) of rights and obligations. To some extent, this means that the contractual foundation of arbitration is upheld and respected in these instances, the arbitration is guaranteed to be based on consent. However, this seems to be more a consequence of the applicable contract law rules than based on a respect for arbitration policy. That inference can be justified by the fact that there are well established principles of contract law that happen to fit in well with arbitration policy in these cases. No deviation from the general rules of contract is necessary to generate an acceptable outcome concerning the arbitration agreement, general contract law provides the remaining party (A) with sufficient protection against arbitrating with an undesired counterparty. At the same time, the contract law principles prevent abuse from the transferor (B), for example by trying to extricate himself from the arbitration through transfer.

Therefore, where both rights and obligations are transferred, the remaining party (A) can look to applicable principles of general contract law to ascertain his standing against the transferee (C). Policy arguments are not lurking in the shadows. Thus, in these scenarios the focus of attention can be the valid transfer of the main contract and what requirements apply there. This seems acceptable for the standing of the remaining party since the principles of general contract law are sufficient to provide the remaining party with protection and at the same time stay in line with fundamental arbitration policies.

6.2 Arbitration Agreements after Singular Succession of Rights Only

Concerning the standing of the remaining party (A) *vis-à-vis* the transferee (C) after a transfer of rights, it was found that this is a scenario involving greater uncertainties than the one discussed previously. The starting point was the rule on remaining parties as formulated in *Emja* – the remaining party (A) continues to be bound by the arbitration agreement, unless special circumstances apply. It was argued that where rights are transferred, policy arguments play a larger role in determining the remaining party's position under the arbitration agreement. The relevant policy arguments were found in *Emja*, despite the *obiter* character of the judgment. In addition to the “special circumstances” inferred from the *Emja* judgment propositions were made on other

relevant circumstances that could relieve the remaining party from the duty to arbitrate with the transferee. These include specific procedural arrangements, the broad or narrow wording of the arbitration clause and the possibility of giving weight to the perceived motives the parties had for choosing arbitration.

It has also been argued that transfer restrictions contained in the main contract are, and should be, effective against the transferee also where only a right is transferred. This is argued to apply even without the support of a general contract law principle requiring consent, as was the case in the first scenario above. Even if the general contract rule is that rights are freely transferrable, a consequence of accepting *Emja*'s main rule that the remaining party is bound to arbitrate, is that some contractual resort must be provided for parties who consider the *Emja* rule for remaining parties unduly burdensome. If parties intend to avoid the *Emja* rule, it seems formalistic to require their restriction to be inserted into the actual arbitration agreement. Such a requirement presupposes that parties have the insight necessary to understand the consequences of where they write the restriction. Therefore, a transfer restriction in the main contract should *in dubio* apply to the arbitration agreement as well.

The thesis also found that even where the remaining party (A) is bound to arbitrate with the transferee (C), it is possible to claim compensation for costs of the procedure from the transferor (B). However, compensation for counsel's fees would require an element of abuse. It was also established that there are possible scenarios where a remaining party could be bound to arbitrate with the transferee based on the third party beneficiary doctrine. However, since there is no indication that the original parties intended to confer a right on a third party, there seems to be no room for applying this theory in *Electrolux*.

In sum, these are a select number of aspects essential to deciding the position of the remaining party (A) *vis-à-vis* the transferee (C) of a right, but they are not exhaustively relevant to decide the issue. The investigation of them, together with the conclusions drawn from *Electrolux*, has intended to clarify at least the aspects that are most pressing and most central to the outcome of *Electrolux*. In light of what has been found in this investigation, and the propositions made in this thesis, the prediction was given that *Electrolux* (A) will not be bound to arbitrate with BFL (C), either because no valid

transfer can be shown or because the transfer restriction in the main contract will be upheld in relation to the transferee, BFL.

Regardless of the outcome of the particular case between BFL and Electrolux, the Supreme Court's judgment will hopefully give useful insight in to some of the aspects discussed in this essay. The *Electrolux* case presents a rare and awaited opportunity to clarify these pressing issues of Swedish arbitration law. Hopefully the Supreme Court will make good use of it and preserve Sweden's position as an attractive arbitration venue.

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