Assignment Without Privity: Disposal of Investment Claims

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This post examines the admissibility of investment claim assignments based on the notion of Investor-State arbitration where there is no contractual relationship between the disputing parties. To do so, it draws on Jan Paulsson's famous article titled Arbitration Without Privity.

Contract Assignments, Assignment of Claim and Arbitration Agreements

The assignment of international contracts is a widespread business practice. By virtue of an assignment, the "assignor" transfers the international contract's legal and beneficial rights to the "assignee", who steps into the assignor's shoes. Whenever such international contracts contain an arbitration agreement, the widespread view is that the arbitration agreement automatically travels together with the assigned contractual receivables. Such view is upheld in many different jurisdictions, such Switzerland, Spain, France, the UK, and Germany. The assignment allows for a substitution of the old creditor (assignor) with a new creditor (assignee) vis-à-vis the original debtor with respect to the same credit, whose underlying binding relationship remains unchanged (*e.g*. Spanish Supreme Court, 26 September 2002, STS 6222/2002). Accordingly, the new creditor enjoys the same rights as the old one, including ancillary rights, which may consist of the right to arbitrate in case of default by the debtor of its obligations under the

contract. Conversely, the debtor may raise the same objections against the assignee as it could have done against the assignor.

It is generally possible to assign an international contract unless the contract expressly states otherwise or was entered into because of the unique characteristics of either of the contracting parties (*intuitu personae*). Other than these two limitations, a debtor cannot oppose the assignment of the contract.

Furthermore, a party to a contract may assign a claim in a more straightforward manner by voluntarily transferring to the assignee the cause of action for breach of contract and the legal remedies to enforce a right against the other party to the contract, where there has already allegedly been a default on that party's contractual obligations. In this instance, as well, the assignee may avail itself of the same dispute resolution mechanism that was available to the assignor, including arbitration, if that was the case.

In most jurisdictions, it is also valid to assign a damages claim concerning prospective receivables originating from a future cause of action. The likelihood that the future claim materialises is not a factor in ascertaining the validity of the assignment, provided that the cause of action is or can be determined (by way of illustration, see Italian Supreme Court ruling No. 31896/2018). Besides being possible to assign a future cause of action, *a fortiori,* it is also possible to assign an existing cause of action intended to take place in the future, or the proceeds of a cause of action (*Re Oasis Merchandising Services Ltd (In liquidation); Ward v Aitken and others [1995] 2 BCLC 493*).

Timing and Forms of Assignments

A claim may be assigned either before or after proceedings have been commenced. If an arbitral award has been rendered, the award may also be assigned and the assignee may seek to enforce it. The assignment of international arbitral awards, including awards issued against States, is not unusual. Energoinvest, for example, assigned to FG Hemisphere its interests in two Awards against the Democratic Republic of Congo.

Assignments may be structured in different ways. For example, an assignment may consist in a complete sale of the claim or in a mere assignment for purposes

of collection (where the assignor holds an equitable interest in the claim assigned and the assignee is entitled to collect from the debtor, who discharges itself by making payment to the assignee). An assignment might otherwise be made through a third-party-funding agreement, where a full transfer of the risk of the proceedings to the assignee/funder takes place and the assignor and the assignee split the damages collected according to an agreed percentage. Third-party funding agreements are often regarded as a form of claim assignment. The Spanish construction company Abengoa, for example, agreed to partially monetize an arbitration to fund it by assigning a participation in the credit rights that could arise from the arbitration in exchange for a price of € 75 million (*see*, further Anna Schmallegger's thesis on the "Commodification of claims"). The selection of one assignment structure over another is a question of claim management and expediency rather than a legal issue and may be influenced by the models commonly adopted in a given jurisdiction/s.

Investment Claim Based on International Treaties

International treaties also may create compulsory arbitration without privity. An aggrieved foreign national does not need to point to any contract to which it is a party to have the possibility of a **direct action** against the host State by means of an international arbitration. In these cases, the cause of action arises out of a given breach of a treaty-based obligation by the host State. Such a breach constitutes the violation of the primary obligation (stipulated in the provisions of the international instrument) and effectively gives rise to a secondary obligation (the obligation of reparation). The aggrieved party is entitled to dispose of such right to claim since the moment the claim arises, which is when the alleged breach of the primary obligation occurred. The aggrieved party can dispose of such right simply by deciding either to file an arbitration or not. The way the arbitration is filed – either directly or through a form of assignment – falls within the discretion of the aggrieved party, who may assign such arbitral claim to another party. Indeed, investment treaties make it possible for the aggrieved party to file an arbitration against a host State without any underlying contract. This is because the international treaty effectively serves as an instrument binding the host State to arbitration. The aggrieved party may equally seek to transfer a claim arising under such an instrument, much like an assignor may transfer a contract containing an arbitration clause or an arbitral claim to an assignee.

This is in practice what happens with political risk insurers (such as Overseas Private Investment Corporation, OPIC, now renamed U.S. International Development Finance Corporation, DFC) who subrogate to the right to claim of the foreign investors upon the payment of the insurance policy. Most bilateral investment treaties (BITs) expressly allow for such assignments, and no BIT expressly forbids them. A foreign investor may therefore freely dispose of investment claims originating from a breach of a BIT. To forbid these assignments would be to read into these BITs a prohibition that is simply not there. The procedural rules usually applicable to investment arbitrations – such the ICSID Convention and ICSID Arbitration Rules, the UNCITRAL Arbitration Rules 1976, 2010, and 2013 – similarly do not prohibit the assignment of arbitral claims. To treat the silence of these procedural frameworks as a prohibition on arbitral claims assignment would be contrary to the purpose of BITs and the ethos of ICSID and UNCITRAL (which are aimed at promoting international investment and trade). The UNCITRAL has even drafted a Convention on the Assignment of Receivables in International Trade, confirming the admissibility of such transactions in order to promote the availability of capital and credit on the basis of receivables at more affordable rates, and in turn to facilitate the development of trade finance and international trade. In the context of an investment arbitration, where a foreign investor may have had all of its assets expropriated by the host State, and as a consequence entered into bankruptcy proceedings, the assignment of its investment claim may be the only way the claim can be actually pursued. As a result of the unlawful expropriation, the investor may lack the required financial resources to pursue its claim (similarly, to what happens in insolvency procedures, where the insolvency office-holder decides to assign a claim because it has insufficient funds to pursue it on behalf of the estate).

Investors may encounter difficulties if they assign their arbitral claims to assignees incorporated in a third country that has a BIT in force with the host State with the purpose of gaining an otherwise nonexistent jurisdiction (*e.g. Mihaly International Corporation v Sri Lanka*, ICSID Case No ARB/00/2, Award, 15 March 2002). The country where the assignee is incorporated is of no relevance for the purpose of establishing (or losing) jurisdiction under an investment arbitration, as the claim originates and crystallizes at the time of the host State's violation.

Case Law

Few cases have considered the assignment of investment claims. So far, no investment tribunal has ruled that an assignment is invalid *per se*. The most vocal case on this topic is *Daimler Financial Services AG v The Argentine Republic,* ICSID Case No ARB/05/1, Award, 22 August 2012). In that case, the tribunal found that the assignment of claims is compatible with investment arbitration, based on the separability between ICSID claims and their underlying investments. The tribunal went on to note that assignments share the same goals as the ISDS system, as they encourage cross-border foreign investments and reduce their political risk, and greatly facilitate and speed up the productive re-employment of assets in other ventures (*see*, further Nelson Goh The Assignment of Investment Treaty Claims: Mapping the Principles; Markus Burgstaller, Agnieszka Zarowna, "Effects of Disposal of Investments on Claims in Investment Arbitration").

Conclusion

In summary, the permissibility of assigning arbitral claims under investment treaties can be analysed using a three-step analysis: (1) arbitral claims can be assigned (either by virtue of assigning a contract containing an arbitration agreement or through direct assignment of the claim itself); (2) a foreign investor has a direct arbitral claim against a host-State based upon the host-State's alleged breach of one of its international obligations (an investment claim, regardless of any prior legal relationship with the host-State); (3) therefore, the investor may freely assign its investment claim without privity.