



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

ASSIGNABILITY OF ARBITRATION CLAUSES IN INDIA: LEGAL PRINCIPLES, JUDICIAL TRENDS, AND CASE LAW ANALYSIS

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I. Introduction

The assignability of arbitration clauses in India remains a nuanced and evolving area of arbitration jurisprudence. While Indian statutory law—principally the Indian Contract Act, 1872 and the Transfer of Property Act, 1882—addresses contract assignment generally, there is no express statutory provision on whether an arbitration agreement embedded within a contract automatically transfers upon assignment.

Judicial approaches vary. On one side, there is support for the proposition that arbitration agreements follow the contract and bind the assignee unless expressly excluded. On the other, certain judgments—most notably from the Delhi High Court—have treated arbitration clauses as personal covenants requiring explicit consent for enforcement against the assignee.

This article critically examines the principles, leading precedents, doctrinal underpinnings, and commercial implications of the assignability of arbitration clauses in India.

II. Statutory Context and the Khardah Principle

1. Absence of Direct Statutory Guidance

While Section 37 of the Contract Act and principles under the Transfer of Property Act regulate assignment of contractual rights, there is no explicit provision concerning the transferability of arbitration agreements.

2. Khardah Company Ltd. Principle

In *Khardah Company Ltd. v. Raymon & Co. (India) Pvt. Ltd.*, AIR 1962 SC 1810, the Supreme Court held:

- Rights under a contract are generally assignable unless inherently personal or prohibited by contract.

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- Obligations, however, cannot be assigned without the promisee's consent.

The question, then, is whether an arbitration agreement is a personal covenant or an assignable right.

III. English Influence – Shayler v. Woolf

In *Shayler v. Woolf* [1946] 2 All ER 54, English courts held:

- An arbitration clause does not render the main contract unassignable.
- It is assignable as part of the contractual framework.
- This is aided by statutory language allowing arbitration by persons “claiming through or under” a party.

This reasoning has been widely cited by Indian courts.

IV. Indian Judicial Approach – General Trend

Indian case law, influenced by *Shayler*, has broadly favoured automatic assignability of arbitration clauses if the underlying contract is assignable.

Key decisions include:

1. Lotus Oil Co. v. B.D. Agarwal, AIR 1965 Cal 450

Followed *Shayler*, holding that arbitration agreements form an integral part of assigned contracts.

2. Hindustan Steel Works Construction Ltd. v. Bharat Spun Pipe Co., (1996) 5 SCC 484

Clarified that the assignability of an arbitration clause depends on the assignability of the underlying contract.

3. High Court Cases Upholding Assignability:

- *Bestech India Pvt. Ltd. v. Sun City Projects Pvt. Ltd.* – Broad assignment clauses transferring all obligations included the arbitration clause.
- *DLF Power Ltd. v. Mangalore Refinery & Petrochemicals Ltd.*, 2016 SCC OnLine Del 5412 – Distinguished from *MR Engineers*; held that an assignee steps into the shoes of the assignor.
- *Siemens Factoring Pvt. Ltd. v. Future Enterprises Ltd.* – Followed *DLF Power*.
- *Kenstream Ventures v. Bank of Baroda* – Affirmed that arbitration naturally follows assigned contracts.

V. The Divergent View – The Delhi Iron & Steel Line of Reasoning

1. Delhi Iron and Steel Co. v. JSW Steel Ltd., 2012 SCC OnLine Del 4843

Relying on *Khardah*, the Delhi High Court treated arbitration clauses as personal covenants—thus non-assignable without specific consent.

2. Government of NCT of Delhi v. Khem Chand, 2017 SCC OnLine Del 10747

Reiterated that the arbitration agreement is “independent” and not assignable unless expressly agreed.

These remain minority positions, criticised for conflating contractual personality with arbitral assignability.

VI. Rights vs. Obligations: A Largely Academic Debate

The Supreme Court in *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corp.*, (1993) 3 SCC 137, and *Cox & Kings Ltd. v. SAP India*, (2023) 7 SCC 1, emphasised:

- Arbitration clauses govern procedure for dispute resolution rather than imposing substantive obligations.
- Assignees “claiming through or under” a party can be bound.

Thus, classification as either a “right” or “obligation” has limited practical relevance; the focus shifts to consent to arbitrate.

VII. Consent for Assignment – Specific Language vs. Implied Intent

1. *MR Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd.*, (2009) 7 SCC 696

- Concerned “incorporation by reference” under Section 7(5) of the Arbitration and Conciliation Act, 1996.
- Held that mere reference to another document does not incorporate its arbitration clause—clear intention is required.

2. High Court Approaches:

- *DLF Power*: *MR Engineers* applies only to incorporation, not assignment.
- *Bombay Dyeing*, *Rajesh Gupta*, and *Siemens Factoring* followed *DLF Power*.
- *Vishranti v. L&T Housing*, 2018 SCC OnLine Bom 10296: Required manifest arbitral intent for assignment, citing *MR Engineers*.
- *N Kumar Projects*: Reinforced *Vishranti*, narrowing *DLF Power* to company division sales.

- Tata Communications Ltd. v. Union of India: Held that express incorporation of “all terms and conditions” includes arbitration clauses.

VIII. Supreme Court Guidance – Giriraj Garg

In *Giriraj Garg v. Coal India Ltd.*, (2019) 10 SCC 529:

- Discussed English “single contract” vs. “two contract” rules.
- In “single contract” cases (e.g., standard form contracts), general words may suffice.
- In “two contract” cases, specific reference to the arbitration clause is required.
- Recognised modern relaxation of this requirement in “single commercial relationship” contexts.

IX. Specific Inclusion vs. Specific Exclusion – A Better Test

The Vishranti requirement for specific inclusion may overextend the doctrine of severability under Section 16(1) of the 1996 Act.

A more pragmatic test—favoured in commercial contexts—is to ask whether the arbitration agreement has been specifically excluded in the assignment, rather than demanding explicit re-inclusion.

This would:

- Better align with the rule of business efficacy.
- Reflect commercial intent as seen in *Lords Inn Hotels Pvt. Ltd. v. Lalit Hotels Ltd.*, 2023 SCC OnLine Bom 1082.

X. Instances Where Courts Have Inferred Agreement to Arbitrate

Courts have upheld implied consent in:

- Assignments of *all* rights and obligations (*Bestech*).
- Amendments to the main contract without removing the arbitration clause (*Tata Communications*).
- Contracts defining parties to include “successors or assigns” (*DLF Ltd., Punjab State Industrial Development Corp.*).
- Conduct showing recognition of the assignment (*Bestech, DLF Power*).

XI. Conclusion

While *Khardah* provides the foundational rule for contract assignment, its strict application to arbitration clauses has been diluted.

The dominant judicial trend recognises arbitration agreements as inherently assignable, provided the main contract is assignable and there is no exclusion. The Vishranti requirement for specific reference is arguably overly formalistic and divorced from commercial realities.

Following *Cox & Kings and Giriraj Garg*, the better interpretive approach is:

- Presume assignability in the absence of exclusion.
- Recognise assignees as “claiming through or under” under Section 7 of the Arbitration Act.

Such an approach balances contractual freedom, commercial convenience, and arbitral efficacy.

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