

Singular succession and arbitration agreements remains an elusive issue

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On April 26, 2016 the Swedish Supreme Court delivered an anticipated judgment in case T 4816-12 “Electrolux” (NJA 2016 s. 288) concerning arbitration agreements and singular succession, but due to a surprising classification of the relevant transfer as a universal succession, the Supreme Court did not provide the much-needed clarification that was expected. The article thus revisits, in light of the Supreme Court judgment, what the state of the law is concerning the obligation of the remaining party to arbitrate with a transferee that compels arbitration following singular succession. The impact of the Supreme Court’s judgment NJA 2015 s. 1040 (“De enstegstättade fasaderna II”) on this issue is also discussed.

1 Singular succession and arbitration agreements

Much of the Swedish debate on party substitution in arbitration agreements has circulated around the effects of singular succession² on arbitration agreements. One of the most disputed aspects is to what extent the remaining party (A) is bound to arbitrate with the transferee (C) when a right only has been transferred from A’s original counterparty (B), to (C). The Swedish position on this issue is unregulated in the Swedish Arbitration Act (SAA). Instead, it is defined by a concise statement in the preparatory works of the SAA and the succinct Supreme Court judgment NJA 1997 s. 866 (“*Emja*”).³

Although the *Emja* case primarily concerned whether the remaining party (A) could rely on an arbitration agreement against the transferee of a right (C), the Supreme Court also noted, in addition to the case before them, what the binding effect of the arbitration agreement would have been if it had been the transferee (C) that sought to rely on the arbitration agreement. On this point the Supreme Court formulated the “*Emja* rule”, according to which the re-

¹ The author is an associate at Wistrand Advokatbyrå. The article is based on, and is a further development of, the author’s master’s thesis written as part of the LL.M. programme at Uppsala University, see Lüning, Rasmus, 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. The thesis can be found at <http://www.diva-portal.se/smash/get/diva2:781421/FULLTEXT01.pdf>

² The term “singular succession” is used to describe the Swedish legal concept where only specifically identified rights and obligations are voluntarily transferred, as opposed to the term “universal succession” used to describe cases where all rights and obligations are transferred by the operation of law.

³ Although *Emja* predates the SAA, it retains its relevance since the matter is still unregulated in the SAA and the case was explicitly taken into account in the preparatory works of the SAA.

maining party (A) is bound by an arbitration agreement also when a transferee (C) seeks to rely on it, unless “special circumstances” apply.

However, as will be further discussed in this article, the argument has been made that the *Emja* rule was only an additional statement (*obiter dictum*) made by the court and, as it was not part of the Supreme Court’s solution of the case at hand, the *Emja* rule has no real precedent value.⁴ For this reason, the Supreme Court case T 4816-12 *Electrolux* presented a much-needed opportunity to settle whether the *Emja* rule constitutes the state of the law, and to clarify the binding effect of arbitration agreements on remaining parties after singular succession.

Unfortunately, no such clarification was provided and it has to be concluded that *Electrolux* is an opportunity foregone. This article will therefore revisit the subject and seek to establish what the state of the law is for remaining parties after singular succession, and to contribute to the understanding of the consequences of singular succession on arbitration agreements. The Supreme Court’s recent judgment NJA 2015 s. 1040⁵ and its impact on the applicability of the *Emja* rule will also be discussed.

2 The Supreme Court’s judgment in *Electrolux*

In 1991 the Danish company Sophus Berendsen A/S acquired Electrolux’s Swedish dry cleaning operations. The share purchase agreement (SPA) contained a warranty concerning environmental contamination and an arbitration agreement providing for arbitration at the SCC Institute in Stockholm. After the acquisition, between 1998 and 2005, three restructurings governed by Danish law took place in Sophus Berendsen A/S.

1. In 1998 Sophus Berendsen A/S went through a procedure similar to a demerger.⁶ 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.⁷ 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)⁸ who had owned Danish Co since 2004, decided to liquidate Danish Co through a procedure that can be described as a simplified liquida-

⁴ Lindskog, Skiljeförfarande — En kommentar (Zeteo) I:0-5.2.2.

⁵ The case is one of the Supreme Court judgments that resulted from disputes regarding facade insulation, the one referred to here has been called *De enstegstättade fasaderna II*.

⁶ The procedure is an institute of Danish law called *fullständig spaltning*.

⁷ The procedure is another institute of Danish law called *partiell spaltning*.

⁸ 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.

tion procedure.⁹ It was this third disposition that was classified as a singular succession by the lower courts.¹⁰

Subsequently, environmental damage that could be covered by the warranty was discovered and arbitration proceedings were initiated by the transferee, BFL. Electrolux objected that there was no arbitration agreement between the parties since BFL was not party to the SPA or the arbitration clause. BFL responded by initiating a declaratory action in the Stockholm District Court to ascertain their right to rely on the arbitration agreement. BFL's primary claim was based on the assertion that BFL had succeeded the original party in the SPA and the arbitration agreement as a whole. The secondary claim, which was the only claim that was tried by the Supreme Court, was based on the assertion that at least the warranty claim had been transferred to BFL, and with it the right and the obligation of the arbitration agreement.

The standing of the parties was thus inverted as compared to *Emja*. In *Electrolux*, it was the transferee (C) that sought to rely on the arbitration agreement against the remaining party (A) and the case thus coincides with the *obiter dictum* pronouncement that is the *Emja* rule.

The Supreme Court found that the potential right to compensation under the warranty had been transferred to BFL through the Danish dispositions. This finding was based on the court's construction of the legal consequences of the Danish legal institute that had been used in the restructuring. The court went on to conclude that the relevant rights transfer had "*from an arbitration perspective — such character of a universal succession that, in accordance with what generally applies for such cases, the right to dispute resolution under the arbitration agreement was also transferred to BFL*", and the remaining party Electrolux was thus bound to arbitrate with the transferee.¹¹

The rather surprising construction of the transfer of the arbitration agreement as a "universal succession from an arbitration perspective" raises the question if there are other established legal concepts that may have a different meaning within the context of arbitration law. It also means, as was explicitly noted by the court, that *Electrolux* is *not* a pronouncement concerning the consequences of singular succession on arbitration agreements.¹²

As seen from the above, *Electrolux* turned on the court's construction of the Danish legal institutes used in the reconstructions. Consequently, *Electrolux* is primarily a precedent concerning Swedish courts' construction and application of foreign law. The effects of singular succession on arbitration agreements and the applicability of the *Emja* rule thus remains an open question.

⁹ The Danish legal institute is known as *betalningserklæring*.

¹⁰ Stockholm District Court's judgment in *Electrolux* case no T 15224-10 p. 18 et seq, Svea Court of Appeal judgment in *Electrolux* case no T 9588-11 p. 5.

¹¹ Supreme Court judgment T 4816-12 p. 9, my translation.

¹² Supreme Court judgment T 4816-12 p. 9.

3 Preliminary comments

3.1 Singular succession in general contract law

In seeking to establish the consequences of singular succession on arbitration agreements, an important distinction to be made is that between singular successions of *mutually binding contracts*, as opposed to transfers of *rights only*. Only the latter was tried by the Supreme Court in *Electrolux*.

It follows from general contract law principles that a party to a mutually binding contract, containing both rights and obligations incumbent on both parties, cannot put someone else (C) in its place without the consent of the original counterparty (A). The principle is not least based on the rule that a debtor may not transfer a debt without the creditor's consent. The principle is also recognized internationally.¹³

It is less debated whether, and under what circumstances, the remaining party (A) is bound to arbitrate with the transferee (C) of a *mutually binding contract* containing an arbitration clause. The prevailing view is that the general contract law principle requiring consent also affects the fate of the arbitration agreement. Absent any qualification, where consent has been given to transfer the substantive contract, there is a presumption that the remaining party (A) consented to the transfer of the arbitration agreement as well.¹⁴ Since the contract law principle mentioned above provides sufficient protection for the remaining party (A), by requiring consent, policy arguments generally play a limited role in determining the standing of the remaining party under an arbitration agreement *vis-à-vis* a transferee (C) when both rights and obligations have been transferred.

Where, as in *Electrolux*, a *right only* has been transferred the general contract law principle is the opposite; rights are freely transferrable, and there is no need to obtain consent from the remaining party (A).¹⁵ In light of this general contract law principle, there are greater uncertainties regarding the binding effects of arbitration agreements after such transfers. The question whether, and under what circumstances, the remaining party (A) is bound to arbitrate with the transferee (C) when a right only has been transferred, is therefore the focus of this article.

¹³ Cf. Art. 9.2.3 UNDRIT Principles 2004.

¹⁴ Heuman, Fråga om skiljeavtals giltighet vid singularsuccession in Festskrift till Sveriges Advokatsamfund 1887-1987, p. 244, Reldén, Nilsson, The Arbitration Agreement in Franke, Magnusson, International Arbitration in Sweden: A Practitioner's Guide p. 73, Andersson et al, Arbitration in Sweden, p. 74.

¹⁵ Andersson et al, Arbitration in Sweden, p. 73, Reldén, Nilsson, The Arbitration Agreement in Franke, Magnusson, International Arbitration in Sweden: A Practitioner's Guide p. 73.

3.2 *Transferability of arbitration agreements and the doctrine of separability*

Despite initial reluctance, there is today universal acceptance that arbitration agreements can be transferred.¹⁶ This is also the case under Swedish law, and parties are generally able to transfer arbitration agreements just as any other type of contract.¹⁷

However, when issues of singular succession and arbitration agreements are discussed, it is important to keep in mind the doctrine of separability. 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 parties involved, regardless of the obligations of the parties 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 of the arbitration agreement is required.¹⁸ However, the automatic transfer of arbitration agreements with substantive contracts is better understood as the consequence of a presumption regarding the will of the parties. It is a presumption that can be rebutted, and consequently it 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 for the doctrine of separability — namely to create arbitral competence and avoid dilatory tactics, and not to remove the competence of the tribunal.¹⁹ 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.²⁰ As in general contract law and law of obligations, such accessory rights generally follow with transfers of the main contract.²¹

¹⁶ Born, *International Commercial Arbitration*, 2nd ed., p. 1466, Brekoulakis, *Third Parties in International Commercial Arbitration*, p. 29, cf. the English case *Cottage Club Estates Ltd. V. Woodside Estates Co. Ltd.* (1928).

¹⁷ NJA 2000 s. 202, Hobér, *International Commercial Arbitration in Sweden*, p. 127.

¹⁸ Moscow District Court, 21 April 1997, *IMP Group Ltd v Aeroimp* in *Yearbook of Commercial Arbitration* vol. 23 p. 745–749.

¹⁹ Heuman, JT 1997–98 s. 533–559.

²⁰ Brekoulakis, *Third Parties in International Commercial Arbitration*, p. 33, cf. also Girsberger, Hausmaninger, *Assignment of Rights and the Agreement to Arbitrate in Arbitration International* Vol. 8 Issue 2, 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.

²¹ Runesson, *Skiljeavtal och singularsuccession in Festschrift till Lars Heuman*, p. 396.

Indeed, in most jurisdictions, the arbitration agreement automatically follows when the substantive contract is transferred.²² Decisions confirming this view can be found in both common law and civil law jurisdictions²³, and the presumption prevails under Swedish law as well.²⁴

3.3 *Standards of binding non-signatory claimants versus 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.²⁵ When, according to the same argument, the remaining party (A) acts as respondent, C's consent to arbitrate is arguably evidenced by the fact that C compels arbitration and there is no need for special considerations in relation to A since A has, at least at some point, agreed to arbitrate disputes that arise out of the contract.

The consequence of this line of reasoning is that different standards apply when binding non-signatory claimants and respondents. In principle, this should be avoided. 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.²⁶ On that basis, there is nothing that motivates treating the non-signatory claimant any different than the respondent. Consequently, any arguments to hold the parties bound by the arbitration agreement have to carry the same weight regardless of whether it is A or C compelling arbitration.

4 **Binding effect of arbitration agreements after singular succession of rights only**

The Supreme Court's assessment in *Electrolux* was limited to BFL's secondary claim. The secondary claim was based on the argument that rights only, emanating from the warranty in the SPA, had been transferred to BFL, and with it the right to have warranty claims tried in arbitration. As mentioned, the general contract law principle con-

²² This is the main rule in England, the US and France, see Hosking, *Pepperdine Dispute Resolution Law Journal* Vol. 4 Issue 3, 2004, p. 500, Born, *International Commercial Arbitration*, 2nd ed., p. 1467 et seq, Gaillard, *Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration*, p. 426, Brekoulakis *Third Parties in International Commercial Arbitration*, p. 29 et seq.

²³ From the US 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 Sicurta SpA* (2005) EWHC 454, English High Court. 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.

²⁴ Hobér, *International Commercial Arbitration in Sweden*, p. 129, Heuman, *JT* 2009–10 s. 346.

²⁵ Born, *International Commercial Arbitration*, 2nd ed., p. 1416, Brekoulakis *Third Parties in International Commercial Arbitration*, p. 187.

²⁶ Born, *International Commercial Arbitration*, 2nd ed., p. 1415, cf. different Brekoulakis, *Third Parties in International Commercial Arbitration*, p. 199.

cerning transfers of rights only is more lenient since rights are freely transferrable.

However, despite the more lenient contract law principle, the main rule on automatic transfer of arbitration agreements together with a right only contains an important caveat. Since *Emja* it has been argued that arbitration agreements bind the transferee (C) and the remaining party (A) — unless “special circumstances” apply.²⁷ Thus, it has been said that Swedish law “adopts a middle position”²⁸ on this point, and in the following the article will therefore elaborate on what that middle position entails for the remaining party (A).

4.1 Case law before *Electrolux*

As described under sections 1 and 2 above, *Emja* remains the only Supreme Court decision on singular succession and arbitration agreements. To the author’s knowledge, the only other case-law available that touches on the subject is NJA 2000 s. 538 (*Bulbank*), where one of the issues in dispute before the District Court was the remaining party’s (A) duty to arbitrate with the transferee (C) of a right, and the published award *Aplha S.p A. ./ Beta Co Ltd.*²⁹

In *Bulbank*, as in *Electrolux*, it was the transferee (C) who initiated proceedings against the remaining party (A). The remaining party, *Bulbank*, argued that 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.³⁰ According to the District Court, these general arguments did not amount to “special circumstances”, which would require an “extraordinary character”. The meaning of “extraordinary character” was not further defined however, and the issue was not included in the Supreme Court’s assessment.

In *Aplha S.p A. ./ Beta Co Ltd.* the remaining party’s (A) duty to arbitrate with the transferee (C) was also tried. Unfortunately, there was some confusion whether the arbitrator treated the question as a transfer of the whole contract or as a transfer of a right only. Although it has been argued that the arbitrator should have assumed jurisdiction based on *Emja* and *Bulbank*,³¹ it must be concluded that the case provides little guidance, due to the mentioned uncertainty and the fact that the case was never tried by the courts.

²⁷ NJA 1997 s. 866 on 873, NJA 2000 s. 538 (*Bulbank*), Reldén, Nilsson, The Arbitration Agreement in Franke, Magnusson, International Arbitration in Sweden: A Practitioner’s Guide, p. 73, Andersson et al, Arbitration in Sweden, p. 73–74, Hobér, International Commercial Arbitration in Sweden, p. 129.

²⁸ Redfern, Hunter, Redfern and Hunter on International Arbitration, 5th ed., p. 102 et seq.

²⁹ SCC Case no. 12/2002.

³⁰ Stockholm District Court judgment T 6-111-98 p. 6.

³¹ Landrove, Stockholm Arbitration Report Vol. 2004:1, p. 134.

4.2 *Binding effect does not necessarily have to be based on a strict application of contract law principles*

As has been pointed out, *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 since it violates the contractual foundation of arbitration.³² The critics argue that the binding effect of the arbitration agreement ought to be based on contract law.³³

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 aspect,³⁴ that international awards can only be enforced with the authority of the New York Convention if jurisdiction of the arbitrators was founded on contract³⁵ and that it is necessary for commercial predictability, especially since *Emja* did not indicate the weighting between different policies.³⁶

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*.³⁷

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 solution.³⁸ This is because, in Heuman's view, only the remaining party (A) is entitled to invoke the "special circumstances", thus in practice creating an option for the remaining party. Although this is a reasonable view, it does not in fact undermine the Supreme Court's solution in *Emja* to any extent since the "choosing" lies with the courts who must either accept or dismiss the remaining party's request. As has been pointed out by

³² Heuman, JT 1997–98 s. 533, Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p. 92 et seq., Kadelburger, *Stockholm Arbitration Report Vol. 2000:2*, p. 22 et seq.

³³ Heuman, *Skiljemannarätt*, p. 111, *Arbitration Law of Sweden: Practice and Procedure*, p. 94–95, 242, Kadelburger, *Stockholm Arbitration Report Vol. 2000:2*, p. 24.

³⁴ Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p. 77, Hobér, *International Commercial Arbitration in Sweden*, p. 127, Redfern, Hunter, *Redfern and Hunter on International Arbitration*, 5th ed., p. 85, Hosking, *Pepperdine Dispute Resolution Law Journal Vol. 4 Issue 3*, 2004, 472.

³⁵ Heuman JT 1997–98 s. 558. Kadelburger, *Stockholm Arbitration Report Vol. 2000:2*, p. 24–25.

³⁶ Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p. 93, Born, *International Commercial Arbitration*, 2nd ed., p. 1486, Hosking, *Pepperdine Dispute Resolution Law Journal Vol. 4 Issue 3*, 2004, p. 476.

³⁷ NJA 1997 s. 866, Landrove, *Stockholm Arbitration Report Vol. 2004:1*, p. 126, Heuman, *Arbitration Law of Sweden: Practice and Procedure*, p. 93.

³⁸ Heuman JT 1997–98 s. 542.

Lindskog, that is arguably something quite different than a right for one party to freely speculate on the choice of procedure.³⁹

Reliance on formalistic arguments may also produce unjust results and any attempt to explain the binding effect solely with contract law tools will “inevitably lead to an untenable fiction”.⁴⁰ 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.⁴¹ As has been suggested, the problem is better approached with a view to strike a workable balance between the contractual foundations and business needs for flexibility.⁴²

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. In addition, as in general contract law there is no written requirement for arbitration agreements under the SAA.⁴³ However, an application of general contract law will not afford the remaining party sufficient 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.

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.⁴⁴ Even the parties’ actions must be construed using established principles and practices of interpretation. 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.⁴⁵ However, in the context of binding non-signatories, it has been resolutely stated that, since parties may just as well choose to settle disputes in courts, such principle of interpreting arbitration agreements ought not to be applied.⁴⁶ If no presumption

³⁹ Lindskog I:0-5.2.2 note 6.

⁴⁰ Lindskog I:0-5.2.1 note 2, my translation.

⁴¹ Lindskog I:0-5.2.1 note 2, cf prop. 1998/99:35 p. 64.

⁴² Hosking, Pepperdine Dispute Resolution Law Journal Vol. 4 Issue 3, 2004, p. 475 et seq.

⁴³ Cf SAA § 1, Hobér, International Commercial Arbitration in Sweden, p. 91 and 95.

⁴⁴ Brekoulakis, Third Parties in International Commercial Arbitration, p. 196, Heuman, Arbitration Law of Sweden: Practice and Procedure, p. 94.

⁴⁵ Cf. Brekoulakis, Journal of International Arbitration Vol. 24 Issue 4, 2007, pp. 341–364.

⁴⁶ Gaillard, Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration, p. 260, Born International Commercial Arbitration, 2nd ed., p. 1488–1489.

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.⁴⁷ 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.

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. Even if clad in different clothes, arguments like those proposed in *Emja* are found in international case law as well.⁴⁸

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. It also stands for a pragmatic and practical approach to the doctrine of separability, in line with what was argued in section 0 above. In contrast to what Heuman suggests, it is submitted that the government's position as expressed in the preparatory works also displays acquiescence to the use of policy arguments and an adherence to pragmatic and practical concerns.⁴⁹ This is a reasonable view in a field of law that develops quickly and must be able to adapt to business needs. 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" still need to be further defined.

Unfortunately, *Electrolux* did not clarify how this should be dealt with. However, the Supreme Court's construction of the transfer of the arbitration agreement "from an arbitration perspective", although surprising, displays again an acceptance of pragmatic and practical concerns and reinforces the argument submitted above that Swedish arbitration law does accept policy arguments. In line with what has been argued above, it is therefore submitted that policy arguments should remain a possible justification for a binding effect of arbitration agreements after singular succession.

⁴⁷ Brekoulakis, *Third Parties in International Commercial Arbitration*, p. 197.

⁴⁸ Lew, Mistelis et al, *Comparative International Commercial Arbitration*, 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, *Third Parties in International Commercial Arbitration*, p. 36 where the transferee's "dire financial position" is recognized.

⁴⁹ Cf prop. 1998/99:35 p. 64.

4.3 *The Emja rule for remaining parties represents the state of the law despite its obiter dictum character*

In *Emja* it was the remaining party (A) who sought to rely on the arbitration agreement against the transferee (C).⁵⁰ In addition to the case before them, the Supreme Court added in *Emja* that if the standing of the parties had been inverted, the remaining party would also be bound to arbitrate unless “special circumstances” apply.⁵¹

It has been proposed that the rule concerning remaining parties is only an *obiter dictum* and as such has low precedent value.⁵² 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.⁵³

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.⁵⁴ Instead, the fact that the new parties (A and C) have not actually 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.⁵⁵ However, since there are imperative arguments in favour of binding the transferee (C), Lindskog argues that a limping binding effect will have to be accepted.⁵⁶ In addition, the court’s opening for “special circumstances” in *Emja* implies that a limping binding effect is not essential to avoid.

Other commentators maintain that the *Emja* decision is the state of the law also for remaining parties.⁵⁷ Since the Supreme Court did not clarify these issues in *Electrolux*, it is submitted that much speaks in favour of regarding the *Emja* rule as the state of the law, despite its *obiter dictum* character.

The reason for the view argued here is that it is preferable to treat both parties equally and avoid the limping binding effect. Allowing one party the benefit of choosing seems unreasonable.⁵⁸ In order to provide necessary business certainty and a rule that is in line with the

⁵⁰ See NJA 1997 s. 866, Hobér, *International Commercial Arbitration*, p. 128.

⁵¹ NJA 1997 s. 866 on 873.

⁵² Lindskog, *Skiljeförfarande — En kommentar*, I:0-5.2.2 (Zeteo).

⁵³ NJA 1997 s. 866 on 873, cf Lindskog, *Skiljeförfarande — En kommentar* I:0-5.2.2 (Zeteo).

⁵⁴ Lindskog JT 1993–94 s. 826, on 827 note 5.

⁵⁵ Lindskog, *Skiljeförfarande — En kommentar*, I:0-5.2.2 note 7 (Zeteo).

⁵⁶ Lindskog JT 1993–94 s. 827 note 5, Lindskog, *Skiljeförfarande — En kommentar*, I:0-5.2.2 note 7 (Zeteo).

⁵⁷ Olsson, *Kvart, Lagen om skiljeförfarande — En kommentar*, p. 140, Hobér, *International Commercial Arbitration in Sweden*, p. 128-129.

⁵⁸ Heuman, *Fråga om skiljeavtals giltighet vid singularsuccession* in *Festschrift till Sveriges Advokatsamfund 1887-1987*, p. 230 and 241.

expectations of both domestic and international parties, the starting point should be that both parties (A and C) remain bound by the agreement.⁵⁹ This should apply despite the argument that the *Emja* rule contains an uncertain exception.⁶⁰ In the view argued here, the “special circumstances” 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. What is more, the main rule for remaining parties is in fact quite certain and, considering *Bulbank*, the room for exceptions seems quite limited.⁶¹ In addition, all this criticism means is that the safety valve from *Emja* still requires further clarification, not that the solution as such is inappropriate.

4.4 The impact of NJA 2015 s. 1040 on the Emja rule and the standing of remaining parties

The above conclusion that the *Emja* rule represents the state of the law for transfers of arbitration agreements must also be considered in relation to another recent development in Swedish contract law. Following the Supreme Court’s judgment in NJA 2015 s. 1040, it has been established that a remaining party (A) cannot generally rely on transfer restrictions contained in a contract against a third party (C), even if a wrongful transfer may give rise to damages between the original parties (A and B). This relates to the debated issue of what effect transfer restrictions included in the substantive contract have on the arbitration clause contained in the same contract.

The *Emja* rule for remaining parties is based on the assumption that, in general, the original party (A) prefers to stay bound by the arbitration agreement also against a new party. However, if that presumption is rebutted, for example because the original parties (A and B) find that the main rule from *Emja* is unduly burdensome, the fundamental arbitration principle of party autonomy demands that there is some contractual resort available to them. However, this requirement may collide with the Supreme Court’s statement in NJA 2015 s. 1040.

As opposed to what has been argued by most commentators both domestically and internationally⁶², NJA 2015 s. 1040 seems to rule out

⁵⁹ Cf Brekoulakis, *Third Parties in International Commercial Arbitration*, p. 34, prop. 1998/99:35 p. 64. Internationally the most common rule is that both parties remain bound, Lew, Mistelis et al, *Comparative International Commercial Arbitration*, p. 146, Redfern, Hunter, Redfern and Hunter on *International Arbitration*, 5th ed., p. 102.

⁶⁰ Lindskog, *Skiljeförfarande — En kommentar*, I:0-5.2.2 note 7 (Zeteo).

⁶¹ See the Stockholm District Court’s judgment preceding NJA 2000 s. 538, case no T 6-111-98. It is also reasonable to provide for a safety valve in cases of apparent abuse such as procedural torpedoes, cf NJA 2014 s. 877.

⁶² See primarily Heuman, JT 2009–10 s. 335 on 346, Andersson et al, *Arbitration in Sweden* p. 73 note 130, Madsen, *Commercial Arbitration in Sweden*, p. 88 note 245. Internationally see Born, *International Commercial Arbitration*, p. 1469, Brekoulakis, *Third Parties in International Commercial Arbitration*, p. 36. In case

the possibility that a transfer restriction contained in the substantive contract should exclude a binding effect of the arbitration agreement between the new parties (A and C). For arbitration purposes, the conclusion from NJA 2015 s. 1040 may be, although it seems overly formalistic, that transfer restrictions have to be inserted *in the arbitration agreement itself* to be effective against a transferee. If they are, it is submitted that restrictions contained in an arbitration agreement should be effective against a transferee (C) regardless of the Supreme Court's statement in NJA 2015 s. 1040.

It would be unfortunate if the above is in fact how the impact of NJA 2015 s. 1040 on arbitration law is to be understood. Indirectly, it results in a strengthening of the doctrine of separability and increased theoretical formalism that is contrary to what was argued in section 0 above. Further, it deviates from the prevailing view internationally; it is formalistic to require the transfer restriction to be written in the actual arbitration agreement; it assumes that the parties have insight in the consequences of where in the contract a restriction is written; and it requires parties to understand that transfer restrictions have to be stipulated twice in the same contract, with different legal implications. It is doubtful whether such insight can be expected, or should be required.

The alternative however, to construe the Supreme Court's judgment in NJA 2015 s. 1040 as ruling out effective transfer restrictions in arbitration agreements altogether, would be even worse. It would contravene one of the most fundamental principles of arbitration, party autonomy, and it would deviate even more from what can reasonably be expected by commercial parties in Sweden and abroad.

4.5 *The meaning of "special circumstances" in the Emja rule*

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, nor was it clarified in *Electrolux*.

As mentioned, the meaning of special circumstances has been considered at the court level once shortly after *Emja* was decided. In *Bulbank* the District Court found that the remaining party's arguments 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"⁶³. 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.

law see both Svea Court of Appeal case T 8032-00 (*Custos*) and the Swiss Federal Tribunal, 9 April 1991, *Clear Star*.

⁶³ Stockholm District Court's judgment T 6111-98 p. 10.

4.5.1 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".⁶⁴ These include cases where the identity of the original parties affected the choice of dispute mechanism, and where the transferee (C) is in a dire financial position.⁶⁵

Admittedly, the circumstance relating to the financial standing of the transferee (C) leaves some issues open — at what point in time is the transferee's financial position to be assessed? how grave must the financial position be? And bad finance compared to whom? At least regarding the latter two, it has been argued that the exception for special circumstances does not apply unless the transferee's ability to pay is "clearly insufficient".⁶⁶ Regarding the last issue it makes sense to require the transferee's (C) financial position to be worse than the transferor's (B) standing.⁶⁷ 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 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) it could still be sufficient to afford both parties' (A and C) costs of the proceedings. As seen the questions must be answered in relation to each other and on a case-by-case basis.

4.5.2 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 (C). Consider if 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.⁶⁸

⁶⁴ Cf Lindskog, *Skiljeförfarande — En kommentar*, I:0-5.2.2 note 5 (Zeteo), Hobér, *International Commercial Arbitration in Sweden*, p. 128–129, Reldén, Nilsson, *The Arbitration Agreement in Franke, Magnusson, International Arbitration in Sweden: A Practitioner's Guide*, p. 73.

⁶⁵ Cf NJA 1997 s. 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 Gaillard, Savage, Fouchard, Gaillard, *Goldman on International Commercial Arbitration*, p. 431.

⁶⁶ Heuman JT 1997–98 s. 542.

⁶⁷ Heuman JT 1997–98 s. 542.

⁶⁸ Example taken from Brekoulakis, *Third Parties in International Commercial Arbitration*, p. 36.

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.⁶⁹ The more of an open “all disputes” kind of clause there is, the more reason to hold the parties bound to it. Under Swedish circumstances there is no evidence of this type of reasoning. However, the more general the arbitration agreement, the more difficult it would be to establish that the identity of the parties was a vital condition. Thus, it is submitted that the agreement’s wording can affect the assessment of special circumstances, at least indirectly.

It could also be argued that weight could be given to the perceived motives the parties had for choosing arbitration. The contents of the contract and types of disputes that were envisaged may have affected the choice of dispute mechanism. In *Electrolux* for example, arbitration may seem a natural choice for both parties because of its confidentiality. A warranty claim is a typical issue that could arise under a share purchase agreement, and neither party would benefit if it became public knowledge that Electrolux’s dry cleaning operations had caused contaminations. The contractual duties of the parties in *Electrolux* also imply that the environmental warranty was a sensitive issue, and much of the contractual regulation related to it was included for the benefit of Electrolux. In such circumstances it could be argued that it would be exorbitant if Electrolux could extricate themselves from the arbitration. Their main argument for choosing arbitration would not change because the identity of the counterparty did. This line of reasoning resembles the theory of “arbitral estoppel” mostly applied in common law jurisdictions, but there is no corresponding theory in Swedish arbitration law and it has to be considered uncertain to what extent Swedish courts and arbitrators would accept arguments of this kind.

4.5.3 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 (A) to show that special circumstances are at hand. Since the special circumstances are formulated and defined by reference to what the court envisaged are generally relevant interests and reasons for choosing arbitration, it could be argued that simply invoking them would be enough. However, in the interest of

⁶⁹ 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, Gaillard, Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration, p. 431, Brekoulakis, Third Parties in International Commercial Arbitration, p. 35, Hosking, Pepperdine Dispute Resolution Law Journal Vol. 4 Issue 3, 2004, p. 498.

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.⁷⁰ 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 Concluding remarks

Since *Electrolux* did not provide the clarifications that were expected, the issue of the binding effect of arbitration agreements on remaining parties after singular succession remains uncertain.

However, it has been argued above that the *Emja* rule does represent the state of the law and the remaining party (A) is thus bound by an arbitration agreement against the transferee (C), even when it is the transferee seeking to rely on the arbitration agreement, unless special circumstances apply. In light of the recent judgment NJA 2015 s. 1040, it has also been noted that the *Emja* rule remains applicable but parties may be required to opt out of the *Emja* rule by way of inserting transfer restrictions *in the actual arbitration agreement*.

Hopefully, a new opportunity to clarify these matters will arise in a not too distant future. The Supreme Court’s explicit demarcation from *Emja*, although unfortunate, was probably motivated in light of the fact that other matters than those discussed here had a decisive impact on the outcome of the case. Thus, even after *Electrolux* the Supreme Court has kept the door open for a clear pronouncement that will set out in plain terms what the state of the law is on this point.

⁷⁰ Landrove, Stockholm Arbitration Report Vol. 2004:1, p. 127.