

Questions

•What is an assignment?

- Transfer of Rights/Benefits AND Assumption/Delegation of obligations or duties.
- Can the two be separate? Assign benefits but not obligations?
- If an Agreement states you can't assign without approval to do so, can you still assign you benefits without the approval?
- If all obligations and duties have been completed, can an assignee bring an enforcement action against the non-assigning party to pay him the benefits?

•Agreements generally include a term that the Agreement applies to successors and assigns. What does that really mean? Applies to the Agreement? Applies to collateral events?

•What about the 'good faith purchaser for value without notice' defense? Where does an international party obtain 'court house' notice? Where do you search for constructive, actual or implied notice?

ASSIGNMENT RIGHTS, DELEGATION AND NOVATION

PITFALLS AND ENFORCEABILITY CONSIDERATIONS

EXPLORATION NEGOTIATIONS

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Assignment Paper Objective

- Better understanding of Assignment Clauses and some suggested do's and don't's to optimize enforceability of intentions.
- Description of some pitfalls to avoid.

Assignment

- What is the Assignment Clause?
 - Mechanism to contractually transfer two property interests...
 1. Rights / Benefits
 2. Obligations and Duties

Rights are Assigned; Duties are Delegated

- Outline of Paper
 - History of Assignments
 - Pitfalls to Avoid
 - Example Assignment Clauses; Novation Forms



Assignment History

- Early common law; agriculture (land based) society, assignments not allowed as contract between two parties considered *personal* and required all parties approval of assignment
 - Early ways around: Create *Power of Attorney*, assignee becomes 'agent' of assignor and can enforce contract rights against non-assigning party.
- As society and commerce became less land based (frequent transfer of intangible property rights: stock, bank accounts, etc) assignments legally recognized though assignor remained a named party in any action between assignee and non-assigning party
 - (modern statutes dispense with need to name assignor as party)

Assignment Features

- Assignment requires 3 parties
 - Assignor, the party transferring an interest
 - Assignee, the party receiving the interest
 - The non-assigning party
- The '*right*' transferred means:
 - "*A party has the aid of organized society in controlling the conduct of that other person in some respect.*"
- Assignment has two parts:
 - (1) just transfer of benefits (with contract performance obligations remaining with the assignor) or
 - (2) transfer of rights and obligations to the assignee ('*assumption*' or '*delegation*' of obligations)

Assignment Features, cont'd

- Assignment restrictions (examples)...
 - Too personal; Parties contractually agreeing not to transfer without approval; Public policy; Gratuitous; Infancy; fraud, materially and adversely affects non-assigning party.
- *Novation (a secure way for assignment enforcement):*
 - *An agreement between all 3 parties; existing obligation and rights are terminated (with assignor) and simultaneously creating new benefits/obligations with assignee – (assumes and delegated duties)*

Assignment Features, cont'd

- Special Cases of Covenants that affects assignments –
2 types
 - *Personal, 'easement in gross', only performed by original parties (the boxer)*
 - *Running with the land, 'attaches' to the land and current and future interest owners are obligated to honor (enforceable against assignees – example a royalty)*
 - *Criteria: 'Touch the Land'; 'Privity of Estate' (intention that covenant pass to future parties); Reasonable (not an involuntary servitude); Notice of the Covenant*

Assignment Pitfalls

- Are contractual intentions clear and unambiguous?
 - Courts as matter of law can rule on ambiguity.
- Mere '*applies to successors and assigns*' contractual language may be insufficient...!!!
- Non-assigning party is *third party beneficiary* and can enforce any right it had against assignor against assignee – if assignee has been given rights – and possibly performance obligations IF assignee has been delegated such)
- *Non-assignment clause* bars delegation of performance obligations but may not bar assignment of assignors rights

Assignment Pitfalls, cont'd

- Notice issues:
 - ‘*good faith purchaser for value without notice*’
 - How do you secure notice? And avoid the **gfpvwn** defence?...
- Main Agreement is not assigned, but collateral right or interest in the Agreement is assigned (the scenario case)
 - Splitting the right from the performance or duty obligation

Enforcement

- Clear and unambiguous language in the contract
- Deal with solvent parties
- Creative 'Notice' options
- Agree to a lien right if inappropriate assignment transfer
- Novation Agreements
- Non-assignability without written approval
- Use words of art: *Novation; Assumption; Delegation*

Bibliography

- Articles
- Law Review Articles
- Cases
- Treatises
- Law Books
- Commercial Papers

Examples

- Example assignment clauses
- Example Novation forms (rights and delegated duties)