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Novation of Contractual Obligations: A Joint Venture Perspective

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SUMMARY

This paper considers the general legal principles relating to the assignment of contractual rights and the novation of contractual obligations and how these principles manifest themselves in the context of an assignment by a participant of its joint venture interest. The paper looks at some of the common commercial instruments which are used in the context of the assignment of a joint venture interest and finally, explores the manner in which appropriate drafting can overcome some or all of these issues. This paper concludes that while the phrase "assign an interest in the joint venture" is a commonly used expression in many joint venture agreements, its meaning is unclear, inherently misleading and capable of achieving undesirable commercial outcomes.

INTRODUCTION

> "Although it is true that the phrase 'assign this contract' is not strictly accurate, lawyers frequently use those words inaccurately to describe an assignment of the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned."[1]

Anyone familiar with the development of the law relating to unincorporated joint ventures will appreciate that very little jurisprudence has arisen directly from the existence and interpretation of the joint venture relationship and, just like the suit that never seems to quite fit properly, existing principles of law have been combined and coerced into this unique commercial structure.[2]

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1 Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 103 (HL).

2 See R L Pritchard, "Unincorporated Joint Ventures" in R P Austin and R J Vann (eds) *The Law of Public Company Finance* (Law Book Co, Sydney, 1986), Ch 18 at 496-497.

One example is the law relating to the assignment and novation of contractual rights and obligations. As lawyers, we are always mindful of the basic legal principle that while you can assign contractual rights, it is not possible to "assign" contractual obligations without the consent of the party to whom the obligations are owed. There is, however, surprisingly very little case law or commentary relating to the "assignment" of contractual burdens and obligations in connection with the assignment of an interest in a joint venture. This is surprising for two reasons. Firstly, it is almost always the intention of a party seeking to assign its interest in a joint venture to also seek to deal with, and typically to discharge, its correlative obligations. Secondly, this is an area where the interests of the parties concerned are likely to diverge and therefore, an area one might expect disputes to have arisen in.

THE LAW RELATING TO ASSIGNMENT AND NOVATION

Assignment of Contractual Rights

In a contractual sense, assignment generally refers to the transfer of a chose in action. That is, rights which can be asserted by bringing an action and not by taking possession of a physical thing.[3] The concept of a chose in action is broad and includes debts and contractual rights. Originally, the common law did not recognise that a chose in action was capable of assignment without the consent of both contracting parties.[4] This proscription arose firstly, from the implausibility of being able to assign anything intangible and secondly, from a fear that permitting a chose in action (which was in effect, a right to sue) to be assigned, would lead to maintenance, that is "intermeddling in litigation in which the intermeddler has no concern".[5]

It is now an accepted and established principle of the common law that, with limited exceptions, contractual rights and benefits may be freely assigned without the need to obtain the consent of the non-assigning party.[6]

The exceptions to this general principle include situations where the parties have, by contract, limited or restricted their ability to assign contractual rights without first having complied with certain conditions including pre-emption rights and consent requirements, or where the rights are so personal to a party that they cannot possibly be performed by someone else.

For a legal assignment of a chose in action to be effective, it is usually sufficient that it complies with the statutory assignment procedures which govern their

[3] *Torkington v Magee* [1902] 2 KB 427 at 430.
[4] H G Beale (ed), *Chitty on Contracts*, (29th ed, Thompson, Sweet and Maxwell) [1163] at 19-001.
[5] *Neville v London Express Newspaper Ltd* [1919] AC 368, 385; *Re Oasis Merchandising Services* [1998] Ch 170, 174.
[6] *Norman v FCT* (1963) 109 CLR 9, per Windeyer J at 26.

conveyance. For example, s 20(1) of the *Property Law Act 1969* (WA)[7] provides that any absolute assignment of a chose in action:

(a) must be "under the hand of the assignor"; and
(b) can only occur after express notice in writing is given to the "debtor" (that is, the non-assigning party).

If these requirements are met, and there are no contractual or legal restrictions on assignment, the assignment is effective at law to transfer the legal right to the chose in action from the date that the notice is given.[8]

The classic illustration of the concept of an assignment usually involves a transfer of a right to be repaid a debt. Accordingly, if A owes B $100, B can, in the absence of any agreement to the contrary, transfer the right to receive the $100 to C. It is this principle which has been a pillar of the emergence of the modern credit economy. It is also intrinsic to most contractual relationships. At a philosophical level, it allows those who possess contractual rights the freedom to sell them to those who value the rights more than they do.[9] Indeed, the judicial trend in Australia and elsewhere in reading down restrictions on a party's ability to assign its contractual rights is evidence that it is a right which the courts actively seek to preserve.

If the requirements of the statutory assignment provisions are not satisfied, an equitable assignment (of the legal chose in action) may still be effected.[10] For example, a verbal assignment is not effective under statute but may still be valid in equity. An equitable assignment of a legal chose in action can take place without notice being given to the debtor. An assignment of an equitable chose in action (such as part of a debt or other chose in action) requires a clear intention of the assignor to transfer the chose to the assignee.[11]

[7] There are corresponding provisions in the legislation of the other Australian States and Territories: *Conveyancing Act 1919* (NSW) s 12; *Law of Property (Miscellaneous Provisions) Act 1958* (ACT) s 3; *Law of Property Act 2000* (NT) s 182(1); *Property Law Act 1974* (Qld) s 199; *Law of Property Act 1936* (SA) s 15; *Conveyancing and Law of Property Act 1884* (Tas) s 86; *Property Law Act 1958* (Vic) s 134. The provisions are based on the *Judicature Act 1873* (UK) s 25(6).

[8] *International Leasing Corp (Vic) v Aiken* (1966) 85 WN (Pt 1) (NSW) 766.

[9] J G Kramer, *When Should Contracts be Assignable? An Economic Analysis*, American Law & Economics Association Annual Meetings (2005) Hosted by The Berkeley Electronic Press and available at: http://bepress.com.alea/15th/bazaar/art40.

[10] *Holroyd v Marshall* (1862) 11 ER 99; *Corin v Patton* (1990) 64 ALJR 256 (which held that a gift is an equitable assignment if the donee has done all that he or she is required to do at law that no one else can do); *CSD (Qld) v Jolliffe* (1920) 28 CLR 178; *Paul v Constance* [1977] 1 All ER 195 (which held that where there is a trust, there may be an equitable assignment of property if there is a sufficiently clear manifestation by the assignor of an intention to constitute himself trustee for the assignee).

[11] *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, 462; *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614, 623-4; *Norman v FCT* (1963) 109 CLR 9; *Sheperd v FCT* (1965) 113 CLR 385; *Noonan v Martin* (1987) 10 NSWLR 402; *NT Power Generation Pty Ltd v Trevor* (2000) 23 WAR 482.

Novation of Contractual Burdens

Unlike assignments, the law does not recognise the ability of a party to "assign" contractual obligations. The inability to assign the burden of a contractual obligation was explained in *Tolhurst v Associated Portland Cement Manufacturers Ltd*:[12]

> "[N]either at law nor in equity [can] the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor."

In order to properly "transfer" contractual obligations from one party to another, a novation is required. In *Scruples Imports Pty Ltd v Crabtree & Evelyn Pty Ltd*,[13] Powell J provided the following articulation of the essential nature of a novation:

> "Reduced to its simplest form, a novation is merely a contract between three parties, the obligee, the original obligor and the substituted obligor, the effect of which contract is that in consideration of the obligee releasing the original obligor from his obligation, the substitute obligor promises the obligee that he will assume responsibility for the performance of the obligation".

Elsewhere, it has been stated that[14] "the two core elements of novation are the rescission, by agreement, of an existing contract or a part of an existing contract; and the entering into of a new contract by way of substitution". Critically, the rescission of the existing contract and the entry into of the new contract must not occur independently of each other.[15] That is, the contractual agreement to discharge the assignor's liability under the original contract needs to be accompanied by the creation of a new, superseding contract.

Again, the classic illustration of the concept of a novation involves attempts to assign monetary liabilities. To follow the example set out above, if A owes B $100, A cannot relieve itself of the obligation to pay $100 to B by entering into an agreement with C in which C agrees to pay the $100 to B. A and C can, of course, agree that C will perform A's obligation to pay B. But what is required before A can be relieved of its obligation to B is that B must have consented to the "assumption" of the obligations by C. In this example, the contract between A and B is rescinded and replaced with a new contract between C and B. The rationale behind this rule of law is often expressed as serving to protect against the unilateral transfer of obligations to a "man of straw".

[12] [1903] AC 414, per Collins MR at 668.
[13] (1983) 1 IPR 315 at 320.
[14] J B Bailey, "Novation" (1999) 14 *Journal of Contract Law* 189.
[15] *Caltex Ltd v FCT* (1960) 106 CLR 205, per Fullager J at 227, Taylor J at 240, Menzies J at 250.

Unfortunately, however, such a simple example is effective only in revealing simple principles. It provides a useful illustration of the principles involved in the novation of contracts which are executory on one side only. Here, there is nothing overly complicated about A's contract with B being rescinded, most likely ab initio, and replaced with a new contract between B and C. The same cannot be said of contracts involving bilateral executory rights and obligations. It would be highly unusual, although not unheard of, for a party which has both executed and executory obligations to find another party willing to assume these obligations in the stead of the assignor such that the assignor is released absolutely from its obligations, including any accrued liabilities and obligations arising from past performance.

Alternatives to Novation – Delegation and Subcontracting

In the absence of contractual or legal restrictions to the contrary,[16] it may be possible for a party who has liability for the performance of certain contractual obligations, to delegate[17] or sub-contract the performance of these obligations to a third party. Such arrangements are commonly encountered in many construction projects.

For the purposes of this discussion, it is worth noting is that while these techniques may be employed to impose certain contractual obligations on a third party without the requirement to obtain the consent of the party to whom the obligations are owed, it is not correct to regard them as having the same effect as a novation. That is, the burden is not "shifted off the shoulders" of the assignor to the assignee. In the event of anything less than perfect performance by the delegatee or sub-contractor, the assignor is the only party who can be called upon to render performance of such obligations.[18]

Exceptions to the Rule against Assignment of Contractual Burdens

It has been argued that there is an exception to the general rule that contractual obligations are not assignable. This exception is said to occur where the discharge of a burden is a condition of the enjoyment of a benefit such that the burden is said to be annexed to the benefit.[19] In such a case, the assignee to whom the benefit is

[16] Most notably, the restrictions on delegating an obligation which is personal in nature. See *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 669 (CA).

[17] In this context, the term "delegate" is used to refer to situations where no contract exists between the delegator and the delegatee. If a contract does exist, it may be appropriate to refer to the relationship as a "subcontract".

[18] This is because the assumption of obligations by an assignee, does not of itself, create privity of contract between the assignee and the delegatee or sub-contractor.

[19] See *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279, 286, 291; *Radstock Co-operative and Industrial Society v Norton Radstock UDC* [1967] Ch 1094; *Rhone v Stephens* [1994] 2 AC 310, 322.

transferred, must perform the burden or forego the benefit if he fails to do so. In *Tolhurst v Associated Portland Cement Manufacturers*,[20] it was decided that where there was an assignment of a right to place an order for goods, if the assignee places an order for the goods and the goods are delivered, the assignee must pay for the delivery because payment is necessary to satisfy the condition to which the assignor's right to call for delivery was necessarily subject. Whether such a principle is entrenched as part of the common law in Australia is doubtful.[21]

WHAT IS THE DIFFERENCE BETWEEN ASSIGNMENT AND NOVATION?

The key differences between an assignment and a novation can be summarised as follows:

1. Novation provides a mechanism for transferring contractual obligations, whereas assignment only allows for contractual rights to be transferred.[22] It is worth noting, however, that the assignment of contractual rights does not, in and of itself, have the effect of making the party to whom the rights were assigned a party to the original contract.[23] Similarly, a novation does not have the effect of making the party to whom the contractual obligations are "transferred" a party to the original contract. In the case of a novation, the assignee becomes a party to a new contract which has been substituted for the original contract and which may or may not be on the same terms as the original contract.

2. An assignment of contractual rights need not be consensual.[24] In contrast, consent is an essential element of a novation.

3 An assignee receives the assigned rights subject to any pre-existing rights and defences against the assignor, whereas novation does not, as a matter of law, involve a transfer of rights and obligations and therefore, the assignee and any remaining parties will take their rights free from any equities which may have existed under the original contract.[25]

4. In a novation, the terms and conditions of the new contract are to be ascertained according to ordinary contractual principles whereas, in the case of an assignment, the terms and condition which govern the contractual rights that have been assigned must be construed according to the terms of the original contract.[26]

[20] [1903] AC 414.
[21] J W Carter, *Carter on Contract*, (Lexis Nexis Butterworths), [40,123] at 17-100.
[22] See *Moneymen Pty Ltd v FCT* (1990) 97 ALR 265 at 278.
[23] Justice Michael Kirby, "Assignments and Transfers of Contractual Duties: Integrating Theory and Practice" (2000) 31 VUWLR 317 at 318.
[24] J B Bailey, "Novation" (1999) 14 *Journal of Contract Law* 189 at 202.
[25] Ibid, at 204. See also *Re Catalina Exploration & Development Ltd* (1973) 16 CBR (NS) 97 at 99.
[26] Ibid, at 205. See also *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 All ER 143 at 146.

ASSIGNMENT AND NOVATION OF JOINT VENTURE INTERESTS

Having now considered the general legal principles relating to the assignment of contractual rights and the novation of contractual obligations, it is now time to turn our minds to the manner in which these general principles apply in the context of an assignment by a participant[27] of its interest[28] in a joint venture. In every assignment of an interest in a joint venture, it will always be necessary to carefully consider the terms of any restrictions on assignment contained in the joint venture agreement and ensure that these provisions are strictly adhered to. In the context of a purported assignment of obligations attaching to the joint venture interest, the legal ramifications arising from an attempt to novate the joint venture agreement will also need to be carefully considered.

The Joint Venture Agreement

The legal nature of joint ventures and the legal principles governing their existence and operation, are now broadly understood by lawyers practising in the resources field. Commentators have been analysing and debating their form and character for well over 20 years, beginning with Merralls' seminal paper delivered at the 1980 AMPLA Conference through to more recent discussions on the subject.[29] Through this period, both the discussion and prevalence of the joint venture structure has moved beyond its mining origins into many other industries.[30] As has previously been noted, the key to understanding and interpreting any joint venture, is the joint venture agreement itself. These agreements too have gained much in their complexity over time as the parties seek to further regulate their activities and address issues which were previously ignored or poorly understood. One particular area where considerable attention has been focused is provisions dealing with assignment.

The multiplicity of issues relating to the assignment of a joint venture interest arise from both the subject matter which a participant may seek to assign and the

[27] The term "participant" is a commonly used expression in many joint venture agreements and has been adopted for the purpose of this paper. This term can be used interchangeably with other descriptions such as "joint venturer" and "joint venture party".

[28] Similarly, for ease of reference, the term "interest" has been used to refer to the interest, usually expressed in percentage terms, which a participant has as a tenant in common, in the joint venture. Similar expressions such as "participating interest" or "percentage interest" can be used interchangeably.

[29] See W F Manning, "Assignment Clauses in Mining and Petroleum Joint Ventures" [1986] AMPLA Yearbook 119; S E N Creese, "Comment on Assignment Clauses in Mining and Petroleum Joint Ventures" [1986] AMPLA Yearbook 151 and R I Cottee, "Comment on Assignment Clauses in Mining and Petroleum Joint Ventures" [1986] AMPLA Yearbook 141.

[30] For instance, its prevalence now extends to the property and construction industry and to projects involving the commercialisation of intellectual property.

nature and manner in which this assignment is regulated by the terms of the joint venture agreement. As Pritchard states,[31] "[t]he obvious difficulty in assigning joint venture interests is that they will ordinarily comprise an individual package of proprietary interests, contractual rights, choses in action and contractual obligations".

The nature and role of assignment clauses in joint venture agreements has also been considered at length in previous AMPLA publications[32] and, other than in a precursory manner, it is not intended to deal with these issues in any great detail in this paper. In particular, it is not within the scope of this paper to consider matters relating to the assignment of the proprietary rights referred to in Manning's paper. The remainder of this paper will therefore concentrate on the manner in which legal obligations are dealt with as part of the broader assignment of joint venture interests.

Assignment of Joint Venture Interests

In order to properly consider the legal issues associated with the assignment of a joint venture interest, it is necessary to first understand exactly what it is that a participant is seeking to assign. As Manning states:[33]

> "an interest in a joint venture consists of a number of different rights but basically divisible into two categories: firstly, an interest as a tenant in common in certain items of property, being the joint venture property, including exploration or mining tenements, freehold and leasehold land, improvements on the land, machinery, plant and equipment; secondly, choses in action being contractual rights under various agreements including the joint venture agreement and the operating agreement."

What then are the "contractual rights" which a participant in a joint venture has and which, in the absence of any contractual restrictions, it may seek to assign? As Manning again states:[34]

> "the contractual rights would include the right to take a share of the production in kind, the rights to enforce the obligation of the other joint venturers to contribute their proportion of the costs and expenses of the joint venture operations and the obligations of the operator to manage the operations in a proper and business like manner with the usual standards of care."

As we have previously seen, the law recognises that contractual rights, such as those described above, can be assigned by the party entitled to the benefit of the contractual rights without the need for the consent of the party responsible for the

[31] See R L Pritchard, "Unincorporated Joint Ventures" in R P Austin and R J Vann (eds), *The Law of Public Company Finance* (Law Book Co, Sydney, 1986), Ch 18 at 510.
[32] See note 29.
[33] W F Manning, "Assignment Clauses in Mining and Petroleum Joint Ventures" [1986] AMPLA Yearbook 119 at 122.
[34] Ibid.

performance of the correlative obligations. Accordingly, in the absence of any specific restriction in the joint venture agreement, it would be open for a participant to assign some or all of its rights in the joint venture to a third party without the need to obtain the consent of the other participants.[35] This basic premise is, of course, somewhat illusory as most, if not all joint venture agreements contain some form of restriction on the ability of a participant to freely assign its interest in the joint venture.[36]

Dealing with Joint Venture Obligations

As noted above, the interest which a participant in a joint venture may purport to assign will include a bundle of obligations which are owed by that participant to the remaining participants and the operator/manager. Typically, these would include financial commitments to keep the operator/manager in funds to enable it to conduct joint operations, obligations of confidentiality, abandonment obligations, liabilities to pay government and third party royalties and various statutory obligations associated with the underlying project titles.

In applying the general legal principles outlined earlier in this paper, one might be eager to conclude that a purported assignment by a participant of its "interest" in a joint venture would, as a result of the existence of these contractual obligations, require a novation.[37] Before considering whether a novation would be required, or indeed if novations are typically used in the context of the assignment of joint venture interests, let us first consider what the implications of a novation would be from the perspective of each of the parties to a transaction involving the assignment of an interest in a joint venture:

1. From the assignor's perspective, the primary concern (other than ensuring it receives adequate consideration for the sale of its interest) is to limit, as much as possible, its liabilities to the remaining participants after the assignment occurs. The main advantage of a novation is that, subject to the terms and conditions agreed to by the parties, it achieves a clean break for the assignor. Ideally, and depending on the respective bargaining positions of the assignor and the assignee, the best outcome for the assignor is to have the assignee assume all of its obligations under the joint venture agreements whenever they

[35] M P G Taylor, T P Windsor and S M Tyne, *The Joint* Operating *Agreement* (Longman, London, 1989), at 59.

The question as to whether rights held by an operator are assignable per se will be considered further in Stuart Barrymore's paper. In relation to the assignment by a participant of its interest in the joint venture, the author's view is that while this is a matter to be considered on a case by case basis, it is unlikely that the rights of a participant (which would include, inter alia, the right to receive information, attend operating committee meetings and, most importantly, to receive product in kind) would be considered as involving personal rights not capable of being performed by another person.

[36] Again, these issues have been considered in detail in other AMPLA publications. See note 29.

[37] See, for example, Lord Browne-Wilkinson's comment in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, 103.

arose. One appropriate mechanism to achieve this result is through a novation of the joint venture agreement. Here, the original agreement is discharged and a new agreement is entered into which the assignor is no longer a party to.

2. From the assignee's perspective, a novation also has some important advantages, not the least of which is that, unlike in an assignment, the assignee does not take the interest subject to the equities accruing in favour of the remaining participants. However, the parties will often negotiate a commercial outcome which preserves the rights of the remaining participants, but this is simply a matter for negotiation between the parties.

3. From the remaining participants' perspective, a novation raises serious implications, many of which appear to have been overlooked in standard form novation agreements. For example, if the result of a novation is to rescind the original agreement and replace it with a new superseding contract, how do the remaining participants deal with obligations which each of them owe to one another and which accrued under the original (but now rescinded) joint venture agreement? That is, are rights of action by one remaining participant against another, still enforceable once the original joint venture agreement is discharged and replaced by a new agreement? Are guarantees or other financial securities which are in place still effective now that a new agreement has come into existence? Is there a statutory obligation to register the new agreement against any of the project titles? These are just some of the issues which may crystallise in the mind of the draftsman responsible for the preparation of a proper novation agreement. Many more will exist depending on the nature of the relationship concerned. What is at least clear, is that most standard deeds of assumption (which may, depending on their terms, be construed as novation agreements) concentrate solely on the position of the assignor and assignee and largely ignore the types of issues raised above. There may be numerous explanations for this oversight, not the least of which may be that the intention is never to rescind the original joint venture agreement (as would occur with a novation).[38]

Is a Novation Required?

Most joint venture agreements do not expressly refer to a requirement to novate the joint venture agreement. One assumes, for the reasons stated above, that such an omission is a deliberate one. Instead, the industry appears to have adopted a fairly uniform approach whereby the assignor of an interest in the joint venture is required to ensure that the assignee enters into a deed of assumption or other form of tripartite agreement[39] by which the assignee covenants in favour of the

[38] The assumption that the parties rarely intend to novate the joint venture agreement is supported by the absence of language referring, for example, to a "Restated Joint Venture Agreement" and is indeed countered by the inclusion of positive language referring to the affirmation of the original agreement.

[39] Young J stated in *J R Stevens Holdings Pty Ltd v Von Begensey* [1992] ANZ Conv R 375 that a tripartite agreement was a distinguishing feature of a novation.

remaining participants to perform the obligations of the assignor. In its most basic form, this requirement is often expressed as follows:

> "A transfer of a Participating Interest will not be effective unless and until the Assignee enters into a deed of covenant agreeing to assume and be bound by all of the obligations and liabilities of the Assignor under the Joint Venture Agreement."

The terms on which the assignee will "assume" responsibility for the obligations of the assignor under the joint venture agreement, and the manner in which accrued liabilities are to be dealt with, is usually prescribed, in varying levels of detail, in the joint venture agreement itself. One need only examine a random selection of joint venture assignment clauses to conclude that there are numerous variations to this basic, yet almost universally adopted, contractual requirement. Often, the requirement will be to enter into a deed of assumption in a form previously agreed between the original parties to the joint venture agreement and annexed to the agreement itself. The advantage of this approach is that it dramatically reduces the necessity to negotiate with an assignee as to how any accrued liabilities will be dealt with. Where an agreed form does not exist, it is not uncommon to find more prescriptive language as to the form and substance that the deed of assumption should take. This may include provisions which seek to demarcate the liability of the assignor and the assignee by reference to an effective date (usually the date that the assignment takes effect) and provisions dealing with mutual releases and indemnities.

If not a Novation, what then?

If the parties do not intend for a novation to occur (as can be inferred from the absence of any express requirement in the joint venture agreements themselves), how then do the parties manage to achieve a "transfer" of obligations from one party to another without a novation? There are a number of possible explanations as to what occurs in the context of an assignment of a joint venture agreement which do not require an examination of issues relating to novation, rescission or other areas of academic reflection. However, arriving at any conclusion as to the proper characterisation of the contractual nature of the assignment is not always an easy task. This is a result of both the application of the existing legal principles to the joint venture setting and the language employed by the draftsmen in achieving the commercial objective of their clients.

One explanation is simply that the parties intend to achieve a variation of the contract in which one party's liability is extinguished and substituted for that of another. Indeed, the common language used in many deeds of assumption would support such a conclusion. An example of a clause which has been commonly encountered by the author is as follows:

> "On and from the Effective Date, the parties agree that:
> (a) the Substitute Party replaces the Retiring Party under the Joint Venture Agreement as if it is an original party to the Joint Venture Agreement; and

(b) a reference in the Joint Venture Agreement to the Retiring Party must be read as a reference to the Substitute Party."

This clause seems to suggest that the only purpose of the deed of assumption is to vary the joint venture agreement by substituting one party for another. However, the clause does contemplate that the substituting party is to be treated as if they were always a party to the joint venture agreement. Are we to read anything into this choice of language? For instance, if the parties intend to treat the substituting party as having always been a party to the joint venture, do they in fact intend for a novation (which does have the effect of making the substituting party a party ab initio) rather than a variation to occur? In this context it should be remembered that there is a fundamental distinction to be drawn between a variation of the contract and its rescission (as occurs in the true case of a novation), namely that a variation does not necessarily involve an agreement to discharge completely the original agreement.[40] But such a distinction is not always self-evident. As the learned authors of *Chitty on Contracts* contend,[41]

> "[t]he question whether a rescission has been effected is frequently one of considerable difficulty, for it is necessary to distinguish a rescission of the contract from a variation which merely qualifies the existing rights and obligations. If a rescission is effected the contract is extinguished; if only a variation, it continues to exist in an altered form".

The question as to whether or not the joint venture agreement has been varied rather than novated (and thereby, rescinded) will ultimately depend upon the intention of the parties.[42] If the parties do not agree to discharge the original contract between themselves, there will not have been a rescission and a novation cannot be said to have occurred.[43] On the other hand, if the original contract has simply been varied, it follows that it cannot be said to have been rescinded, for, as the court stated in *Moschi v Lep Air Services Ltd*:[44] "it is only in the jurisprudence of Humpty-Dumpty that the rescission of a contract can be equated with its variation."

Perhaps the better interpretation, and one which is supported by the author, is that in the context of an assignment of an interest in a joint venture, it is not correct to speak of a novation (which has the effect of discharging the original agreement) but rather a contractual agreement between the assignor, assignee and the remaining participants, in which the assignee assumes responsibility for the performance of the executory obligations of the assignor and the assignor is released from its obligations and liabilities to the remaining participants, either absolutely or as and from a specified date. Whilst it may sound and feel very much like a novation, the important distinction to be drawn is that the original joint venture agreement remains on foot, albeit that the parties to the joint venture have changed. Indeed, this interpretation is consistent with the role that the parties

[40] J W Carter, *Carter on Contract* (Lexis Nexis Butterworths), [07-170] at 16,245.
[41] H G Beale (ed), *Chitty on Contracts*, (29th ed, Thompson, Sweet and Maxwell), [22-028] at 1295.
[42] J B Bailey, "Novation" (1999) 14 *Journal of Contract Law* 189 at 192.
[43] Ibid.
[44] [1973] AC 331 at 355.

intend the deed of assumption to play and the manner in which these deeds are typically drafted.

DRAFTING TIPS

As previously discussed, the primary concern of a party assigning its interest in a joint venture is to limit as much as possible, its liabilities to the remaining participants after the assignment occurs. In this context, and depending on the terms which have been negotiated, a novation of the joint venture agreement is one method of achieving a complete release of the assignor. If the intention is to achieve a novation, then this should be communicated to the remaining participants and clear and unambiguous wording should be used to reflect this intention. In the author's opinion, it is recommended that in order to avoid confusion, express reference should be made to the fact that the original agreement is being terminated or rescinded and replaced with a new agreement. An example of such a clause is as follows:

> "Each of the parties agree that on and from the Novation Date:
>
> (a) the Joint Venture Agreement is terminated and a new agreement is created between the Assignee and the Remaining Parties on the same terms and conditions as the Joint Venture Agreement subject to the changes set out in this agreement; and
>
> (b) the Assignor is released of all of its obligations which arose or accrued at any time under the Joint Venture Agreement."

Where the parties do not intend, for the reasons outlined earlier in this paper, for a novation to occur it is important that they avoid language which may lead to any inference that a novation was intended. Accordingly, including any references to the word "novate" should at all times be avoided. Similarly, language which serves to confuse rather than to clarify the intention of the parties should also be avoided. This may mean that expressions such as those used above stating that "the substituting party is to be treated as if they were always a party to the joint venture agreement" need to be carefully considered before being included.

Commonly, the key issue in the negotiation of joint venture assumption deeds (which are not intended to operate as a novation) will be whether the assignee will succeed to all of the obligations of the assignor or only those which accrue after the date of the assignment of the interest. Insofar as standard deeds of assumption contemplate how the obligations of the assignor are to be dealt with, vis-á-vis the remaining participants and the assignee, it is possible to divide them into three broad categories:

(a) situations where the assigning participant remains liable for the performance of all of the obligations under the joint venture agreement whether they accrued before or after the assignment of the interest. Sometimes, although not always, the assignee will assume corresponding obligations in favour of the remaining participants. In these circumstances, the assignor's liability is limited to circumstances where the assignee fails to perform;

(b) situations where the assigning participant is released absolutely from the performance of all of the obligations under the joint venture agreement whether they arose or accrued before or after the assignment of the interest. In these circumstances, the assignee will assume liability for all of the obligations of the assignor, whenever they arose; or

(c) situations where the assigning participant remains liable for the performance of obligations which arose or accrued prior to the date of the assignment of the interest but is released from the performance of obligations which arise after the date of the assignment of the interest. In these circumstances, the assignee's liability is only in respect of obligations which fall due for performance after the date of assignment of the interest.[45]

In the author's experience, the last of the above-mentioned categories is most commonly encountered in the context of the assignment of joint venture interests. A sample clause which would reflect this position is as follows:

"The Parties agree that:

(a) the Assignee is liable for the performance of all obligations under the Joint Venture Agreement which arise on or after the Effective Date;

(b) the Assignor is released from all of its obligations under the Joint Venture Agreement which arise on or after the Effective Date; and

(c) the Assignor remains liable for all obligations and liabilities which arose under the Joint Venture Agreement prior to the Effective Date."

CONCLUSION

From its origins in ancient Roman law, the law relating to the novation of contractual obligations has developed into a modern legal principle which is widely articulated but frequently misunderstood. Indeed, it has been said that "[n]ovation is a doctrine well known in our law though rarely discussed".[46] This remark, made over 100 years ago, remains true of the general sparsity of discussion and commentary of the principles of novation applied in the context of the assignment of joint venture interests.

The purpose of this paper is not to resolve the countless legal issues that arise in the context of an assignment of a joint venture interest but rather to arm the reader with a greater appreciation of the complexities of the law relating to the novation of contractual obligations. It should also serve to reassure the reader that the general manner in which contractual obligations are dealt with in the context of assignments of joint venture interests is an appropriate one and provide a salutary reminder of some of the problems which often arise in the application of legal principles to commercial practice.

[45] Note, in defining when the assignee's liability arises, the use of the words "accrued", "arose" or "incurred" need to be carefully considered.

[46] J B Bailey, "Novation" (1999) 14 *Journal of Contract Law* 189, quoting the Chief Justice of the Supreme Court of British Columbia, Sir Matthew Begbie, in *Polson v Wulffsohn* (1890) 2 BCR 39 at 43.

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