

# Assignability of Commercial Contracts (GA)

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A Practice Note examining Georgia law relating to the transferability of commercial contracts, including a party's legal ability to assign its rights and delegate its performance obligations under a contract that is silent on transferability, and the construction and enforceability of contractual anti-assignment and anti-delegation clauses. It also includes applications to different types of commercial contracts and transactions, and discusses key drafting considerations for anti-assignment and anti-delegation provisions.

Contracts are a form of intangible property. Like other property owners, parties to commercial contracts often desire to transfer their property to a third party. With a contract, transfer involves the assignment of some or all of a party's rights or the delegation of some or all of a party's performance, or both, to a non-party to the agreement.

Situations in which a party may desire voluntarily to transfer contractual rights or performance, or both, include:

- The manufacturer that sells its accounts receivable to a third party (known as a factor).
- The borrower that grants a security interest in its assets to its lender.

Situations that may require a party to transfer contractual rights or performance, or both, include:

- The company that divests some or all of its business in an asset sale.
- The business conglomerate that undergoes an internal corporate restructuring.

- The contractor that subcontracts its work under certain projects (in this situation it is important to distinguish an assignment from an agency or subcontracting agreement).

In cases involving assignment, delegation, or both, the non-transferring party may object to assignment or delegation for reasons that include:

- The desire to select the party with which it conducts its business.
- Concern that a different obligor or obligee may adversely affect the non-transferring party's ability to receive its benefit of the contractual bargain.

The transferring party (sometimes referred to as the transferor) must look to applicable law and the express language of the contract to determine whether it can validly complete the intended transfer without obtaining the non-transferring party's consent. If consent is required and is not obtained, the transferring party risks:

- Breaching the contract, including an express covenant or default legal rule against assignment, which may result in either:
  - liability to the non-transferring party for money damages;
  - discharge of the non-transferring party's duties under the contract; or
  - both.
- (See, for example, *Forest Commodity Corp. v. Lone Star Indus., Inc.*, 255 Ga. App. 244, 245, 247-48 (2002).)
- Making an ineffective and invalid transfer, which may result in liability to either:
  - the transferee for money damages;
  - the non-transferring party for non-performance; or
  - both.
- (See, for example, *W. Sur. Co. v. APAC-Se., Inc.*, 302 Ga. App. 654, 656-57 (2010).)

This Note examines the key issues to consider when analyzing contract transferability or drafting a contractual anti-assignment and anti-delegation provision under Georgia law, including:

- Definitions of assignment and delegation.
- The general rules governing assignment and delegation, including key exceptions.

- Contractual anti-assignment and anti-delegation clauses.
- Applications to some major commercial contract types and business situations.

All references to the UCC refer to the Georgia Uniform Commercial Code enacted under Georgia law and not the model UCC.

This Note uses the terms:

- “Assign” and “assignment” to refer to the transfer of a party’s contractual rights.
- “Delegate” and “delegation” to refer to the transfer of a party’s contractual performance.
- “Transfer” to refer to a transfer that is an assignment, a delegation, or both, depending on the facts.

### ASSIGNMENT AND DELEGATION DEFINED

Each party to a contract is an:

- Obligee regarding its rights under the contract.
- Obligor regarding its performance obligations under the contract.

Contracting parties and practitioners often refer to “assignability” of contracts. While in some instances they are specifically addressing the assignment of a party’s rights under the contract, in many cases they use the term “assignment” to refer to both:

- The assignment of rights to receive performance.
- The delegation of duties to perform.

However, assignment and delegation are two distinct legal concepts that must be separately addressed because they may have different consequences (see General Rules Governing Assignment and Delegation).

When parties refer to “assigning a contract” or permitting “assignment of the contract,” most courts hold that they are both assigning rights and delegating performance unless the language or the circumstances indicate to the contrary (O.C.G.A. § 11-2-210(5) and Restatement (Second) of Contracts § 328(1)). Conversely, when parties are restricting assignment, language generally prohibiting “assignment of the contract” only restricts the delegation of performance and not the assignment of rights (O.C.G.A. § 11-2-210(4) and Restatement (Second) of Contracts § 322(1)). For more information on anti-assignment and anti-delegation clauses, see Contractual Anti-Assignment and Anti-Delegation Clauses.

### ASSIGNMENT DEFINITION

Assignment is the transfer by an obligee (assignor) of some or all of its rights to receive performance under the contract typically, but not always, to a non-party (assignee) (see *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 680 (1985); see also Restatement (Second) of Contracts § 317(1)). In certain commercial contexts, a party may wish to transfer its rights to receive performance. For example, a commercial bank may wish to assign a mortgagor’s stream of future payments to another lender, or a business may wish to assign its accounts receivable to a creditor. For clarity, this Note assumes the assignee to be a non-party but the rights and obligations of the parties discussed apply equally to an assignee who is also a party to the agreement.

The assignor must consider whether:

- The assignor or the assignee may enforce the contractual right to performance in the event of nonpayment by the non-assigning party.
- The misdirected performance still discharges the non-assigning party’s obligation in the event of misdirected performance to the assignor.
- The assignor is liable to the assignee in the event of misdirected performance to the assignor.

When these rights are assigned, the assignor is no longer entitled to receive any benefits of the assigned rights, all of which are transferred to the assignee. However, even though the assignor is divested of its contract rights, assignment does not reduce or eliminate the assignor’s obligations of performance to the non-assigning party (see Delegation Definition). Therefore, while the non-assigning party to the contract is relieved of its obligations to perform for the assignor (although not for the assignee), the non-assigning party retains:

- The right to receive performance from the assignor.
- Its remedies against the assignor for any failure to perform.

(See *Fagbemi v. JDN Realty Corp.*, 275 Ga. App. 540, 542 (2005) (discussing the assignment of a commercial lease).)

For an assignment to be effective, it must include a clear, present intent to transfer the assigned rights without requiring any further action by the assignee, which means that a promise to assign in the future is ineffective as an actual transfer (see *First State Bank v. Hall Flooring Co.*, 103 Ga. App. 270, 271 (1961) (the court stating that a legal assignment must show the intention of the owner of the right to transfer it instantly)). Otherwise, there is no specific language that is required to draft an effective assignment, including no requirement to use the word “assign.”

More commonly, a party will encounter an agreement that purports to transfer “all rights and interests” to a third party. For example, a business may wish to transfer a commercial lease to an affiliate, or a bank may wish to transfer a credit agreement to another financial institution.

For a sample assignment provision, see Standard Document, Assignment and Assumption Agreement and Optional Novation (GA): Section 1.1 ([W-004-8148](#)).

### DELEGATION DEFINITION

Delegation is the transfer by an obligor (delegating party) of some or all of its performance obligations (or conditions requiring performance) under the contract typically, but not always, to a non-party (delegatee) (see *BDI Laguna Holdings, Inc. v. Marsh*, 301 Ga. App. 656, 660 (2009); see also Restatement (Second) of Contracts § 318(1)). For clarity, this Note assumes the delegatee to be a non-party but the rights and obligations of the parties discussed apply equally to a delegatee who is also a party to the agreement.

The delegating party must consider whether:

- The express language of the contract or applicable law limits or conditions the delegation.

- The delegating party is liable to the delegatee for an invalid delegation.
- The delegating party would remain liable to the non-delegating party if the delegatee fails to perform.

The law may limit or condition the ability to delegate duties under the contract (see Ability to Delegate Performance). If the agreement itself purports to restrict delegation, the delegating party may be liable either to the non-delegating party for breach of the covenant not to delegate or to the delegatee for breach of the transfer agreement.

For a delegation to be effective, the delegatee must agree to assume the delegated performance (see *Sims v. Bayside Capital, Inc.*, 327 Ga. App. 47, 52-53 (2014)). However, the delegating party remains liable for the delegated performance, whether or not it has also assigned its contract rights, unless the non-delegating party has agreed to a novation (see Novation; see also *S. Concrete Co. v. Carter Const. Co.*, 121 Ga. App. 573, 574 (1970)). In *S. Concrete Co.*, the court held that:

- The assignment of a contract to a third person does not relieve the assigning party from his obligations.
- The non-assigning party may expressly agree to accept the responsibility of the assignee in the place of the assigning party, making a new contract by way of novation.

(121 Ga. App. at 574.)

This differs from an assignment of rights where, on assignment, the assignor relinquishes its contractual entitlements (see *Bank of Cave Spring*, 173 Ga. App. at 680). Even if the delegating party can effectively delegate its actual performance to the delegatee (so that the delegatee's actual performance discharges the delegating party's duty), the delegating party cannot be relieved of its obligation to perform and its liability for non-performance unless the non-delegating party has agreed to a novation.

Like the assignment of rights, there is no required language to create an effective delegation in Georgia. When performance is effectively delegated, the delegatee assumes liability for the delegating party's performance obligations (under an assumption agreement) even though, absent a novation, the delegating party retains its liability to the non-delegating party for failure by the delegatee to adequately perform the delegated obligations.

Unless the parties expressly agree otherwise, courts commonly hold that the delegatee's liability is primary and the delegating party remains secondarily liable (see *S. Concrete Co.*, 121 Ga. App. at 574 (the court stating that the delegating party remains liable under the contract and answerable in damages if the delegatee does not perform the delegated obligations in strict fulfillment of the contract)). The delegating party may itself have recourse against the delegatee under the assumption agreement, often addressed through a contractual indemnification right (see Standard Document, Assignment and Assumption Agreement and Optional Novation (GA): Section 6 ([W-004-8148](#))).

## NOVATION

Although a delegation may be effected unilaterally, if the delegating party desires to fully extricate itself from liability for non-performance, it must obtain the consent of the non-delegating party

to the contract (novation). In most novations, the delegating party, the delegatee, and the non-delegating party agree that:

- The delegatee is substituted for the delegating party as a party to the contract.
- The delegating party is no longer liable for performance under the contract.
- The delegatee is directly and solely liable for the delegating party's performance under the contract.

(See *Georgialina Enterprises, Inc. v. Frakes*, 250 Ga. App. 250, 253 (2001); see also *Hall v. Robertson*, 168 Ga. App. 582, 582 (1983).)

With respect to novation, Georgia statutes provide that:

- If there is a new agreement about the same subject matter that is between the same parties with no new consideration, the original contract has not been destroyed.
- If new parties are involved and the person to whom the original obligation is due has changed, the original contract has ended.

(O.C.G.A. § 13-4-5.)

Under Georgia law, a novation can be either:

- A substitution of a new party to the contract for an original party to the contract (see *S. Concrete Co.*, 121 Ga. App. at 574).
- The intentional substitution of a new contract for an old contract (see *Powell v. Norman Elec. Galaxy, Inc.*, 229 Ga. App. 99, 101 (1997)).

There are four elements necessary to form a novation in Georgia:

- A previous valid obligation (contract).
- Agreement of all the parties to the new contract (assigning party, assuming party, and remaining party must all agree). Georgia requires a meeting of the minds to form a valid and binding novation (*Asgharneya v. Hadavi*, 298 Ga. App. 693, 696 (2009)). Sometimes the remaining party agrees to novate the contract only after:
  - renegotiating the assigned contract terms; or
  - extracting additional value from the assigning party or the assuming party.
- Extinguishment of the old contract.
- Validity of the new contract.

(*River Forest, Inc. v. Multibank 2009-1 RES-ADC Venture, LLC*, 331 Ga. App. 435, 440 (2015).)

To create a proper novation, parties must do something more than just modify the old terms of the contract (for example, simply charging a higher rate of interest or assigning a later due date) (*River Forest*, 331 Ga. App. at 440). While the parties to a contract themselves do not need to change, the mere substitution of the payor, with all other terms remaining the same, does not create a novation of the original contract (*Melton v. Lowe*, 117 Ga. App. 783, 785 (1968)).

Without a novation, the assigning (or delegating) party remains liable to the remaining party if the assuming party (the delegatee) does not perform the delegated obligations (see *Hall*, 168 Ga. App. at 582).

For a sample novation provision, see Standard Documents, Novation Agreement (Short Form) (GA) ([W-013-5445](#)) and Assignment and

Assumption Agreement and Optional Novation (GA): Section 2 ([W-004-8148](#)). For information on the differences between a novation and an assignment, see Practice Note, Novation, Accord and Satisfaction, and Substituted Contracts: Novation Versus Assignment ([W-016-0229](#)).

### VOLUNTARY AND INVOLUNTARY TRANSFERS

It is often clear that a contracting party has voluntarily transferred some or all of its contractual rights, obligations, or both to an assignee or delegatee. For example:

- In connection with a business transfer structured as an asset sale or a discrete transaction relating solely to a particular contract, a transferring party enters into a written assignment and assumption agreement with an assignee and delegatee.
- A non-party to the agreement renders certain performance or exercises certain rights, even though the contract has not been formally transferred to that non-party.

However, a contract is not always directly and voluntarily transferred to an assignee or delegatee by one of the parties. Instead, it may be indirectly transferred, often in conjunction with a corporate reorganization or a business sale structured as a merger or as the result of a court order. With these types of transfers, which are often characterized as occurring by operation of law, it may be more difficult to determine whether:

- A contractual anti-assignment and anti-delegation clause applies to a specific type of transfer.
- The transfer is permissible, with or without a contractual anti-assignment and anti-delegation provision.

The parties must look to Georgia's general contract law or business entity law, or both, to determine whether the transfer is permissible. The result may differ depending on whether the transferred contract has an anti-assignment and anti-delegation provision and the precise language of that provision (see Drafting Anti-Assignment and Anti-Delegation Clauses). For more information on transfers by operation of law, see Transfers by Operation of Law.

Certain commercial transactions and matters, such as business sales, corporate reorganizations, and bankruptcies, often require special considerations when determining contract transferability (see Assignment Issues in Certain Commercial Contexts).

### CHANGE OF CONTROL

A change of control (or change in control) refers to a significant change in the equity ownership or management of a business entity (often defined as a sale of more than 50% of a party's stock or a change in a majority of the board members of a party, or both) (see, for example, *Planning Techs., Inc. v. Korman*, 290 Ga. App. 715, 716 (2008) (defining a change of control in the context of a stock incentive plan) and *Bau v. Actamed Corp.*, 254 Ga. App. 573, 574 (2002) (defining a change of control in the context of a stock option plan)).

While a change of control does not involve the actual transfer of assets held by the affected business entity, contracting parties sometimes assume that a change of ownership or management triggers an impermissible transfer of contractual rights or obligations that are non-assignable or non-delegable under the contract or by applicable law (see General Rules Governing Assignment and

Delegation). However, the general rule acknowledges the technical distinction, and courts commonly hold that a change of control does not implicate any legal or contractual restrictions on the transferability of a particular contract unless the contract either:

- Contains anti-assignment and anti-delegation language that expressly restricts a change of control.
- States that a change in the management or equity ownership of the contracting party is deemed to be an assignment (which is subject to restrictions in the contract's anti-assignment and anti-delegation clause).

Commercial real estate leases often include these types of provisions (see Commercial Real Estate Leases). In other situations (for example, in supply agreements), restrictions on a change of control are more commonly addressed in a different clause, often by including a contractual termination right in favor of one or both parties if the other party undergoes a change of control (see, for example, Standard Document, Manufacturing Supply Agreement (Pro-Seller): Section 6.3(f) ([8-520-6860](#))).

### GENERAL RULES GOVERNING ASSIGNMENT AND DELEGATION

The modern rule generally favors free transferability of all types of property, including contracts. It broadly permits:

- Most assignments of contractual rights and choses of action. For example:
  - notes and accounts (*Johnson v. Brewer*, 134 Ga. 828 (1910)); and
  - a legal malpractice cause of action pursuant to contractual duties (see *Lucky Capital Mgmt., LLC v. Miller & Martin, PLLC*, 741 Fed. Appx. 612, 617-18 (11th Cir. 2018)).
- Many delegations of contractual performance.

In general, a contracting party can assign its contractual rights to:

- Receive money.
- Receive non-monetary performance.
- Pursue contract remedies.

In many cases, a party may delegate its contractual obligations to:

- Pay money.
- Deliver goods.
- Perform services that are not personal in nature (often requiring specialized skill or discretion).

The major exceptions to free transferability include:

- Contracts with anti-assignment or anti-delegation clauses (see Contractual Anti-Assignment and Anti-Delegation Clauses).
- Assignments and delegations that violate public policy or law (see Ability to Assign Rights).
- Assignments of rights or delegations of performance that are personal in nature (see Ability to Assign Rights and Ability to Delegate Performance).

The general rules of contract transferability are codified in the UCC, which applies to contracts for the sale of goods (O.C.G.A. § 11-2-210) and the Restatement (Second) of Contracts, which applies generally to all types of contracts (Restatement (Second) of

Contracts §§ 317-323). For a discussion about the transferability of some major types of contracts, including intellectual property licenses and distribution and franchise agreements, see Applications to Some Major Types of Contracts.

### ABILITY TO ASSIGN RIGHTS

Most contract rights are assignable. Aside from where the parties have agreed contractually to restrict assignment of rights, the legal bases for limiting assignment protect the non-assigning party against any significant adverse consequences of a particular transfer. When ruling on assignability, courts focus on the particular facts and circumstances of the assignment at issue.

Most states, like Georgia, rely on the Restatement (Second) of Contracts § 317(2), which, along with case law, provides that a contractual right is assignable unless:

- Transferring the right to the assignee would materially:
  - change the duty of the non-assigning obligor;
  - increase the burden or risk imposed on the non-assigning obligor;
  - impair the non-assigning obligor's chances of obtaining return performance; or
  - reduce the value to the non-assigning obligor of return performance.
- (See *CGU Life Ins. Co. v. Singer Asset Fin. Co., LLC*, 250 Ga. App. 516, 522 (2001), affirmed, *Singer Asset Fin. Co. v. CGU Life Ins. of America*, 275 Ga. 328 (2002).)
- The assignment is prohibited by statute or on public policy grounds (see Statutory and Public Policy Exceptions).
- The rights are personal in nature (see, for example, *Gold Kist, Inc. v. Wilson*, 227 Ga. App. 848, 852 (1997) and *Decatur N. Assocs., Ltd. v. Builders Glass, Inc.*, 180 Ga. App. 862, 865 (1986)).
- The parties have validly restricted assignment by contract (see, for example, *Williams v. Mayflower Ins. Co.*, 238 Ga. App. 581, 583 (1999)).

The UCC follows a similar principle and O.C.G.A. § 11-2-210(2) includes similar exceptions (see Contracts for the Sale of Goods).

Except for those situations governed by specific provisions of the UCC, Georgia has codified that a right of action is assignable if it involves, directly or indirectly, a right of property (O.C.G.A. § 44-12-24). A right of action for personal torts, certain legal malpractice claims, or injuries arising from fraud to the assignor may not be assigned.

Additionally, all "choses of action" arising from a contract are assignable unless otherwise provided by the UCC or the parties' agreement (O.C.G.A. § 44-12-22; see also *Decatur N. Assocs.*, 180 Ga. App. 862, 864 and *Mingledorff's, Inc. v. Hicks*, 133 Ga. App. 27, 27 (1974)). Choses of action include, but are not limited to:

- Proceeds from contract performance.
- The right of a creditor to be paid on a debt owed by a debtor.

(*Prodigy Centers/Atlanta No. 1 L.P. v. T-C Associates, Ltd.*, 269 Ga. 522, 524 (1998).)

Even if parties have agreed to restrict the assignment of their contract rights:

- Either party may assign its right to receive damages for non-performance (Restatement (Second) of Contracts § 322(2)(a) and O.C.G.A. § 11-2-210(2); see also *Irvin v. Lowe's of Gainesville, Inc.*, 165 Ga. App. 828, 829 (1983)).
- A party that has performed its obligations under the contract, such that it is no longer executory, can still assign its right to enforce the other party's liability under the contract unless:
  - the other party inserted the restriction on assignment to protect itself from a material reduction in the value of the contract; or
  - the contract requires peculiar skills or services which are inherently not assignable.
- (*Singer Asset Fin. Co.*, 275 Ga. at 329; see also *Mail Concepts, Inc. v. Foote & Davies, Inc.*, 200 Ga. App. 778, 780-81 (1991).)
- The contractual anti-assignment provision would be ineffective to prohibit a party from granting a security interest to a secured party (O.C.G.A. §§ 11-9-406 and 11-9-408; see also Secured Transactions).

### Statutory and Public Policy Exceptions

Examples of statutory restrictions on the free assignability of contractual rights include:

- The Federal Assignment of Claims Act and its implementing regulations, which generally limit the assignment of rights under government contracts (31 U.S.C. § 3727 and 41 U.S.C. § 6305; 48 C.F.R. §§ 32.800 - 32.806).
- The UCC, which prohibits the assignment of the right to draw funds under a letter of credit in certain cases (O.C.G.A. § 11-5-112).
- The Georgia Code, which, for example, prohibits the assignability of:
  - lottery retailer contracts (O.C.G.A. § 50-27-18); and
  - actions for personal torts, certain legal malpractice claims, or injuries arising from fraud (O.C.G.A. § 44-12-24; see also *Villanueva v. First Am. Title Ins. Co.*, 292 Ga. 630, 631-32, 635 (2013)).

Examples of assignments that are commonly held to be inoperative because of public policy reasons include assignments:

- Made for consideration that is illegal.
- Of unearned wages made by a municipal employee (see *Haverty Loan & Sav. Co. v. McAfee*, 179 Ga. 673 (1934)).

### ABILITY TO DELEGATE PERFORMANCE

The general rule is that a party may delegate its performance obligations. However, in practice, the delegation of performance is more often restricted than the assignment of rights. Conceptually, the exceptions to delegation are similar to those applicable to the assignment of rights. While worded differently, both sets of exceptions focus on the likely effect of the transfer on the non-transferring party. With delegation, this effect is often more significant.

The Restatement (Second) of Contracts § 318 permits delegation of performance to a third party unless:

- Delegation is against public policy.
- The parties have agreed contractually to restrict delegation.



- The non-delegating obligee has a substantial interest in having the delegating party perform or control performance of the delegated acts (which includes duties that are personal in nature because the original obligor has special skill, talent, or ability to perform).

(See, for example, *Gaffney v. EQK Realty Inv'rs*, 213 Ga. App. 653, 655 (1994) (where public policy prevented landlord from contractually delegating his duty of elevator passenger safety because this duty was one “in which the public has an interest”).)

The UCC similarly includes the exceptions listed in the second and third bullet points (O.C.G.A. § 11-2-210(1); see also *W. Sur. Co.*, 302 Ga. App. at 656-57).

Georgia law provides that contractual duties are generally not delegable (although the parties may agree otherwise) when:

- Personal skill is required.
- Performance by the delegatee would vary materially from performance by the original obligor.

(O.C.G.A. § 13-4-20 and *Dennard v. Freeport Minerals Co.*, 250 Ga. 330, 334 (1982).)

When a contract is silent on the obligor's right to delegate performance, enforceability concerns commonly relate to the ability of the delegatee to adequately meet the expectations of the obligee when performing the delegated obligations.

#### When Performance Is Personal

Some contractual obligations can be performed consistently by many different obligors (for example, the obligation to make payment, construct a building, or deliver fungible goods). Not only is the product of performance objectively measurable, the delegating party remains secondarily liable for performing the delegated obligations (see *S. Concrete Co.*, 121 Ga. App. at 574). However, other types of performance are more subjective, either:

- Involving a special relationship of trust or confidence between the parties.
- Requiring:
  - special types or levels of talent, skill, training, or knowledge;
  - taste or discretion;
  - character; or
  - reputation.

For example, in *Decatur N. Assocs.*, 180 Ga. App. at 865, the court stated that when obligations to be performed involve a relationship of personal confidence that make it clear it is intended that the rights should be exercised and the obligations performed by that party alone, the contract (including the party's rights and obligations) cannot be assigned without the consent of the other party.

In these situations, both rendering and measuring performance is less objective and more personal. If performance from a substitute obligor would materially alter the benefit bargained for by the non-delegating obligee, courts often hold that:

- Performance is personal.
- The duties are non-delegable.

(See *Decatur N. Assocs.*, 180 Ga. App. at 865 (where the evidence showed that no personal confidences were involved in a building's caulking work and the contract was thus assignable).)

The courts consider the facts and circumstances to make this determination. There is no specific legal test. Obligations under personal services contracts often fall into this category of non-delegable duties (see Personal Services Contracts), but obligations of a business entity under some types of professional services agreements (notably those that rely on the services of particular employees or contractors, for example, a film production agreement or an architectural design contract) may be treated similarly (see, for example, *Cowart v. Singletary*, 140 Ga. 435 (1913) (where company was hired to supply lumber for railway construction, contract's personal nature prevented lumber firm from assigning its obligations)).

#### CONTRACTUAL ANTI-ASSIGNMENT AND ANTI-DELEGATION CLAUSES

Instead of relying on a somewhat ambiguous legal structure, most parties to commercial contracts choose to address issues of transferability in the written agreement. Therefore, most commercial contracts contain a negative covenant (an anti-assignment and anti-delegation clause or an assignment and delegation clause) that limits either party's or both parties' rights of assignment and delegation.

These clauses often also contain express exceptions permitting one or more of the parties to assign and delegate rights and obligations, usually to specified non-parties such as affiliates and successors-in-interest to the transferring party's business.

Georgia courts commonly enforce anti-assignment and anti-delegation provisions included in a contract if the contract contains mutual obligations that haven't been performed (see *Mingledorff's*, 133 Ga. App. at 27 (referring to a contract with mutual obligations as an “executory contract”).)

However, once a party performs its obligations under the contract so that the contract is no longer executory, its right to enforce the other party's liability under the contract may be assigned without the other party's consent even if the contract contains an anti-assignment clause unless:

- The other party inserted the restriction on assignment to protect itself from a material reduction in the value of the contract.
- The contract requires peculiar skills or services which are inherently not assignable.

(See *Singer Asset Fin. Co.*, 275 Ga. at 329-30 (discussing and clarifying the holding in *Mail Concepts*, 200 Ga. App. 778; see also *W. Sur. Co.*, 302 Ga. App. at 656-57).)

While courts may favor the right of parties to freely contract for provisions like anti-assignment and anti-delegation clauses, they generally construe them narrowly (see *In re Cooper*, 242 B.R. 767, 771 (Bankr. S.D. Ga. 1999); see also *Rumbin v. Utica Mut. Ins. Co.*, 254 Conn. 259, 268-77 (2000) for a general discussion of how US courts narrowly construe anti-assignment clauses). Parties therefore should draft anti-assignment and anti-delegation clauses carefully to support their intended result where Georgia law does not otherwise

restrict their ability to prevent assignment or delegation (see Drafting Anti-Assignment and Anti-Delegation Clauses).

## DRAFTING ANTI-ASSIGNMENT AND ANTI-DELEGATION CLAUSES

When drafting or negotiating an anti-assignment and anti-delegation clause, there are several key points that the parties should consider, including:

- Directly addressing assignment of rights and delegation of performance (see Directly Addressing Assignment and Delegation).
- Clarifying the universe of restricted transfers (see Clarifying the Universe of Restricted Transfers).
- Designating the non-transferring party's consent rights (see Designating the Non-Transferring Party's Consent Rights).
- Specifying exceptions to non-transferability (see Specifying Exceptions to Non-Transferability).
- Requiring notification of a permitted transfer (see Requiring Notification of a Permitted Transfer).
- Including a declaration that impermissible transfers are void (see Including a Declaration That Impermissible Transfers Are Void).
- Adding a novation to the anti-assignment and anti-delegation provision (see Adding a Novation to the Anti-Assignment and Anti-Delegation Provision).

For more information on drafting and negotiating anti-assignment and anti-delegation clauses, see Standard Clause, General Contract Clauses: Assignment and Delegation (GA) ([W-000-0989](#)). For more information on subcontracting, see Standard Clauses, General Contract Clauses: Subcontracting ([3-521-4457](#)).

### DIRECTLY ADDRESSING ASSIGNMENT AND DELEGATION

Contractual language prohibiting “assignment of the contract” (instead of specifically addressing assignment of rights, delegation of obligations, or both) is commonly considered by courts to prohibit only the delegation of performance and not the assignment of rights (O.C.G.A. § 11-2-210(4) and Restatement (Second) of Contracts § 322(1)).

However, contractual language expressly permitting “assignment of the contract” is commonly construed to permit the assignment of rights and the delegation of performance (O.C.G.A. § 11-2-210(5) and Restatement (Second) of Contracts § 328(1)).

While failing to expressly permit the “delegation of duties” in a contract may not prohibit delegation, successful delegation depends on assumption of the contractual obligations by the delegatee. As a result, drafting the language of the assignment agreement without an express delegation leaves open the possibility that the delegatee did not assume such duties. For clarity, the non-assignment and non-delegation clause should not address assignment of the contract generally. Instead, it should specifically reference assignment of rights and delegation of performance.

### CLARIFYING THE UNIVERSE OF RESTRICTED TRANSFERS

Some anti-assignment and anti-delegation clauses do not include general restrictions against transferability, and instead state the types of transfers that are permissible. However, this formulation

is ambiguous for any non-specified transfers that are not generally restricted by law. To avoid ambiguity, parties should include a comprehensive restriction, followed by any exceptions to the general prohibition (see Specifying Exceptions to Non-Transferability).

In addition, the language of the general prohibition should:

- Specify whether it is limited to voluntary transfers or includes involuntary transfers.
- Identify the particular types of transactions (for example, mergers and dissolutions) that qualify as involuntary transfers.

Parties should avoid generally referencing involuntary transfers as “transfers by operation of law” because courts construe this term inconsistently (see Transfers by Operation of Law).

If a change of control is intended to be treated as an assignment for purposes of this provision, the parties should precisely define “change of control,” including whether it is limited to a direct change in that party's ownership or management or also applies indirectly if there is a change in the ownership or management of a direct or indirect controlling parent company.

### DESIGNATING THE NON-TRANSFERRING PARTY'S CONSENT RIGHTS

If the non-assigning or non-delegating party's consent is required for some or all transfers, the clause should specify if:

- The consenting party has complete discretion or must not unreasonably withhold its consent.
- Consent must be in writing.
- Consent must be obtained before making the transfer.
- Obtaining consent is a contractual obligation or a condition precedent to the right to make the transfer.

(See, for example, *Hunting Aircraft, Inc. v. Peachtree City Airport Auth.*, 281 Ga. App. 450, 451-52 (2006).)

If the anti-assignment or anti-delegation clause states that the non-transferring party must consent to the assignment before the transfer is made, Georgia courts view this as a condition precedent and the assignment will not be effective until consent is obtained (see *Accurate Printers, Inc. v. Stark*, 295 Ga. App. 172, 175-77 (2008)).

For a sample form of request for consent to the assignment of a commercial contract, see Standard Document, Request for Consent to Assignment of Contract ([5-529-2265](#)).

### SPECIFYING EXCEPTIONS TO NON-TRANSFERABILITY

The clause should also clearly address whether exceptions for permitted transfers are either:

- Broadly applicable, allowing the designated party to assign or delegate freely to any non-party.
- Limited to specified categories of non-parties (such as affiliates and acquirors of all or a significant portion of the transferor's assets).

Parties commonly permit assignments and delegations of contract rights and obligations to any of the following:

- Affiliates of the transferor.
- Successors of the transferor.

- Purchasers in an asset acquisition.
- Lenders as collateral.

If the parties envision a situation where they might want to assign or delegate their contract rights or obligations to a future affiliate, it should consider including a temporal modifier when drafting the exceptions. For example, a New York court held that use of the term “affiliates” in a contract includes only those affiliates in existence at the time the contract was executed, absent clear and unambiguous language indicating that the parties intended to bind future affiliated parties to the underlying contractual obligations (see *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 246 (2014)).

The parties should specify each type of transfer that is excluded from the general prohibition.

#### REQUIRING NOTIFICATION OF A PERMITTED TRANSFER

Consider whether circumstances support adding a requirement for the transferring party to notify the non-transferring party of any permitted transfer that is made. If included, the provision should specify whether the required notice is a contractual obligation or a condition subsequent to the right to make the transfer.

Even if the contract does not impose a notification requirement, the assignee is usually concerned about ensuring that notice of an assignment is promptly given to the non-transferring party. While the law does not formally require written notice of an assignment, an assignee takes the assignment subject to all defenses of the non-transferring obligor as against the assignor that arise before effective notice of the assignment (see *Houghton v. Sacor Fin., Inc.*, 337 Ga. App. 254, 258 (2016) and *Pridgen v. Auto-Owners Ins. Co.*, 204 Ga. App. 322, 322 (1992)).

Therefore, it is in the assignee’s best interest to notify the non-transferring party of any permitted assignment as quickly as possible. The assignee may separately obligate the assignor to deliver this notice or instead notify the non-transferring party itself. For a sample notice of assignment, see Standard Document, Notice of Assignment ([2-508-6945](#)).

If the non-transferring party delivers payment to the assignor instead of the assignee, it is not liable to the assignee if it did not have reason to know of the assignment. Upon receipt of notice, the non-transferring party is required to direct payment to the assignee. (See *Fulton Cty. v. Am. Factors of Nashville, Inc.*, 250 Ga. App. 366, 367, 370 (2001).)

#### INCLUDING A DECLARATION THAT IMPERMISSIBLE TRANSFERS ARE VOID

Because courts construe anti-assignment and anti-delegation clauses narrowly, language prohibiting assignment or delegation is typically held to trigger a breach but not to make the transfer invalid. This means that the non-transferring party may claim that the transferring party has breached the contract by making the transfer but cannot attack the validity of the transfer itself (Restatement (Second) of Contracts § 322(2)(b)).

Although Georgia generally follows this section of the Restatement, the Georgia Supreme Court has held that an assignment will be

void if it materially reduces the value of a contract, even if the anti-assignment clause does not make assignments expressly void or otherwise ineffective (*Singer Asset Fin. Co.*, 275 Ga. at 329-30).

The non-assigning or non-delegating party often prefers to limit the other party’s power to transfer, not merely its right to transfer. Therefore, parties should consider including both:

- A negative covenant restricting transfer.
- A declaration that a prohibited transfer is invalid. For example, “Any purported assignment or delegation in violation of this Section shall be null and void.”

This formulation:

- Provides the non-assigning or non-delegating party with a claim for breach if a restriction is violated.
- Renders the prohibited assignment or delegation ineffective.
- Safeguards against a future Georgia court upholding a transfer made in violation of an anti-assignment and anti-delegation clause, leaving the non-assigning or non-delegating party with only a breach of contract claim against the assignor.

#### ADDING A NOVATION TO THE ANTI-ASSIGNMENT AND ANTI-DELEGATION PROVISION

When a non-assignment and non-delegation clause includes exceptions for permitted transfers, a party with sufficient negotiating leverage should consider trying to include novation language in the anti-assignment and anti-delegation provision. This language, which is not commonly included in most anti-assignment and anti-delegation clauses, provides that when a permitted transfer is made:

- The transferee is deemed substituted for the transferor as a party to the agreement.
- The transferor is released from all of its obligations and duties to perform under the agreement.

(*Hall*, 168 Ga. App. at 582 (holding that an assignment document did not function as a novation because it did not delegate the assignor’s duties and obligations under the contract to the assignee and because the non-transferring party did not agree to the transfer).)

Without a novation, the assigning party remains liable to the remaining party if the assuming party does not perform the delegated obligations (see *Hall*, 168 Ga. App. at 582).

For more information on novation, see Standard Document, Novation Agreement (Short Form) (GA) ([W-013-5445](#)).

#### APPLICATIONS TO SOME MAJOR TYPES OF CONTRACTS

Many types of commercial contracts routinely include a contractual anti-assignment and anti-delegation clause. If not, transferability depends on the subject matter of the contract and the nature of the rights and obligations that are to be transferred. This Note discusses applications to the following major types of contracts:

- Contracts for the sale of goods (see Contracts for the Sale of Goods).
- Distribution and franchise agreements (see Distribution and Franchise Agreements).



- Personal services contracts (see Personal Services Contracts).
- Intellectual property licenses (see Intellectual Property Licenses).
- Commercial real estate leases (see Commercial Real Estate Leases).
- Commercial real estate sale agreements (see Commercial Real Estate Sale Agreements).
- Merger and Acquisition Agreements (see Merger and Acquisition Agreements).
- Construction contracts (see Construction Contracts).
- Loan agreements (see Loan Agreements).
- Insurance contracts (see Insurance Contracts).

### CONTRACTS FOR THE SALE OF GOODS

Rights and obligations under contracts for the sale of goods generally are assignable and delegable. Exceptions may include, for example, an exclusive requirements or output contract, or a contract for a particularly unique product. Otherwise, most supply contracts do not involve the type of performance that courts view as non-transferable (see Ability to Assign Rights and Ability to Delegate Performance for the approach taken under the UCC).

The UCC provides that if performance is delegated, the non-delegating obligee may treat delegation as reasonable grounds for insecurity and demand adequate assurances of performance from the delegatee. Failure to give that assurance acts as a repudiation of the contract by the delegating party. (O.C.G.A. §§ 11-2-609 and 11-2-210(6) and see Practice Note, Anticipatory Repudiation and Adequate Assurances of Future Performance ([9-519-7153](#))).

Many supply agreements contain express anti-assignment and anti-delegation clauses, often with exceptions for transfers to affiliates and successors-in-interest to all or a significant portion of the party's business (see, for example, Standard Document, Sale of Goods Agreement (Pro-Seller): Section 18.12 ([2-518-9260](#))). However, even if a supply agreement includes a restrictive anti-assignment and anti-delegation provision, parties should be aware that:

- The UCC permits a party to assign its right to sue for breach of the contract despite the restriction (O.C.G.A. § 11-2-210(2); see *Irvin*, 165 Ga. App. at 829).
- The UCC invalidates a contractual provision that prohibits assignment of:
  - an account, which includes the right to receive payment under the contract;
  - a general intangible for the payment of money due or to become due;
  - chattel paper; or
  - a promissory note.
- (O.C.G.A. § 11-9-406(d)(1), cmt. 5; see *State Dep't of Corr. v. Developers Sur. & Indem. Co.*, 324 Ga. App. 371, 376-77 (2013)).
- This means, for example, that an anti-assignment provision cannot prevent a seller from:
  - using its receivables as collateral when it borrows money from an asset-based lender; or
  - factoring its receivables.

### DISTRIBUTION AND FRANCHISE AGREEMENTS

Distribution and franchise agreements are often considered more personal than sale of goods contracts. Selection of a distributor or franchisee is based on many individual factors and, in both situations, the distributor or franchisee is marketing and selling:

- The manufacturer's or franchisor's products.
- Products or services under the franchisor's or manufacturer's trademarks.

In many cases, assignment or delegation by the distributor or franchisee can be harmful to the supplier's or franchisor's business if the transferee is not as capable and financially secure as the transferor, which is a particular concern for the franchisor. In addition, the non-transferring party is often concerned that the distributor or franchisee may transfer the contract to a competitor of the non-transferring party.

Therefore, franchisors and parties supplying goods to distributors typically insist on unilaterally limiting the franchisee's or distributor's transferability rights in a contractual anti-assignment and anti-delegation clause (see, for example, *Atl. Coast Line R. Co. v. S. Ry. Co.*, 214 Ga. 178, 180-81 (1958); Standard Document, Distribution Agreement (Pro-Seller): Section 21.12 ([2-520-3379](#))). These clauses often:

- Restrict the identity or categories of permitted transferees.
- Specify the terms that must be included in any assignment and delegation agreement.
- Reserve the non-transferring party's right to review and approve the proposed transferee and related deal terms. For example, in Georgia, a dealer of agricultural equipment may not assign a franchise without the consent of the manufacturer, distributor, or wholesaler, which may not be unreasonably withheld (O.C.G.A. § 13-8-15(c)(8)).
- In a franchise agreement, require the transferring franchisee to make a transfer payment to the franchisor.

For more information on transferability of franchise agreements, see *Drafting and Negotiating a Franchise Agreement Checklist* ([9-524-1429](#)).

### PERSONAL SERVICES CONTRACTS

Personal services contracts, including employment agreements, are often considered sufficiently personal in nature that they are held to be non-transferable without obtaining the consent of the non-transferring party.

While the classic case typically concerns the delegation of obligations by the service provider, many courts similarly restrict assignment of the service recipient's rights in certain circumstances. Service providers are often unconcerned about the identity of the party that is responsible for paying for the services rendered (noting that the original obligor remains secondarily liable for performance). However, in some situations, the nature of the services is sufficiently personal that public policy interests protect the service provider against being obligated to perform for a substitute obligee, especially where performance is guided by the discretion of the service recipient.

In Georgia the general rule is that most personal services contracts are not transferable without the non-transferring party's consent

(*Gold Kist*, 227 Ga. App. at 852). Generally, a personal services contract is non-transferable when it:

- Involves a personal relation of confidence between the parties.
- Relies on the skills or qualifications of a party.

(*Decatur N. Assocs.*, 180 Ga. App. at 865; for more information, see *When Performance is Personal*.)

Many personal services contracts contain an express anti-assignment and anti-delegation clause that addresses each party's transferability rights and restrictions (see, for example, Standard Document, Independent Contractor/Consultant Agreement (Pro-Client) (GA): Section 13 (5-586-5947)). These provisions often permit the services recipient (but usually not the service provider) to both assign rights and delegate duties, commonly limited to that party's affiliates and to successors-in-interest to all or a material portion of the transferring party's business.

### INTELLECTUAL PROPERTY LICENSES

Transferability of intellectual property (IP) licenses often depends on:

- Whether the transferor is the licensor or the licensee.
- The type of IP covered by the license.
- Whether the license is exclusive or non-exclusive.

Note that federal law may apply to the transferability of intellectual property licenses.

#### Licensor

Unless an IP license contains an anti-assignment or anti-delegation provision, licensors can generally assign rights and delegate performance (while remaining secondarily liable) under the license agreement.

If a license agreement provides that the licensor is to also provide certain services (such as intellectual property development, maintenance, or training), a licensee may have a valid objection to the licensor's transfer of the agreement if the original licensor is uniquely qualified to provide these services. In this situation, the licensee may be able to argue that the additional services that the licensor is obligated to provide make the contract more like a personal service contract rather than a license, and that it should be non-assignable under general contract law principles.

#### Licensee

Even if the IP license does not restrict transferability by the licensee, the policy interest in permitting the licensor to control the use of its IP often supports non-transferability by the licensee. Therefore, as a general rule of federal common law, non-exclusive IP licenses are not transferable by the licensee without the licensor's consent (see, for example, *Gilson v. Republic of Ireland*, 787 F.2d 655, 658 (D.C. Cir. 1986)).

The rule regarding exclusive licenses varies, depending on the type of IP that is being transferred. While courts often hold that exclusive patent and trademark licenses are non-transferable by the licensee, exclusive copyright licenses, which are treated under the federal Copyright Act as exclusive transfers of ownership, are usually transferable by the licensee.

Most courts will enforce contractual provisions that expressly permit or restrict transferability.

For more information on contractual restrictions, see Practice Note, IP Licenses: Restrictions on Assignment and Change of Control (3-517-3249). For information on when a licensor's consent may be required in connection with an M&A transaction, see IP Licenses: Restrictions on Assignment and Change of Control Flowchart (W-000-7928).

### COMMERCIAL REAL ESTATE LEASES

Most commercial real estate leases contain provisions that restrict the tenant's right to assign its lease interest without the landlord's express consent. Depending on the language in the lease, a landlord's consent to an assignment may be required before the assignment can become effective. Many anti-assignment and anti-delegation provisions in leases expressly define an assignment to include a change of control (whether direct or indirect).

A commonly negotiated aspect of the assignment clause is whether the landlord can withhold its consent in its sole discretion or whether the landlord must not unreasonably withhold, condition, or delay consent (see, for example, *Stern's Gallery of Gifts, Inc. v. Corp. Prop. Inv'rs, Inc.*, 176 Ga. App. 586, 593 (1985) (lease provision where landlord may not unreasonably withhold consent)). In Georgia, where consent to an assignment or sublease is within the landlord's discretion, the landlord's consent is not required to be reasonable (*Tap Room, Inc. v. Peachtree-TSgt Associates, LLC*, 270 Ga. App. 90, 91 (2004)). However, if the lease provides that landlord's consent may not be unreasonably withheld, the landlord's failure to consent must be fair and commercially reasonable (*WPD Center, LLC v. Watershed, Inc.*, 330 Ga. App. 289, 292 (2014)).

Tenants often try to negotiate for certain exemptions to the landlord's consent requirement for an assignment. For example, a landlord's consent may not be required when the tenant:

- Sells all or substantially all of its business assets.
- Undergoes a merger or consolidation.
- Transfers the lease to a wholly owned subsidiary or affiliate of the original tenant.

Most states does not distinguish between usufruct leases, which basically confer use rights, from estate-for-years leases, which grant an interest in land. However, Georgia law makes a distinction between them. In Georgia:

- A lease term of five years or less is rebuttably presumed to be a usufruct.
- A lease term of five years or more is rebuttably presumed to be an estate-for-years.

(O.C.G.A. § 44-7-1(b); *Camp v. Delta Air Lines, Inc.*, 232 Ga. 37, 39 (1974).)

Courts look to the terms of the lease to determine whether the parties intended to convey a usufruct or an estate-for-years (see *Stuttering Found., Inc. v. Glynn Cty.*, 301 Ga. 492, 495-96 (2017); see also *Richmond County Bd. Of Tax Assessors v. Richmond Bonded Warehouse Corp.*, 173 Ga. App. 278, 279 (1985) (court ruled that the 30 year lease at issue was a usufruct based upon restrictive

provisions in lease agreement)). Oftentimes, commercial real estate leases in Georgia expressly state that the lease is a usufruct, even if the term of the lease is greater than five years.

In the case of a usufruct:

- The lease cannot be assigned or transferred without the express consent of the landlord (O.C.G.A. § 44-7-1(a); see also *Splish Splash Waterslides, Inc. v. Cherokee Ins. Co.*, 167 Ga. App. 589, 593 (1983)).
- The assignment of the lease by the tenant to a third party does not create a contractual relationship between the landlord and the assignee without acceptance by the landlord (*Liberty Loan Corp. of Lakewood v. Leftwich*, 115 Ga. App. 113, 114 (1967)).
- The original tenant is not released from liability under the lease when the lease is assigned without a written release by the landlord or evidence that the landlord entered into a contractual relationship with the assignee (*Westmoreland v. JW, LLC*, 313 Ga. App. 486, 490 (2012); see also *Step Ahead, Inc. v. Lehndorff Greenbriar, Ltd.*, 171 Ga. App. 805, 806 (1984)).

For more information on usufructs, see Standard Document, Office Lease Agreement (Multi-Tenant Gross Lease) (Pro-Landlord Short Form) (GA) ([W-002-5605](#)).

For more information on lease assignment, see Standard Documents:

- Landlord Consent to Assignment of Lease ([6-518-9258](#)).
- Office Lease Agreement (Multi-Tenant Gross Lease) (Pro-Landlord Short Form) (GA): Section 13 ([W-002-5605](#)).
- Assignment and Assumption of Leasehold Interest in Corporate Transactions (Short Form) ([5-503-7784](#)).

To analyze the interpretation of assignment clauses across multiple states (not including Georgia), see:

- Real Estate Leasing: State Q&A Tool: Questions 13, 14, 15, 16, and 17.
- Managing Commercial Real Estate Leases: State Q&A Tool: Question 16.

For further information, see Practice Note, Assignment and Subleasing: Leasing Fundamentals ([4-556-7825](#)).

## COMMERCIAL REAL ESTATE SALE AGREEMENTS

A contract for the sale of real property is generally transferable unless the purchase agreement expressly restricts transferability. However, many purchase agreements include anti-assignment and anti-delegation clauses prohibiting the purchaser from transferring the contract, often subject to standard exceptions for affiliates and successors-in-interest to the purchaser's assets.

Many commercial lenders providing acquisition funding for a real property purchase require the purchaser to create a special purpose entity (SPE) to own the purchased property. If the SPE has not been formed before the purchase agreement is executed, the purchaser must ensure that the agreement does not prohibit transfer of the sales contract to the newly formed entity. For a sample agreement for transferring a purchase agreement to an SPE, see Standard Document, Assignment and Assumption of Purchase and Sale Agreement (Commercial Real Estate Purchase and Sale ([5-524-5245](#))). A commonly negotiated aspect of a purchase agreement is whether the purchaser may assign the agreement to

the SPE without the seller's consent. Alternatively, the purchaser may want to negotiate that the seller may not unreasonably withhold, condition, or delay consent.

For more information on assignment of commercial real estate agreements, see Standard Document, Purchase and Sale Agreement (Commercial Real Estate) (Pro-Seller Short Form) (GA): Section 14.08 ([W-002-1994](#)).

## MERGER AND ACQUISITION AGREEMENTS

Merger and acquisition agreements typically include an anti-assignment and anti-delegation provision restricting each party from assigning its rights or delegating its obligations under the contract to a non-party without obtaining the non-transferring party's prior written consent. Buyers commonly try to negotiate an exception to this restriction that would permit transfer of the agreement to a subsidiary when they intend to have a different entity purchase the stock or assets from the seller (or, with a merger, to use a different entity in the merger transaction).

For sample anti-assignment provisions used in merger and acquisition agreements, see Standard Documents, Stock Purchase Agreement (Pro-Buyer Long Form): Section 10.07 ([4-382-9882](#)) and Merger Agreement (All-Cash, Pro-Buyer): Section 8.11 ([8-383-4693](#)).

For information on contract transferability issues that may arise in the context of M&A transactions, see Sale of a Business.

## CONSTRUCTION CONTRACTS

Construction contracts are generally transferable unless the parties agree otherwise. Similar to the sale of goods, these agreements are considered less personal than other types of service contracts.

However, parties often enter into a construction contract intending to work with a specific owner or contractor and each party desires to preserve the identity of the original contracting party. Therefore, in practice, most construction contracts contain anti-assignment and anti-delegation clauses that restrict transfer of the agreement without obtaining the other party's consent. These provisions often include standard exceptions that permit transfer by:

- Either party to its affiliates and successors-in-interest to its assets.
- The owner to a purchaser of the owner's interest in the construction project before completion.

Construction contracts also commonly address:

- The contractor's rights and restrictions regarding subcontracting, and whether the owner's consent is required.
- Requirements regarding the terms of any permitted subcontracting agreements.

(See *W. Sur. Co.*, 302 Ga. App. at 656 (where subcontractor's refusal to abide by anti-assignment clause constituted anticipatory breach).)

## LOAN AGREEMENTS

Commercial loan agreements typically include complex anti-assignment and anti-delegation provisions that:

- Restrict the borrower from transferring any of its rights or obligations under the loan agreement without obtaining the consent of each lender.

- Address the terms and conditions under which lenders may:
  - transfer all or part of the loan to another lender (commonly referred to as an assignment even though it includes a full transfer of rights and obligations, and a novation where one lender is substituted for another and the loan agreement is amended to include the assignee as a party) (see, for example, *Hosch v. Colonial Pac. Leasing Corp.*, 313 Ga. App. 873, 874 (2012)); or
  - sell an interest in the loan (known as a participation) to another lender that does not become a party to the loan agreement, and who contracts and interacts solely with the lead lender (*Jaycee Atlanta Dev., LLC v. Providence Bank*, 330 Ga. App. 322, 330 (2014)).

Participations typically do not require the borrower's consent. However, because loan assignments involve a novation, the borrower's consent is usually required, except under certain circumstances (such as the existence of a default or for assignments to other lenders or their affiliates. Some syndicated loan agreements include language providing that the borrower is deemed to have consented to the assignment if it does not object to it within a stated period of time.

For more information on loan transfers, see Practice Note, [Assignments and Participations of Loans \(8-381-8532\)](#) and Standard Clauses, [Loan Agreement: Assignment and Participation Clauses \(8-383-3066\)](#).

## INSURANCE CONTRACTS

Insurance contracts are generally transferable unless they contain express transferability restrictions (O.C.G.A. § 33-24-17; see also *Santiago v. Safeway Ins. Co.*, 196 Ga. App. 480, 480 (1990)). Most insurers want to restrict the insured from transferring the contract because a different insured may present a different risk profile and increase the insurer's liability exposure. Therefore, insurance policies typically contain anti-assignment and anti-delegation restrictions that prohibit transfer by the insured without the insurer's consent.

Many courts distinguish between transfer of the policy and transfer of claims under the policy. They often limit application of contractual anti-assignment and anti-delegation provisions to prohibit transfer of the contract itself, but not of claims for covered losses insured under the contract. Once a loss occurs, the only contract right involved is the right to receive proceeds for covered losses, which does not impact the insurer's liability exposure (see *Santiago*, 196 Ga. App. at 480-81).

## ASSIGNMENT ISSUES IN CERTAIN COMMERCIAL CONTEXTS

Certain types of commercial transactions and matters present unique considerations relating to contract transferability. These include:

- Assignability of contracts in the sale of a business (see [Sale of a Business](#)).
- Internal corporate reorganizations that involve the merger, consolidation, or conversion of a contracting party (see [Corporate Reorganizations](#)).
- A borrower's grant of a security interest in its accounts and general intangibles (see [Secured Transactions](#)).
- Debtors' rights to assign contracts in bankruptcy (see [Bankruptcy](#)).

## SALE OF A BUSINESS

In the sale of a business, the structure of the sales transaction determines whether any contract transferability issues are implicated. As a technical matter, some types of sales (for example, a stock sale) do not involve actual contract transfers (see [Change of Control](#)), while other types of sales (for example, asset sales) do involve contract transfers.

In an equity purchase transaction (for example, a stock acquisition), the buyer acquires the target's equity, rather than the target's assets. Because the target company continues to own its assets (including contracts) after the closing, Georgia practitioners generally take the view consistent with Delaware law that a stock acquisition generally does not trigger an anti-assignment and anti-delegation provision (see *Baxter Pharm. Products, Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at \*5 (Del. Ch. 1999)). Although a stock purchase transaction generally does not trigger anti-assignment provisions, counsel should carefully review applicable contracts for change of control provisions that may be triggered by the transaction.

In general, contract assignment and delegation issues arise if the transaction is structured as:

- An asset sale.
- A forward merger or forward triangular merger.

If an asset transfer occurs, anti-assignment clauses in the target's business contracts may trigger a breach or prevent the assignment of the applicable contracts, or both, unless the non-assigning parties to the contracts consent to the transfer (for more information on acquisition structures, see Practice Note, [Private Acquisition Structures \(6-380-9171\)](#)). To address this issue, sellers are typically required to obtain the necessary consents before closing. Non-assignable contracts (where consents are not obtained) are excluded from the transaction (see, for example, Standard Document, [Asset Purchase Agreement \(Pro-Buyer Long Form\): Section 2.02 \(6-384-1736\)](#)).

The result usually differs for a transaction structured either as a stock sale or a reverse triangular merger. Typically, neither of these structures involves a technical transfer of the contracting party's assets, and in many jurisdictions, including Delaware, generally they do not implicate anti-assignment or anti-delegation clauses (see *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 88 (Del. Ch. 2013) and Legal Update, [Delaware Court of Chancery Holds that Reverse Triangular Mergers Do Not Trigger "Assignment by Operation of Law" Provisions \(7-524-4725\)](#)).

Merger-based transactions may or may not implicate anti-assignment and anti-delegation restrictions, depending on the type of merger involved and applicable state law. Under Georgia law, however, in a corporate merger of any type, generally:

- Every contract right that existed in the merging parties is vested in the survivor of a merger without reversion or impairment.
- No conveyance, transfer, or assignment occurs.

(O.C.G.A. § 14-2-1106(a)(2), cmt.; see also *Williamson v. Bank of Am., N.A.*, 2015 WL 11517083, at \*7 (N.D. Ga. June 8, 2015) and *Nat'l City Mortgage Co. v. Tidwell*, 293 Ga. 697, 700 (2013).)

Although Georgia courts have not directly ruled on whether a reverse triangular merger triggers an anti-assignment or anti-delegation



clause, the Massachusetts Superior Court, applying Georgia law, found that a reverse triangular merger did not cause an impermissible assignment of a data license agreement (*PharMetrics, Inc. v. Source Healthcare Analytics, Inc.*, 2006 WL 3201065, at \*4-5 (Mass. Super. Sept. 5, 2006)). The Court, citing both O.C.G.A. § 14-2-1106 and *Ward v. City of Cairo*, held that both Georgia case and statutory law make clear that a merger (including a reverse triangular merger) is not an assignment of property or contract rights by operation of law (*PharMetrics*, 2006 WL 3201065, at \*4-5).

Similarly, with respect to forward and forward triangular mergers, Georgia's state merger statute expressly states that the merging parties' contract rights vest in the surviving entity without assignment (O.C.G.A. § 14-2-1106(a)(2)). These types of mergers are unlikely to trigger a simple anti-assignment provisions based on state court decisions. For example, the Georgia Supreme Court held that there were no assignment issues where a subsidiary's contract rights vested in its parent pursuant to a valid forward merger (see, for example, *Ward v. City of Cairo*, 276 Ga. 391, 394 (2003)).

However, parties should be aware that certain anti-assignment and anti-delegation provisions may be drafted broadly to:

- Restrict all forms of mergers (including reverse triangular mergers).
- Deem a change of control to be an assignment for purposes of the anti-assignment provision.

Note that not all states follow the general rule that a reverse triangular merger does not result in an assignment of assets by operation of law. For example, one California federal district court found that an assignment or transfer of rights does occur through a change in the legal form of ownership of a business (see *SQL Solutions, Inc. v. Oracle Corp.* (N.D. Cal., Dec. 18, 1991) 1991 WL 626458, at \*3). However, another California federal court addressing the issue began from the presumption that a reverse triangular merger does not effect a transfer of rights (see *Floreys Institute of Neuroscience and Mental Health v. Kleiner Perkins Caufield & Byers* (N.D. Cal., Sept. 26, 2013) 2013 WL 5402093, at \*4-5).

## CORPORATE REORGANIZATIONS

When a company reorganizes its corporate structure, it faces the same transferability issues applicable to the sale of a business if either or both:

- Assets are distributed.
- The contracting entity merges into or consolidates with a different entity.

In each of these cases, assets, including contracts, are transferred as a technical matter, and the law in some states may treat the underlying event as triggering a transfer (for a discussion of the treatment of asset transfers and mergers in Georgia, see *Sale of a Business*). Therefore, depending on the details of the transaction, a contract transfer may be impermissible, especially if the transferred contract contains a broadly drafted anti-assignment and anti-delegation clause (see *Transfers by Operation of Law*).

There is, however, one key exception to the general rule. It may apply when a legal entity converts from one type of business entity into another type of business entity (for example, when a limited liability company (LLC) converts into a corporation).

An increasing number of states, including Georgia, have enacted statutes that permit an existing business entity (typically, a corporation, LLC, or limited partnership) to convert into a different type of business entity (also typically a corporation, LLC, or limited partnership) The Georgia statutes include:

- O.C.G.A. § 14-2-1109.1 (governing conversion of a corporation into a Georgia LLC or limited partnership).
- O.C.G.A. § 14-2-1109.2 (governing conversion of an LLC, a general or limited partnership, or a foreign corporation into a Georgia corporation).
- O.C.G.A. § 14-11-212 (governing conversion of a corporation, general partnership, limited partnership, or foreign LLC into a Georgia LLC).
- O.C.G.A. § 14-9-206.2 (governing conversion of a corporation, LLC, general partnership, foreign limited partnership into a Georgia limited partnership).

While state conversion statutes often differ in their scope (including, for example, whether they apply equally to domestic and foreign corporations), many conversion statutes deem that:

- The original entity's existence continues (see, for example, O.C.G.A. § 14-11-212(d)).
- No assignment of the converting entity's assets occurs (see, for example, O.C.G.A. § 14-11-212(c)(5)).

Some statutes, including those in Georgia, even include language that expressly states that a converted entity is for all purposes the same entity that it was before the conversion (see, for example, O.C.G.A. §§ 14-11-212(d), 14-2-1109.2(d), and 14-9-206.2(d)).

If a party undertaking a corporate reorganization is concerned about running into contract transferability restrictions, it may be able to use a conversion to avoid triggering a restricted asset transfer during the reorganization process. However, broadly drafted anti-assignment and anti-delegation language in a loan agreement, for example, may be triggered even by a conversion and make it necessary to obtain consent before the conversion can occur (see *Loan Agreements*). Parties contemplating conversion should do careful diligence to confirm that their business contracts will not require prior consent.

For more information on entity conversions, see *Entity Conversion Checklist: Converting into a Georgia Entity (GA)* ([W-000-0566](#)) and *Practice Note, Internal Corporate Group Restructurings Involving LLCs or Partnerships: Tax Considerations* ([2-519-6920](#)).

## SECURED TRANSACTIONS

The grant of a security interest to a secured party includes an assignment of the grantor's rights in the collateral (but not a delegation of obligations). Under UCC Article 9, many commercial contracts that give one party the right to receive payment of a monetary obligation are likely to be considered accounts or payment intangibles (a subcategory of general intangibles). Borrowers and other parties that grant security interests to lenders and other secured parties may be concerned that the lien granted to the secured party violates any anti-assignment clauses in its contracts.

UCC Article 9 eliminates this concern. Under the UCC, an anti-assignment clause is rendered ineffective if it attempts to restrict

or prevent the grant of a security interest in an account or a general intangible (O.C.G.A. §§ 11-9-406(d) and 11-9-408(a)).

Therefore, the UCC permits the lender to take a security interest in the asset despite the terms of the agreement between the grantor and non-assigning party to the contract. However, while this right to take a security interest may allow the secured party receive the proceeds of the asset, it may not allow the secured party to “step into the shoes” of the grantor without the consent of the non-assigning party.

For more information on secured transactions, see Practice Note, UCC Creation, Perfection, and Priority of Security Interests ([6-381-0551](#)).

### BANKRUPTCY

Under § 365 of the Bankruptcy Code, a debtor has the power to assume, assign (a term of art that covers both assignment and delegation), or reject executory contracts and unexpired leases. Technically, any transfer to a non-party violates a contractual anti-assignment and anti-delegation provision. However, the Bankruptcy Code invalidates contractual anti-assignment clauses in this context (11 U.S.C. § 365(f)(1)).

While assignability is the general rule, contracts that are non-transferable without consent under non-bankruptcy statutory or common law (for example, personal services agreements) are also non-assignable under bankruptcy law. In these cases, the general rules of assignability apply, even if the contract does not contain a specific anti-assignment and anti-delegation provision, unless the non-debtor party consents to the transfer.

For more information on assignability under bankruptcy law, see Practice Note, Executory Contracts and Leases: Overview: Anti-Assignment Clauses ([8-381-2672](#)).

### TRANSFERS BY OPERATION OF LAW

The law of contract transferability is often more permissive in its treatment of involuntary transfers, including those transfers categorized as occurring by operation of law. This distinction is particularly relevant when a contract has an anti-assignment and anti-delegation clause, which, for involuntary transfers, is more narrowly construed (see *If the Contract Has an Anti-Assignment and Anti-Delegation Clause*).

Examples of transfers that are generally considered to occur by operation of law include:

- Testamentary dispositions.
- Court-ordered asset assignments in bankruptcy proceedings.
- Court-ordered transfers in divorce proceedings.
- Assets transferred when a business entity is merged into another business entity.

However, courts do not universally construe this term or consistently rule on whether a particular transfer by operation of law is permissible. Therefore, to make this determination, the parties must look to:

- State corporate and business entity law.
- State contract law.
- The precise language of any contractual anti-assignment or anti-delegation provision.

### IF THE CONTRACT IS SILENT ON TRANSFERABILITY

If a transfer has occurred and the contract does not restrict transferability, the general rule permitting transferability usually applies (see *General Rules Governing Assignment and Delegation*). Similar to other types of transfers, courts typically consider the effect of the transfer on the non-transferring party. This is often a fact-intensive inquiry. (See *Jones v. Glover*, 93 Ga. 484 (1893) (“When the intention to assign is to be inferred... all the facts requisite to form a basis for the inference must be proved”).)

In the business merger context, courts often hold that the transfer is permissible if a merger or other consolidation or dissolution does not result in a change of beneficial ownership or a change in the management or affairs of the transferred business, and should therefore not adversely affect or prejudice the non-transferring party. For a discussion on the treatment of mergers under Georgia law, see *Sale of a Business*.

For resources addressing the transferability of IP assets in M&A transactions, see *Intellectual Property in M&A Transactions Toolkit* ([8-564-3827](#)).

### IF THE CONTRACT HAS AN ANTI-ASSIGNMENT AND ANTI-DELEGATION CLAUSE

The fact that a contract contains an anti-assignment and anti-delegation clause is not always determinative. Because courts construe anti-assignment and anti-delegation clauses narrowly, many courts permit involuntary transfer of contracts by operation of law, even if the contract includes a general transfer restriction. In some states, there is no general rule regarding permissibility of involuntary transfers and the courts take various fact-based approaches. The leading approaches focus on:

- **The intent of the parties.** Many courts look to the intent of the parties when determining whether a general transferability restriction covers a particular transfer. Some courts have held that a general transfer restriction does not indicate the intent to include transfers by operation of law and only applies to voluntary transfers.
- **The effect on the non-transferring party.** Some courts focus primarily on whether the non-transferring party was adversely affected by the transfer. If the non-transferring party is not adversely affected or prejudiced by the assignment, many courts permit the transfer despite the presence of the contractual restriction.

Even if a contractual restriction expressly prohibits transfers made by operation of law, the result may differ, depending on:

- The particular type of transaction.
- Whether the clause specifies the types of transactions that qualify as occurring by operation of law.

If the anti-assignment and anti-delegation clause expressly restricts a particular type of transfer, most courts enforce that restriction as the stated intent of the parties. However, when the clause is left unspecified, results vary for different types of transactions and within different states. In particular, judicial decisions are inconsistent about whether mergers and other types of consolidations are voluntary transfers or involuntary transfers by operation of law. While some courts have addressed this question directly, others apply the same general approach used to determine whether a general transferability restriction applies (often focusing on the intent of the parties or the effect on the non-transferring party). For a discussion on the treatment of mergers under Georgia law, see *Sale of a Business*.

Parties must review appropriate state law to determine the general rule applicable to their situation. To avoid uncertainty, when drafting and negotiating a contractual anti-assignment and anti-delegation clause, they should consider including comprehensive and explicit language to address this issue. If the clause specifically lists the types of prohibited transfers and permitted transfers (as exceptions to a general prohibition), courts are more likely to honor the parties' actual intent (see *Drafting Anti-Assignment and Anti-Delegation Clauses*).

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