

ASSIGNMENT OF CONTRACTS

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From a business perspective, various situations may arise whereby it becomes necessary to transfer a contract to a third party. For example, it may be necessary to assign important contracts within the context of the sale of certain assets or technology transfers.

It consequently becomes paramount for a legal representative to determine the manner in which and under what conditions a contract may be assigned, as well as the consequences of such an assignment.

In an effort to establish if a contract may indeed be assigned, the first step consists of verifying the clauses pertaining to assignment. Generally speaking, under Quebec law, contracts are considered to reflect the intentions of the contracting parties and as such govern their contractual relationship. The only condition is that the parties respect rules of public order. As such, it is possible to stipulate in the contract itself whether or not it may be assigned, to whom (sometimes contracts may only be assigned to affiliated persons or entities, other times such contracts may also be assigned to the purchaser of substantially all assets or of the business), and under what conditions (remittance of a notice, approval by the other party, etc.).

In the absence of any indication regarding either party's right to assign the contract or a prohibition from doing so, we must rely on the case law. Prior to the decision in *N.C. Hutton Ltd. c. Canadian Pacific Forest Products Ltd.*, REJB 1999-15643 (C.A.) rendered by the Court of Appeal in 1999, there existed few cases in Quebec regarding the assignment of contracts. Such circumstances in fact prompted Justice Baudouin to refer to French authorities. With regards to the manner in which contracts may indeed be assigned, Justice Baudouin explained the two different existing schools of thought in France. The first

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argues that a contract should be regarded as an economic operation by which either party may assign the contract without first obtaining the consent of the other, insofar as the initial economic operation is preserved in its entirety. As for the second, it considers that obliging a party to a contract, be it *intuitu personae* or otherwise, to accept a new contracting party is both difficult and likely to provoke conflicts and accordingly, the approval of the other party must be sought. In rendering his decision, Justice Baudouin indicated that in 1997, the French *Cour de cassation* had rendered a judgement favouring the latter approach (Cass. Com., 6 mai 1997, D-97-Jur.588). This approach was also adopted by Justice Baudouin who concluded that it was necessary for the assignor to obtain the consent of the assigned and that such consent could be obtained in advance, for example, when executing the contract.

Relying on French law, Justice Baudouin went on to discuss the legal implications involved in assigning a contract, particularly in determining whether such assignment provokes the release of the assignor vis-à-vis the assigned. Assigning a contract is regarded by many authors as having a translatif effect, whereby the assignee replaces the assignor, thus releasing the latter. Other authors argue that in assigning a contract, a new contract, identical to the first, is formed in which case the assignor is not released from its obligations vis-à-vis the assigned. Such an interpretation seems to have been favored by the Superior Court in *General Accident Insurance Co. c. Cie. De Chauffage Gaz Naturel* (1978) C.S. 1160. According to Justice Baudouin, the assignment of a contract cannot be equated to novation or a delegation of payment (which in any event cannot be presumed), where the assignor would be released. An assignment would consequently lead to the addition and not the replacement of the debtor.

In 2000, in making reference to the *Hutton* case, the Quebec Superior Court decided in *Steamatic Canada inc. c. Gestion A.D.R. inc. (Steamatic Centre du Québec)*, C.S. Drummond (Drummondville) 405-05-001137-009, 2000-10-19, AZ-50081131, J.E. 2001-47 (Jean-Pierre Sénécal J.) that an assignment may only be enforceable and binding against the assigned if the assignor has obtained the former's consent prior to assigning the contract to the assignee. The Court did however mention that the *Civil Code of Quebec* does not provide for the manner in which such approval is to be given. As a consequence, the Court, referring to Section 1641 of the *Code*, decided that it was not imperative that the assignor obtain a formal consent of the assigned prior to the assignment of the contract. According to such Section, the assignment may be set up against the debtor and a third person as soon as the debtor has acquiesced to it or received a copy or a relevant extract of the deed of assignment or any other evidence of the assignment which may be set up against the assignor. In fact, the Court indicated that such consent

may be inferred from the actions of the assigned. For example, if the assigned continues to remit royalties to the assignee without objection, consent of the assigned may be inferred. In circumstances where the assigned has neither been informed of the assignment in the prescribed manner, nor explicitly consented to such an assignment, one can acknowledge, especially in commercial matters, as was the case in *Hutton*, that consent of the assigned may be implicit.

Consequently, one must remember that in the absence of any stipulation regarding the assignment of a contract, it is crucial that the assignor first obtain the approval of the assigned for an assignment of a contract to be enforceable and binding and, depending on the intentions of the parties, that such assignment result in the release of the assignor vis-à-vis the assigned.

Do not hesitate to contact a lawyer from the commercial/corporate sector of our Group if additional information regarding this subject is required.



