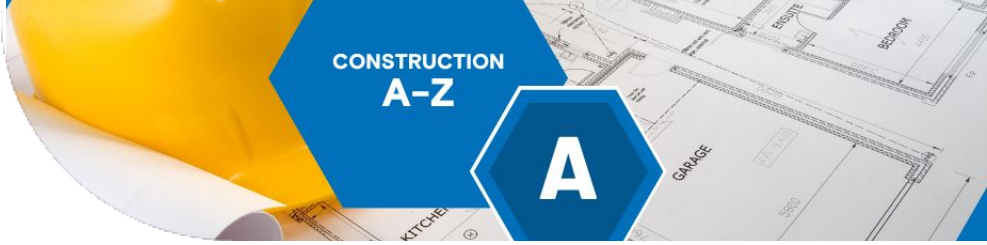

Construction A-Z: Assignment

To celebrate the new year, our construction team is pleased to announce the launch of LA's A-Z Construction. Every two weeks, the team will share their thoughts on various topics relevant to the construction industry in a blog. We hope that those unfamiliar with certain legal terms will use this A-Z as a reference to better understand construction contract negotiation and dispute resolution. Our first instalment looks at assignment.

Definition - What is an assignment?

To put it simply, an assignment is the transfer of a right from one party to another. In a construction context, the rights assigned primarily relate to the transfer of the benefit or interest – not the burden – under a construction document for a project, such as a building contract, consultant appointment and collateral warranty, from an assignor to an assignee.

For example, if an employer enters into a building contract with a contractor, the employer (assignor) may transfer its benefit under that contract to a funder (assignee) during the construction of the project or to a subsequent purchaser (assignee) of the completed development, or by way of an assignment.

Unless the assignment agreement provides otherwise, an assignment will normally include both accrued and future rights.

How can I assign a construction document?

Subject to meeting certain formalities, an assignor can unilaterally and freely assign legal rights either:

- By legal assignment: as under Section 136(1) of the Law of Property Act 1925 (LPA 1925), a legal assignment shall be:
    - In writing;
    - Absolute;
    - On notice.

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Parties wishing to opt for this method of assignment will normally enter into an assignment agreement or deed of assignment.

- By equitable assignment: if an assignment does not comply with Section 136 of the LPA 1925, then it will be an equitable assignment. For instance, an equitable assignment does not need to be in writing, and a notice to the obligor (party to the contract performing the obligations) is not required, although recommended.

Where there is a legal assignment, the assignee is able to bring any action against the obligor in its own name. In contrast, under an equitable assignment, the assignee must join the assignor as a party to any action. An assignee will generally prefer to opt for a legal assignment as it gives greater certainty.

Difference between assignment and novation

An assignment only allows the assignor to transfer the benefit (rights) of a construction contract from one party to another, whereas novation allows the parties to transfer the benefit and the burden (obligations) of the contract.

Assignment in construction contracts

It is not uncommon to find express provisions dealing with assignment in construction contracts. Such provisions are primarily designed to restrict a party's ability to assign, without which rights under such contracts would generally be freely assignable to anyone, unlimited in person or frequency, and without the consent of the obligor being required.

For example, it is often proposed that assignments are limited to two without the consent of the obligor, with free assignments to funders and/or group companies.

Assignment by way of security

Assignment by way of security is a concept that comes up on many construction projects, typically as a condition of providing finance: a funder will require an assignment by way of security of key construction

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documents, including building contracts and appointments, with the intention that if the borrower defaults on the loan, the assignment will be perfected and the funder will be entitled to enforce its rights under the constructions documents. It is important to check if the assignment is by way of a charge by a legal assignment.

Tip – Be careful with assignment provisions!

Do not assume that there is an automatic right to assign in a contract. Unamended JCT Contracts provide that assignment is only possible with the other party's agreement. This is rarely forthcoming. Check the contract or appointment.

When obtaining finance for a project, it is crucial to understand what the funder really requires in relation to security over construction documents. If all rights are assigned, the employer no longer has the ability to enforce such rights and may have given away more than he bargained for.

It may be that the use of collateral warranties or third-party rights together with a charge will suffice, but if not (which is unfortunately still the common position), it is important that any such rights are re-assigned before the employer commences an adjudication or any other proceedings.

It is important to review and consider the implications of the requirements included in an assignment clause. For example, if you are a contractor or consultant, you may want to limit the employer's right to assign without your consent. If you are an employer, you may want to include the right to freely assign your contract to any group companies and/or funders.

Please get in touch with our construction team if you would like some advice on suitable assignment clauses in your construction contract email amy.lewis@la-law.com or call 023 8082 7502.

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