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NOVATION OF CONTRACTS: EXAMINING THE EFFECTS IN MODERN INFORMATION AND COMMUNICATION TECHNOLOGY AGREEMENTS

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ABSTRACT: *This paper explores the essence of novation as it affects the contracts for ICT and contractual rights in general before dealing with questions raised in the contracts in relation to the novation or assignment clauses. Novation is one of the mechanisms whereby parties can swap or assign duties and obligations under an existing contract to new parties. The paper points out recognized mechanisms of transferring obligations as well as analyses the presumed assignment of obligations by contrasting the position of the law in other jurisdictions under common law. The state of the law on the assignment or transfer of contractual obligations in Nigeria, owing to problems occurring under common law, statutory provisions and the drafting of assignment clauses and related documents, are curiously far from simple. The basic principle of contract law in Nigeria as seen through various judicial pronouncements therefore suggests that the assignment or transfer of contractual obligations are unclear. Unfortunately, the lack of an established system for contract law in Nigeria, as well as strong judicial precedents on the subject, can be due to several of these challenges. It is therefore the position of this paper that the principle of law concerning novation must be clarified to minimise the uncertainty in its application by parties and enforcement by the court.*

KEYWORDS: law of contract, privity of contract, assignment, novation

INTRODUCTION

Often, parties enter into information and communication technology (ICT) agreements in modern business transactions, which they then need to give up, either because of internal restructuring or after the acquisition of an asset. Termination may not always be the most suitable or feasible option in these types of situations. They can however be able to pass to a third party both their rights and obligations. This is what is called' Novation' under contract law. Novation effectively involves

substituting or replacing. Novation is one of the exceptions to the "doctrine of privity" or "third-party rule" of the long-standing principles of contract law.[1].The doctrine of privity holds that a contract does not grant rights or enforce obligations on any individual other than the parties to the contract. The doctrine has two aspects: as a general rule, (a) under a contract to which he is not a party, a person cannot obtain and enforce rights; and (b) a person who is not a party to a contract cannot be held liable under it. Privity of contract is necessary to give rise to a legal duty to meet it or to be punished under the contract. The duties and benefits in the normal case are the entirety of the contract belonging to one of the parties. As an exception to this law, Novation allows one party to transfer to a third party all of its responsibilities and benefits under a contract[2]. A new contract is formed and the original party is extinguished. Practically speaking, companies often try to shift a contractual liability in agreements due to new situations or issues. This is one of the areas in which, while straightforward, the law does not lend itself well to business practices, particularly in modern times. Such contractual provisions or clauses should, from a strict legal point of view, in most cases be known as novation not assignment, in order to prevent a long legal battle in the future.

NATURE AND TRANSFER OF CONTRACTUAL OBLIGATIONS

At its cardinal level, the term "contractual obligations" is characterized as the duties which the parties to the contract are liable for under the terms of the contract[3]. Thus the essence of the contractual obligations of the parties depends primarily on the terms of the contract. Each contract is supported by an exchange of valid considerations, which can be almost anything from products, services, or money[4]. Each party to the contract will have various obligations in connection with this exchange of consideration[5]. If any of the parties to the contract fails to carry out their contractual obligations per the contractual terms, usually the result will be the breach of the contract[6].

Thus, the contractual obligations mostly depend upon the specific subject-matter of the contract[7]. For various forms of contracts it may be different. However some of the fundamental types of

[1] The doctrine of privity at common law is generally considered to have been established in *Tweddle v. Atkinson* (1861) 1 B & S 393. The rule was affirmed in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847

[2]*Phillips v. Arco Ltd* (1971) LPELR – 2918; *Polak Investment and Leasing Co. Ltd v. Sterling Capital Market Ltd* (2018) LPELR-46830

[3]Dileep Krishnan, "Obligations of Parties to Contract - A Theoretical Perspective" (*iPleaders*, May 30, 2018) https://blog.ipleaders.in/obligations-parties-contract/ accessed June 28, 2020.

[4]*A-G, Lagos State v. Purification Tech. (Nig.) Ltd* [2003] 16 NWLR (Pt. 845) 1; John Carter, *Contract Law in Australia* (LexisnexisButterworths 2013).at 40

[5]*AminuIshola Investment Ltd v. Afribank Nig. Plc* (2013) LPELR - 20624

[6]*African Petroleum Plc v. Aborisade&Anor* (2013) LPELR – 20362; Stephen Smith, "Performance, Punishment, and the Nature of Contractual Obligation" (1997) 60 *Modern Law Review* 360 https://ssrn.com/abstract=2695483

[7]Stephen Smith, *Contract Theory* (Oxford University Press 2007). p. 52

contractual obligations under which almost all contracts may represent include payment (in which a contact can specify obligations again as to the sum, the duration, the place and the mode of delivery), the quality of goods (that may again be specified under the contract) etc. (which the contract specifies obligations in relation to time, place and manner of delivery). These forms of specific obligations can be varied or adjusted in accordance with the applicable contract details. Besides that, such general rules and obligations can also extend to the parties at the termination of a contract[8]. Each party to a contract, for example, is obliged to negotiate honestly and equally with other parties, and to refrain from the use of force or fraud in obtaining the agreement's consent.
Contractual obligations cannot in general, be assigned, but can be "transferred" through delegation(either with or without a subcontract0 or by novation.The case of *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd*[9] is quite apt in explaining the nature of transfer or delegation of contractual obligations. This case law is the leading authority on this issue. Because of the importance of understanding the issue, this paragraph by Lord Browne-Wilkinson is given below in its entirety:

It is trite law that it is, in any event, impossible to assign the 'contract' as a whole, (i.e. including both burden and benefit). The burden of a contract can never be assigned without the consent of the other party to the contract in which event such consent will give rise to a novation.
The inability to assign the burden of a contractual obligation was explained in *Tolhurst v Associated Portland Cement Manufacturers Ltd*[10]:

Neither at law nor in equity can the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the *contractee*. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three and involves the release of the original debtor.
To properly "transfer" contractual obligations from one party to another, a novation is required. In *Scruples Imports Pty Ltd v Crabtree & Evelyn Pty Ltd*[11], Powell J. provided the following articulation of the essential nature of a novation:

Reduced to its simplest form, a novation is merely a contract between three parties, the obligee, the original obligor and the substituted obligor, the effect of which contract is that in consideration of the obligee releasing the original obligor from his obligation, the substitute obligor promises the obligee that he will assume responsibility for the performance of the obligation. Therefore the two principal elements of novation are the cancellation, by consent, of an existing contract or a part of an existing contract; and the entering into by way of substitution, of a new contract[12]. Critically, the termination of the current contract and the entering into effect of the new contract

[8]Hugh Beale and Joseph Chitty, *Chitty on Contracts* (Sweet & Maxwell 2018) p. 1163

[9] [1993] UKHL 4 (22 July 1993)

[10] [1903] AC 414, per Collins MR at 668

[11] (1983) 1 IPR 315 at 320

[12]Julian Bailey, "Novation" (1999) 14 Journal of Contract Law 189 at 194

must not take place independently of one another[13]. In other terms, the contractual agreement to discharge the obligations of the assignor under the original contract must be followed by the formation of a new contract to replace it.

Most significantly, obligations cannot be delegated if the contract prohibits delegation or if they are personal in nature[14]. In *M v. B*[15], the court held that under common law, a party to a contract is entitled to fulfill the contract by an agent unless the contract explicitly or implicitly precludes vicarious performance or is so personal as to be deemed incapable of performing it. A restriction on the assignment of rights by a party can also mean that that party may not delegate its obligations[16]. If the delegator has no contract with the delegate, it cannot (as far as contract law is concerned) force the delegate to satisfy the obligations of the delegator. The other party cannot blame the delegate for default in the original contract either[17].

Without any contractual or juridical limitations to the contrary, the performance of these obligations can be assigned or sub-contracted to a third party by a party which has responsibility for the performance of these contractual obligations[18]. In this context, it is worth noting that while such techniques can be used to enforce on a third party certain contractual obligations without requiring the consent of the party to which the obligations are due, it is not appropriate to regard these techniques as having the same impact as the novation. In other words, the responsibility is not removed from the assignor's shoulders.In the event of anything less than the perfect performance by the *delegatee* or sub-contractor, the assignor is the only party who can be called upon to render performance of such obligations[19]. This is because the assumption of obligations by an assignee, does not of itself, create a privity of contract between the assignee and the *delegatee* or sub-contractor.

It has been argued that there is an exception to the general rule that contractual obligations are not assignable. This exception is said to occur where the discharge of a burden is a condition of the enjoyment of a benefit such that the burden is said to be annexed to the benefit[20]. In such a case, the assignee to whom the benefit is transferred, must perform the burden or forego the benefit if he fails to do so. In *Tolhurst v Associated Portland Cement Manufacturers*[21], It was determined that when a right to place an order for goods has been assigned and the assignee places an order for the goods and indeed the goods are delivered, the assignee must then pay for the delivery

[13]*Caltex Ltd v. Federal Commissioner of Taxation* (1960) 106 CLR 205

[14]*Tolhurst v. Associated Portland Cement Manufacturers (1900) Limited* [1903] AC 414

[15] (1998) 6 NZBLC 102

[16]*Jeffrey v. DB Breweries Ltd* (19 February 1999) unreported, High Court, Auckland Registry, 158/98, 17- 19

[17]*Cooper v. Micklefield Coal and Lime Company Limited* (1912) 107 LT 457

[18]*SchiffahrtsgesellschaftDetlev Von Appen GmbH v. Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279

[19]*Radstock Co-operative and Industrial Society v. Norton RadstockUDC* [1967] Ch 1094

[20]*Rhone v. Stephens* [1994] 2 AC 310

[21] [1903] AC 414

because the payment is required to fulfill the condition to which the right of the assignor to call for delivery was necessarily subject. It is unclear if this idea is enshrined in Nigeria's common law

NOVATION OF CONTRACTS

The definition of novation is very clear and its specific features have been stated by the numerous commentaries on it.Black's Law Dictionary[22], defined Novation as:

(1) The act of substituting for an old obligation, a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party. A novation may substitute (1) a new obligation between the same parties, (2) a new debtor, or (3) a new creditor.[23]

Furthermore, Cheshire and Fifoot described "Novation" as a transaction by which, with the consent of all the parties concerned, a new contract is substituted for the one already made. The new contract may be between the original parties (where a written agreement is later incorporated in a deed), or between different parties(where a new person is substituted for the original debtor or creditor)[24].

The Supreme Court in *Union Beverages Limited v. Owolabi*[25]defined "Novation" as a transaction whereby a new contract or new parties to a contract by consent of both parties express or implied is deemed to have been substituted for or with the one originally made, or a material part thereof is added to or materially amended. In *Grover v. International Textile Industries Nig. Ltd*[26], the Supreme Court explained the doctrine of novation thus:

The law is well settled that a later agreement by the parties to an original contract to extinguish the rights and obligations that the original contract has created is itself a binding contract, provided that the latter agreement is either made under seal or supported by consideration.Consideration raises no difficulty if the original contract sought to be extinguished is still executory. This is because each party by the later Agreement is deemed to have agreed to release his rights under the original contract in consideration of a similar release by the other. Such bilateral discharge may take the form of dissolution plus replacement. Thus, the parties may extinguish the original contract but substitute an entirely new agreement in its place[27].

Novation is the mechanism by which a third party takes over the rights and responsibilities of one of the parties to the original contract and replaces it for another party. As a result, the original

[22]*Black's Law Dictionary* (8th edn, Thomson West 2004).

[23] Ibid. p. 1094; Definition adopted in *Blyther v. Pentagon Federal Credit Union* D. C. Mun. App. 182 A 2d, 892 at 894

[24]Geoffrey Chevalier Cheshire, Cecil Herbert Stuart Fifoot and Michael Peter Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (8th edn, LexisNexis Butterworth 1972). p. 504

[25] (1988) 1 NWLR (Pt. 68) 128 at 167

[26] (1976) 11 SC 1

[27] Ibid. p. 19

contract is extinguished[28]. This ensures that all the benefits and obligations under the contract are passed by the original party. The benefits may be in the form of money or a service, while the burden of providing benefits, such as payment for a service or for a product, or performance of a service, is the parties' responsibility. For example, the contract clauses typically contains obligations to be met by each party, such as terms of payment and notifications within a fixed time. The contractual benefits are what the party gets in exchange for its commitments - financial reimbursement for the supply of goods, for instance. These contractual agreements and advantages would however be passed to a third party in the case of novation. The third party essentially substitutes for the original party as a contracting party. In *Southway Group Limited v. Wolff*[29], Bingham LJ stated:

If A wishes to assign the burden of the contract to C he must obtain the consent of B, upon which the contract is novated by the substitution of C for A as a contracting party

Novation takes place in two ways. Firstly, novation may be effective by a change in parties with the consent of all of them. Secondly, novation of a contract may occur when the same parties to the contract agree to make any material alteration in nature of the obligation of the original contract[30]. In a recent Nigerian case, *Jacob v. Eton*[31], the Court of Appeal, per Shuaibu,J.C.A, explained the conditions required for novation of contract to ensue to wit:

On whether exhibit F is a novation, novation is the substitution of a new contract for an existing one between the same or different parties. It is also done by mutual agreement and never presumed. The requisites for novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishing of the old obligation and the validity of the new one…For novation to ensure there must be not only the substitution of some other obligation for the original one but also the intention or *animus novandi*.[32]

Novation is a dynamic process, because the Novation Agreement must be signed by all concerned (the original parties and the incoming party). Novation happens most commonly in corporate takeovers, a merger of businesses or the selling of a company. Thus all parties (outgoing and continuing parties) to the original contract and the incoming party must agree to the novation in order to be considered legitimate[33]. For example, if the incoming party is of inferior financial status to that of the outgoing party, this could be a problem where the continuing party is unwilling to consent to novation. The explanation for this is that while contractual benefits can be assigned

[28] Julian Bailey, *op. cit.* 211

[29] (1991) 57 BLR 33, 52 (CA)

[30]*Phillips v. Arco Ltd* (1971) LPELR – 2918; Chris Corry, "Contractual Obligations of an Assignee" (1990) 5 Butterworths Conveyancing Bulletin 165.

[31] (2020) LPELR – 49577

[32] Ibid. p. 18

[33]Joseph Chitty and Anthony Gordon Guest (eds), *Chitty on Contracts. General Principles.* (Sweet & Maxwell ; Sydney 1983) p. 985

without the consent of the other party, contractual obligations cannot be assigned. This implies that this can only be done by the original party if both the buyer (the new party) and the third party consent to a novation[34]. In certain cases this can be complicated, for instance when a service provider is changed. If the other original party sees little gain from the novation contract or demands more assurances that the novations will not make them worse,he/she will find it difficult to consent. In such cases it should be necessary to negotiate with the other side if the Party wishes to novate the contract.

In several judicial decisions, the courts have held that consent to novation does not have to be given in writing[35]. In *Cooper v. Commissioner of Inland Revenue*[36], Cartwright J. stated that the novation, in that case, did not have to be in writing and "consent may be inferred from acts and conduct in the absence of rebutting circumstances"[37]. Consent can be given verbally, and it can also be inferred by conduct. In practice, written consent would normally be given[38]. In any event, the new contract following novation would effectively amount to written consent. However, this principle is in direct contrast with another germane principle of contract law which deals with a variation of contracts. The general rule of law is that where a contract is in writing, any agreement which seeks to vary the original agreement, must itself, be in writing[39].All courts in Nigeria have for decades supported and embraced this stance. The question is that the form for obtaining consent does not have to be in writing because Novation is a modification to an originally written contract. The ambiguity and incoherence in some common law and case law is further illustrated.

Upon novation of the contract, the outgoing party and the remaining party usually release each other of all responsibility and claims in relation to the original agreement on or after the date of signing of the agreement.[40]. They will also agree to indemnify, that is, pledge to compensate each other for the damage caused by the actions of the first party or some other party to the other party. For example in relation to any liability and commitments that the incoming party decides to take on the outgoing party may agree to indemnify the incoming party and the incoming party may agree to pay the outgoing party for any liabilities that the outgoing party maintains. However, there have been some cases where the Nigerian courts have ruled that even though the original agreement was terminated after novation, all the parties are still bound by the obligations found in

[34]MichealFurmston, "The Assignment of Contractual Burdens" (1998) 13 *Journal of Contract Law* 42

[35]*Onegbedan v. Unity Bank PLC* (2014) LPELR-22186; Jack Beatson and others, *Anson's Law of Contract* (Oxford University Press 2016) p. 407

[36] (1995) 17 NZTC 12

[37] Ibid. p. 216

[38]*Mercantile Bank v. Adelma* (1990) 5 NWLR (Pt. 153) 747; *Chatsworth Investments Limited v. Cussins (Contractors) Limited* [1969] 1 All ER 143, 144 (CA) per Lord Denning MR

[39]*Central Bank of Nigeria v. Igwillo* (2007) LPELR - 835

[40]Millie Johnson, "Novation Agreements - What Is a Novation Agreement?" (*Rocket Lawyer*) https://www.rocketlawyer.com/gb/en/quick-guides/novating-a-contract accessed June 28, 2020.

the original agreement. This was the position of the court In *NNPC v. Clifco Nig. Ltd.*[41]In that case, the appellant entered into an agreement to sell twenty-four shipments of vacuum gas oil (VGO) to the respondent at the rate of one shipment per month. The contract was set for a term of two years and started on October 7, 1994. As of 1999, only five shipments of VGO were made available to the Respondent by the Appellant. The Respondent chose Novation rather than suing for breach of contract. The parties had a meeting on 27 October 1999, and a novation arose at that meeting. The old agreement was turned into a new contract. Some provisions of the term contract were agreed to replace new terms. The new terms were that nineteen shipments of Low Pour Fuel Oil (LPFO) at the same rate would be supplied to the Respondent as from November 1999 to replace VGO.The appellant argued, therefore that the arbitration clause found in the original contract had been nugatory since the original contract had been novated. As such, the ability of the Arbitration Tribunal to arbitrate between the parties was lacking. The court disagreed with the appellants and held that the arbitration clause in the original contract was not extinguished by amending the terms of the obligation in the original contract with new terms on 27 September 1999.

As novation extinguishes a contract and replaces it with another, the new contract must satisfy the legal requirement of consideration[42]. Consideration, in contract law, is simply the exchange of one thing of value for another[43]. It is one of the six elements that must be present for a contract to be enforceable[44]. Consideration must be both legally sufficient and bargained-for by the receiving party[45]. Generally, the promises agreed between the parties in the novation agreement will be considered adequate consideration but to avoid any argument most novation agreements are in the form of a deed[46]. In order to put it clearly in a standard novationagreement, where A owes B a contractual obligation, and both parties agree with C that C, not A, is to satisfy a binding obligation, B considers that C agrees to compensate him by promising to release A: while A takes into account B's pledge of release by granting the new debtor, C. In essence, C substitutes A for B in the agreement. B shall also agree to this rearrangement both to end the initial A-B contract and to conclude the current B-C contract.

From A point of view, the primary benefit of a novation lies in having a fresh start, i.e. A does not have continuing obligations to B subject to the terms of the rearrangement negotiated between the parties when its contract with B is terminated. Formal deed of novation and novation agreements often specify that A remains liable to B until the date of the novation for any violations of its commitments, but not after that date for any violations. However instead of depending on a delegate or a subcontract, parties to commercial agreements are sometimes obliged, as B does not

[41] (2011) ALL FWLR (Pt. 583) 1875; (2011) LPELR-2022

[42]Hugh Beale and Joseph Chitty*op. cit.* para. 19-086

[43]*Curie v. Misa* (1875) LR 10 Exch. 153

[44]*Orient Bank (Nig) Ltd. v. Bilante International Ltd* (1997) NWLR (Pt.515) 37

[45]*Sruttons Ltd v. Midland Silicones Ltd* [1962] AC 446.

[46]*Grover v. International Textile Industries Nig. Ltd* (1976) 11 SC 1; *Scarf v. Jardine* (1882) 7 App Cas 345, 351 per Lord Selborne LC

offer consent to a novation (or may enable the renegotiation of the substance of the contract for the purpose of obtaining consent). Instead if C does not perform, B will sue C directly under its C contract. Novation is the only way in which A can transfer its responsibility lawfully and legitimately in the sense that A no longer be responsible for failure in performing the obligations[47]. C may also prefer a novation, as subject to the terms of the rearrangement, agreed between the parties, C's rights are not then subject to equities resulting from anything done by A.

While novations can be effected formally (for example by the parties entering into a deed of novation or exchanging other documentation), novations can also be effected informally. In *Karangahape Road International Village Limited v. Holloway*[48],Chilwell J stated:

Novation can be inferred from acts and conduct but ordinarily, it is not to be inferred from conduct without some distinct request

In that case, Mr and Mrs Holloway agreed to sell land to Jackson "or a nominee". Jackson nominated Karangahape Road International Village Limited as the nominee. That company argued that there had been a novation creating a contract between itself and the Holloways (and terminating the contract between Jackson and the Holloways) based on conduct such as the Holloways executing a memorandum of transfer to the company and addressing their settlement statement to the company. The Court held that there was insufficient evidence of a novation by conduct, as the conduct was consistent with an alternative explanation – that is, that the company remained Jackson's nominee to complete the contract. Ultimately, whether or not there is a novation - as against another type of transaction - depends on the parties' intention[49].

DISTINCTION BETWEEN CONTRACTUAL ASSIGNMENT AND NOVATION

There may be many reasons that rights and/or obligations under a contract would need to be shifted to another party. For instance, if a purchaser buys the assets of Company A, the contracts to which company A is a party to are an integral part of that company and the purchaser will want all those contracts to be transferred to him. As part of that process, the terms “Assignment” and “Novation” are often used interchangeably. But they are not the same thing, each method is distinct, each of them has unique features that need to be strictly considered when deciding which is the preferred option. As mentioned above the benefits and responsibilities of a contract are transferred to a third parties through a novation agreement. On the other hand, the assignment does not transfer the burden of the contract[50]. A contractual assignment is where the contractual rights and privileges (but not obligations) of a contracting party are passed to a third party. The parties to the contract do not alter, such that the privity of the contract between the original parties still remains. However the assignor will generally be covered ('indemnified') from any potential claims or conflicts by

[47]*Southway Group Limited v. Wolff* (1991) 57 BLR 33, 43

[48] [1989] 1 NZLR 83, 101

[49]*Vickery v. Woods* (1952) 85 CLR 336, 345 (HCA)

[50]Justine Kirby, “Assignments and Transfer of Contractual Duties: Integrating Theory and Practice” (2000) 31 Victoria University of Wellington Law Review 317, 318.

means of a 'letter of assignment.' This ensures that the outgoing party is responsible for any previous liability accrued prior to the assignment.

In addition the consent of the other original contracting party is not necessary unlike novation when a party to the contract decides to grant a third parties the benefit of the contract. An agreement between the initial contracting party and the third party is all that is necessary. However certain contracts forbid particular rights assignments as well as all rights under a contract directly. If this is the case, consent will be necessary to assign the contract benefits to a third party.[51].In a novation the new contract's terms and conditions shall be defined by usual contractual rules, while the contractual rights that were assigned in the case of assignment must be understood in accordance with the terms and conditions of the original contract.[52].

While the benefits of a contract can be assigned, obligations under a contract cannot be assigned[53]. For example, in US case of *Clark v. General Cleaning Company Inc.*[54], Clark's employment contract with General Cleaning provided that the contract could "be transferred to any purchaser of this branch of the business". After General Cleaning sold its assets and transferred Clark's contract to a buyer, Clark worked for the buyer for two weeks and then for a subsequent buyer for two weeks. The Court held that the jury could find that Clark had not released General Cleaning from its liability to him. Under an assignment, an original party will remain a party to the contract and liable for performance under the contract, even if such party has contracted with a third party to perform the contract on their behalf. As noted, it is an established rule of English common law that an assignment of a contract can only transfer the rights and benefit[55]. Therefore, if company A entered into a supply contract with company B, and after sometimes Company C purchases the assets of company A. In this case, company B is entitled to be supplied with goods and services from suppliers and if company C fails to fulfil the obligations to pay on-time for the goods and/or services, the obligations or burden under the contract will remain with company A. It is only through novation that contractual obligations can be assigned[56].

If the requirements of novation (i.e. the consent of all parties and consideration) are not satisfied, the novation may be considered invalid and the transfer ineffective[57]. It is, therefore, necessary

[51]*Kakara Estate Limited v. Savvy Vineyards 3552 Limited* [2014] NZSC 121

[52] Julian Bailey, *Op. cit.* p. 205

[53]*Budana v. The Leeds Teaching Hospitals NHS Trust &Anor* [2017] EWCACiv 1980

[54] (1962) 185 NE 2d 749

[55]*Pan Ocean Shipping Limited v. Creditcorp Limited* [1994] 1 All ER 470

[56]Hugh Beale and Joseph Chitty*op. cit.* para. 19-086

[57]*Mercantile Bank v. Adelma* (1990) 5 NWLR (Pt. 153) 74; Sarah Woyciechowski, "Substitution of New Debtor: Transfer of Contract" in Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) p. 1730

that both the original parties to the contract and the incoming party must all consent to novation[58], and clinch that the initial agreement is annulled and replaced with a new one with the same content that the initial (extinguished) one had, under which incoming party takes up all the rights and obligations duplicating those undertaken by the parties under the extinguished contract[59]. Alternatively, an assignment of the benefit of the contract may be held to have occurred – assuming the original contract does not prohibit assignment – instead of a novation of the benefit and burden of the contract[60]. In such a situation, the outgoing party will remain liable for the incoming party's defaults.

NOVATION IN TECHNOLOGY-RELATED CONTRACTS

As we have noted above, Novation is another means by which contractual obligations can be transferred from one person to another. Almost all modern ICT agreements and contracts often provide that either or both parties may assign their rights under that contract. Most provisions refer more ambiguously to assigning or transferring either "the contract" or both rights and obligations. For example, most of the clauses are drafted in this format:

Assignment and Novation. Each Party must not assign or novate the benefits of any rights conferred on that Party under this Agreement to any person without the prior written consent of the other Party which consent must not be unreasonably withheld, conditioned, or delayed; provided, however, that a Party may, upon written notice to the other Party and without the consent of the other Party, assign or otherwise transfer this Agreement in connection with a change of control transaction (whether by merger, consolidation, sale of equity interests, sale of all or substantially all assets, or otherwise).[61]

For this paper, we shall be referring to such clause as "Transfer Clause". The primary issue is whether a prospective transfer clause authorises a novation or merely an assignment – perhaps accompanied by a delegation. One reason for this is that such provisions, especially those not requiring consent, are typically found in standard form technology transfer or services contracts in which case, following a transfer, the transferee usually seeks to establish a new contract between itself and clients or contracting parties. Therefore the transferor's continuing liability (if any) is rarely in the issue. Prospective substitution provisions not requiring consent in contracts between large commercial parties (for example provisions enabling a party to transfer both rights and obligations to another company in the same group) usually provide that the transferor remains

[58]James Peter and Stanley Giffard, *Halsbury's Laws of England. Volume 22, "Contract".* (LexisNexis 2012) p. 604

[59] Sarah Woyciechowski, *op. cit.* p. 1721

[60]Justine Kirby, *op. cit.* p. 318

[61] Law Insider, "Assignment and Novation Sample Clauses" (*Law Insider*) https://www.lawinsider.com/clause/assignment-and-novation accessed June 28, 2020; This is just a short sample clause as most other clauses can be longer and contain even specific references to a new contractual arrangement. However, all transfer of contractual obligations clauses must contain these basic elements.

liable[62]. Unfortunately, there are no reported cases on this issue in Nigeria. Nonetheless, we shall be reviewing the nature and implication of these clauses considering decisions from other common law jurisdictions on similar or related clauses.

In a curious case of *Australian National Airlines Commission v. Commissioner of Stamp Duties (Qld)*[63], the Australian Court of Appeal ruled that where a contract contemplates that a party can substitute another person for itself, the substitution is not a novation as the substituting party performs rather than terminates the original contract. This decision implies that novation cannot occur within an agreement but must be a separate agreement entered into by the transferring party and the third party.

What, then, is the effect of a purported "assignment" of obligations clause (either by themselves or as part of a purported assignment of a contract)? In common law (which is applicable in Nigeria), the approach proposed in the courts was to construe references to assigning "a contract" as assigning only the rights under that contract[64]. Beyond this, the English common law offers few guiding principles. It is a basic premise of contract law that interpreting contracts involve ascertaining the parties' objective intention, rather than their subjective intention(s). As stated by Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society*[65], interpretation "is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

Whether or not the non-transferring party must consent to a proposed transfer according to a prospective transfer or assignment provision in a contract is important – both legally and commercially. In *British Gas Trading Limited v. Eastern Electricity Plc*[66], the court held that the granting of consent would hold the court to treat such clause as novation. The facts of the case are that British Gas and Eastern Electricity were parties to a long term gas supply contract with the following provision:

Except as provided in General Condition 15(1) above neither party shall transfer or assign its rights or obligations hereunder without the prior written approval of the other party, which approval shall not be unreasonably withheld.

While the issue was whether Eastern Electricity could withhold approval to a proposed transfer by British Gas, LeggattLJ, delivering the judgment of the English Court of Appeal, noted that:

[62]John Carter, *op. cit.* p.100

[63] (1987) 87 ATC 4

[64]*Westcom Technology & Energy Services Ltd v. Transclear SA* (2018) LPELR - 44794

[65] [1998] 1 All ER 98, 114 (HL)

[66] (18 December 1996) unreported, Court of Appeal, QBCMF 96/1647/B

It seems to me that we are not here concerned with consent to an assignment, properly so-called, but with approval of a novation. Thus, if given, Eastern Electricity's consent would be construed as accepting an offer to contract with the "transferee" on the same terms as Eastern Electricity's contract with British Gas, and as terminating its contract with British Gas (releasing British Gas from liability for future performance).

The New Zealand Court of Appeal's judgment in *Commissioner of Inland Revenue v. Renouf Corporation Ltd*[67] also stated that no party could assign the benefit or burden of an agreement without the other party's prior consent. The issue in the case was whether consideration for the transferor's interest in a joint venture was assessable income. This turned on whether, under the transfer agreement, the transferor transferred the beneficial interest in its shares in the joint venture company as well as its interest in the joint venture agreement. The Court stated that:

[The transferor], on the Commissioner's argument, would have ceased to be bound by the joint venture agreement. A novation would have occurred when [the other party] consented to the assignment of [the transferor's] contractual rights. [The transferor] would no longer be bound by its provisions.[68]

Determining the type of transaction authorised by a transfer clause requiring consent is particularly important where the non-transferring party's ability to withhold consent is constrained (for example where it cannot "unreasonably" withhold consent). In any event, while the non-transferring party might not consent to the transfer of obligations in the sense that the assignor would no longer be responsible for the performance, it might not be able to object to the assignor delegating those obligations to the assignee (or any other person).

Furthermore, as well as the provision itself, the terms of the actual transfer and consent will be important. Even if, on its proper interpretation, a prospective substitution provision enables only the assignment of rights (and perhaps a delegation of obligations), the transfer and consent transaction may nevertheless constitute an agreement to terminate the original contract and enter into a new contract on the same terms with a new party. Conversely, while a prospective substitution provision may anticipate a novation, a transfer and consent may be merely an assignment of rights (perhaps accompanied by a delegation of obligations).

In *Riseda Nominees Pty Ltd v. St Vincent's Hospital (Melbourne) Ltd*[69], the court stated that unless the provision in question conferred a unilateral right on the party not only to assign its rights but also to bring about a novation, the transfer of both rights and obligations required a tripartite agreement between both original parties and the transferee. The Court further added that in any event it was more straightforward and made commercial sense to agree that the assignment would

[67] (1998) 18 NZTC 13

[68] Ibid. p. 919

[69] [1998] 2 VR 70

be effected by a tripartite agreement. Therefore, it is not sufficient that an agreement or a contract merely contain a transfer clause or assignment provision, whether the intentions of parties are clearly stated or not, parties must further execute fresh assignment or novation agreements which would encapsulate the new rights and obligations of the parties to the new arrangements.
In summary, while the particular wording of a transfer clause and corresponding transfer and consent must be carefully examined, it is not clear that such a provision requiring consent will usually result in the transferee assuming contractual obligations as well as contractual rights vis-à-vis the non-assigning party and the transferor ceasing to be responsible for performance. Thus, parties wishing to bring about such consequences should ensure that these are specified in the original contract, assignment agreements and novation agreement.

THE FUTURE OF NOVATION CLAUSES IN CONTRACTS

When two parties to a contract confer benefits on a third party who has not signed the contract, then it would appear that they intended that the third party should be in a position to independently enforce that right[70]. In such circumstances, the third party would be adversely affected if the two parties signing the contract were to cancel or amend the contract to the detriment of the third party. This is the basis of the general principles of privity of contract and third-party rule[71]. While the rule has its advantages, it had been criticized for being too strict and burdensome on modern business practices as well as that it was not grounded by sound logical jurisprudence. Over the years, the courts, as well as legislative bodies in different jurisdictions, have sought to create exceptions to this rule where it is detrimental to the rights and intention of parties. Assignment and Novation have been developed by the courts as some of the grounds for transferring of contractual rights and obligations within the principle of privity of contract. While some jurisdictions have outrightly abolished the privity doctrine and established statutory regimes to regulated third-party rights in contracts as well as the statutory assignment of contractual rights, Nigeria has yet to even begin any form of debate for contract reforms. Aside from specialized commercial transactions like insurance, banking transactions and sale of goods, most contracts and transactions in Nigeria are still governed by common law decisions or case-law. Reviewing the rules of privity of contract is very important and cannot be done easily by the judiciary since they are not the appropriate body that ought to make laws.

We have noted in the preceding sections on the nature and transfer of contractual obligations. The general nature of contract law in Nigeria indicates the uncertain nature of "assignment" or "transfer" of contractual obligations. Additionally, the application of the law is also uncertain, even in the determination of the parties' intention under a transfer or assignment clause. Most of these challenges can be attributed to the absence of a developed framework for contract law in Nigeria as well as clear judicial precedents on the issue. Nonetheless, the review of foreign judgments has set a clear standard and guidelines on how novation clauses or agreements can be made enforceable.

[70]*The Vessel Leona II v. First Fuels Ltd* (2002) LPELR-1284

[71]*Makwe v. Nwukor* (2001) 7 SCNJ 87; (2001) 14 NWLR (Pt. 733) 356

As a practical perspective of the above, international judicial precedents have laid down that the following two issues should be checked as soon as the issue whether a particular third party can enforce its rights under the contract becomes contentious:

1. Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision?; and
2. Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general or the provision in particular, again as determined by reference to the intentions of the parties?

As part of the recommendations in this paper, we believe that the law must be clarified to minimise this uncertainty, and thus to lower the costs that such uncertainty creates in commercial transactions. The National Assembly, and maybe State House of Assembly, should enact legislation clarifying the nature of assignment, novation or transfer of contractual obligations under contracts in Nigeria. While there has been no contentious judgment from the courts on the issue, the growth of commercial and business practices demands that legislation should be up-to-date in dealing with novel issues and contract arrangements. The legislative houses should be at the forefront of modernizing the contract law in Nigeria.

Nonetheless, where there is an absence of such clarification of the principle by the legislature, parties to commercial contracts can minimize this uncertainty themselves by drafting assignment and novations provisions as well as related agreements to reflect the underlying legal principles as noted in the preceding section. Thus, in the absence of statutory provisions or guidelines on the execution and enforceability of a novation agreement, the following points would be recommended to parties that wish to take cognizance of and incorporate in their ICT Agreements:

1. Ensure that original contracts should not prevent the non-assigning party from enforcing the remedies of damages and cancellation against an assignee.
2. If the assignee is to perform the assignor's obligations, the agreement should be clear whether the assignee is merely authorized to do so or is contractually bound to the assignor to do so. Furthermore, if the assignee is to be contractually bound to the assignor to perform the obligations, parties should consider whether the contract with the assignee should specify a remedy for failure to perform such obligations.
3. Parties should agree on the performance of the subsisting or remaining obligations under the original contract and state explicitly whether the non-assigning party is excluded from enforcing damages or cancellation against the assignee
4. Parties should consider whether the transfer clause or assignment provision should specify any other consequences of a transfer of the contractual rights or obligations of a party. For example, the transfer clause or assignment provision should state if the new contract between the non-transferring party and the new party will be time-specific or obligation-specific.
5. Parties should ensure that any transfer clause or assignment provision in the original contract must be drafted per the underlying principles stated in *Linden Gardens'* case. Thus, while drafting the transfer clause or assignment provisions in contracts, assignor or transferor should be careful not use the term or phrase "assigning" a contract as a whole or to "assigning" both rights and obligations. Instead, the clause or provision should state that powers of parties to assign rights and, if relevant, delegate or subcontract obligations

6. The agreement must expressly state that transferred or assigned rights must be free of some or all conditions or other equities.
7. The Agreement must make clear whether or not the transferring party will continue to be liable for any default in performance.
8. The procedure for expressing and obtaining consent should be stated to avoid misunderstanding or further liability to the assignee after the novation agreement has been executed.
9. Where a proposed novation transaction is executed and consented under a patently ambiguous transfer clause, parties should clarify in the new novation agreement whether the agreement is for the assignment of a right, substitution (i.e. novation), or a different transaction.

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

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

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

CONCLUSION

In law, the general rule is that only the original parties to the contract can discharge or fulfil the obligations and enforce the rights created under it and nobody else gets a look in. This is called “privity of contract”. Essentially, novation is a mechanism to get around this restriction. Just like every modern contract, ICT contracts creates rights and obligations. More often than not, parties to these contracts incorporate provisions to transfer their rights and/or obligations. These clauses are a common feature in modern ICT contracts and parties can initiate them under the conditions stated in the clause. However, the enforceability of those clauses depends on the position of the

law of the particular country, whether common law or statutory. The law on the "assignment" or "novation" of contractual obligations in Nigeria is unclear. To compound the issues, the legislature has failed to develop a statutory framework for contract law in Nigeria which would have clarified some of the inconsistencies and gaps of the common law on contractual principles such as assignments or novation of obligations (by themselves or as part of a contract). This lack of guiding principles imposes costs on commercial parties seeking to enter into or understand the consequences of, such transactions. Despite having been an exception to an old common law principle, the courts in Nigeria have not clarified its meaning. This creates difficulties for parties and their lawyers in structuring assignment, novation or transfers agreements and in determining the consequences of past or concurrent obligations by which parties were originally bound to. While contract law has to some extent moved from treating contracts as creating only personal rights and obligations, it may need to move even further to be appropriate for the market characteristics of the 21st century. There is no doubt that the rule on assignment and delegation stands the doctrine of privity on its head. Free assignability and the concomitant presumption of a delegation of duties, however, have been extraordinarily useful in the development of credit economy in other developed jurisdictions and the free alienation of business assets and property in a dynamic ICT business ecosystem.

In the meantime the inconclusive existence of the principle of "assignment" or "transfer" means that in practice lawyers have to draft documents showing the nature and effect of such transfers or assignments. The lawyers are responsible for drafting documents. This is not a good mechanism and can lead to unnecessary lawsuits, market conflict and contractual commitments that are not resolved. This would have a negative impact on the development of both our ICT industry and the economy at large.

Although we have made some suggestions in the preceding section, it should be noted that this is neither the final nor the best approach to the current uncertainty of our business practices and contract law. The suggestions serve as a framework that will facilitate the smooth drafting and enforcement of creative agreements – which are now the standard in modern contracts – and ensure that the agreements respect the interests of all parties concerned and are enforceable in the courts. It is hoped that one day our legislature, whether federal or state, will take the issue of contracts and commercial transactions seriously. Many of the contract principles have become archaic and have been modified or entirely scrapped in similar jurisdictions in order to strengthen business practices in those countries.

Finally, the objective of this review is not to address the many legal issues that occur in connection with the assignment or transfer of interest to the ICT Agreement, but rather to inform the reader with a greater understanding of the complexities of the law relating to the invention of contractual obligations. It should also help to inform the reader that the general way in which contractual responsibilities are dealt with in the form of assignments and innovations of interests and obligations under ICT Agreements is acceptable and offers a welcome reminder of some of the problems that often occur in the application of legal concepts to commercial practice.

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