



Virginia Business Lawyers

Do It Yourself Contracts – Who’s in Charge?

By: Thomas L. Bowden, Sr. Tuesday, January 10th, 2012



In previous posts we’ve dealt with “boilerplate” **clauses** such as **waiver, jurisdiction and venue**, and **integration**. Today we will talk about two related clauses: the “assignment” clause and the “binding effect” clause. Both of these clauses relate to the question of who may enforce a contract at a later date.

Let’s start with binding effect. The binding effect clause typically reads something like this:

Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

Image by NobMouse via Flickr

It almost seems redundant. Why would you need a paragraph saying that the contract is binding? After all it’s a contract right? Well not so fast. Judge Richard Posner, a noted federal judge and scholar on the topic of contracts recently decided a case in which he explained why not every document which expresses a mutual understanding is or should be enforceable as a contract, especially when that document includes language that specifically disclaims the intent to form a contract. **Judge Posner** is known for his clear and direct writing and you can read that case **here**.

It’s worth noting that the converse is not necessarily true. Just because you say something is a contract, does not make it a contract if it is missing the essential elements such as offer, acceptance, mutuality, consideration (meaning exchange of value) and a legal purpose. Those are all topics for entire first-year Law school contracts course, but it is sufficient for this topic to note that it is easier to disclaim the existence of a contract than to create one. However, if you include a “binding effect clause” you certainly have reinforced the idea that you intend the document to be binding to some extent.

So what does the “binding effect” clause really do? It simply defines the parties to whom the benefits and burdens of the contract apply. Under common law, with some exceptions, a contract is an intangible right that can be freely transferred. One of those exceptions, however, is for **personal service** contracts. When you

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contract with someone for their personal services, they may not simply sell that contract and transfer their obligation to another party with whom you have had no prior contact. In the same way, if you are performing an obligation under a contract for a specific person, you may not want to continue to have that obligation if the original party substitutes a new one for any reason. But the most likely application of the binding effect language is when an individual party dies, or becomes disabled, or when a business is sold. In those cases it is critical for the other party to know whether it can expect a contract to survive.

Which brings us to the assignment clause. An assignment clause might read something like this:

Assignment. Neither party shall assign any rights or obligations under this Agreement, which are personal to the parties, without the prior written consent of the other party, which consent shall not be unreasonably withheld. No assignment of this Agreement by the Company shall operate to release the Company from any of its obligations hereunder.

This clause sets limits on either party's ability to transfer its rights and obligations. Some assignment clauses are very permissive, and some are very restrictive. Just as the binding effect clause deals with transfers caused by unexpected events, such as death, or sale of a business, the assignability clause is more focused on voluntary transfers of rights and obligations. In the assignment clause, either party may restrict the right of the other party to transfer its obligations and benefits. This is very important. For example, what if you enter into a contract with a business, and the contract requires you to provide confidential information about your business to the other party? If that party were then allowed to simply sell that contract to your competitor, your information would be compromised. That's just one of many examples. Another is where you contract for the services of a specific person because of their expertise, connections, reputation or your pre-existing relationship. If that person could then simply sell the contract to a 3rd party with whom you had no prior dealings, you may not receive the benefit of your bargain.

So as I hope you can see, both the binding effect clause and the assignability clause can have critical implications for your business. However, the circumstances in which they matter are usually not presented immediately. If you sign a contract and everything goes well, the job is completed and payments made, then they really never come into play. It's only after you are in contract with someone, and the unexpected happens that they become relevant, and often critical.

If you are tempted to try crafting your own contracts, beware of the pitfalls of removing or neglecting these boilerplate terms. How happy will you be with the apparent cost saving when you later have trouble keeping the other party to the agreement true to its requirements? If you have questions or comments, just note them below and one of our **Virginia business lawyers** will get back to you.

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