Published on *The National Law Review* https://natlawreview.com

Guide to Understanding Anti-Assignment Clauses - Doing Business with Israeli Companies

Article By:

Aaron R. Katz

Introduction

With the increasing trend of globalization in the business world, *Israeli* companies and investors are commonly entering into agreements with U.S.-based entities. One of the most frequently found clauses in U.S. commercial agreements is an anti-assignment provision that prevents either or both of the parties from assigning the agreement to a third party prior to receiving the consent of the non-assigning party. Many transactions will also require the due diligence review of a large number of U.S. commercial agreements that the target has entered into. The following post will provide an overview and general guidance on the proper analysis of anti-assignment clauses.

Silent Provision and Change of Control Provision

In the event that an agreement does not contain an anti-assignment provision, a contract is generally assignable without the consent of the non-assigning party. See ***Peterson v. District of Columbia Lottery and Charitable Games Control Board*****,** 673 A.2d 664 (D.C. 1996) ("The right to assign is presumed, based upon principles of unhampered transferability of property rights and of business convenience.") Exceptions include where the assignment affects the duties of the other party to the contract, where the contract is considered to be a personal contract and when the assignment violates public policy (i.e. tort liability).

On the other hand, many contracts contain provisions that not only prevent the assignment of the contract, but also state that a change of control of the target is deemed an assignment or the contract contains a separate clause requiring consent in the event of a change of control. This type of provision will often be triggered in transactions in which a buyer is acquiring the target company. A careful review of change of control clauses is thus especially imperative and often very fact specific to the deal at hand.

Deal Structures

One of the commonly used anti-assignment provisions reads as follows: "No party may assign any of its rights under this Agreement, by operation of law or otherwise, to a third party without the prior written consent of the non-assigning party." In the situation where the target has entered into

agreements that contain this clause, whether or not an assignment is considered to have taken place in the event of the acquisition of the target will largely depend on the specific deal structure of the transaction.

The commonly used deal structures are an asset acquisition, a stock acquisition and a merger.

- **Asset Acquisition**: In an asset acquisition the buyer only acquires those assets and liabilities of a target that are specifically listed in the Asset Purchase Agreement. Any agreement that has an anti-assignment clause will be triggered in the event of an asset acquisition. Indeed, one of the disadvantages of structuring a corporate acquisition as an asset acquisition is that contracts that will be transferred must be assigned

- **Stock Acquisition**: In a stock acquisition, a buyer acquires a target's stock directly from the selling shareholders. After the closing of the Stock Purchase Agreement, the target will continue as it existed prior to the acquisition with respect to its ownership of asset and liabilities. Thus, in essence, the anti-assignment clause was never triggered in the first place. See *Baxter Pharm. v. ESI Lederle*, 1999 WL 160148 (Del. Ch. 1999).

- **Mergers**: Mergers differ from both asset acquisitions and stock acquisitions in that a merger is considered a creature of law, and the specific type of merger that is used will have a direct impact on whether the anti-assignment clause is triggered

    1. A direct merger occurs when the target merges with and into the buyer, and the buyer continues as the surviving entity. In a similar fashion to an asset acquisition, this type of merger will trigger the anti-assignment clause

    2. A forward triangular merger occurs when the target merges with and into the buyer's merger subsidiary, with the merger subsidiary surviving the merger. This type of merger will trigger the anti-assignment clause. See *Tenneco Automotive Inc. v. El Paso Corporation*, 2002 WL 45930 (Del. Ch. 2002) and *Star Cellular Telephone Company, Inc. v. Baton Rouge CGSA, Inc., 19 Del. J. Corp. L. 875* (Del. Ch. 1993).

    3. A reverse triangular merger occurs when the buyer's subsidiary merges with and into the target, with the target surviving as a wholly owned subsidiary of the buyer. In effect, the target continues to exist after the closing. The Delaware Chancery Court in *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH,* 2013 WL 655021 (Del. Ch. Feb. 22, 2013) held that the acquisition of a target in a reverse triangular merger did not violate an existing agreement of the target that prohibited assignments by operation of law. The court noted that generally, mergers do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after the merger. Thus there is a significant difference between a reverse triangular merger and both a direct merger and forward triangular merger, as in those cases the target was not the surviving company of the merger. Note, however, that the matter is not uniformly resolved. In *SQL Solutions, Inc. v. Oracle Corp.* (N.D. Cal. 1991), a United States District Court in the Northern District of California applied California law and federal IP principles to hold that a reverse triangular merger constitutes an assignment

by operation of law.

Additional Considerations

Damages and Termination: Some courts have held that a contractual provision prohibiting assignment operates only to limit the parties' right to assign the contract (for which the remedy would be damages for breach of a covenant not to assign) but the provision does not limit the power to actually assign the contract (which would invalidate the assignment), unless the contract explicitly states that a non-conforming assignment shall be "void" or "invalid." See, e.g., *Bel-Ray Co v. Chemrite (Pty.) Ltd*., 181 F. 3d 435 (3d Cir. 1999). It is also imperative to review the termination section of an agreement, as certain agreements contain a provision by which the non-assigning party has the right to terminate the agreement in the event of an assignment.

Conclusion

As described above, any review of U.S. commercial agreements is highly dependent on the structure of the deal and at times, the specific jurisdiction governing the agreement. With offices across the United States, and specifically in Delaware, New York, and California, all states with highly sophisticated and oft-invoked commercial laws, Greenberg Traurig is uniquely situated in a position to offer high value legal services to Israeli clients.

National Law Review, Volume VI, Number 35