

## Facilities Management from A to Z



Based on The FM Lexicon by Martin Pickard  
published monthly in Facilities by Lexis Nexis between 2008 and 2016

# N

## ovation

Facility managers who outsource facilities services may sometimes wish to transfer responsibility for a contract from themselves, or a departing contractor, to a new incumbent. The process used is known as Novation.

In simple terms Novation means replacing a party to a contract with a new party. It is a concept that originated in Roman Law and refers to the process by which two contracting parties agree, by consent, to replace one of them with a third party.

Under contract law only the original parties to a contract are bound by and are able to exercise the rights created by that contract. The process of Novation actually changes the parties to a contract such that there is effectively a new contract between those parties on the same terms.

An alternative approach is assignment, where the rights and obligations of a contract are transferred to a new party but the contracting parties remain the same. With an assignment one party can transfer the benefits it expects to receive to a new party who can enforce the performance of those rights directly. The most widespread use of assignment in the construction industry is in connection with collateral warranties. The collateral warranties given by consultants, contractors and sub-contractors are often assigned to subsequent owners or leases.

Assignment is generally permitted unless the contract explicitly forbids it. This is particularly common in the construction industry but can apply in any contract. Attempting to assign a contract that cannot be assigned creates the risk of invalidating the original contract. Where it is permitted the assigning party does not need to consult the other party to the contract.

While the difference between assignment and novation is relatively small, it is an essential one. Assigning rather than Novating could leave one company liable for the original contract while the other party is not liable to perform their obligations.

Under Novation all three parties' agreement needs to be obtained. Rather than the contract being transferred to a new party, the third party actually replaces the outgoing party effectively creating a new contract. The normal principles of contract law apply, namely the requirement for: offer, acceptance, intention to create legal relations and consideration.

*The Chartered Institute of Purchase and Supply (CIPS) provide a number of useful guides on contract law at their website [www.cips.org](http://www.cips.org)*