

client alert

FINANCE | UNITED KINGDOM |

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PLANNED UK REGULATION: *NON ASSIGNMENT* CLAUSES TO BE INEFFECTIVE

Businesses entering into English law governed contracts with their clients could soon be able to assign receivables arising under these contracts despite clauses that restrict the ability of parties to do so. The Small Business, Enterprise and Employment Act 2015 gave the power to the Secretary of State to introduce secondary legislation to tackle this issue. Although there is currently no timetable for its implementation, commentators hope that this change in law could be effective in late 2015 or early 2016.

Assigning receivables has become a common method for businesses to raise finance whether in the context of a securitisation or factoring transaction, more modern peer to peer financings or simply as security for a loan. This can unlock working capital, avoid cash flow problems or enable businesses that lack significant physical assets to gain access to finance.

However, in many industry sectors it has become standard practice to include clauses in contracts that seek to restrict the ability of a party to assign receivables arising under that contract. Typical clauses can require that a party gains the consent of its counterparty in order to assign receivables arising thereunder; more restrictive clauses can ban a party from assigning receivables at all. In the context of a receivables backed financing, these non-assignment clauses can require that a business go through a drawn out process of consulting its clients about its plans to raise finance in order to seek consent under such clauses. Alternatively, if such a process is unsuccessful, this can significantly reduce the pool of receivables against which a business can raise finance, or in the best case scenario substantially change the transaction structure by requiring the business to declare an English law trust over the receivables instead of the more robust true sale of receivables using an English law assignment.

To promote the ability of businesses to assign receivables and to thereby improve access to finance, the previous UK Government successfully passed the Small Business, Enterprise and Employment Act 2015 (the "**Act**"), which gained royal assent on 26 March 2015. Under the Act, the Secretary of State is granted the power to introduce regulations that mean that any "non-assignment of receivables" clauses in contracts have no effect (or at least have no effect in relation to certain parties).

Despite the passage of the Act, no regulation has yet been finalised. This may be due in part to the election of a new Government following the May 2015 UK General Election, which is yet to publish any timeline for the introduction of regulations. The previous Government did however produce a draft regulation (The Business Contract Terms (Restrictions on Assignment of Receivables) Regulations 2015 (the "**Draft Regulation**")), which will apply to any contract for the supply of goods, services or intangible assets. The Draft Regulation is clear that any attempt to restrict the assignment of receivables arising under these contracts will "have no effect". Furthermore, as currently drafted, the Draft Regulation does not refer to the date of the contracts giving rise to the receivable, meaning that the implementation of this legislative change should apply to existing contracts.

The Draft Regulation as published does not nullify non-assignment terms which:

- are for "prescribed financial services";
- involve a consumer acting for purposes outside his trade, business or profession;
- "give rise to a duty of confidence"; or
- provide that the only permitted assignment will be to a "supply chain finance provider".

The last of these exceptions gives the flexibility to the underlying debtor (the client of the seller of the receivable) to only accept an assignment to a supply chain finance provider in the context of a reverse factoring. However, it should be noted that the Draft Regulation is at present a short document that has attracted significant comments from different industry groups including industry representatives, invoice financiers and legal practitioners. The Draft Regulation should be considered as subject to change.

If this legislative change is successfully introduced, the UK would catch up to similar laws adopted in other jurisdictions. In the US, Article 9 of the Uniform Commercial Code similarly renders ineffective any contractual clause that prohibits the "assignment of an account [*being a receivable*] or... creation of a security interest in a general intangible for money due or to become due".¹ In France, Article 442-6 of the French Commercial Code also has a similar effect.

Gide recognises the positive impact that this legislative change could have on receivables based financings and will continue to monitor the progress and development of this important area moving forward.

¹ Explanatory reference in square brackets added by Gide.

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