
Kickstarting SME finance? Government publishes response to consultation on the nullification of contract clauses that ban invoice assignment

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The Department for Business, Innovation & Skills recently published its response to a government consultation on a proposal to nullify clauses in contracts which prohibit the assignment of invoices. BIS's intention is to remove contractual barriers to selling invoices in order to improve SME access to finance and the culture of prompt payment.

What is the problem anyway?

Many SMEs are technically prevented from accessing invoice finance due to non-assignment clauses in contracts governing the supply of goods or services. These may be clauses that specifically prevent the supplier from selling the debt due to it under the contract to a third party financier or clauses that place a general prohibition on assignment of a party's rights under the contract without the consent of the other party.

What is the government proposing?

The government is proposing to introduce legislation which will render ineffective clauses that ban, restrict or impose conditions on invoice assignment in business to business contracts. The nullification of such clauses will extend to all businesses, regardless of size.

Is this the boost that the alternative finance industry has been looking for?

In a word, no. As any invoice financier (or marketplace offering the sale of invoices) knows, the law around receivables financing is complex to say the least (the definitive legal text on this subject runs to over 500 pages ...). The legal and practical issues arising out of financing receivables are usually covered off by voluminous financing contracts and painstaking operational diligence. The particular issue of ban on assignment clauses is already dealt with by a number of legal and operational workarounds (e.g. trust mechanisms), and I suspect that such workarounds will remain, regardless of the proposed changes (to guard against the "just in case" scenarios some lawyers love to cover off).

So this is nothing to get excited about at all?

This is a welcome step in the right direction and may well open up the possibility of invoicing financing to those SMEs who weren't aware that they could raise finance against their invoices. It may well also provide an impetus to the alternative finance community to find technological driven solutions to some of the legal and operational

issues we mention above, as now one of the current obstacles to a frictionless customer experience will have been removed. Perhaps a more effective change for SMEs would be the introduction of tighter regulation of late payment practices often imposed by large companies.

Are there any exceptions?

For the sake of completeness, there are a number of exceptions to the proposals:

1. The nullification of such clauses will only apply to business to business contracts; it will not cover any bans on assignment that might arise in business to consumer contracts;

2. Specific business to business contracts will not be caught by the ban including financial services contracts (including banking, insurance, financial trading and broking contracts, as the functioning of some financial market products are dependent on non-assignment) and contracts creating interests in land (so as to avoid interfering with existing laws and practices); and

3. The nullification will only apply where the parties conduct a business to business transaction using English contract law and one of them carries on business within the UK (companies carrying on business abroad using English contract law will not be caught by the new rules).

How will the changes be implemented?

The Small Business, Enterprise and Employment Act 2015 gives the Secretary of State the power to introduce regulations to invalidate anti-assignment clauses. Draft regulations (The Business Contract Terms (Restrictions on Assignment of Receivables) Regulations 2015) (the "Regulations") were published together with the consultation.

The nullification of clauses banning the assignment of invoices will begin from the commencement of the Regulations which BIS have indicated will come into force in early 2016 (once they have been amended to reflect the outcome of the consultation). The new rules will not apply to contracts retrospectively.

For more information, the draft Regulations and other consultation documents are available via Invoice finance: nullifying the ban on invoice assignment contract clauses.