



Why the proposed UK regulation prohibiting non-assignment clauses is bad

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Summary

If you want to object, you have to act immediately

The Government is proposing to pass a regulation within the next week or so which will **nullify clauses in contracts which prohibit or restrict assignments** of receivables arising under the contract. It will also **nullify confidentiality and other clauses** which prevent an assignee from getting detailed information about the contract. So you will not be able to stop assignments or disclosures to any third party coming into your contract, such as debt factors or competitors anywhere.

The regulation will not apply (mainly) to contracts for financial services or for land or for the sale of shares or a business.

It **will apply to all other business contracts** where broadly one party is in the UK. So it will apply for example to project contracts (such as construction, power purchase, supply and pipeline agreements), to sale agreements of all kinds for goods or services, including bulk and long-term sale agreements and including oil, electricity and data, to charterparty, lease and hire agreements, to custodianship and warehousing of goods, to joint venture and collaboration agreements, to agreements and licences involving intellectual property and know-how, to technology agreements, to outsourcing agreements, to media and publishing, to network agreements of all kinds, including satellite and cable capacity agreements, and all other kinds of commercial contracts, big or small. It is unclear how the regulation would apply to hybrid contracts with a financing element.

Parties to contracts often wish to limit assignments by the other party for legitimate reasons, eg to preserve the business relationship, to prevent the receivables coming into the hands of an aggressively hostile party or competitor, to protect the brand, to preserve confidentiality, to protect the ranking of security, to discourage the trade in litigation claims and to ensure that an incoming party is bound by the obligations. The ban will also interfere with set-off and netting as against assignees.

The original intent of the Small Business, Enterprise and Employment Act 2015 under which this regulation is to be made was to allow small businesses to engage in invoice financing, eg of supermarket debts. Now however the scope is extended to all contracts other than those which are excluded.

We think this regulation is bad. It discriminates against the industrial, commercial and technology sectors. It damages the stability of project contracts, eg energy and infrastructure projects. It interferes with freedom of contract for no good reason and is injurious to the reputation of English law. It encourages business to use other legal systems. It is grossly disproportionate and seems anti-business. It comes at a particularly unsuitable time. It also weakens netting.

For a summary of points, see page 5 below.

We believe that the initial and subsequent consultations have been inadequate. **If you wish to object**, you should write to Mr Francis Evans at francis.evans@beis.gov.uk who is handling the draft regulation or to your governmental contacts or MP or to your trade association. **The department has requested comments by mid-week so you should act immediately.**

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Why the proposed regulation prohibiting non-assignment clauses in contracts is bad

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1. Purpose

This note deals with what we understand is the current draft Business Contracts Terms (Assignment of Receivables) Regulation 2018 proposed imminently to be enacted under the Small Business, Enterprise and Employment Act 2015 (both attached). The regulation nullifies a term of a contract which prohibits the assignment of a receivable under that contract or imposes a condition or other restriction on the assignment. The main exclusions are contracts for financial services, for land or for the sale of shares or a business.

The note explains why in our view the proposed regulation is unsatisfactory.

The draft regulation has been the subject of objections and piecemeal amendments over many months. Our conclusion now is that it will not be possible to meet the objections unless the regulation is targeted specifically at small business invoice factorings instead of all commercial contracts, big or small.

We believe that the initial and subsequent consultations were inadequate.

2. Summary of why the regulation is bad

- The regulation is injurious to English law.
- The Act was intended to facilitate the sale of invoices by UK small businesses to factoring finance companies. It should be limited to those situations.
- The fact that the regulation strikes at major business contracts is grossly disproportionate.
- The regulation is anti-business.
- The regulation discriminates against the industrial, commercial, project and technology sectors, amongst others

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- English law is an international public utility and one of the two most important systems of law in the world used internationally. The regulation encourages people to use other systems of law.
 - The regulation risks interfering with set-off and netting both of which are a characteristic and fundamental risk reduction technique under English law.
 - The regulation would override clauses preventing assignment to a competitor or activist fund or a hostile party or other interloper.
 - The regulation interferes with the freedom of English business contract law.
 - The regulation overrides confidentiality and other clauses which prevent third parties, including competitors from getting full details about the contract. This could effectively be an expropriation of private know-how. See para 22 below.
 - Assignment and confidentiality clauses are in principle normal and reasonable in major contracts in which they are used.
 - The forced nullification of standard clauses in major contracts is inconsistent with the ideology of English law.
 - We do not believe there is evidence of abuse of contract freedom on this point in the case of business contracts generally. Claims of all kinds are by far the most liquid and accessible class of collateral.
 - The regulation is full of holes, uncertainties and unpredictability.
 - The regulation is legalistic and labyrinthine, another impenetrable contribution to the pile. English law is expected to be clear and common sense.
 - The forced nullifying of non-assignment clauses is accepted by only a tiny minority of significant countries. See para 25.
 - The claim that these measures will miraculously conjure up huge quantities of money for small businesses from debt factors can be tested in the real world by trying it out – with real life small businesses.
 - Invoice factoring is a niche old economy business. Factors should not be permitted to dictate the terms of English law contracts or to nullify confidentiality clauses so that information can be divulged to them.
 - The timing is terrible.

We deal with some of these points in more detail below.

3. **Small business invoice factoring**

The main aim of the Act was to facilitate the factoring of receivables owned by small businesses so that they could raise finance. This is how it was sold to Parliament.

The factoring of receivables – or invoice financing – is an old economy technique. A supplier sells goods to a distributor. The distributor owes the price to the supplier. The supplier sells its right to this price to a finance company and thereby gets paid immediately for a debt which the distributor may not pay for months. The amounts involved in this factoring, or invoice discounting as it is sometimes called, are miniscule compared to financing generally.

The factoring of invoices by small businesses would be tiny. The Regulatory Legal Assessment said that the net present value to the economy to the industry would be \$966m. By way of contrast, the flows in the international foreign exchange market are around \$1500, trillion a year, that is, \$ 1500,000,000,000,000. So factoring is, say, around 0.0001 per cent of the foreign exchange market, give or take a nought or two. One is therefore perplexed why those active in the foreign exchange market should have to work their way through the over-complicated regulation to see if they are exempt (which they probably are, but you have to spend a lot of time working that out). Why should invoice factors insist that they are allowed to override confidentiality clauses to obtain full details of contracts? This is not just the tail wagging the dog. It is the speck of dust on the hair on the tail of the dog which is wagging the dog.

The regulation should be drafted specifically to deal with small business receivables of small amounts, not all receivables. If all receivables are caught, then there have to be endless carve-outs which will ultimately never be satisfactory.

The Minister made it clear to Parliament that the intent was to facilitate small business factoring. He said, “some business contracts contain a barrier that inhibits small businesses from accessing business financing... The clause will attack that specific barrier” (Hansard 21 October 2014). This sole intent should be honoured in the regulation.

Small businesses are important to this country. Some of them will end up as big businesses so it is fair to help ensure that they have access to finance. We are not too sure that invoice financing is the answer to all their problems instead of straight-forward finance, such as bank loans, nor are we persuaded that the power to make regulations should be exercised at all at this stage. Nevertheless, if the Government is intent on making the regulation, we think that the wishes of those who want small businesses to receive this protection can be accommodated as set out below.

4. What the regulation should say

Amongst other things, the contracts should be limited to contracts between commercial parties, one of whom is a clearly defined small business and both of whom have their registered office and chief place of business in England etc. The receivables should be limited to a low amount appropriate to small businesses. A quantitative limit is essential as a clear divider, as in the Consumer Credit Act. The assignor should be the small business. The assignee should be limited to finance factoring companies or the like or the assignment should be for the purposes of invoice financing only. It should be absolutely clear that the regulation does not intrude on the wholesale sector or other important sectors of the economy.

If the regulation specifically targets the above, it would meet the intentions of Parliament, satisfy small businesses, keep most other people happy, avoid long and complex lists of exclusions, and honour the fundamentals of English law.

5. The role of English law

English law is an international public utility. The shares of English and New York law of the largest international commercial and financial contracts are probably together about 80 per cent by amount, in roughly equal proportions. The use of English law confers hard and soft power and enhances the goodwill and reputation of the country. This is because of the overwhelming importance of law in our societies as the anchor of civilisation. English law is probably the country's greatest export after the language.

The legal system is the foundation of the legal systems of about 40 percent of the world's jurisdictions. This provides a common link with between a third and a half of the world.

It is therefore fundamental that nothing should be done which is injurious to English law unless there is some overwhelming reason to do so. It is disproportionate that a statute intended to ease factoring by small businesses should interfere so intrusively with contracts generally.

It is common knowledge that many people abroad have expressed a loss of confidence in English law (wrongly in our view). This is therefore not a good time to throw pebbles into the cogs.

Our firm gives large numbers of formal legal opinions on very large transactions. So daily the firm and other international firms will have to announce to an incredulous world that there are problems for our legal system stemming from a small business statute.

The regulation directly undermines the campaign launched by the Ministry of Justice in the last few weeks called "Legal Services are GREAT" which extols the pro-business stance of English law.

The use of English law produces large taxable revenues and is beneficial to the UK economy.

It cannot have been the intention of Parliament in this case that the regulation would be injurious to English law.

6. Choices which legal systems make

Legal systems have to make hard choices between competing policies – in this case between the forced marketability of receivables, as against freedom of contract, predictability, and the protection of set-off and netting and other values. English law has consistently made its choices in favour of the latter. We deal with this point more generally later.

In this note we are primarily concerned with business to business contracts, not contracts with consumers. Most advanced jurisdictions accept that legal policies apply differently as between retail and wholesale. The dividing line should be clearly maintained without creep.

7. Freedom of contract and assignability

Outside consumer protection and the like, one of the fundamental underpinnings of English business law is freedom of contract, except where manifestly abusive. One consequence is that parties are allowed to express their intentions in the contract within reason and then the courts will enforce what they have agreed unless this violates some basic policy or is unconscionable. Contract law is free and not despotic, nor is it subject to some sectoral or fringe policy. This liberty is a cornerstone of the English legal ideology.

The regulation is inconsistent with English law. It is this type of uncharacteristic intrusion which makes a legal system seem dangerous and arbitrary. People don't trust legal systems which nullify ordinary and routine clauses which are terms they have agreed to and which are legitimate.

Controls on assignments are common in large contracts and are entered into for good reasons, for example:

- A party may wish to control who its contract counterparty is to ensure that the contract does not come into the hands of an unfriendly or harsh assignee. The assignee may be unrestrained by a good relationship with the debtor.
- The assignee may be a competitor.
- The assignee may be an aggressive hedge fund determined to exploit the control which creditors have over insolvency or break-ups or to frustrate a deal by acting as a hold-out creditor.
- Some people don't want to be called up by a debt collector or told that they now owe the money to a special purpose vehicle in the Cayman Islands.

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- Parties often wish to keep the contract together without splitting it up by the intervention of a third party.
 - In the case of brands, the identity of the counterparty is crucial.
 - In other contracts it is also crucial that the counterparty should be a regulated entity, e.g. in the case of pharmaceuticals.
 - The debtor may wish to ensure that the mutuality required for set-off on insolvency is preserved.
 - The debtor may wish to avoid confusion about who to pay and the risk of fraud.
 - The debtor may wish to preserve confidentiality. Businesses are entitled to privacy. See para 22 below.
 - The debtor may wish to ensure that there is no breach of embargoes or sanctions, eg paying an assignee who is sanctioned, or that there are no money-laundering problems.
 - The assignment may attract a withholding tax and oblige the debtor to gross-up.
 - Assignability may make it easier to characterise a claim as covered by the rigours of securities legislation (which is typically aimed at transferable claims).
 - Debtors do not wish to encourage the traffic in litigation claims.
 - Debtors may wish to have a say in what type of business they have a relationship with, e.g. not businesses of which they disapprove (alcohol, tobacco, nuclear, climate, etc.).
 - The debtor may wish to ensure that the receivable goes to the intended recipient, especially where there is a chain of contracts. Chains are extremely common, e.g. an employer of a construction contractor pays the contractor who pays sub-contractors. A buyer pays an agent who pays the principal. A sub-charterer pays the charterer who pays the owner of the ship, ditto for all kinds of leases of chattels. A sub-buyer pays a buyer who pays the seller. So it is debtor to creditor to next creditor to next creditor. You can get chains on chains. The essential purpose is to keep the chain from being broken by an outsider, such as an assignee. The break in a chain can cause domino or knock-on or cascade insolvencies because the first recipient sold off its money and so the next in the chain never gets it. The channelling of proposals, e.g. in projects, is often key.
 - The debtor may wish to ensure the continuing financial stability of the creditor so that it does not carelessly raise money on its assets by disposing of them and then squandering the proceeds.

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- The creditors may wish to ensure that the debtor who has granted security over the contract does not assign to a second assignee who could trump the priority of the first assignment or interfere with the first security interest, e.g. by insisting on a premature sale.
 - There may be several parties who wish to keep the club together without the intervention of outsiders, e.g. in a joint venture agreement.
 - Non-assignment clauses are essential to stop a charge being a floating charge after the *Spectrum* decision.
 - The debtor may wish to make sure that the incoming assignee of the rights to the receivable is bound by the obligations under the contract owed to the debtor. This is achieved by an accession agreement, i.e. the creditor can assign but only if the assignee agrees to be bound by the obligation in the contract – it can't cherry pick the rights, have the cherry but ignore the pip.
 - Many non-assignment clauses include “reasonableness” criteria.

It may be that the legislator was thinking primarily of very simple contracts which have been fully performed and where only the price is owing, payable in 30 or 90 days, or something like that. These simple contracts just resolve themselves into a debt. But contracts also include a multitude of complex and continuing contracts where it is not feasible to unbundle the payment and ignore the other terms of the contract, e.g. which may give rise to defences and which have other continuing obligations. Life is not that basic in the real world.

Most contracts contemplate two-way payments, ie payments by each party to the other, such as the price payable by the buyer but damages for delay payable by the seller. Hence there is a separate case for judging the legitimacy of the ban on assignments in relation to each party. The unrestricted sale of damages claims is particularly susceptible to abusive trading in litigation claims.

Freedom of contract is one of the main attractions of English law.

In addition English law places a high value on certainty and predictability.

8. Degree of abuse

We do not believe that there is evidence of a widespread and systemic abuse of assignment restrictions in business contracts generally.

Attempts by, say, supermarkets to prohibit assignment by suppliers of the right to payment are not in our view a good enough reason to prohibit non-assignment clauses for all non-financial contracts. In other words, a prohibition intended to protect creditors with low bargaining power should be limited to the people you are trying to protect.

We are doubtful of claims that the measure will miraculously unleash large amounts of untapped funds for small business or anybody else for that matter. Small businesses need start-up finance – when they do not have receivables to finance. Once they have enough receivables to make factoring worthwhile, they would not be small businesses anymore and will have improved bargaining power. We suspect that the factoring of some 30 to 90 day receivables is not going to suddenly transform the scene economically. The political promises made may then backfire as just another empty political gesture. If that is true, there is even less reason to interfere with contracts generally outside the small business sector. In any event the claim can be tested – by applying the regulation only to small businesses and seeing what happens.

As we show later, factoring of receivables by large businesses is often irrelevant.

The financing of receivables in bulk is achieved by a much more sophisticated successor to niche factoring – securitisations. It is these – with their access to bond markets – which can unleash large amounts of finance alternative to bank loans.

If we take financial receivables into account, it is clear that receivables – meaning money claims in general – are exceptionally liquid and exceptionally eligible to act as collateral for finance. In this respect they vastly out-distance the stickiness, costs and illiquidity of land and the unsuitability of most classes of ordinary goods. An example is the ability to transfer securities, such as traded bonds and shares, almost instantaneously.

Those who are owed bulk receivables – for example, electricity or water or telephone companies, companies which lease cars or hold consumer receivables or banks which lend money secured against residential mortgages – generally make sure that their receivables are assignable if, for example, they want to securitise them.

So it is not as if huge quantities of receivables are locked up. They are the most accessible asset class for collateral.

9. **Set-off and netting**

Set-off and netting in English law have to be absolutely bullet-proof. They can lead to a phenomenal reduction in risks – over 90 per cent sometimes. The amounts involved in international markets are colossal. The protection of set-off and netting has been the policy of successive governments since as far back as we can remember. The law is not supposed to wobble on this. But now they may not be bullet-proof. Some points are:

- **Wagging the dog** It has already been remarked that the annual flows through the global foreign exchange markets are about \$1500 trillion, that is, \$1500, 000,000,000,000 and that the amounts involved in small business invoice factoring in this country is a tiny percentage of this

amount. And yet those who deal in foreign exchange markets will have to read the statute and regulation about small business factoring to see whether they are in or out.

- **Carve-out statutes** It has always been an iron-clad policy in this country that set-off and netting would be clearly available, in all cases universally, without doubts or legalistic niceties. In particular the international community did not have to read an impenetrable carve-out statute to see if they are protected. There are a large number of these statutes around the world, especially in countries which do not allow close-out netting on insolvency. They typically list the contracts where close out-netting is allowed. These carve-out statutes are an international nightmare – everybody has a different list. How does the trader at the trading desk work it out?
- **Complexity** Complexity increases risk. In the end international users shrug and say that English law is not up to it anymore.
- **Close-out netting** Close-out netting must be bullet-proof against interveners such as assignees. The first line of defence is to prohibit assignments. If a creditor assigns a debt, then the debtor cannot set off against this debt in the insolvency of the creditor because the claims are no longer mutual. The debtor has to be able to set off against the intervener outside the compulsory insolvency set-off of mutual debts on a UK insolvency. The circumstances in which this can be done are incredibly complicated, even for specialists, and there is no way that ordinary businesses can be expected to take them on board. This is so especially in light of the different classes of set-off and the fact that rights can be cut off after notice of assignment. Since the notice can be received quite casually in another part of the business or read in the newspaper or imparted on the golf-course, so there can be no security or certainty that the set-off is preserved against the intervener.
- **Neutering of defences** We discuss below whether the wide wording of the prohibition on restrictions on the assignee getting paid might annul set-offs which dilute the payment – including transaction set-offs (such as damages), contract set-off and independent set-off where the claims are independent of each other.
- **Central counterparties** The excluded contracts do not appear to cover expressly some major multilateral set-off and netting arrangements outside settlement systems for financial assets, for example, an exchange for metals or commodities. Because the Act expressly excepts settlement systems only for financial assets, would settlement systems such as that used by the London Metal Exchange and the various commodity exchanges, e.g. for Brent, sugar, cocoa, etc, still be caught by the regulation? These arrangements usually involve the use of a central counterparty which acts as the intermediary on all market contracts so as to mutualise contracts between the central counterparty and an insolvent. Thus when a contract is entered into

between market traders A and X, the contract is immediately transformed into two mirror contracts whereby trader A sells to the central counterparty and the central counterparty sells to X. In this way all the market contracts are mutual between the central counterparty and X which would not be the case if A, B, C, D etc all contracted directly with X. The central counterparty can close out and set off against X if X defaults.

The central counterparties must ensure that the settlement members do not assign the claims they are entitled to in order to ensure that the claims remain mutual. Clearing members who act on behalf of outside clients must also ensure that the outside clients do not assign their contracts in the chain. The relationship between the clearing member and the central counterparty must also be principal to principal (to ensure set-off mutuality if either should become bankrupt).

Central counterparties lead to an enormous concentration of risk and hence the set-off and netting that they perform across a whole market is systemically important.

Some settlement systems are protected by the Settlement Finality Directive 1998 as amended. Are the commodities exchanges within the Directive? Does the Directive validate netting against an assignee? Even if it did, would there be questions as to whether the Settlement Directive implementation was overridden by this new regulation as regards new contracts? We reserve on those issues, but we should not have to ask questions like these.

- **Other netting schemes** Other examples of multilateral netting are inter-group commercial payments or the netting of aviation payments between airlines or railway companies or indeed any other netting scheme which relates to any kind of commercial contract other than financial assets. We suspect there are many such multilateral systems in particular industries (eg between tour companies or travel agencies?).
- **Bilateral set-off** The regulation should not prejudice bilateral set-off and netting agreements between parties trading non-financial assets or performing non-financial services. Trade in goods of all kinds - from oil and metals through to consumer goods - is an important part of the UK economy and traders often build up reciprocal claims between themselves. About 75 per cent of the UK GDP is for services and much of this is non-financial.

These problems are good examples of why it is disproportionate to elevate the ease of factoring by small businesses over the above dangers.

Set-off and netting are considered so fundamental that they are specifically safeguarded in the EU Bank Recovery and Resolution Directive 2014/59, reflected in the UK version.

10. Excluded contracts

The technique adopted by the regulation is to apply the nullity of the clause to all contracts and then to exclude those not intended to be caught. This is the carve-out method – ban everything and then allow a few exceptions with reluctance. The result is an intricate and higgledy-piggledy list and a massive increase in the complexity of the legal system and the uncertainty of interpretation.

Contracts for financial services are the biggest class of excluded contracts, as they should be. By common consent it is recognised that the non-assignment ban should not impinge on bank loans, securities trading, derivatives and the like. The question which then arises is, if it is right to exclude financial contracts, why is it wrong to exclude other large business contracts where identical policies apply? Why does the regulation discriminate against other areas of the economy (outside small business invoices)? Why for example should a contract for the transport of nuclear waste be controlled, restricted and neutered while a contract for a small loan to Cornish Pasties Ltd is free?

Contract is everywhere. No matter how hard you try, it is impracticable to cover every type of contract in an exclusion list. There already are about 70 express exclusions in the regulation and you could easily double or triple that and still not get there. In addition it is not possible to cover future types of contract. Experience of carve-out statutes internationally shows that the list is almost always out of date as soon as it is enacted or leaves out something crucial. Carve-out statutes are common internationally and they often show that the country is not able to make up its mind. They are fudged compromises, blurs, mud in the water.

Contract stability is essential to investment in this country – including investment in energy and infrastructure.

11. Non-excluded contracts

We examine a few examples of contracts which are not excluded or where it is unclear whether they are excluded or not. We think these examples are only the tip of the iceberg.

A legal regime which is hostile to reasonable contract freedom ultimately discourages investment and enterprise and is harmful to the economy. Contract is the legal foundation of enterprise.

12. Project contracts

Project finance is the usual way in which large projects are carried out for power stations, roads, railways, bridges, hospitals, pipelines, mines, refineries and the like. In the simplest form, the banks lend to a specially formed company owned ultimately by the sponsors which builds the project. The banks rely completely on the project to get paid. Thus in a power station project, a gas producing company supplies the gas or other fuel for the electricity generators and the project company pays for the fuel out of the sale proceeds of resulting electricity to an electricity distributor. The surplus received

by the project company from the sale of electricity is used to pay back the banks plus interest. Nearly all major infrastructure and other major enterprise developments adopt this basic model. In these projects contract is king.

The following is a typical list of the non-financial agreements, i.e. other than the bank loan agreement with the project company and the accompanying security documents whereby the project company charges all its assets and in particular the project contracts to the banks to secure the loan:

- Construction contracts
- Agreements auxiliary to construction agreements, e.g. performance bonds
- Engineering agreements
- Power purchase agreements and other off-take agreements
- Mineral or oil or gas purchase agreements
- Pipeline agreements
- Tolling agreements
- Take or pay agreements
- Supply agreements to build the project, e.g. equipment, generators, materials for construction
- Supply agreements to operate the project, e.g. for fuel
- Sponsor technical services agreements, e.g. expertise, secondments
- Production agreements
- Completion undertakings
- Equity agreements
- Joint venture and shareholder agreements
- Operation and maintenance agreements
- Guarantee of environmental risks
- Sponsor or management support agreements, e.g. as to warranties and permits
- Purchase of tax loss agreements
- Electricity grid agreements

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- Pipeline connection agreements
 - Government concessions and licences
 - Collateral warranties
 - Direct agreements allowing the lenders to step into a contract on default.

These project contracts exhibit the extraordinarily wide range of contracts in a straight-forward and routine project financing. The finance documents under which the banks agree to lend to the project company are excluded as financial contracts from the regulations but the others listed above are not (usually).

In some cases the project company is owed a receivable, as by an electricity buyer, and so the debtor is not allowed to assign away money used to pay for the fuel and to pay the banks and already charged to the banks. The banks must be able to stop the project company from assigning the receivables a second time to somebody else who is not bound by the intercreditor and subordination agreements and could therefore disrupt the project.

In other cases it is the project company who pays to a contractor, such as the construction contractor, and here the intent is that the parties should not allow others to interfere in this small and tight club of parties by assigning a receivable to an outsider to the potential detriment of the others.

Some of the reasons that these project contracts should not be caught by the regulations include (1) the contracts are charged to the lenders, the project company is already financed and therefore factoring is irrelevant, (2) the contracts are far too complex for invoice financing, (3) it is essential to ensure that outside third parties and assignees do not interfere with the project or its security and are, for example, subject to the intercreditor and subordination agreements, and (4) the project company must honour its commitments not to raise other finance or dispose of its assets in order to sustain the project economics and keep the project bankable.

The proposals prejudice new innovative structures for nuclear and off-shore wind projects and could inhibit infrastructure investment.

It is clearly wrong that proceeds cannot be locked-in in the case of nuclear and offshore wind decommissioning agreements.

13. Sale agreements

Sale agreements for non-financial assets are caught by the ban on non-assignability clauses. Outside financial assets, the assets could be pharmaceuticals or medical devices. They could be cars or tractors or caravans or oil rigs, ships or aircraft or railway rolling stock. They could be steel girders or copper wire or diamonds. They could be gravel or timber. They could be large machines or computers or

washing machines or rocketry or defence weapons, or space platforms. They could be for cotton or chemicals or gas or oil. They could be very large contracts covering consignments of toys or phones or televisions.

They could be contracts for the supply of electricity or water or data or phone networks, including large distribution or grid contracts.

They could be for the sale of a non-financial service, such as construction or administration or the law or accounting or engineering or management consultancy or medicine or computer software or running an office IT system or providing other technology or research or education or training or haulage or rail franchise or a courier service or advertising or films, music, television or broadcasting or publishing or logistics or printing or a labour or recruitment agency.

The contracts could be for franchises or distributorship where the parties should be left to put in their own clauses about whether or not assignments are restricted.

The contracts could be contracts regarding the sale or lease of capacity for technology or phone infrastructure, such as cable capacity, satellite capacity or network agreements, including network service agreements for infrastructure.

The contracts could be manufacturing agreements where considerable reliance is placed on the identity of a counterparty.

Again, these contracts are not generally excluded but financial contracts are. Many of them could involve bulk consignments worth millions. Some are long-term agreements. Why should these contracts not have the same freedom as is shown to financial contracts? Apart from the points as to freedom of contract, protection of set-off and the like, other reasons that many of these contracts should not be caught by the ban on non-assignment clauses include:

- The parties are large businesses which finance themselves by large unsecured bank syndications and bond issues. They do not normally use factoring which is a form of secured financing in substance. Indeed their bank loans would normally prohibit this type of title finance as part of a negative pledge. So factoring is irrelevant to them.
- The receivables under many of these contracts are not suitable for invoice financing, such a franchise agreement or a complex long-term sale agreement or a recruitment agency contract.
- The ban is discriminatory against the industrial and infrastructure sector.
- The parties have equal bargaining power to decide whether or not to impose restrictions on assignment by the other.

Similar remarks apply to all of the other examples of contract classes mentioned below.

How does the legislation work out who should be free and who should not be free?

14. Lease and hire agreements

The contract or charterparty could be for a huge range of non-financial assets – ships, aircraft, machinery, practically every asset mentioned above in the sales list.

15. Custodianship and warehouse agreements

The contract could be for the custodianship or warehousing on non-financial assets, such as commodities or just about all the assets available for sale.

16. Intellectual property and know-how

The contract could relate to the sale or licence of patents, trademarks, copyrights, designs or know-how. Intellectual property and know-how are often a major element of all kinds of sales agreements, collaboration agreements, joint venture agreements and manufacturing agreements. Often the payments in respect of the intellectual property and know-how go two ways, e.g. licence fees payable by the licensee to the owner of the intellectual property or know-how and payments from the owner to the licensee to fund a collaborative project. Often the licences themselves are contributed by each party reciprocally. These situations also involve technology agreements relating to the use of IT. In many of these situations, the brand of the parties is fundamental and the parties would not wish to permit the intervention of assignees.

In practice, receivables are not usually naked except in the simplest of cases. They typically attract the whole of the contract which gives them life and meaning and you cannot realistically separate the receivable from the contract. As mentioned, this is true of anything other than a simple debt due under a short-term contract which has been performed in full.

17. Joint venture agreements

This head comprises a straight joint venture agreement between corporations for a project or other enterprise. It also includes network agreements for electronic communications, railway agreements for the sharing of a rail network, airport agreements regarding slots and airport usage, even agreements establishing a trade or professional association receiving membership fees. It includes partnership contracts. The parties would be surprised to find themselves caught by the Small Business etc Act 2015.

18. Government contracts

Governments can and do often act in a commercial capacity, as is recognised by state immunity legislation. The theory is that if governments descend to the market place, they are subject to the law of the market place. They might therefore be acting for the purposes of a “business” and so be caught (see regulation 1(3)(c)).

19. **Blockchain and new technologies**

Blockchain (which is not just for cryptocurrencies) and other new technologies will search for a legal system. They can't just exist in a legal vacuum. One imagines that they will want a legal system which is as free from as much interference as possible.

20. **Marginal agreements with contracts for financial services**

The contract could be marginal between a financial contract and a non-financial contract. There will be many such agreements on the border line. Consider the following:

- **Long payment receivables** Practically all contracts involve a debt of some kind and very commonly an agreement to postpone the debt so that there is practically everywhere a degree of financing. When does a postponement of payment after performance become financial?
- **Guarantees and commitments** The excluded financial contracts include “guarantees or commitments”, This presumably means guarantees of financial contracts because otherwise a guarantee of, say, the price of a sale of goods contract could restrict assignments of the guarantee, thereby frustrating the purpose. Some contracts are not guarantees or commitments in respect of financial services. An example is a performance bond in respect of a construction contract or a trade letter of credit which is really the payment of the price of sale of goods. The UCP only allows assignments of proceeds. Another is a completion undertaking given by the shareholders of a project company to the banks to ensure that the project is completed. A third example is an agreement by a parent to maintain its ownership interest in a subsidiary as comfort that the subsidiary will pay a creditor - often called a comfort letter.
- **Hybrid title finance** Virtually all the assets mentioned above can be the subject of a repo or a forward purchase agreement or a lease or hire-purchase or a conditional sale or retention of title or a sale and lease-back. Some of these are clearly financial. But a great many are not financial or are on the border line or are hybrids.
- **Other hybrids** Other examples of hybrids are take-or-pay contracts (where the buyer has to pay regardless of whether it receives the product, such as electricity) or forward purchase contracts for goods, such as oil. These contracts are typical of projects but not exclusively. Another is a joint venture agreement which typically contains provisions as to the financing of the venture.
- **Bundled contracts** Many contracts have a financing element, such as finance for a car sale. How does one treat an agreement which is an inextricable blend of the financial and the commercial?

-
- **General** Generally we believe there are numerous contracts where it is not possible to characterise the contract as financial/non-financial or even land/not land.

These examples demonstrate the excessive tightness of the language in the draft regulation of the exclusion of financial services – the exclusion is currently limited to “a contract *for* financial services” as opposed to a contract “in connection” with financial services or a contract which “comprises” financial services. Is a bond really a contract for financial services?

21. Contract, property and non-contract claims

We reserve the issue of whether it matters that contracts are different from transfers of property, whether by way of sale or trust or security interest. We also reserve on the issue of non-contractual receivables, in particular whether the nullification of non-assignment clauses in a contract could prejudice assignment restrictions in relation to matters connected with a contract, such as tort claims.

We think there are issues as to whether, say, a security agreement is or is not a contract within the Act and regulation and whether an accompanying agreement, such as an intercreditor or subordination agreement, would be in or out. In addition, there is no express mention of repos or hire-purchase or collateral transfers of the type contemplated by the ISDA master agreement and you have to fall back on general wording.

22. Confidentiality and restrictions on other clauses

The regulation nullifies a confidentiality or other clause which prevents an assignee, such as a debt factor or a competitor, from obtaining various details about the contract such as a description of the goods, services or intangible assets covered by the contract, the amount of any discount, unit prices, evidence of any performance and particulars of any potential defence or set-off by a party to the contract (any party). Various VAT details are included in the unprotected information: see regulation 2(2). Confidentiality clauses are standard in many of the contracts listed in previous sections. We do not think this override of normal confidentiality provisions is acceptable. Businesses are entitled to privacy. Some information may be price-sensitive. It is wrong to force disclosure of confidential information to private parties.

The prohibition also extends to a term of a contract which does not just prohibit an assignment but also one which imposes a condition or restriction on the assignment. No doubt this was mainly intended to cover, for example, requirements for debtor consent to assignment and restrictions of assignment to anybody other than named parties. But it could also go further and cover anything which interfered in the assignee’s full possession of the right to be paid the whole receivable.

Examples might be:

- A right to set off against the creditor or a right to set off against an intervener, such as an assignee. See above
- A right to deduct from non-performance by the creditor
- A right to terminate a contract on an event of default or termination event
- Any other defence to non-performance by the creditor claiming the money
- A right to restitution
- A right to cancel the contract for force majeure
- A right to cancel the contract for fraud
- A right to cancel the contract for total failure of the creditor to perform
- A flawed asset, that is, a right to withhold a payment if the debtor does not get paid so that the payment is conditional

The potential nullification of all these legitimate rights is obviously overkill.

Whether or not the above are caught is a matter of subtle interpretations between a wide and narrow construction. Business contractors don't expect that English law will unnecessarily involve them in this kind of legalistic hair-splitting interpretation.

23. Negative pledges and anti-disposal clauses

A negative pledge is a clause which prevents a debtor creating security to another creditor so as to subordinate the first creditor or an anti-disposal clause is a clause which typically prohibits a debtor from disposing of all or a material part of its business. Negative pledges also typically extend to outright disposals typical of title finance.

A typical further clause is a prohibition on substantial disposals.

Both clauses are standard in unsecured bank term loan agreements - which are intended to be exempt.

But they can legitimately appear in other agreements where the credit of the debtor is important or where the creditor does not wish to be subordinated to other creditors of the debtor who take security. It makes no sense to ban the clause in one type of agreement but not another.

24. Governing law and territorial links

We do not believe that the precatory provision in regulation 1(3) nullifying an evasive choice of a foreign governing law is appropriate. This clause is a symbol of the despotic dark days of 1977 when it

was used in an English statute. People are allowed to choose another legal system if they do not like what is on offer. In fact they do this all the time, subject to some really basic principles. It is called freedom.

Statutes like this might override the chosen foreign governing law so that a choice of a foreign governing law has to take into account the question of whether effectively legislation of this type is extraterritorial.

We do not see why the regulation should apply to contracts where UK purchasers buy from overseas suppliers.

Nor should UK exporters have to explain to customers that a normal contract term is not allowed.

The UK territorial links are too vague and tenuous.

25. Position in other countries

Our present research so far shows that only a tiny minority of significant countries accepts the proposals embedded in the regulation.

We believe that one of the origins of the ban on non-assignability may have been Article 9 of the US Uniform Commercial Code which deals with security interests and which outlaws non-assignment clauses in some contracts. The US policies of Article 9 are poles apart from the UK policies on security interests for various historic reasons (as indeed is the case in many other areas of private law). Article 9 is a creature of the late 1940s when security interests in the US were very poor – quite unlike the position in England.

There are versions of Article 9 elsewhere in the common law countries, notably Australia, New Zealand and most of Canada. We believe that most, if not all, of the Commonwealth statutes concerned allow the debtor to claim for breach of a non-assignment clause so the prohibition is not convincing. Also Saskatchewan, Queensland and New Zealand do not have a global legal reputation to protect, nor are those legal systems used by the international community generally for major contracts.

According to a quick straw poll which we carried out recently, some other countries – a tiny minority out of nearly 200 countries – also restrict non-assignment clauses, e.g. France and Germany, but not Belgium, the Netherlands, Italy, Spain, China or Sweden. Japan allows the debtor to continue to pay the assignor if the assignee knew or should have known of the prohibition. We have not checked whether two regional aspirants for the status of an international governing law, namely Hong Kong and Singapore, have this restriction but for the moment we doubt it.

The UN Convention on the Assignment of Receivables in International Trade 2001 never came into force – it was ratified only by Liberia.

The Unidroit Convention on International Factoring of 1988 has a somewhat similar provision to Canada and Australia (subject to opt-out). It has been ratified by Belgium, France, Germany, Hungary, Italy, Latvia, Nigeria, Russia and Ukraine, but the impact depends on opt-out.

The only significant countries which we have identified so far which have a clean nullification of non-assignment clauses are the US, France and Germany. There may be others of course.

There are some Unidroit Principles of International Commercial Contracts 2016 which also state that a debtor can claim for breach of contract.

English law policies in commercial and financial law are often different in major ways from, say, the policies in France or Germany: people have different priorities. English policies also differ in many ways from legal ideas in the United States.

The legal systems of England, France, Germany and the United States have been highly influential in the rest of the world – perhaps influencing nearly 90 per cent of all jurisdictions. The contribution of these countries to world law has been enormous and each of the legal systems is sophisticated and successful. But they all exhibit divergent ideologies in their commercial and financial law so that the parties everywhere have a choice when they select the governing law of their contracts. Their policies are legitimate, but so are those of England. Selections have to be made. There is no question that the English law policies are considered highly suitable by the international community for large business contracts.

An example of the divergence of policies is shown dramatically by the chart below.

World financial law: five key indicators

TOPIC	Napoleonic	Roman-Germanic	Common Law
Set-off			
Debt Transfers			
Security			
Trust			
Tracing			

Set-off	Is set-off available generally on the insolvency of a debtor-creditor?
Debt Transfers	Is the assignment of debts free of a need to give notice to the debtor, if it is to be effective on the insolvency of the assignor?
Security	Is security wide and protected on insolvency?
Trust	Is the trust (divided ownership) freely available for all assets and effective on the insolvency of the trustee?
Tracing	Is the tracing of wrongfully-taken assets freely available on the insolvency of the ultimate holder, including tracing into mixed money?

No Yes

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We do not have to go into technicalities of these key indicators and indeed the chart is broad-brush and subject to many qualifications. Nevertheless one can make two points. The first is that at least three of the indicators involve colossal sums of money. The second is that, if a jurisdiction has embarked on a legal ideology which is successful, it has to be firm about maintaining its momentum in the chosen direction.

26. Conclusion

For these and other reasons we believe that the regulation should be revised along the lines we suggest.

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DRAFT STATUTORY INSTRUMENTS

2018 No.

BUSINESS CONTRACTS

**The Business Contract Terms (Assignment of Receivables)
Regulations 2018**

Made - - - - *****

Coming into force in accordance with regulation 1

The Secretary of State, in exercise of the powers conferred by section 1 of the Small Business, Enterprise and Employment Act 2015(a), makes the following Regulations:

In accordance with section 161(4) of the Small Business, Enterprise and Employment Act 2015, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement, interpretation and application

1.—(1) These Regulations may be cited as the Business Contract Terms (Assignment of Receivables) Regulations 2018 and shall come into force on the day after the day on which they are made.

(2) These Regulations apply to receivables arising under any contract entered into after 6th April 2018.

(3) In these Regulations—

“excluded contract” means-

- (a) a contract for prescribed financial services;
- (b) a contract which concerns any interest in land;
- (c) a contract where one or more of the parties to the contract is acting for purposes which are outside a trade, business or profession;
- (d) a contract where none of the parties to the contract has entered into it **in the course of** carrying on a business in the United Kingdom;

(a) 2015. c. 26.

-
- (e) a contract which concerns national security interests (and a certificate provided by the Secretary of State to the effect that a contract concerns national security interests shall be conclusive evidence of that fact);
 - (f) a contract where one or more parties to the contract is a person designated as a CFD counterparty under section 7 of the Energy Act 2013(a) and who has entered into the contract by virtue of that Act;
 - (g) a petroleum licence;
 - (h) a contract where one or more parties to the contract is the licensee in respect of a petroleum licence whose terms would prohibit or restrict the assignment of receivables under that contract;
 - (i) a contract which is for the purposes of the acquisition, disposal or transfer of an ownership interest in a firm (as defined in section 1173(1) of the Companies Act 2006(a)) or of a business or undertaking or part of a business or undertaking, and which states it is for those purposes; or
 - (j) [possible exclusion for commodity contracts if these are not in financial services].

“intangible assets” includes electricity and data which are produced and supplied in digital form;

“licensee”, in respect of a petroleum licence, means the person to whom a petroleum licence is granted, their personal representatives and any person to whom the rights conferred by that licence may lawfully have been assigned;

“petroleum licence” means a licence granted under section 2 of the Petroleum (Production) Act 1934(b) or under section 3 of the Petroleum Act 1998(c);

“prescribed financial services” means a regulated agreement within the meaning of the Consumer Credit Act 1974(d) or any financial service within the meaning of section 2 of the Small Business, Enterprise and Employment Act 2015; and

“receivable” is a right (whether or not earned by performance) to be paid any amount under a contract (other than an excluded contract) for the supply of goods, services or intangible assets.

(4) These Regulations have effect notwithstanding any contract term which applies or purports to apply the law of Scotland or some country outside the United Kingdom, where the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of these Regulations.

(a) 2006 c. 46.
(b) 2013 c. 32.
(c) 1934 c. 36
(d) 1974 c. 17.
(e) 1974 c. 39. “Regulated agreement” is defined in section 189(1).

Effect of a non-assignment of receivables term

2.-(1) A term in a contract other than an excluded contract has no effect to the extent that it prohibits or imposes a condition, or other restriction, on the assignment of a receivable arising under that contract or any other contract between the same parties.

(2) A term in a contract which imposes a restriction on the assignment of a receivable includes a term which prevents a person to whom a receivable is assigned from determining the validity or value of the receivable or their ability to enforce the receivable.

(3) For the purposes of paragraph (2), a term prevents a person to whom a receivable is assigned from determining the validity or value of the receivable or their ability to enforce the receivable if the condition or restriction prevents that person from obtaining-

- (a) the names and addresses of the parties to the contract,
- (b) [where neither party to the contract can confirm the validity and amount of the receivable, the name and address of the person who can confirm the validity and amount of it,]
- (c) the VAT registration number of the party to the contract who supplies the goods, services or intangible assets that give rise to the receivable,
- (d) the date on which the goods, services or intangible assets that give rise the receivable are supplied,
- (e) a description sufficient to identify the goods, services or intangible assets that give rise to the receivable (including the quantity of goods or intangible assets, or the extent of services, the unit price, the rate of VAT and the amount payable, excluding VAT),
- (f) the date and number of the invoice for the goods giving rise to the receivable and any credit note related to that invoice (and the reason for issuing the credit note),
- (g) the amount, basis or rate of any discount offered,
- (h) the total amount of VAT chargeable,
- (i) the reason for any zero rate of exemption,
- (j) details of any term in the contract to which regulation 2(1) applies,
- (k) the credit period for paying the receivable,
- (l) evidence of the performance of that part of the contract (or other contract between the parties) which gives rise to the receivable, or

(m) particulars and evidence of any **potential** defence or set-off by a party to the contract.

Date *Name*
Parliamentary Under Secretary of State
Department for Business, Energy and Industrial Strategy

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations deal with contractual terms in contracts to which the law of England and Wales and Northern Ireland applies which prohibit or restrict the assignment of receivables. A receivable is a right to be paid under a contract, but various types of contract are excluded from the scope of the Regulations.

A full regulatory impact assessment of the effect of these Regulations on the costs of business and the voluntary sector is available from the Department for Business, Energy and Industrial Strategy, 1 Victoria Street, London, SW1H 0ET or from www.gov.uk/beis.

Status: Law In Force

Small Business, Enterprise and Employment Act 2015 c. 26

Part 1 ACCESS TO FINANCE

Assignment of receivables

This version in force from: **May 26, 2015** to present

(version 1 of 1)

1 Power to invalidate certain restrictive terms of business contracts

(1) The appropriate authority may by regulations make provision for the purpose of securing that any non-assignment of receivables term of a relevant contract—

(a) has no effect;

(b) has no effect in relation to persons of a prescribed description;

(c) has effect in relation to persons of a prescribed description only for such purposes as may be prescribed.

(2) A “*non-assignment of receivables term*” of a contract is a term which prohibits or imposes a condition, or other restriction, on the assignment (or, in Scotland, assignation) by a party to the contract of the right to be paid any amount under the contract or any other contract between the parties.

(3) A contract is a relevant contract if—

(a) it is a contract for goods, services or intangible assets (including intellectual property) which is not an excluded financial services contract, and

(b) at least one of the parties has entered into it in connection with the carrying on of a business.

(4) An “*excluded financial services contract*” is a contract which—

(a) is for financial services (see [section 2](#)) or is a regulated agreement within the meaning of the [Consumer Credit Act 1974](#) (see [section 189](#) of that Act); and

(b) is of a prescribed description.

(5) “*Prescribed*” means prescribed by the regulations.

(6) The “*appropriate authority*” means—

(a) in relation to contracts to which the law of Scotland applies, the Scottish Ministers, and

(b) in relation to other contracts, the Secretary of State.

(7) The power of the Scottish Ministers to make regulations under this section includes power to make such provision as the Scottish Ministers consider appropriate in consequence of the regulations.

(8) The power conferred by subsection (7) includes power—

(a) to make transitional, transitory or saving provision;

(b) to amend, repeal, revoke or otherwise modify any provision made by or under an enactment (including an enactment contained in this Act and any enactment passed or made in the same Session as this Act).

(9) In subsection (8) “*enactment*” includes an Act of the Scottish Parliament.

(10) Regulations under this section—

(a) if made by the Scottish Ministers, are subject to the affirmative procedure;

(b) if made by the Secretary of State, are subject to affirmative resolution procedure.

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Subject: Banking and finance **Other related subjects:** Contracts

Keywords: Assignment; Interpretation; Ministers' powers and duties; Receivables; Void contract terms

Annotation

Section 1

Introduction

The Government's Explanatory Notes to the Bill for this Act (see Key Legal Concept: [Explanatory Notes](#)) say as follows (clause numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

“111. This clause provides a power for the appropriate authority to make regulations restricting the effect of terms in business contracts that restrict the ability of one of the parties to assign a right to be paid under the contract (known as a ‘receivable’) to a third party. The appropriate authority is the Secretary of State, except in relation to contracts to which the law of Scotland applies, for which the Scottish Ministers are the appropriate authority. Businesses commonly obtain up-front finance against the value of unpaid invoices, assigning the right to the payment due under those invoices to a third party finance provider. Contractual terms which restrict the ability to assign rights to be paid have an impact on businesses’ ability to obtain finance in this way.

“112. Subsection (1) enables regulations made under the power to make such terms ineffective either generally or in relation to particular persons or for specified purposes. Subsection (2) defines the type of contractual term concerned. This covers terms which prohibit assignment or impose conditions or other restrictions on a contracting party’s ability to assign a right to be paid, whether under that contract or any other contract between the parties.

“113. Subsection (3) sets out which types of contracts come within the scope of the power to make regulations. It applies to contracts for goods, services or intangible assets, where at least one of the parties is acting in the course of a business. Financial services contracts are, however, excluded from scope: the definition of a financial services contract for these purposes is set out in subsection (4) and clause 2, although the regulations are to prescribe the types of financial services contract which are excluded.

“114. Subsections (7) and (8) provide ancillary powers for the Scottish Ministers in consequence of regulations made under clause 1. These include the power to make transitional, transitory and saving provision and to amend, repeal, revoke or otherwise modify provisions made by or under an enactment (including an Act of the Scottish Parliament).

“115. Subsection (10) makes the making of regulations by the Secretary of State under the power subject to affirmative procedure, so that a draft of the regulations must be approved by both Houses of Parliament, before the regulations can be made. Regulations made by the Scottish Ministers are subject to the affirmative procedure in the Scottish Parliament.”

Navigation Note (General):

For consequential amendments see [s.159](#); for repeals see [s.159](#); for transitional provisions see [s.160](#); for money provided by Parliament see [s.162](#); for extent see [s.163](#); for commencement see [s.164](#).

Definitions Note (General):

For statutory definitions of “small business” and “micro business” see [s.33](#); for Secretary of State’s power to make further provision about the meanings of these expressions see [s.33\(4\)](#) and [s.34](#).

Definitions Note (Section 1):

For meaning of ‘financial services’ in s.1(4)(a) [see s.2](#).

Subordinate Legislation Note (General):

For supplementary powers and procedure for subordinate legislation under this Act see s.161.

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the [Long Title / preamble](#).

Relevant Key Legal Concepts:

[Person.](#)

[Scotland.](#)

[Scottish Ministers.](#)

[Secretary of State.](#)

Consider — [Levels of Certainty.](#)

[Necessary or Appropriate.](#)

[Transitional Provision.](#)

[Textual Amendment.](#)

May amend — [Henry VIII Provision.](#)

[Statutory Instruments: Supplementary Provision Powers.](#)

[Statutory Instruments: Ancillary Provision.](#)

[Repeal.](#)

[Enactment.](#)

Session — [Parliamentary Periods](#).

[Scottish Parliament](#).

[Statutory Instruments: Draft Affirmative Procedure](#).

Legislative Intention Note (see Key Legal Concept: [Pepper v Hart](#)): In the Public Bill Committee on the Bill for this Act in the House of Commons the Minister said as follows:

“Currently, some business contracts contain a barrier that inhibits small businesses from accessing invoice financing. A clause in those contracts prevents the assignment of a payment that is due under the contract. Businesses often use that ban on assignment clause as a general catch-all to prevent suppliers from subcontracting services due under that contract, meaning that the small business’s ability to use invoices issued under that contract for invoice financing is unintentionally inhibited. The clause will tackle that specific barrier.

“That is especially important for new and successful peer-to-peer invoice finance providers and platforms, which are growing rapidly in the UK. Those newcomers are allowing businesses to submit individual invoices for finance — a sort of on-demand service for small business finance — but along with more traditional invoice financiers, they currently have to work around the ban on assignment clause. Otherwise, individual lenders would, in effect, be making an unsecured loan to the business. Those work-arounds cost money, increase the difficulty of accessing invoice financing, and in some cases can be the deciding factor in whether a business is declined for invoice finance. Last year in our discussion paper, ‘Building a Responsible Payment Culture’, we asked whether these barriers should be removed, and the answer was very clearly yes, which is why we are taking action.

“The measure is being introduced as a delegated power, which is appropriate because a lot of technical details lie behind it. It will be important to consult on some of the more detailed aspects, and we intend to launch the consultation before the end of the year. For example, the Committee will note that clause 2 sets out the financial services that may be exempted so as to focus the measure on the core purpose of facilitating invoice financing against business-to-business contracts rather than financial services contracts. I also assure Committee members that the Government intend to publish draft regulations during the passage of the Bill.” ([Hansard, 21 October, 2014](#).)

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Status: Law In Force

Small Business, Enterprise and Employment Act 2015 c. 26

Part 1 ACCESS TO FINANCE

Assignment of receivables

This version in force from: **May 26, 2015** to **present**

(version 1 of 1)

2 Section 1(4)(a): meaning of “financial services”

(1) In [section 1\(4\)\(a\)](#) “*financial services*” means any service of a financial nature, including (but not limited to)—

(a) insurance-related services consisting of—

- (i) direct life assurance;
- (ii) direct insurance other than life assurance;
- (iii) reinsurance and retrocession;
- (iv) insurance intermediation, such as brokerage and agency;
- (v) services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services;

(b) banking and other financial services consisting of—

- (i) accepting deposits and other repayable funds;
- (ii) lending (including consumer credit, mortgage credit, factoring and financing of commercial transactions);
- (iii) financial leasing;
- (iv) payment and money transmission services (including credit, charge and debit cards, travellers' cheques and bankers' drafts);
- (v) providing guarantees or commitments;
- (vi) financial trading (as defined in subsection (2));
- (vii) participating in issues of any kind of securities (including underwriting and placement as an agent, whether publicly or privately) and providing services related to such issues;

(viii) money brokering;

(ix) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(x) settlement and clearing services for financial assets (including securities, derivative products and other negotiable instruments);

(xi) providing or transferring financial information, and financial data processing or related software (but only by suppliers of other financial services);

(xii) providing advisory and other auxiliary financial services in respect of any activity listed in sub-paragraphs (i) to (xi) (including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy).

(2) In subsection (1)(b)(vi) “*financial trading*” means trading for own account or for account of customers, whether on an investment exchange, in an over-the-counter market or otherwise, in—

(a) money market instruments (including cheques, bills and certificates of deposit);

(b) foreign exchange;

(c) derivative products (including futures and options);

(d) exchange rate and interest rate instruments (including products such as swaps and forward rate agreements);

(e) transferable securities;

(f) other negotiable instruments and financial assets (including bullion).

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Subject: Banking and finance **Other related subjects:** Contracts

Keywords: Assignment; Financial services; Ministers' powers and duties; Receivables; Statutory definition; Trading; Void contract terms

Annotation

Section 2

Introduction

The Government’s Explanatory Notes to the Bill for this Act (see Key Legal Concept: [Explanatory Notes](#)) say as follows (clause numbering may not match final section numbering; the Notes as re-issued after Royal Assent are shown at the end of the Act on Westlaw UK):

“116. This clause defines ‘financial services’ for the purposes of clause 1, subsection (4). The definition covers any service of a financial nature and includes an indicative list of the types of service covered. These include insurance related services, banking and other financial services.”

Navigation Note (General):

For consequential amendments see [s.159](#); for repeals see [s.159](#); for transitional provisions see [s.160](#); for money provided by Parliament see [s.162](#); for extent see [s.163](#); for commencement see [s.164](#).

Definitions Note (General):

For statutory definitions of “small business” and “micro business” see [s.33](#); for Secretary of State’s power to make further provision about the meanings of these expressions see [s.33\(4\)](#) and [s.34](#).

Subordinate Legislation Note (General):

For supplementary powers and procedure for subordinate legislation under this Act see [s.161](#).

Background Note:

For information about the background to this Act (including Ministerial Statements) see the annotations to the [Long Title / preamble](#).

Legislative Intention Note (see Key Legal Concept: *Pepper v Hart*): In the Public Bill Committee on the Bill for this Act in the House of Commons the Minister said as follows:

“Under clause 1, we are removing barriers inhibiting small businesses’ access to invoice finance. That is typically not provided for financial services contracts, such as loan agreements between a small business and a bank. In addition, for some financial services contracts it is important to maintain the ability to prevent assignment of rights under that contract — for example, a business may want to ensure that it deals directly with its own bank in respect of payments due under a loan agreement or other financial service contract. Clause 1 therefore sets out the power to invalidate certain restrictive terms of business contracts, and clause 2 limits the scope of clause 1 to focus that clause on facilitating invoice finance. To this effect, it provides a list of financial services that can be excluded

from the scope of clause 1. The list is based on the list of financial services given under [section 40](#) of the [Terrorist Asset-Freezing etc. Act 2010](#). The list of financial services in clause 2 should be considered only as an indicative list of financial services excluded from the scope of clause 1. In particular, subsection (4) retains the flexibility to define financial service contracts more fully in secondary legislation, on which, as I said, we intend to consult later this year.” ([Hansard, 21 October, 2014.](#))

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