



Nullification of Ban on Invoice Assignment Clauses

ICAEW welcomes the opportunity to comment on the consultation paper *Nullification of Ban on Invoice Assignment Clauses* published by the Department for Business, Innovation & Skills on 6 December 2014, a copy of which is available from this [link](#).

This response of 4 February 2015 has been prepared on behalf of ICAEW by the Business Department in consultation with the Business Law Committee and Corporate Finance Faculty. These include representatives from public practice and the business community. The Business Department is responsible for ICAEW policy on wider business issues such as Enterprise and national and local growth issues and related submissions to government, think-tanks and other business organisations.

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MAJOR POINTS

The problem – SMEs lack access to finance

Small and Medium Sized Enterprises (SMEs) lack access to finance, particularly from conventional bank sources. This is particularly the case for first time applicants for finance. The British Bankers Association's *SME Finance Monitor* shows that only 40% of first time applicants for an overdraft and 44% of first time applicants for a loan are successful in obtaining a facility. The figures are averages for applicants with up to five years trading. For applicants with less than two years trading the success rates are 34% and 42% respectively.

The supply of finance to SMEs has increased in the last three years – and now offers a much wider range of finance providers including peer-to-peer lending and crowdfunding. Traditional factoring and invoice discounting providers have been supplemented by providers through the internet. Invoice trading is where businesses sell their invoices at a discount to a pool of individual or institutional investors in order to receive funds immediately rather than waiting for invoices to be paid.

The government proposes a number of measures to improve the situation for SMEs accessing finance in the Small Business, Enterprise and Employment Bill currently being debated in Parliament. The ICAEW broadly welcomes these measures.

ICAEW supports the objectives in the consultation paper. Both traditional and newer invoice finance providers offer solutions which will assist SMEs seeking to grow and who are unable to access bank finance. The proposed measures will remove a potential obstacle to SMEs accessing invoice finance.

RESPONSES TO SPECIFIC QUESTIONS

Question 1: What comments do you have on our draft Regulations?

We believe the introduction of a regulation which simply nullifies all bans in contracts after the regulation has come into force (with certain exemptions) is the quickest and simplest way to achieve the objective

Question 2: Do you agree that a nullification of ban on invoice assignment is the best way to introduce this measure?

Yes

Question 3: Do you agree that we should limit the extent of the nullification to business to business contracts?

Yes within the "prescribed financial services" as defined in the draft clause.

Question 4: Do you agree that financial services contracts should be excluded (and hence still be allowed to include bans on assignment)?

Yes.

Question 5: Do you agree with our list of excluded financial services, based on the Terrorist Asset Freezing etc. Act 2010?

No comment

Question 6: Are there any other activities that should be excluded or other special provisions that need to be taken into account?

None

Question 7: Do you agree that tenancy agreements and other contracts creating interests in land should be excluded (and hence still be allowed to include bans on assignment)?

Yes.

Question 8: Do you agree that the nullification of bans on invoice assignment clauses should not extend to exclusivity clauses for supply chain finance?

No. We do not believe that the nullification should not extend to exclusivity clauses for supply chain finance. The disparity in negotiating power between large customers and SME suppliers might result in the customer forcing the supplier into supply chain finance agreements which are not appropriate for the SME supplier. The SME supplier should be free to choose between any supply chain finance offered and other forms of financing including factoring and invoice discounting.

Question 9: Do you agree that commercial confidentiality is an important contractual freedom for debtors, even if this could mean that an invoice assignment is prevented?

No. We do not believe that commercial confidentiality is such an important contractual freedom for debtors that it should be used to prevent possible assignment of sales invoices. It is likely that some large customers might add confidentiality clauses to their contracts to prevent assignment of invoices.

In theory, the information belongs to the purchaser (debtor) and only it can really know how it wants to protect its own information, what the consequences of breach would be etc. While confidentiality agreements tend to be quite standard, there are various provisions which can be fought over when the issue is of concern. In particular:

- How will confidential information be defined? Will invoices and supporting evidence be handed over to the invoice financier or just the amount due (presumably more will be required if dispute handling is involved)?
- Will the obligation expire after a period of time and, if so, when?
- Is disclosure to group companies or agents permitted and, if so, on what terms?
- What would the measure of damages for breach be? It can be very difficult to prove the amount of loss for breach of confidentiality obligations, so parties sometimes provide for liquidated damages. These need to be a reasonable estimate of losses in the particular circumstances (not a penalty).
- Would the factor and purchaser be obliged to inform the supplier if they become aware of a breach?
- In a freely negotiated confidentiality agreement, parties might seek indemnities or other protections, depending upon the circumstances.

We recommend that to address concerns regarding the debtor's confidentiality a confidentiality clause be incorporated in the agreement between the invoice financier and the supplier (client). We understand that such a clause is not currently practice in these agreements but

this would be a way to meet the concerns of the debtor's confidentiality. If necessary this might be included in statute. There would need to be exceptions for example the capacity to disclose to lawyers in the event of litigation (against the debtor or indeed the client) or Insolvency Practitioners in the event of client insolvency and probably auditors too.

Question 10: Do you agree that the nullification to ban on invoice assignment should extend to linked contracts?

Yes.

Question 11: Do you agree that we should not prescribe who could benefit from invoice assignment? If you do want the regulations to prescribe who could benefit from invoice assignment, how should the regulations do this?

Yes.

Question 12: Do you agree that there is no need to include a provision for the debtor to add specific terms for damages? If not, what provisions should be included?

Yes.

Question 13: (a) Do you agree that the status quo position on contractual disputes should be maintained so that, when an invoice is disputed by a debtor, the invoice finance provider should take up the dispute with the supplier rather than the debtor (b) Do you have alternative ways in which the status quo could be maintained?

The assignment of a debt to a third party (an invoice financier) cannot put the debtor in a less advantageous position than they would be if the debt had not been assigned – the assignment of the debt cannot make good something that was not. So if there is any dispute whatsoever about the goods or services supplied, the amounts invoiced and so on, the ultimate customers (debtors) retain all their rights against their suppliers. The potential prohibition on ban on assignment clauses (as they relate to the debt only) will not change this current situation.

In practice however; the concern that if there is a dispute about the goods a debtor would have to deal with a factor as well as their supplier chasing for payment. In reality, as soon as an issue with an invoice is raised, the invoice financier will designate the debt as Disputed, funding against it will be withdrawn and the client (supplier) will be put on notice that they need to resolve the situation before the funding would be released. The onus should always be on the client/supplier not on the debtor. It would depend on the parties involved, of course, but broadly speaking there would be a tendency to give the benefit of the doubt to the customer rather than the client (supplier).

Question 14: Do you agree that we should not make any special provision with respect to set-off?

Yes.

Question 15: Are there any other issues not covered in this consultation which you think we ought to be considering?

No

Question 16: Do you agree that this measure will not require changes to current legislation?

No comment

Question 17: Do you agree that this measure will not necessitate Government enforcement?

Yes.

Question 18: Do you agree that this measure will remove the current costs of putting in workarounds for invoice financiers, benefiting the overall invoice finance market? If not, why not?

Yes, we agree that this measure will remove the current costs of putting in workarounds for invoice financiers, benefiting the overall finance market

Question 19: Do you agree that the costs of the nullification for businesses will be very low? If not, why not?

Yes.