

Withdrawal of Draft Regulations on Contractual Terms with respect to Assignment of Receivables

The draft Business Contract Terms (Assignment of Receivables) Regulations (the “**Regulations**”), which were expected to facilitate the assignment of receivables, have been withdrawn.

The draft Regulations were published pursuant to the Small Business, Enterprise and Employment Act 2015 (the “**Act**”). The Act provides for regulations to be made to provide that any terms in commercial contracts for goods, services or intangible assets (other than certain financial services contracts) which prohibit or impose a condition or restriction on the assignment of receivables would be ineffective. The intention was to improve access to finance for businesses by allowing them to assign the right to payment under their invoices to a finance provider. A number of other countries have similar so-called “legal override” provisions with respect to commercial contracts, for example, in the New York Uniform Commercial Code, the French Commercial Code and the German Commercial Code.

The first draft of the Regulations was published in December 2014, together with a consultation paper. Following the submission of responses to the proposals from interested parties, the Department for Business, Innovation & Skills published a Government response to the consultation in August 2015. Contrary to the original expectation that the Regulations would become effective early in 2016, a revised draft of the Regulations did not appear until September 2017.

Although not the subject of a formal consultation at this stage, the revised draft of the Regulations attracted a number of comments from various different bodies and firms, including Mayer Brown, the LMA, the City of London Law Society and the Financial Markets Law Committee. These comments

primarily resulted from changes in wording from the previous draft of the Regulations, since certain provisions now appeared to be insufficient, create uncertainty, or go beyond the wording of the Act and could therefore have been considered to be ultra vires.

The specific concerns which were raised included the following:

- the failure to include the wording from the Act with respect to nullifying conditions or restrictions on assignment, such as requirements for consent from the debtor, as well as outright prohibitions;
- the Regulations would not necessarily have applied to contracts with English choice of law clauses, unless English law would have applied irrespective of the choice of law clause, and they also allowed the possibility for foreign choice of law clauses to be disregarded if the intent appeared to have been to evade the operation of the Regulations;
- lack of clarity on the face of the Regulations as to whether they would extend to existing contracts (although the Government response indicated that they would not apply retrospectively); and
- the risk that the wording could inadvertently have resulted in negative pledges or non-disposals provisions in financing documents, unrelated to the receivables contract, becoming unenforceable.

It is not yet clear when a revised version of the Regulations will be published but given the delays so far and the demands of the Brexit timetable it may take some time. In the meantime, companies and finance providers will have to make do with the current methods of dealing with prohibitions and restrictions on assignment. It is hoped that an amended version of the Regulations will address the concerns that were expressed.

If you would like to discuss any issues in relation to the assignment of receivables in connection with securitisation or asset based financing transactions, please contact the author or your usual Mayer Brown contact.

Merryn Craske

Of Counsel

E: mcraske@mayerbrown.com

T: +44 20 3130 3029

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Mayer Brown comprises legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is a member. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services.

"Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2017 The Mayer Brown Practices. All rights reserved.

Attorney advertising. Prior results do not guarantee a similar outcome.