A CASE FOR INTERFERING WITH FREEDOM OF CONTRACT? AN EMPIRICALLY-INFORMED STUDY OF BANS ON ASSIGNMENT

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Do "bans on assignment" of trade receivables cause serious problems with receivables financing? Should Government render them ineffective? Two empirical investigations suggest that though there are good reasons for using BoAs, they cause disproportionate problems to SMEs needing to factor their debts, and there is a good case for intervention.

PART 1: INTRODUCTION

(a) Introduction

This article is about clauses in the contracts between a business and its customer which prohibit the supplier assigning receivables arising under the contracts. These clauses are sometimes called "prohibitions on assignment", sometimes "anti-assignment clauses"; but in the industry it seems most common to call them "bans on assignments" or BoAs. This is how we will refer to them in this article. There is an argument that BoAs do little for the customer while posing a serious problem for small suppliers, and only appear when the customer has the bargaining power to dictate the terms of the contract. This paper draws on empirical work to consider whether, notwithstanding English law's commitment to commercial parties' freedom to agree their own terms, there is a case for legislation to render BoAs in contracts for the supply of goods and services ineffective.

Receivables financing is of enormous importance, particularly to smaller businesses. On the one hand, except in the retail sector, smaller businesses are likely to have to accept payment for goods or services that they have supplied on credit terms. This means that they are likely to be short of working capital, for example to pay employees. On the other, the resulting receivables will often comprise a very large proportion of their assets. Larger businesses may have other assets which they can use as security for an overdraft or other forms of financial accommodation; but much of the value of many small businesses is likely to be locked up in its receivables. This means that anything which may prevent the business from being able to obtain financing on the strength of its receivables – whether by selling the receivables outright to a factor or invoice discounter, or by charging them to secure a loan from another financier – may have serious consequences.

In many jurisdictions BoAs have already been rendered wholly or partially ineffective by legislation. In 2015 the UK Government took a legislative power to nullify BoAs of invoice receivables in the Small Business, Enterprise and Employment Act 2015.[1] The Department for Business Innovation and Skills (henceforth BIS) subsequently published a consultation paper together with draft regulations in

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[1] Small Business, Enterprise and Employment Act 2015, s 1.

which it proposed to nullify outright such a BoA, subject to some exceptions.[2] This article provides some empirical evidence to inform the debate, based on two qualitative studies. One was carried out by Hugh Beale and Louise Gullifer in 2011 ('the 2011 study').[3] It was funded by the Asset Based Finance Association ('ABFA'), who stressed from the outset that it wanted a completely independent view to be taken. The second was carried out in 2014 by all the authors of this paper as part of the work of the Secured Transactions Law Reform Project ('the 2014 study'). It is the purpose of this article to draw tentative conclusions from these (admittedly quite small scale) surveys about how much BoAs are an obstacle to receivables financing, in what areas problems are most severe and the possible costs of working around difficulties. We will then offer some suggestions for the current debate on reform of the law based on our conclusions.

The 2011 study involved interviewing a number of people involved in receivables financing about their experience of BoAs – why BoAs are used, what effect they have and whether they are necessary. Three categories of people were interviewed, face-to-face or by telephone. These were representatives of financiers, buyers who use BoAs in their terms and conditions of purchase and businesses that seek to use receivables financing - in particular businesses that were thought to have had difficulties in obtaining receivables financing because one of more of their major customers insisted on a BoA. An officer of an organisation which represents finance directors and two officers from two organisations that help small businesses find finance were also interviewed.

The second study was prepared as part of a seminar which the Secured Transactions Law Reform Project held in May 2014 to explore and discuss the merits of an online register for all security interests, including outright assignments of receivables.[4] The seminar brought together many members of the receivables financing industry and two of the presentations focused on BoAs.[5] The survey was distributed at the seminar and attendees asked to complete it. The survey was subsequently posted on the Secured Transaction Law Reform Project website and a small number of respondents completed it through this forum.[6]

The terminology in this area can be confusing, so we have tried to adopt a standard terminology for the whole of this article. We will normally refer to the parties as "the supplier" (the business who is being financed and who sells or charges its receivables), "the financier", and "the customer" (the person who owes the receivable as a result of a sale or supply contract).

(b) The background in brief

As we explain in more detail in the next part, in the absence of a BoA, under English law receivables are freely assignable without the need for the customer's consent. If the customer is notified of the assignment, it must pay the financier; if it pays the supplier, by accident or design, it will not be discharged and can be made to pay again. Notice of assignment also affects defences that the customer may rely on to reduce or avoid payment. After it has received notice of an assignment, the customer can still rely on counterclaims that arise out of the same contract as the contract pursuant to which the receivable arose (and closely related counterclaims) and it may set-off other liquidated

[2] Draft Business Contract Terms (Restrictions on Assignment of Receivables) Regulations 2015 (The 2015 Regulations). Consultations on the drafting of the regulations continue at the time of writing.
[3] With the assistance of Anna Kloeden, a DPhil student from Magdalen College, Oxford.
[4] For further details on the Secured Transactions Law Reform Project, see http://securedtransactionslawreformproject.org/
[5] Presentations available for download at http://securedtransactionslawreformproject.org/past-events/
[6] *ibid.*

claims which had arisen before the date of notice, but it loses the right to set off other claims that may arise in the future.

Many contracts for goods or services, especially when they are standard terms drafted for a buyer of goods or services, contain a BoA. These are said to make it much more difficult for the supplier to obtain receivables financing. Because the clause will prevent the financier being able to enforce the debt in the normal way, and because there is a risk that if the customer pays the supplier, the supplier may dispose of the money before the financier can claim it, a concern arises that financiers may refuse to give credit against such receivables, or at least will do so only at a significantly reduced level. BoAs are also said to put up the cost to financiers because they must check each receivable to see whether or not it contains a BoA and, if necessary, try to negotiate a waiver of the clause by the customer. If they are not successful in this, they may have either to take additional steps to safeguard their position (such as taking a floating charge over the supplier's assets as a whole, and negotiating with any other financier that already has a such a charge), or they may have to refuse credit altogether. The result is a concern that BoAs at best increase the cost of an essential form of credit and at worst starve businesses of credit – in particular, smaller businesses which are most dependent on their receivables to raise financing.

In discussions that have taken place in many jurisdictions as to whether BoAs should be rendered ineffective,[7] there are typically put forward a number of standard reasons for the use of BoAs and some standard arguments as to why they should be rendered ineffective. The questions asked in the two studies were designed to test whether, and how far, these arguments apply to the receivables financing market in the UK. Our findings will be examined in Parts 3 and 4 of this article.

The standard explanations for the use of BoAs are as follows:[8]

(1) Sometimes the clause is an accident, based on misunderstanding. Many businesses want their contractual counter-party to perform the contractual obligations itself, rather than to pass responsibility for performing to another person or to get another person to do the work as a sub-contractor. They therefore include a clause prohibiting assignment of the contract. In fact a prohibition on assignment is completely unnecessary for the first purpose: it is not possible for a contracting party to transfer its obligations to another person without the consent of the other party to the contract. For the second purpose such a clause is ineffective: sub-contracting does not involve assignment. What is needed is a prohibition on sub-contracting without consent. But the effect of a general prohibition on assignment of "the contract" or "the right and obligations under the contract" is to prohibit, at least as against the customer, the assignment of the sums to be paid for the goods delivered or work done.

(2) The customer is concerned that a notice of assignment might be overlooked, so that it pays the wrong party and may have to pay again.

(3) The customer may not want to have to change its accounting systems to ensure that the financier is paid and not the supplier.

[7] See part 5.

[8] See e.g. O Akseli, 'Contractual prohibitions on assignment of receivables: an English and UN perspective' [2009] JBL 650, 656.

(4) The customer wants to deal only with its original contracting party, whose commercial attitude towards demanding payment or settling any disputes may be very different to that of a financier, which is likely to be a professional financier.

(5) The customer wants to be able to rely on set-offs which arise from other contracts and which may come into existence only after it has received notice of assignment.[9]

Two arguments against rendering BoAs ineffective should also be noted at this stage:

(1) The notion of freedom of contract requires that parties should be free to contract on whatever terms they wish, and this should include the freedom to agree on a BoA.[10]

(2) If legislation prohibits BoAs, it will be impossible to identify all the contracts which might be affected by the ban in order to assess whether exemptions are needed.[11]

The standard arguments made in favour of rendering BoAs in contracts giving rise to receivables ineffective seem to be these:

(1) A well–run business, particularly the larger business which is the typical user of BoAs, should be able to manage its accounts department well enough to avoid overlooking a notice of assignment and paying the wrong person.

(2) In these days of electronic transfers, the cost of changing the destination of the payment is minimal.

(3) The attitude of the creditor is very important in relation to some debts – for example, a business that has taken a loan, particularly a loan repayable on notice, from Nice Bank A may be justifiably upset if it discovers that it is now dealing with Nasty Bank B. But this is really not relevant when the debt is a receivable in respect of goods or services that have been supplied – the money is payable at the end of the credit period and there is no more to it.[12]

(4) The question of set-off seldom arises with receivables, since normally the only justification for non-payment will relate to the goods themselves (and this can be raised even after notice of assignment); the parties will not be involved in other mutual dealings that might give rise to set-offs.[13]

(5) It is practically impossible for a receivables financier to check all the relevant contracts to see whether or not they contain a BoA.[14]

(6) The clauses are, therefore, a serious hindrance to the supplier/would-be assignor, without bringing any real benefit to the customer/account debtor. If the parties were of equal

[9] BIS have asserted that their proposal was that “mutuality is not affected when an invoice is assigned”: see BIS, ‘Nullification of Ban on Invoice Assignment Clauses: Summary of Responses’ (March 2015) 9. It is not entirely clear what is meant by this; set off is considered in more detail below.
[10] This argument appears to have featured significantly in the responses to BIS's consultation paper: *ibid* 5. See also R Calnan,‘Ban the Ban: Prohibiting Restrictions on Assignment of Receivables’ (2015) 3 JIBFL 136, 137.
[11] See BIS, 'Summary of Responses' (n 9), 6.
[12] The BIS proposal suggests that financial services contracts should be excluded from the scope of the 2015 Regulations: BIS, 'Summary of Responses' (n 9) 6.
[13] BIS, 'Summary of Responses' (n 9) 9-10.
[14] Though a standard argument, this does not seem to apply in the UK context, see parts 3 and 4.

bargaining weight and sophistication, BoAs would not be included in the contracts. They are usually found in standard form contracts drafted unilaterally by large customers. Even if the supplier is sufficiently sophisticated to look out for BoAs and object to them, the large customer will simply insist on them. The individual supplier, even though it would be prepared to adjust its prices to allow for any additional marginal costs to the customer were the BoA to be removed, will in practice be unable to get the terms changed, or will find the cost of trying to do so exceeds the likely benefit. Therefore BoAs are not only unfair but inefficient and they should be banned.

(7) Those who argue that exemptions to nullification (other than financial services contracts) may be required are unable to provide examples.[15]

Part 2 of this article considers how English law has resolved the arguments over the legal effect of bans on assignment, the adaptations used by the finance market to address the relatively hostile legal environment which otherwise arises for the receivables financing industry and the issues which these 'workarounds' raise. Part 3 presents a summary of the 2011 study and draws some tentative conclusions about the case for reform of English law on bans on assignment. Part 4 presents a summary of the 2014 study and considers both the extent to which it supports the conclusions from the 2011 summary and what both studies together tell us about the shape of any reform initiative. Part 5 examines how other jurisdictions, which have wholly or partially accepted the arguments in favour of overriding BoAs, have tackled reform in the area. Part 6 concludes.

PART 2: THE LAW

(a) Statutory assignment and equitable assignment

As we explained in 1(b), when a receivables financier buys receivables, the transfer is usually effected by assignment. There are two methods of assignment. One is laid down in section 136 of the Law of Property Act 1925, which requires certain formalities to be fulfilled, for example, that the customer is notified of the assignment in writing. This method we call ‘statutory assignment’. The benefit of statutory assignment is that the financier is able to sue on the receivable in its own name, without involving the supplier. In effect, the supplier loses all right to the receivable which is then owed by the customer to the financier. This is the method of assignment that is used in factoring (notification financing). The other method is known as ‘assignment in equity’, or ‘equitable assignment’. For this kind of assignment to be effective, none of the formalities laid down in section 136 are required. The only requirements are that the supplier agrees to assign the receivables to the financier, and that there is “executed consideration” for that promise: this will usually mean that the financier has advanced at least something to the supplier. This is the method of assignment which is used in non-notification invoice discounting.

In the context of receivables financing, the most significant benefit of an equitable assignment is that there is no need to notify the customer of the assignment. An equitable assignment is effective

[15] As described above, BIS proposed exemptions for financial services contracts. It also proposed exemptions for consumer contracts and tenancy agreements. Although respondents to the BIS consultation made the point that contracts may be caught by the ban which ought to be excluded, they did not provide examples to support the view: BIS, 'Summary of Responses' (n 9) 6.

against third parties such as the liquidator of the supplier and, subject to certain priority rules, against another assignee. Thus the assignee (the financier) should be protected even though the customer will pay the assignor (the supplier). The drawback is that, at least in theory, the financier is unable to enforce the assigned receivable in its own name and has to join the supplier to any enforcement proceedings against the customer. Joinder, however, is easily done and may not even always be necessary.[16] Receivables financiers will usually include in the financing agreement a right to convert an equitable assignment into a statutory assignment, by giving notice to the customer, in case it becomes necessary for the financier to enforce the receivable (for example, if the supplier becomes insolvent).

Two further effects of notice to the customer of the assignment should be noted at this stage. First, once the customer has notice of assignment it cannot obtain a good discharge by paying the supplier and must pay the financier.[17] Secondly, the customer can assert *any* set-off which arises against the supplier before notice, while it can only assert set-offs arising after notice which arise from the assigned contract itself (or a closely connected cross-claim).[18]

At this point we should note that an argument has sometimes been made that, on assignment of the receivable, the customer is no longer able to set off any claims it has against an insolvent supplier, even those arising before notice or those arising after notice from the same contract. This is because insolvency set off applies mandatorily in an insolvency, and it is an essential condition of insolvency set off that the claims are mutual, that is between the same parties and in the same capacities.[19] The argument runs that mutuality is broken because the customer's claim is against the supplier but the customer owes the debt to the receivables financier.[20] However, this is to misunderstand the position. On an assignment, unless the original contract between the customer and the supplier provides otherwise, the receivables financier takes subject to these rights of set off. As a result, the receivable financier's claim is limited to the debt after set off, so that mutuality is not broken for the purposes of the set off itself.[21]

(b) BoAs

So far we have considered receivables arising from contracts which do not include a clause prohibiting assignment. However, as explained in 1(a), some customers include a clause in the

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[16] *William Brandt's Sons & Co v Dunlop Rubber Co* Ltd [1905] 2 AC 454 (HL); *Sim Swee Joo Shipping Sdn Bhd v Shirlstar Container Transport Ltd* (unreported) 17 February 1994 (QB); *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2000] 1 All ER (Comm) 897 [60]. See also *Kapoor v National Westminster Bank* [2011] EWCA Civ 1083, [2012] 1 All ER 1201 [30]–[45] (Etherton LJ); and obiter dicta in *Roberts v Gill & Co* [2010] UKSC 22, [2007] All ER (D) 89 [67] (Lord Collins), [127] (Lord Clarke).

[17] *Brice v Bannister* (1878) 3 QBD 569.

[18] *Roxburghe v Cox* (1881) 17 Ch D 520*; Government of Newfoundland v Newfoundland Rly Co* (1888) 13 App Cas 199 (HL)*; Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741 (Ch) 748. Certain respondents to the BIS proposals argued that a customer should be able to raise all rights of set off against the receivables financier which it would have had against the supplier: see BIS, 'Summary of Responses' (n 9), 10.

[19] Insolvency Rules 1986, SI 1986/1925, r 4.90, r 2.85. On the mandatory nature of insolvency set off see *National Westminster Bank Ltd v Halesowan Presswork & Assemblies Ltd* [1972] AC 785, [1972] 1 All ER 641.

[20] See LC Ho, 'Rationality in Company Law (Publication Review)' (2010) 126 LQR 328-331 and 'The Law of Personal Property (Publication Review)' (2014) 130 LQR 688-691. For a more detailed explanation of the argument (which the author goes on to refute) see F Collacao Moraes, 'The Mutuality of Assignment in Subordination' (2014) CRI 187.

[21] *Ibid* and P Pichonnaz and L Gullifer *Set Off in Arbitration and Commercial Transactions* (Oxford: OUP), 12.53. Support for this position is found in *In re South Blackpool Hotel Co ex p James* (1869) LR 8 Eq 255 and *Re Pinto Leite and Nephews* [1929] 1 Ch 221 [232] and [286], both cited in Collacao Mores, 'The Mutuality of Assignment in Subordination' (n 20) and both dealing with the right of the liquidator of the debtor to set off claims against the assignor against amounts owing to the assignee.

contract giving rise to the receivable which prohibits the assignment of the benefit of the contract. Depending on the construction of the clause, this can include a prohibition of the assignment of the receivable which arises once the contract is performed (a BoA). What difference does this make to the analysis in the previous paragraphs? It should be remembered that the purpose of such a clause is to protect the customer. So one would expect that while a BoA should affect the relationship between the customer and the supplier, preventing the financier from stepping in and enabling the customer to get a good discharge by paying the supplier, it should not affect the relationship between the supplier and the financier. This appears to be broadly the position in English law, but neither proposition is entirely clear.

(i) The effect of a BoA on the customer

As between the customer on the one hand and the supplier or financier on the other, it seems clear that a receivable arising out of a contract that contains a BoA cannot be the subject of a statutory assignment.[22] This means that if the customer is given notice of such an assignment, it can refuse to pay the financier and insist on paying the supplier, and that if it pays the supplier it can obtain a good discharge from the debt. Further, if the customer does not pay, it cannot be sued by the financier in its own name. An equitable assignment of a receivable containing a BoA, though, will in many respects not affect the customer. Thus if a financier which has taken an equitable assignment notifies the customer of the assignment, whereas in the absence of a BoA the notice will normally turn an equitable assignment into a statutory assignment, if there is a BoA the customer can still refuse to pay the financier and can get a good discharge by paying the supplier.

Further, a customer can rely on a set-off arising between it and the supplier even after it has received notice of the assignment. Some commentators have queried the availability of set off in the insolvency of the supplier.[23] This is a result of the effect of the BoA as between the supplier and the financier where the receivable has not yet been paid by the customer, and is therefore considered below.[24]

What is also not clear is whether the customer is entirely free from interference by the financier. This is because it is not settled whether the financier can force the supplier to sue, in particular by bringing an action in which the supplier, if it will not co-operate, is joined as a co-defendant with the customer. We return to this later.[25]

(ii) BoAs as between supplier and financier

The second proposition, that the anti-assignment clause will not affect the position as between the supplier and the financier, also seems to be broadly correct. However, often the legal basis on which this result has been reached is one of construction, so that the exact effect of any clause will depend on its wording, and the manner in which a court will interpret it.[26] We need to distinguish two cases:

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[22] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) 106-9. Of course, the true effect of a clause will always depend on its exact wording, and the case of *Linden Gardens*, though laying down certain principles, was considering a particular form of words.

[23] See Ho (n 20)

[24] See Part II(b)(ii)(a).

[25] See Part II(b)(ii)(b).

[26] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL) 106-9.

where the receivable assigned has been paid (so that it is the proceeds that are in issue) and when it has not.

a. Sums that have been paid by the customer ("proceeds")

When there is no prohibition on assignment but the customer is not notified of the assignment and pays the supplier, the supplier holds these proceeds on trust for the financier. There is very often an express declaration of trust, and the supplier usually opens a trust account into which the proceeds are paid, but in fact a trust would arise even if not expressly declared,[27] so that the proceeds are not available to the supplier's other creditors if it became insolvent.

It is unlikely that a court would interpret a BoA as prohibiting an assignment of the monies paid pursuant to the contract once they are in the hands of the assignor.[28] Such a construction is not likely to have been intended by the parties to the contract and, even if it were, there is a strong argument that such an effect would be void as against public policy.[29] This is on the basis that the customer has no interest in preventing such a trust arising[30] and cannot, by contract, prevent the assignor from alienating what has become its own property.

Thus, where receivables are assigned by a supplier to a financier, once a receivable has been paid, the supplier holds the proceeds on trust for the financier even if there is a BoA. Although there is no direct authority on this point, there are a number of important dicta in the cases,[31] and this view is supported by many influential commentators.[32] This is the case whether or not there is an express declaration of trust over the proceeds.

b. The right to receivables that have not yet been paid

The more difficult question is the effect of the anti-assignment clause on the position before the receivable is paid by the customer and, in particular, on the ability of the financier to enforce the receivable.[33]

Any action to enforce the debt would need to be brought by the supplier[34] against the customer. However, if the supplier refuses to bring such an action, it will be in breach of its contract with the financier, as the obligation to enforce would be an express or implied term of the contract of assignment. Arguably, the financier could obtain an order for specific performance of the contract to force the supplier to sue. We say 'arguably' because there is academic debate as to whether an anti-assignment clause is merely a contractual restriction, such that there is still an equitable assignment of

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[27] *G.E. Crane Sales Pty. Ltd. v Commissioner of Taxation* (1971) 126 CLR 177 (HCA) 213-4; *Barclays Bank Ltd. v Willowbrock International Ltd.* [1987] 1 FTLR 386 (CA).

[28] *Re Turner Corporation Ltd (In Liquidation)* (1995) 17 ACSR 761 (FCA) 767.

[29] R Goode, 'Inalienable Rights?' (1979) 42 MLR 553.

[30] As by the time the trust arises, the debtor will already have paid the original creditor and will be discharged.

[31] *Re Turcan* (1888) 40 Ch D 5, 10-11; supported by Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 AC 85 (HL) 106; and Waller and Rix LJJ in *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148 [28], [77].

[32] B Allcock, 'Restrictions on the Assignment of Contractual Rights' [1983] CLJ 328, 335–336; G Tolhurst, 'Prohibitions on Assignment and Declaration of Trust' [2007] LMCLQ 278; G McMeel, 'The Modern Law of Assignment: Public Policy and Contractual Restrictions on Transferability' [2004] LMCLQ 483, 507-508; M Smith & N Leslie, *The Law of Assignment* (2nd edition, Oxford, OUP 2013) 524.

[33] For the distinction between the proceeds and the debt see M Bridge, 'The Nature of Assignment and Non-Assignment Clauses' (2015) LQR (forthcoming).

[34] This would include the liquidator or administrator of the supplier.

the contractual right as between the supplier and the financier,[35] or whether the anti-assignment provision affects the receivable financier's property rights such that the receivable financier acquires a right compromised by the anti-assignment provision and is unable to assert anything more than a right to the proceeds, once they are received, against the supplier.[36] In any event, actually achieving such enforcement would be costly and time-consuming, and would raise particularly difficult issues if the supplier was in insolvency proceedings.[37]

We are told that most financiers who enter into an invoice discounting arrangement therefore take fixed and floating charges over all the assets of the supplier, so that if the supplier becomes insolvent the financier can appoint, or effectively control the appointment of, a supportive administrator who will then enforce the debts in the name of the supplier.[38] Alternatively, financiers take a power of attorney from the supplier, so that they can enforce the debts in the supplier's name.[39]

In a case outside the context of receivables financing, rather than assign a debt which arose from a contract which included a BoA, the 'assignor'[40] declared itself a trustee of the debt for the financier: it was held that the BoA did not prevent this so that the debt became part of the financier's assets.[41] If the language used falls short of an express declaration of trust, the court may nonetheless be willing to imply a trust of the debt for the receivables financier, provided it finds sufficient evidence of intention to confer a beneficial interest on the assignee, even though an *assignment* in breach of the prohibition would be ineffective,.[42] Thus the reasoning below applies both to a case where there is an express declaration of trust of the receivable, and where such a trust would be implied.

The legal effect of the trust is in some ways similar to a purported assignment of the receivable, but there may be a difference. A beneficiary under a trust can force the trustee to take steps to realise the trust property if it refuses to do so. The courts have developed a procedure known as the *Vandepitte* procedure[43] whereby if a trustee refuses to sue, a beneficiary can bring an action in its own name

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[35] R Goode, 'Contractual Prohibitions against Assignment' [2009] LMCLQ 300, 304.

[36] See GJ Tolhurst and JW Carter, 'Prohibitions on Assignment: A Choice to be Made' [2014] CLJ 405, 423.

[37] In administration, a moratorium is imposed on commencement of legal proceedings against the insolvent without the consent of the administrator or the leave of the court: Insolvency Act 1986 (IA1986), Sch B1, para 43. In deciding whether leave should be given, the court will decide first whether specific performance of the contract would have been granted if the company were not in administration. If it decides that it would have been, the court will go on to consider whether enforcement of the contract would frustrate the administration *Astor Chemicals v Synthetic Technology* [1990] BCC 97 (Ch)*; Sunberry Properties Ltd v Innovate Logistics Ltd* [2008] EWCA Civ 1321.

[38] See Parts 3 and 4 below. The financier may prefer not to appoint the administrator itself, leaving it to the directors to do so (ordinarily using the out-of-court procedure provided for in the IA1986, Sch B1, para 22). But a financier who has the benefit of a fixed and floating charge over all or substantially all of the company's assets can control the identity of the administrator. This is because, if it is unhappy with the identity of the administrator chosen by the directors, it can make its own appointment instead using the power contained in IA1986, Sch B1, para 14, or it can apply to court to have its own administrator appointed (IA1986, Sch B1, para 36). In practice the directors, knowing this, are unlikely to choose an appointee who is not acceptable to the financier and the administrator is highly motivated to meet the financiers concerns after appointment.

[39] An irrevocable power of attorney will survive insolvency if it is given to secure (a) a proprietary interest of the donee or (b) performance of an obligation owed to the donee: Powers of Attorney Act 1971. However, where there is BoA (b) will not be the case, and it is not at all clear that (a) is either.

[40] That is, the person in the position of a supplier: it was, in fact, a bank.

[41] *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148. This does, however, depend on the interpretation of the BoA clause. Academic commentary has suggested that these sorts of express declarations of trust are comparatively rare. See Bridge (n33) fn 45 and accompanying text, citing OR Marshall, *The Assignment of Choses in Action* (Pitman, 1950), 85.

[42] *Don King Productions Inc v Warren* [2000] Ch 291; whether the court will be prepared to recognise a trust arrangement in the absence of a declaration of trust will depend on the drafting used in the contract between the supplier and the financier *Co-operative Group Limited v Birse Developments Limited* [2014] EWHC 530; *Stopjoin Projects Limited v Balfour Beatty Engineering Services (HY) Limited* [2014] EWHC 589 (TCC).

[43] After the case of *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, in which it was first used.

joining the trustee as defendant. There has been some judicial discussion as to whether this procedure is available where a trust is declared of a receivable subject to a BoA. Some judges have thought that it was inappropriate[44] but the majority of the Court of Appeal in the recent case of *Barbados Trust Co Ltd v Bank of Zambia* considered that it could be used[45] (although this was not the ground for the decision in the case).[46] Despite this, it is fair to say that the position remains unclear, and there is certainly room for argument that in any particular case the court might decide that the procedure was inappropriate.

We noted earlier that it has been argued that even in the absence of a BoA, on assignment of the receivable, the customer is no longer able to set off any claims it has against an insolvent supplier, even those arising before notice or those arising after notice from the same contract. A similar argument has been made in relation to a declaration of trust. The argument is that, in an insolvency, insolvency set off applies mandatorily and it is an essential condition of insolvency set off that claims are mutual, that is between the same parties in the same capacities;[47] and that where the supplier has declared a trust of the debt from the customer in favour of the receivables financier, mutuality is broken because the customer's claim is against the supplier as principal but the supplier is trustee of the claim against the customer.[48] Again this is to misunderstand the position. As described above in relation to an assignment, unless the original contract between the customer and the supplier provides otherwise, the receivables financier takes subject to the existing rights of set off between the customer and the supplier, and the customer's procedural defence to payment, so that the set off continues to operate between supplier and customer in the same capacity and mutuality is not broken. In other words, it is only the debt after the operation of set off which is held on trust for the receivables financier.

(iii) The overall legal position on BoAs and assignment

It will be evident that the position of a financier who is an assignee of a receivable which arises from a contract which contains a BoA is in many respects weaker than one who is an assignee of a receivable arising from a contract which does not contain such a clause. If the receivable is paid to the supplier, the supplier probably holds the proceeds on trust for the financier, but there is still some uncertainty as to the position, even where the trust of the proceeds was expressly declared. The other problem for the financier in relying on a trust of the proceeds is that it will usually only give the financier priority in the insolvency of the supplier if the supplier has actually paid the money into a trust account and it can be identified. If it has not done this, even if it is obliged to do so under the terms of the invoice discounting agreement, the financier only has a proprietary claim if it can, by the rules of tracing, identify the proceeds among the general assets of the supplier.[49] If the proceeds have been paid into an overdrawn bank account, for example, then the financier has no proprietary claim, and is merely an unsecured creditor.[50] It is for this reason that financiers may insist on using factoring (notification financing) for a very small business, where the risk of insolvency is high. As will be seen below, BoAs cause particular problems in factoring.

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[44] *Don King Productions Inc v Warren* [2000] Ch 291, 321 (Lightman J) and *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148 [139] (Hooper LJ).
[45] *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148 [29] (Waller LJ), [119] (Rix LJ).
[46] See also the discussion in *Stopjoin Projects Ltd v Balfour Beatty Engineering Services (HY) Ltd* [2014] EWHC 589 (TCC) [70]; cf *Explora Group plc v Hesco Bastion Ltd* [2005] EWCA Civ 646 [119].
[47] See fn 19 and accompanying text.
[48] LC Ho (n 20).
[49] *MacJordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350.
[50] *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211, 217-219; *Moriarty v Various Customers of B.A. Peters plc* [2008] EWCA Civ 1604; *Re Global Trader Europe Ltd* [2009] EWHC 602 (Ch).

If the receivable has not been paid, the financier cannot sue in its own name without more. It may be able to force the supplier to sue, but this is uncertain, time-consuming and particularly problematic when the supplier is insolvent, which is the very situation when a receivables financier will want to enforce the receivable There is a reasonable chance that the financier could sue the customer using the *Vandepitte* procedure, if there has been an express declaration of trust, but this is far from certain and if there is not express declaration the financier faces the additional hurdle of arguing that a trust of the receivable should be implied.

Since the declaration of trust route is rarely used in practice, it might seem that this uncertainty is not important. Yet there is another point which is of even greater practical concern.

(iv) BoAs and charges

We have already identified that one route which the financier may use to avoid the uncertainties of a trust is a fixed and floating charge over all of the assets of the supplier. This enables the financier to secure the appointment of a supportive administrator to the supplier for the purposes of collection on a default in payment. It also enables the financier to have recourse to the supplier's other assets if the proceeds of the receivables are insufficient for a full recovery and to have the contingency of a fixed charge over the receivables in case its proprietary interest by way of assignment is attacked, enabling the financier to avoid the statutory loss of priority of a floating charge on insolvency.[51] If there is an existing charge holder, such as a bank, that has similar fixed and floating charges to secure an overdraft to the supplier, the financier will usually negotiate a priority agreement with them.[52]

But it is possible that a BoA could be effective to prohibit the grant of a charge of the contract receivables by the supplier.[53]

At least one of the clauses seen as part of the 2011 study expressly prohibits a charge of contract receivables. Most others only prohibit assignment or 'transfer', but it is possible that this could be interpreted to cover the creation of a charge. While a 'mere' charge does not involve the transfer or assignment of the charged asset, many fixed charges are drafted in such a way that they are likely to be construed as equitable mortgages, which do.[54] While it is possible, as a matter of strict law, to say that a 'mere' charge is not an assignment, in many contexts a fixed charge (or a crystallised floating charge) is treated as one.[55] For example, in the case of *Foamcrete (UK) Ltd v Thrust Engineering Ltd*,[56] it was assumed that a BoA prohibited the grant of a charge.[57]

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[51] Given that the proceeds of the receivables subject to an invoice discounting arrangement are paid into a trust account, it is quite likely that the financier has sufficient 'control' for the charge to be fixed. This use of fixed and floating charges by the receivables financing industry is controversial for other reasons; see P Walton, 'Fixed and Floating Charges: the Great British Fund Off?' (2015) 1 Corporate Recovery and Insolvency 18; A Walters, 'Statutory Erosion of Secured Creditors' Rights: Some Insights from the United Kingdom' (2015) University of Illinois LR 543, 558.

[52] This is more easily done when the receivables financier is part of the same corporate group as the bank lender, which is reasonably frequently the case.

[53] Cf N Ruddy, *Salinger on Factoring* (5th ed, Sweet & Maxwell 2015) 13.12.

[54] Beale, Bridge, Gullifer and Lomnicka, *Law of Security and Title-based Financing* (2nd ed, 2011), para 6.58.

[55] *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93; *NW Robbie & Co v Witney Warehouse Co* [1963] 1 WLR 1324 (CA).

[56] [2000] EWCA Civ 351; [2002] BCC 221.

[57] See also *Re Turner Corporation Ltd (In Liq)* (1995) 17 ACSR 761 (FCA), where the Federal Court of Australia took the view that a clause prohibiting assignment also prohibited a charge.

Thus it is reasonably arguable that an appropriately drafted BoA in a contract could be held to prohibit the grant of a fixed charge over a debt arising from that contract. If the BoA is effective to prevent a fixed charge in relation to a particular debt, that debt is nonetheless likely to fall within the general floating charge created by the financier's debenture. It seems unlikely that a BoA would be held to prohibit a floating charge, at least not without very clear words. However, the crystallisation of that floating charge, which is likely to be treated as an assignment, would be prohibited.

If a BoA were to be interpreted to prohibit a fixed, or crystallised, charge, this might lead to considerable uncertainty. First, it would make it difficult for the chargee (the financier) to enforce the charge over unpaid receivables outside of the insolvency of the supplier, as it could not sue the customer directly. It is not clear whether it could enforce by appointing a receiver over those debts. Second, it might be arguable that the financier was not a qualifying floating charge holder,[58] so as to entitle it to appoint an administrator or, perhaps more significantly, to effectively control the identity of the appointee, on the basis that some of its charges over the supplier's property (the receivables containing a BoA) were invalid. This could be on one of four bases:

a) that these were fixed charges either expressly prohibited by the BoA or caught within the scope of the general anti-assignment language in the BoA, or
b) that they were floating charges which had crystallised (and the anti-assignment provision was wide enough to capture the effect of crystallisation)[59], or
c) that they were floating charges and the BoA expressly prohibited charges (including floating charges), or
d) more speculatively, that a floating charge which can never crystallise over all of the assets within it is not really a valid charge at all.

The position in relation to the right to appoint an administrator is very unclear. The charge prohibited by the BoA would have some effect as between the financier and the supplier (for example, the proceeds of the receivables would be charged). However, given the limited effectiveness of the charge it would lack some of the features of a normal charge, namely, the right of the chargee to realise the charged assets directly, and so it is possible that such a diminished interest is not really a charge at all.[60]

Even if the financier cannot appoint an administrator, this may not be problematic: if the supplier is insolvent, either there will be another qualifying floating charge holder who can appoint an administrator,[61] or the financier could insist that the directors appoint an administrator.[62] In either case, the appointment would be out of court. In the last resort, the financier could apply to the court for the appointment of an administrator.[63] Once an administrator is in place, he is likely to get in the receivables owed to the supplier, and will be obliged to account to the financier for the assigned

[58] It is necessary to have charges covering all or substantially all the property of the company: see above (n 38).

[59] A floating charge crystallises at common law when a winding up order is made in relation to the chargor (*Re Crompton & Co Ltd* [1914] 1 Ch 954 and *Evans v Rural Granite Quarries Ltd* [1910] 2 KB 979 (CA)), when the chargee takes an intervening step (such as the appointment of a receiver over the assets) implying that the chargor's freedom to deal with its assets is withdrawn (*Re Woodroffe's (Musical Instruments) Ltd* [1986] Ch 366) and when the chargor ceases to carry on business (*Re The Real Meat Co Ltd* [1996] BCC 254 (Ch)). The appointment of an administrator does not necessarily have the effect of crystallising the charge at common law because the administrator acts as agent of the company with power to deal with the charged assets: IA1986, Sch B1, para 69. The charging document may also specify circumstances in which the charge will crystallise which may either require the chargee to deliver a notice specifying that the floating charge has crystallised before they take effect or which may specify that the charge will crystallise automatically if they occur.

[60] P Turner, 'Charges of Unassignable Rights' (2004) 20 *Journal of Contract Law* 97.

[61] Under Sch B1 para 14.

[62] Under Sch B1 para 22.

[63] Under Sch B1 para 12.

receivables, which will not, then, be available for distribution to the general creditors. However, it is not clear that an administrator appointed by the directors or by the court will always be willing to work hard to collect debts that will not swell the assets of the estate; and probably he cannot be required to do so.[64]

(v) The effect of the BoA on the contract between the customer and the supplier

Another area of potential uncertainty in invoice discounting arrangements is the effect of a breach of a BoA between the customer and the supplier. Depending on the construction of the BoA, an equitable assignment (that is, one which is not notified to the customer) or even a charge may be a breach of the supplier's contract with the customer. A breach could give rise to at least three possible remedies. The first is that, if a customer discovered that a supplier intended to assign (or charge) its receivables, the customer could, in theory, obtain an injunction to prevent this happening. However, this is very unlikely to occur in practice. The second remedy is that the customer could sue the supplier for damages; however, it is very difficult to see that the customer has suffered quantifiable loss.[65] The third remedy is that the customer could terminate the contract with the supplier, either on the grounds that the breach was a repudiatory breach or on the grounds of an express right to terminate (if the contract contained such a right). We have not seen contracts which expressly provide that unauthorised assignment is a ground for termination but a number of contracts provide for termination for "any material breach", which might include assignment of receivables.[66] This would potentially be very serious for the supplier, and could act as a disincentive to enter into an invoice discounting arrangement without obtaining a waiver from the customer. However, we do not know whether this is a real danger for the supplier, since if the supplier is performing adequately in other respects, generally a customer will be keen to keep the supply contract on foot.

PART 3: THE 2011 STUDY

(a) Introduction

In this study we interviewed financiers, customers and suppliers. Many of those interviewed did not wish to be named, so we refer to the various interviewees by letters or, where two persons from the same organisation where interviewed separately, by letter and number. The financiers interviewed included both banks and other asset based financiers. We also talked to one company who introduces potential clients to funders and one whose website acts as an online market for invoices. Between them, our interviewees financed businesses of all sizes. Interviews were conducted with representatives of five small or medium UK-based suppliers that regularly supply goods/services to

[64] It is far from clear that the administrator has any duty to the financier to collect in the debts owed to the supplier, as the administrator only owes duties to 'creditors'(IA1986 Sch B1 para 3(2). 'Creditors' do not include people with absolute interests see *Re Lehman Brothers International (Europe) (in Administration) (No 2)* [2009] EWCA Civ 1161 (at least in the context of the meaning of the word in section 899 Companies Act 2006, which relates to schemes of arrangement). Even if a duty is owed, it may be difficult and costly for the financier to enforce it against an unwilling administrator: see S Bowmer and R Ambery, 'Why Don King Needs a Haircut — Transfer and Assignment of Contracts: How to Sell Trade Receivables under English Law' [2000] JIBFL 216.

[65] Professor Bridge has also raised the possibility that the customer may have a claim against the receivables financier for the tort of inducing breach of contract. Once again, it is difficult to see the quantifiable loss. See Bridge (n 33) 19.

[66] The contracts might also provide for "cross-default", so that assignment of a receivable under one contract is a ground for termination of other contracts under which receivables have yet to arise.

large customers.[67] We obtained detailed information from two large companies that currently use BoAs in the standard conditions of purchase, one a manufacturer, the other in the retail sector.[68]

(b) Type of financing

Most of the financiers we interviewed said that they provided both invoice discounting, which is on a non-notification basis, and factoring, where the customers are notified of the assignment of the debts. Typically, most clients would be funded by invoice discounting. The supplier would continue to collect the payments from customers and would normally be required to pay the proceeds into a trust account in favour of the invoice discounter. Other clients would only be financed by factoring. Here the customer would be notified (perhaps by an over-stamp on the invoice) that payment should be made to the factor. In the absence of a BoA, this would normally amount to a statutory assignment of the debt, giving the factor the right to sue the customer in its own name.

Generally, businesses financed by factoring were smaller SMEs, although some financiers (A2 and C) told us that a client funded by invoice discounting would be transferred to a factoring arrangement if there were concerns about the financial state of the client. Larger companies were all funded by invoice discounting. A factoring arrangement gives the financier much more control over the debt collection process: the concern over using invoice discounting was that the client would collect in the debts, would not pay them into a trust account and would then become insolvent. Therefore, although most clients wanted an invoice discounting arrangement (A2), this was only available where the financier considered that the client had the ability both to run its sale ledger properly and to operate a trust account, and also where the client was strong enough financially (A, A2, D). However, invoices sold over the website of G were sold on a non-notification, invoice discounting basis. The other distinction is between recourse and non-recourse financing. In recourse financing, most of the risk of non-payment of the financed receivables is borne by the supplier, who agrees to buy back unpaid receivables. Non-recourse financing (where the risk of non-payment of the financed receivables is borne by the financier, for a fee) is much rarer and is largely found in the financing of SMEs (E).

All of the suppliers interviewed had general factoring arrangements in place with financiers, on a notification basis, for an advance of around 80% of the debt value. Non-notification financing is typically not available to businesses of the size of the suppliers interviewed, due to the risk of insolvency and/or payment disputes. Generally in relation to such suppliers, financiers wish to be able to verify the accuracy of invoices with customers, and to be in contact with customers in the event of payment disputes/non-payment.

(c) Factors taken into account when deciding to finance a new client

There are a number of factors which financiers take into account when deciding whether to finance a new client, and on what terms. Receivables financiers prefer to finance against debts which are easily collected. This means that they look at a number of features. One feature relates to the client's business: ideally it has good products and good quality (that is, creditworthy) customers (A,C,D,E).

[67] To give some idea of their size, their annual turnovers were as reported to us as follows: Supplier A, £2.25m; Supplier B, £6m; Supplier C, £1.8m; Supplier D, £2.5m; Supplier E, £2.5m.
[68] We also spoke to a representative of another multi-national manufacturer which uses BoAs, but he told us that he had not considered the effect of BoAs on the assignment of receivables. His concern has merely been to prevent the supplier from assigning its obligations or sub-contracting. We explained why such concerns are not relevant to this Study above.

Another feature is whether the contracts are on the client's terms or the customers' terms: the latter is more problematic (C, E), although very common among small suppliers.[69] A third feature is whether the debts are likely to be subject to disputes or cross-claims: these make collection difficult and uncertain. Potential problems in this area often come from the customers' terms and conditions, and financiers scrutinize these closely. A fourth feature is the spread of customers. Too small a spread (just 2 or 3 customers) is undesirable as it concentrates risk too much, but so is a very wide spread of customers (A). The financier also prefers there to be some large customers among the spread (A).

Without exception, we were told that financiers look at the contracts of potential clients to see if they contain BoAs. It was, however, made clear to us that there were potentially other problematic clauses in contracts as well, and the contract was checked for all of these. The amount of time spent looking at BoAs varied, depending on the type of financing (invoice financing of large clients took the least time), but was significant, and often included consulting lawyers about the construction of a particular clause (A,E).

(d) Reactions to the presence of a BoA in a contract

Rather than make a general adjustment to the possibility of BoAs in the ledger, the financiers we interviewed said that they checked, as described above, and adjustment was made in relation to the actual clauses present.

Financiers worried most about BoAs when considering a factoring arrangement . Where the financing was done by invoice discounting, they were less concerned. This is partly because the customers are not notified of the assignment, and so continue to pay the client (supplier). However, more significantly, it is standard practice in invoice discounting for the financier to take a debenture (fixed and floating charges) over the client's entire business including its receivables (A, A2, B, C,D,E,F). The main purpose of this is so that the financier can appoint an administrator to collect in the debts, if the client becomes insolvent (A, A2, B,F). If there was another (prior) floating charge holder, the financier would enter into an inter-creditor agreement (A, A2) One financier told us that they also take a power of attorney from the client, so that they could 'step into the shoes of the client' (C, also F). Financiers also take guarantees as an additional protection (B, E).

In an invoice discounting arrangement, the customer pays the client (supplier) direct, into a trust account. One financier told us that some customers (who have BoAs in their agreements) refuse to pay if they find out it is a trust account, although the reason for this is not clear as 'the customer still had the benefit of set-offs, etc.' because of the BoA clause. (B) Apart from this, most financiers thought that the existence of the trust account mean that BoAs were not a very significant problem in invoice discounting (C, D,E) where security is taken (A).

(e) Waiver of BoA

In other situations (that is, where there is no security taken so the financier is relying solely on the book debts for payment, or where there is a factoring arrangement), financiers usually seek waiver of the BoA. Either this is done by the financiers direct (B,C,E) or by the financier in conjunction with

[69] Only one of the suppliers interviewed (A) brought their own contractual terms and conditions (T&C) to procurement agreements with customers. Supplier B, which had around 150 clients including most of the large supermarkets, reported that they have found large retailers very willing to be flexible on T&C. For the other suppliers interviewed, their customers typically insist on use of their standard T&C, and it is very difficult to negotiate on such T&C without risk of losing business.

the client (C,D) or the financier insists that the client obtains a waiver (A,F). Views varied on how easy a waiver was to obtain. One financier (B) said about 2/5 customers agreed to a waiver, another interviewee who advised small businesses said that in her experience waivers were rarely given (F). Others said that, although they do get waivers, some customers (particularly retailers) are very difficult to deal with (C). For example, one financier said that waivers often took some time to get, and 'customers may impose terms (e.g. debts outstanding in the event of insolvency won't be paid or will be subject to set-off from loss of profit or cost of changing suppliers)' (E). However, one financier (who financed largely on the basis of invoice discounting) said that customers will give waivers once they understand why it is being requested (D).

If the customer refuses to waive the clause, then the financier will not finance against that customer's debts, or will reduce the percentage financed. (A,B,D,E,F). Occasionally (though not often) a financier will refuse to finance a client at all (C): these are most likely to be the smallest businesses who are looking for a factoring arrangement (A). Quite often the BOA clause is not the only reason the financier refuses to finance a client (F): one interviewee called it 'one more nail in the coffin' (E).

We were told that invoices from a contract containing a BoA cannot be sold on the website of G. This is because the buyers take no other protection such as guarantees or a charge, and will not buy an invoice which they may not be able to enforce. They sometimes try to get the supplier to obtain a waiver of the BoA, in which case the invoice could be sold. However, the evidence from the 2014 survey is that the position is now different, and contracts containing a BoA can now be financed through online auctions.

(f) Suppliers' Problems with Receivables Financing

All but one of the suppliers (C) indicated they have on occasion had difficulty obtaining receivables financing in relation to receivables due from specific customers. These customers objected to factoring, and the suppliers had had either to negotiate special arrangements with the financiers to accommodate the concerns of the customers, or were not able to obtain financing against those receivables at all. In the latter case, sometimes customers would agree to shorten the credit period to mitigate the cash flow effect for the supplier. One supplier (A) had a major dispute with a large customer due to it being in contravention of a confidentiality agreement A had signed.[70] The invoices from this customer had to be withdrawn from the factoring agreement.

(g) Why BoAs are included in contracts

Financiers had many different theories about why customers include BoAs in their contracts. One view was that it was an attempt to stop assignment of obligations rather than benefits, and that the application of the clauses to the prevention of receivables financing was largely a historical accident (A,F) or that they continued to be used as a matter of habit (E, in relation to councils and local authorities). Several acknowledged that they might be used to avoid confusion over who to pay (A, B, C, E), especially where the supplier was small so that a customer might not be able to recover a mistaken payment. Another view was that customers felt that it was easier to retain a two party relationship in order to sort out disputes (B), especially as the customer might have more bargaining power vis a vis the supplier than as against a financier (F). Avoiding loss of set-off was not seen as a

[70] BIS proposed that debtors wishing to keep commercially sensitive information private should be able to ban assignment of invoices; 'Summary of Responses' (n 9), 7. Many respondents objected to this exemption because of a concern that confidentiality clauses might be used as a backdoor route to circumvent the prohibition on BoAs. The position on confidentiality in other jurisdictions is briefly touched on in Part 5.

big issue (A), although one interviewee commented that where a contract enabled all cross-claims to be set off against all claims, the resulting debt was difficult to finance (F). One interviewee cynically thought that some customers might use BoAs to avoid paying if the supplier goes into administration.

When asked to speculate on the possible reasons customers have for objecting to receivables financing, most suppliers felt the only concern of customers is to avoid being pursued for payment by third parties, who are often perceived as being either aggressive and more efficient than suppliers, or as having less regard for debtor-client relationships. It was generally felt that financiers have less tolerance for customers trying to delay payment of invoices.

Both customers told us that they had no concerns about invoice discounting. What mattered to both was that the financier should not have direct claims against them.

The reasons given for this reflected only partially the standard arguments for BoAs. The risk of a notice of an assignment being overlooked and payment being made to the wrong party seemed to be only a subsidiary factor; similarly, set-off did not seem to be a major reason for their use of BoAs, though it would be employed on occasion. The principal reasons the customers we interviewed gave for using BoAs related to, first, practical issues over incorrect invoices and, secondly, to the commercial relationship between the parties. They overcame the former concern partly by introducing a 'self-billing' system under which, rather than the supplier sending an invoice when it supplied the goods, the customer would issue the invoice itself after it had received and checked the goods, and partly by offering supply chain finance, whereby the customer arranges with a financier that the latter purchases receivables owed by the customer to its suppliers at the point when the receivables arise, once the invoice has been confirmed by the customer.. Thus, invoices that the customer had issued under a self-billing scheme would be permitted to be assigned to the bank operating the supply chain financer scheme. The customers' objection was not to assignment on a notification basis in itself, but to this kind of assignment when the customer had not issued or at least approved the invoice representing the receivable. The second concern seemed to be slightly less important, and linked to the first in that disputes were often related to incorrect invoices.

The evidence from customers might suggest two things. First, the disputes which concern customers most – over incorrect invoices – are a diminishing problem because of the new "self-billing" systems that are in place. However, the manufacturer told us that it still receives "huge numbers" of paper invoices issued by suppliers and that it did not think it would ever be able to convert all its suppliers to self-billing. If BoAs were rendered ineffective, it would have to review its relationship with some suppliers and might cease to purchase from them.

Secondly, the introduction of supply chain finance may seem to reduce the problems for suppliers, particularly those who cannot use invoice discounting for the reasons given by the financiers to whom we spoke.[71] But the manufacturer told us that the scheme is available only to those with whom it does more than £100,000's worth of business a year; and also that some suppliers cannot use it because they are locked into their current financing arrangements. The retailer told us that it seldom dealt with small firms, since they do not have the "scale" to supply at the levels required.[72]

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[71] See above, 3(b).

[72] BIS has proposed that the nullification of anti-assignment clauses should not extend to contracts which included exclusivity clauses for supply chain finance. However, this is controversial, with respondents to the consultation pointing out that this would limit the financing options available to SMEs and that it may lead to exclusivity clauses being included as a back door route to circumvent the prohibition on BoAs. Some receivables financiers who were also providers of supply

(h) Additional costs

Financiers were asked whether the possibility of enforceable BoAs had caused them additional costs. The replies tended to vary according to the sort of financing the respondents carried out. Thus financiers who did virtually all invoice discounting financing for medium sized businesses said that it did not increase its costs at all (A2,D). The others all agreed that costs were increased (A,B,C,E,F) and that the volume of financing was reduced (B,E,F). The costs included administrative time in checking for BoAs and interpreting them (A,B,C), negotiating waivers (A,E) and costs in taking a charge over all the client's business as part of an invoice discounting arrangement (E).

(i) Conclusion

The overall message was that BoAs caused most problems where the financing arrangement was a factoring one, particularly when it was non-recourse. This tended to apply to the smaller end of the SME market. However, there was also some increase in costs in the invoice discounting market, in that additional steps had to be taken by financiers to protect themselves, such as taking charges, guarantees and powers of attorney, which were largely attributable to the existence of BoAs. We were also given a summary of communications ABFA had had from their members (not identified) giving their views on the effect BoAs had on the clients they financed. The overall message was that BoAs had led to reduced funding for some of their clients, although considerable attempts were made to mitigate this, either by using non-notification financing, or obtaining waivers, or (in a few cases) the financiers 'living' with clients being paid direct and forwarding cheques. Several members made the point that it was not just BoA clauses which caused trouble, but also 'pay when paid' clauses, and other onerous clauses, particularly when the end user was not paying the client direct, but payment was through an agency. This was also the message from suppliers: only one of the companies interviewed attributed difficulties with receivables financing directly to BoA, but they all said that access to receivables financing can be difficult where large customers, with greater bargaining power in contractual negotiations, object to the factoring of their debts. Whether reference is made to BoA or non-transfer of debts is made a condition of continued custom,[73] the impact on small-medium companies' cash flow can be substantial.[74]

PART 4: THE 2014 SURVEY

As already described, the 2011 study was a relatively small-scale, interview-based study producing qualitative data. The purpose of the 2014 survey was to attempt to gather data from others in the receivables financing industry to see whether it would support the conclusions which had been tentatively reached. In total, 18 respondents completed the survey. The majority of respondents (10) were active in both invoice discounting and factoring, with five of these also specifying activity in other types of financing not directly covered by the survey.[75] Of the rest, three respondents were active only in invoice discounting, one only in factoring and one in block discounting. Three

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chain finance commented that they did not consider that the lack of this exemption would render supply chain finance uneconomical or not be commercially viable ; see 'Summary of Responses' (n), 7. The information here about the limited availability of supply chain finance for smaller businesses would appear to add further grist to the mill.

[73] Or possibly confidentiality agreements, but only one respondent mentioned this.

[74] On confidentiality clauses in particular, see fn 70 and accompanying text.

[75] One of the individuals completing the survey in this group noted that, although his employer was active in both invoice discounting and factoring, his personal experience was limited to invoice discounting and so he had completed the questions to the best of his knowledge with respect to factoring.

professional advisers also submitted returns, two from the legal profession and one specialising in restructuring and recovery services.

(a) Reactions to presence of BoA

The 2014 survey supported the view that BoAs are more of a concern for financiers providing factoring services. When asked whether the fact that a contract contained a BoA would make it impossible for some businesses to raise finance against its receivables where it would otherwise have been able to do so, nine respondents replied that it would have this effect in factoring. Of those who specifically disagreed with respect to factoring (5), one was an individual who stated that he did not personally work in factoring, one said that the organisation always sought a waiver in respect of a factoring arrangement (whilst it only "sometimes" sought a waiver in respect of an invoice discounting arrangement) and the remaining three were all professional service providers rather than receivables financiers. Four respondents active only in invoice discounting made no selection in respect of factoring at all.

The picture was more mixed for invoice discounting. Eight respondents continued to hold the view that the presence of a BoA may prevent some businesses from raising finance against their receivables but seven felt that it would not (with three respondents making no selection).[76] One professional service provider continued to hold the view that the BoA would not act as a brake on an invoice discounting arrangement and was joined by six specialist invoice discounters who agreed. Three respondents completed the survey solely from the perspective of factoring (one legal adviser and two specialist factoring organisations).

The 2011 study found three reasons for this apparent distinction between invoice discounting and factoring, as follows : (i) the customers are not notified of the assignment in an invoice discounting arrangement, (ii) it is standard practice to take an all asset debenture (and, possibly, a power of attorney) in invoice discounting and (iii) proceeds are generally paid by the customer directly into a supplier trust account. The results from the 2014 survey suggest that the fact that customers are not notified of the assignment in an invoice discounting arrangement is the most important of these three reasons. We say this because the 2014 survey suggests that the practices of taking an all asset debenture and paying proceeds into trust accounts are now also widely employed in the factoring world.

Although thirteen respondents responded that they took all asset debentures with respect to invoice discounting, compared with only eleven respondents in factoring, respondents who made no selection accounted for the balance between the two. Trust arrangements also provided an important method of protection for both types of financier with thirteen respondents (in the case of invoice discounting) and ten respondents (in the case of factoring) identifying some combination of a declaration of trust and a requirement to hold proceeds in a separate account as a method of protecting themselves against the insolvency of an assignor. But the survey supported the conclusion that less use was made of the *Vandepitte* procedure as a method of enforcement, with only five invoice discounters and four factors responding that it was part of their tool kit. Instead, in addition to relying on the appointment of an administrator, respondents confirmed that they relied on persuading the assignor to pursue the debtor (ten respondents in the case of invoice discounting and eight in the case of factoring) and a power of

[76] One respondent who made no selection with respect to invoice discounting had identified his organisation as providing only factoring.

attorney enabling them to bring a claim in the name of the assignor (nine respondents in the case of invoice discounting and seven in the case of factoring). Enforcement of a contractual obligation on the assignor to pursue the debtor was less popular (seven respondents in the case of invoice discounting and five in the case of factoring). The survey also identified a high incidence of taking personal guarantees from directors, although one legal adviser noted that this was particularly common at the lower end of the market.

(b) Waiver of BoAs

When asked whether they would seek a waiver of a BoA if one were identified, only one respondent, a factor, responded that they would always do so and two respondents who said that they would "sometimes" seek a waiver in a factoring arrangement said that they would never do so in an invoice discounting arrangement. Overall, seven respondents would never seek a waiver in an invoice discounting arrangement compared with only three in the case of factoring. This tends to support the view that BoAs are more of a concern for factors than they are for invoice discounters. Nonetheless, one respondent who responded that they would never seek a waiver for invoice discounting explicitly stated that they would not consider funding and equal numbers of respondents in both factoring and invoice discounting said that they would "sometimes" seek a waiver (nine). Nine respondents also confirmed that it is possible to identify contracts which may contain a prohibition when the customer is taken on, but ten felt the time and effort involved in obtaining a waiver to be "significant", with nine recording that a waiver would only sometimes being given. These results support the findings from the 2011 study that suggest the presence of BoAs increases costs for the financing industry.

The 2014 survey attempted to find out to what extent these costs are passed on to the customer, resulting in a higher cost of finance in the market. The survey results suggested that this is indeed the case, at least for some suppliers with a majority of respondents answering positively to a question on whether receivables are purchased at a greater discount to face value or the advance rate applied to the purchase of receivables reduced as a result of the possibility that the receivables contract may contain a BoA. However, responses suggested that this was the case only some of the time and respondents struggled to specify how much the cost of finance may be increased, with a majority either admitting that they could not put a number on it or making no selection in answer to a question designed to establish the range of the reduction. Of those who did provide a quantified answer, one invoice discounter and two factors put the reduction in the 0-5% range, three invoice discounters and three factors put it in the 0-10% range and two respondents considered that it might exceed 10% in both cases.[77]

(c) Why BoAs are included in contracts

Although the 2014 survey generally adopted a "tick box" approach, it did ask respondents for views on the use and purpose of BoAs. Once again, the results supported the results of the 2011 survey. Views were mixed on which companies made greatest use of BoAs, although the largest number of replies (8) specified large companies and government agencies. The majority of respondents agreed that the incidence of BoAs was "much the same as before". But just as the 2011 survey had found, a wide range of views were advanced as to why BoAs were included, ranging from a misguided attempt to ban the transfer of obligations, to a general dislike of dealing with factors, a desire to deal with the

[77] Responses to the BIS Proposal were similarly mixed as to whether the nullification of anti-assignment cluases would negate the cost of waivers and workarounds, although this may be due in part to other elements of the proposals such as the proposals for an exemption for supply chain finance and commercial confidentiality; see, 'Summary of Responses' (n 9), 11.

party the customer has contracted with,[78] legal advice and boilerplate drafting. Once again, set off was not specifically identified as a concern.

(d) Difficulty in relying on methods of protection.

Opinion was roughly equally divided on whether respondents to the 2014 survey had experienced difficulty in relying on the methods of protection which have developed in the market to deal with the issues raised by BoAs. Seven respondents had experienced no difficulties, one replied that they had generally not experienced difficulties and three left no comment. Others responded positively that they had faced issues, although nothing emphatic was recorded. Interestingly, nine respondents agreed that, in the event the law was changed (such that a prohibition on assignment was not valid as against the assignee but could result in damages against an assignor who assigned in breach of such a prohibition), companies may be reluctant to seek financing backed by their debtor book due to concerns of inadvertent breach. This suggests that if any change in law were to be made in this area, the responsibilities of the assignor would need to be identified clearly, at least in the early years.[79]

(e) Conclusion

There are obvious challenges in any survey-based approach to collecting evidence in this area. It is for this reason that two different approaches were adopted – the interview-based data gathering in 2011 and the questionnaire-based approach of 2014. In the main the 2014 results do support the 2011 findings. They suggest, however, that methods of protection may be similar in both invoice discounting and factoring and that the more relaxed approach in invoice discounting may have more to do with the fact that the customer is not notified of the assignment. The 2014 survey suggests that the methods of protection which the industry has developed are working reasonably well but that they may also be increasing the cost of finance for some customers. They also suggest that if reform is introduced in this area, it will be important to identify the responsibilities of the assignor in order to avoid the unintended consequence of discouraging suppliers from seeking receivables financing for fear of their own liability in the event of breach of a BoA. But most of all, perhaps, they suggest that (pending reform) any hardening of the law in this area against the industry in court decisions could have an immediate and dramatic affect on the availability of receivables financing.

PART 5: OTHER LAWS

(a) Introduction

Many jurisdictions around the world have legislation or case law that has the effect of overriding BoAs on whole or in part. For convenience, we divide this summary into parts. It is, of necessity, very brief and there are many detailed qualifications and exceptions to the broad propositions we set out.

(b) The Uniform Commercial Code and the PPSAs

[78] BIS sought views on whether invoice discounters should raise disputed invoices with the supplier of the goods or services. A majority disagreed, with three invoice discounters reporting that they raised disputes with the customer, in consultation with suppliers; see 'Summary of Responses' (n 9), 9.

[79] For an increase in litigation after a change in law see RC Clark, 'The Interdisciplinary Study of Legal Evolution' (1981) 90 The Yale LJ 1238, 1248. The BIS proposal is for an outright prohibition.

In the United States, Article 9 of the Uniform Commercial Code (which governs both security over moveable property and outright assignments of "accounts", and which is in force in every State) provides that a term in a contract giving rise to an account[80] which prohibits or restricts its assignment, or which requires the account debtor's consent for assignment, is ineffective.[81] The general rule is that the anti-assignment override does not affect the enforceability of a confidentiality clause, even if the confidentiality clause (as a "practical" matter) indirectly "impairs" the ability to assign. So, the debtor can assign its rights notwithstanding a general anti-assignment clause, but the assignee (secured party) cannot obtain the confidential information because the confidentiality clause remains effective. But if the confidentiality clause is a disguised effort to make the contract non-assignable (for example, if the "confidential" information is not really confidential), then § 9-408 of the UCC would treat the provision as "directly" prohibiting assignment and would override it.

Many provinces in Canada have adopted Personal Property Security Acts which were modelled on an earlier version of Article 9; most of these have the same rule, save that the assignor may be liable in damages to the assignor for breach of contract.[82] The customer cannot, however, terminate the contract for breach of a BoA. Interestingly, the first PPSA to be adopted in Canada, the Ontario PPSA, did not originally contain an override, but this was heavily criticised by leading commentators[83] and an override (in similar terms to the other Canadian PPSAs) was introduced in 2006.[84]

The Personal Property Security Act in New Zealand (1999) does not contain an override, but the latest PPSA to be adopted, the Australian Personal Property Securities Act 2009, does.[85] The Australian Attorney-General's commentary on the Personal Property Securities Bill (2008) notes that the [proposed Section 81]

> 'recognises that it would be impractical for transferees of accounts to examine each contract for anti-assignment clauses. It is intended to promote the development of markets for accounts' by 'reducing transaction costs associated with dealings in accounts …'.

The recent review of the Australian PPSA notes that most respondents were in favour of retaining the override, and suggested various amendments, including extending it to overriding clauses banning the grant of security interests as well as 'transfers', which would reflect the position in the US and Canada.[86]

(c) German law

[80] For present purposes it may be said that "an account" under the UCC is equivalent to a trade receivable plus some other items (such as sums due under credit cards and "health care receivables") with which we are not concerned..
[81] UCC § 9-406(d).
[82] E.g. Saskatchewan PPSA, s 41(9). This also seems to be an answer to the confidentiality point in Canada; if the debt is assigned in breach of a BoA and in breach of confidentiality provisions, the customer would retain a right to sue for damages but would need to show loss. Anecdotal evidence suggests that this has not given rise to significant issues in Canada.
[83] J Ziegel and D Denomme, *The Ontario Personal Property Security Act Commentary and Analysis* (2nd ed, LexisNexis Canada 2000) para 40.5.
[84] Ontario PPSA s 41(1.), (am 2006, c. 34, Sched. E, s. 11 (4).
[85] Australian PPSA 2010, s 81.
[86] B Whittaker, *Review of the [Australian] PPSA 2009 Final Report* (2015) paragraph 7.11.3.

German law also makes BoAs in receivables in commercial contracts ineffective.[87] §354a HGB (Commercial Code), a new section which was introduced in 1994, makes an assignment of a claim arising from a commercial transaction (other than loan agreements when the lender is a financial institution[88]) effective despite a BoA.

As the debtor, under a non-assignment clause, is still free to pay the assignor notwithstanding the assignment, the assignee may find himself in an uncomfortable situation: if the debtor has paid to the assignor and insolvency proceedings over the assignor's estate are opened before transferral of the amount to the assignee, the assignee is left with only a claim for unjustified enrichment against the assignor's insolvent estate. This obligation will hardly ever be fully honoured by the assignor's trustee in the case of an insolvency. In order to avoid this, the assignee may stipulate that the assignor shall receive payment from the debtor and book this money on a separate account. As the money thus received is still identifiable in the insolvent estate, the assignee can claim that sum of money under § 48 InsO. The same applies where the debtor pays to the assignor's trustee in insolvency after the opening of insolvency proceedings.[89]

Although the position is not entirely clear, it appears that the German provision does not prevent the obligation not to assign being effective between the parties, so that contractual remedies are available to the customer.[90]

(d) French law

It appears that French law has reached the same results as the PPSAs, though by two quite different routes.

First, assignment of claims arising in the course of a supplier's business to credit institutions was made possible by the Loi Dailly (1981).[91] The Cour de Cassation has decided[92] that a prohibition of assignment does not prevent the transfer of the claim to the credit institution. The reasoning appears to be that the credit institution, the assignee, was not a party to the prohibition stipulated between debtor and assignor, and so the prohibition does not have any effect on it. An assignment contrary to such a prohibition can nevertheless probably impose a liability for damages upon the assignor towards the debtor.[93]

Secondly, due to the formal requirements of assignment, the French legal system had found other ways to transfer claims before legislation intervened in 1981. The subrogation personnelle (Civil Code, Articles 1249 et seq.) provides the legal framework for the French factoring business: the factor pays the debtor's debt to his client, and without any further arrangements the claim is thus transferred to the factor. As this effect is provided for by law, it is not conceivable that any prohibitions on transfer of claims could hinder the transfer of claims by way of subrogation.[94]

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[87] They are effective in other types of contracts, see BGB §399.
[88] §354a(2) HGB. This was added in 2008 by the Gesetz sur Begrenzung der mit Finanzinvestitionen verdbundenen Risiken of 12 August 2008.
[89] Rasche, European Legal Forum (E) 3-2002, 133, 137
[90] ibid.
[91] Loi 81-1 of 2 January 1981. A more recent development, enabling fiduciary assignments to be made, was introduced in 2007 (art. 2018-2 C. civil). This followed the form of the Loi Dailly and so it is likely that the same reasoning applies to this type of assignment.
[92] Cass Com 21 November 2000, Recueil Dalloz 2001.123
[93] Rasche, European Legal Forum (E) 3-2002, 133, 135.
[94] ibid.

(e) Other civil code countries

A number of other countries which have civil codes have adopted the approach that a BoA is not effective against a third party assignee unless (at least in some countries) the assignee knew of the BoA at the time it took the assignment.[95]

(f) International Conventions

The UNIDROIT Convention on International Factoring, Art 6(1) and the 2001 UN Convention on the Assignment of Receivables in International Trade, Art 9 contain this rule also.[96] The same is true of the draft Model Law being prepared by UNCITRAL.[97] In each case, the provision is similar to that in the Canadian PPSAs, so that the assignor is still liable in damages for breach but that the customer cannot terminate the contract as a result of that breach.

PART 6 CONCLUSION

The foregoing discussion brings us to a conclusion on the case for reform of English law on BoA having regard to the current legal position, the results of the 2011 and 2014 studies and the approach adopted in other jurisdictions. As we have shown in Part 2, very broadly English law currently respects the right of a debtor to prohibit assignment of a debt in its contact with its creditor but an assignment is likely to have some effect between the creditor assignor and the third party assignee. Nonetheless, several challenges remain for the third party assignee because of the absence of direct rights against the customer.

The 2011 and 2014 studies discussed in Parts 3 and 4 suggested that customers do have genuine interests in BoAs, in particular they often have concerns about having to deal with a financier in place of the original supplier. So parties may have good reasons for including a BoA in their contract. Nonetheless, on the current law BoAs do seem to have an effect on receivables financing that is out of proportion to the benefits that the BoA will bring to the customer. The current law would, we think, be totally unsatisfactory were it not for the "workarounds" that are available to deal with these challenges and that we described in Part 2.

The 2011 and 2014 studies discussed in Parts 3 and 4 confirmed that the receivables financing industry does indeed rely heavily on some of these workarounds. Yet, as we showed in Part 2, a number of uncertainties remain with these workarounds leading to the risk that a judicial decision could harden the law against them and consequently destabilise the ongoing provision of receivables financing. We therefore conclude that there is merit in reform, particularly given the ongoing challenge for SME Britain in accessing finance.

We advocate a straightforward nullification without the possibility of a damages claim between the customer and supplier for breach of contract, following the US model. This is so that one area of uncertainty is not replaced with another (with the result that, at best, transaction costs are not reduced

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[95] Other countries that have overrides, at least partially, are: Korean Civil Code, s 449(2); Japanese Civil Code, s 466(2); Italian Civil Code, s 1260(2); Greek Civil Code, s 466(2); Portuguese Civil Code, s 577(2); Spanish Civil Code, s 1112. In Korea, Japan, Italy and Portugal, the BOA clause is invalid against a third party assignee who does not know of it.

[96] See too O Lando and others (eds), *Principles of European Contract Law, Part III* (Kluwer 2003), art 11:301; V Bar and others (eds), *Draft Common Frame of Reference* (2009), art III-5:108; *Unidroit Principles of International Contracts* (3rd ed, 2010), art 9.1.9(1). The PECL and Unidroit rules apply to assignment of monetary claims in general, which does not seem to be supportable for reasons given above.

[97] See http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V15/052/64/PDF/V1505264.pdf?OpenElement

and, at worst, suppliers are unable to assess the costs/benefits of receivables financing arrangements and avoid them entirely). Similarly, the results of the 2011 study emphasise that it is not just BoAs which give rise to concerns for financiers but also other provisions such as confidentiality clauses. We therefore suggest that any reform should be as wide-ranging as possible and should not provide a series of exceptions which, once again, risk replacing one problem with another and providing a charter for the clever draftsman. We accept that the position on some points (such as set off) may be more complicated for large and larger mid-cap companies with complex contractual relationships than for SMEs. Consideration could, therefore, be given to restricting the reform to SMEs. However, such a restriction would almost inevitably turn out to be under or over-inclusive, and it may be unnecessary. We understand that suppliers who are large enough to be able to influence the terms on which they supply customers do not agree to a BoA in the first place; so in practice a general override of BoAs would not affect them.