

STATUTORY INVALIDITY OF NON-ASSIGNMENT CLAUSES

On 4 March 2025, the Senate passed the 'Act on the Abolition of the Prohibition of Pledging (*Wet opheffing verpandingsverboden*)'. The purpose of this Act is to invalidate restrictions on the assignment or pledge of receivables (hereinafter: 'non-assignment clauses'). Article 3:83(2) of the Dutch Civil Code provides that the transferability of claims can be excluded by a clause between creditor and debtor. When the Act enters into force a third and a fourth paragraph will be added to Article 3:83 of the Dutch Civil Code, in which non-assignment clauses in respect of certain monetary claims will be invalidated. This will make receivables more widely available as collateral in financing transactions or for transfer in the context of transactions such as factoring and securitisation. The downside is that it becomes more difficult for companies to protect themselves against the consequences of a transfer or encumbrance of a claim by their creditor (e.g. set-off).

Financial institutions and other companies would be prudent to take into account the (positive and negative) consequences that the new legislation will have for them. In this client briefing, we address a number of questions to which the Act gives rise.

Why was this Act made?

The main purpose of the Act is to give SMEs more access to credit. This will avoid unnecessary liquidity problems and increase the amount of money available for investment in innovation, jobs and growth. The scope of the new Act is not limited to claims that are originated by SMEs, but extends to (almost) all monetary claims from professional and commercial parties.

Especially in the construction and retail sectors, the transfer and pledging of receivables is excluded on a large scale. This has undesirable economic consequences. Receivables may not be pledged to a credit institution or transferred to a factoring company in order to obtain financing. This economically counterproductive effect is further reinforced by the fact that in neighboring countries, such as Germany, Austria and the United Kingdom, the effect of non-assignment clauses is limited or excluded. This leads to a distortion of the level

Key issues

- This Act improves access to credit for SMEs.
- Assignment and pledge prohibitions for certain monetary claims will be null and void.
- There are some exceptions to the nullity of these prohibitions, such as claims under a current or savings account, syndicated loans, and claims against certain institutions involved in clearing and settlement of transactions.
- Obligatory clauses such as penalty clauses or early maturity upon assignment or pledge are also affected.
- The nullity of assignment and pledge prohibitions applies to new clauses immediately from the date of entry into force of the new law. For existing clauses, this nullity applies from three months after the entry into force of the new law.

playing field to the detriment of the competitive position of the Dutch business community.¹

What does the new legal regulation look like?

The new paragraphs of Article 3:83 of the Dutch Civil Code read as follows:

3. Exclusion of transferability or pledge is not possible if it concerns a registered money claim arising from the exercise of a profession or business. A clause between creditor and debtor that is intended to exclude the transferability or pledgeability of such a monetary claim in whole or in part or to prevent its alienation or pledge is null and void.

4. The preceding paragraph shall not apply to pecuniary claims:

a. on the basis of a current or savings account;

b. pursuant to a credit or loan agreement in which several parties are or will be involved on the part of the lender;

c. from or on a clearing institution, as referred to in Article 1:1 of the Financial Supervision Act, or a central counterparty, a settlement agency, a clearing house or a central bank, as referred to in Article 212a, parts c, d, e and g of the Bankruptcy Act;

d. which will be paid on the basis of an agreement as referred to in Articles 34, third paragraph, 35, fifth paragraph, or 35a, fourth paragraph, of the Collection of State Taxes Act 1990 into a bank account held for the purpose of payment of wage tax, turnover tax and social security contributions.

Does the new statutory regulation only apply to limitations for pledging receivables?

No, despite the abbreviated title of the new Act being the "Act on the abolition of the prohibition of pledging". The new regulation also includes clauses that exclude or limit the *transferability* of claims. It concerns both limitations intended to have 'proprietary effect' (i.e. prevent the actual transfer of a claim) and limitations intended to have merely contractual (obligatory) effect (i.e. liability for breach of contract).

Can claims for which a proprietary non-assignment clause has been agreed be validly assigned and pledged? Are there any special requirements in this regard?

Yes, that is possible. The new Article 3:83(3) of the Dutch Civil Code means that, even if the parties intended a non-assignment clause to have proprietary effect, the claims can still be validly transferred or encumbered with a right of pledge.

In that case, a new formal requirement applies. For an assignment or pledge of claims, for which a (null) non-assignment clause has been agreed, the debtor must be notified in *writing*. A fifth paragraph will be added to Articles 3:94 (assignment) and 3:239 of the Dutch Civil Code (pledge) in which this requirement of being in writing (including the *electronic* form) is laid down. If the notification is not made in writing, it has no legal effect: a disclosed assignment or pledge does

¹ Parliamentary Papers II 2019/20, 35482 no. 3, p.1.

not lead to a transfer or a right of pledge, while an undisclosed assignment or pledge cannot be invoked against the debtor of the claim.² The requirement of writing ensures that it will be sufficiently clear to the debtor to whom payment must be made (Parliamentary Papers II 2019/20, 35482 no. 3, p. 2). For assignments and pledges of claims for which no prohibition on assignment or pledging has been agreed, a verbal communication is still sufficient.

Is it still possible to exclude or limit the assignment or pledging of claims under contract law?

No, in the new Article 3:83(3) of the Dutch Civil Code, non-assignment clauses only intended to have obligatory contractual effect (e.g. breach, penalty) are also considered null and void.

What are examples of invalid obligatory terms?

A clause stipulating that a penalty is due in the event of assignment or pledge will be null and void. Additionally, clauses that provide that in the event of assignment or pledge the other party will be entitled to terminate the agreement or the claim will be accelerated, will in all likelihood also be invalid. In accordance with the explanatory memorandum, even confidentiality clauses which have been included in order to make transfer or pledging more difficult will be null and void.³ It is also possible that clauses that give the debtor the power to still make a discharging payment to the original creditor (despite the assignment of the claim) will be invalid.

To which claims does the new Article 3:83 paragraph 3 of the Dutch Civil Code apply?

The new regulation only applies to claims for payment of a sum of *money*. A non-assignment clause that has been agreed for a claim for the delivery of goods remains possible. Moreover, the new Article 3:83(3) of the Dutch Civil Code only applies to claims *by* companies, including claims *against* consumers. Consumer claims are exempted from the nullity of non-assignment clauses. In short, it must concern claims that have arisen in regular trade or credit transactions, i.e. in the exercise of a profession on a business. Finally, the transferability of claims is a matter governed by the law applicable to the claims (Article 10:135(1) of the Dutch Civil Code). This means that the new legislation only applies to claims that are governed by Dutch law.

Does the new statutory regulation also apply to subsidies?

This depends on the case. When a government agency grants a subsidy to a company, this company acquires a monetary claim on the subsidy provider. If the *law* stipulates that such a subsidy claim is non-transferable, or if this claim is non-transferable by its nature (e.g. because of the personal nature of the subsidy), the

² The new Article 3:94 paragraph 5 of the Dutch Civil Code says: "the notification referred to in paragraph 1 or paragraph 3 shall be made in writing". This means that the requirement of being in writing applies not only to the notification as a delivery requirement (public assignment: Article 3:94(1) of the Dutch Civil Code), but also to communication that aims to have the debtor pay to the assignee (silent assignment: Article 3:94(3) of the Dutch Civil Code). The same applies to pledge - *mutatis mutandis*.

³ Parliamentary Papers II 2019/20, 35482 no. 3, p. 12

new legislation will not change this (Article 3:83 paragraph 1 of the Dutch Civil Code). Nor does the new Act have any consequences for a *subsidy order* (*beschikking*) that stipulates that the subsidy claim is non-transferable or unpledgeable. According to the State Secretary, such a prohibition is not a contractual clause within the meaning of the new legislation. If a *subsidy administration agreement* contains a prohibition on assignment or pledging, it is possible that this is invalid on the basis of the amended Article 3:83 of the Dutch Civil Code. This will be the case if it can be said that the subsidy claim arises from the exercise of a profession or business of the subsidy beneficiary (Parliamentary Papers I 2023/24, 35482 C, p. 4-5).

Are there also monetary claims for which the nullity of assignment and pledge limitations does not apply?

Yes, the Act exempts a number of categories of monetary claims.

- (i) An important exception applies to claims under a *current or savings account*. An assignment of such claims could lead to a disruption of the payment system, because it is not always clear to whom the bank is obliged to pay the credit balance, and the bank's account administration would not always adequately reflect the actual balance obligations. For the financing practice, this exception therefore does not remove a major obstacle to the pledging of bank accounts.
- (ii) A prohibition on assignment and pledging also remains possible for claims on the basis of a *syndicated loan*. The purpose of this is to maintain alignment with clauses in standard documentation (LMA), in which the borrower is given the opportunity to stipulate that assignment and pledging by the lenders is only possible with his consent. Since it happens in practice that only one bank acts as the borrower's counterparty when the loan is concluded, while it is intended that other banks will also be involved in the financing at a later stage, the legal text refers to several parties that are or will be involved. The agreement must show the intention to involve several parties in the agreement on the part of the lender.⁴
- (iii) In addition, claims against certain institutions involved in *clearing and settlement* of transactions are excluded. The aim is to safeguard the interests of uninterrupted payment and securities transactions. However, claims arising from OTC derivative transactions are not excluded, although assignment or pledging of such claims may have a negative impact on the settlement of such transactions in the event of default (*close-out netting*).
- (iv) Finally, limitations on assignment and pledging remain valid for claims paid into a *G account* for the purpose of paying wage tax, turnover tax and social security contributions.

⁴ Parliamentary Papers II 2019/20, 35482, no. 3 p. 11.

Are 'negative pledge' and 'pari passu' clauses affected by nullity?

'Negative pledge' and '*pari passu*' clauses remain valid if it concerns clauses that have not been agreed "between creditor and debtor", but between a creditor of a claim and a third party (the financier). Limitations on alienation or pledging of agreements agreed with third parties are not affected by the new Act.

Will the new regulation also apply to assignment and pledge limitations that were agreed upon prior to the entry into force of the new Act?

Yes, but only from three months after the new Act enters into force. This gives the parties extra time to try to make a contractual arrangement in another way to achieve the objectives that were intended with a prohibition on assignment or pledging. If, for example, the parties have agreed on a prohibition on assignment to ensure that all claims that arise between the parties can always be set off, they can also agree on this directly in a set-off clause. Of course, the cooperation of the other party is required for this.

When will the new Act enter into force?

It is expected that this Act will enter into force on 1 July 2025. The nullity of assignment and pledge limitations applies to new contracts *immediately* from this date. As indicated, this nullity applies to existing clauses from three months after this date.

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