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Onoverdraagzaamheid van vorderingen krachtens partijbeding

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SUMMARY

Current Dutch law assumes the principle that claims are transferable assets without the consent or co-operation of the debtor. The transferability of claims has not always been a given. For many years, the personal relationship between the creditor and debtor was emphasized. In practice though, financial markets require claims to be easily tradable, and therefore transferable. Over the years, the law aligned itself with this desired principle, by abandoning the idea that a claim should be qualified as a purely personal right. There is no objection against the transferability of claims, because the content of the claim – and therefore the level of performance required from the debtor – is not altered by changing the person of the creditor. There are a few exceptions to this general rule though. Under certain circumstances, the position of the debtor can deteriorate in a legal or practical sense upon transfer. (**chapters 1 and 2**)

However, art. 3:83 sub 2 BW allows the debtor to agree with a creditor that a claim cannot be transferred. Different than in the case of property or limited rights, claims can be non-transferable not only due to the law or their specific nature, but also because of an agreement between creditor and debtor. Thus the autonomy of parties overrides the interest of always being able to transfer and therefore trade claims.

Through a no-assignment clause, a claim becomes non-transferable by its content. Any attempt to transfer such a claim is doomed to fail, because it bears the feature that it is non-transferable. A no-assignment clause therefore also affects third parties. (**chapter 3**)

The opportunity offered by art. 3:83 sub 2 BW is used extensively in practice, because a debtor does not want to be confronted with a different creditor and the related consequences in legal or practical terms. The far-reaching consequences of these no-assignment clauses are somewhat mitigated by dogmas as 'conflict with the law, good morals or public order', 'abuse of circumstances', 'reasonableness and fairness', 'unreasonably onerous', 'abuse of power', 'protection of third parties' and 'wrongful act'. This will not easily be the case though, given that with art. 3:83 sub 2 BW, the legislator lets the autonomy of parties prevail. (**chapter 4**)

Besides non-transferability, a no-assignment clause also entails that a claim cannot be put up as collateral for financing transactions. The opinion often voiced in literature that a no-assignment clause does not prevent the establishment of a right of pledge on a claim containing such a clause, should be rejected as in

conflict with the law and its reason. A similar reasoning is applicable to the right of usufruct. (**chapter 5**)

Incorporating a no-assignment clause does not prohibit third-party creditors from seizing a claim on which that clause rests. Also, creditors and debtors cannot prevent a claim from attachment by specifying this in a no-assignment clause. Neither does a no-assignment clause prevent collection on the claim by third parties after attachment. This is even the case when collection by a party other than the original creditor has explicitly been excluded in the no-assignment clause. Claims which are not due and payable can be transferred in an enforced sale despite of a no-assignment clause. The circumstance that – according to common view – the buyer under execution obtains the claim through transfer, does not prevent this. Any other opinion would make the recovery of a claim which contains a no-assignment clause and is not due and payable, impossible. Appeal on rules regarding fraudulent conveyance or preference to creditors whose interests have been adversely affected (*actio pauliana*) offers insufficient opportunity to escape this conclusion. A possible route though is to treat the no-assignment clause as in conflict with the system of recovery as incorporated in the law, in so far as it also precludes a transfer under execution. One could also deduce from art. 474bb sub 1 Rv that claims which are not due and payable can be recovered through an enforced sale despite a no-assignment clause. To ensure legal security it is nevertheless recommendable to add a sentence to art. 3:82 sub 2 BW, which states that a no-assignment clause can be voided, if and in so far it prevents the recovery by third parties. (**chapter 6**)

A no-assignment clause does not keep a claim, which includes this clause, from being included in a bankrupt's estate. Also, creditors and debtors cannot prevent a claim from being included in a bankrupt's estate by specifying this in a no-assignment clause. Neither does a no-assignment clause prevent collection on the claim by the receiver in the bankruptcy. This is even the case when collection by a party other than the original creditor has explicitly been excluded in the no-assignment clause. A no-assignment clause does in principal prevent recovery through the sale of the claim though, because the no-assignment clause does stop the receiver in the bankruptcy from transferring the claim to the buyer. A no-assignment clause does not obstruct the third route Dutch bankruptcy law offers to the receiver in the bankruptcy from realizing the claim, i.e., realization through another route than collection or sale and transfer (art. 176 sub 2 Fw).

If a claim cannot be collected by the receiver in the bankruptcy because it is not due and payable and also cannot be made due and payable, cannot be sold and transferred because of a no-assignment clause, and can neither be realized through art. 176 sub 2 Fw, then the receiver in the bankruptcy can appeal on rules regarding fraudulent conveyance or preference to creditors whose interests have been adversely affected (art. 42 Fw). Thus, the no-assignment clause can be attacked. However, it will be difficult to meet the conditions of those rules,

even though the articles Under these circumstances conflict with the system security it is also for Du art. 3:82 sub 2 BW, which and in so far it prevents t

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- i. the interpretation of
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A no-assignment clause c creditors, a receiver in the assignment clause aims t other than the original cr party creditors, a receiver debtor can successfully p than the original creditor. clause implies that collec creditor is impossible, dep In the case of an heir or a ture in the interpretation sh by these persons, unless th In the case of a collection the exact opposite: a non-t lection assignee, unless the Creditor and debtor can al the creditor is part of the b as a fact that collection by possible, and secondly on assignee. (**chapter 8**)

A claim cannot be used in included. Question is wheth in which financial transact legislation and international 3:83 sub 2 BW.:

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not prohibit third-party creditors. Also, creditors and debtors can prevent this in a no-assignment clause by excluding collection on the claim by third parties when collection by a party other than the creditor is excluded in the no-assignment clause. It can be transferred in an enforced collection in a circumstance that – according to the law – remains the claim through transfer, and the creditor can make the recovery of a claim which is not due and payable, impossible. The creditor's preference or preference to creditors (actio pauliana) offers insufficient protection. The route though is to treat the no-assignment clause as incorporated in the law under execution. One could also argue that claims which are not due and payable can be excluded in a no-assignment clause. To ensure legal security, one could add a sentence to art. 3:82 sub 2 BW that a no-assignment clause can be voided, if and in so far it prevents the recovery by third parties. (chapter 7)

which includes this clause, from creditors and debtors cannot prevent collection by specifying this in a no-assignment clause prevent collection on the claim. It is even the case when collection is explicitly excluded in the no-assignment clause. The creditor does in principle prevent recovery because the no-assignment clause prevents transferring the claim to the buyer. The standard route Dutch bankruptcy law is to realize the claim, i.e., realization through transfer (art. 176 sub 2 Fw). In the bankruptcy because it is not due and payable, cannot be sold, and can neither be realized in the bankruptcy can appeal on the claim to creditors whose interests are excluded in the no-assignment clause can be voided under the conditions of those rules,

even though the articles 43 and 45 Fw can help the receiver in the bankruptcy. Under these circumstances one could argue that the no-assignment clause is in conflict with the system of recovery as incorporated in the law. To ensure legal security it is also for Dutch bankruptcy law recommendable to add a sentence to art. 3:82 sub 2 BW, which states that a no-assignment clause can be voided, if and in so far it prevents the recovery by third parties. (chapter 7)

Whether non-transferability of a claim by party agreement also has consequences for the issue whether another person than the original creditor – for example in the case of factoring – can collect on the claim, depends on:

- i. the interpretation of the agreement;
- ii. whether or not *legal barriers* exist against exclusion by the creditor and debtor of collection on the claim by others than the original creditor.

A no-assignment clause does not prevent collection on the claim by third party creditors, a receiver in the bankruptcy, or a subrogated party, not even if the no-assignment clause aims to prevent the claim from being collected by persons other than the original creditor. When one is not dealing with a claim by third party creditors, a receiver in the bankruptcy, or a subrogated party, creditor and debtor can successfully prohibit a claim from being collected by anyone else than the original creditor. The answer to the question whether a no-assignment clause implies that collection on the claim by a person other than the original creditor is impossible, depends in those cases on the interpretation of the clause. In the case of an heir or a person holding power of attorney, the point of departure in the interpretation should be that a non-transferable claim can be collected by these persons, unless the drift of the no-assignment clause is to prevent this. In the case of a collection assignee, the point of departure in the interpretation is the exact opposite: a non-transferable claim *cannot* be collected upon by a collection assignee, unless the drift of the no-assignment clause indicates otherwise. Creditor and debtor can also in an *explicit statement* indicate that the person of the creditor is part of the body of the claim. In that case, firstly it is established as a fact that collection by an heir or a person holding power of attorney is not possible, and secondly one does not have to figure out the case of a collection assignee. (chapter 8)

A claim cannot be used in financial transactions once a no-assignment clause is included. Question is whether art. 3:83 sub 2 BW still fits in a modern economy in which financial transactions play such an important role. Based on foreign legislation and international treaties, four alternatives can be formulated for art. 3:83 sub 2 BW.:

- i. no-assignment clauses are invalid;
- ii. no-assignment clauses are valid, but can only be interpreted as allowing the debtor to pay to the assignor instead of the assignee;

- iii. no-assignment clauses are valid, but can only mean that the debtor has a cause of action for damages against the other party in the event he assigns;
- iv. no-assignment clauses are valid, but the assignment of a claim containing such a clause is ineffective against the debtor only, and remains fully effective as against other parties.

One could consider adopting one of the above alternatives into Dutch law. However, alternatives (iii) and (iv) are not an option because they are ineffective in eliminating a possible financing blockade. Alternatives (i) and (ii) are interesting though, with the second being the preferred one. In that alternative, not only the interests of creditors, financial institutions and factoring companies who like transferability of a claim are taken into account, but also those of debtors who prefer non-transferability. (chapters 9 and 10)

The proposal on the table is to make a right of pledge possible on a claim for payment that contains a no-assignment or no-pledge clause. The interests of the debtor are protected by allowing him to fulfill his obligation through the original creditor/pledgor, even after the establishment of the right of pledge has been communicated to him. To ensure that the protection offered to the debtor does not stand in the way of the ability of the pledgee to realize the value of the claim for payment, this proposal provides in a right of pledge on what the original creditor/pledgor collects after the debtor has been given notice of the fact that the claim for payment has become a pledged asset. The money the original creditor/pledgor collects on the pledged claim must be kept separate from his own capital and should be channeled immediately to the pledgee. Beyond this, the proposal does not deviate from the existing legislation with regard to set-off, remission, postponement of payment, etc.. With regard to those aspects, even a debtor who agreed upon a no-assignment or no-pledge clause with his creditor will need to be open to another person collecting upon the claim, if the claim for payment upon which that clause rests is nevertheless used as collateral in this way.

For the creditor and his finance providers the proposal only works out positively. Claims for payment which include a clause as covered by art. 3:83 sub 2 BW can then be used in most financial transactions, including factoring, and thus become relevant as collateral. This eliminates an important barrier to getting access to financial means. There are a few less attractive implications for the debtor. Inclusion of an art. 3:83 sub 2 BW clause does not prevent the debtor from being confronted with the pledgee instead of the creditor who is to collect on him. However, this is mitigated by limiting the intrusion on the party autonomy to the minimal extent required by a modern economy. This because the proposal does not create the possibility to *transfer* a claim on which a no-assignment or a no-pledge clause rests, but only the possibility to establish a *right of pledge* on such a claim, and this only when it concerns a claim for pay-

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ment. In addition, the interest of the debtor to not have to adapt himself to another person than the original creditor, is largely protected. Therefore, it is still interesting to a debtor to include a clause as covered by art. 3:83 sub 2 BW. Moreover, one should realize that eliminating obstructions in financial traffic due to no-assignment or no-pledge clauses is also in the interest of a debtor, because it leads to lower costs of capital in the financial system, which should ultimately also benefit the debtor. For the Dutch economy as a whole the proposal offers great benefits, because it eliminates an inefficiency in the financial system and will thus lead to further growth in the financial services market. (chapter 11)

- HR 10 oktober 1980, NJ 1980, 412
- HR 12 januari 1982, NJ 1982, 484
- HR 27 augustus 1977, NJ 1978, 9
- HR 3 april 1983, NJ 1983, 11 (Gerechtshof Amsterdam)
- HR 3 oktober 1972, NJ 1973, 277 m.m. (Gerechtshof Amsterdam)
- HR 30 januari 1957, NJ 1957, 134
- HR 19 december 1969, NJ 1970, 178 (Gerechtshof Amsterdam)
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