



## Debt Sale in the Netherlands

### Questions & Answers<sup>1</sup>

#### 1. **What is debt sale?**

Debt sale is just another collections / finance tool. It is a manner of financing a company and enables a company to clean up its balance sheet by selling the receivables against its debtors, regularly at a discount.

By a sale of receivables, the legal title of the receivables is transferred by the seller (the assignor, *cedent*) to the buyer (the assignee, *cessionaris*). As a result, as from the moment the receivables are validly transferred to the buyer, the buyer bears the risk of a defaulting debtor.

#### 2. **Factors of pricing**

Factors influencing the price for the debt can be, among other things, (i) the age of the debt, (ii) the moment of transfer, (iii) the payment history of the debtor, (iv) whether or not there is a payment default or other default, (v) whether or not it entails an asset sale rather than a contract sale, (vi) underlying contract terminated or not, (vii) type of debt (consumer credit requiring a license) and (viii) whether or not there is an insolvency situation.

#### 3. **Type of transaction**

The sale transaction itself can be structured in multiple manners; from a one-off bulk sale or a spot sale in which (part of) the existing debt portfolio is sold to a continuing forward flow in which on an ongoing (regularly monthly or quarterly) basis new debts are sold and any hybrid form in between. It can be a partial or full portfolio sale and/or the portfolio itself can be segmented by type of debt (performing/non performing, collections/insolvencies, secured/unsecured, etc.).

#### 4. **What structure is commonly used in the Netherlands?**

Debt sale in the Netherlands by a creditor can either be structured by means of (i) an assignment of the receivables (*cessie van vorderingen*) or (ii) a sale of contract (*contractsovername*). The first, assignment, is the most common structure used in the Netherlands.

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## **5. What are the legal requirements for a debt sale by means of assignment?<sup>2</sup>**

If the receivables are transferred by means of assignment, from a Dutch law perspective, the following cumulative conditions need to be satisfied:

- power of disposal (*beschikkingsbevoegdheid*) over the receivables of the seller;
- legal title (*titel*) for the assignment; and
- valid transfer of title of the receivables.

Assignment can be effectuated by means of a disclosed assignment (*openbare cessie*), being an assignment with notification to the debtor, or an undisclosed assignment (*stille cessie*), being an assignment without notification to the debtor.

In the case of a disclosed assignment, a notification of the assignment to the debtor(s) is required for the transfer of the receivables to become effective. In the case of an undisclosed assignment, registration of the deed of assignment with the Dutch tax authorities is required for the transfer of the receivables to become effective. Alternatively, the deed of assignment can be executed in front of a Dutch civil law notary in which case the deed does not require registration with the Dutch tax authorities in order for the transfer of receivables to become effective.

## **6. When does a disclosed assignment become effective?**

When the cumulative requirements (power of disposal, legal title and valid transfer) are met and notification of such assignment has been received by the debtors.

## **7. When does an undisclosed assignment become effective?**

When the cumulative requirements (power of disposal, legal title and valid transfer) are met and either (i) a notarial deed of assignment has been executed in front of a Dutch civil law notary or (ii) a private deed of assignment has been received for registration by the Dutch tax authorities.

## **8. What are the legal requirements for a debt sale by means of a contract sale?**

If the receivables are transferred as part of a contract sale, from a Dutch law perspective, the seller transfers the legal relationship with the debtor in full to the buyer by special title (*onder bijzondere titel*). As a consequence, the buyer becomes the counter party of the debtor in respect of the

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It is presumed that both debt sale and the receivables to be sold are governed by Dutch law and that the receivables are registered claims rather than claims payable to bearer (*vorderingen aan toonder*). If the receivables are claims payables to bearer, other legal requirements apply to the valid transfer of those receivables to a buyer from a Dutch law perspective. Valid transfer for example shall already be effectuated upon the handing over of the document embodying such claim payable to bearer. In these Q&A, we have assumed that all receivables to be transferred in a debt sale are registered claims (*vorderingen op naam*).

underlying agreement. Therefore, also the cooperation/consent of the debtor is required for a contract sale to be effective. The consent however does not have a prescribed form and could be given in writing or orally, as well as in advance when entering into the initial contract between the seller and the debtor (e.g. by including it in applicable terms and conditions) or just upon the contract being transferred to the buyer by the seller. An explicit written consent of the debtor is recommendable.

### **9. Which documents are needed?**

The following legal documents come into play in a debt sale transaction.

- a non-disclosure agreement;
- due diligence checklist / report;
- corporate authorizations;
- purchase agreement and deed of transfer;
- in the case of assignment: debtor notifications (hello/goodbye letters); or registration of the deed of assignment with the Dutch tax authorities;
- in the case of contract sale: consent of the debtor; and
- a legal opinion may be required.

### **10. What are the most common hiccups and pitfalls in a debt sale?**

- The receivables that are subjected to the transfer need to be sufficiently identifiable.
- Due to the so called *fiducia* prohibition the debt sale needs to be an actual sale and transfer of ownership. From a Dutch law perspective, it is prohibited to transfer receivables solely as security for the buyer or to transfer receivables which do not purport to belong to the assets of the buyer following such transfer.
- The transferability of receivables should not be restricted or excluded by law or by contract (NB always check applicable terms and conditions which are applicable to the contractual relationship).
- A cross border transfer may trigger international private law queries in respect of the laws governing the several relationships in connection with the transfer.
- Transfer by means of sale of contract implies that new contracts shall not be covered by such deed of transfer and would require a supplemental deed.
- The receivables subjected to an undisclosed assignment can only be existing receivables and future receivables arising out of or in connection with an existing legal relationship between the seller and the debtor. Any future receivables arising out of or in connection with a *new* legal relationship requires a supplemental deed of assignment. This limitation does not apply if the receivables are transferred by means of a disclosed assignment. However, in that case, still notification of the assignment is required to the debtor in order for the transfer of such future receivables

to become effective as well. A supplemental deed of assignment is not required (although contract parties regularly choose to transfer future receivables arising out of a new legal relationship by means of a supplemental deed of assignment irrespective of whether the assignment is done by means of a disclosed or an undisclosed assignment for the sake of clarity).

- If the receivables to be transferred have arisen from a consumer credit agreement, the buyer of the receivables needs to have a license as consumer credit offeror within the meaning of article 2:60 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*) or otherwise be authorized to administer and manage those receivables, for example because the buyer enters into an SLA with a licensed servicer who can act as the buyer's credit manager (*kredietbeheerder*) within the meaning of article 3 Exemption Regulation DFSA (*Vrijstellingsregeling Wft*). Moreover, it is highly recommendable to take into account specific representations and warranties, covenants and undertakings in the purchase agreement in relation to the laws and regulations that are applicable to consumer credit.

### **11. What is the impact for the debtor after the debt sale has occurred?**

In case of a contract sale, the debtor has consented to the sale and can only pay in discharge of his payment obligations (*bevrijdende betaling*) to the new creditor.

In case of an assignment, it depends on the type of assignment chosen whether the debtor can still pay in discharge of his payment obligation to the seller, i.e. his original creditor.

In case of an undisclosed assignment the debtor can still pay in discharge of his payment obligation to the seller, his original creditor, provided, however, that the debtor has reasonable grounds to believe that the recipient of the payment was entitled to such payment. This means that if the debtor is aware of the assignment and therefore knows that the seller is no longer entitled to receive payment, the debtor can only pay in discharge of his payment obligation to the buyer.

In case of a disclosed assignment, the debtor can only pay in discharge of his payment obligation to the buyer. If the debtor (mistakenly) pays to the seller instead, the seller is not entitled to such payment and should repay the debtor, whilst the buyer can also claim payment from the debtor. The debtor can be held to pay twice and needs to recover the initial – wrongful – payment to the seller, his original creditor, himself. Seller and buyer regularly contractually agree how to deal with these type of irregular payments by a debtor to the seller.

**12. What happens to ancillary rights to a receivable when such receivable is transferred?**

In general, ancillary rights (such as security rights) to a receivable remain attached to such receivable. The ancillary rights shall be transferred to the buyer at the same time as the assignment of the receivables becomes effective.

**13. What are the consequences from a data protection point of view?**

If the receivables to be subjected to a debt sale are against natural persons, please obtain legal advice in relation to the applicable data protection rules and regulations.

The Dutch Data Protection Act (*Wet bescherming persoonsgegevens*, "DDPA") makes a distinction between a responsible party (*verantwoordelijke*) and processors (*bewerkers*) of data of natural persons.

It is highly recommendable to include relevant provisions regarding the use, storage and transfer of data in the deed of transfer.

**14. Selling to a foreign entity, what does that mean for a debtor?**

Presuming that the claims that are subjected to a sale are registered claims (*vorderingen op naam*) governed by Dutch law, these claims remain governed by Dutch law upon transfer of the debt portfolio from the seller to a buyer. From a Dutch international private law perspective, the laws governing the claim (i.e. Dutch law) determines:

- whether the claim can be legally transferred;
- the relationship between the debtor and the buyer;
- the conditions under which the transfer of the claim can be enforced against the debtor; and
- the question whether a debtor has paid in discharge of his payment obligations.

**15. A cross border sale and data protection**

Under the European Data Protection Directive, an entity processing personal data is either a controller or a processor. Both a controller and a processor of personal data need to comply with applicable data protection rules and regulations. As the controller determines the purposes for which the personal data may be processed and the processors must act under and in compliance with instructions from the controller, the controller has full responsibility for compliance with the applicable privacy rules.

The DDPA makes the same distinction between a controller and processor of personal data. The DDPA applies to the processing of personal data in relation to activities of a branch of a controller (*verantwoordelijke*) in the Netherlands. Branch is a broadly defined term. A branch may be an office (not necessarily a registered office) or a subsidiary of the controller in the Netherlands. It may also be one employee of the controller working for the

controller in the Netherlands in relation to the activities (e.g. for purposes of coordinating the debt portfolio).

Presuming the seller is located in the Netherlands, the DDPA is applicable to the activities of the seller. Under the DDPA, pre-sale, the seller qualifies as a controller regarding its activities concerning the debt portfolio. As such, the seller must ensure it transfers the personal data of the debtors of the claims to a (foreign) buyer in compliance with the DDPA. This entails:

- one of the legitimate grounds for processing (and thus transferring) personal data as stated in the DDPA should be applicable; and
- the data subjects (i.e. the debtors) are notified of all processing of personal data before such processing takes place. Such notification could be included for example in the 'goodbye' letter of the seller to the debtor notifying the debtor that the debt was sold to the buyer.

### **16. What are the rights of a buyer if a debtor does not satisfy his payment obligations?**

In general, the buyer, as the new creditor, can summon the debtor to pay, followed by sending a default notice (*ingebrekestelling*) (unless this is not required under the specific agreement), after which the debtor shall be in default.

To secure its recoverability, a creditor can attach assets of the debtor. An attachment can be levied as an attachment before judgment (*conservatoir beslag*) after having obtained approval from the court and/or as an attachment in execution (*executoriaal beslag*) on the basis of a judgment. An attachment before judgment needs to be followed by initiating proceedings by the creditor against the debtor.

If the creditor is a secured party, it can enforce its security rights after the debtor is in default. If the creditor is already subjected to insolvency proceedings, the secured creditor can enforce its security rights as if there was no bankruptcy.

### **17. Outsourcing of selling?**

The difference between outsourcing or selling the collections of (a part of) a debt portfolio is that the seller maintains ownership, and therefore the risk involved, when collection is outsourced. A true sale, however, transfers ownership and the accompanying risk to the buyer.

Rationale for either choosing outsourcing rather than a sale is mainly a commercial one.

Outsourcing:

- In case of outsourcing, a creditor can, subject to the terms of the agreement with the debt collections agency (DCA), maintain control over its portfolio, whilst not having to put lots of resources in servicing and/or collecting the portfolio.

## Sale:

- In a sale on the other hand, control over the portfolio shifts to the buyer. The seller and buyer may agree that the seller has an audit right and/or an information right in respect of the performance of the portfolio post sale. But it also often happens that the seller simply is not interested in having to do anything with the portfolio post sale. Only in exceptional cases, the buyer may then need to be able to reach out to the seller, e.g. for regulatory reasons.
- Naturally, after a true sale, the buyer itself can outsource the servicing and/or collections of the purchased portfolio. In securitization transactions, for example, the seller (originator) regularly remains pool servicer of the portfolio sold to a special purpose vehicle as buyer.
- The original purchase agreement would regularly include arrangements between the seller and the buyer in respect of what the buyer can do with the portfolio without the seller's prior consent. As the debt originally arose with the seller, the seller may still have a relationship with the debtor. It may be negotiated that certain receivables are put back to the seller on the occurrence of certain events. On-sell to a third party generally requires the prior consent of the original seller. General terms to which a servicer of DCA must comply are generally agreed upon in advance as well between a seller and a buyer.

### **18. Who to go to when negotiating and structuring a debt sale?**

FG Lawyers is happy to assist! FG Lawyers is a boutique law firm focusing on corporate & (alternative) finance. Our firm was founded in 2013 as a spin off of NautaDutilh by Jan Paul Franx and Gijs Gerretsen. (Alternative) Finance partner Anne Hakvoort joined in 2015 after having gained experience at NautaDutilh and Eversheds.

We are a specialist firm without any fuss or strings attached: your interest is our priority and we can help you achieve an optimal legal solution. In doing so we offer reasonable fees and a flexible fee structure. Solution driven, pragmatic, open-minded, personal and good quality: that is what we stand for.

Please visit our website: <http://www.fglawyersamsterdam.com> or contact us directly should you have any questions.



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