

# Strategies for preventing disputes & managing potential disputes

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# Focus on potential disputes and early resolution

- Situations where there is a prospect of dispute (before the dispute has crystallised and is obviously headed for litigation or arbitration)
- Disputes are:
  - › costly
  - › time-consuming
  - › distraction
- Outcomes not always easy to predict
- Whilst not always possible to circumvent completely, there are some strategies that can be adopted to limit dispute potential and to increase the chances of successful outcome

# Avoiding ambiguous drafting or documents

- Commercial pressure to get the deal done
- Ambiguous or insufficiently specific drafting or documents
- English court's approach to contractual interpretation: to ascertain the objective meaning of the contract from the language parties have chosen to use to express their agreement
- No weight given to subjective intentions
- Impact of change of approach: compare
  - › Pre-contract negotiations
  - › Post dispute behaviours

# The *last-minute addition* clause

- Dangers of looking at a proposed new clause in isolation
- Always consider consistency with the rest of the drafting
- Avoid elegant variation: invitation to infer something different was intended
- *“Pilgrims on the endless road to unobtainable perfection”*
- The dangers of relying upon the obvious “common sense” interpretation

# Deviating from the contract – waiver and estoppel

- Relying upon contractual framework agreed for one structure for one completely different
- Absence of an appropriate contractual framework within which to assess your rights and counterparties obligations
- Accepting defaults without putting in place reservation of rights
- Doctrines of:
  - › Waiver by election
  - › Waiver by estoppel
- Adopt a rigorous approach to waiver requests

# Absence of governing law and jurisdiction clause

- Failing to agree choice of law to govern the contract, and to specify an effective method of dispute resolution, creates dispute potential
- Disputes regarding jurisdiction and choice of law: a costly side show
- Litigating your dispute in a foreign court fraught with difficulties
- Choosing a “neutral venue” for your dispute infinitely preferable to making no choice at all
- Check dispute resolution clause is appropriately drafted

# Managing potential disputes: establishing legal issues/evidence

- Is your dispute contractual, based in tort, mixed?
- Collating the relevant documents:
  - › Executed copies of agreements
  - › Checking security has been perfected
- Importance of contemporaneous evidence
- Human memory fragile and malleable
- Importance of preserving potentially relevant documents
- Danger of creating potentially disclosable documents
- Preserve access to electronically held documents/storage backup files

# Managing potential disputes: privilege

- Legal advice privilege
  - › Importance of identifying the "client"
- Litigation privilege
- Clear communication within the organisation of:
  - › Obligation to disclose documents
  - › Obligation to preserve documents
  - › Dangers of creating new documents



# Managing potential disputes: follow the money, interim remedies

- Consider enforcement
- Does your counterparty have the resources to meet your claims?
- Do you need local law advice on enforcing your security?
- Is there a concern your counterparty will dissipate assets or destroy evidence?
- Interim remedies: freezing injunctions, search orders
- Norwich Pharmacal Orders

# Managing potential disputes: time limits

- Rules on limitation of actions
  - › Contract
  - › Tort
  - › Claims under a deed
- Contractually agreed limitation periods often much shorter
- Foreign limitation periods may be less generous

# Managing potential disputes: insurance

- Do you have any insurance covering or connected to the subject matter of the dispute
- Notification procedure
- Time limits
- Insurers' right to be consulted
- Claims control

# Managing potential disputes: negotiation

- Benefits of trying to resolve the dispute in a less adversarial setting
- Choosing the negotiator and agreeing the brief
- Recording the scope of any agreement
- The use of “without prejudice” privilege
- Rules on privilege generally, and in particular protection for settlement discussions, not available in all jurisdictions

# Marian Boyle

## Partner

Marian heads Sullivan's UK insurance and disputes practices, working closely with the firm's established and multi-disciplinary trade and export finance team, and the firm's U.S.-based disputes team, providing advice on commercial dispute resolution, insurance and risk management.

With over 30 years' experience, Marian's contentious practice includes advising clients in relation to disputes arising from trade finance, professional negligence, commercial insurance and breach of contract claims. These disputes are often international in nature and result in large-scale, highly complex multi-party litigation, arbitrations and mediations.

Marian advises banks, insurance brokers, investment funds, government agencies and corporates in relation to their commercial insurance arrangements which support structured trade, commodity and pre-export financings as well as corporate finance, energy, property, M&A and outsourcing transactions.

She advises on the management of insurance claims and subrogation actions and issues arising from the restructuring of insured loans. She also drafts and interprets insurance policies and advises on the use of insurance by credit institutions and investments firms as credit risk mitigation for capital adequacy purposes under the UK's Capital Requirements Regulation and the EU's equivalent capital requirements regimes. Marian's contentious experience informs her approach to policy drafting and eligibility of insurance for use as credit risk mitigation.

Marian was recognized in the 2023 Edition of Best Lawyers, United Kingdom for her work in insurance law.

# Awards & Recognition

## **Chambers UK, 2022**

*Chambers UK, 2022* ranked Sullivan in Commodities: Trade Finance (UK-wide) Geoffrey Wynne and Simon Cook are Ranked Lawyers in Tier 1 and Tier 2 respectively Sam Fowler-Holmes is recognised as an “Up and Coming” lawyer

## **The Legal 500 UK, 2022**

Sullivan ranked in Tier 1 for Trade Finance by *The Legal 500 UK, 2022* for the eighth year running Partner Geoffrey Wynne is included as a Leading Individual for Trade Finance in the “Hall of Fame” Simon Cook and Mark Norris are recognised as Leading Individuals Sam Fowler-Holmes is recognised as a Next Generation Partner and Hannah Fearn as a Rising Star

## **IFLR1000 Banking and Finance Guide, 2022**

Sullivan recognised for Banking Lending - Lender Side, United Kingdom, in *IFLR1000's Banking and Finance Guide, 2022* Partner Geoffrey Wynne is ranked as a Leading Lawyer in the United Kingdom

## **Global Trade Review (GTR) “Best Trade or Supply Chain Finance Law Firm”, 2022**

GTR named Sullivan “Best Trade or Supply Chain Finance Law Firm” at the GTR Leaders in Trade Awards in 2022

## **Trade Finance Global “Best Trade Finance Law Firm” 2022**

Sullivan named “Best Trade Finance Law Firm” 2022 by *Trade Finance Global* (in connection with BAFT) at its International Trade Awards, 2022

## **In 2021, 2020 and 2019, GTR named Sullivan**

The “Law Firm of the Year” in the category “Leaders in Trade for Innovation” at the 2021 GTR Leaders in Trade Awards and “Best Trade Finance Law Firm” at the GTR Leaders in Trade Awards in 2020 and 2019

## **2021 Lexology “Client Choice” award for Banking, United Kingdom**

Geoffrey Wynne named a recipient of the Lexology “Client Choice” Award 2021 for Banking, United Kingdom

## **Trade Finance Global “Best Trade Finance Law Firm” 2019**

Sullivan named “Best Trade Finance Law Firm” 2019 by *Trade Finance Global* at its International Trade Finance Awards, 2019



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