

Trade & Export Finance Webinar

What To Do If Things Start To Go Wrong In a Trade, Export or Project Finance Transactions?

Webinar presentation by Geoffrey Wynne,
Partner and Mark Norris, Partner

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Areas to be covered

- Trade and export finance in a historic context
- What has happened in the recent past
- Fraud, double payment, obligor problems, bank problems
- Types of financings and the concerns
- Parties involved and what problems might mean
- Possible positions in case of default and restructuring
- How Parties should or should not react
- Waiver of rights
- Agent conduct
- How to move forward in a trade or export finance related transactions
- Some pointers if things are going wrong
- Summary and conclusions

Recurring Themes

- Trade gets paid
 - › does it?
- Trade finance is “inherently risky”
 - › Is that what Wolfsberg said?
- Use a risk-based approach
 - › But for what?
- Structure the transaction properly
 - › Are structures respected if transaction starts to go wrong?
- The answer could always be due diligence
 - › Of whom and what?
- Is the message monitoring?
 - › And using the information

What has been going wrong?

- Usual “suspects”
- Fraud
 - › Do they follow a pattern?
 - › Can you spot/stop a fraud
 - › Always misrepresentation and false documents?
- Double payments
 - › Does your structure facilitate this?
 - › Simple checks the answer or not?
- “Misselling”
 - › Greensill used as an example
 - › Do you know the transaction well enough?

What about with the Parties?

- Obligor problems
 - › Are these easier to deal with?
 - › Who is the obligor in the transaction?
 - › Who controls what aspect?
- And now...
 - › Bank problems
 - › How do you react?
 - › Do you need to react?
 - › Where is relationship banking?
 - › How do you react in documenting?

Types of financings

- Many obligors raise different forms of debt
- Structured trade
 - › PXF
 - › Pre payment
 - › Other structures
- Secured loans
 - › Secured on goods
 - › Secured on receivables
 - › Secured on project assets
 - › Borrowing base
 - › Value of security?
- Unsecured loans
 - › Trade related
 - › Syndicated/multi bank facilities

Other financings to look at

- Receivables
 - › Receivables purchase-supplier led
 - › Buyer led-payables
 - › Sell down issues to other funders/risk takers
- Letters of credit
 - › Reimbursement obligations – how to document
 - › Issuing bank claims
 - › Claims against the applicant
 - › Do UCP/ISP have all the answers?
- Guarantees
 - › Indemnity claims
 - › Guarantees issued for trade purpose
 - › How to protect and recover

Receivables and Payables in a restructuring

- Increase in receivable/payables financing
- Could be loan against receivable or purchase of it
- What sort of receivable?
- Many believed purchasing trade receivables-were they?
- What if receivable not paid?
- Is there/should there be better treatment for trade receivables?
- Payer argues it will pay trade receivables in on-going business
- Argument that receivable held by a financial institution is financial debt not trade debt

Position: Where financing goes wrong

- Where do you rank if loan/receivable not paid?
- Can you do better than being unsecured?
- Can you deal with your “secured” position?
- Can you keep security/ ownership over assets and sell them?
- Can you get better ranking in insolvency of obligor and/or buyer (of goods) who is paying?
- What arguments to make?
- What position to take as a creditor?
- What about other parties?

Stance in a Restructuring

- Who runs the negotiations?
- The large lenders/debt providers
 - › Unsecured e.g. RCF
 - › Bond holders
 - › They may control creditors' committee
- What to do with trade debt?
- Time against complex restructuring
- Why avoid the use of liquidation model?
 - › Different result where going concern
- Allow short term receivables to be paid?
 - › Buy time to restructure
- Call default is to accelerate/liquidate
 - › Avoid liquidation?

Essentials of restructuring in a trade finance context

- Keep company going
- Respect financing structures
- Avoid liquidation
- Structured (secured) trade debt can/should? get paid
- Needs flexibility in structure to avoid default
- Needs flexibility from all financiers/creditors
- In practice does not happen
- So what does happen?

Some pointers if things go wrong

- The early warnings
 - › have them in documentation
 - › react in some way
- Easier to “flex” at this point
 - › extend time for performance/payment
- Makes monitoring the best course
- Keep on top of information
 - › take care about information overload
 - › consider what is key
- Watch out for other parties
 - › do they help or hinder
 - › chasing the same (non existent?) assets
- Can obligor perform?
- Keep “support” informed/involved

Waiver of rights

- Reservation of rights letter
 - › If an obligor defaults under a relevant finance document what can the financier do?
 - › It is common to issue a reservation of rights letter to specify a default has occurred.
 - › The letter informs the obligor that the financier reserves its rights and remedies under the relevant finance document.
 - › The letter provides a financier time to gather further information and assess options available to it.
- Lombard North Central Plc v European Skyjets Ltd (2022)
 - › Issuing a reservation of rights letter is not a guaranteed method of preventing a waiver of rights.
 - › Although the court sided with the lender, the court found that the lender had waived its right to rely on the event of default through its conduct (such as allowing extra time).
- How to issue a reservation of rights letter?
 - › Comply with notices section of the relevant finance document.

Agent conduct in a syndicated/multi bank facility

- An obvious point BUT it is important to make sure that the Agent understands the terms of the underlying documents.
- What requires Majority Consent?
- What requires Unanimous Consent?
- When will consent be implied?
- When it comes to consent
 - › Voting should be formal and clear so a proper record can be kept
 - › If voting is informal disputes will follow.
- Communications need to be clear to avoid disputes as to who is voting in favour and who is against.
- An Agent should always consider getting external advice – misunderstanding the requirements of the documentation can leave an Agent exposed.
- Check the rights and obligations of each financier
 - › Minority lender rights?

How to move forward in a trade related transaction

- Put trade debt in a better position?
- Any likelihood of legislation?
 - › Where?
 - › Need to cover jurisdiction of obligor
- Would all financial creditors agree?
- Agree to what?
 - › Priority for “true trade” structures?
- Define “true trade”
- What can true trade be?
 - › Buying and selling of goods and services
 - › Import/export
 - › Independent third parties involved
 - › Cover short term only?

Respecting structures

- Obtain “agreement” that preference is for a work out solution
- Would regulator/legislation accept trade debt has priority?
- Advantage of treatment of trade debt for regulatory purposes
 - › Give trade debt better regulatory treatment
- Make trade and export finance more attractive?
- Worth doing?
- From whose point of view?
 - › Regulator says protect banking sector
 - › Auditors say make balance sheet more transparent
 - › Rating agencies say it is all bank debt!
 - › Governments say finance trade
 - › What is the trade finance market’s position?

Summary and conclusions

- Watch your structures
 - › Due diligence is key
 - › Monitoring is needed throughout the life of the transaction
- Try to avoid problems
- Accept that some problems may be inevitable
 - › Sanctions
 - › Force Majeure
- Documentation is important to try to cover this

Key pointers especially where things may go wrong

- Assume that the transaction might go wrong
- Better to react from that position
- Know all the parties involved where you can
 - › That includes all the other financiers
- Enforcement and Liquidation are unpredictable
 - › Avoid where you can
- Always keep on top of the transaction
- Remember your rights and duties
 - › Consider what rights you have and against whom
 - › Consider what duties you owe and to whom
- Remember things may go wrong but the consequences can often be controlled
- What we do in trade and export finance remains a good product

Geoffrey L Wynne

Partner

Geoffrey Wynne is head of Sullivan's Trade & Export Finance Group and the firm's London office.

He has extensive experience in banking and finance, specifically in corporate and international finance, trade, structured trade and commodity finance, electronic banking and digitizing trade finance, structured finance, asset and project finance, syndicated lending, equipment leasing, workouts and financing restructuring and general commercial matters.

Recognised as one of the leading trade finance lawyers globally, Geoff advises many of the major trade finance banks and financial institutions around the world on trade and commodity transactions in virtually every emerging market including in the CIS, Asia, India, Africa and Latin America. He has worked on many structured trade transactions covering such diverse commodities as oil, nickel, steel, tobacco, cocoa and coffee.

Geoff also acts extensively for industry bodies including BAFT (the Bankers Association for Finance & Trade), ITFA (the International Trade and Forfeiting Association) and the ICC (the International Chamber of Commerce) on documentation and rules promulgated by them in trade finance.

He has recently been involved with issues including the ITFA White Paper on electronic Payment Undertakings (ePUs), the ICC Uniform Rules for Digital Trade Transactions (URDTT) and ITFA's Uniform Rules for Transferable Electronic Payment Obligations (URTEPO). He worked with the Law Commission on the Electronic Trade Documents Bill which will help with the move towards digitizing trade documents.

The team which Geoff leads has won numerous awards and recognition for its work in the Trade and Export Finance industry. In 2022, Sullivan was named 'Best Trade or Supply Chain Finance Law Firm' at the Global Trade Review (GTR) Leaders in Trade Awards, 2022 and 'Best Trade Finance Law Firm' by Trade Finance Global (TFG) in its International Trade Awards, 2022.

Geoffrey is ranked in *Chambers UK*, 2023 in Tier 1 as a Leading Individual for Commodities: Trade Finance, is included in the 'Hall of Fame' for Trade Finance by *The Legal 500 UK*, 2023 and is recognised as a Leading Lawyer – Highly Regarded in the United Kingdom by the *IFLR1000*, for banking and finance.

Sullivan & Worcester UK LLP T +44 (0)20 7448 1001
Tower 42 gwynne@sullivanlaw.com
25 Old Broad Street
London EC2N 1HQ

Mark Norris

Partner

Mark's practice covers project and export credit finance, asset finance, structured trade and commodity finance, debt restructurings, acquisition finance and corporate advisory work.

He represents financial institutions, export credit agencies, corporates, boards, and national and supranational sovereign organizations in relation to finance transactions throughout Western, Central and Eastern Europe, Africa and the Middle East. Mark has extensive sector experience in infrastructure financing across Africa including off-grid power, healthcare and transportation. He also advises on ESG financings including hospitals, clean energy and transportation.

Advising on sustainability, governance and compliance matters, Mark has extensive experience counseling corporate boards in connection with bribery, corruption, modern slavery, criminal finance and sanctions issues. He also advises financial institutions on the UK's Capital Requirements Regulation and the EU's equivalent capital requirements regimes.

Recognized as a Leading Individual in The Legal 500 UK for Trade finance, he is noted as 'excelling' in structured export credit transactions and is praised for his 'commercial and user-friendly approach.' He was also recognized in the 2023 Edition of Best Lawyers, United Kingdom for his work in banking and finance law.

In May 2022, he was re-elected Deputy Chair of the British Exporters Association (BExA). He sits on BExA's Executive Committee as well as UK Finance's Export Finance and Trade Committee.

Mark is based in the UK but has lived and practiced law in the Czech Republic, England, Germany and Russia.

Sullivan & Worcester UK LLP **T +44 (0)20 7448 1003**
Tower 42 **mnorris@sullivanlaw.com**
25 Old Broad Street
London EC2N 1HQ

Awards & Recognition

Global Trade Review (GTR) “Best Export Finance Law Firm”, 2023

GTR named Sullivan “Best Export Finance Law Firm” at the GTR Leaders in Trade Awards, 2023



The Legal 500 UK, 2023

Sullivan is ranked in Tier 1 for Trade Finance by *The Legal 500 UK, 2023* for the ninth 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



Chambers UK, 2023

Chambers UK, 2023 ranked Sullivan for Commodities: Trade Finance (UK-wide)
Geoffrey Wynne and Simon Cook are both ranked in Tier 1 and Mark Norris in Tier 3
Sam Fowler-Holmes is recognised as an “Up and Coming” lawyer



IFLR1000 Banking and Finance Guide, 2023 (32nd edition)

Sullivan recognised for Banking Lending - Lender Side, United Kingdom, in *IFLR1000's Banking and Finance Guide, 2023*
Partner Geoffrey Wynne is ranked as a Leading Lawyer – Highly Regarded in the United Kingdom



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 2022, 2021, 2020 and 2019, GTR recognised Sullivan

The firm was named “Best Trade or Supply Chain Finance Law Firm” at the 2022 GTR Leaders in Trade Awards, “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

Suggestions for future topics and webinar dates

Please feel free to send any suggestions for future topics to London Events (londonevents@sullivanlaw.com)

Webinar dates for 2023

- Thursday 22 June
- Thursday 20 July



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Your
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Move forward with Sullivan

Boston

One Post Office Square
Boston, MA 02109
+1 (617) 338-2800

London

Tower 42
25 Old Broad Street
London EC2N 1HQ
+44 (0)20 7448 1000

New York

1633 Broadway
New York, NY 10019
+1 (212) 660-3000

Washington, DC

1666 K Street, NW
Washington, DC 20006
+1 (202) 775-1200

Tel Aviv

28 HaArba'a Street, HaArba'a Towers
North Tower, 35th Floor
Tel Aviv 6473925
+972 74 7580480

sullivanlaw.com

[@sullivanlaw](https://twitter.com/sullivanlaw)

