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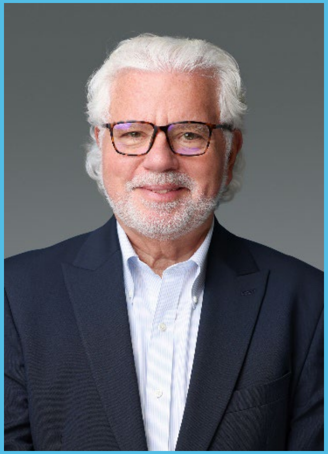
Trade & Export Finance Webinar

An update on documenting to avoid transactions going wrong and what to do if it does go wrong

Thursday, 31 October 2024

12:30 - 1:30 pm (GMT / London time)



Webinar presentation by:

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Areas to be covered

- Types of financings
- What are the issues?
- Fraud, double payment, obligor problems, financer problems
- What to look out for and how to react
- Possible positions in case of default
- Intercreditor relationships
- How to move forward in trade finance related transactions
- “Special situations”
- Summary and conclusions

Types of financings

- Many obligors raise different forms of debt
- Structured trade
  - PXF
  - Prepayment
  - Other structures
- Secured loans
  - Secured on goods
  - Secured on receivables
  - Secured on project assets
  - Borrowing base
- Unsecured loans
  - Trade related
  - Syndicated/multi bank facilities
  - Different financers providing different facilities

Other financings

- 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 and other contingent obligations issued for trade purpose
  - How to protect and recover

Four Areas Identified

- **Risk Assessment**
  - Financial crime risk factors – more active focus required by firms
  - Risk mitigation – evidence should inform a firm's rationale in relation to any residual risk
  - Due diligence – should be meaningful and probing, not generic
  - 'Holistic assessment' of financial crime risks should be in place
- **Counterparty Analysis**
  - Credit analysis of all trade finance counterparts, including all parties with an interest in the transaction
  - DD on other parties, when this is appropriate and identifying fraudulent activity
- **Transaction Approval**
  - Financial and non-financial risks on end-buyers should be considered. What is the rationale for the transaction? This should never be overlooked
- **Transaction Payments**
  - More effective risk management required in relation to end-buyers, credit insurance arrangements and security

What are the risks?

- Identify
- Evaluate
- Eliminate, reduce, mitigate, allocate
- AIM: Balance parties' expectations and needs
- Get the documentation right at the outset!
- Watch out for changes
  - To the parties
  - The transaction
  - The financing needs

Recurring Themes

- Trade gets paid
  - does it?
- Trade finance is "inherently risky"
- 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?
- The message is monitoring?
  - And using the information well

What about the Parties?

- Obligor problems
  - Who is the obligor in the transaction?
  - Who controls what aspect?
- But also…
  - Problems with multiple financers
  - How do you react?
  - Do you need to react?
  - Where is relationship banking?
  - How do you react in documenting?
- Can you pre-empt problems?

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”
  - Do you know the transaction well enough?
- What is the key issue?
  - Cannot pay – who?
  - Cannot perform – who?

What else can go wrong?

- All trade transactions in reality pay back through performance and then payment by the buyer
- What do you need?
  - Seller/producer performance
  - Buyer pays
- So, trade finance is easy?
- It should be so long as
  - Receivable is created properly and paid
  - Receivable is not already sold or charged to another
- The solution is to structure and check these aspects
  - Why not always done?

What should you look out for on the Seller side?

- On seller/producer side
  - Non performance
  - Defective performance
  - Misleading performance - cheating
- Seller cannot perform due to lack of finance, lack of technical expertise, failure of other parties
- Seller's product does not meet buyer's requirements
- Seller tells two financers the same story (or different stories)
- Third party interference or support

What should you look out for on the Buyer side?

- Buyer does not want to pay
- Buyer cannot pay
- Buyer is required to pay two people
- Easier solutions here?

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 they were purchasing <u>trade</u> receivables - were they?
- What if receivable not paid?
- Is there/should there be better treatment for trade receivables in a restructuring?
- Payer argues it will pay trade receivables in on-going business
- Argument that receivable held by a financial institution is <u>financial</u> debt <u>not trade</u> debt – what is the effect?

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 or equity providers
  - Unsecured e.g. RCF
  - Bond holders/equity providers
  - 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 <u>all</u> financers/creditors
- In practice does not 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 financer do?
  - It is common to issue a reservation of rights letter to specify a default has occurred.
  - The letter informs the obligor that the financer reserves its rights and remedies under the relevant finance document.
  - The letter provides a financer 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.

Conduct in a syndicated/multi financer facility

- An obvious point BUT it is important to make sure that the Co-ordinator 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.

Intercreditor relationships more widely

- Co-ordinator should always consider getting external advice – misunderstanding the requirements of the documentation can leave Co-ordinator/Agent exposed.
- Check the rights and obligations of each financer
  - Minority lender rights?
- Many obligors are funded by multiple financers
  - Often completely different documentation
- Once there are multiple financers what should you do?
  - Each keeps its own security/assets
  - Deal with overlapping security/assets
  - Intercreditor agreement upfront?
  - What about other market views?

"Liquidity Management"

- How useful it is in a trade finance context?
- Comes from US and the involvement of private equity
- Useful only where SPV obligor and structured/tiered financing?
- Watch securitisation in trade finance context
- Concepts could be adapted/adopted
  - Use of majority decisions for "cram down"
  - Protection for whom?
- Same message – avoid liquidation or other formal liquidation proceedings
- When should you use such a document?
  - Cover new money?
  - Protect transfers of assets?

What about multiple participations?

- What does the BAFT MRPA say?
- Challenges of "syndicated" participations
  - How best to achieve this?
- What about the funded participant?
  - Yieldpoint v Kimura
  - Who agreed what?
- What to do about a non/payment?

How to move forward in a trade related transaction where it is going wrong

- Put trade debt in a better position?
- Any likelihood of legislation?
  - Where?
  - Need to cover jurisdiction of obligor(s)
- 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 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?

If it all goes wrong

- Arbitration v litigation
- Should your agreement have covered this?
  - It should
- Relative merits/disadvantages
- Think about timing and enforcement

Litigation v Arbitration

- No brightline test indicating that one means of dispute resolution is preferable to another
- There are pros and cons of each – requires an assessment of the factors you consider are most important.
- In favour of arbitration:
  - Private process, if there are concerns about maintaining confidentiality
  - Parties can choose their arbitrator(s)
  - Finality:limited opportunity to appeal
  - Party autonomy and procedural flexibility -so significant greater control the process
  - No front end loading of costs or fixed disclosure rules (which reduces expense)
  - Much easier enforcement – arbitral awards can be enforced in over 170 jurisdictions under the New York Convention 1958
  - Arbitral process, being consensual in nature, viewed as less aggressive (if the parties wish to preserve commercial relationship)

Litigation v Arbitration (cont'd)

- In favour of the litigation before the English courts:
  - Much more suitable for multiparty disputes – arbitration only possible with parties' consent
  - Better if legal precedent is required
  - Better if urgent injunctive relief is required (e.g. to freeze assets or prevent evidence disposal)
  - Open nature of British justice- hearings mostly take place in open court (and thus attract publicity)
  - Likely to be much more swift disposal of cases where one side reluctant to engage with the process

- Exercise in weighing up the pros and cons and deciding which better suits your commercial aims

“Special situations”

- Letter of credit and other “irrevocable” payment obligations
- The effect of sanctions
  - Wording is key?
- Avoid being caught in the middle
- Check your obligations to the beneficiary
- Check your rights against the applicant
- What structures are most challenging?

Issues to consider if your financing is insured

- If the risk that you want to restructure is insured, imperative that you check the credit insurance policy wording
- There will almost certainly be contractual obligations that need to be complied with:
  - Likely to be an obligation to notify insurers of an event likely to give rise to a default and to co-operate with insurers in agreeing how to handle the (possible or actual) default
  - Separately there will be provisions in your policy that address your obligations in the event of
    - material amendments to the transaction documents or
    - rescheduling
  - These are be policy specific, likely to be contained in different clauses, and will require you to first obtain insurers consent
  - The policy may contain other restrictions on your ability to act (e.g. to reduce your participation) without insurer consent

Issues to consider if your financing is insured

(cont'd)

- Complications arise if there is more than one insurer (as is common) because the policy may require consent of each insurer
- Voting deadlines, e.g. for syndicated loans, can be challenging if you have to take into account the views of a large market of insurers
- If any step you are likely to take as part of a restructuring might impact insurers rights of subrogation, you will need to consult insurers and obtain consent
- Additional challenges will arise if you are dealing with a sanctioned entity:
  - in light of "*Celestial*" Court of Appeal decision, some insurers assert that they cannot engage with insureds in connection with key aspects of the policy cover, unless they first obtain a licence

Implied Terms Might Help (if you forgot LIBOR cessation)

- Transition from Libor (implied term of replacement rate) - *Standard Chartered PLC v Guaranty Nominees Ltd and Ors.*
  - The High Court has published a judgement on how a LIBOR-referencing contract should be interpreted now that LIBOR is no longer published as a benchmark rate.
  - The majority of financial contracts were transitioned to alternative benchmark rates before the final LIBOR publication; however, a replacement rate could not be agreed in this case.
  - This case involved preference shares redeemable only at the bank's option, paying dividends of 1.5% plus 3-month Libor.
  - The bank argued for a replacement rate to be implied into the contract, whereas the investors argued the preference shares should not be redeemed.
  - The court ruled that the contract should continue to operate even if LIBOR was not available. The court modified the bank's proposed replacement rate formulation (stressing it was the court's role to decide on the replacement rate).

Implied Terms Might Help-more generally

- The test for implying contractual terms set out in Mark & Spencer v BNP Paribas UKSC [2016] was applied' the test being that any implied term must either be necessary to give business efficacy to the contract, or be so obvious that it goes without saying
- The bank persuaded the court on both elements, ruling that an implied term was both necessary to give business efficacy to the contract and was so obvious it goes without saying.
- The interpretation of this ruling is that it seems likely that once a court can find a reasonable basis for inferring that the common intention of the parties was that the contract should continue (notwithstanding the unavailability of the LIBOR benchmark) the court is likely to do so.
- This case was under the Financial Markets Test Scheme, which was introduced to apply to any Financial List claim which raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed.

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 financers
- 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

Summary and conclusions

- Watch your structures
  - Due diligence is key
  - Monitoring is needed <u>throughout</u> the life of the transaction
- Try to avoid problems
- Accept that some problems may be inevitable
- Ultimately, documentation is important to try to cover this
- Action or inaction may be key to recoveries
  - But which course is the challenge

Any questions?

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 Forfaiting 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 2023, Sullivan was named Best Export Finance Law Firm at the GTR's Leaders in Trade Awards, 2023. This followed the award for 'Best trade or supply chain finance law firm' at the 2022 GTR Leaders in Trade Awards, and 'Best Trade Finance Law Firm' by Trade Finance Global (TFG) in its International Trade Awards, 2022.

Geoff is ranked in *Chambers UK, 2025* 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, 2025* and is recognised as a Leading Lawyer – Highly Regarded in the United Kingdom by the *IFLR1000*, for banking and finance.

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Awards & Recognition

Receivables Finance International (RFIx) Annual Awards
Partner Geoffrey Wynne presented with the “Lifetime Achievement Award” at the Receivables Finance International (RFIx) Annual Awards, 2024 Geoffrey Wynne named “Industry Ambassador of the Year” at the RFIx Annual Awards, 2023

***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

***Trade Finance Global* “Legal Innovation in Trade” 2023**
Sullivan recognised for “Legal Innovation in Trade" 2023 by *Trade Finance Global* (in connection with BAFT) at its Trade, Treasury and Payment Awards 2023

The Best Lawyers in the United Kingdom®, 2025
Best Lawyers included five London partners — Marian Boyle, Simon Cook, Sam Fowler-Holmes, Mark Norris and Geoffrey Wynne — in the 2025 edition of *The Best Lawyers in the United Kingdom®*

The Legal 500 UK, 2025
Sullivan ranked in Tier 1 for Trade Finance by *The Legal 500 UK, 2025* for the 11th year running
Partners Geoffrey Wynne and Simon Cook are recognised in the “Hall of Fame”
Partners Mark Norris and Sam Fowler-Holmes are recognised as Leading Individuals
Partner Marian Boyle, Counsel Daniela Barrdear, and Associate Luna Owen are recognised as key members of the practice

Chambers UK, 2025
Chambers UK, 2025 ranked Sullivan for Commodities: Trade Finance (UK-wide)
Geoffrey Wynne and Simon Cook are both ranked in Tier 1
Mark Norris and Sam Fowler-Holmes are both ranked in Tier 3

Chambers Global, 2024
Chambers Global, 2024 ranked Sullivan as a Spotlight Firm in its inaugural 2024 Africa-wide Banking & Finance table
Simon Cook and Mark Norris are included as Leading Lawyers

IFLR1000, 2024
Sullivan recognised for Banking Lending - Lender Side in the United Kingdom by the *IFLR1000, 2024*
Partner Geoffrey Wynne is recognised 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

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