Legal and practical issues relating to the financing of trade and some market developments

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Presentation by:

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Topics to be covered

- Overview of structuring and risks
  - Lending based structures
  - Some points to note on taking security and other risk mitigants
- Market developments
  - Possibilities to alleviate the funding shortfall
  - General points of interest

Structuring is all about risk

- Identify
- Evaluate
- Eliminate, reduce, mitigate, allocate
- AIM: Balance parties' expectations and needs

Lending structures – commonality and differences

- PXF, prepayment and tolling vs Pre/post-shipment and warehouse finance
  - How do they work?
  - What about the goods?
  - What risks apply?
    - Differences

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Common risks and how to mitigate?

- Some common risks
  - Payment/Price risk
  - Risk stages associated with goods
    - Storage
    - Transport
    - Processing
- Potential mitigants
  - Third parties?
    - Warehouse operators
    - Collateral managers/logistics service providers
  - Security?

Who is involved?

- Most transactions are going to involve third parties including:
  - Transport companies
  - Freight forwarders
  - Warehouse owners
  - Collateral managers or stock monitors
  - Account banks
- In addition to the practical role they play, these parties may be relevant to:
  - Competing security interests over the secured assets
  - Perfection of the security holder’s security
  - Monitoring and control of the secured assets

Storing the goods (1)

- Types of warehouse
  - Private?
  - Public/regulated?

- Issues around storing goods
  - Fraud
  - Interference/lack of control
  - Loss, deterioration etc

- Who is going to be responsible for the goods?

Storing the goods (2)

- What should financers be looking for?
  - Satisfactory agreement
  - Monitoring and control
  - Insurance
  - Security

Potential issues with security over goods (1)

- Proprietary vs possessory interests

- What is possession?
  - Attornment
  - Constructive possession

Potential issues with security over goods (2)

- Fungible goods
- Commingled goods
- Future goods

Potential issues with security over goods (3)

- Liens
- Trust receipts
- Bills of lading
- Passing of title/risk and payment terms

Potential issues with security over goods (4)

- Nature of warehouse receipts
  - A document issued by a warehouse operator, collateral manager, or other storage operator that provides proof or evidence of existence and ownership of commodities stored in a warehouse or other storage depository or evidence that a collateral manager is holding commodities under the terms of a collateral management agreement
  - A warehouse receipt may be:
    - A document of title, or not
    - Negotiable or non-negotiable
    - Transferable or non-transferable
    - Receipt confirming deposit of goods
- Format of warehouse receipts
  - Legal requirements for negotiability / transferability
  - Format prescribed by law or public / private regulation

Potential issues with security over goods (5)

- Warehouse receipt financing system
  - Regulated systems that provide for financing of goods using warehouse receipts as collateral
  - Created through legislative reform or through voluntary systems of regulation
  - Key elements :
    - Warehouse receipt specific laws / rules
      - Rights and obligations of the parties
      - Enforceability of collateral
      - Registration of financier's interest / collateral
    - Regulation, licensing and insurance of warehouses
    - System to guarantee performance of warehouses
      - Financier protected from potential fraud or negligent behaviour of warehouse operator (outturn guarantee, indemnity system)
      - Funding of guarantee / indemnity system

Potential issues regarding receivables

- What is a receivable?
- Key factor in any trade arrangement
- Each sale and purchase, from raw material to finished product, can create a receivable which could be the subject of financing
- Commercial considerations for financier

Assignments – Types of assignment

- Legal Assignment
  - Meets requirements of s.136 of the Law of Property Act 1925
  - Allows assignee to sue the debtor in its own name
  - Requirements prevent legal assignment of a partial debt
  - Electronic document considered to be “in writing” under English law

- Equitable Assignment
  - Does not meet the requirements of s.136 of the Law of Property Act 1925
  - Effect?

Assignments – some points to note (1)

- Assignment of contractual rights vs proceeds

- Contractual restrictions on assignment
  - Effect
  - Consent/waiver

- Public policy
  - Restrictions in some jurisdictions

Assignments – some points to note (2)

- Applicable to legal and equitable assignments
- Priority
  - The rule in Dearle v Hall (1828) 3 Russ 1
- Ability to give good discharge of debt
- Right to sue debtor directly

Security (by way of charge) over bank accounts

- Equitable proprietary interest in an asset
  - Asset can be appropriated by the chargee to satisfy the debt
  - Possession not required

- Fixed charge
  - Attaches immediately to charged asset
  - Requires control (partly question of fact, regardless of terms of charge)
  - Priority over other creditors

- Floating charge
  - Hovers above changing pool of assets – allows debtor to deal with assets
  - Crystallises on occurrence of certain events
  - Subject to priorities

Security (by way of charge) over bank accounts

- Control over account
  - Funds ever released?
  - Is the account blocked?

- Third party bank
  - How ensure control?
  - Onshore issues?
  - Waiver of rights
  - Insolvency risk

Perfecting security

- Stamp duty
  - Is it payable? If yes, usually payable before registration of security
  - May be fixed amount or percentage of secured or facility amount
  - Reducing stamp duty impact: limit secured amount, up-stamp or restructure
- Registration
  - Is the security registerable?
  - May be fixed amount or percentage of secured or facility amount
  - Rules differ
- Other Fees
  - Notary fees
  - Translation costs

Formalities and procedures

- What do the terms notarisation, legalisation and apostille mean?
  - Notarisation: the act of certifying due execution or verifying some fact or thing by a notary or verifying some fact or thing of which the notary has certain knowledge
  - Legalisation: the act of certifying that a notary’s signature and seal on a notarised document are genuine, performed usually by a foreign embassy or consulate
  - Apostille: a certificate issued by a state authority to certify that a notary’s signature and seal are genuine instead of legalisation
- Other notarisation, apostille and legalisation considerations
  - Rules differ across countries
  - Rules apply to the local obligors and the finance parties
  - Check where the parties will execute and consider options

Is enforcement of security always the answer?

- Things you hear: “Security means my deal is better. Security means that if the transaction goes wrong I get paid, doesn’t it?”
- Costs and delay
- What about alternatives?

Market Developments (1)

- Alternative approaches – Project Eureka
  - Collaborative approach
  - TFCoP 1
  - Capacity building
  - Pilot project

Market Developments (2)

- Alternative approaches
  - Investment vehicles
  - Deep tier finance
  - The role of electronic documents
  - Local currency funding
  - Shorter form market acceptable templates

Market Developments (3)

- Law Commission
  - Conflicts of laws
  - New asset class
- Late payment regulation (UK)
- New Hague Convention

Questions?

Simon Cook

- Simon is a partner in the Trade & Export Finance Group in the London office of Sullivan & Worcester UK LLP. He has experience in a wide variety of banking and finance transactions, including in particular in relation to structured trade finance, trade finance, project finance, invoice discounting facilities and borrowing-base facilities in Africa, the Middle East and Asia. His work in the structured trade area covers a range of structured trade and commodity financings notably in oil, telecoms, soft commodities and metals sectors with particular experience in Africa and the Middle East, where he has worked and travelled extensively, having spent over three and a half years in Dubai.

- He has participated in many structured trade finance, receivables finance, general finance and project finance conferences and seminars across Europe, the Middle East and Africa.

- Simon was a founding member of the Africa Regional Committee (ARC) of ITFA (the International Trade and Forfaiting Association) and has twice been re-elected to the ARC. Simon was also re-elected to the Executive Board of ITFA in 2024 and is the current Head of Education for ITFA.

- Simon is ranked in *Chambers UK*, 2024 in Tier 1 for Commodities: Trade Finance and is included by *The Legal 500 UK*, 2025 in its “Hall of Fame” and as a Leading Individual for Trade Finance. Simon is part of the Sullivan team that 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.

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 recognized as key members of the practice

Chambers UK, 2024
Chambers UK, 2024 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

Chambers RANKED IN UK 2024
Chambers RANKED IN Global 2024
GTR Leaders in Trade
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