

Trade Finance

A Practitioner's Guide to Trade and Commodity Finance – a new edition and beyond

Presentation by

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Sullivan & Worcester UK LLP January 2022



Today's webinar

- ***A Practitioner's Guide to Trade and Commodity Finance*** New and expanded Guide in its second edition
 - › What is in the new Guide?
 - › Key legal and regulatory issues
- Some ongoing areas of development since publication of the new Guide
 - › ESG and sustainability – will it become the norm in ***trade and export finance*** transactions?
 - › What developments are there in the field of Digital Assets?

A Practitioner's Guide to Trade and Commodity Finance

- *“The Guide covers all aspects of trade and commodity financing, from pre-export financing and structured trade finance to the rise of supply chain finance as part of the techniques involved in receivables finance. It provides an in-depth discussion of risk - including risk management, risk transfer issues, regulation and due diligence - as well as how the regulatory regime impacts on banks, insurers, producers, traders and buyers when financing trade and commodities. It also considers other topics relating to structuring transactions such as special purpose vehicle (SPV) ownership structures, Islamic financing, warehouse financing and documentary letters of credit as well as insurance and taking security in emerging markets.”* Sullivan Press release December 2021

Key points about the Guide

- Written with an international flavour and challenges of emerging markets in mind
- Uses English law and English law concepts
- We recognise that trade finance is a moving market with new products and ongoing developments
 - › Coronavirus pandemic brought technological solutions to the fore
 - › Digital trade, blockchain and law reform on the use of Electronic Trade Documents is developing at different speeds internationally
 - › Export Credit Agency finance is now a recognised sector with a devoted chapter
 - › Receivables Finance structures have developed - expanded and new chapters covering, Commodity Ownership and SPV structures; Receivables Finance; Forfaiting, factoring and invoice discounting; and Receivables Finance:Supply Chain Finance
 - › Brexit – stated at post-Brexit, and post-implementation period (ended 31 December 2020)

What is in the new Guide? (1)

Risks highlighted

References to LMA

Pre-export finance documents,

Commodity

finance documents and Developing

Markets

documents

- New chapter on Export Credit Agency Finance - growth in international finance
 - › Buyer credit facilities
 - › Direct lending
 - › Supplier credit facilities
 - › Export Development Guarantees and General Export Facilities
- Documentary Letters of Credit and L/C facilities
- Structured Letters of Credit considered
- IPUs – Independent Payment Undertakings
- Expanded chapter on Standbys, demand guarantees and bonds

What is in the new Guide? (2)

More recent examples and relevant jurisdictions

Focus on structures with diagrams

- Warehouse financing
- Taking security: pledge, assignment of rights and charge over bank account – more recent examples and up-to-date on law of assignment
- Chapter on Forfaiting, factoring and invoice discounting
- New chapter on Receivables Finance: Supply Chain Finance looks at structures:
 - › buyer-led, supplier-led, and third-party transactions;
 - › Standard Definitions for Techniques for Supply Chain Finance,
 - › IFRS 9; and
 - › use of platforms

What is in the new Guide? (3)

Diagrams on participations

Analysis of Insurance Act 2015

- Expansion of the chapters on risk – Participations and other forms of risk sharing techniques – more detailed issues to consider, accounting treatment, credit risk mitigation and derecognition and on capital relief: Basel Standards, EU capital Requirements Regulation (EU CRR) and the onshored UK CRR, market standard documents and Insurance Act 2015
- Expanded chapter on the use of insurance in trade and commodity finance especially reform under Insurance Act 2015: e.g. fair presentation, manner of disclosure, materiality and insured's knowledge. Key terms of insurance policy and status of secured creditor as either co-assured, assignee of proceeds or loss payee

Legal and Regulatory issues (1)

- Legal and Regulatory issues expanded –
 - › Brexit and financial regulation, Financial Services Act 2021 with powers for the regulators and HM Treasury to act to achieve a smooth transition away from LIBOR
 - › international sanctions and UK regime, OFSI, Sanctions and Anti-Money Laundering Act 2018
 - › AML regulations – international reach
 - › anti-bribery and corruption and fraud - legislation and case law
- Chapters on enforcement of security, waivers and standstills and Insolvency all amended for
 - › Corporate Insolvency and Governance Act 2020 and its restructuring plan, and temporary Covid-19 rules and permanent changes in law)
 - › effect of Brexit,
 - › practical solutions, self help and cross border options post-Brexit

Legal and Regulatory issues (2)

- Benchmarks – outside the remit of the Guide
 - **Deadline for no new US Dollar LIBOR lending: 31 December 2021**
 - **Deadline for no new Sterling LIBOR lending: 31 March 2021**
 - New phase
 - › Amending legacy contracts
 - › Using alternative rates – Risk Free Reference Rates either compounded in arrears or SOFR Term Rates, Fixed rates or Central Bank rates
 - › Synthetic Sterling LIBOR 1,3 and 6 month based on new methodology is available to end 2022 but not necessarily beyond that, for legacy and tough legacy contracts
 - › US dollar LIBOR continues until June 2023 on panel bank submissions
- SONIA, TSRR, Term SONIA, SONIA compounded in arrears
- SOFR, Term SOFR, SOFR compounded in arrears

Legal and Regulatory issues (3)

- **Brexit** – Reform of financial services – financial services framework was expected in summer 2021, still pending, now likely summer 2022
- Divergence of UK and EU regimes possible
- UK Temporary Permissions Regime, FCA started to close March 2022, moving EU financial institutions to apply for permanent authority to conduct business in the UK, or to stop certain activities
- UK keen to follow wider international framework of Basel III/IV regime rather than stick to EU
- **Coronavirus** legislation gave extensive powers to UK Parliament and devolved administrations until March 2022, some may extend further. Company registration deadline back to 21 days, stays on insolvency proceedings, most relaxed except rights of commercial landlords. Work at home and social mixing rules relaxed

Key Developments on Sustainability in the Trade and Export Finance Sector (1)

UK GREEN TAXONOMY

- Coming out of COP26 > HM Treasury's paper Greening Finance: A Roadmap to Sustainable Investing addresses how the UK will develop its own Green Taxonomy
- A lack of common sustainability definitions means that businesses and investors struggle to understand the environmental impact of their decisions. This can lead to problems such as greenwashing
- The Green Taxonomy seeks to set out criteria against which specific economic activities must meet to be considered environmentally sustainable and thereby 'Taxonomy-aligned'
- The aim is to create clarity and consistency for investors, improve understanding of companies' environmental impact and provide a reference point for companies

Key Developments on Sustainability in the Trade and Export Finance Sector (2)

The Roadmap also addressed the Government's intention to introduce a new UK Sustainability Disclosure Requirements regime (SDR)

- This is intended to combat the current lack of consistency across sustainability reporting
- The SDR will use the same framework across the economy to provide a clear link from investors to the businesses they are invested in and the relationship with the environment
- Metrics will also be drawn from international standards

Key Developments on Sustainability in the Trade and Export Finance Sector (3)

ICC REPORT ON SUSTAINABLE EXPORT FINANCE

- Aimed to understand further the state of the industry, as well as provide policy and product recommendations to help increase the flow of sustainable export finance
- As part of an industry wide survey > among export finance issuers – 95% of bank respondents felt that export finance should become more sustainable with export credit agencies (ECAs) having a major role to play
- Banks were also expressed to have the ability and intention to embed sustainability into the industry – banks have begun to leverage industry-wide frameworks to issue green and social export finance loans

Some key conclusions from the report:

- Further coordination / alignment is needed between ECAs, banks and domestic financing initiatives to improve efficiency and enable a “whole government” approach towards global sustainability commitments
- ECA mandates and regulations should be more flexible to be able to respond swiftly to market demands in a cohesive manner
- Exporters and buyers to leverage sources of blended finance to make greener technologies more affordable
- Develop standardized reporting metrics for environmental and social impacts of transactions and projects

Key Developments on Sustainability in the Trade and Export Finance Sector (4)

- There is significant scope for trade / export finance to help achieve sustainability targets through active engagement e.g. incentives or the introduction of sustainability requirements
- BUT the lack of market standards, or a common framework, has hindered progress
- There have been some interesting developments recently that seek to combat this lack of standardisation

Key Developments on Sustainability in the Trade and Export Finance Sector (cont.)

- › LMA has published Green/ Social/ Sustainability Linked Loan Principles and Guidance
- › The Chancery Lane Project launched net zero toolkit that aims to provide practical tools to embed net zero and sustainability commitments into law firm precedents and commercial agreements
- › **PRA Dear CEO letter** on 2022 sets out priorities for supervising international banks including, the financial risks arising from climate change (January 2022) – significant development
- › IFRS announced International Sustainability Standards Board to deliver a comprehensive global baseline of sustainability-related disclosure – this will help to align metrics globally and standardise sustainability reporting

Fintech and its use in trade finance

Law catching up with trade and e-commerce, e-signatures, Electronic Trade Documents, platforms and Model law
Dedicated chapter in the new Guide

- Digital contracts and formalities
 - › smart contracts, e-signing
- Digitalisation of trade finance and digital trade instruments
 - › law reform on e-bills of exchange, digitalisation of promissory notes and key documents in the trade cycle, platforms and contractual rights
- Distributed ledger technology
 - › Blockchain and trade

Digital Assets Update (1)

- Law Society Report: Legal and Regulatory Guidance (Second Edition)
 - › Published in January 2022. Report can be accessed [here](#)
 - › Looks at key issues such as developing technologies, regulation of cryptoassets and impact on the wider landscape, including implications for data protection, security, IP and dispute resolution
- Key Recommendations include
 - › Regulation – ensuring that the legislative and regulatory framework in the UK is adapted to capture DLT and to facilitate wider market adoption of DLT
 - › Improving best practice in respect of data governance underpinning smart contracts and digitisation projects: specifically, tightening up data variables, data quality and data sets prior to smart contract rollout
 - › Ensuring data protection compliance in the absence of explicit guidance from DP authorities

Digital Assets Update (2)

- Law Commission – Electronic Trade Documents
 - › A consultation on proposals to allow for legal recognition of electronic trade documents such as bills of lading and bills of exchange. Summary available [here](#)
 - › Responses being analysed with publication of report expected in Spring 2022
- Key Issues
 - › The paper addresses the fundamental problem of possession and tangibility under English law and how this affects the position in respect of electronic documents
 - › The paper also discusses current workarounds such as contractual frameworks designed to allow parties to agree recognition of electronic documentation
 - › Themes emerging in the paper include the need for harmonisation of law governing electronic documents, technological neutrality and, crucially, control

What will 2022 bring for Trade Finance? (1)

- Same as last year?
 - › Unlikely as too much going on
 - › Political (sanctions) and regulatory areas in particular
- ESG likely to be a key focus
 - › Will we/can we do anything else?
- Regulatory developments
 - › Good or bad?
- Engaging with the Regulators may be crucial
 - › Improve perception of trade
 - › Allow use of tools for compliance

What will 2022 bring for Trade Finance? (2)

- Greater interest from non-bank investors
 - › Focus on receivables?
 - › Use of platforms
 - › Structures using securitisations, note issuance, NFTs
- The year for digital trade?
 - › Move on from proof of concept
 - › Who wants it anyway?
- Trade Gap to Finance
 - › Let's get going!
 - › The Guide is here
 - › We are here to help
- Hopeful New Year?

Any Questions?

Suggestions for future topics and next webinar date

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

Next webinar: Thursday 24 March

Geoffrey Wynne

Partner

Geoffrey Wynne is head of Sullivan & Worcester's London office and also head of its Trade & Export Finance Group. He has extensive experience in banking and finance, specifically trade and structured trade and commodity finance. He also advises on corporate and international finance, asset and project finance, syndicated lending, equipment leasing and workouts and financing restructuring.

Geoff is one of the leading trade finance lawyers and has advised extensively many of the major trade finance banks, multilateral financiers and companies around the world on trade and commodity transactions in virtually every emerging market including CIS, Far East, 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. He has worked on warehouse financings in many jurisdictions and advised on how to structure involving warehouse operators and collateral managers. He has also advised on ownership structures and repos for commodities and receivables financings.

Geoff sits on the editorial boards of a number of publications and is a regular contributor and speaker at conferences. He is also the editor of and contributor to *The Practitioner's Guide to Trade and Commodity Finance* published by Sweet & Maxwell and *A Guide to Receivables Finance*, a special report from TFR published by Ark.

Geoff has recently been recognized as the only UK lawyer included in the Trade Finance section of the *UK Legal 500's* all new UK 'Hall of Fame.' *Trade & Forfeiting Review* (TFR) honoured Geoff with the TFR Fellowship Award in its 2017 TFR Excellence Awards.

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Sam Fowler-Holmes

Partner

Sam Fowler-Holmes is a Partner in Sullivan's Trade and Commodity finance team, advising a wide spectrum of traditional and alternative financial institutions and corporate clients of all sizes.

Sam's experience includes advising clients on a range of traditional and innovative trade finance products in relation to a broad range of commodities, both in developed and emerging markets across the globe. He regularly acts for clients in relation to structured and unstructured trade financings and has extensive experience in supply chain finance matters, including acting for both electronic platform providers and platform participants.

He speaks regularly at the Sullivan trade and export finance seminars and has presented at events organised by ITFA Emerging Leaders Committee. He has been a member of the ITFA Emerging Leaders Committee since January 2020.

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Jacqueline Cook

Of Counsel and Senior Knowledge Development Lawyer

Jacqueline Cook is a senior finance lawyer and has been in practice for over 25 years. She has experience in syndicated lending, general banking, structured and asset finance, Brexit issues, legal training, advising on legal opinions, precedent drafting, current awareness, legal analysis and knowledge management and is now expanding into trade and export finance and has recently been focusing on Brexit, LIBOR, training and opinions.

Jacqueline has been a member of the Consulting Editorial Board of LexisPSL Banking & Finance since 2016 and in 2020 was on the judging panel for the Lexis Nexis Awards for the Knowledge/PSL award. She has a great interest in law reform, including LIBOR reform and Brexit, and has been involved in projects on the CLLS Secured Transactions Code and the Secured Transactions Law Reform Project. She has also helped out on the Cape Town Convention Academic Project and developments on the Pretoria (MAC) protocol, publishing articles in Leasing Life and for UNIDROIT. She has been an active member of the City Finance PSL network for many years in her role in professional support.

Jacqueline has had a number of articles published in JIBFL and in her latest, 'Book Review' in June 2020 she gives a flavour of a new text on contract law "Contents of Commercial Contracts: Terms Affecting Freedoms" which was published by Hart and edited by Paul S Davies and Magda Raczynska both of UCL. Jacqueline has written the last chapter pulling together themes from earlier chapters by leading commercial lawyers and adding her own experience in finance and commercial contracts.

Jacqueline's passion is for Mary's Meals, the Scottish charity which combines the fight against hunger and poverty by providing daily meals in schools and nurseries for some of the world's poorest children bringing children back to education. She is a community ambassador and volunteer speaker giving presentations virtually and in person. She has just completed lots of little walks totaling 159km in the month leading up to Christmas 2020 walking every day and has raised over £3,200. In 2019, she was the guest speaker at the Global Trade Review Awards Dinner for Mary's Meals. www.marysmeals.org.uk

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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 is 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 “Law Firm of the Year” in the category “Leaders in Trade for Innovation”, 2021

Global Trade Review (GTR) named Sullivan the “Best Trade Finance Law Firm” in the category “Leaders in Trade for Innovation” at the 2021 GTR Leaders in Trade Awards

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

Global Trade Review “Best Trade Finance Law Firm” 2020 and 2019

Global Trade Review (GTR) named Sullivan “Best Trade Finance Law Firm” at their GTR Leaders in Trade Awards in 2020 and 2019

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

Trade Finance Magazine “Best Law Firm of the Year” 2019

Trade Finance Magazine named Sullivan “Best Law Firm of the Year” at its Awards for Excellence, 2019





**What's
Your
Next?**

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Doc ref 4867-7298-9450 v5

