

# Trade Finance

## Some things to look out for in Trade Finance in 2021 and beyond

Presentation by Geoffrey Wynne, Partner,  
Mark Norris, Partner and Jacqueline Cook,  
Senior Knowledge Development Lawyer

Thursday 23 September 2021



# What we are covering today

- An update on LIBOR changes
- An update on what to do about ESG
- Some Bail-in news
- Where we are on URDTT
- The “Dear CEO letter” and trade finance
- Any questions from you

# Trade & Export Finance LIBOR update Summer 2021

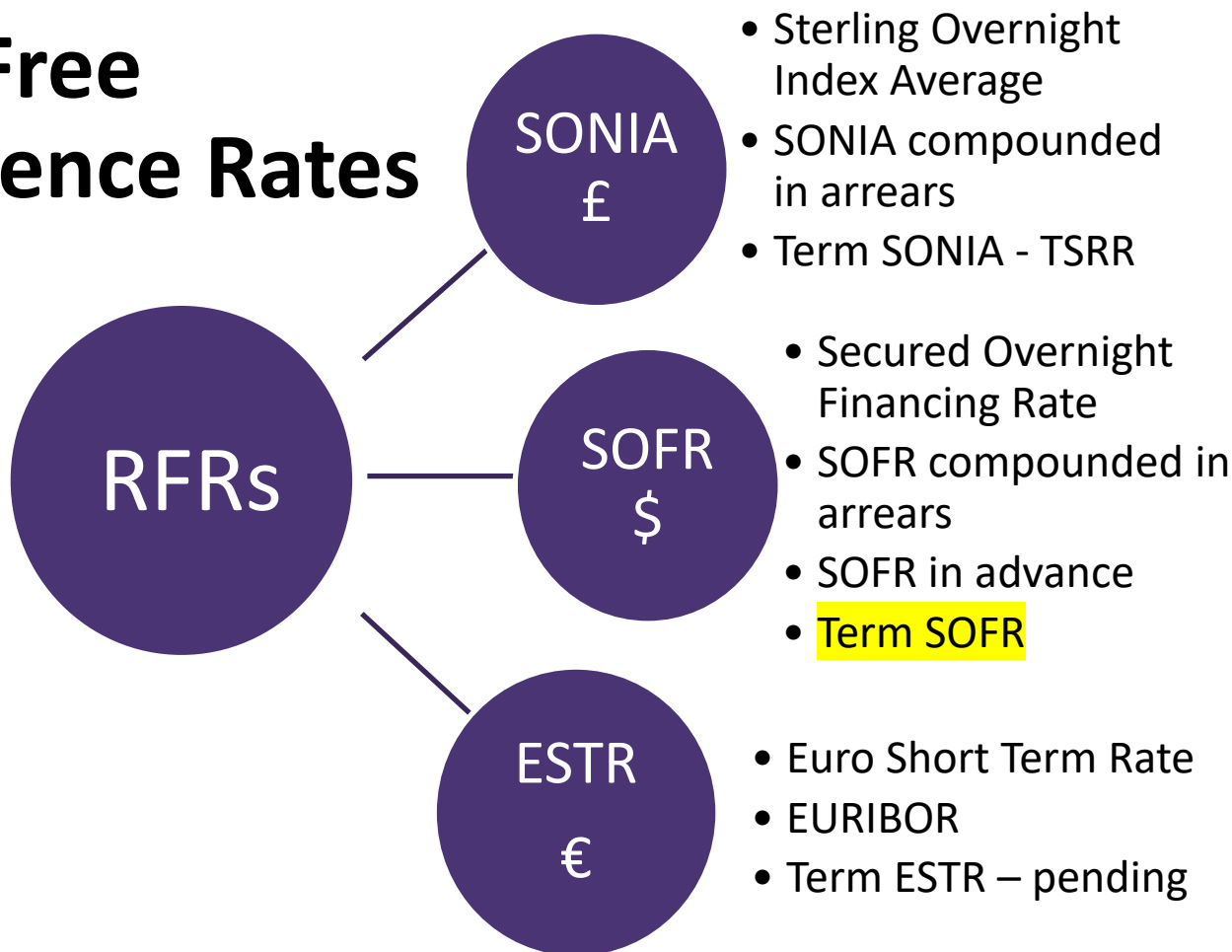
Jacqueline Cook, Senior Knowledge  
Development Lawyer



# Update

- Significant developments - summer 2021
- Using SOFR Term Rates for USD
- Issues to think about and timing for transition
  - › USD,
  - › Sterling and
  - › euros
- Legacy contracts and tough legacy contracts

# Risk Free Reference Rates



# Significant developments - summer 2021

- Launch of SOFR First Initiative for US dollars and switch for interdealer swap market meeting ARRC market indicators
- **Term SOFR for US dollars - ARRC recommended CME Group's Term SOFR for US dollars on 29 July**
- **FMSB Standards on the use of Term SONIA Reference Rates 28 July**
- LSTA issues a Concept Document covering Term SOFR 25 August
- LMA LIBOR update webinar 17 Sept
- ARRC fourth and fifth symposia - 21 July and 20 Sept
- New York legislation and draft UK legislation for tough legacy contracts
- RFR First Initiative - Cross currency swaps and cross jurisdiction 21 Sept

# Use of Term Rates – US dollar

- CME Group Benchmark Administration Limited
- Recommended 29 July 2021 – only ARRC recommended provider
- Tenor **1, 3 and 6 month Term SOFR** (no 12 month tenor yet)
- Published at 5am CET
- Access – licensed through Bloomberg and Refinitiv
- **Use case** – ARRC Best Practice Recommendations to Scope of Use of the Term Rate – supports use of Term SOFR for **trade finance loans**, multi- lender loans and middle market loans where transitioning to an overnight rate has been difficult
- FAQs on Best Practice Recommendations to Scope of Use of the Term Rate 27 Aug

# Term SOFR – issues to think about...

- Hardwired contractual terms (i) to negotiate, or (ii) state agreed alternative rate – i.e. replacing LIBOR
- Credit Adjustment Spread – set March 2021, to maintain economic parity – new deals or just on conversion? (See LSTA paper on CAS)
- Term SOFR – Fallbacks
  - › Shorter tenors
  - › Temporarily unavailable (safeguards in place by administrator/market options)
  - › Permanently unavailable and replacing Term SOFR – other SOFR rates or other term rates
  - › Ultimate fallback – cost of funds or central bank rate



# US Dollar – Timing for transition

-SOFR

-simple SOFR

-SOFR in arrears  
(compounded)

-SOFR in  
advance

Term SOFR

CME Group

ARRC

recommended

- **June 2021** – ARRC's best practice date to move to SOFR for US \$
- **Q3 and 4** hardwired or amendment mechanism in contracts and ARRC recommend transitioning now to SOFR
- **31 December 2021** – End of publication of 1 wk, 2 month \$ LIBOR. No new \$ LIBOR transactions
- **1 January 2022 to 30 June 2023** – 1, 3, 6 and 12 month LIBOR for tough legacy contracts
- **30 June 2023** – End of publication of O/N, 1, 3, 6 and 12 month \$ LIBOR
- **From 1 July 2023** – ARRC warns do not expect synthetic \$ LIBOR tenors FCA will consider working with ICE for 1, 3 and 6 month synthetic LIBOR

# Term SONIA/TSRR – issues to think about...

- Which rate to use?
- Hardwired contractual terms (i) to negotiate, or (ii) state agreed alternative rate – i.e. replacing LIBOR
- Credit Adjustment Spread – set March 2021, to maintain economic parity – new deals or just on conversion?
- Fallbacks
  - › Shorter tenors
  - › Temporarily unavailable (safeguards in place by administrator/market options); use rate of other provider
  - › Permanently unavailable, replacing Term SONIA or TSRR
  - › Ultimate fallback – cost of funds or central bank rate

# Sterling – Timing for transition

- SONIA

- SONIA

compounded in  
arrears

- Term SONIA  
(TSRR)

- Refinitiv

Benchmark

Services (UK)  
Limited

- ICE Benchmark  
Administration  
Limited

- **31 March 2021** – no new £ LIBOR deals (FCA/WGSRFR/BOE)
- **28 July 2021** FMSB's Standards on use of SONIA term rates
- **30 September 2021...** – complete amendment to legacy contracts to use alternative rate from Jan 2022- **ongoing?**
- **31 December 2021** – End of publication of O/N, 1 wk, 2 and 12 month £ LIBOR; 1, 3 and 6 month £ LIBOR no longer representative
- **1 January 2022** – synthetic 1, 3 and 6 month LIBOR published for tough legacy contracts. Legacy contract amendments to kick in to use alternative rates

# Euro – Issues to think about

- Contractual terms – suggested trigger events to switch from EURIBOR to alternative rate
- Credit Adjustment Spread – to maintain economic parity
- Forward-looking ESTR – timing? Or use ESTR compounded in arrears
- Fallbacks suggestions – use thinking from Sterling and US dollar markets
- Use and conduct issues – who is your regulator?

# Euro – Timing for transition

-EURIBOR

-ESTR

-ESTR

compounded  
in arrears

-Term ESTR (to  
follow)

- **11 May 2021** – ECB recommendations on euro RFRs and fallbacks
- **31 December 2021** – End of publication of all 7 euro LIBOR tenors
- **3 Jan 2022** – planned cessation of EONIA
- **No deadline yet** – EURIBOR set to continue for a while
- Use of forward-looking term ESTR – trade finance, export finance and emerging markets: forward looking, or backward-looking ESTR with reset methodology, unless parties don't need to know rate at outset, then backward-looking ESTR with lookback period
- Euro LIBOR and EONIA
- EURIBOR remains for now

# Legacy contracts and tough legacy contracts

- **Legacy contracts** in place after 31 December 2021 should be amended now – amendment agreement or override agreement
- **Tough legacy contracts** – impossible or impractical to amend in place after 31 December 2021
- US dollar – US dollar LIBOR tenors till June 2023 or use New York legislation or pending Federal legislation to apply alternative rate
- Sterling – can use synthetic LIBOR for Sterling for ‘Tough Legacy contracts’. Critical Benchmarks (References and Administrator Liability) Bill for continuity of contract

# Trade & Export Finance ESG and Bail in news

Mark Norris, Partner



# Some Things To Look Out For In Export Finance

- ECA becoming more important to meet Government UN SDG and Paris Agreement obligations
- Greater transparency
- Alignment of methodologies
- Greater scrutiny



# Sustainability In Export Finance - Leveraging Export Finance to support the delivery of the SDGs

- White paper published by the ICC and the Rockefeller Foundation at the UN sponsored SDG Business Forum
- Highlighted the importance of ECA finance in meeting the UN SDGs and the Paris Agreement - with annual ECA financing volumes comparable to those of DFIs
- Highlighted that ECAs were once leading the way on sustainability however in recent years they have fallen behind
- Expect to see ECA finance no longer an adjunct to Governments' SDG/Paris Agreement commitments but to play more of a central role

# House of Commons International Trade Committee – UK Export Finance – A few themes

- More renewables

*“In 2020–21 UKEF did not support any renewable energy projects”*

- More information

*“[UKEF] said that it will increase the amount of climate-related information it makes available year-on-year, and that “quantitative disclosure and scenario analysis are key objectives for disclosure within our second (2021–22) report in 12 months’ time”.*

- Concessional finance?

*“In its response to this report, the Government should provide [the ITC] with more details about its proposed untied concessional finance offer, including whether it will come from the Official Development Assistance budget, and details of any consultation or impact assessment it has planned or already undertaken.”*

# House of Commons International Trade Committee – UK Export Finance – A few themes

- Diversification

*“We recommend that UKEF review its business model to consider how it can diversify its business to support more exports from more sectors and include this in its 2021–22 Annual Report and Accounts.”*

- Increasing focus on compliance

*“UKEF should not be seen to be complacent in terms of the due diligence it undertakes or the consequences for those that do not comply with its procedures. UKEF should review its anti-bribery and corruption policies and notices to exporters and buyers to ensure that they are clear and consistent with those of its leading G7 counterparts in this area. It should report the findings of this review to us, and its plan to implement them, by the end of March 2022.”*

# Sustainability In Export Finance - Leveraging Export Finance to support the delivery of the SDGs

- The need for more data and greater reporting
- *“ECAs are still behind the curve when it comes to monitoring and reporting sustainability impacts of their portfolios”*
- Little alignment across institutions and monitoring methodologies vary
- Capturing information and reporting - Increasing transparency
- Increased focus on sustainability will be translated into more stringent E&S due diligence
- Concern - who bears the cost?
- Concern - that exporters will bear the cost for such diligence
- Concern - that more stringent E&S due diligence will slow down business and add overheads

# Greater transparency will lead to greater scrutiny

- Expect greater scrutiny of ESG financings
- Care with drafting ESG criteria
- Greater transparency will lead to greater focus on drafting and incentives
- Concern that ESG benchmarks end up being meaningless

# Greater transparency will lead to greater scrutiny

- *“Wall Street’s ESG Loans Charge Corporate America Little for Missed Goals*
- *Banks and borrowers are rushing to add sustainability targets to loans, yet for many deals the incentives are all but meaningless.”* (Source: Bloomberg Green, 8 September 2021)
- American Campus Communities Inc. \$1 billion sustainability-linked credit line May 2021
- *“We are pleased to have completed the renewal of our credit facility, which includes a 15 basis point reduction in borrowing costs and extends the maturity by over three years ... Additionally, we are proud to have introduced sustainability-linked pricing, demonstrating our commitment to ESG, and believe that we are the first U.S. listed REIT to have included a performance component tied to all three pillars in Environmental, Social and Governance.”*
- Later criticised by Bloomberg Green: “Wall Street’s ESG Loans Charge Corporate America Little for Missed Goals”

# Greater transparency will lead to greater scrutiny - *“Wall Street’s ESG Loans Charge Corporate America Little for Missed Goals (Source: Bloomberg Green, 8 September 2021)”*

- *“Banks and borrowers are rushing to add sustainability targets to loans, yet for many deals the incentives are all but meaningless”*
- *“What the statement didn’t say was that the financial incentives embedded in the loan were largely meaningless. American Campus Communities faced no extra cost for failing to achieve its ESG targets, and would save only one one-hundredth of a percentage point in interest — a mere \$100 a year for every \$1 million drawn — if it met all of its goals”*
- Bloomberg’s analysis of over 70 sustainability-linked revolving credit lines and term loans arranged in the U.S. since 2018 showed that more than a quarter contained similar provisions:
  - › no penalty for falling short of stated goals
  - › only a minuscule discount if targets are met
- “The findings suggest that while bank loans offer corporations one of the easiest avenues to access ESG financing, the path is also one of the least ambitious.”

# UK Green Taxonomy – Green Technical Advisory Group (GTAG)

- New independent expert group established to advise on standards for green investment
- UK Green Taxonomy
- *“... Part of Government’s efforts to improve the environment, accelerate the transition to net zero and create green jobs ...”*
- The Green Technical Advisory Group (GTAG) will oversee the Government’s delivery of a “Green Taxonomy”
- GTAG *“... will provide independent, non-binding advice to the Government on developing and implementing a green taxonomy in the UK context ...”*
- Purpose of the Green Taxonomy – to provide *“... a common framework setting the bar for investments that can be defined as environmentally sustainable ...”*
- GTAG is to provide initial recommendations to the Government in September 2021



# Bail-in and Contractual Impossibility

- UK has ceased to be part of the EEA for the purposes of applying the EU bail-in rules
- An English law governed credit agreement constitutes a non-EEA law governed liability
- Some form of bail-in language may, therefore, need to be included in finance documents governed by English law to which EU-authorized financial institutions are party
- European Commission has adopted Delegated Regulation setting out the Regulatory Technical Standards for contractual recognition of write down and conversion powers

# Bail-in and Contractual Impossibility

- Why this is important?
- The Delegated Regulation specifies:
  - › The conditions under which it would be legally, or otherwise, impracticable to include the clauses in certain categories of liabilities
  - › The conditions for the resolution authority to require the inclusion of the clauses in certain categories of liabilities, where it concludes that none of the conditions of impracticability notified to it are fulfilled
  - › The reasonable timeframe for the resolution authority to require inclusion of the clauses
- The scrutiny period granted to Council and Parliament has now been finalized – neither the Council nor the Parliament objected

# Bail-in and Contractual Impossibility

- The conditions under which it would be legally or otherwise impracticable for an institution to include bail-in provisions shall be the following:
  - (a) the inclusion of the contractual term would constitute a breach of the laws, regulations or administrative provisions of the third country governing the liability
  - (b) the inclusion of the contractual term would be contrary to an explicit and binding instruction from a third country authority
  - (c) the liability arises from instruments or agreements concluded in accordance with international standardised terms or protocols that the institution or entity is unable to amend
  - (d) the liability is governed by contractual terms that the institution or entity has to accept in order to be able to participate in or to utilise the services of a non-Union body, and which the institution or entity is unable to amend
  - (e) the liability is owed to a commercial or trade creditor and relates to provision of goods or services that, while not critical, are used for daily operational functioning of the institution or entity and the institution or entity is unable to amend the terms of the agreement

# Bail-in and Contractual Impossibility where the liability arises from instruments or agreements concluded in accordance with international standardised terms or protocols that the institution or entity is unable to amend

- *It should also be considered as impracticable for an institution or entity to include the contractual term in an agreement or instrument where that institution or entity is unable to amend those contractual provisions*
- *This is often the case where agreements or instruments are concluded in accordance with international standardised terms or protocols setting uniform terms and conditions for such kinds of agreements or instruments*
- *Trade finance products, such as guarantees, counter-guarantees, letter of credit or other instruments used in the context of supporting or funding trade transactions are typically issued subject to internationally recognised standard terms or rules set by an internationally recognised industry organisation or developed based on standard bilateral customs*

# Trade & Export Finance URDTT and Dear CEO

Geoffrey Wynne, Partner



# Uniform Rules for Digital Trade Transactions

- Background to URDTT
- Digitalisation of trade but not yet...?
- Still need to document and perform the trade transaction
- What the Rules do (and do not do)
- Published and become effective on 1 October, 2021
- Part of the move towards digitalisation

# How will URDTT be used?

- Much debate still going on
- Much explanation being given
- Get ready...
- Focus is on use of Electronic Records to evidence the digital trade transaction
- URDTT follows G7 Framework and MLETR (UNCITRAL Model Law on Electronic Transferable Records)
- Sets out Rules as to how they are used to evidence the transaction, create a Payment Obligation of the Buyer and (where agreed) of a Financial Services Provider

# Documenting with URDTT in mind

- Parties still sign commercial contract
- Agree to evidence performance by Electronic Records
- Incorporate URDTT into that agreement
- On Data Match Payment Obligation arises
- Payment Obligation can be undertaken by one or more FSPs
- Provisions cover responsibility for Electronic Record, corruption of data and force majeure
- Parties can agree method by which data is provided
- A good start on this road...?



# Dear CEO...

- Interpreting the recent joint letter from the PRA and FCA

# Background

- A 'Dear CEO' joint letter regarding 'Trade Finance Activity' was sent out on 9 September 2021 by the PRA and FCA to firms that carry out trade finance activity
- The letter highlights 'expectations' in light of 'high-profile failures of commodity and trade finance firms' over the past 18 months
- 'Inherent risks' of trade finance are signposted, such as its complexity, global nature and often large volumes of trade flows across multiple currencies
- 'Significant issues' identified fall under credit risk analysis and financial crime controls

# 4 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

# Next Steps

- A 'holistic assessment' of associated financial crime risks should be in place, if not already. The letter states that 'in future engagements with your firm, we may ask to see the risk assessment you have carried out and any follow-up action undertaken as a result'
- Due diligence – ensure that instances of higher risk are being identified
- Financial and non-financial risk on the end-buyers – consider this, along with the rationale underpinning a given transaction
- Policies and procedures – ensure there is adequate oversight, monitoring and constant review

# What does this mean for trade finance in practice?

- Are you not already doing this?
- Will you have to change some practices and tighten up documents?
- Will some flexibility have to go?
- Is this yet another problem for trade finance to overcome?
- Will it stop or slowdown trade transactions when the opposite is required?

# Any Questions?

# Suggestions for future topics and webinar dates

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

## **Future webinar dates for 2021**

- Thursday 21 October
- Thursday 25 November
- Thursday 16 December

# 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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# Mark Norris

## Partner

Mark's practice covers cross border syndicated lending, structured export credit finance, structured trade and commodity finance, debt restructurings and asset finance. Mark is recognized in The Legal 500 UK as "excelling" in structured export credit transactions and is praised for his "commercial and user-friendly approach".

Mark also advises on financial crime, modern slavery, bribery and corruption issues in connection with trade and export finance.

He has advised financial institutions, funds, corporate borrowers, agents and trustees, and national and supranational sovereign/quasi-sovereign organisations on award-winning finance transactions throughout Africa, Western, Central and Eastern Europe, Russia and the CIS and the Middle East.

Mark has extensive sector experience in infrastructure financing across Africa including off-grid power, health care, airports and roads.

Mark has lived and practised in the Czech Republic (Prague), England (London), Germany (Düsseldorf and Frankfurt) and Russia (Moscow).

Mark holds graduate (Social Policy (BSc Econ)) and post-graduate (Banking Law and Financial Regulation (LLM)) degrees with honors from the London School of Economics.

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# Jacqueline Cook

## 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](http://www.marysmeals.org.uk)

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# Awards & Recognition

## **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



## **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 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

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

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



## **The Legal 500 UK, 2021**

Sullivan is ranked in Tier 1 for Trade Finance by *The Legal 500 UK, 2021* for the seventh year running  
Partner Geoffrey Wynne included as Trade Finance Leading Individual in the “Hall of Fame”

Simon Cook and Mark Norris are both recognised as Leading Individuals and Hannah Fearn as a Rising Star

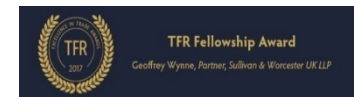
Sullivan is also ranked for Commercial Litigation - Mid-market by *The Legal 500 UK, 2021*



## **Chambers UK, 2021**

*Chambers UK, 2021* ranks Sullivan in Commodities:Trade Finance (UK-wide)

Partners Geoffrey Wynne and Simon Cook are Ranked Lawyers in Tier 1 and Tier 2 respectively by *Chambers UK, 2021*



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

Sullivan was recognized for Banking Lending - Lender Side, United Kingdom, in *IFLR1000's Banking and Finance Guide, 2022*

Partner Geoffrey Wynne was also ranked a “Leading Lawyer” in the United Kingdom



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Your  
Next?**

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