Problems and solutions in cross-border receivables transactions

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Overview

Part I

- What is receivables finance?
  - Perspectives of seller and buyer
  - Considerations when determining what financing available

- Overview of local law and cross-border issues

- Electronic platforms

- How to do transactions: some key considerations

Part II

- Local law due diligence: what questions should you ask local counsel?
  - A look at some different cross-border structures
What is receivables finance?

- One possible definition:

  *An arrangement providing credit to a party using an amount payable by one party to another for goods or services*

- What is a receivable?
  - The payment by a buyer of goods or services to the seller, until the time when it is paid
  - An asset of the seller
  - A liability of the buyer
Trade finance and receivables finance

• The generation of receivables is a key factor in any trade arrangement

• Receivables represent the culmination of most if not all trading arrangements where a product or service is sold or provided

• There may be more than one sale and purchase in the time from producing a raw material to selling the finished product: each sale and purchase creates a receivable which could be the subject of financing

• Either or both of the seller and the buyer might see the need to obtain financial support for a sale and purchase transaction

• Opportunities for financers at each step of the trading arrangements
Different perspectives: seller and buyer

- **Seller:**
  - The faster conversion of receivables into cash reduces the seller’s working capital needs
  - “Days sale outstanding” (DSO)
  - Off-balance sheet treatment

- **Buyer**
  - The quicker the buyer must pay, the more working capital it needs for its business
  - “Days payable outstanding” (DPO)

- Conflict of interests: the seller wants to achieve a shorter DSO, while the buyer wants to achieve a longer DPO

- Receivables financing can provide solutions for both parties
Determining what financing is available

Considerations for the financer:

- The quality of the receivable
- The credit standing of the buyer
- The extent of performance risk on the seller
- Logistics affecting the seller’s performance
- Level of recourse to the seller
- Assisting the seller or the buyer or both?
- Local law and cross border issues
Local law issues

- How is receivable established?
- Can you have an irrevocable payment obligation?
- If not, is there performance risk on seller (of goods)?
  - What needs to be done to make the receivable unconditional?
  - Can the financer control the risk?
    - Example: taking possession of transport documents (e.g. bills of lading) under import letter of credit
- What can buyer do to avoid payment?
  - Set off
  - Credit notes
- How do you “secure” right to payment?
  - From seller
  - From buyer
Cross-border issues

- Which legal systems are relevant?
  - Seller
  - Buyer
  - Third party credit support

- What law to use?
  - English law
    - Why?
  - Local law
    - Whose?
Electronic platforms

- Do they create or solve problems?
- Bank “owned”
- Third party run
- What to look for?
- The magic of the irrevocable payment undertaking
- Some risks
  - Who takes what risks?
    - Limited or non recourse
    - Against whom?
How to do the transaction

- Get the right parties committed
- Due diligence
  - Analyse local laws
- Obstacles to doing the transaction
  - KYC
  - Financial crime
  - Sanctions
  - Dual use goods
- How do these issues apply to receivables?
- How can these obstacles be overcome?
Cross-border receivables purchase – structure

**Before purchase**

- **Seller / Exporter**
  - **Country A**

  - Sales contract
  - Export of goods
  - Payment for goods

- **Buyer / Importer**
  - **Country B**

**After purchase**

- **Financier**
  - **Country C**

  - Proceeds from collection account
  - Offshore collection account

  - Payment of face value when due

- **Seller / Exporter**
  - **Country A**

  - Purchase of receivable by payment of discount
  - Receivables purchase agreement

  - Sales contract
  - Export of goods

- **Buyer / Importer**
  - **Country B**
Local due diligence (1)

- Seller, buyer and financier each in a different jurisdiction
  - Introduces further legal and practical considerations
- Which jurisdictions are relevant?
  - Jurisdiction of the seller and the buyer
  - Jurisdiction of the financier
  - Governing law of the receivables
  - Governing law of the receivables purchase agreement
- Questions to ask counsel in seller’s jurisdiction
  - Capacity of seller
  - Enforceability of receivables purchase agreement
  - Enforceability of assignment of receivables
  - Insolvency of seller
  - Tax
  - Regulation and compliance
Local due diligence (2)

- Questions to ask in buyer’s jurisdiction
  - Enforceability of assignment against buyer
  - Form of notice of assignment and acknowledgment
  - Tax

- Governing law of receivables
  - Requirements for effective, perfected assignment of receivables

- Governing law of receivables purchase agreement
  - Enforceability
  - True sale
  - Enforcement against buyer

- Outcome of due diligence: structure and documentation
  - Legal opinions
Collection agency structure

• Seller, buyer and financier each in a different jurisdiction
• Buyer continues to pay invoices to seller
• Seller collects payment and remits to financier
• Structure may be undisclosed to buyer
Collection agency structure – due diligence

- Undisclosed structure
  - Possible to enforce against buyer?
  - Perfection steps
  - Contractual obligations on seller to assist with enforcement
  - Power of attorney

- Proceeds in hands of seller
  - Will proceeds form part of seller’s estate on insolvency?
  - Trust wording
Structuring to solve local law issues

- Example: use of intermediary commercial entity

![Diagram showing the relationships between
Financier (Country C), Seller (Country A), Producers affiliate (Country D), Offshore collection account, and Buyer/Importer (Country B).]

- Purchase of receivable by payment of discount
- Receivables purchase agreement
- Proceeds from collection account
- Payment of face value when due
- Sales contract
- Sale of goods
Third party credit support

- Example: seller has benefit of buyer parent guarantee

Diagram:

- Financier
  - COUNTRY C
- Seller / Exporter
  - COUNTRY A
- RPA and assignment of guarantee
- Guarantee of buyer’s obligations
- Assigned benefit of guarantee
- Buyer’s parent
  - COUNTRY D
- Buyer / Importer
  - COUNTRY B
- Sales contract
Third party guarantee – due diligence

- Legal due diligence on guarantee: how can benefit be transferred to financier?
  - Form of guarantee: in sales contract or separate document
  - Governing law of guarantee
  - Form of assignment / transfer
  - Perfection requirements

- Legal due diligence on guarantor: can the financier enforce the guarantee against the guarantor?
  - Where is the guarantor located?
  - Capacity of guarantor
  - Enforceability of guarantee and transfer
Alternative structures

- Forfaiting
  - Receivable is an independent payment instrument
  - The receivable is sold without recourse to the seller
  - Payment obligation is unconditional
  - Due diligence on buyer and payment undertaking

- Secured financing
  - Loan to seller secured by assignment of receivables due from buyers
    - Proceeds of receivables paid into a charged collection account and applied against loan repayments
  - Seller and buyer located in different countries: due diligence
    - Appropriate security
    - Notice of assignment and perfection of security
    - Formalities, stamp duty etc
Conclusions
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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 corporate and international finance, bank mergers and acquisitions, structured finance, asset and project finance, syndicated lending, equipment leasing, workouts and financing restructuring, leveraged and management buy-outs and general commercial matters.

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 also advised on ownership structures 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.

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Hannah has advised clients on sanctions issues arising out of cross-border finance transactions and has advised a number of banks on the use of credit risk mitigation techniques in trade finance transactions under the EU’s Capital Requirements Regulation (implementing Basel III).

Hannah is a contributor to A Guide to Receivables Finance, a special report from TFR published by Ark.

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