Cross-border Receivable Financing

Talk by Geoffrey Wynne, Partner, and Tom Glinka, Associate
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Breakfast seminar on 24 October 2014
at Pinners Hall, 105-108 Old Broad Street, London, EC2N 1EX
What the talk will cover

• Introduction and overview
• Risks and mitigation ideas
• Specific structures
  › Buyer led RPAs
  › Supplier led
  › Other types
• Some legal issues
• Case studies and what has gone wrong
• Conclusions
Introduction and overview

- What type of receivables?
  - Arising from sale of goods (and services)
- Not, for example, structured trade future flows
  - E.g. asset-based lending with security
- Cross border
  - Involving a mixture of jurisdictions
  - Not just UK
  - Could be multi-jurisdictional in same transaction
- Assumes the existence of the receivables
  - But view performance and payment risks
  - Both seller and paying party
Overview of structures

- Generally framed as receivables purchase arrangements (RPAs)
- Different type of these
  - Bilateral
  - Multiparty – both sellers and buyers of goods
  - Use of electronic platforms
- Structured arrangements
  - Use of forfaiting and URF
  - Factoring and its structures
  - Securitisation
  - What else?
Risks and mitigation

- Key risks
  - Receivable does not exist
  - Receivable is not paid
  - Receivable gets paid to someone else

- Due diligence and its place

- Quality of supplier

- Quality of what is supplied

- Quality of receivable

- Quality of paying party
What to do with the receivables

- What performance is needed from the supplier?
- Will the buyer pay?
- The independent payment undertaking (IPU)
  - What is its place?
  - What are its problems?
- The subject of double funding
  - How to avoid it
  - Actions by the financer (or inaction)
  - Look at case studies and structures
Specific Structures

- Buyer-led structure
- Supplier-led structure
- Third party structures
Buyer-led structure

- The buyer/debtor is the financer’s primary client
- Contractual arrangements with the buyer/debtor
- Confirmed/accepted receivables
- Usually uses an electronic platform
- Disclosed assignment
- Commercial reasoning
  - suppliers obtain early payment (improving DSO) with financing costs based on creditworthiness of IG buyer
  - used as a wider scheme to help buyer/debtor lengthen payment terms (improving DPO) producing cash-flow benefit
- Focus on accounting treatment for supplier AND buyer/debtor
Buyer-led structure

1. Purchase Order
2. Supplies goods/services and invoice
3. Details or accepted receivable uploaded to platform
4. Notification of upload accepted receivable (manual discount only)
5. Request for financier to purchase receivable (manual discount only)
6. Payment of discounted purchase price in exchange for assignment of receivable
7. Notice of assignment of receivable
8. Payment of face value of receivable on maturity date

Debtor (Buyer)

Supplier (Seller)

Service Provider/Financer
Supplier-led structure

- Wider variety of structures
- The supplier is the financer’s primary client
- Usually contractual arrangements with supplier only
- Less frequently electronic platform-based
- May be confirmed or unconfirmed receivables
- May be disclosed or undisclosed
- Supplier as collection agent of the financer
- Focus on accounting treatment for the supplier
Supplier-led structure

1. Purchase Order

2. Supplies goods/services and invoice

3. Acknowledgement/acceptance of invoice (confirmed structure only)

4. Details of accepted invoice/receivable and request for financer to purchase

5. Notice of assignment (disclosed structure or supplier default only)

5a. Notice of assignment (disclosed structure or supplier default only)

6. Payment of face value of receivable on maturity date

7. On-payment of discounted purchase price in exchange for assignment of receivable

Supplier (Seller)

Debtor (Buyer)

Financer
Third party structures

- Wide variety of structures
- Usually buyer-led
- Relationship of the buyer and often the supplier is with the third party originator
- Multiple financers within the structure
- Identity of financers may be disclosed or undisclosed (to buyer and/or supplier)
- Third party originator as paying agent and collection agent
Third party structures – other contractual structures

Debtor (Buyer) → Supply Contract → Supplier (Seller)

Third Party Originator

Payable Services Agreement → Platform Services Agreement

Financer Agreement → Receivables Purchase Agreement

Financer
Third party structures – other contractual structures

- **Debtor (Buyer)**
- **Supplier (Seller)**
- **Third Party Originator**
- **Financer**

- Supply Contract
- Payable Services Agreement
- Receivables Purchase Agreement
- Agency Agreement
Some legal issues

- What is the structure?
  - Sale v secured financing
  - True sale issues
  - Does it matter?

- Best position for financer
  - Notice of assignment
  - Avoid set offs and counterclaims

- Must the receivable be assignable?
  - The law

- How to transfer the receivables

- Purchase of future receivables
The jurisdiction of the parties

- Governing law of the sale contract/receivable
- Governing law of the receivable purchase document
- Must they be the same?
  - The issues
  - How to work around the problems
- Standard industry terms v what you want
  - Override arrangements
  - Framework agreement
How to deal with financial crimes etc.

• Protection in the documents
  › How far should you/can you go?

• How to monitor?

• Who should monitor?

• The unforeseen issues
  › How to deal with them
  › Who takes the risk?
Case study – The double funding

Facts

- Supplier obtained funding against sending financer signed documents.
- Supplier collected for financer
- No notice to paying party
- Supplier had paying party sign more than one original
- Supplier obtained finance from more than one financer
- Financers lost out
Double funding - analysis

- Straight fraud
- Financers too relaxed
  - No notices of assignment
  - Financers let supplier act as agent
  - Little tracking of payments
  - Worked while business growing until ...
- Legal fights on priorities
- Lessons learned
  - Track your receivables
  - Consider transactional steps
Case study – Change to payment instructions

Facts

- Finance to seller of goods where paying party key to the finance
- Assignment of receivables taken and notice served on paying party
- Seller changed details of account by a further notice to the paying party
- Paying party paid to new account
- Eventually financer realised what happened
- Seller unable to pay
- Paying party refused to pay again
Change to payment instructions - analysis

- Possible fraud
- Financer too slow to react
- Know your transaction should not have permitted this
- Paying party says come and sue me in my jurisdiction
- Prognosis for financer is poor
Case study – Structural risks

Facts

- Financer agrees to buy receivables from a number of suppliers of goods to the same buyer
- Separate documents and different structures
- One has supplier collecting the receivables for financer with notice of assignment
- One directs payment to a designated account with notice of assignment upfront (once only)
- One gives notice to pay to financer’s account with notice each time
Structural risks - analysis

- All work
- Financer needs to assess risks and take a view
- Credit risk is on paying party in all cases
- Paying party asked to waive set off (key)
- What risk is on supplier?
  - Can monitoring protect the financer?
- Answer on risks is it depends on the parties
- Legal analysis
  - All can work as true sales of receivables
Conclusions

- Receivable Purchase – good structuring possible
- Cross border issues can be dealt with
- Look at structuring from “true sale” point of view
- Important to have an enforceable right to payment
- A number of ways to achieve this
- Remember what has gone wrong and can go wrong
- Length of document is not an excuse for poor due diligence
- Knowledge is key to success
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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 financers 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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