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Trade Finance Quarterly Insight

Issue 5 | December 2021

TRANSACTIONAL POWERHOUSE

Leading and closing complex deals – every day

Trade Finance Quarterly Insight

Welcome to the December edition of this quarterly. In this edition we lead with coverage and commentary on two documents that have been long awaited by trade finance market participants. Firstly, we look in detail at the foundations and mechanics of the new LMA recommended form of borrowing base facility agreement.

We give consideration to the amendments and fine-tuning that will still be required to make this document workable on each specific transaction given the diverse nature of borrowing base structures and assets, as well as local law considerations. Secondly, we ask if, with the publication of the Uniform Rules for Digital Trade Transactions (URDTT), the trade finance world is finally ready to swap its pen for a keyboard.

The concluding article in this edition was first published in the September 2021 edition of Butterworth's Journal of International Banking and Finance Law and examines the different ways in which fraud can manifest itself in commodity financing. We consider how to identify fraud, the actions lenders can take to mitigate against it occurring in the first place and the possible resolutions available should a lender find themselves the victim of fraud. This is a follow-up article to '**Commodity Finance: the complete security package**', that featured in the June 2021 edition of this publication.

Both of these article are set against the backdrop of recent disruptions to commodity transactions, as a consequence of COVID-19 driven lockdowns, that have resulted in closer scrutiny of borrower businesses.

Our regular Sanctions and Export Controls update page features some interesting reads on, amongst other topics, the immediate issuance by the Ministry of Commerce for China, and immediate effect of, new encryption import controls and the issuance by the US Commerce Department of a Proposed Rule to clarify and further restrict Licence Exception Strategic Trade Authorisation. A link to the blog by the same name is also provided together with links to other topical blogs such as the Import and Trade Remedies Blog, the Global Supply Chain Compliance Blog and the Foreign Investment and National Security Blog.

As always we hope that you enjoy this edition of Baker McKenzie's Trade Finance Quarterly Insight and invite you to reach out to any of the contributors or indeed anyone else in the team (please see enclosed Key Contacts) should you wish to discuss any of the issues covered in this edition or have any other trade finance related queries.

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New LMA recommended form: the borrowing base facility agreement

Editor Highlights

- On 29 September 2021, the LMA published the long awaited recommended form of borrowing base facility agreement
- The new LMA form is based on the LMA recommended form of developing markets facility agreement, with inclusion of typical borrowing base mechanics
- Although the form is helpful, the diverse nature of borrowing base structures and assets comprising the borrowing base as well as diverse local law considerations mean that significant fine-tuning will be required on a case-by-case basis

Drafting approach

The new form is based on the LMA recommended form of developing markets facility agreement, adapted to include typical borrowing base mechanics.

Most of the borrowing base mechanics and related definitions have been inserted in a single clause (Clause 25 (*Borrowing Base*)). As customary, the typical drawstop and "top-up requirement" remain located in separate sections of the facility agreement (Clause 5.2 (*Further conditions precedent*) and Clause 12.4 (*Mandatory prepayment - Borrowing Base amounts*)). This approach is consistent with the LMA's goal, made clear in the User Guide, to facilitate the review of all borrowing base related provisions by separate sub-groups within Lender teams.

Importantly, the LMA User Guide notes that the new form was considered by a working party consisting of representatives from banks (including in-house lawyers) and major City law firms. Although this working party "consulted" with members of the borrower community, the User Guide concedes that there was no "negotiation" with the borrower community. This is in line with the approach taken on the developing markets and leveraged finance documentation. Borrowers beware...

Borrowing base provisions

The essence of the new agreement is in the typical borrowing base mechanics:

- drawstop if disbursing a proposed Utilisation would exceed the borrowing base;
- mandatory prepayment or requirement to evidence additional eligible assets if outstanding loans at any time exceed the borrowing base;
- eligibility requirements for inventories, receivables and cash collateral to be included in the borrowing base;
- valuation mechanics for determining the value of eligible inventories and receivables for purposes of inclusion in the borrowing base;
- haircuts on the valuation of eligible inventories and receivables so that only the discounted value is included in the borrowing base;
- undertaking for the Borrower to provide regular borrowing base certificates and reports;
- audit and access rights for the Lenders; and
- additional representations, undertakings and conditions precedent relating to the borrowing base assets and reporting.

Although the principles are commonly understood, the devil is in the detail. Significant alteration may indeed be required depending on the structure of the deal, the nature of the assets as well as local law considerations (see below). This is presumably also the reason why a large number of the provisions in the new form are expressly marked as optional.

Optional features

The new form contains a number of features that, although not included in square brackets, are to be considered optional. For example:

- a specific role of "Borrowing Base Agent" distinct from the facility agent;
- a multicurrency feature;
- an uncommitted facility;
- an accordion increase feature;
- an extension option;
- the ability to use the committed RCF for the issuance of letters of credit; and
- Ancillary Facilities.

Depending on the commercial agreement, the new form will need to be amended to remove some of these features, which in our view are not all commonly adopted as market standard.

LIBOR transition

The new form provides for a multicurrency RCF. Euro loans are still EURIBOR-based, but USD and sterling loans are based on SOFR or SONIA compounded in arrear in accordance with the LMA recommended form of multicurrency term and revolving facility agreement incorporating backward-looking compounded rates and forward-looking term rates with rate switch provisions.

An option for term SOFR is not currently foreseen. An exposure draft of developing markets facility agreement with term SOFR provisions was however published on 27 October 2021, and such provisions can easily be introduced in the form of borrowing base facility agreement.

Local law review and amendments

The LMA User Guide stresses that "[w]hile some provisions applicable to overseas companies on a generic basis are included, it is not possible to contemplate all amendments required for every jurisdiction and so further changes may need to be made depending on where the Obligors are incorporated". Typical local law issues flagged in the LMA User Guide relate to local law guarantees, with corporate benefit and limits on the amounts that may be guaranteed as examples.

It is important to point out that, although such local law issues relating to guarantees require consideration in any type of lending arrangement, additional consideration may be required in the borrowing base context. Indeed, in a typical leveraged finance context it will likely be acceptable that guarantees are taken up to the maximum amount permitted by law. This is however not necessarily the case in a borrowing base context, where Lenders often require full security in respect of the borrowing base assets owned by each Guarantor. It may not be possible to provide such security if the underlying guarantee of the relevant Guarantor is limited. These issues will need to be carefully analysed with local counsel to maximise the credit support of the Lenders while minimising any risk of liability for the directors of the Guarantors.

In a borrowing base structure, local law amendments are not limited to issues under the laws of the jurisdictions in which the Obligors are incorporated. Indeed, inventories may be stored in, or in transit through, multiple jurisdictions, which may or not be the same as the jurisdictions in which the Obligors are incorporated. Similarly, receivables may be governed by different laws and/or owed by debtors located in different jurisdictions. Depending on applicable private international law rules, it may therefore be necessary to make further local law amendments driven by legal requirements in jurisdictions relevant to the perfection of security over inventories or receivables.

By way of example, a typical local law issue relating to security is the very different approach taken in different jurisdictions towards the position of unpaid suppliers. In some jurisdictions, unpaid suppliers are treated analogously to ordinary unsecured creditors. In other jurisdictions, they may benefit from an unpaid seller's lien, which may be senior to the security of the Lenders and which may even extend to receivables generated from the sale of the unpaid inventories. Depending on the local law position, it will be necessary to carefully modify the borrowing base definitions to ensure that the Lenders receive the necessary comfort, without however limiting the borrowing base where this is not strictly necessary.

"Although the form is helpful, the varied nature of borrowing base structures and assets as well as diverse local law considerations mean that parties will need to consider tailoring the document on a case-by-case basis."

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Uniform Rules for Digital Trade Transactions: will the trade finance world finally swap its pen for a keyboard?

Editor Highlights

- With the publication of this document the ICC aims to create a universally adopted digital framework for trade transactions
- However, a critical mass of participants will be required to adopt these rules for them to become market standard
- A number of issues will need to be faced and overcome along the way for standardisation to occur and we explore these in this article

On 1 October 2021, the International Chamber of Commerce (**"ICC"**) published the Uniform Rules for Digital Trade Transactions Version 1.0 (**"URDTT"**), the preparations for which started in December 2018. In brief, URDTT (i) defines the term "digital trade transaction" (which can be paraphrased as a process whereby electronic records are used to evidence the underlying sale and purchase of goods or services resulting in a payment obligation from one person to another), (ii) sets out principles that apply to each party to a digital trade transaction and (iii) regulates the presentation and validity of electronic records. In light of the growing importance of digitalisation, particularly in the aftermath of the COVID-19 pandemic, the ICC aims to create a universally adopted digital framework for trade transactions. Accordingly, fully digitalised trade transactions through a set of technology-agnostic rules that seek to future-proof themselves by being deliberately imprecise in describing the technological media they seek to govern, is one of the distinguishing features of the URDTT among the other rules issued by the ICC. In this article, we will examine the URDTT and discuss potential problems that may arise from its implementation and limitations as to its efficacy.

Buy-in

Trade finance remains a world that still relies in many circumstances on the possession of wet-ink originals. Given the broad spectrum of global trade actors and digital trade transactions the URDTT seeks to govern in aiming to facilitate digitalised trade transactions through general rules, the URDTT leaves certain aspects to be shaped by implementation. We may see early users adopt sector specific amendments or supplements which may in turn be incorporated into later versions of the URDTT. For the time being, meeting the needs and demands of diverse market participants in a rapidly changing digital environment is one of the most prominent challenges for the URDTT in becoming a universally accepted set of rules. Worryingly, certain key global stakeholders have yet to give the rules their backing - including the US[1]. As with other governing rules of international application seeking to usher trade finance towards digitalisation, a critical mass of participants will need to adopt the rules if they are to become market standard.

Conflicts of laws

URDTT does not exist in a vacuum: it can only operate within the confines of applicable laws relating to the digital trade transaction it seeks to govern and the entities that are party to it. Consequently, local laws can easily override URDTT. Indeed, Article 17(b), acknowledges the precedence of local laws; and the URDTT expressly excludes its application with respect to local mandatory laws. The URDTT exempts any and all liabilities or responsibilities of principal parties, financial service providers and beneficiaries as to payment obligations or undertakings to the extent prohibited by applicable laws. Consequently, users will need to diligence the impact all applicable laws will have on the application of the URDTT to any digital trade transaction entered into with each counterparty.

[1] GT Review, "ICC Publishes New Rules for Digital Trade Transactions", Global Trade Review (GTR), October 7, 2021, https://www.gtreview.com/news/fintech/icc-publishes-new-rules-for-digital-trade-transactions/.

Universal application

As an overarching framework for digital transactions, the URDTT, attempts to fill the gaps pertaining to issues such as the use of electronic records as evidence and the consequences of incompatibility between parties' electronic data relating to a transaction. However, in seeking to adopt a technology-agnostic approach, whereby any transaction regardless of the platform and/or technology used is within the scope of the URDTT, it raises questions with respect to interoperability of the systems and adaptability of the relevant provisions.[2]

Versioning up

URDTT's issuance with version numbers (i.e. currently Version 1.0) implies that updates will be needed on an ongoing basis in light of developing technology, evolving business life and the changing needs of the markets. Pursuant to Article 1/d, a transaction will not necessarily be subject to the version in effect at the time of entry into the transaction; rather, the prevailing version will be applied unless otherwise stipulated by the parties. This approach is consistent with the rules' drive towards flexibility and adaptability, but clearly participants will need to keep abreast of updates to the URDTT to ensure any modifications to the rules do not prejudice them.

Wait and see

Overall, publication of the URDTT is an important step in facilitating an end-to-end digitalised environment for trade transactions for a wide-range of trade finance participants. Upon consultations with various stakeholder groups and following the preparation of six drafts, the first set of rules has been established in a non-bank-centric and all-encompassing approach with an attempt to popularize the use of electronic records to evidence trade transactions. Notwithstanding aforementioned issues, which may impact on the practical applicability of the URDTT, the rules offer a much welcome proposed industry standard on the enforceability of electronic records as between parties to a digital trade transaction. As the ICC remarked in their statement, the next stage awaiting the URDTT is the implementation and commercialisation for which a group was established so as to provide educational support and accelerate market adoption.[3] The Baker McKenzie team will be monitoring the market closely in the hope that the rules gain the necessary traction to become internationally established - look out for an update in due course!

> **Publication of the URDTT is an important step in facilitating an end-to-end digitalised environment for trade transactions. As highlighted in this article, they are not without their issues, however they do offer the foundations to a much welcome proposed industry standard on the enforceability of electronic records between parties to a digital trade transaction.**
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[2] TradeFinance.training, "Blog URDTT FAQ", Collyer Consulting, accessed November 22, 2021, https://www.tradefinance.training/blog/articles/urdtt-faq/.

[3] GT Review, "ICC Publishes New Rules for Digital Trade Transactions".

Fraud in commodity finance: identification, mitigation and resolution

Editor Highlights

- Fraud in commodity financing can manifest itself in a number of ways and lenders need to be able to identify key indicators of the different types of fraud
- There are a number of tools that lenders can avail themselves of to mitigate the risk of fraud – many of them are centred around due diligence and protective documentary provisions
- There of course remains a trade-off to be made between adopting rigorous due diligence and documentation and the flexibility to strike a competitive deal
- In the event of fraud the English courts are well-equipped to deal with this complex area of law and have the jurisdiction to grant a range of remedies

When the sea was calm all boats alike Show'd mastership in floating

In our previous article, '*Commodity Finance: the complete security package' (2021)*, we touched upon how disruption to commodity transactions, as a consequence of lockdowns, has led to the uncovering of fraudulent activities due to enhanced oversight of borrowers' businesses and how a well-constructed security package can mitigate this risk to a degree. In this follow- up article we examine in detail the different ways in which fraud can manifest itself in commodity finance transactions, the actions lenders can take to try and mitigate against such frauds occurring in the first place and the possible resolutions available should a lender find itself a victim of fraud.

You would never know a car's brakes are not working until that car needs to stop. During fair economic weather, frauds often go unnoticed because a company's satisfaction of its debt service suggests that it is operating profitably and in the manner in which it reports to its lenders. However, when a company hits choppy waters, the disguise conferred on its activities by a never- ceasing stream of transactions falls away, and nefarious goings-on are uncovered beneath. In some instances, the challenging times themselves lead to fraudulent behaviour – a company may deceive lenders to hide shortfalls and losses.

The coronavirus pandemic has decimated the businesses of many commodity traders, paralysing the ebb and flow of international trade. Frauds have been uncovered during post-mortems of a number of commodity trading businesses that have recently failed. This article briefly describes some of these frauds, examines ways in which lenders can protect themselves, and finishes with analysis of some of the remedial action defrauded lenders can take to mitigate their losses.

COMMON VARIETALS

Below, in brief detail, are a handful of the most common frauds lenders have fallen victim to in recent times.

"Fresh air" fraud

This fraud involves conjuring commodities, trades and/or invoices out of thin air/"fresh air" – they do not exist. This fraud in particular brings into sharp relief the trade finance world's reliance on paper and the risk all lenders face of disbursing money on the basis of forged or doctored documents. It also highlights the chink in the armour of even the most comprehensive security package – there is no value to any security interest if the asset being secured does not exist (for more detailed analysis of a typical commodity finance security package, please see our article 'Commodity finance: the complete security package' (2021) 5 JIBFL 351.

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The wrong commodity

At its most brazen, this fraud involves a lender financing what it is led to believe is a valuable cargo that turns out to be worthless. In March 2021 Mercuria made the headlines by purchasing multiple cargoes of painted rocks, disguised to look like blister copper. Other lenders have seen the actual quantity or quality of a cargo differ markedly from that specified in the documents presented, resulting in a shortfall between the value of the financing and the value of the commodity.

Double financing

Here the commodity exists and matches the specification. The problem for the lender is that one or more other lenders also claim to have financed it. In what is the most infamous example of recent double-financing, Dezheng Resources fraudulently pledged the same warehouse receipts issued at the port of Qingdao multiple times to various financiers, leading to substantial losses for a number of international banks.

Teeming and lading

This is commodity finance's take on a Ponzi scheme. Shortfalls associated with one commodity flow are disguised with fresh money corresponding to another commodity flow. None of the fraudster's lenders will be aware that their financing is not self-liquidating as intended provided that the debt service is satisfied on time. But at some point the wheels will stop and at least one financier will have disbursed funds to finance a flow only to discover those funds have been applied towards an unrelated flow. This technique was neatly summarised in PwC's report to the Singapore High Court following the collapse of oil trader Hin Leong as "a vicious circle whereby financing is required to sustain the scheme, which gives the false impression of the company's financial health, which in turn allows the company to obtain further financing, thereby perpetuating the scheme".

Offtaker conspiracy

By conspiring together, a lender's client and the offtaker can together defraud that lender. Sham transactions can be documented, purchase prices or quantities inflated and offtake proceeds diverted to alternative accounts. On the client's insolvency, a lender may struggle to prove the offtaker was in cahoots with the client. Even in circumstances where fraudulent collaboration can be proved, the offtaker too may be insolvent and not worth pursuing. The authors have very recently advised a bank whose borrower was alleged by its counterparty to have forged a purchase contract, but upon further diligence a number of shared directorships between the borrower and the counterparty have been unearthed, and the bank is one of a number of financiers exploring fraudulent collusion between the two companies.

LENDER MITIGANTS

It is easy to be critical of a lender's failure to spot the fraud after its details have been uncovered – hindsight is a wonderful thing. However, in reducing their exposure to fraud, commodity financiers are hamstrung by the following:

- the trade-off between adopting a rigorous due diligence process and the flexibility needed to strike a deal in a competitive market;
- the trade finance world's traditional reliance on hard copy documents;
- the number of parties involved in a commodity flow and the lack of communication between those parties.

Conversely, it is also easy upon discovering fraudulent activity to bemoan its prevalence and ascribe the resultant losses to misfortune. We set out below a list of ways lenders can reduce their risk of being defrauded:

- **Transaction Due Diligence:** This will uncover fresh air frauds and sham transactions. For example, a lender may wish to contact the client's customer to verify the trade, or the shipowner to verify a bill of lading. If the Lloyds Register records that a vessel was broken up for scrap in Pakistan nearly a decade before documents delivered by a client indicate a cargo of sugar was loaded on to that vessel in Brazil, then further investigation might be advisable before an LC is issued![1]
- Client Due Diligence: Due diligence of the client, and the client's business, is essential. Lenders may want to ensure their client has adopted good corporate governance, to ensure what the Monetary Authority of Singapore summarised in its recent commodity financing code of

[1] This example is taken from W X Huang's Commodity Finance Principles and Practice.

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best practices as “segregation of roles and responsibilities within the board of directors” and“sufficient independence in the decision-making and exercising of [its] judgements”.[2] Certainly, some lenders have veered away from SMEs and opted instead to lend only to established market players in what some are calling a “race to quality”, but with so many financiers wishing to do business with a limited pool of large commodity houses, there has been an inevitable squeeze on pricing.

- **Commodity Due Diligence:** Independent warehouse inspectors can verify the quantity and quality of a commodity, and reputable warehouse operators can ensure the commodity is not tampered with or inadvertently released to a third party.
- **Document scrutiny:** Has there been any obvious tampering of any document (eg date or signature)? Fraudsters rely on banks failing to check the veracity of supporting documentation adequately, which is often voluminous and of poor image quality. The submission of large numbers of irrelevant or ancillary documents may mask the fact that key documents are missing or incomplete.
- **Documentation and structure**: Lenders should consider what information will enable them to keep track of the borrower’s business and ensure this information is delivered in full and on time, and subjected to adequate scrutiny. Putting in place a structure that allows a lender to track the commodity and corresponding flow of money on each transaction will reduce the risk of phantom cargoes or misappropriation of loan or offtake proceeds. The finance documents should reflect these protections, and these requirements should be enforced by the lender without exception.
- **Independent credit support:** This could comprise surety guarantees from parent companies, or support from financial institutions in the form of insurance or avalised payment instruments. Lenders should always check the terms of their insurance policies carefully, as demonstrated by the legal proceedings issued earlier this Spring by Thera Agri Capital against its insurer following losses sustained after the demise of agri-trader Phoenix Commodities.
- **Digitisation:** Much criticism has been aired of the trade finance world’s failure to digitise. With paper swapped for electronic entries using distributed ledger technology, doctoring documents and double financing should be rendered impossible. But this technology is only of use while its integrity remains uncompromised – talented criminals will inevitably find a way of circumventing technological protections in due course. And the trade finance world’s appetite to embrace innovation does not seem to have been galvanised by the coronavirus pandemic, as exemplified by the recent outpouring of support in favour of the re-opening of London Metal Exchange’s “The Ring” trading floor bull pit.

LENDER RESOLUTION

The resolution of commodity fraud is of central importance to lenders, not just financially, but also from a reputational perspective. Fraud’s nebulous and multifaceted nature, however, can make it difficult for lenders to know how best to pursue fraudsters and achieve redress.

A primary consideration is the fact that fraud has different definitions under the civil and criminal law in England and Wales, and even within each of these, there are several different claims or offences depending on the circumstances.

Criminal Fraud

Fraud in a criminal context means fraud that is capable of being prosecuted in the criminal courts and of resulting in a criminal conviction, including imprisonment.

Criminal fraud is defined by way of common law and statute, namely the Fraud Act 2006.

In order to make out an offence, the prosecution must prove the constituent elements of the relevant offence to the criminal standard, ie beyond reasonable doubt, which is much higher than the civil standard of the balance of probabilities.

As a starting point for criminal proceedings, a lender should report the fraud to the police, who can be notified using the Action Fraud service. This refers the matter to the City of London Police, the national police authority for investigating fraud, who may then transfer it to another appropriate

[2] https://abs.org.sg/docs/library/code-of-best- practices-commodity-financing.pdf

authority, such as the Serious Fraud Office (SFO), National Crime Agency (NCA) or the Financial Conduct Authority.

There is no legal requirement for a lender who is the victim of fraud to report the matter to the authorities (unless the fraud involves suspected money laundering or terrorist financing), and often when civil proceedings are simultaneously pursued, the police do not get involved. It is important to remember that in criminal proceedings, the lender will lack agency as it is up to the authority whether they choose to investigate or not. On the flip side, this means that a lender will not have to fund any investigation that an authority chooses to commence. Moreover, the authorities have wider powers of investigation than a lender and its legal team.

A lender does not necessarily have to choose between civil and criminal proceedings, as they can both run in parallel. However, lenders should note that this could lead to an application to stay one set of proceedings until the other has been resolved.

Civil Fraud

A lender may opt to initiate civil proceedings, because there is a greater likelihood of recovering its money than in criminal proceedings. The costs of the proceedings, however, should be factored into the overall recoverability.

In the civil sphere, fraud is not a cause of action in itself, but instead encompasses various activities, at the heart of which is the notion of dishonest conduct. The broad scope of fraud makes it a challenging area of law, but lenders should be reassured that the courts are well-equipped to deal with fraud and have the jurisdiction to grant a range of remedies.

A lender who considers itself a victim of fraud should first identify which cause(s) of action it may pursue via civil proceedings based on the factual matrix of the situation. In cases of commodity fraud, the most likely heads of claim will be fraudulent misrepresentation, the tort of deceit, unjust enrichment, or conspiracy. All of these claims are only available against the primary defendant(s), and thus not against any secondary perpetrator who assisted in the fraud in some way.

Emergency Interim Relief

When a lender is considering making one of the above claims, the courts have the power to grant emergency forms of interim relief, without notifying the alleged fraudster, in order to prevent them from dissipating assets or destroying evidence.

Given the intrusive nature of interim remedies, the courts do not grant them lightly. The decision to make an application for interim relief will thus need careful consideration due to the onerous procedural requirements involved.

Below are some of the interim remedies for which a lender can apply:

- **Freezing order:** A lender should consider an application for a freezing order when there is a real risk that once the defendant becomes aware of the proceedings against it, it will move or dissipate assets. If granted, a freezing order will prevent the defendant from doing this. A freezing order will not grant a lender any proprietary interest over the assets.
- **Proprietary Order (including following and tracing):** A lender should consider a proprietary order instead of a freezing order if the lender alleges that the defendant has property belonging to it, which will likely be so in cases of commodity fraud (other than "fresh air" fraud of course). In order to identify the assets subject to a proprietary claim, a lender may need to undergo following or tracing. Following is the process of following the same asset as it moves from hand to hand, whilst tracing is the process of identifying new assets derived from, or obtained from, the lender's original asset. Common law only allows tracing in circumstances where the asset has not been mixed with other assets. However, a lender can trace mixed funds under equity if it can demonstrate that it would be unconscionable for the defendant to be permitted to retain the property. Tracing and following are not remedies themselves, but are evidential processes used to identify the assets over which an application for a proprietary order may be made. If granted, a proprietary order will give the lender priority over other creditors in an insolvency situation.
- **Search order:** A lender may consider an application for a search order when there is a need to preserve evidence

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relating to its case. If granted, a search order will require the defendant to allow the lender's solicitors into its premises (including residential premises) to conduct a search for the material outlined in the search order. In cases of commodity fraud, this can be extremely valuable to lenders, since there is a real risk that the fraudster would destroy evidence if it were put on notice.

- **Norwich Pharmacal Order:** This allows a victim of fraud to obtain information that allows it properly to consider what claims it should make and against whom. Banks are most susceptible to such orders, because the proceeds of fraud often pass through the defendant's bank account. If granted, such an order would require a bank to provide confidential information about their customer, the defendant, to the lender, in order to enable the lender to commence proceedings against the defendant.

Jurisdiction

As a final point, the international nature of most fraud cases can raise tricky jurisdictional questions. Complete consideration of all jurisdictional issues is beyond the scope of this article, but the below offers a helpful starting point for the victims of fraud.

In the criminal context, jurisdiction will generally be determined by where the offence took place. With fraud, however, this is often difficult to determine as offences often take place via the internet. If the fraud did not take place in a specific jurisdiction, lenders should consider reporting the matter to the authorities of the jurisdiction in which the fraudster is based. A UK lender can also report the matter to the authorities in England and Wales, who have the power to seek assistance from overseas authorities.

In the civil context, since fraud is a non- contractual dispute, jurisdiction will depend on the domicile of the parties. Some of the relevant considerations for lenders include the jurisdictional regime that applies (taking into account that post-Brexit, the rules have changed slightly for cases with an EU dimension), and whether there are multiple defendants, which could affect which jurisdiction is most appropriate. Lenders should also note that to serve a claim form on a defendant located outside of England and Wales, the court's permission may be required.

This article was first published in the September 2021 edition of Butterworths Journal of International Banking and Financial Law

> **During fair economic weather fraud often goes unnoticed but when a company hits choppy waters the disguise conferred on its activities by a never-ceasing stream of transactions falls away. Lenders of course need to protect against potential fraud upfront as best they can but would also be well advised to be aware of the remedies available to them should they fall victim to fraud.**
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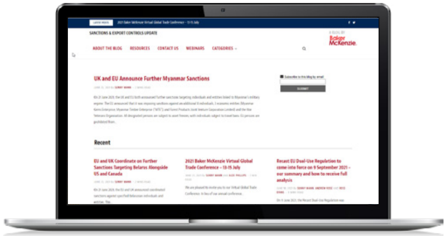
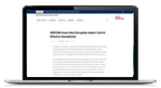
Sanctions & Export Controls Update



Baker McKenzie's Sanctions & Export Controls Update Blog aims to provide you with real time news and updates in respect of US and EU economic sanctions against key sanctioned countries, such as Russia and Iran. We will also keep you informed of developments in other countries, including Australia, Canada and Japan. Contributors to the blog are made up of partners and associates from our market leading International Trade Group. Here is a sample of our recent blog posts. Please click here for the full range.

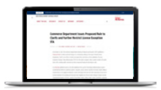
OFAC Issues First Round of Sanctions Under Ethiopia Sanctions Program and New General License

Biden Administration Signs Law to Increase Sanctions against Nicaragua



MOFCOM Issues New Encryption Import Control Effective Immediately

Ukraine Imposes a New Set of Sanctions



Commerce Department Issues Proposed Rule to Clarify and Further Restrict License Exception STA

EU Introduces New Document Codes for Dual-Use Customs Export Declarations

Additional Insights

[Ready or Not, Here it Comes - LIBOR Transition's Endgame in the Loan Markets]

The endgame of the LIBOR transition is imminent, if not already upon us. LIBOR will cease for all currencies other than USD on 31 December 2021. Ready or not, loan market participants need to deal with it. We examine the state of play of LIBOR transition in the loan markets in each LIBOR jurisdiction in the short time left until the end of this year. We also discuss the post-2021 environment for loan interest rates, including with respect to multicurrency facilities.

Please visit our LIBOR Transition Hub for further information concerning the transition.

Import and Trade Remedies Blog

Baker McKenzie's Import and Trade Remedies blog (formerly the International Trade Compliance Update) provides an overview of the latest trends and developments across customs programs, policies and procedures, and trade remedies, including from the WTO and WCO. For other trade developments, please visit our other international trade blogs.

Global Supply Chain Compliance

We bring you supply chain compliance insights from practitioners around the globe to offer our analysis of emerging legal trends and hot topics in supply chain risk management. In addition to providing the latest updates on global and industry-specific supply chain risks, this blog has been created to flag pitfalls and navigate the complexities of supply chain legal regimes, as well as advise on opportunities, ethical considerations and best practices for organizations and in-house counsel.

Foreign Investment and National Security Blog

A growing number of jurisdictions have now introduced national laws enabling the screening and review of incoming foreign investments, often with a focus on specific sectors perceived to be particularly sensitive. This blog aims to provide you with the latest news and updates in respect of foreign investment review and national security trends and developments, keeping you up-to-date and informed about the legal and business risks impacting your next transaction.

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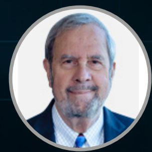
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