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Trade Finance Insight

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TRANSACTIONAL POWERHOUSE

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Trade Finance Insight

Welcome to this edition of the Trade Finance Insight. In this edition, we lead with a summary review of the highly anticipated revised version of the Organisation for Economic Co-operation and Development's Arrangement on Officially Supported Export Credits, with a particular focus on the most significant changes that relate to the Understanding on Export Credits for Climate Change that were last amended in 2014.

Secondly, we examine the instrumental role Development Finance Institutions and Export Credit Agencies are playing in countries across Africa in unlocking capital, bolstering private investment in sustainable projects and fostering local production in Africa.

Thirdly, we shine a spotlight on the critical role of project managers in debt for nature swaps, which continue to be a hot topic in both international finance and conservation circles due to their vital importance for conservation.

This being the final edition of 2023, we have then chosen to highlight three cases that have been decided by the English courts this year that are likely to be of significant interest to our readers, namely:

- Unicredit Bank A.G. v Euronav N.V. – with our analysis considering the impact of this case on the nature and status of the bill of lading and the potential concerns it could raise for financing banks;
- Re Avanti Communications Limited (in administration) – a case where the English court significantly revisited the vexed issue of fixed and floating charges since the landmark decision in Re Spectrum Plus Ltd [2005]; and
- CRF I Ltd v. Banco Nacional de Cuba and another – where we consider the important question of what to consider when borrower consent to a loan transfer is required.

Our regular Sanctions and Export Controls update page features some interesting reads on, amongst other things, a summary of the joint guidance from the OFSI and the FCDO on the application of the UK's "ownership and control" test under financial sanctions legislation in circumstances involving designation of public officials, the EU's updated list of goods regarded as "economically critical" to Russia and our latest compliance podcast covering the US sanctions system over the Venezuelan government and the latest decision regarding the suspension of the sanctions for the hydrocarbons and mining sectors.

We have included some of our latest resources and tools on both the topics featured in the articles and relating to wider trade finance issues. And finally, we are delighted to share some new awards that the team has won.

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Editor Highlights

- The OECD has published its highly anticipated revision of the Arrangement on Officially Supported Export Credits.
- The most significant changes in the revised OECD Arrangement relate to the Sector Understanding on Export Credits for Climate Change (CCSU), which was last amended in 2014 since when the landscape for the types of projects covered by the CCSU has changed significantly.
- For transactions not covered by a sector understanding (such as the CCSU) updates, amongst others include, increasing repayment terms, greater repayment flexibility and transparency requirements.

01 Organisation for Economic Co-operation and Development (the "OECD") updates the Arrangement on Officially Supported Export Credits

In brief

The OECD has published its highly anticipated revision of the Arrangement on Officially Supported Export Credits (the "**OECD Arrangement**"), with effect from 15 July 2023.

This revision replaces the January 2022 version of the OECD Arrangement, and includes changes intended to promote affordability for developing markets and to provide better support for sustainable finance transactions.

The most significant changes in the revised OECD Arrangement relate to the Sector Understanding on Export Credits for Climate Change (the "CCSU"). The CCSU, last amended in 2014, applies to renewable energy, climate change mitigation and adaptation and water projects. The landscape for such projects is much changed since 2014, and the focus of the revisions to the OECD Arrangement are accordingly CCSU-centric.

Background

The OECD Arrangement is a so-called 'Gentleman's Agreement', due to its non-binding nature.[1] It is applicable only as between its participants[2] and came into effect in April 1978.

The purpose of the OECD Arrangement is two-fold: (i) to provide a framework for the orderly use of officially supported export credits; and (ii) to foster a level playing field for governmental support, in order to encourage competition among exporters based on quality and price of goods and services, as opposed to favourable officially supported financial terms and conditions.

Key changes

Under the revision to the OECD Arrangement, the CCSU has been significantly expanded to include:

- environmentally sustainable energy production;
- CO2 capture, storage and transportation;
- transmission, distribution and storage of energy;
- clean hydrogen and ammonia;
- low emissions manufacturing;
- zero and low emissions transport; and
- clean energy minerals and ores.

Financings which are within the expanded CCSU, along with projects eligible under the Sector Understanding on Export Credits for Nuclear Power Plants, will now benefit from increased maximum repayment terms of 22 years (up from 18 years).

Greater repayment flexibility has furthermore been introduced for CCSU projects, with principal repayments now able to be made on an annual basis. In the case of annual principal repayments, interest will also be able to be paid on a 12-month (as opposed to six month) basis. For annual principal repayments and interest payments, there may also be a 12-month grace period following the starting point of credit.

For transactions not covered by a sector understanding (such as the CCSU) there have also been noteworthy updates in the revised OECD Arrangement, including:

- repayment terms have been increased to 15 years (up from 8.5 years for high income countries or 10 years for all other countries);
- greater repayment flexibility has similarly been introduced (with principal repayments now able to be made on an annual, as opposed to six monthly, basis, and with a 12-month grace period from the starting point of credit);
- new transparency requirements and review procedures have been introduced; and
- minimum premium rates for credit risk with respect to longer repayment terms and obligors with a higher credit risk rating have been adjusted.

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1. The exception to the non-binding effect of the Arrangement is the EU and its members by virtue of Regulation (EU) 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credit.

2. The participants are Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland, Türkiye, the United States and the United Kingdom.

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Lastly, the minimum interest rate, i.e. the Commercial Interest Reference Rate (CIRR), has been reformed so that it is computed using seven-year government bond yields, and determined based on the repayment period, the drawdown period, and the repayment profile of the transaction, as opposed to solely the repayment period.

Conclusion

We expect that the updates to the OECD Arrangement will draw more long-term sustainable finance projects to ECA supported financings.

It is anticipated that the possibility of longer term tenors and reduced minimum premium rates will make ECA financing more appealing, affordable and competitive generally, beyond projects primarily concerned with environmental impact.

However, as was the case with pandemic-induced down payment requirement reductions, ECAs may not necessarily utilise the full flexibility permitted under the revised OECD Arrangement. It remains to be seen to what extent industry participants will be willing to shift terms and conditions to accommodate CCSU projects.

> "We expect that the updates to the OECD Arrangement will draw more long-term sustainable finance projects to ECA supported financings."
>
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Editor Highlights

- An increased demand for working capital across African countries is being driven by a desire to embrace the energy transition through diversifying supply chains, addressing infrastructure gaps, boosting climate-resilient projects and facilitating sustainable trade.
- Increased availability and competitiveness of ECA-supported funding is providing a diversified source of liquidity to help support this demand, in particular Afreximbank are stepping in to facilitate critical mineral projects in Africa.
- Non-bank activity will continue to grow as new credit mitigation products come to market and the appetite of established market participants, such as DFIs and ECAs, to create products that are not tied to existing arrangements (that may have limited the type of finance available) increases.

02

Africa: Moving up the value chain – financing sustainable development

In brief:

With the growing demand for critical minerals to support the energy transition and the need to support the development of sustainable infrastructure and trade across the continent, Development Finance Institutions and Export Credit Agencies will be instrumental in unlocking capital, bolstering private investment in sustainable projects and fostering local production in Africa.

In more detail

To achieve a low-carbon future, address climate change, and embrace the energy transition, countries in Africa have been focused on securing and diversifying their supply chains, addressing their infrastructure gaps, boosting climate-resilient projects, and facilitating sustainable trade. This is driving an increased demand for working capital that traditional lenders are unable to provide. The inherent tension between the need to finance transactions and the cost of funds has opened the market to new and innovative financing options.

Export credit agencies

The volatility in the capital markets in Africa is leading to the increased availability and competitiveness of Export Credit Agency (ECA) - supported funding as a diversified source of liquidity for deals. ECAs have an essential role to play in supporting trade in Africa, and their government backing means they are able to act as guarantors for private investment funds, reducing risks in the process. The role of ECAs in facilitating deals in Africa is also evolving. For example, there are an expanding number of ECA programs and products covering projects related to the trade in renewables, raw materials, and critical minerals in Africa.

Critical minerals

Geopolitical challenges and a growing demand for clean energy have led the major players to look at how they can build and finance alternative supply chains for critical minerals. Driven by the energy transition, the demand for critical minerals is expected to rise sharply, more than doubling by 2030 and quadrupling by 2050, with annual revenues reaching USD 400 billion, according to the International Energy Agency's World Energy Outlook 2022.
As one of the world's top producers of many critical minerals, Africa has a big role in powering the global energy transition. The increasing interest of the major players in Africa's supply of raw materials is evident in recent policy announcements from the European Union (the Critical Raw Materials Act) and the United States (the Inflation Reduction Act). Both the EU and the US have emphasized the need to mitigate commodity supply chain risks and develop strategic agreements with countries that are able to supply responsibly sourced critical minerals.

At present, the majority of Africa's critical minerals are exported in the form of ores or concentrates. Certain countries in Africa, including Namibia, Ghana, and Zimbabwe, have imposed export restrictions on some of their unprocessed critical minerals, such as lithium, noting that they are losing income by exporting the minerals as raw materials and that they are planning to develop the capacity to process these minerals locally.

Afreximbank

The African Export-Import Bank (Afreximbank) is stepping in to facilitate critical mineral projects in Africa, acting as a financial and technical partner to ensure that African countries move up the critical mineral value chain. For example, Afreximbank and the United Nations Economic Commission for Africa recently signed a Framework Agreement with the Democratic Republic of Congo and the Republic of Zambia to establish Special Economic Zones that will facilitate the processing of their critical mineral resources to produce Battery Electric Vehicle and related services.

The African Continental Free-Trade Area (AfCFTA), implemented in 2021, has also acted as a strong impetus for African governments to address their infrastructure gaps, enhance and streamline supply chains, improve climate policies that fulfill net zero commitments, boost manufacturing capacity, and overhaul regulation relating to trade, cross-border initiatives, investment-friendly policies, and capital flows. It is expected that the trade in critical mineral commodities in Africa will benefit from these reforms and that, among other factors, this will result in

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African countries undertaking a more active role in the sustainable processing of metals and minerals, better capitalizing on the continent's vast mineral resource base.

On a continent-wide scale, Afreximbank is a key player in the finance and promotion of African trade and one of the architects of the AfCFTA. Afreximbank and several other development banks have increasingly been bridging Africa's trade finance gap through increased lending and alternative products to support market participants. Trade remains a key driver of Africa's social and economic development, and banks such as Afreximbank and the African Development Bank (AfDB) have sought to stay on top of market developments and provide sustainable solutions to boost intra-African trade.

Recently, it was announced that Afreximbank would increase intra-African trade funding to USD 40 billion by 2026, up from USD 20 billion in 2021. This would be in the form of an AfCFTA Adjustment Fund to facilitate and provide support through financing, technical assistance, grants, and compensation to state parties and private enterprises to effectively participate in the AfCFTA.

Since the establishment of AfCFTA, there have been other significant developments for intra-African trade, including the launch of the Transaction Guarantee Instrument, the Pan African Payment and Settlement System, and the Base Fund of the AfCFTA Adjustment Fund. A year ago, Afreximbank Trade Payment Services was launched to facilitate "the settlement of international trade on open account terms on behalf of identified African financial institutions and their clients." This was developed specifically to address African banking challenges, exacerbated by the withdrawal of international banks, mainly due to stringent regulatory and compliance requirements but also due to rising costs.

Infrastructure finance

Traditional lenders have also been scaling back in terms of funding infrastructure gaps in Africa. Baker McKenzie's report, New Dynamics: Shifting Patterns in Africa's Infrastructure Funding (report), pointed to infrastructure gaps in energy provision, internet access, and transportation that have resulted in an urgent imperative to identify and enable new sources of financing outside traditional lenders and international partners. Such gaps must be addressed to facilitate the construction of climate-resilient, sustainable infrastructure and enable the free flow of trade, including in critical minerals, across the continent.

The report outlined how Development Finance Institutions (DFIs) are increasingly anchoring the infrastructure ecosystem in Africa because they can shoulder political risk, access government protections, enter markets that others cannot, and are uniquely capable of facilitating long-term lending. However, the amount of capital needed is significant, and DFIs cannot bridge it alone. Private equity, debt finance, and specialist infrastructure funds are primed to enter the market, and multi-finance and blended solutions are expected to grow in popularity as a means to de-risk deals and support a broader ecosystem of lenders.

Climate finance

Developing countries are among the most vulnerable in the world to the effects of climate change, especially with regard to adapting to weather extremes and finding solutions that address food insecurity and energy and water scarcity. The availability of climate financing to assist developing countries with the transition to a low-carbon, climate-resilient future has been a hot topic in Africa for some time. In 2022, a number of countries pledged to increase their climate finance commitments, including France, Germany, the Netherlands, and the United States (US). The AfDB noted that around USD 1.6 trillion in financing is required by 2030 to assist Africa in adapting to and mitigating the risks of climate change, as well as for African countries to effectively implement their "Nationally Determined Contributions" under the Paris Agreement.

Transition finance

Transition finance, in the form of green, social, and sustainability-linked bonds, has become another well-established method of financing climate-resilient projects and the energy transition. There has been a rise in demand for sustainability-linked loans that incentivize borrowers to achieve pre-determined environmental, social, and governance targets. The essential foundation for transition finance is the development and agreement between the parties on a detailed, credible, and testable long-view transition plan to engender confidence that the activities being financed are meaningfully contributing to the net-zero target.

Conclusion

There will be continued growth in non-bank activity in Africa going forward as a result of new credit mitigation products coming to market and an increase in appetite from established market participants, such as DFIs and ECAs, to create products that are not tied to existing arrangements that may have limited the type of finance available. With the growing demand for critical minerals to support the energy transition and the need to support the development of sustainable infrastructure and trade across the continent, DFIs and ECAs will be instrumental in unlocking capital, bolstering private investment in sustainable projects, and fostering local production in Africa.

> "Development Finance Institutions and Export Credit Agencies will be instrumental in unlocking capital, bolstering private investment in sustainable projects and fostering local production in Africa."
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Any opinions

Related article: ***What next for the implementation of the African Continental Free Trade Area Agreement: An interview with Dr. George Elombi***
(Executive Vice President and Member of the Board of Afreximbank)

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Editor Highlights

- Debt for nature swaps are, and have been for several years, a hot topic in both international finance and conservation circles due to their vital importance for conservation.
- The role of the project manager on debt for nature swaps is a critical one incorporating aspects of a traditional founder, sponsor, arranger and monitoring agent.
- As a key transaction party, and a signatory to the deal documentation, the project manager will be expected to have its own legal representation - Baker McKenzie were pleased to advise Oceans Finance Company in their role as project manager on the Ecuadorian governments debt conversion to provide more than USD 300 million for the financing of marine conservation in the Galápagos Islands earlier this year.

03

Debt for nature swaps - The critical role of the project manager

Much has been written about debt for nature swaps and an increasing number of market participants are looking to get involved. In this article, we highlight the critical role of the project manager, whose functions incorporate aspects of a traditional founder, sponsor, arranger and monitoring agent throughout the life of such transactions.

On 9 May 2023, it was announced that the government of Ecuador had completed a debt conversion that would (in addition to reducing the principal amount of Ecuador sovereign debt outstanding) provide more than USD 300 million for the financing of marine conservation in the Galápagos Islands. Through this transaction, the world's largest debt conversion for marine conservation (and largest "debt for nature swap", as described below) to date, Ecuador's existing sovereign bonds with a face value of over USD 1.6 billion were exchanged for a USD 656 million loan made from the proceeds of a marine conservation-linked bond, benefitting from political risk insurance and a guarantee from third parties. In this transaction, Baker McKenzie acted for Oceans Finance Company in its role as project manager, as described further **here**.

Debt for nature swaps are, and have been for several years, a hot topic in both international finance and conservation circles. Accordingly, there is no shortage of commentary by practitioners and observers on debt for nature swaps generally, spanning the gamut from enthusiastic boosterism to sceptical wariness. Other than a brief recap of the central concept, this short article does not aim to repeat the many worthy entries to this genre, but rather to focus in on the role of an oft-overlooked but absolutely central figure to these transactions.

The basics of a debt for nature swap such as Ecuador's are relatively straightforward. A sovereign whose debt trades at a discount to face value issues new debt at par for the purposes of funding the debt conversion. The amount generated is used to buy the existing debt at its discounted value.

The purchased debt is then exchanged, generating a saving for the government in an amount equal to the face value of the retired debt minus that of the new debt. The buyers of the new debt, as well as any credit support providers arranged for the new debt, benefit from certain obligations of the sovereign to use a portion of these savings for agreed purposes.

To date, in these structures, these purposes have largely been environmentally based, but in the future, these may more frequently include other agreed purposes, e.g. those set out in the United Nations Sustainable Development Goals, such as education (for which some smaller such swaps have completed) or gender equality.

Along with the sovereign and the arranging investment bank (which will run the tender for the existing debt and underwrite or place the new debt with investors), one of the central participants in debt for nature swaps such as Ecuador's is the project manager. Their role includes the following:

- Structuring the deal in conjunction with the sovereign and the investment bank
- Sourcing and liaising with third parties to obtain credit support for the sovereign's new debt (e.g. political risk insurance and guarantees), which provides for the necessary pricing differential between the "new" and"old" debt to make the transaction structurally feasible.
- Constituting and providing the fund documentation (constitution and bylaws, investment guidelines, committees documents) for the entity that will be administering the conservation funds generated by the swap. While this does not necessarily have to be a charitablestatus fund, for tax treatment it will often be so, as was the case in the Ecuador swap.
- Acting as a or the founding member of the conservation trust fund or similar entity, ensuring that the fund documents are adopted, the agreed additional members are appointed and committees are established.
- Providing ongoing key monitoring and reporting services on the use of the

- sustainability-earmarked funds and achievement of targets for all financial stakeholders, which can include insurers and guarantors as well as credit investors.

- In conjunction with the investment bank, assist in assembling the investor pool (either via the main debt-for-nature swap or in related transactions benefitting from the conservation apparatus being assembled).

As is clear from the above, the project manager's roles are wide ranging and require several different types of expertise. Accordingly, some of these roles may be fulfilled by specialist third parties (e.g. verification agents or director service providers), appointed and supervised by the project manager.

The documentation a project manager may be expected to sign will include certain key finance documents (e.g. documentation setting sustainability commitments and how these will be financed) but also appointment agreements for any such third parties, as well as documentation required by insurers/guarantors (whose participation in the transaction may be contingent on a particular trusted project manager being appointed, given their internal mandates for their credit support to only be provided to correctly managed/well-reported transactions).

As a key transaction party, and a signatory to the documents referred to above, the project manager will be expected to have its own legal representation. Upon the closing of the transaction, this representation may be combined with ongoing representation and assistance to the trust fund or other entity managing the sustainabilityearmarked funds.

Given the vital importance of conservation, as well as the other potential projects which can be funded by similar swaps, it is to be hoped that debt-for-nature and similar swaps increase in both number and scale. For this to happen, there will be an increasing demand for the skills and experience of the relatively limited numbers of qualified project managers, whose expertise is absolutely vital for the deals to happen in the first place, as well as ensuring their correct functioning over their durations.

To sign up to receive our newsletter, please click **here.**

> "The experience of qualified project managers on these types of transactions is absolutely vital for deals to happen in the first place and to ensure their correct functioning over their duration."
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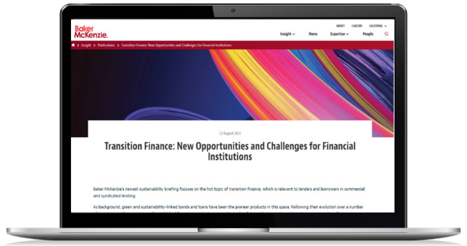
Additional Insights and Resources



[Transition Finance: New Opportunities and Challenges for Financial Institutions]

Baker McKenzie's newest sustainability briefing focuses on the hot topic of transition finance, which is relevant to lenders and borrowers in commercial and syndicated lending.

[Sustainability Risk Radar]

An overview of trends and recent developments in the sustainability space

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04

Significant Case Decisions 2023

United Kingdom: The reduced benefit of a bill of lading in the hands of a financing bank

The significance of Unicredit Bank A.G. v Euronav N.V. on the nature and status of the bill of lading and the impact for both financing banks and shipowners

In brief

On 4 May 2023, the Court of Appeal ("**Court**") handed down a significant judgment relating to the ability of financing banks to successfully claim against shipowners for discharging cargo without the presentation of an original bill of lading. Accordingly, the case may dilute the benefit conferred on a financing bank as holder of a bill of lading in being able to sue its carriers. This is undoubtedly a cause for concern for banks, and may lead to them taking a fresh look at their typical commodity finance security packages.

Key takeaways

The recent judgment highlights the nature and status of bills of lading in trade financing arrangements when it comes to financing banks enforcing their security for breach of contract. A bill of lading (B/L) has three functions:

- It operates as a receipt, evidencing that goods have been loaded onto a vessel.
- It is a document of title, which confers on the holder a constructive right to possession of the cargo.
- In some circumstances, it is a document containing terms of carriage between the shipowner and the lawful holder of the B/L.

This judgment is concerned with the third of these functions.

The key takeaways from the case can be summarised as follows:

- It is trite law that the carrier who issues a B/L is under an obligation not to deliver the relevant cargo without production of an original B/L.
- There is also a long-established legal position that, in the hands of a charterer, a B/L can only be a "mere receipt" and does not contain evidence of a contract of carriage.
- The Court found that a contract of carriage on the terms of the B/L had "sprung" into existence.
- By permitting discharge of the cargo without presentation of the original B/L, the shipowner was in breach of the contract of carriage.
- However, the breach of contract of carriage was not the cause of the Bank's loss and accordingly the Bank's appeal was rejected.

Background

Key Facts

- Unicredit Bank A.G. ("**Bank**") financed the purchase of a cargo of oil by Gulf Petrochem FZC ("**Gulf**") from BP Oil International Ltd ("**BP**"). BP entered into a charter party with Euronav N.V. ("**Shipowner**") and chartered the vessel "SIENNA".
- Before the completion of the carriage, the Bank issued a letter of credit (LC) on behalf of Gulf in favour of BP for the majority of the cargo (being approximately 80,000 mt) and Gulf became the owner of the cargo after payment to BP by the Bank following a compliant presentation by BP under the LC. The charter party was then novated to Gulf, which became the charterer in place of BP.
- As is common in trade financing arrangements, it was agreed that any B/Ls would be pledged as security to the Bank for repayment of the financing. The Shipowner issued a B/L to BP on shipment and it was envisaged that BP would indorse the B/L directly to the Bank. However, due to COVID restrictions, the indorsement had not happened by the time of discharge.
- On Gulf's instructions, the Shipowner discharged the cargo via ship-to-ship transfer to Gulf against its letter of indemnity (LOI) without requiring presentation of any B/L.

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Only some time after the discharge was the B/L indorsed by BP to the Bank. By this time, it was apparent that Gulf had perpetrated a fraud, the cargo vanished and the Bank was not repaid.

- The Bank brought a claim for breach of the B/L contract against the Shipowner for discharging the cargo without production of the original B/L.

Issues

The High Court found in favour of the Shipowner on the grounds that the B/L did not evidence a contract of carriage and, therefore, the Bank had no claim for breach of contract. The Bank appealed.

The Court of Appeal focused on two main issues:

- Did the B/L constitute a contract of carriage or was it a "mere receipt"?
- Did the breach of contract, by permitting discharge without presentation of the original B/L, cause the Bank's loss?

In more detail

It is trite law that the carrier who issues a B/L is under an obligation not to deliver cargo without production of an original B/L and that it does so at its own peril. This is a contractual obligation contained within the terms of the B/L in its function as a contract of carriage. The Bank's claim was for a breach of this contract.

There is a long-established legal position that, in the hands of a charterer, a B/L can only be a "mere receipt" and does not contain evidence of a contract of carriage with the carrier. As such, any terms of carriage contained in the B/L cannot supersede the terms of any existing charter party. However, the court found that with effect from the novation of the charter party, the "mere receipt" assumption was displaced by a new contract "springing up" between the Shipowner and Gulf under the terms of the B/L. Upon indorsement of the B/L to the Bank by BP, a contract on the terms of the B/L came into existence retrospectively, giving the Bank the right to sue the Shipowner for breach of contract for discharging prior to the production of the B/L.

However, it was on the issue of causation that the appeal failed. The Court found that the breach of contract was not the cause of the Bank's loss. Had the Shipowner initially refused to discharge without the production of the B/L, the Shipowner would have consulted with the Bank as to what to do. It was held (on the basis of the witness testimony of the Master and the Bank's employees) that the Bank would have permitted the discharge to take place without production of the original B/L in keeping with well-established commercial practise in the commodity finance world of discharging against an LOI. The appeal was accordingly dismissed.

Significance of the case

The outcome of the case is significant in that it materially dilutes the benefit conferred on a financing bank as holder of a B/L in being able to sue its carriers. Lenders will need to show, on a balance of probabilities, that if the shipowner complied with its obligations and refused discharge without production of the B/L, the lender would not have permitted discharge anyway under the LOI.

The inference is that this security interest will only be helpful to the secured party if a default is uncovered or suspected prior to discharge, so that the secured party can refuse to discharge to the borrower. Alternatively, if discharge is made against a LOI, the lender can argue causation when suing the shipowner because, with the knowledge or suspicion of the default, it can assert it would not have permitted discharge.

Another legal development may make the factual matrix for this case soon become historic. With the passing of the Electronic Trade Documents Bill in the UK Parliament scheduled for this summer, it is soon hoped that the industry will adopt electronic B/Ls as the norm. Shipowners will take comfort that LOIs may no longer be required as electronic B/Ls will be readily available at the port of discharge. For more insight into e-B/Ls, please refer to our Trade Finance Insight (Issue 7).

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United Kingdom: Re Avanti Communications Limited (in administration) — a critical examination of fixed and floating charges

In brief

In Avanti Communications Ltd [2023] EWHC 940 (Ch), the English court revisited the vexed issue of fixed and floating charges. Notably, it is the first significant case since the landmark decision in Re Spectrum Plus Ltd [2005] UKHL 41 to do so.

The distinction between fixed and floating charges is economically important and affects the recoveries a secured creditor may expect to receive in an insolvent liquidation of the security provider.

The High Court found that a satellite (together with its related infrastructure, permits and licences) was subject to a fixed charge at the time of its disposal. In doing so, the High Court clarified that a total prohibition on a security provider's ability to deal with charged assets and their proceeds is not necessary for a charge to be categorised as a fixed charge. Categorisation of a charge is two-stage process; firstly, ascertaining the parties' rights and obligations in respect of a secured asset and, secondly, deciding as a matter of law what type of charge has been created based on the rights and obligations provided.

Given the nature of the charged assets, none of the general permissions for the security provider to deal with assets were practically available to it. In addition, the parties agreed that, upon disposal of the charged assets, any disposal proceeds were required to be applied in repayment of the secured debt (with a 1% "make whole" premium). The assets themselves were the "tangible and non-tangible infrastructure" of Avanti Communication's business (rather than "fluctuating assets"), and consequently the relevant charge was correctly categorised as fixed.

This decision will come as welcome news to secured creditors and demonstrates the English courts' willingness to take a practical and commercial approach to the construction of finance documents.

Key takeaways

- A court will carefully examine any ability to dispose or deal with charged assets and their proceeds, but a complete prohibition on dealing is not necessarily required to establish a fixed charge.
- Factors likely to be taken into account by a court when categorising a charge over a particular asset as fixed or floating include the following:
  - Whether the asset is of a type that is sold to generate income ("circulating capital or fluctuating assets or circulating stock in trade") or whether it is used in the business to assist with income generation.
  - The extent to which particular or general permissions to deal with assets are of practical relevance to dealings with the asset in question.
  - Whether the disposal proceeds may be retained by the security provider or paid over to the secured creditor (and, if so, whether there are commercially unattractive terms for doing so).
  - Any history of dealings with the asset (or assets of the same type) with or without consent.
- Where commercially appropriate, parties should consider the following:
  - **Labelling as fixed charge:** Expressly label a charge as "fixed" (if this is the intention). This is relevant evidence of the parties' intentions for the first stage of the categorisation process (discussed in detail below), although not determinative.
  - **Limited contractual permissions:** Contractual permissions to deal with assets without consent should be limited to those assets of a type that are part of the "circulating capital or fluctuating assets or circulating stock in trade" of the relevant business.
  - **Clearly define categories of assets:** Where there is an asset category that includes some particularly valuable or important assets and others that are less important, or some assets that are typically sold or disposed of to generate income and some that are not, consider separating the security taken over those assets into two categories in the security document. This will mitigate the risk of dealings with the less important assets resulting in the categorisation of the charge over all such assets being floating.
  - **Licences:** Where operating licences or leases are important to the business (e.g., in this case, the Ofcom licences), ensure that any disposal permission referring to licences or leases applies to a disposal of assets by way of licence or lease rather than a disposal of a licence or lease that is an asset required by the business in its operations.
  - **Control of proceeds:** Require any disposal proceeds to be paid over to the secured creditor rather than the security provider being free to retain and use those proceeds as it wishes.
  - **Post-contractual conduct:** Ensure that any request to dispose of an asset (where consent is required) is dealt with individually and on its merits and the consent properly documented. Whilst conduct subsequent to the creation of a charge is usually not relevant to the categorisation of a charge as fixed or floating, if there is evidence of subsequent dealings that are inconsistent with the nature of a charge as fixed, a court may consider that the labelling in the security document is not determinative and re-characterise the charge as floating.

Click **here** to access the full alert.

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Europe: Can an obligor's consent be taken at face value?

What to consider when borrower consent to a loan transfer is required

In brief

In this case summary, we consider lenders and their legal advisers carefully check the capacity of obligors and the due authorisation of their signatories when a deal commences. In this edition, we consider the issues arising when consent is needed from obligors during the life of a facility. The recent English case of *CRF I Ltd v. Banco Nacional de Cuba and another* [2023] EWHC 774 (Comm) is a cautionary reminder of the consequences of failing to obtain obligors' approval going forward.

Key takeaways

- An obligor's capacity and authority to give consent is a matter for the law of such obligor's jurisdiction of incorporation.
- The giving of requisite consent is relevant not only at the outset of a transaction but may also be necessary to ensure the smooth operation of the facility throughout a transaction.
- Where prior obligor consent is required to transfer a loan participation, contemporaneous evidence as to capacity and authority should be provided.
- Contractual conditions to assignments or transfers should be strictly complied with to ensure that an effective transfer of legal title occurs.

Capacity and authority to consent

Creating a valid facility agreement, like any other contract, involves several different elements. These include, under English law,the requirements of offer and acceptance,certainty of terms and the intention to create legal relations. A crucial concern for any lender is ascertaining the obligors' capacity to enter and perform obligations under the facility agreement and that the persons executingthe facility agreement on their behalf havethe requisite authority. It is standard practice for the lender's legal counsel to check each obligor's constitutional documents, corporate authorisations and director's certificate, and issue a legal opinion confirming the existence of actual capacity and authority. For UK borrowers, this is despite sections 39 and 40 of the UK Companies Act 2006, which provide that third parties dealing with a UK company are not adversely impacted by any limitations on capacity or authority in a company's constitutional documents.

Cross-border transactions introduce a further element. English law recognises parties'freedom to choose any law to govern contractual rights — see Article 3(1) of Reg(EC) No. 593/2008 of 17 June 2008 on thelaw applicable to contractual obligations(as it now forms part of the UK's domestic law) (Retained Rome I) — but the issues of companies' capacity and agents' authorityto bind their principals (such as directors'ability to bind a company) are outside the scope of Retained Rome I.[1] Under English conflict of laws rules, the law of an obligor's jurisdiction of incorporation is the applicable law for considering those points. Accordingly,it is market practice to require opinions from legal counsel in each relevant jurisdiction that addresses these issues.

However, what happens after a facility agreement is signed? There are events that will, or may, subsequently occur that require an obligor (or its agent) to execute further finance documentation or consent to certain acts. One example, in syndicated facilities, is where the obligors' prior approval is required for a lender to transfer its rights (and, where applicable, obligations).

Transfer provisions

Absent any contrary contractual provisions,the starting position under English law isas follows:

- **Novation:** a "transfer" of rights and obligations, being a replacement of one original party with a new party involving extinguishing the original rights and obligations and creating new rights and obligations on identical terms, requires the consent of all parties.
- **Assignment:** An assignment of rightsonly does not require the consent of anyother party.

This position is typically altered by negotiation,such that:

- Some novations and assignments require obligor consent to be sought (and provided)at the time of the relevant transfer.
- By executing the facility agreement, up-front consent to future transfers to specific persons or categories of persons is given by the obligors in advance.

This latter mechanic was judicially approved in *Habibsons Bank Ltd v. Standard Chartered Bank(Hong Kong) Ltd* [2010] EWCA Civ 1335.

Is obligor consent required?

A typical loan trade is made on "a trade is a trade" basis — if the required consent is not obtained or any other transfer condition not met, the parties must still settle the trade.When approached by, or contacting, a potential buyer of their participation, a lender must consider any applicable transfer conditions before agreeing to any trade. They should form a view on whether a transfer to the potential buyer is "pre-approved", requires specific consent or is prohibited. This may involve reviewing any applicable prohibited and/orpre-approved new lender lists and considering any relevant definitions, such as "loan-to-own investors" or "industry competitors". Where the position is unclear, the parties should consider seeking further legal advice or, adopting a cautious approach, request obligor consent.

How is effective obligor consent provided?

The provision of contemporaneous obligor consent may be one of the conditions for creating a valid agreement for a loan transfer.The same analysis applying to the obligor's entry into the facility agreement applies to the giving of its consent to the transfer.

1. *Articles 1(2)(f) and 1(2)(g) of Retained Rome I respectively*

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In *CRF I Ltd v. Banco Nacional De Cuba and another* [2023] EWHC 774 (Comm), the high court, in deciding whether it had jurisdiction in relation to the non-payment of certain English-law-governed debts, first needed to ascertain whether those debts and a related guarantee had been validly assigned to the claimant (who was not the original lender). Under the terms of the debt agreements, the prior consent of the debtor, Banco Nacional de Cuba (BNC), not to be unreasonably withheld, was required for any assignment. For the benefit of the guaranteeto transfer to the assignee, the consent of the guarantor, the Republic of Cuba (Cuba),was required.

Cockerill J set out the relevant applicable laws.

- Capacity and actual authority: Cuban law
- Apparent authority: English law
- Meaning of "prior consent": English law

She concluded that, as a matter of English law,prior consent had been given to the transfer,as evidenced by an email request to BNC for consent and BNC's emailed response accepting the assignment "in principle" (and requesting further documentation to be sent to it to process the assignment). The court interpreted BNC's email as constituting consent, with the provision of documentation as a condition subsequent that was later fulfilled when that documentation was provided to and accepted by BNC.

While the court concluded, after hearing expert evidence on the relevant Cuban law from both sides, that BNC had capacity to give consent to the assignment of debts and the persons giving that consent had sufficient authority to do so,it found that the relevant provisions of the guarantee (including that communications were to be made to the State Finance Committee,and not BNC) and the Cuban Civil Code meant that BNC did not have capacity to consent to the assignment of the guarantee on behalf of Cuba. There were no grounds under English law to find that BNC had capacity or authority to consent on behalf of Cuba. No representation was ever made by Cuba (or anyone else) to CRF I Limited (or anyone else) that could form the basis for any apparent authority.

Lenders and agents should not take at face value that the person giving consent to a transfer has capacity and authority to act for their own entity or for other obligors.

At the outset of a transaction, steps should be taken to reduce the likelihood of future issues arising, including the following:

- Ensuring that obligor board resolutions specifically authorise individuals (or"any director") to provide consent tofuture transfers
- Ensuring an "obligors' agent" provision isincluded in the facility agreement, whereby all obligors irrevocably authorise theobligors' agent to, among other things,approve transfers
- Ensuring "pre-approval" to certain transfers is as wide as possible

Where contemporaneous consent is required,while it is impractical to require new corporate authorisations and legal opinions, lenders and agents should do the following:

- Check that the persons consenting to the transfer are referred to in the original board resolutions and, if not, request evidence of their authority
- Particularly where there is no "obligors' agent" provision, request specific confirmation from those persons of their capacity and authority to bind other obligors

What if no consent is obtained when it is contractually required?

As between the obligors and the lenders, any purported transfer failing to meet contractual conditions is ineffective. In *Barbados Trust Co Ltd v. Bank of Zambia and another* [2007] EWCA Civ 148, a facility agreement provided that the borrower's prior written consent was required for any assignment, but that consent wouldbe deemed given if the borrower did not reply to a request for consent within 15 days. The lender purported to conclude a transfer before the expiry of that period. The court of appeal held that the transfer failed and legal title to the debt in question was not transferred tothe "new lender". As noted above, "a trade isa trade" and, in such circumstances, the seller and buyer of the loan are obliged to find an alternative solution, such as a sub-participation arrangement. In contrast, as seen in *Musst Holdings v. Astra Asset Management* [2023] EWCA Civ 128, it is possible for a consent requirement to be waived through conduct.In that case, the court of appeal held thata contract was successfully novated dueto the counterparty's conduct, despite the counterparty not providing the contractually required prior written consent and the inclusion of a no-oral-variation clause. A novation does not constitute a variation of a contract and so is not prevented by a clause requiring variations to be made in writing.

Practical considerations

These cases highlight the following:

- The strict requirements for transfer,including requesting and obtaining anyrequired obligor consent, should be followed.Obligors should choose their words andactions carefully when responding to atransfer request, for example, if furtherinformation is needed to make a decision,expressly state: "This does not constitute ourconsent to the proposed transfer".
- Lenders should not accept an obligor's consent at face value — check existing evidence or request new evidence thatthe person giving consent has sufficient authority to act on their behalf and on behalf of other obligors and require thata specific representation be included inthe consent communication that actual capacity and authority exists in respect of all relevant obligors.
- Facility agents should regularly reviewauthorised signatory details and check that any individual consenting to a transfer request is included.

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It also appeared as an article in our In The Know Series. To read more from our 'In The Know' series please click **here.**

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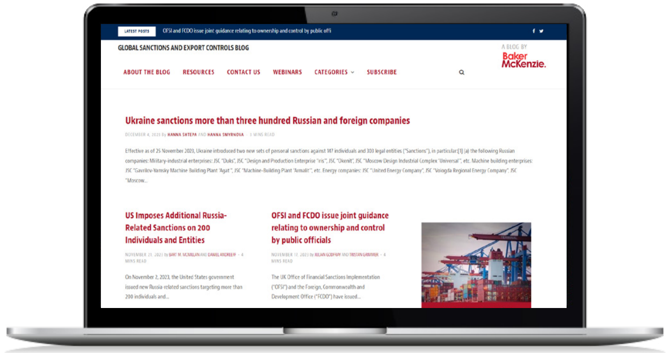
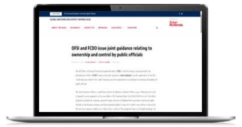
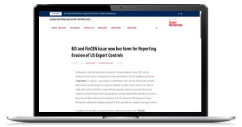
Sanctions & Export Controls Update



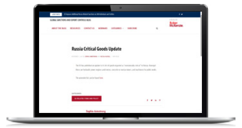
Sanctions & Export Controls Update



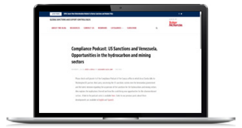
[OFSI and FCDO issue joint guidance relating to ownership and control by public officials]



[BIS and FinCEN issue new key term for Reporting Evasion of US Export Controls]



[Russia Critical Goods Update]



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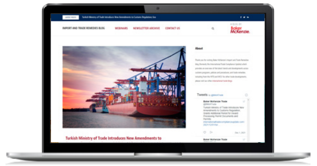
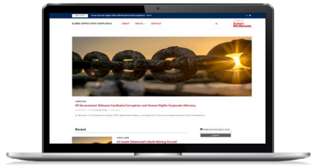


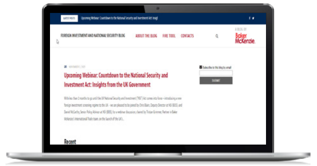
Import and Trade Remedies Blog

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.



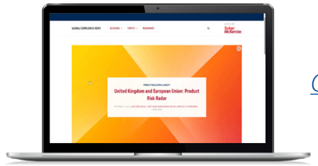
Global Supply Chain Compliance

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.



Global Compliance News

Global Compliance News is a blog hosted by Baker McKenzie that covers trends and developments in compliance around the world.

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Global Trade Review 2022

Best Law Firm in Africa
EMEA Finance, African Banking Awards 2021 and 2022

Power Finance Deal of the Year

Banking and Finance Legal Adviser of the Year

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Bonds, Loans & ESG Capital Markets Africa Awards 2023

Local Currency Sovereign, Supra & Agency Bond Deal of the Year
Development Bank of Southern Africa's ZAR 3 billion senior unsecured green bond private placement
Bonds, Loans & ESG Capital Markets Africa Awards 2023

Banking & Finance Legal Adviser of the Year
Bonds, Loans & Sukuk Africa Awards 2023 and 2021

Project Loan Deal of the Year
Canal Sugar's USD 750 million multi-tranche, multi-currency syndicated loan
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EMEA Finance Achievement Awards 2021

Best Deal
Tanzania Standard Gauge Railway
Global Trade Review 2021

Africa Deal of the Year
Tanzania Standard Gauge Railway
Asset Triple A Infrastructure Awards 2021

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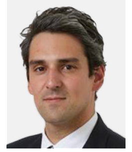

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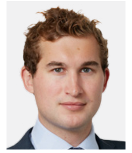

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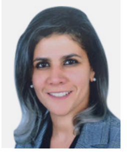

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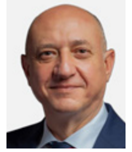

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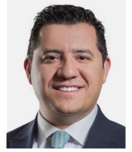

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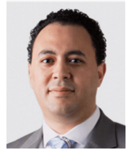

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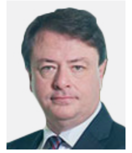

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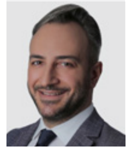

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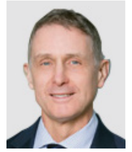

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