

Using Experts in Trade Finance Litigation

Trade finance is a complex field which incorporates both the highly codified provisions of the Uniform Customs and Practice for Documentary Credits (UCP) and creative financing approaches tailored to the specific characteristics of individual transactions.

This briefing paper provides background on a number of issues which we believe lawyers and their clients will find helpful if they are making or defending claims in this field.

Roles and responsibilities

Many banks involved in trade finance have two departments working with customers:

- The first of these, generally part of the bank's business development group, deals with financing applications, credit approvals and the initial contact with customers in respect of new transactions.
- The second department, often known as Documentary Credits, deals with the actual handling of Letters of Credit and documentary collections, including applications, confirmations, negotiating shipping documents and handling Bills of Exchange.

Bank staff working in the second department will be responsible for the detailed scrutiny of documents passing through the bank and will therefore be familiar with the minutiae of documentation. Their work involves frequent reference to the latest version of the Uniform Customs and Practice for Documentary Credits, UCP600, which has been effective since 2007.

Bank staff working in the former department will also have a good general knowledge of the issues and instruments involved in trade finance, but will rely on Documentary Credits staff for advice on more specific areas.

Typical areas addressed

Trade finance disputes may require specialised Documentary Credits expertise where the claim involves issuance of Letters of Credit or presentation or negotiation of documents. In such cases, expert evidence will usually involve commentary on the application of the provisions of UCP600 to the disputed transactions.

Where disputes involve financing, expert evidence will normally require an expert who has been involved in structuring, approving and monitoring trade finance operations (i.e. from the first of the two groups discussed above).

Some cases involve both types of expertise and may require two experts with overlapping experience. GBRW Expert Witness has experts who work in both fields and we can discuss the most appropriate approach for specific transactions.

It is important to bear in mind that claims will often involve parties other than the lender and borrower, for example counterparties who were involved in supplying or purchasing the underlying goods; inspection and verification services; correspondent banks who handled documents; and professional advisers.

Trade finance facilities: general comments

Trade finance involves a wide range of relationships and financing practices between banks and their customers. Three approaches commonly adopted by banks are:

- Fully secured financing. In this case, the bank will only lend against security, normally at or below a specified loan to value (or “LTV”) ratio which is maintained while the financing is outstanding.
- Transactional financing. This type of financing should normally relate to clearly identifiable, self-liquidating transactions entered into by the customer, so that the bank can track the use of its funds from initial purchase of goods, through shipment, to the onward sale to the customer’s purchaser which repays the bank’s loan. While the bank can track the transaction from start to finish, it may not have full security throughout – for example, it may release title documents to its customer against a Trust Receipt.
- Unsecured financing. For larger and stronger trading companies, banks may be willing to provide finance on an unsecured basis. Under this approach, letters of credit are issued and loans made up to agreed facility limits, but without further monitoring. A high degree of reliance is placed on the strength of the customer’s balance sheet and the integrity of the company’s management. Generally only the largest and strongest trading companies can finance themselves entirely on this basis.

As a general principle, banks will tend to insist on a fully secured approach in the case of borrowers who have low capital bases, who operate with a high level of gearing (the ratio of liabilities to shareholders’ funds), whose accounts or financial situation are unclear, or whose shareholders’ commitment is open to question.

Trade finance tends to be a very “hands on” lending area (more than most others) for banks which have adopted secured and transactional financing approaches. The higher levels of return which these types of financing attract not only reflect the credit risk which banks take on, but also the enhanced levels of monitoring and management by which banks seek to minimise those risks.

For this reason, trade finance disputes are often quite “document heavy” and a successful expert report may require a detailed analysis of the document flows for a series of individual transactions.

For further information

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