

# The ITFA Muse

Tuesday, 13 October 2015

## CHAIRMAN'S MESSAGE - Sean Edwards, ITFA Chairman / Head of Legal at SMBC

The sun has set on ITFA's most successful conference to date. A record number of participants attended the main conference and the educational seminar, held at Dubai Chamber with the assistance of our partners at the ICC, which was the most interactive and lively I have attended. One of the challenges we set ourselves in organising the conference in Dubai was to impart some of the accumulated knowledge of our



particular brand of originating, managing and distributing trade finance risk to bankers and financiers in the Middle East and, with wide local and regional attendance, I feel that we rose to that challenge very well.

As I mentioned during the opening night dinner this was a conference of firsts and lasts. The "first first", and, for me, the most personally significant, is that I have now become your Chairman. This is, of course, a great honour but equally a great responsibility as ITFA is now, I believe, at a seminal point in its existence. As the frontiers, and even the meaning, of supply chain finance, of which we are part, evolve and expand, the association has the opportunity to play an important part in this dynamic and very elastic sector. Which brings me to the second first, namely the new members of the Board. As we have already announced, the existing Board has been joined by Zeyno De Vries-Davutoglu of Credit Europe Bank, Chris Hall of Lloyds Bank and Anurag Chaudhary of Citibank. With the current members of your Board, I believe we have a strong team to make an even stronger impact.

Some of these changes would not have been possible without two of the lasts I would like to mention. Paolo Provera, our chairman for these last six years, has retired from his position and Dubai was therefore his last conference as Chairman. ITFA and his members owe him a large debt of gratitude. Under his faultlessly charming leadership, the association has broadened its profile and enhanced its professionalism. He will certainly be a tough act to follow. Dubai was also the last conference of Daniel Schär our treasurer. Finally, our conference organiser of the last 15 years, Faye Hamilton, has retired from business life. Her last conference was as always flawlessly organised and her successor, Ana Sjolund, who assisted Faye as a conference hostess, will have a high standard to live up to. (As I write we are exploring our venue options for next year).

It is not necessary for me to remind the membership of the recent turmoil in world markets and especially in commodities. The situation is volatile and may yet recover or at least stabilise but one of the strengths of our particular market is its relative resilience due to its broad base. Moreover, the large pool of unbanked receivables globally which can be unlocked, in part, by use of the techniques we excel at underpins the prospects of future

The Newsletter of the International Trade & Forfeiting Association



October 2015



### Contact us

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growth. ITFA has an important part to play in fostering that growth and ensuring it reaches its full potential.

Last but not least, with the Christmas season fast approaching, the ITFA Board is pleased to invite all ITFA members to attend the yearly informal gathering; the ITFA Christmas Cocktail Party. To view the invite please [click here](#). The event is being held at The Roof Garden, Kensington, London on Monday **7th December 2015** at 19:00 hrs. As always, we encourage you all to attend this valuable networking opportunity, so please...save the date!

As always, we look forward to hearing from you with any feedback you may want to share with us by sending an email to myself, any of the Board Members or to our general email, [info@itfa.org](mailto:info@itfa.org).

Best wishes,  
Sean Edwards

Posted by [Alexia Vella](#) at 08:18 No comments: 

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## TRANSFERABILITY OF RIGHTS UNDER DEMAND GUARANTEES IN GERMAN LAW, by Jorg Gloss, Berliner Sparkasse - Branch of Landesbank Berlin AG, Corporate Development and Legal

*The technical paper deals with the "Transferability of rights under Demand Guarantees in German law" written by Mr Jörg Gloss, Berliner Sparkasse - Branch of Landesbank Berlin AG, Corporate Development and Legal.*

### 1. Different perspectives: Demand Guarantee as an obligation and Demand Guarantee as collateral security

It is quite a difference in perspective whether a bank issues a demand guarantee or whether a bank accepts a demand guarantee as collateral security.

In both situations a bank will be interested in a guarantee that provides clear terms for a demand (in most cases either a simple demand or a demand together with a declaration and/or a submission of specific documents) with as little examination duties as possible for the respective guarantor.

For banks issuing guarantees the transferability of the rights under a guarantee is not very attractive as the potential additional administrative effort in examining demands by or payments to assignees is invariably not compensated for. This potential additional administrative effort consists in the examination of the assignee's (or of several assignees') entitlement to the rights under the guarantee in order to avoid the risk of a payment to a person not entitled.

Either the original beneficiary and assignor has given a written notice of assignment to the guarantor or the guarantor may demand from the assignee submission of the assignment agreement.<sup>[1]</sup>

The perspective of a bank which wants to benefit from a demand guarantee (issued in connection with the receivable) when purchasing a receivable à forfait is obviously different. The forfeiting bank wants to have transferred to it the rights under the demand guarantee and possibly to transfer these rights to subsequent purchasers.

### 2. The Law governing the assignability of a claim or right

According to the applicable EU-Regulation<sup>[2]</sup> the law governing the assigned claim shall determine its assignability. Therefore, if the demand guarantee is – either expressly or according to article 4 of the said regulation - governed by German law, the assignability of the rights under it shall be determined by German law.

### **3. The Distinction between the Right to Proceeds and the Right to make a Demand under a Guarantee**

The beneficiary's right to the proceeds only arises once a demand is made which complies with the conditions stipulated in the guarantee, in most cases a specific declaration. On the other hand the right to make a demand and consequently the fulfillment of these conditions which (although abstract and to be examined on a documentary basis) are aimed at a specific security purpose (e.g. security for the payment of a purchase price, security for the performance of specific contractual obligations) may depend on different and more complex criteria, e.g. on specific events in a contractual relationship and their evaluation. The distinction between the right to proceeds and the right to make a demand under a guarantee is reasonable and has been an established distinction for considerable time.[3]

### **4. Assignment of Proceeds**

Once a demand complying with the conditions stipulated in the guarantee has been made the right to proceeds comes into existence and can be assigned. According to section 354a of the German Commercial Code a provision in the guarantee prohibiting such assignment will not render the assignment void. But the guarantor may still choose to pay to the original beneficiary thereby being released from its payment obligation (in the context of a demand guarantee issued by a bank it is neither practical nor likely that payment will be made to the original beneficiary after a notice of assignment has been received by the guarantor).

The conditions for the applicability of the mentioned section will almost regularly be met: the right to proceeds is a claim for money and the agreement giving rise to the right to proceeds (the demand guarantee) will in most cases constitute a commercial transaction for the parties of the guarantee as defined in section 343 of the German Commercial Code.

### **5. Assignment of the right to make a demand**

#### **5.1 Assignment of the right to make a demand where the guarantee is silent as to its transferability**

Many demand guarantees do not contain any provision as to their transferability or the assignability of rights under it. Reported court judgments do not relate to an assignment of the right to make a demand under a demand guarantee which is silent as to its transferability. Published articles and commentaries differ in their views. The following thoughts are based on what I perceive to be the most persuasive legal argumentation.

##### **5.1.1 The right to make a demand as an accessory ancillary right**

Section 401 of the German Civil Code provides for a transfer of the accessory rights when transferring the rights to which the accessory rights belong. There is case law applying this section "per analogiam" to ancillary rights closely related to the rights which are to be transferred. One could think of arguing the assignability of the right to make a demand under an independent, non-accessory demand guarantee by applying the mentioned section "per analogiam".

But it is almost impossible to conceive the right to make a demand under a demand guarantee as an ancillary right only. Rather considering the nature of a demand guarantee the right to make a demand is the most important and essential right. Furthermore, the application of a statutory rule "per analogiam" should be restrictive. Therefore, the mentioned section should not apply to the transfer of the right to make a demand under a demand guarantee[4].

##### **5.1.2 Restriction of Assignability of a claim**

According to section 399 of the German Civil Code the assignment of a claim is not allowed if either the performance to the benefit of a person other than the original creditor would change the content of the performance or if the assignment is excluded by agreement with the debtor (either expressly or by implication, e.g. the right to performance by the employee in an employment contract).

The content of the performance of the guarantor's obligations under a demand guarantee (examination of a demand and subsequent demand rejection or payment) would not change by the fact that the demand is made by an assignee.

Due to the security agreement between the party instructing the guarantor and its counterparty (the beneficiary of the guarantee) the guarantee carries a specific security function closely related to the underlying contract (e.g. to serve as security for the performance of payment obligations or of other specific contractual obligations). In addition, the exercise of the security function of a demand guarantee does not require any evidence that the right to make a demand has crystallized. Rather, a formalized demand according to the conditions stipulated in the guarantee is sufficient to trigger the payment obligation of the guarantor.

These circumstances show that a demand guarantee presupposes a considerable amount of trust by the guarantor and the party instructing it and ultimately privity to the underlying contract by the beneficiary. Neither the party instructing the guarantor nor the guarantor would extend the necessary trust to grant the right to make a demand to any other person.

Although the guarantor is not a party to the underlying contract, the guarantor knows about the security function of its guarantee obligations, is well aware of the trust extended to the beneficiary and takes a vital interest in avoiding any increase of the danger of fraudulent or unrightful demands under its guarantee.

Professional guarantors like banks do not simply rely on the credit risk of their instructing customers and forget about the identity of the beneficiary. For compliance purposes and in order to protect its own reputation and the reputation of its demand guarantee business a guarantor is always keen to understand (although not to accurately assess) the underlying situation including the security function of the demand guarantee, the identity of the beneficiary and its role in the underlying contract.

The necessary trust involved in demand guarantees is equally shared by both the party instructing the guarantor and the guarantor itself.

It does not seem clear, whether a demand guarantee securing a payment obligation the performance of which may easily be evidenced (as opposed to demand guarantees requiring declarations and/or documents relating to specific breaches of contract), presupposes a lesser degree of trust.

For these reasons a demand guarantee is to be construed as containing an implied exclusion of the assignment of the right to make a demand. Section 354a of the German Commercial Code does not apply to the right to make a demand because it is not a claim for money.

An assignment of the right to make a demand would require the consent of the party instructing the guarantor and of the guarantor and an according amendment to the guarantee.

## **5.2 Assignment of the right to make a demand where the demand guarantee provides for the assignability of such right**

### **5.2.1 German Law**

At present there are at least two reported judgements of the German Federal Court of Justice<sup>[5]</sup> holding that an assignment of the right to make a demand is possible to the extent such assignment is expressly allowed in the demand guarantee.

Such assignability provision in the demand guarantee would indicate from the beginning that the party instructing the guarantor and the guarantor agree that the beneficiary is entitled to delegate the trust inherent in the demand guarantee to the assignee(s) of its choice<sup>[6]</sup>.

### **5.2.2 URDG 758**

The URDG 758 are even more cautious in allowing the transfer of a demand guarantee (transfer constructively meaning the issuance of a demand

guarantee with identical conditions to the new beneficiary).

Not only must the demand guarantee expressly indicate that it is "transferable" but:

- Even if the guarantee is transferable a transfer is still subject to the consent of the guarantor
- The guarantee may be transferred more than once but it may not be transferred partially
- The transferor must submit to the guarantor a signed statement that the transferee acquired the transferor's rights and obligation in the underlying relationship.

## 6. Conclusion

In order to assign the right to make a demand under a demand guarantee governed by German law it is highly recommendable to expressly provide for the assignability of the right to make a demand under it. Such a provision would, of course, need to be covered by the instruction or consent of the party instructing the guarantor and by the consent of the guarantor.

In order for the assignor to avoid any liability in case of a fraudulent or unrightful demand by the assignee and new beneficiary, the latter should expressly assume (e.g. in the forfeiting agreement) the obligation to respect the security purpose of the demand guarantee. This obligation should generally not be a burden for the assignee and forfeiter or subsequent assignee and forfeiter because it will also become the creditor of the secured receivable and thus be in a position to monitor the performance under the receivable.

As a further precautionary measure the forfeiting agreement should include an obligation by the original beneficiary of the demand guarantee (assuming that it is a party to the forfeiting agreement) to make a demand under the guarantee at the request of the forfeiter.

Alternatively, a new guarantee may be issued directly to the benefit of the forfeiter.

If the demand guarantee is subject to the URDG 758 the requirements stipulated in art. 33 URDG 758 will have to be met.

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[1] According to section 410 of the German Civil Code, which would be applicable to the relationship between assignee and debtor (here the guarantor) in accordance with art. 14 (2) of the EU Regulation 593/2008 ("Rome I") if the demand guarantee is subject to German law

[2] EU Regulation 593/2008 ("Rome I"), art. 14 (2)

[3] The distinction is reflected in Art. 4 URDG 458, Art. 33 URDG 758, R. 6.06 ISP and in articles 9 and 10 of the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit (adopted by the UN General Assembly on 11 Dec. 1995 and in force since 1 Jan. 2000 between Ecuador, El Salvador, Kuwait, Panama and Tunisia and up until today also Belarus, Gabon and Liberia)

[4] In a decision of 1987 the German Federal Court of Justice (BGH NJW 1987, 2075) referred to section 401 of the German Civil Code in holding that the right to make a demand was assigned together with an accessory suretyship ("Bürgschaft"). Most commentators are of the view that this decision should be treated with caution when applying it to independent demand guarantees. The facts are quite singular and an accessory suretyship can only be assigned together with the secured claim.

[5] BGHZ 90, 287, 291; BGH WM 1999, 72,73

[6] According to the German Federal Court of Justice the assigning beneficiary of an independent security right is under the obligation to oblige the assignee and new beneficiary to respect the security purpose of the demand guarantee (BGH NJW 1997, 461, 463f.)

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## TO FORFAIT OR NOT TO FORFAIT? by Sofia Lotto Persio, Editor - Global Trade Review (GTR)

*Clearer definitions of forfaiting are being developed to make it easier for people to answer this question and understand forfaiting's risks and opportunities. Sofia Lotto Persio reports.*

Any conference with a session on supply chain finance (SCF) will invariably invite the speakers to upload a PowerPoint slide with a definition of the term – a challenging task due to the number of instruments to consider and the lack of a standardised common reference.

This may soon change, as a coalition has come together to define SCF in all its forms. The International Chamber of Commerce (ICC), along with the Bankers Association for Finance and Trade (BAFT), Factors Chain International (FCI), Euro Banking Association (EBA), International Factors Group (IFG) and International Trade & Forfaiting Association (ITFA) have joined the effort to create SCF definitions once and for all.

Forfaiting is described by the Global SCF Forum's draft publication released in June this year as "a form of receivables purchase, consisting of the without recourse purchase of future payment obligations represented by a negotiable or transferrable financial instrument or claim, at a discount or at face value in return for a financing charge".

Sean Edwards, head of legal at SMBC and ITFA's Chairman, is one of the people involved in the drafting process. He explains that, with the development of the new definition, his intention has been to show that forfaiting is very much part of SCF techniques, and a very important instrument for managing trade receivables. "What I wanted to draw out was the wide variety of underlying instruments that could be used with forfaiting. Where forfaiting and factoring start to blur together is in the discounting of book or invoice receivables. Traditionally it was hard for a pure forfaiter to do this without recourse, as book receivables contain contract performance risk, and a factor would traditionally have had recourse in those situations. If you can amend the terms of the receivable, however, so that it is unconditional, then you can purchase a book receivable or invoice without recourse," he tells GTR.

Edwards adds that while usage of SCF instruments is on the increase, it has become less easy to ascertain which category they fall under, particularly in emerging economies where forfaiting, factoring and receivables discounting often merge into one another in some hybrid forms. He mentions as examples: short-term loans accompanied by standby letters of credit; bank payment obligations (BPO) forfeited between recipient and obligor banks; and banks under a supplier finance arrangement selling an obligor's irrevocable payment undertaking as a separate instrument into the forfaiting market.

Professionals in the forfaiting market, however, warn against restricting the definition to too narrow a meaning. "The key unique selling point of forfaiting is that it is a very flexible product which can be tailored to the client's requirements," says Simon Lay, deputy CEO of Fimbank. "Forfaiting is a word people use, but it covers different meanings for different institutions. The forfaiting entities, those who provide the services, tend to be those that have a structure which allows them to give quick, flexible financing solutions to the client. The client does not really want to know what you are going to call the financing technique, he just wants to know you can finance that contract for him in an efficient way," he adds.

Edwards acknowledges that there is a certain overlap between the definitions of forfaiting, factoring and receivables discounting: "There is a lot of common ground between all three techniques and I think that one of the big benefits of the definitions is to set out the commonalities and differences in one document. From that more effective hybrid, structures and arrangements may become apparent and be created, which will assist innovation."

The draft of the SCF definitions is available online for feedback, with the release of a final version expected by the end of the year.

According to Lay, it is now the banks' responsibility to ensure these are enforced. "The rules will only become fully adopted when banks apply them in their regular dealings with each other, rather than adopting a 'wait and see' approach."

Commenting on the forfaiting definition itself, he says: "Although this is a new definition, it really gives a very traditional explanation of forfaiting but also adds the interpretations of the universal rules for forfaiting (URF 800). Whilst a lot of effort has been put in producing these rules, they are still not a major component in discussions between primary and secondary market participants. Forfaiting tends to operate under fairly traditional customs and practices. However, the rules serve as a useful reference document to interpret such practices and to give structure and guidance in any dispute."

### Creating awareness in emerging markets

Associations such as ITFA are doing their part to promote awareness of forfaiting and its rules. Adding to its historical partnerships with the ICC, BAFT, the Asian Development Bank and the European Bank for Reconstruction and Development, ITFA signed an agreement with Afreximbank in April 2015 to promote best practices, attract non-bank funding and develop a primary and secondary market for African-traded debt papers, among other initiatives.

It is believed that having clearer definitions of SCF instruments would increase not only the awareness but also the availability of different trade finance products in emerging markets. "It will make it easier for people to do transactions, especially for banks in Africa," says Benedict Oramah, Afreximbank's incumbent president. "It makes it easier for them to adopt it, and the common language of risk would be accepted by everybody. Without this you have problems. We see it ourselves because people may not understand trade finance risk, or the difference between conventional trade financing and forfaiting."

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Monday, 12 October 2015

## NEW ITFA MEMBERS

The ITFA Board is pleased to announce the following four new members.

**United Bank Limited (UBL)** is the second largest private bank in Pakistan, registered in 1959. Currently it has more than 1,300 domestic branches and an international footprint in 11 countries including - UAE, Bahrain, Qatar, Yemen, Oman, UK, USA, Switzerland, China and Tanzania.

UBL is proud of its long history in the Middle East. In the UAE, they were privileged to be the second international bank to open its branch in Abu Dhabi in July 1967. At present "Bestways Group" of United Kingdom is the major stake holder (51.60%) of the Bank. The group is mainly involved in the largest cash & carries business in UK, together with other activity.

UBL is the leading market participant in the Corporate, Retail, Investment, Treasury & Capital markets and Trade Finance business with consolidated equity of USD1,454.1mIn, assets of USD13.500mIn. UBL's GDR's are listed on the London Stock Exchange and shares are listed on Karachi, Islamabad & Lahore stock exchanges.

Muhammad Omer will be the main delegate for all ITFA related matters.

**Emirates Islamic Bank PJSC** was incorporated in 1975 and is headquartered in Dubai, the United Arab Emirates. Emirates Islamic Bank

PJSC is a subsidiary of Emirates NBD PJSC. The total assets as of June 2015 reached USD 13 billion, which also makes it ranked as the third largest Islamic bank in the country.

Emirates Islamic (EI) was formed as a full-fledged Islamic bank to provide the highest standards of Islamic banking services for individuals and small businesses as well as large corporations through 60 other branches.

EI focuses on corporate finance, capital market, commercial banking, and private banking services in and out of the Middle East. EI combines banking expertise and insights of Middle East with strong Islamic banking credentials to tap into opportunities in the world.

Ahmed El Sahhar will be the main delegate for all ITFA related matters.

**Natixis** is the corporate, investment, insurance and financial services arm of Groupe BPCE, the second largest banking group in France (with two retail banking networks namely Banque Populaire and Caisse d'Épargne).

At Natixis, the long-term best interests of clients come first. Based on a strategic dialog and a 360 vision of their needs, challenges, risks and interests, they build a long-term trusting relationship with clients. All resources, talents and energy are geared to providing the best client support. They harness all their expertise and combine them to design the best banking, financial and insurance solutions.

Natixis has three main business lines: Corporate & Investment Banking, Investment Solutions & Insurance, and Specialised Financial Services. Listed on the Paris stock exchange, it has a CET1 capital under Basel 3 (1) of Eur1.4 billion, a Basel 3 CET1 Ratio (1) of 10.6% and quality long-term ratings (Standard & Poor's: A/Moody's: A2/Fitch Ratings:A).

Lakhdar Hamadi is the main delegate for ITFA matters.

**Commercial Bank of Kuwait (CBK)** is one of the largest financial institutions in Kuwait with a strong and growing corporate and retail banking franchise providing innovative financial and investment solutions to every growing customer base.

Established on 19th June 1960, CBK is the second oldest bank in Kuwait. From retail banking to major project finance, CBK is mobilising its substantial capital base and decades of expertise to assume a cutting edge role in the Kuwait economy.

The Bank has emerged as a lead financier, ranging from a flow of loans to diverse power, construction and notable infrastructure projects in Kuwait.

Mr. Tan Tat Thong will be the main delegate for all ITFA related matters.

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## UPCOMING EVENTS - SAVE THE DATE

With Christmas only two months away, the ITFA Board is pleased to invite all ITFA members to attend its yearly informal gathering; the **ITFA Christmas Cocktail Party**. To view the invite please [click here](#). The event is being held at The Roof Garden, Kensington, London on **Monday 7th December 2015** at 19:00 hrs.


Invites to the Christmas event have already been sent to the Main delegate of each member association and to non-member individuals who attended the Dubai Conference. Please keep in mind that the invite is for MEMBERS ONLY and access to the event is restricted to confirmed guests only.

As always, we encourage you all to attend as this is a valuable networking opportunity. The informal setting will definitely make it an enjoyable event, were all present can get into the Christmas spirit and unwind. We look forward to seeing most of you there. So please...save the date!



On a different note, we wish to remind our readers of the [9th German Export Finance Conference](#) (30th November – 1st December, Berlin). Major exporters, agencies, financiers and banks will be meeting at this event, which is dedicated to discussing the latest European trade finance challenges facing exporters and financiers.

Another interesting event which is being held between 8-9 December in London is the AML Risk Reduction and Compliance Europe conference. The event breaks down into 2 complementary days: Legislation, regulation and the future of the AML industry; and AML, KYC and CDD: Examining your processes and improving outcomes. For all the necessary details about this event [click here](#).

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