

Bank Account Control Agreements

BACKGROUND

One of the most important structural issues for a receivables financier is to ensure that the proceeds are controlled in an appropriate manner. This takes on even more importance for secured ABL/RF deals in England & Wales given that control of collection accounts is a key consideration in obtaining fixed security over receivables.

While less common in Europe than the US, some banks (particularly US or global institutions) will often require that the parties to a transaction wanting to regulate the operation of collection accounts enter into a bank (or sometimes deposit) account control agreement (BACA).

WHAT DO THEY DO?

BACAs are tripartite agreements, entered into between the security holder, the account bank and the account holder. The typical document will cover a range of commercial provisions relating to the operation of the bank account, including:

- **Control over the bank account, by whom and at what times:** The BACA is most likely to be drafted on the basis of one of two main structures, with either the account holder continuing to control the bank account until the security holder indicates otherwise or with the security holder taking control from day one.
- **The method for giving instructions:** The BACA will typically specify the particular method (often electronic) for delivery of instructions from the security holder and can also limit the types of instructions that can be given.
- **Costs and expenses and indemnities:** The BACA will normally provide for protections for the account bank and reimbursement of their costs and expenses.

- **Termination rights:** The BACA will usually regulate who can terminate the arrangements and with what notice.

In most jurisdictions, the BACA will also serve as formal notice to the account bank of the security for perfection purposes, although this is not necessarily the case in all jurisdictions. In some jurisdictions, a separate notice (complying with local formalities/referring to relevant local statute) may still need to be served on the account bank.

KEY DISCUSSION AND NEGOTIATION POINTS

BACAs tend to be bank-standard forms and are seen by the account banks as a key protection for them against the risks in operating bank accounts when a third party (in this case the security holder) has an interest. Accordingly, there is usually a strong reluctance on the part of the account bank to make too many changes to the form (at least without reverting to their internal (or external) legal function, and therefore extending the time taken to agree the document).

That being said, there are a number of key points that a security holder should consider and, if necessary, look to negotiate, with a view to getting a position that is in line with their commercial requirements.

- **Taking control:** This is clearly the key commercial issue, especially if the security holder is looking to control the bank account from day one. Where the security holder is taking control at a future point, an issue often arises as to whether or not the trigger event (e.g. an event of default, an availability trigger or otherwise) needs to be stated in the BACA or whether there simply needs to be a notice from the security holder. Often, the account bank will not care what the trigger event is (and just wants clarity as to whose instructions to follow and when); equally, the account holder may want it specified, so that it is clear to all when the security holder's rights may be exercised.

- **How can instructions be given?** A practical concern for security holders relates to whether the account bank is imposing any restrictions on the method by which instructions may be given. In some cases, the account bank may require the security holder to sign up to the account bank's on-line portal and submit instructions through that; in other cases, it may specify that instructions can only be given via SWIFT. Whatever the provisions, the security holder will need to consider if it is able to comply with the requirements and set up the process prior to taking control in order to ensure a seamless transition. This would include providing any "kyc" requirements that the account bank may require.
- **What instructions can be given?** If control is being taken in the context of an ABL/RF deal, this is likely to require that moneys be swept on an on-going basis; either to the security holder to apply against the loan (i.e. cash dominion) or to another bank account of the account holder until such time as the security holder instructs otherwise (i.e. springing cash dominion). Accordingly, attention should be paid to any provisions that stipulate what instructions may be given – in some cases, BACAs have been known to prohibit standing instructions and may only allow one time transfers, often coupled with the closure of the bank account. Even where multiple instructions are allowed, this may need to be done on a manual basis each time. The security holder should therefore consider the deal requirements and discuss these with the account bank.
- **Who bears the costs of the account bank?** BACAs usually contain provisions dealing with the payment of the costs and expenses of the account bank. From a security holder's perspective, these should only be costs relating to the operation of the bank account but equally the question of who bears those costs (either the account holder, the security holder or both) and at what times (generally, the issue being whether the security holder should bear the costs prior to it taking control) will need to be considered and negotiated.
- **Rights of set off:** BACAs will sometimes contain provisions on what items the account bank may set off against the amounts in the bank account. Where these are collection accounts, the security holder is likely to want to restrict what may be set off against (given the amounts represent the proceeds of receivables) but it may be unrealistic to have no set-off at all – e.g. direct debit returns and the costs of running the bank account - although the security holder may want to push back if there are wider set-off rights (which may capture other facilities (such as overdrafts) in place between the account bank and the account holder, unrelated to the ABL/RF facility).
- **Termination:** There will typically be a process for termination; usually allowing either the security holder and/or the account bank to terminate the arrangements. The main discussion point surrounding termination will often relate to timing. If the account bank has the right to terminate, from the security holder's and account holder's point of view, there should be sufficient notice given to allow them to work together to find replacement arrangements in order to ensure a continuity of protection for the security holder and to avoid a default for the account holder under the ABL/RF. Care should also be taken to ensure there are no automatic termination provisions (for example after a period of time) as these could cause issues either if the termination falls prior to the termination of the underlying facility or, in any event, could cause issues in a refinancing or extension.

If you have any questions or require specific legal advice in respect of any of the English law matters discussed in this publication, please click [here](#) and get in touch with any of the **Key Contacts**.