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10 Most Common Insolvency Questions in Receivables and Payables Finance

— A Focus on Asia and Europe

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A close-up, slightly blurred image of several Euro banknotes, showing the faces of historical figures and the intricate patterns of the currency. The colors are muted, with shades of blue, green, and yellow.

Who Are We?

- ***Global Receivables and Supply Chain Finance Team***
 - Over 50 professionals across our platform focused on receivables and supply chain finance
 - Coverage across our platform including the US, the UK, France, Germany, Hong Kong, Singapore, Brazil and Mexico
 - We are the go-to law firm for a number of the world's leading participants in the supply chain finance market.



Welcome To Our Webinar Series!

- ***Supply Chain and Working Capital Finance Webinars***

- 9 webinars from July to November (repeated twice daily)
- Previous webinar: 22 July – Insolvency Questions in the US
- Next webinars:
 - 5 August - Capital Markets/Alternative Investors; Investing in the Trade Receivable Asset Class
 - Full program available in Appendix
- We will have our normal live programs in New York, London, Singapore and Hong Kong in 2021 – circumstances permitting, early in the year.

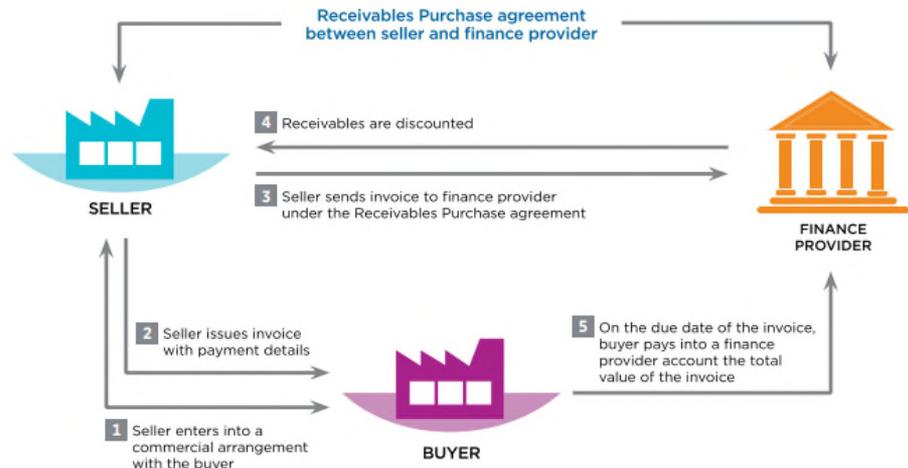
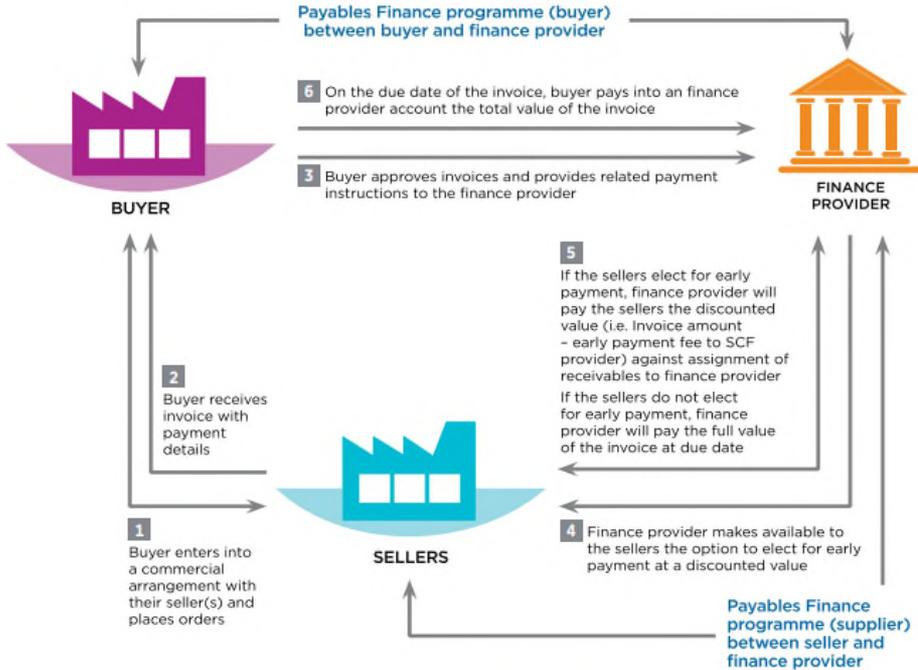
The background of the slide features a close-up, slightly blurred image of several Euro banknotes. The notes are in shades of blue, green, and yellow. A prominent feature is the portrait of a man, likely a historical figure, on one of the notes. The text 'Related Events' is overlaid on the left side of this image in a white, sans-serif font.

Related Events

- ***Global Supply Chain and Distribution***

- A series of webinars running from June until end of the year focusing on global supply chain issues and solutions to mitigate them
- Previous Webinar:
 - June 24: 10 Key Issues to Managing an Effective Supply Chain
- Next Webinars:
 - August 19: Contract Risk: Building Resilient Relationships with Suppliers and Distributors
 - September 23: Geographic Risk: Re-shoring and Diversifying Your Supply Chain
 - October 7: Supplier Compliance and Reputational Risk

Context: Buyer-Led and Seller-Led Supply Chain Finance Structures





Part I Asia
From a Hong Kong and Singapore
Laws Perspective

Q1: Does a company need to be insolvent to file for insolvency?

Hong Kong

- Members' voluntary liquidation (for solvent companies)
- Creditors' voluntary liquidation (for insolvent companies)
- Special procedure (*Section 228A of the Companies (Winding Up and Miscellaneous Provisions) Ordinance*)
- Schemes of arrangement

Singapore

- Members' voluntary winding up
- Creditors' voluntary winding up
- Schemes of arrangement
- Judicial management

Q2: What about involuntary insolvency?

Hong Kong

- Compulsory liquidation
 - winding-up petition to the Hong Kong court
 - winding-up order usually on the ground of the company's "inability to pay its debts"
- Provisional liquidation
 - prior to winding-up order

Singapore

- Compulsory liquidation
 - winding-up petition to the Singapore court
 - winding-up order usually on the ground of the company's "inability to pay its debts"
- Provisional liquidation
 - prior to winding-up order

Q3: Will I know immediately after a company files for insolvency?

Hong Kong

- Depends on insolvency process
- Searches:
 - Companies Registry
 - Official Receiver's Office
 - Cause Book of High Court
 - Hong Kong Government Gazette
- Monitoring local newspapers

Singapore

- Depends on insolvency process
- Searches:
 - ACRA Search
 - Insolvency search via the Ministry of Law Insolvency Office's E-Services
 - Cause Book of High Court
 - Singapore Government Gazette
- Monitoring local newspapers

Q4: What's the effect of a company filing for insolvency (and why should I care about it)?

- Generally, powers of directors cease
- For compulsory liquidations
 - After presentation of winding-up petition, the company or any creditor may apply to the court to stay or restrain any proceedings
 - Once winding up order made there is no freeze on enforcement of security but there is a stay on commencing or continuing any proceedings against the company without the leave of the court
 - Any disposition of the company's property after the presentation of the petition is void unless the court orders otherwise.
- Certain transactions may be subject to insolvency unwind (*we cover this in Question 8*)

Q5: I bought receivables in a “true sale”. Can my purchase be challenged in insolvency?

- True sale respected, but:
 - Certain transactions may be subject to insolvency unwind (*we cover this in Question 8*)
 - Re-characterisation risk (risk a court determines a transaction in an unintended manner)
- True sale requires:
 - Sale, transfer or isolation of assets from insolvency estate
 - Minimised re-characterisation risk
- If a “sale” is re-characterised as a “secured loan”, such transaction
 - may be void against the liquidator if not duly registered
 - may trigger unlicensed lending risk



Some Insolvency Observations in Asia

- Observations on the first 5 questions in practice ...
 - Q1: *Does a company need to be insolvent to file for insolvency?*
 - Q2: *What about involuntary insolvency?*
 - Q3: *Will I know immediately after a company files for insolvency?*
 - Q4: *What's the effect of a company filing for insolvency (and why should I care about it)?*
 - Q5: *I bought receivables in a "true sale". Can my purchase be challenged in insolvency?*

Q6: Can I enforce outstanding receivables / collect against the Buyer directly (so proceeds do not go to Seller's collection accounts)?

- Broadly, yes
- The automatic stay prohibits legal proceedings against "assets of the Seller" only
- Provided there is a "true sale":
 - the receivables are not "assets of the Seller"
 - notwithstanding the insolvency of the Seller, the Finance Provider (as purchaser) may notify, and enforce the receivables against the Buyer.
- Note, equitable assignments may require leave of the court to compel the Seller to perform any obligations

Q7: The proceeds of purchased receivables have been paid into a co-mingled collection account of the Seller. Should I be worried?

- Segregated collection account v commingled account
- Structuring
 - Frequency of transfers mitigate risk?
 - Trust over the proceeds standing to the credit of the collection account?
 - Security over the proceeds standing to the credit of the collection account?
- Control over the proceeds is important

Q8: Do I need to worry about payments I received prior to the insolvency?

- Certain transactions are vulnerable to unwind on insolvency:
 - Transactions at an undervalue
 - Unfair preferences
 - Transactions which constitute “onerous property”
 - Property dispositions after insolvency
 - Extortionate credit transactions
 - Transactions defrauding creditors

Q9: What if I failed to perfect the transfer of my receivables?

- Perfection for assignments
 - Legal assignments and equitable assignments
 - Key elements include notice, assignment of whole (not part) receivables and existing (not future) receivables
- Equitable assignments:
 - Buyer may validly discharge its debt by paying the Seller
 - Buyer may raise against the Finance Provider (as purchaser) all the defences it could have raised against the Seller
 - Finance Provider must join in the Seller in any suit against the Buyer
 - Third parties may take priority over the Finance Provider if they perfect first

Q10: The Buyer in my payables facility has agreed to pay me directly, unconditionally and irrevocably, if I fund any Supplier invoices. That's all I need, isn't it?

- It depends on the drafting of the agreements.
- The Finance Provider (as purchaser) may have to bear risks:
 - Perfection of assignment
 - Prior interests
 - counterparty risk (e.g. in payables programs through a third party administrator, platform or a third party funding vehicle)
 - Fraud



Some Insolvency Observations in Asia

- Observations on the last 5 questions in practice ...
 - Q6: *Can I enforce outstanding receivables / collect against the Buyer directly (so proceeds do not go to Seller's collection accounts)?*
 - Q7: *The proceeds of purchased receivables have been paid into a co-mingled collection account of the seller. Should I be worried?*
 - Q8: *Do I need to worry about payments I received prior to the winding-up?*
 - Q9: *What if I failed to perfect the transfer of my receivables?*
 - Q10: *The Buyer in my payables facility has agreed to pay me directly, unconditionally and irrevocably, if I fund any supplier invoices. That's all I need, isn't it?*



Part II Europe
From an English Law Perspective

Q1: Does a company need to be insolvent to file for insolvency?

- Members' voluntary liquidation on solvent companies
- Creditors' voluntary liquidation on insolvent companies only

Q2: What about involuntary insolvency?

- Compulsory liquidation
 - by a winding-up petition to the English court
 - usually on the ground of the company's inability to pay its debt
- Provisional liquidation
- Administration

Q3: Will I know immediately after a company files for insolvency?

- Through a winding up search at the Companies Court's Central Registry of Winding up Petitions
- Through a search of the London Gazette

Q4: What's the effect when a company files for insolvency (and why should I care about it)?

- In liquidation

- After the presentation of petition the company or any creditor may apply to the court to stay or restrain any proceedings
- Once winding up order made there is no freeze on enforcement of security but there is a stay on commencing or continuing any proceedings against the company without the leave of the court
- Any disposition of the company's property after the presentation of the petition is void unless the court orders otherwise

- In administration

- Subject to certain exceptions, no security may be enforced without consent of administrator or permission of court
- A statutory moratorium on commencement or continuing legal proceedings without the consent of the administrator or permission of the court

Q5: I bought receivables in a “true sale”. Can my purchase be challenged in insolvency?

- Re-characterisation risk
 - If it is re-characterised as a secured transaction, such transaction could be held void against the liquidator as well as creditors of the Seller due to the lack of registration
- Clawback risk?
 - Transaction at undervalue
 - Preference
 - Disclaimer of onerous property
 - Avoidance of property disposition
 - Extortionate credit transactions
 - Transaction defrauding creditors

Q6: Can I enforce outstanding receivables / collect against the Buyer directly (so proceeds do not go to Seller's collection accounts)?

- The automatic stay (whether in liquidation or in administration) prohibits legal proceedings against "assets of the seller" only
- Provided the sale of receivables is a true sale, the receivables are not "assets of the Seller" and the Finance Provider (as purchaser) may give notice to Buyers notwithstanding the winding-up of the Seller
- If it is an equitable assignment, the Finance Provider (as purchaser) will need to join the Seller in any proceedings against the Buyer

Q7: The proceeds of purchased receivables have been paid into a co-mingled collection account of the Seller. Should I be worried?

- Segregated collection account v commingled account
- Frequency of transfers mitigate risk?
- Trust over the proceeds standing to the credit of the collection account?
- Security over the proceeds standing to the credit of the collection account?
- Control over the proceeds is important.

Q8: Do I need to worry about payments I received prior to the winding-up?

- Subject to insolvency carve-out:
 - a transaction at an undervalue
 - a preference by the company
 - a transaction involving any disposition of the company's property after the commencement of the winding-up
 - a transaction involving the provision of extortionate credit to the company
 - a transaction defrauding creditors

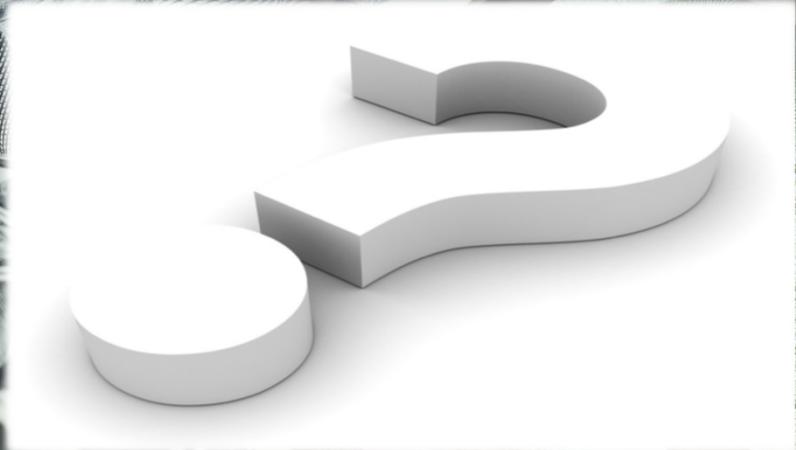
Q9: What if I failed to perfect the transfer of my receivables?

- It may be an equitable assignment
- Buyer may validly discharge its debt by paying the Seller
- Buyer may raise against the Finance Provider (as purchaser) all the defences it could have raised against the Seller
- Finance Provider must join in the Seller in any suit against the Buyer
- Third parties may take priority over the Finance Provider

Q10: The Buyer in my payables facility has agreed to pay me directly, unconditionally and irrevocably, if I fund any Supplier invoices. That's all I need, isn't it?

- It depends on the drafting of the agreements.
- The Finance Provider (as purchaser) may have to bear risks such as:
 - the purchase is not effectively perfected under applicable laws
 - the receivables have not been acquired free and clear of existing liens
 - counterparty risk in payables programs through a third party administrator or a third party funding vehicle

Questions



Presenter Bios



Angelia Chia | Partner, Singapore

Angelia Chia is a partner in Mayer Brown's Singapore office and a member of Mayer Brown's Global Finance Practice Group. She has more than 20 years of experience in trade and trade finance spanning the globe. Angelia's unique advisory capability stem from her in-house experience in Cargill, JPMorgan and most recently Standard Chartered Bank where she was global head of legal for trade, ensuring she can provide comprehensive end-to-end advice covering the myriad of issues faced by clients as they manage the interplay of laws, regulations, industry rules, systems and policies in the confines of the organisation's operational requirements. Angelia is an active member of the ICC Legal, ITFA and BAFT Committees and is internationally recognised for her trade advisory experience.



Ben Sandstad | Partner, Hong Kong and Singapore

Benjamin Sandstad is a partner in Mayer Brown's Hong Kong and Singapore offices and a member of Mayer Brown's Global Finance Practice Group. Ben has over twenty years' legal experience, including as global head of legal for credit, lending and governance for a leading global bank, and specialises in on and off-balance sheet financing, structured finance, trade finance (particularly trade lending and open account finance) and governance of legal risk. Ben draws on his combination of senior in-house and private practice experience to holistically advise clients on the origination of, process and governance for, and distribution of risks in respect of, the full spectrum of credit and lending transactions, particularly where there is an underlying asset, trade transaction, recourse, tax or regulatory requirement.



John M. Marsden | Partner, Bangkok, Hong Kong and Ho Chi Minh City

John Marsden is a partner of Mayer Brown and is the Managing Partner of the firm's Vietnam and Thailand offices. He represents clients in a wide range of matters in the commercial and corporate context. His assignments have included financing transactions, non-performing loan disposals and corporate restructurings. John has provided advice in such large-scale restructurings or insolvencies as Asia Pulp and Paper, Pacific Andes, the Moulin Group, TMT and Vietnam Shipbuilding Industry Group, all of which are multi-jurisdictional transactions. John was placed into the Shanghai office for three years during which time he was involved with a number of substantial property acquisition and financing transactions.

Presenter Bios



Ravi Amin | Senior Associate, London

Ravi Amin is a senior associate in the Banking & Finance practice of the London office. Ravi's work is primarily focused on asset based lending (ABL), receivables finance, supply chain/payables finance and real estate finance. Ravi has experience on a wide range of complex, cross-border and domestic financing transactions, representing banks, financial institutions, sponsors and corporates. Ravi has been listed as a Rising Star by Legal 500, 2020 edition for his advice on structuring and executing asset based lending transactions.



Sheena Frazer | Counsel, London

Sheena Frazer is a counsel in the London office of Mayer Brown's Restructuring practice. She represents a range of clients, including banks, central banks, funds, insolvency officeholders and directors on a mixture of cross border, contentious and transactional restructuring assignments. In recent mandates, Sheena has advised in the retail, aviation, financial services and construction sectors.

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- The contents are intended to provide a general guide to the subject matter only and should not be treated as a substitute for specific advice concerning individual situations.
- You may not copy or modify the materials or use them for any purpose without our express prior written permission.



Appendix – Upcoming webinars

- August 5: Capital Markets/Alternative Investors; Investing in the Trade Receivable Asset Class
- August 19: 5 Most Common Questions About Financing Receivables and Payables Through a Platform
- September 2: 5 Most Common Questions About Financing Foreign Receivables; Issues Beyond Simple Perfection, Priority and Enforcement
- September 16: Supply Chain Finance Using Drafts and Bills of Exchange
- October 7: Working Together for Mutual Benefit: Non-Recourse Receivables Purchase and Trade Receivables Securitization
- October 21: Credit Insurance – How Does It Actually Work in Supply Chain Finance?
- November 4: The UN Convention on the Assignment of Receivables – What Is It, and How Will It Change Trade Finance?

Registrations for the upcoming webinars will be sent approximately a week in advance.



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