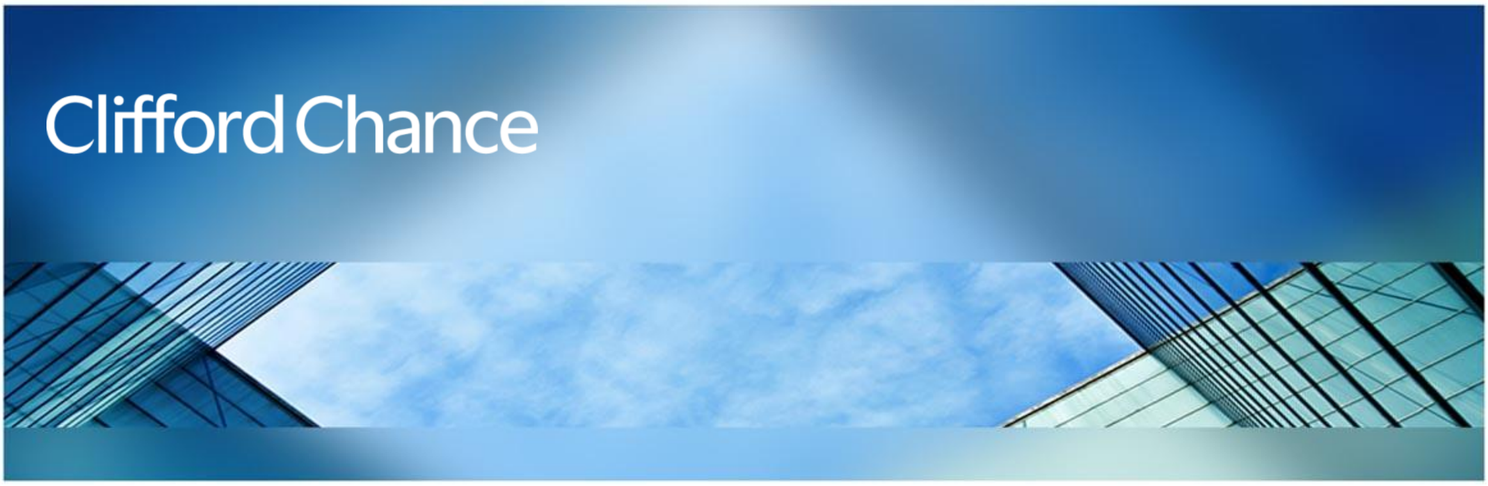

THE CLAIM GAME: DEALING WITH TRADE CREDIT INSURERS AFTER A DEFAULT

INTRODUCTION

Whilst trade credit insurance can be an effective way of mitigating credit risk, it is a product that needs to be handled with care, particularly where loss payee arrangements are in place or seller insolvency has occurred.

In this briefing, we set out the key points to consider where a potential trade credit insurance default has arisen, or is expected to arise. We look in particular at steps that may be taken to reschedule or restructure the underlying debt, and how those fit in with any eventual claim.

NOTIFICATION AND CLAIM OBLIGATIONS

The trade credit insurance policy will set out specific obligations to inform the insurer of circumstances that may give rise to a claim, or of a claim itself. These will, in particular, deal with (i) what needs to be notified, and (ii) when notification needs to be made.

It is likely that you will be obliged to keep your insurer informed of overdue receivables and of any event or circumstance that is likely to result in a non-payment.

It is important to ensure that these notification and claim obligations are complied with. A failure to comply with the notification requirements may result in the insurer(s) being entitled to reduce the cover available in full or in part. You should also ensure that the insurer is informed of any issues, as their consent to any remedial actions will be needed.

MITIGATION EFFORTS

If a default has arisen, there may well be options on the table to seek to minimise losses. Those might involve rescheduling payments, refinancings or other restructures.

If you have trade credit insurance in place, you should work out whose consent would be needed for any of those processes, whether that be insurers or other finance parties. Where multiple parties are involved, the contracts should set out the process to follow where there is not unanimity on a course of action.

If you are looking to take action, it will be important to liaise with insurers at an early stage so that they are on board. Remember that insureds are under an obligation to take reasonable steps to mitigate their loss and, when it appears likely a debtor will not make a payment, consideration should be given as to what options are available.

Key issues

- Notify your insurers when you become aware of an issue
- Make sure you understand whose agreement you will need for any restructuring/ rescheduling, and bring them on board as soon as possible
- Consider what steps you might need to take to mitigate loss
- Ensure premium has been paid
- Take care to comply with confidentiality obligations
- Make sure any claim is properly documented and submitted within the relevant time limits

Before agreeing to a rescue package, consider the impact of it on the insurers' obligations: will the insurers pay out upfront and treat future payments as recoveries, will they be insuring the revised obligations, and will you suffer a shortfall?

Where the insurer pays a claim, it is likely that they will gain rights of subrogation, allowing them to 'step into the shoes' of the insured and bring claims in respect of the insured loss. Before this happens, the insured is under an obligation not to prejudice the insurer's subrogation rights unreasonably and this should be borne in mind when looking to mitigate loss, particularly in communications with the debtor.

ENSURE PREMIUM HAS BEEN PAID

Trade credit insurance will commonly contain provisions that entitle the insurer to cancel coverage and/or reduce claims in the event of non-payment of premium.

It is therefore important to ensure that all premium due and payable under the policy has been paid.

COLLATE EVIDENCE TO SUPPORT CLAIM

Whilst the documentation required to accompanying the claim notice under a trade credit insurance policy is often limited, the burden of proving a claim is on the insured and additional documentation may be necessary to do so.

Even if there is no express obligation to retain documents in respect of the transaction, it would be prudent to ensure they are retained and readily available. Similarly, if transaction documents are held by third parties, it would be prudent to request these promptly.

COMPLY WITH CONFIDENTIALITY OBLIGATIONS

Trade credit insurance policies often contain confidentiality obligations, which may include an obligation not to inform the debtors of the existence of the insurance cover. Care should be taken to ensure these are complied with so, for example, if settlement discussions are paused pending insurer confirmation, this should not be communicated to the debtor where disclosure of the existence of the insurance is not permitted.

COSTS ASSOCIATED WITH RECOVERIES

Trade credit insurance policies are likely to expressly deal with the allocation of recoveries and, in particular, may make provision for the insured's costs incurred in effecting the recovery to be given priority out of any recovery obtained.

If it is necessary to take steps to effect a recovery, ensure that these are discussed in advance with insurers wherever possible and that the costs involved are understood by insurers.

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