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CSG Quarterly Update

April 2022

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Introduction

We are delighted to welcome you to the first edition of the Commodities & Shipping Group's (CSG) Quarterly Update.

We launched the group just before the outbreak of COVID-19 in early 2020 and despite the challenges that the pandemic presented and that our clients faced, it has been a very exciting time for the group. Over the last 12 months, we have welcomed a number of leading practitioners to the group in London, Singapore, Perth and United States, who join us from well-known commodities and shipping firms including Kate Sherrard, Robert Parson, Ivan Chia, Hazel Brewer, as well as Michael Kaye and Emily Huggins Jones. The group continues to grow exponentially as we develop global "best-in-class" practices in conjunction with our colleagues in the firm. We, and our clients, have all welcomed the collaborative culture and global platform that our firm provides.

In this edition of the CSG Quarterly Update, we provide updates on the Russian sanctions and the wider implications for commodities and shipping clients. We examine whether international trade is a key driver in the fight against climate change and how slavery is being addressed in supply chains. We then provide a bite-size snapshot on *Sharp Corp Limited v Viterra B.V.* and the Singapore case of *The Luna* [2021] SGCA 84. Finally, we share with you details on where you can meet the team and recent firm news, which highlights some of the key initiatives we are involved in within diversity, equity and inclusion (DEI) and environmental, social and governance (ESG) space.

We hope that you find this update an enjoyable and informative read.

Chris Swart
Practice Group Head – Commodities & Shipping Group

Barry Stimpson
Practice Group Head – Commodities & Shipping Group

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Russian Sanctions and Their Wider Implications for Commodities and Shipping Clients

Unprecedented global sanctions against Russia continue to be implemented as the Ukraine – Russia conflict continues. Our reports on the EU, US and UK sanctions can be found here. Reviews of existing contracts, insurance policies and other impacts and contingencies will still need to be undertaken regularly in light of the changing daily landscape. See our article here for risk management considerations.

From the commodities and shipping perspective, the last month has seen a wide range of legal challenges, from dealing with destroyed or damaged facilities and plants in Ukraine, to challenging the validity of *force majeure* notices, and options being exercised for the origin of goods, to disputes arising under price adjustment clauses, and issues relating to increased margin calls.

For those companies leaving Russia, the legal and organisational considerations are not straightforward. Russia has endorsed administration and forced sale proposals of property belonging to Western companies leaving the country. Companies are also considering what to do with the employees in Russia on their payroll whose livelihoods depend on their business.

While the conflict continues, significant upheaval and adaptations to supply chains and contractual arrangements will need to be undertaken and kept under continuous review.

Gabriella Martin
Senior Associate

Additional Articles for Reference

1. Russia Sanctions Update – What Risk Management Steps Can Be Taken Now?
2. The US, UK and EU Impose a Series of New Targeted and Territorial Russia-related Sanctions
3. Russia Sanctions – UK Port Closures and Wider Implications
4. Additional US, UK and EU Sanctions on Russia

Disruptions Caused by Disconnecting Russia From SWIFT

Introduction

The EU announced on 2 March 2022 that it will ban seven major Russian banks from participating in the Society for Worldwide Interbank Financial Telecommunication (SWIFT), the world's leading messaging system that facilitates financial transactions across country borders. This move by the EU, in collaboration with the UK, the US and Canada, is considered by some to be the ultimate economic weapon. It follows a raft of more targeted sanctions by the UK, the EU and the US intended to ultimately segregate Russia's economy and bring an end to the Russia/Ukraine conflict. According to the EU Council's press release of 2 March 2022, the SWIFT exclusion also applies to any Russian entities in respect of which an excluded Russian bank holds more than 50% of the ownership rights in such entity.

To better understand the impact of disconnecting these Russian banks out of the SWIFT messaging system, we will first need to understand what SWIFT is and why such a measure could be considered tantamount to excluding Russian banks from engaging in finance transactions worldwide and Russian companies largely from international trade.

(a) What Is SWIFT?

SWIFT is a secure messaging system that banks in every country in the world (with the exception of North Korea) use to communicate with one another. It is important to note that SWIFT is not a payments system but a platform for banks to exchange a variety of messages, including messages concerning cash transfers between banks, messages relating to interest rate and foreign exchange products, including derivatives, messages concerning the securities market and information messages.

SWIFT is the leading player in the market for global financial messaging services and was set up by a group of international banks in the 1970s to address communications regarding cross-border payments. It has more than 11,000 members and is accessed in more than 200 countries. The SWIFT system allows its participants to communicate with each other globally and it is a crucial tool in the trading of commodities and the financing of that international trade. As a Belgium-based cooperative, SWIFT is subject to EU regulations and, therefore, required to follow any EU sanctions that require any SWIFT member to be cut off from its messaging system.

To illustrate how SWIFT works, we use the following straightforward example of a cross-border sale and purchase between Party A (Seller) and Party B (Buyer). In this example, Party B, as buyer, would instruct its bank (Bank B) to pay Party A in a foreign currency (e.g. US dollars). Bank B, will issue two messages: one to its correspondent bank (i.e. a MT202) instructing it to debit Bank B's account to transfer funds to Party A's bank (Bank A) and a second message to Bank A (MT103) notifying it that the funds credited by Bank B's correspondent bank are for its customer, Party A.

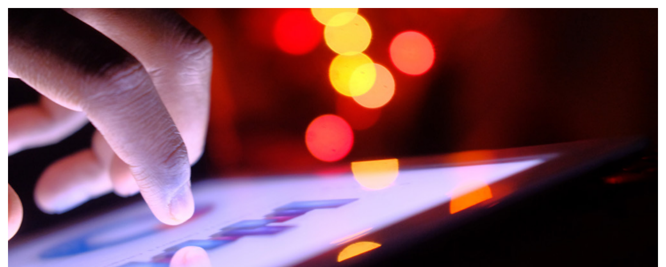
Bank A then reconciles both pieces of information (i.e. the MT103 and the incoming funds from Bank A's correspondent bank) before crediting the sum to Party A's account and notifying Party A via MT910. Since banks all around the world are very familiar with the SWIFT messaging system, they have become very heavily dependent on it to facilitate cross-border payments securely and rapidly (almost instantaneously), that it would be difficult at this stage for any other bilateral messaging system between banks to replace SWIFT.

(b) SWIFT as a Historical Financial Weapon

The first time that SWIFT was used as a form of "financial weapon" by way of excluding its members was in March 2012. A group of Iranian banks were effectively barred from the SWIFT messaging system, due to sanctions issued by the EU along with other measures being taken against Iran. These actions were aimed at putting an end to Iran's nuclear activity at the time and it has previously been reported that the country's oil exports dropped from around 2.5 million barrels per day to approximately under 1.4 million barrels per day and that, accordingly, Iran saw a 50% decrease in its export revenues from 2011 to 2013. Russia itself has also previously faced the threat of being disconnected from SWIFT when in 2014, Russia annexed Crimea and consequently took steps to create the System for Transfer of Financial Messages (SPFS), a financial messaging system for use by Russian and foreign banks.

(c) SWIFT and Documentary Credits

The importance of SWIFT in the global financial system extends beyond facilitating cross-border payments – it is also essential in international trade given that it also serves the documentary credit platform and plays a key role in the issuance of documentary letters of credit and related acts such as any confirmation and amendment of these instruments. The use of SWIFT as a platform for documentary credits has greatly lowered the cost of issuing documentary credits and the secure SWIFT network protects the authenticity and integrity of the documentary credit, which would be impossible if letters of credit were to be communicated by any other means, such as by mail or telex. Often referred to as the "lifeblood of international commerce", letters of credit are an essential method of payment in international trade and without the means of receiving letters of credit securely via SWIFT and further communications related to these letters of credit, Russian exporters are potentially left without means of being paid, effectively cutting off Russian exporters from global trade.



(d) Disrupting Daily Russian Banking and Trade Finance

Despite the EU's SWIFT ban, the affected Russian banks would still be able to continue executing cross-border transactions. However, their ability to do this in the same efficient way as when communicating through SWIFT would be impeded. Other less secure methods of communication would need to be used by these banks, resulting in increased costs and delays for parties whose transactions involve an excluded Russian bank. The excluded Russian banks could, for example, be impacted by the SWIFT ban where they would need to collect payments on behalf of Russian exporters, make payments to entities abroad to discharge their own or their customers' debt obligations, pay for their customers' purchases of foreign goods or receive deposits from abroad. Payments could be hampered in connection with financial transactions ranging from loans and short-term credit to various forms of trade finance and guarantees. This could include payment and reimbursement under documentary and standby letters of credit and bank guarantees, as well as payments under promissory notes and bills of exchange. Over time, these kinds of interruptions, combined with Russia's role as a major exporter of commodities globally, might lead to an adverse effect on its economy, Russian banks and Russian companies trying to do business and, in turn, the global economy.

(e) Disruptions Extend to Non-Russian Entities in Banking and Finance

Financial institutions often face huge challenges in navigating and analysing how the targeted sanctions introduced by each jurisdiction affect their own operations. Given the potential penalties imposed by the relevant jurisdictions against financial institutions for a breach of sanctions, financial institutions often give due consideration as to how such targeted sanctions affect them and formulate stringent internal policies and regimes to ensure that they would be able to comply with the targeted sanctions of each jurisdiction. The quickly evolving roll-out of new targeted sanctions against Russian banks has left financial institutions scrambling to update, adapt and respond to how such targeted sanctions could impact their operations. This could lead to an uncertain application of sanctions standards across banking and finance transactions and, in particular, customers would be unable to foresee whether stringent internal polices and regimes by the relevant financial institution may be applicable in their particular transaction.

We have already seen recently how such uncertain application of sanctions standards could easily affect non-Russian entities and non-Russian banks. Using the example in paragraph (a) above, even where Bank A, Party A, Bank B and Party B are outside the EU, the UK, the US and Canada, where Bank B would need to remit funds in euros, pounds, US dollars or Canadian dollars on behalf of Party B to Bank A on behalf of Party A, such funds would be subject to a SWIFT message from Bank B to its correspondent bank (i.e. a MT202) instructing it to debit Bank B's account to transfer funds to Party A's bank (i.e. Bank A).

Given the fund's denominations, it is likely that such MT202 SWIFT message would need to be sent to a correspondent bank in the EU, the UK, the US and Canada (as applicable). The correspondent bank's internal policies and regime (which by virtue of being in such jurisdictions which have rolled out targeted sanctions and may therefore have stricter internal policies and regimes than Bank A and Bank B which may not be located in a jurisdiction which has rolled out targeted sanctions), may cause transactions made by Bank A, Bank B, Party A and Party B to be flagged, screened and funds to be withheld. This may result in payments from Party B to Party A being delayed and with Party B and Bank B having no visibility or control as to the time taken for the funds to reach Party A's account with Bank A – whilst this may seem trivial, non-payment under contracts and loan agreements typically have drastic consequences for non-payment (or short grace periods for such non-payment) such as events of default or termination rights (often together with cross default provisions which could be triggered under other financings as a result of these defaults).

Parties remitting funds in such denominations may need to consider making the remittance in advance even if the parties' remitting and receiving bank or counterparty may not be a Russian entity or Russian bank, particularly while the financial institutions in these jurisdictions are still updating and adapting their internal operations and procedures to deal with the latest sanctions roll-out.

Further defaults in the commodity industry would be unwelcome to creditors so soon after a number of large commodity defaults that arose during the COVID-19 pandemic, such as Hin Leong, Agritrade and Gulf Petrochem, and any further defaults in the industry could potentially trigger further retrenchment of banks from financing commodities, causing a further liquidity shortage for corporates.

(f) EU Oil and Gas Payments Unaffected

Given that Russia is a significant supplier of oil and natural gas to Europe, the EU has had to balance its Russian energy needs during a time of already escalating energy prices with the need to take further action to stop the Russia/Ukraine conflict. The EU SWIFT ban, therefore, strategically did not cover two major Russian banks, Sberbank and Gazprombank, due to their substantial role in processing payments for Russian exports of oil and gas. This has meant that the export of these commodities into Europe has been able to continue. The stopping of such essential trade between the EU and Russia would require the EU to find alternative sources and energy prices would likely rocket. With prices for commodities exported from Russia being driven ever higher, it becomes even more difficult to control inflation, which is already high in Europe, the US and elsewhere.

(g) Retreat From Doing Russian Business

Under normal circumstances, without a SWIFT ban, Russian banks would be able to provide their cross-border banking and financial services swiftly and Russian commodity companies trading on global markets would be able to get paid reliably. If, however, the current SWIFT sanction against specific Russian banks continues for a prolonged length of time, together with other Russian sanctions, this could negatively impact both Russian banks and corporates. Following Russia's action, we have already seen the European section of Sberbank close, BP selling its 19.75% stake in Rosneft and Shell looking to withdraw from joint ventures with Gazprom. Foreign companies within the commodities industry have, therefore, severed their ties with Russia, as well as those across other industries from shipping to retail. Other companies are considering abandoning or suspending their Russian-linked operations. Large-scale businesses across the globe are, therefore, no longer going to transact with Russian counterparties as long as these sanctions are in place. Additional Russian banks might also be added to the list of banks to be blocked from SWIFT. In the meantime, foreign banks and financial institutions are working on ensuring that the SWIFT ban is put into practice and will continue to be properly effected as long as the ban continues, alongside complying with other Russian sanctions that have been passed in the last few weeks.

(h) Mitigating the EU SWIFT Ban

Various commentators have suggested avenues that Russia might take to bypass the intended effect of the EU SWIFT ban. These range from further developing Russia's trading ties with China to using alternative messaging and payment systems available to it, as well as cryptocurrency.

> In particular, Ethereum founder, Vitalik Buterin, has noted that Russians are already crypto-savvy, with the country being ranked 18th worldwide in terms of overall adoption.

However, while individual consumers may be able to quickly exchange their roubles for cryptocurrency, in reality, it would be difficult for businesses to make such a switch quickly and to arrange for an entire economy to make such switch. The Central Bank of Russia has also begun the process of disconnecting its financial system from the SWIFT network and connecting them to the SPFS in order to cope with the impact of the EU SWIFT ban. According to Russia Briefing, the SPFS is currently connected to more than 400 banks in Russia, as well as to banks in Armenia, Belarus, Germany, Kazakhstan, Kyrgyzstan and Switzerland.

There are also plans to integrate the SPFS network with China's homegrown payment system Cross-Border Interbank Payment System (CIPS). Whilst this may further soften the blow of the EU SWIFT ban given that much of the investment into Russian infrastructure (especially its energy projects) has been sourced from China in recent years, it remains to be seen whether the SPFS, a messaging system that only operates during regular Russian working hours, will truly be able to cope with the demands of Russian businesses and the Russian economy. About 50% of all global payments are made in dollars, along with about 90% of trade finance. Therefore, even if Russia wanted to bypass SWIFT using SPFS, it would be very difficult, as dollar payments are often made between institutions that do not have accounts with one another, meaning that a correspondent bank in the US must be used (who are unlikely to be willing to process transactions even if those transactions were considered non-sanctioned).

(i) Future Impact

We have seen the EU's and its allies' strategic actions in an attempt to halt the Russia/Ukraine conflict, the falling Russian rouble and leading international banks and companies pulling out of Russia and Russian-related business. That said, Russia remains strongly connected to the global markets for oil, gas and other kinds of commodities locally produced, including wheat, steel, aluminium and other metals. Looking forward into the future, it remains to be seen how Russia and, potentially, the rest of the world will be truly impacted by the package of the EU's SWIFT ban and other Russian sanctions.

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Electronic Trade Documents – Moving Into a Paperless New World

On 16 March 2022, the Law Commission of England and Wales published its long-awaited report on electronic trade documents setting out its recommendations for legislation, which will for the first time give legal recognition to electronic trade documents such as bills of lading and bills of exchange.

Existing Legislation and the Case for Reform

Despite the size and sophistication of the international trade market, the underlying legal framework is based on practices developed by merchants hundreds of years ago. The result is that existing English legislation does not recognise the possibility of "possessing" an electronic document at the time performance is demanded. The concept of "possession" is central to a number of aspects of international trade law, as the right to claim performance of an obligation in certain documents is vested in the person in possession of that document. For example, the right to be paid under a bill of exchange is vested in the person in possession of that bill of exchange as "holder". The document does not merely contain the right, it embodies the right currently in paper form only.

In recent years, contractual workarounds to this abstract legal problem have emerged for use with electronic platforms. Parties can agree that the transfer of an electronic version of a trade document will put the transferee in a similar position to that of the party in possession of the paper document by signing up to the contractual terms of the electronic platform. The problem with such workarounds is that they require extensive platform terms and conditions and can only bind the immediate parties to the platform. In other words, they create personal rights between the parties to a multilateral contract, not proprietary rights. Not all market participants in a trade will be willing or able to sign up to these types of platforms.

In publishing its report, the Law Commission seeks to address this problem.

Scope of the Law Commission's Review and Key Drivers Behind Its Approach

The scope of the report was limited to solving the problems caused by the existing legislation's approach to "possession" – in other words, to resolve an issue that prevents electronic documents from functioning in the same way as their paper equivalents.

> Importantly, the Law Commission recognised that the "possession" problem could be solved in a manner that leaves centuries of well-established and internationally followed case law around bills of lading and bills of exchange intact.

The goal was, therefore, not to rewrite the legislation. Equally, the Electronic Trade Documents Bill is not intended to affect the validity or operation of existing contractual workarounds, which will continue to play a key role in developing the digital trade marketplace. In this sense, the Law Commission sought to adopt the "least interventionist" approach possible.

The Law Commission has also been careful to ensure its recommendations are "technology neutral". The mechanics of the Electronic Trade Documents Bill are not predicated on the functionality of a particular technology, to the exclusion of all others. In theory, therefore, the recommendations should be able to accommodate any existing or future technologies.

Finally, the Law Commission has been conscious of the importance of international compatibility, notably with the Model Law on Electronic Transferable Records (MLETR) published by UNCITRAL, which has already been adopted by a number of countries, including Singapore, Bahrain, Abu Dhabi Global Market and the United Arab Emirates. MLETR provides a prototype for law reform at national level and aims to enable use of electronically transferable records by establishing legal equivalence between "control" of an electronic transferable record and "possession" of a paper document. The Law Commission's approach and legislation proposal align with the aims and policy of MLETR.

The Bill

The Electronic Trade Documents Bill, which it is hoped will be enacted by early 2023, only seeks to change the law in relation to a limited category of documents, which are set out in the following list (with scope to amend later via delegated legislation):

- Bills of Exchange
- Promissory Notes
- Bills of Lading
- Ship's Delivery Orders
- Marine Insurance Policies
- Cargo Insurance Certificates
- Warehouse receipts

The Bill recognises an electronic trade document as being a document in electronic form, which is one of those documents listed above and which satisfies certain criteria pertaining to reliability, integrity and uniqueness. The implication is that where a document satisfies such criteria, it is an electronic trade document and is capable of being "possessed" in the same way that a piece of paper can be possessed. The core premise of the Law Commission's legislation proposal is, therefore, that the common law concept of "possession" can be extrapolated to include electronic trade documents.

A Game Changer in the Electronic Trade Platform Market?

The availability of fully enforceable electronic trade documents recognised by the most commonly used jurisdiction for trade, English law, will be significant in itself. The most obvious and immediate impact will, it is hoped, be a sharp rise in the number of participants in electronic trade transactions, although until critical mass is achieved in terms of significant trading nations adopting a MLETR or English law style adoption of electronic trade documents law, there will be continued reliance on the established platforms offering electronic trade document equivalents.

The potential for other Commonwealth countries to follow, either on a modified MLETR basis as in Singapore or following the English law model, is also a real prospect. Other non-Commonwealth jurisdictions may also see the commercial benefits of keeping pace with the forerunners in adoption of legislation for electronic trade in what will be an increasingly competitive race to be at the forefront of the technological revolution in international trade.

Timeline

> Legislation could begin its journey through the UK parliament as early as May 2022, with enactment by December 2022, subject to political will.

Given that the Law Commission does not foresee the need to establish any certification body for determining fitness to provide the service of issuance and transfer of an electronic trade document, in principle, any product that is ready to go live once legislation is in force will be able to be promoted.

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International Trade – A Key Driver in the Fight Against the Effects of Climate Change or an Obstacle in Reaching Global Sustainability Goals?

International trade and its relationship with climate change has been a topic that has attracted a range of extreme responses by commentators engaged in the climate change debate and for a range of differing motives. Many of us, including those advising in the trade and trade finance legal sector, are just as frustrated at the lack of leadership on climate change at a political level as many of those voices. Is climate change, however, a "big subject" that we have to leave to national governments in the hope that the tearful climax to COP26 will one day lead to real progress or is there an important role for international trade lawyers in accelerating progress in this area?

Advisors in the trade and commodities legal space can often draw fire from those leading the charge against the environmental impact of commodity extraction and the global trade in hydrocarbons. Legal advisers are too often seen as part of the defence mechanism of an industry that is perceived to be slow or reluctant to adopt more sustainable practices for fear of diluting profits. Some will argue that globalisation of trade is, taken as a whole, simply bad for the environment and a major contributor to climate change. Leaving aside the high-profile subjects of "dirty" commodities, such as coal and oil, critics will point out, for example, that any cheap foreign imported goods and foodstuffs brought by polluting cargo ships across the world's oceans will, in fact, compete unfairly with "clean" locally produced food and goods with a substantially lower carbon footprint. However, the danger of cherry-picking certain aspects of the trade/climate change discussion in isolation (sometimes as part of a wider anti-globalisation manifesto) is that it often misses the much bigger picture.

As Paul Brenton and Vicky Chemutai point out in the World Bank's recent paper, The Trade and Climate Change Nexus – The Urgency and Opportunities for Developing Countries[1], the "import v home grown" debate is far more nuanced than that. Fruits and vegetables produced in Africa using sunshine, manual labour and natural compost may, in fact, generate far fewer emissions than production of the same or similar foods in Europe requiring heated greenhouses, tractors and manufactured fertiliser even after factoring in the emissions from marine fuel used by the cargo ship to bring them to Europe. Therefore, the higher cost of goods produced "at home" may not just be an economical one but may also carry an environmental price tag.

International transportation needs to clean up its act – and it is already doing so with major success but with more work to be done – however, those advising in the international trade sector should not be shy to highlight the upside that global trade brings to the climate struggle.

Firstly, as Brenton and Chemutai argue, trade can help shift production to areas with cleaner production techniques and as the world makes the transition to a low-carbon economy, comparative advantages in export markets will almost certainly change, compelling countries to adapt, change and take up new opportunities. The ICC's Standards for Sustainable Trade and Sustainable Trade Finance positioning paper published in November 2021 (in a project carried out with Boston Consulting Group) is aimed at financiers and international traders and, necessarily, the legal market that serves them. The positioning paper[2] sets out a prospective roadmap for defining what "sustainable" trade and trade finance is. It then looks at developing global standards for measuring compliance with sustainability goals that will be implemented throughout the industry. A first draft of the standards is to be expected in Q1 2022 and feedback is sought from the industry at large. The contribution of experienced legal practitioners to this project will be crucial.

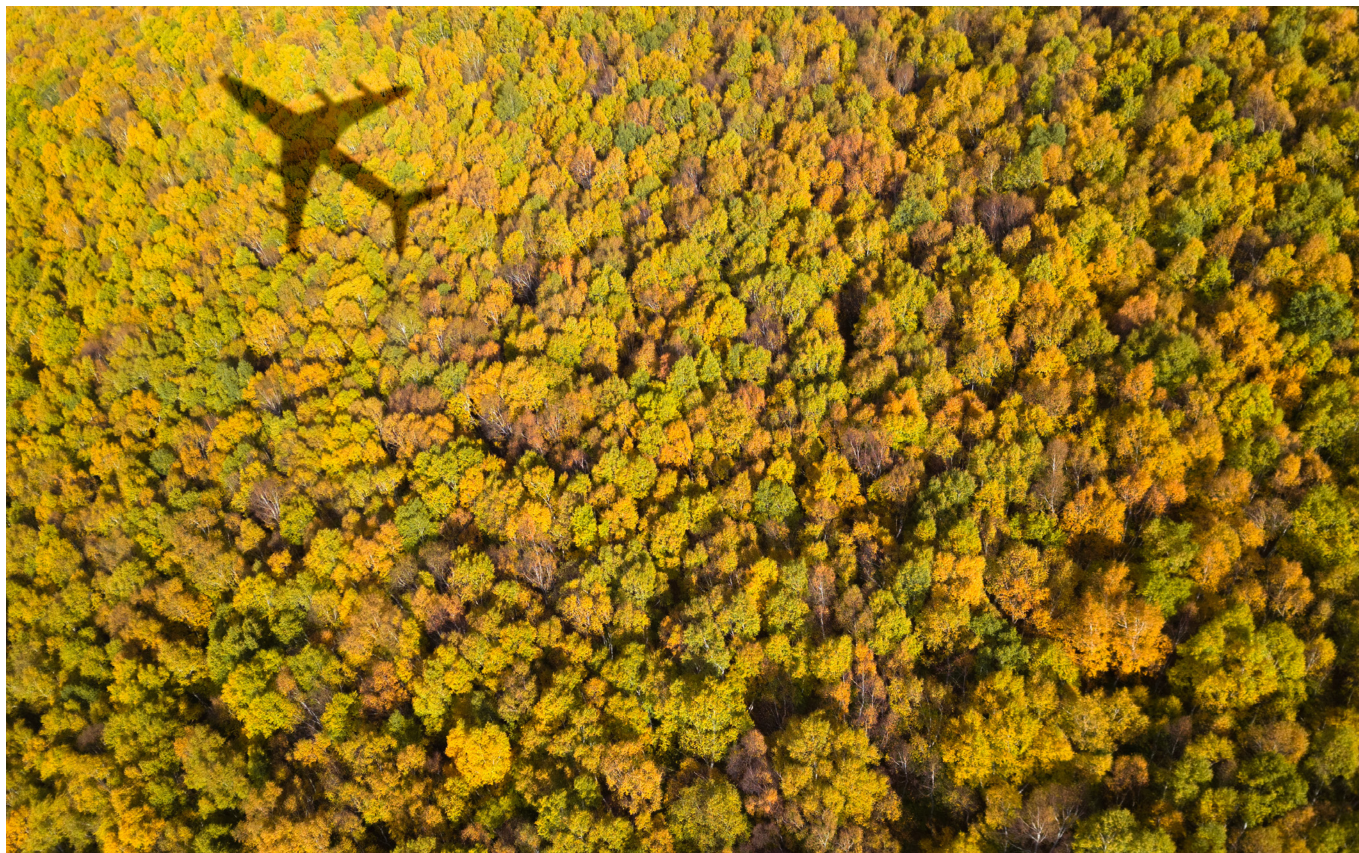
The ICC's intervention is to be welcomed in a space where there are already multiple providers of "green" vetting services and vocal discontent in some quarters that "tick-box" compliance and "greenwashing" is rife in big business. The ICC recognises that there are a number of significant hurdles to be overcome. Should the proposed framework, for example, only recognise sustainable transactions as those that actively contribute to reaching one or more of the UN's identified 17 Sustainable Development Goals[3], or should it also acknowledge those transactions that also already meet sustainable best practices in the industry? How will the standards be practically usable in real time by financial institutions and how would those standards work between financial institutions themselves when dealing in relation to underlying sustainable loans and products. Would the ICC develop the assessment standards themselves and in what form would they be made available for country-by-country adoption?

> This is a step in the right direction and leadership is much needed in a global trade environment where cooperation between nation states on sustainability standards clearly cannot be taken for granted. The contribution of legal practitioners in the sector to this effort will be crucial if the end result is to be an effective set of standards by which to measure and promote sustainable practices across the industry.

1 https://openknowledge.worldbank.org/bitstream/handle/10986/36294/9781464817700.pdf?sequence=5&isAllowed=y

2 https://iccwbo.org/publication/icc-standards-for-sustainable-trade-and-sustainable-trade-finance/

3 https://sdgs.un.org/goals



The Loan Market Association, in collaboration with the Asia Pacific Loan Market Association and the Loan Syndications and Trading Association, have already produced a valuable set of Sustainability Linked Loan Principles[4] (SLLP) to guide how lenders and borrowers can seek to achieve agreed sustainability goals in their financing arrangements whatever the motivation for those goals. The SLLP set out how sustainability-related key performance indicators (KPI's) and sustainability performance targets (SPTs) can be chosen, how meeting those chosen benchmarks affects the economic characteristics of the loan (e.g. margin reduction) and how a credible reporting and verification regime can be established. While the apparently slow progress at an inter-governmental level may appear (and often is) heavily compromised by nationalistic/populist agendas and political vulnerabilities, the trade finance industry and the international bodies that represent it can set a more ambitious timeline.

In the meantime, trade and the trade finance that makes it possible has an immediate and positive role to play in tackling climate change.

Trade promotes the delivery of environmental goods and services that will actively help reduce emissions and improve management of the world's fragile environment. In a global merchandise market estimated for 2020 to be around US$17 – 18 trillion[5], trade in environmental goods is estimated at more than US$1 trillion annually and is rising. On a practical level, imports of key materials are critical to assist in recovery from natural disasters (whether directly attributable to climate change or not) when essential items such as food and medical supplies are difficult to source locally.

> In short, trade is and will always be key to dealing with issues such as food security and recovery from natural disasters whatever the politicians say or do in the background.

So when we are asked what we, as legal practitioners in the trade and trade finance sector, can do to help promote sustainability in international trade as part of the fight against climate change, the answer is that we can do a lot. A good starting point is to contribute to the collaborative effort to establish global and verifiable standards that will hold industry to account on a level playing field. There is plenty of work to be done.

Robert Parson
Partner

4 https://www.lma.eu.com/application/files/8416/2210/4806/Sustainability_Linked_Loan_Principles.pdf

5 https://stats.wto.org/

Slavery in Supply Chains

Modern Slavery Risks

The Global Survey Index reported that over 45.8 million people are subject to modern slavery, 26% of whom are children, and 55% are women and girls. The International Labor Organization reported that the profits generated from forced labour amount to over US$150 billion per year. In addition, the G20 countries have imported over US$354 billion worth of products produced out of forced slavery per year.

> Forced labour risks involve products as diverse as bricks, charcoal, coffee, cotton, diamonds and gold, among a range of other products, involving over 50 source countries worldwide.

These sobering numbers have attracted global attention and understandably raised alarm.

Global Responses to Modern Slavery

The UK:
The Modern Slavery Act 2015 (the Act)

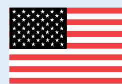
In January 2021, the UK government imposed obligations on British businesses to publish an annual statement disclosing the steps they took to ensure that there is no slavery or human trafficking present within their organisation or supply chain. The obligations apply to organisations who:

- Carry on business or part of their business in the UK
- Supply goods or services
- Are above a certain size (currently £36 million annual global turnover)

The annual statement must confirm either:

- The steps taken by the organisation to eradicate modern slavery in its supply chain and in its own business
- That the organisation has taken no steps

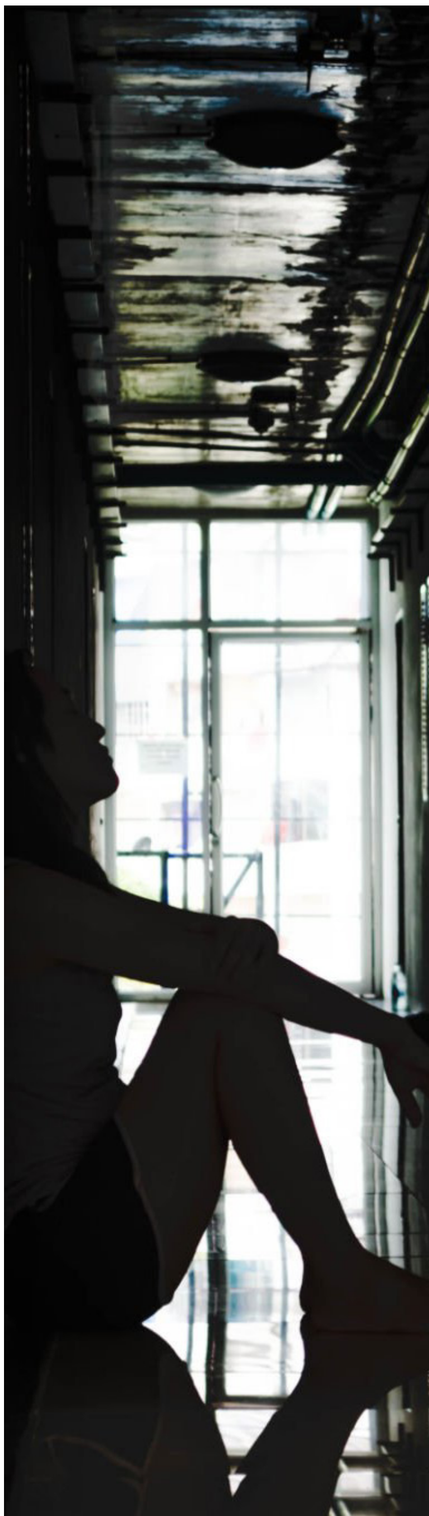
Additionally, companies must prepare a link to their annual statement, and ensure that the statement is signed by a director and published on the company's website. Currently, we have not seen any financial penalties for failing to issue a statement; however, the Secretary of State has the power to enforce a mandatory injunction to a company to issue its modern slavery statement. As such, relevant businesses are advised to prepare their modern slavery statement and ensure that effective and transparent due diligence on their supply chain has been conducted.



The US:
Uyghur Forced Labor Prevention Act (UFLPA)

The UFLPA imposes a complete import ban on goods mined or produced "in whole or in part" or made with forced labour from Xinjiang, China. The exception to the ban is for companies to prove to customs officials with "clear and convincing" evidence that forced labour was not used in their production. In addition, the UFLPA expands the US's ability to impose sanctions on foreign entities that commit "serious human rights abuses in connection with forced labour."

The UFLPA will force businesses to perform extensive due diligence to identify issues in their supply chains. This will require financial institutions to assess their potential exposure to the risk of handling the proceeds of forced labour on behalf of their clients and to implement mitigation measures as appropriate.



The European Union (the EU): Sustainable Corporate Governance Directive

On 15 September 2021, the European Commission (EC) announced plans for a ban on products made by forced labour to be proposed in 2022. In December 2021, the EU Executive Vice-President for Trade, Valdis Dombrovskis, warned the EC of the risks of a ban targeting only forced labour in Xinjiang being deemed as "discriminatory." He further noted that the UFLPA "cannot be replicated in the EU." Instead, he argued that including the ban within the EU's proposed Sustainable Corporate Governance Directive (SCG Directive) would be more effective. After lengthy delays, the EC's proposal for the SCG Directive is due in early 2022.

On 23 February 2022, the EC adopted the SCG Directive proposal. The proposal requires companies to report on any violations to international rules on child labour, workers' rights, or environmental damage. Firms that fail to act could face fines, as well as compensation claims. This obligation will force companies to operate their business activities, including their global supply chains, diligently. Didier Reynders, EU Justice Commissioner, stated, "With these rules, we want to stand up for human rights and lead the green transition. We can no longer turn a blind eye on what happens down our value chains. We need a shift in our economic model."

The obligations apply to EU companies with worldwide revenue of more than €150 million (US$170 million) and at least 500 employees. Additionally, the obligations will also apply to an EU company who is a "high impact" in an industry, such as clothing and mining, make more than €40 million annually, and have over 250 employees. The fines have yet to be set by each EU government; however, the EC announced that the fines should be "effective, proportionate, but also dissuasive. They will be organised by a percentage of the company's revenue."

Looking Ahead

More than ever, businesses worldwide need to work on supply chain transparency and ensure they are ready to deal with an ever-increasing regime of regulatory scrutiny. The UK, US and Germany are three major jurisdictions who are leading the way in enacting extra-territorial laws to combat modern slavery but this is an irreversible trend and the most recent announcement by the EU is evidence of this.

Jonathan Chibafa
Director (Barrister)

Malak Abbas
Associate

GAFTA Default Clause – English Court Authority on the Assessment of Damages

In *Sharp Corp Limited v Viterra B.V.* [2022] EWHC 354 (Comm), Cockerill J considered an appeal under section 69 Arbitration Act 1996 against two awards rendered by the GAFTA Board of Appeal on 1 April 2021 (the **Awards**). The case provides authority on the meaning of the "actual or estimated value of the goods, on the date of default." in sub-clause (c) of the Default Clause in GAFTA Contract No. 24.

Background

The Awards arose out of two contracts on C&F Free Out Mundra terms dated 20 January 2017, whereby Viterra agreed to sell and Sharp agreed to purchase 20,000 mt of Canadian Crimson Lentils at a price of US$600 per mt and 45,000 mt of Canadian Whole Yellow Peas at a price of US$339 per mt.

The goods arrived at Mundra in June 2017, were customs-cleared and were stored pending payment by Sharp. Subsequently, Viterra held Sharp in default on 9 November 2017, India imposed tariffs that led to an increase in the value of the goods on 21 December 2017 and Viterra resold the goods to another company in the same group on 9 February 2018, as the goods were only made available to Viterra on 2 February 2018.

> This raised the issue of who, between Sharp and Viterra, should benefit from the increase in value of the goods between 9 November 2017 and 2 February 2018.

The GAFTA Board of Appeal decided that, under the default clause of GAFTA Contract No. 24, the "actual or estimated value of the goods, on the date of default":

- Should not be assessed by reference to the market value of the goods themselves on the Indian domestic market
- Was the market value of the goods C&F FO Mundra in bulk on or about 2 February 2018

This decision gave Viterra the benefit of the increase in value of the goods on the Indian market between 9 November 2017 and 2 February 2018.

Question of Law

The question of English law at issue concerned the meaning of the terms "the actual or estimated value of the goods, on the date of default", as contained in sub-clause (c) of the Default Clause of GAFTA Contract No. 24 (the **Default Clause**):

> "*25.* DEFAULT
>
> In default of fulfilment of contract by either party, the following provisions shall apply:
>
> - The party other than the defaulter shall, at their discretion have the right, after serving a notice on the defaulter to sell or purchase, as the case may be, against the default, and such sale or purchase shall establish the default price.
> - If either party be dissatisfied with such default price or if the right at (a) is not exercise and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.
> - The damages payable shall be based on, but not limited to, the difference between the contract price of the goods and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above."

Findings

Cockerill J agreed with Viterra that the "actual or estimated value of the goods, on the date of default", as contained in sub-clause (c) of the Default Clause, was to be determined by considering the value of the goods sold on the same contractual terms at the default date. Following *obiter dicta* in *Bunge SA v Nidera BV* [2015] UKSC 43, this was to be determined by taking a sale by the innocent party "under a notional substitute contract" "assumed to have been entered into […] at the market rate but otherwise on the same terms".

She dismissed Sharp's argument that the exercise under sub-clause (c) was to arrive at an approximate value for the goods and that, logically, the best evidence of this would be the market value of the goods themselves at their location on the default date. This methodology was that applicable to sub-clause (a), in the case of a mitigation sale by the seller, but not to sub-clause (c), by which the parties specifically agreed an alternative mechanism to determine the value of the goods.

Cockerill J also dismissed Sharp's argument that this approach would place Viterra in a better position than if the breach had not occurred. This dispute would necessarily leave one of the parties with a windfall, resulting from the contractually agreed valuation mechanism in sub-clause (c). Given that Sharp was responsible for the default, it would not be nonsensical for that party to be Viterra.

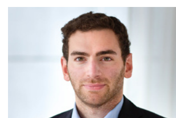
Commentary

It is now established that sub-clause (c) of the default clause of GAFTA Contract No. 24, which is common across the GAFTA contracts, requires a valuation of the goods based on a notional substitute contract concluded on the same terms at the time of default, and not by reference to the value of the goods themselves at their location at the time of default. As stated by Cockerill J, it requires the parties "to compare like with like", "to value the goods based on the same terms and conditions".

> This leads to goods being valued on the same contractual terms as those in the unfulfilled contract (non-customs cleared and in bulk) and not on materially different terms (customs-cleared and sold ex-warehouse in small parcels).

In practice, claimants usually rely on the valuation mechanism in sub-clause (c) of the Default Clause, rather than that in sub-clause (a), even when a mitigation sale is concluded. Although the valuation mechanism in sub-clause (a) could potentially lead to higher damages in case of a "below" market mitigation sale, the other party will usually oppose that valuation under sub-clause (b), which will lead in any event to a valuation under sub-clause (c).

John Rollason
Director



Ruggero Chicco
Trainee

The Fiction of Bills of Lading (The Luna)

In the landmark decision of *The Luna* [2021] SGCA 84, the Singapore Court of Appeal found that the certain bills of lading (**BLs**) issued by local bunker operators functioned neither as contracts of carriage nor documents of title, and were not true bills of lading.

> While the BLs incorporated superficial hallmarks of typical bills of lading, the court took into account the parties' intention and the terms of the underlying sales contract, and found that the holders of the BLs were not entitled to bring a claim for misdelivery.

The decision in *The Luna* is important to players in the bunker industry and has wider implications for parties who deal with bills of lading. In the wake of *The Luna*, parties should reconsider the terms of their sales contracts and contemplate implementing risk mitigation strategies.

Clement Lin
Associate

Come and Meet the Team!

Europe

John Rollason
Gafta Trade Foundation Course – London, 26 April

Robert Parson
8th Annual Supply Chain Finance Summit – London, 26 April

Robert Parson, John Rollason, Gabriella Martin, Geraldine Butac, Jennifer Greengrass

GrainCom22 – Geneva, 17-19 May

Jessica Kenworthy, Robert Parson

TXF Global Commodity Finance 2022 – Amsterdam, 10-11 May

Americas

Emily Huggins Jones

Business Network for Offshore Wind's International Partnering Forum – Atlantic City, 25-26 April

Middle East

Robert Parson
GTR Turkey – Istanbul, 12 May

Jennifer Greengrass

GTR Saudi Arabia – Riyadh, 31 May

Africa

Brian Gordon, Jayson Marks, Chris Swart

Mining Indaba – Cape Town, 9-12 May

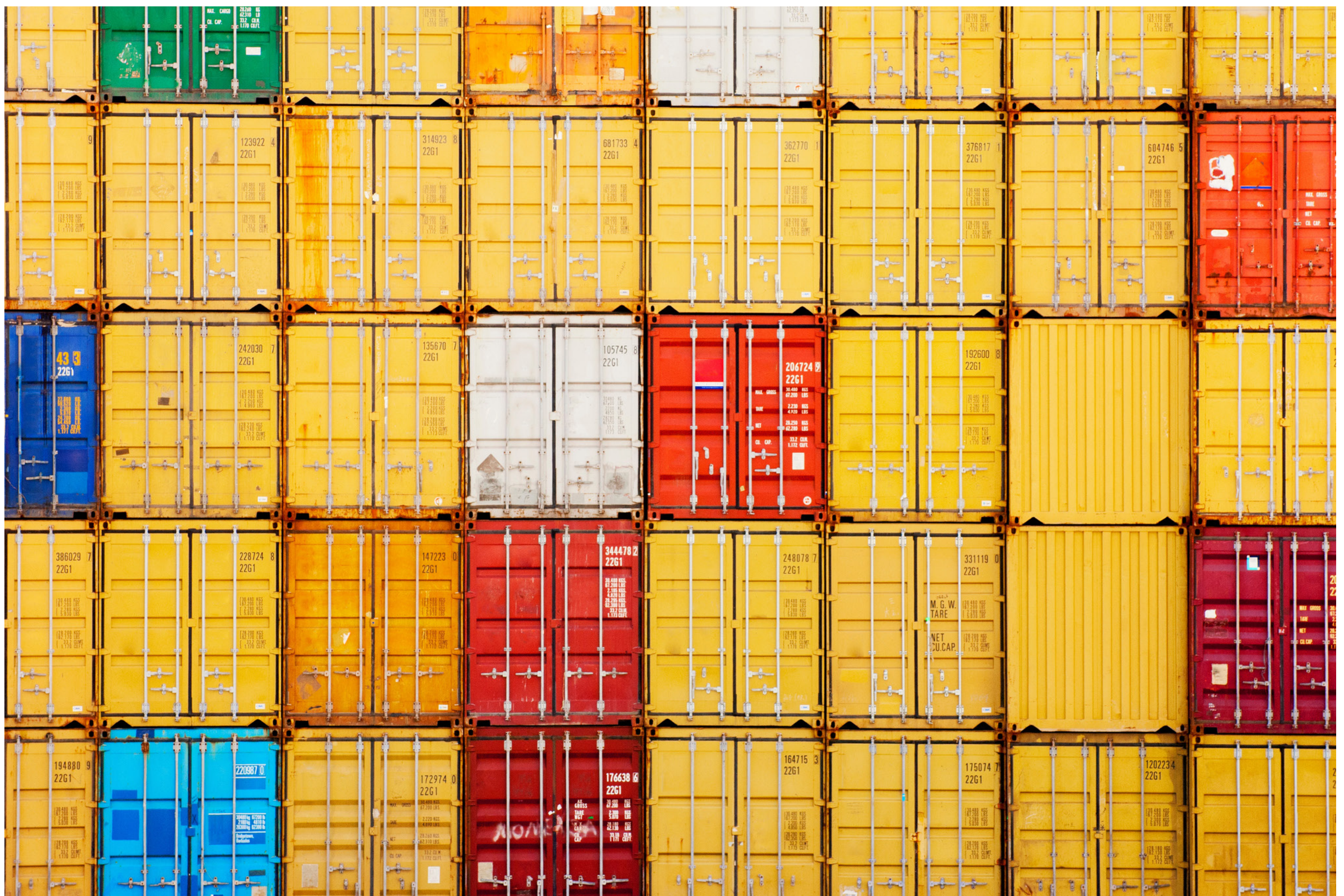
Commodities & Shipping Group Related Articles

Shipping – the Engine Room of Australian Commerce (January 2022)

Indonesia Relaxes Coal Export Ban (January 2022)

Indonesia's Coal Ban on Coal Exports (January 2022)

A Snapshot of Australian LNG (March 2022)



Our Firm's DEI and ESG Initiatives

Our Office of Diversity, Equity & Inclusion (DEI) is led by global managing partner, Fred Nance and is committed to assuring that all personnel feel welcomed and that they have the opportunity to fully and fairly pursue their career objectives. Over the last two years, we have appointed global taskforces to analyse, recommend and implement strategies that advance women and other diverse professionals. As a global firm, we work closely with our employee resource groups to promote locally relevant strategies.

In the US, we are working towards Mansfield Rule certification that will require us to track diversity across our pitch panels, candidate shortlists, talent pipeline and senior leadership. We also participate in DiversityLab's OnRamp200 Fellowship initiative that aims to bring 200 women lawyers back to the profession following an extended career hiatus by 2025.

In the UK, we have replicated such principles with stretching targets in terms of both diverse representation and attaining certain levels of accreditation. We have communicated these targets publicly and will be reporting annually on progress.

By 2026, we aim to achieve:

- 25% women in partnership
- 19% ethnic minority representation
- A Disability Confident Employer Leader status
- A Top 100 Stonewall Ranking
- Retaining our Top 75 employer ranking in the Social Mobility Employer Index (in 2021, we saw a 31 position improvement in our ranking to 15)

> To embed our strategy, all partners have DEI objectives and UK fee earners have a 25-hour productivity target allowance against DEI activity.

What Have We Been Working On?

Our Firm Hosted an Ambitious Lineup of Speakers for International Women's Day

During the week 7 – 11 March, our Advancing Women's Task force held over 35 sessions across five wellbeing themes – intellectual, physical, mental, career and financial wellbeing. Covering topics such as networking, mentoring, taking up space, maintaining professional boundaries, menopause, belonging and domestic violence, as well as thought-provoking sessions on environmental sustainability, financial planning and the use of smart technology, we welcomed 24 external speakers, as well as internal specialists, to take part in fireside chats, panel discussions and presentations.

Social Mobility, Class Pay Gaps and Why It Should Be on Everyone's Diversity Agenda

As signatories of the Social Mobility Pledge, we have a strong commitment to open access to law, as well as improve the aspiration and attainment of those from lower socioeconomic backgrounds.

What Are We Doing?

- Ranked 15 in the Social Mobility Employer Index.
- In March, hosted a North West Social Mobility Conference with speakers providing delegates with practical information on how to implement a social mobility strategy within their respective organisations, as well as providing examples of the benefits to organisations and as individuals.
- Providing both a strategic and supportive function as funding partners of the Social Mobility Business Partnership securing work and employability skills insights to Year 12 students via a network of regional corporate partners.
- Hosting work placements through Sutton Trust's Pathways to Law programme.
- Local champions delivering a series of mentoring programmes directly with schools.
- Adoption of Rare Contextualised Recruitment to enable us to contextualise academic achievement according to

Our Firm Is a Founding Member of Stronger Together, Leeds City Region

Stronger Together is a local cross-firm network that will aim to raise the profile of racial diversity, inclusion and equality in the Yorkshire professional services sector, create peer to role model relationships and encourage more people from black and other ethnic minority communities to see the professions as a viable career.

This is the first time that the Big Four accounting firms and largest six law firms have collaborated locally on the challenges around racial diversity, inclusion and equality. The network officially launched on Friday 11 March at a high-profile event at Leeds Civic Hall, hosted by Tom Riordan, Chief Executive of Leeds City Council.

> "I'm delighted our professional services sector is also embracing clear commitments to equalise opportunities and conditions for people who may not traditionally have easy access to fulfilling careers in the field. When a city and its workforce are aligned, everyone wins as not only do you tackle inequality, but you also benefit from a rich diversity of people and talent."
>
> Tom Riordan

During the afternoon, panel members shared their personal stories around how they overcame challenges in their career journey and their vision for the network.

US Black History Month Provided the Opportunity to Host a Global Conversation About Hair Discrimination

In February, we hosted a panel discussion on the issue of hair discrimination. Having recently received national and international attention with the passing of the CROWN Act in California (and a few other states in the US) and the HALO code campaign in the UK, awareness of the stigma that permeates society's perception of what is "acceptable," "professional" or "proper standards" relating to Black hair dates back to the 1700s. This was an interesting discussion and brought attention to the ways in which hair can exclude people of colour from various professional settings and why it is critical to deepen our perspectives on creating truly inclusive workplaces.

Listen to the discussion here.

LGBT+ History Month Opened up a Conversation About the Role of Art in Inclusion

In the UK during February, we celebrated LGBT+ History month, which aims to raise awareness and visibility of lesbian, gay, bisexual and transgender people, their history, lives and experiences. Our resource group hosted breakfasts in each office to update on their achievements over the last three years and the work they are undertaking to promote allyship and inclusion. We have also enjoyed their podcast series celebrating the lives and experiences of members of both our internal and external LGBT+ community exploring this year's theme of art in politics.

Listen here:

Episode 1 | Episode 2 | Episode 3

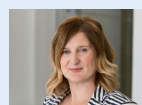
ESG

Environmental, social and governance (ESG) considerations are at the forefront for governments, regulators, consumers and employees. When it comes to developing, implementing and reporting on strategy, businesses are beginning to see ESG as central to creating long-term value.

ESG is proving a material driver of financial performance and business resilience. Businesses cannot ignore the growing momentum behind ESG and the drive to greater disclosure and transparency.

We have a dedicated global cross-practice ESG group, which provides solutions to our clients both in addressing ESG risks, opportunities and compliance, as well as ESG-related litigation.

Tom Hancocks took the opportunity to write about ESG in relation to how it is shaping our firm's strategy and how it is becoming essential to the work our firm undertakes.



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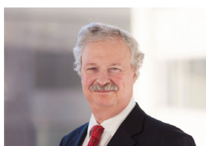

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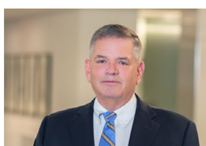

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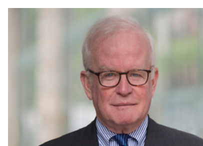

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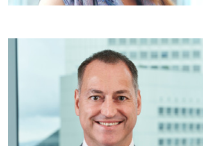

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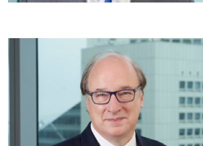

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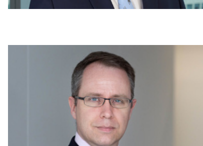

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