

Article 55 & trade finance

Summary

This note summarises the impact of requirements for contractual bail-in under Article 55 of the BRRD on trade finance. It provides a high-level explanation of the different trade finance products and services that banks provide and why it would be inappropriate to include these within the scope of any bail-in.

For simplicity, we describe the implications for UK-incorporated banks and UK importers and exporters but the broad equivalent is true for other EU member states and their banks and importers and exporters.

Key points:

- It is practically impossible for banks to add contractual bail-in terms to some types of trade finance liabilities due to the use of international standard documentation and rules, the practice of having no express choice of governing law of contracts, the legal nature of certain trade finance liabilities and inability to impose unilateral changes to a contract because of the dominant bargaining position of non-customers (overseas counterparties and beneficiaries) in many trade finance transactions;
- BBA members are very concerned that a requirement to implement contractual bail-in provisions will lead to a fall in the number of trade finance transactions that can be undertaken by UK/EU banks. This will, as a consequence, hinder the ability of UK, EU and non-EU clients to access trade finance, in contradiction to government policy to support import and export activity, with a possible impact on the economy. In particular, SMEs and Mid Markets clients are likely to be affected as they very often have only one banker, as compared with larger corporates who may have access to the services of several banks;
- Even if it were possible to implement Article 55 provisions, it is not clear that the bail-in of contingent liabilities arising from trade finance products (e.g. letters of credit) would provide resources to support recapitalisation. Furthermore, the bail-in of trade finance liabilities would undoubtedly result in a reduction in payments due to the bank under resolution from its counterparties and potential contagion to other institutions in the same market; and
- The implementation of Article 55 therefore needs to be postponed until its scope is redefined, via the forthcoming review of MREL. At a minimum, there needs to be clarification that resolution authorities will consider trade finance liabilities to satisfy the conditions for exclusion from bail-in and therefore the requirements of Article 55.

Background

Article 55(1) of the BRRD introduces a requirement that European institutions¹ include contractual terms in agreements with respect to liabilities governed by the law of a third (non-EEA) country recognising the possibility that the liability may be subject to the BRRD bail-in powers exercised by a resolution authority and binds the holder to accept any reduction of the principal, conversion or cancellation. The requirement applies from 1st January 2016 at the latest. The Article specifies that the requirement does not apply:

¹ EU banks, building societies, 730K investment firms, EU financial holding companies and EU financial institutions that are subsidiaries of the foregoing

- to any liability that is excluded from the scope of bail-in under Article 44(2) of the BRRD or to deposits which rank senior to other senior unsecured liabilities under Article 108(a)²;
- to any liability issued or entered into before the Member State applied the provisions to transpose the requirement; or
- where an EU resolution authority determines that the liabilities in the third (non-EEA) country can be subject to bail-in under the law of the third country or where there is a binding agreement concluded with the third country.

Trade finance

Trade finance is a term used to refer to the financial component of an international trade transaction, i.e., managing the payment for goods and/or related services being imported or exported, but can also cover managing bonding and guarantee requirements in connection with cross-border supplies of goods and services to governmental or commercial buyers (for example bid bonds, advance payment guarantees, retention bonds and performance bonds). Trade finance activities may include issuing or confirming documentary (also known as 'commercial') or standby letters of credit, issuing demand or shipping guarantees, letters of indemnity in oil trades, accepting or availing bills of exchange (for instance, the context of a documentary letter of credit or a documentary collection), availing promissory notes, issuing bank payment obligations under Uniform Rules of Bank Payment Obligation, payment guarantees as an import factor under international factoring rules and issuing irrevocable reimbursement undertakings. In effect, trade finance products are near-cash payment methods and the inclusion of bail-in provision appears to be contrary to the BRRD safeguards for the continuity of critical economic functions and the financing of European economies.

A number of trade finance products are typically governed by uniform international industry rules and procedures set by the International Chamber of Commerce ('ICC') and other industry organisations. Indeed, documentary letters of credit and irrevocable reimbursement undertakings are without exception issued subject to the relevant ICC rules. By way of example, a summary of different sample products and the impact of Article 55 on these is provided in the annex.

There is also an active market for the sale and purchase of risk in such trade finance transactions. There is an element of liability of UK/EU banks when they purchase or sell such risks. The ability of UK/EU banks to acquire, divest and manage the risk in their portfolio is critical and the inclusion of the bail-in provision could hinder this ability.

Practical and legal challenges

The current indication is that it is possible that all of the trade finance instrument types mentioned above will be subject to the requirements of Article 55. If that is the case, it should be noted that it will be practically impossible for UK/EU banks to comply with the requirement to include contractual recognition terms in these types of liabilities.

Standard documentation

Many trade finance instruments operate under standard rules and electronic message formats³ set and governed by international bodies. For example, letters of credit operate under a set of rules known as Uniform Customs and Practice for Documentary Credits ('UCP') governed by the ICC to ensure uniformity of terms and conditions whether providing finance to clients in or outside the EU. The current 2007 version is the sixth revision since the rules were first introduced in 1933. As such, it is simply impossible for UK/EU banks to be in a position to amend these standards to include

² Eligible deposits from individuals & SMEs which exceed the coverage level and deposits from individuals & SMEs that would have been eligible had they not been made through branches located outside the EU

³ Trade finance instruments such as irrevocable reimbursement undertakings are in a specific form of SWIFT message which have a very limited number of characters

contractual recognition ahead of 1st January 2016, if at all. The effectiveness of international trade finance relies on banks' ability to adhere to these international rules and standards, unamended.

Governing law

A further complication relates to the market convention not to express a choice of governing law. For documentary letters of credit this is the global practice without exception. For guarantees and standby letters of credit, some instruments do contain an express choice of governing law but this is in the minority of cases and it is not always possible to have an EU governing law particularly where these relate to domestic transactions. Many trade finance transactions involve counterparties, beneficiaries and financial institutions in a number of jurisdictions acting in a variety of capacities together with cross-border goods and payment flows. In the absence of an express choice of law, trying to establish whether any particular liability in a transaction or series of transactions could be governed by the law of a third (non-EEA) country and therefore subject to Article 55(1) requirements may present practical and legal difficulties and may not be conclusive.

Beneficiary/seller agreement

It is anticipated that banks will face significant resistance from beneficiaries of letters of credit, bonds and guarantees to the implementation of contractual recognition terms. It will certainly not be possible to impose the terms into ongoing trade finance instruments and arrangements, which have liabilities which arise after 1st January 2016. Article 55 requirements would cut across a key motivation for beneficiaries/sellers who require their buyers to arrange the issuance of a trade finance instrument by a bank to ensure certainty of payment.

As such, it is highly questionable from practical, commercial and legal perspectives whether it will be possible for banks to comply with the requirements of Article 55 when dealing with non-EEA counterparts, be it clients and their counterparts (beneficiaries or other), or other banks / financial institutions.

Market response

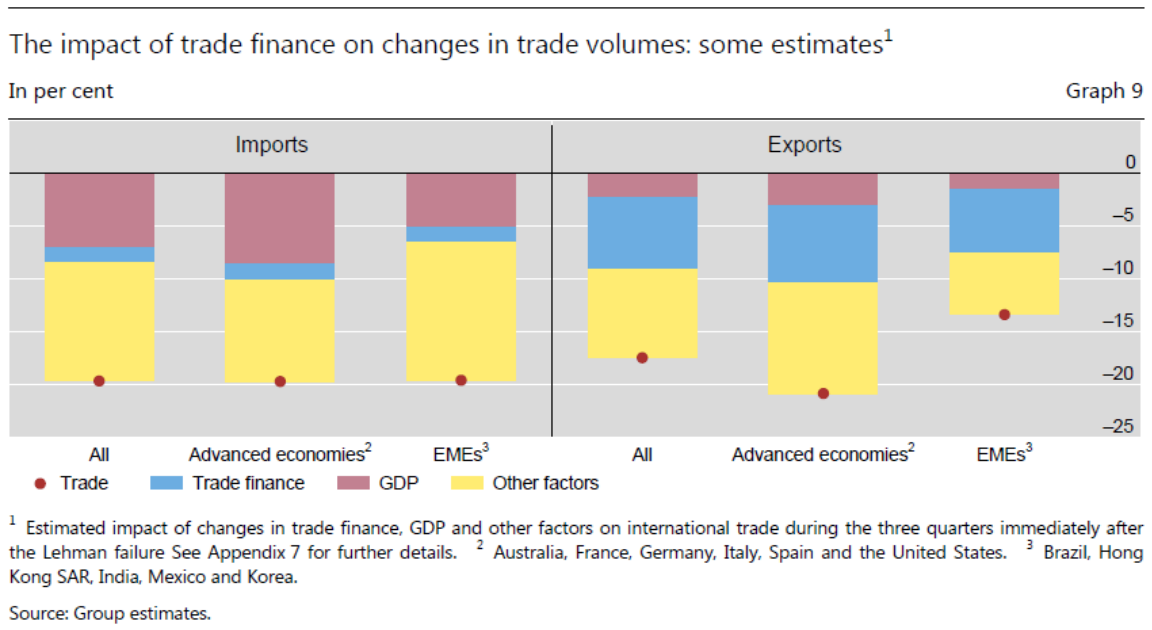
The consequences of Article 55 for trade finance will arise in a number of ways. For the reasons discussed above, it is, for example, very unlikely that an exporter whose objective is to achieve certainty of payment would accept a term which brings this certainty into question. The most likely outcome of an attempt by an UK/EU bank to include a contractual recognition provision is therefore that the exporter will insist the importer transacts with a bank which is not subject to Article 55 requirements, and thereby practically ruling out UK/EU banks (and those clients that rely on them) from the trade finance arena for the most impacted types of trade finance instrument.

Reduction in trade

Trade finance provided by UK/EU banks plays an important role in promoting free trade by supporting the timely and efficient movement of goods, documents and payments. This relies on adhering to recognised international banking standards. A move in the market away from the provision of trade finance by UK/EU banks is likely to have a direct impact on the ability of UK/EU clients, SMEs and Mid Markets clients in particular, to access trade finance solutions and lead to a consequent fall in trade. This will weaken the competitiveness of UK/European clients in international markets with potential adverse economic effects for UK/EU GDP. It is noteworthy that analysis of the financial crises conducted by the United Nations found that '...increasing difficulty in obtaining trade finance was a contributing factor explaining the large declines in trade during the crisis'⁴. More recently, the BIS concluded that, whilst reduced global demand was the main driver, '...trade finance disruptions had a secondary but economically significant role in the sharp reduction in global

⁴ United Nations Economic Commission for Europe: "[The global financial crisis and its impact on trade: The world and the European emerging economies](#)", September 2010, p12

trade volumes in the quarters following the Lehman bankruptcy⁵. Indeed, it concludes that ‘...reduced trade finance could have accounted for as much as two fifths of the fall in export volume...’⁶ in the period after the collapse of Lehman Brothers, as shown in the following graphic⁷.



Impact on SMEs and Mid Markets clients

Whilst an inability for UK/EU banks to offer trade finance will be disruptive to larger corporates, in time it is to be expected that they will be in a position to transact with banks not subject to the requirements of Article 55. It is less certain, however, whether SMEs and Mid Markets clients, who tend to have UK/EU banking relationships, will be in a position to access trade finance solutions potentially from non UK/EU banks or other players in the market.

Questionable benefits of trade finance bail-in

Should the contractual recognition clause be included in trade finance liabilities, it is far from clear that a bail-in of these liabilities would contribute in a beneficial way to a successful resolution.

Contingent nature

Trade finance liabilities arise from the desire to support and fund trade transactions rather than the need to fund the bank. Their nature is closely linked to ‘cash’, as opposed to ‘debt’. The liabilities are either contingent or will at some point be fulfilled⁸. To contribute to the recapitalisation of a bank under resolution, the liabilities would need to become actual and payable at a future date.

Recourse to another party

Trade finance liabilities are not usually created on a standalone basis, typically a particular liability of a bank would form part of a bigger picture. For example, a simplified chain of parties for a documentary credit or bill of exchange would be: buyer – buyer's bank – seller's bank – seller. The

⁵ BIS, Committee on the Global Financial System: “[Trade finance: developments and issues](#)”, January 2014, p23

⁶ Ibid

⁷ Ibid, p25

⁸ Guarantees, standbys and sight letters of credit are contingent for the majority of their life. Deferred payment documentary letters of credit and bills of exchange/promissory notes this is case for the minority of their life in many cases.

buyer's bank would identify a local bank to the seller to accept presentation from the seller on the issuing bank's behalf. The seller's bank would look to the issuing bank to be reimbursed for any payments made under the structure and in turn the issuing bank would also be indemnified/have the right to be immediately reimbursed by its customer on paying out under such an instrument.

The contribution that trade finance liabilities could make to resolution is therefore reduced by the fact that as soon as a bank fulfils its trade finance payment undertaking, it should have a right to be reimbursed.

If a bank in the chain pays out a reduced amount, that will automatically mean the amount it is entitled to claim from its customer or the next bank in the chain is reduced by the same amount, so there is no financial gain for a bank resolution that applies a haircut to a trade liability it has an obligation to pay.

Contagion

The nature of international trade finance leads to networks of banks working together to act on different sides of trade finance transactions. If a bail-in was applied to the trade finance liabilities of a UK/EU bank under resolution it is likely that counterparties would cease to pay amounts due to such bank in resolution heightening its distress. Furthermore, there is a risk that this contagion could spread to other banks located in the jurisdiction in which the bail-in occurred.

Recommendations

The application of Article 55 to critical services banks provide to the economy, such as trade finance, cannot have been the intention of the European legislators⁹. As Article 55 is due to enter into force on 1st January 2016 policymakers must take urgent action to address the very serious unintended consequences that will arise as a result.

Postpone implementation of Article 55

The BBA believes that the simplest solution would be for the UK/EU authorities to postpone the implementation of Article 55 until such time as the scope of the requirement can be reconsidered bearing in mind the points raised. The forthcoming MREL review is the most obvious opportunity for this, which indicates the need for a 24 month postponement to permit time for the review to be concluded and legislation to be adopted.

Exclude trade finance from the scope of bail-in

If postponing the implementation of Article 55 is not possible, then resolution authorities should confirm that the exclusion from bail-in for commercial or trade creditors under Article 44(2)(g)(ii) of the BRRD can be read to include trade finance as provided by UK/EU banks.

Another option would be to use the forthcoming delegated act specifying the circumstances in which resolution authorities can exercise discretion to exclude an eligible class of liabilities from the scope of bail-in to provide an exemption for trade finance. Article 44(3) identifies four examples of where

⁹ The BRRD implies that the legislators' intention was that i) losses should be borne first by shareholders and next, in general, by creditors of the institution under resolution in order of preference (Art 45(9)(a)); ii) exclusions from bail-in should be limited to the minimum necessary to achieve the objective which justifies the exclusion (Art 44(3)(b-c)); iii) when considering the exclusion of liabilities from bail-in in exceptional circumstances resolution authorities should have regard to the level of loss absorbing capacity that would remain in the institution under resolution if the liability or class of liabilities were excluded (Art 45(9)(b)); iv) shareholders and creditors whose claims have been written down or converted into equity do not incur greater losses than they would have incurred in normal insolvency (Art 73(b)); and v) institutions do not have an inappropriate incentive to enter into liabilities issued under third country law.

such exclusion from bail-in might be appropriate. Trade finance would appear to satisfy the following three:

- b) the exclusion is strictly necessary and proportionate to achieve the continuity of critical functions and core business lines in a manner that maintains the ability of the institution under resolution to continue key operations, services and transactions;
- c) the exclusion is strictly necessary and proportionate to avoid giving rise to widespread contagion, in particular as regards eligible deposits held by natural persons and micro, small and medium sized enterprises, which would severely disrupt the functioning of financial markets, including of financial market infrastructures, in a manner that could cause a serious disturbance to the economy of a Member State or of the Union; or
- d) the application of the bail-in tool to those liabilities would cause a destruction in value such that the losses borne by other creditors would be higher than if those losses were excluded from bail-in.

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Annex: Trade finance products and the impact of Article 55

Product	Description	Practicality of implementing bail-in term	Likely contribution to resolution
<p>Avalisation of bills of exchange, often in the context of a documentary collection</p>	<p>A bill for collection is used where the buyer does not want to pay for goods on delivery and the seller is comfortable the buyer will not reject the goods but wants to be certain of payment before the seller hands control of the goods to the buyer. The seller asks its bank to present documents relating to the shipment of the goods, plus a bill of exchange drawn against the buyer, to the buyer's bank on condition that the buyer's bank does not release the shipping documents to the buyer (and so give the buyer control of the goods) unless and until the buyer accepts the bill of exchange and the buyer's bank avalises it. The terms of the collection are always made subject to a set of ICC rules that are not varied. When a bank avalises a bill, it is endorsing its promise to pay the bill in place of the acceptor paying. If the buyer and its bank agree to the collection terms, the buyer's bank hands the shipping document to the buyer and returns the accepted avalised bill of exchange to the seller via its banks (or holds the avalised bill to the seller's order).</p>	<p>A bill of exchange, like a personal cheque, is a very short document that in a trade context rarely if ever contains an express choice of governing law. Bills of exchange are actually layers of separate contracts because each party that adds its signature and endorsement to a bill of exchange creates a new contract. The law that will govern any endorsement of a bill (such as a bank endorsing an aval onto a bill) although it will be governed by the relevant local law, is fairly predictable because bill of exchange laws in most countries provide that the law that will govern the liabilities of an endorser of the bill is the law of the place where the endorsement was added to the bill. This means that bill avalisations by offices of UK/EU banks location that are endorsed within the EEA will not need the contractual bail-in provision added, but avalisations by branches of the banks located outside the EEA will need the bail-in term added to the endorsement in order to comply with BRRD Article 55 requirements.</p>	<p>When a bank agrees to avalise a bill of exchange for its buyer-customer, it will do so on the basis that the customer agrees to indemnify the bank if it pays out under the bill. If the avalising bank paid less than face value of the bill, it would be entitled to claim less from its customer and the holder of the bill could claim against the buyer for the difference. In practice, as the holder of the bill would have the option to claim payment from the buyer on the maturity date of the bill, this is probably what a holder of the bill would do in order to avoid being caught up in the resolution of the avalising bank.</p>

Avalisation of promissory notes	Like a bill of exchange, a promissory note is used to pay for goods when the buyer wants to pay for the goods later than when the goods are delivered and the seller is happy to accommodate this as long as a creditworthy party (i.e. the buyer's bank) is obliged to pay on the maturity date of the promissory note. The difference between the two is that where a promissory note is used, there is usually no collection via the seller's bank. The buyer will issue the promissory note, ask its bank to add its aval and then forward the note to the seller, who can hold it until maturity and present it for payment, or sell it (to its own bank, for instance) to get paid early.	The position is the same as for avalisation of bills of exchange.	The position is the same as for avalisation of bills of exchange.
Issuing a documentary letter of credit	Documentary letters of credit are used to pay for goods in situations where the seller does not want to ship the goods until it is certain it will be paid if it does so, and the buyer wants to be certain before it becomes obliged to pay for the goods that the goods are on their way and are of the correct specification and quantity. A documentary letter of credit is an irrevocable undertaking made by the buyer's bank to the seller that it will pay the seller up to the amount of the letter of credit if the seller presents specified documents (which in practice are documents that evidence shipment of the goods and their specification and quantity) to the bank. When the bank receives the correct documents from the seller it is bound to pay.	Documentary letters of credit are issued using a SWIFT message format that has no field to specify a governing law. They are without exception issued subject to the ICC UCP rules and the letter of credit itself virtually always contains no substantive legal terms.	The position is the same as for avalisation of bills of exchange.

<p>Confirming a documentary letter of credit</p>	<p>Sometimes, when a seller is unfamiliar with the buyer's bank, the seller will insist the buyer asks its bank to arrange for a bank local to the seller to "add its confirmation" to the documentary letter of credit under which it will be paid for goods it is selling to the buyer. When a bank "adds its confirmation" or "confirms" a documentary letter of credit, the confirming bank is making the same undertaking to the seller/beneficiary (i.e. to pay against presentation of documents) as the issuing bank.</p>	<p>The ability of a confirming bank to qualify its obligations as confirming bank, for instance, by making them subject to a bail-in provision, are even more constrained than that of the issuing bank. Being authorised to add your confirmation to a letter of credit is a take-it-or-leave it request. If a confirming bank added a bail-in provision to its confirmation without first obtaining the authority of the issuing bank to do so, it would run the risk of its rights to be reimbursed by the issuing bank being impaired.</p>	<p>The position is the same as for avalisation of bills of exchange, except instead of the confirming bank having a right of recourse to the buyer it has a right to be reimbursed by the issuing bank.</p>
<p>An issuing bank's liabilities to a confirming or other nominated bank under a documentary letter of credit</p>	<p>To allow flexibility for the seller's bank to speed up payment to the seller/beneficiary under a letter of credit, the ICC UCP rules oblige an issuing bank to reimburse a confirming bank (or any other bank via whom the issuing bank authorises the seller/beneficiary to present documents, called a "nominated bank") who pays the seller under the letter of credit.</p>	<p>To comply with BRRD Article 55, the issuing bank would have to make its obligation to reimburse any nominated bank subject to a bail-in provision. This would be as challenging in practice as getting a seller/beneficiary to agree to a bail-in provision, because the seller/beneficiary would object to this flexibility for facilitating early payment being impaired, as would the nominated bank.</p>	<p>The position is the same as for avalisation of bills of exchange, except instead of a right of recourse to the buyer the nominated bank has a right to be reimbursed by the issuing bank.</p>
<p>Acceptance of bills of exchange</p>	<p>Some documentary letters of credit (for instance virtually all letters of credit issued to sellers in Asia) require the seller of goods (the beneficiary under the letter of credit) to present a bill of exchange drawn against the issuing or confirming bank. If the beneficiary has made a complying presentation the relevant bank is obliged to accept the bill of exchange and when it does the seller's rights under the letter of credit conclude and its rights to be paid</p>	<p>The position is the same as for avalisation of bills of exchange.</p>	<p>The position is the same for the issuing bank as for avalisation of bills of exchange and for the confirming bank the position is the same as for any other type of letter of credit it confirms.</p>

	<p>under the bill of exchange take over. As the bill of exchange is easier to transfer than the right to be paid under a letter of credit, having the accepted bill of exchange gives the seller more flexibility if it wants to sell the bill in order to receive payment earlier.</p>		
Demand guarantees	<p>Demand guarantees (in all their forms – customs bonds, tender bonds, bid bonds, advance payment guarantees, rental deposit guarantees, performance guarantees to name but a few) as their names suggest, are not a primary method of payment. They are used to shift the economic burden of a dispute (if one arises in connection with the underlying trade transaction the guarantee supports) from one party to another. For instance, if a seller trusts its buyer to pay 90 days after goods are shipped and it ships goods to the buyer once a month, the seller might ask the buyer to provide a payment guarantee covering the anticipated value of three shipments, so that if the buyer fails to pay for a shipment on day 90, the seller can claim under the guarantee for the price of that shipment plus the two others it will already have shipped by the time the buyer's payment default on the first shipment happens. Apart from the fact that the documents the seller/presents to make a claim are different, a guarantee works in the same way as a documentary letter of credit, but confirmation of a guarantee is not possible.</p>	<p>Guarantees are used to support all kinds of transactions in all sorts of ways, so standbys generally contain more substantive terms than documentary letters of credit. There is sometimes scope for the issuing bank (guarantor) to negotiate changes with the beneficiary and its customer and there is sometimes an express choice of governing law. In these situations, there is some opportunity for an issuing bank to negotiate for inclusion of a bail-in provision or for an EEA law to govern. However, many guarantees are issued for the benefit of public authorities (e.g. customs authorities, or in the context of big construction projects commissioned by public authorities) and in these situations there is little or no scope for negotiation of the guarantee's terms, which sometimes may be prescribed by local law.</p>	<p>The position is the same as for avalisation of bills of exchange.</p>

Issuing standby letters of credit	Standby letters of credit perform the same purpose as demand guarantees. The reason both exist is that they evolved independently in different markets. Beneficiaries in the United States and areas influenced by the US (e.g. the Philippines, South America) prefer standby letters of credit, as do some industry sectors. Elsewhere guarantees are more popular. Standby letters of credit work the same way as documentary letters of credit and guarantees, except confirmation is possible (although rarely used in practice).	The position is broadly the same as for demand guarantees.	The position is the same as for avalisation of bills of exchange.
Irrevocable reimbursement undertakings	These are used between banks involved in documentary letters of credit where, e.g. a confirming bank is unsure of the creditworthiness of the issuing bank and so insists the issuing bank arranges for another (more creditworthy) bank to be obliged to pay the confirming bank on behalf of the issuing bank. The issuing bank asks another bank to issue an irrevocable reimbursement undertaking in favour of the confirming bank in return for an indemnity from the issuing bank. The reimbursing bank then makes an irrevocable undertaking to pay the confirming bank on demand by the confirming bank. This undertaking is almost always made subject to a set of ICC rules and so is very short-form. Often the reimbursing bank will also agree to defer its request for reimbursement for a pre-agreed period in return for payment of interest on the reimbursement amount (i.e. effectively grant a loan the issuing bank).	As the purpose of having an irrevocable reimbursement undertaking is to give the receiving bank certainty of payment, any attempt to add a bail-in would be commercially unacceptable to the receiving bank. Also if the issuing bank is required to make its indemnity to the reimbursing bank subject to a bail-in provision, this will be commercially unacceptable to the reimbursing bank.	The position is the same as for avalisation of bills of exchange, except the reimbursing bank has recourse to the issuing bank rather than the buyer.

<p>ECA-backed finance</p>	<p>Export finance, another key tenet of trade finance, is supported by guarantees and insurance policies from sovereign export credit agencies (ECAs) made available to UK and EU banks (similar to the UK Export Finance, the operating name of the Export Credits Guarantee Department of the UK government). These guarantees provide credit support for trade loans, ship and aviation financing made available to finance payments under supply contracts between importers and exporters. A number of the insurance policies provided by ECAs are under non-EU laws, e.g. US Eximbank, Korea K-Sure and Chinese Sinasure. As there are obligations to pay premia.</p>	<p>Unlike other commercial contracts all ECA guarantees are usually governed by the law of the sovereign to which they relate. Some ECA guarantees, e.g. MIGA (Multilateral Investment Guarantee Agency) have no governing law provision at all. The terms and conditions of the ECA guarantees are standard and the likelihood of any sovereign ECA agreeing to renegotiate these terms to include bail-in which would facilitate the non-payment of premia is remote.</p>	<p>The exercise of bail-in by the amendment or cancellation of liabilities under the ECA policy or guarantee will result in a failure to comply with the terms of the relevant non-EU law governed ECA policy or guarantee resulting in it becoming void, thereby removing the credit support, insurance cover and beneficial regulatory capital treatment which are the primary economic reasons/benefits the ECA policy were sought by the bank.</p>
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