

Strafford

presents

Financing In-Transit Inventory: Legal Risks to Lenders

Structuring In-Transit Financing to Protect Lenders
From the Risk of Borrower Insolvency

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

James C. Chadwick, Partner, **Patton Boggs**, Dallas

C. Edward Dobbs, Partner, **Parker Hudson Rainer & Dobbs**, Atlanta

Thomas Hemmendinger, Of Counsel, **Brennan Recupero Cascione Scungio & McAllister**, Providence, RI

Wednesday, March 31, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers.
Please refer to the dial in/ log in instructions emailed to registrations.

For CLE purposes, please let us know how many people are listening at your location by

- closing the notification box
- and typing in the chat box your company name and the number of attendees.
- Then click the blue icon beside the box to send.

**Financing In-Transit Inventory: Legal Risks to
Lenders**
**Structuring In-Transit Financing to Protect Lenders From the
Risk of Borrower Insolvency**

James C. Chadwick - Partner
Patton Boggs LLP - Dallas, TX

C. Edward Dobbs – Partner
Parker, Hudson, Rainer & Dobbs LLP - Atlanta, GA

Thomas Hemmendinger - Of Counsel
Brennan, Recupero, Cascione, Scungio & McAllister, LLP - Providence, RI

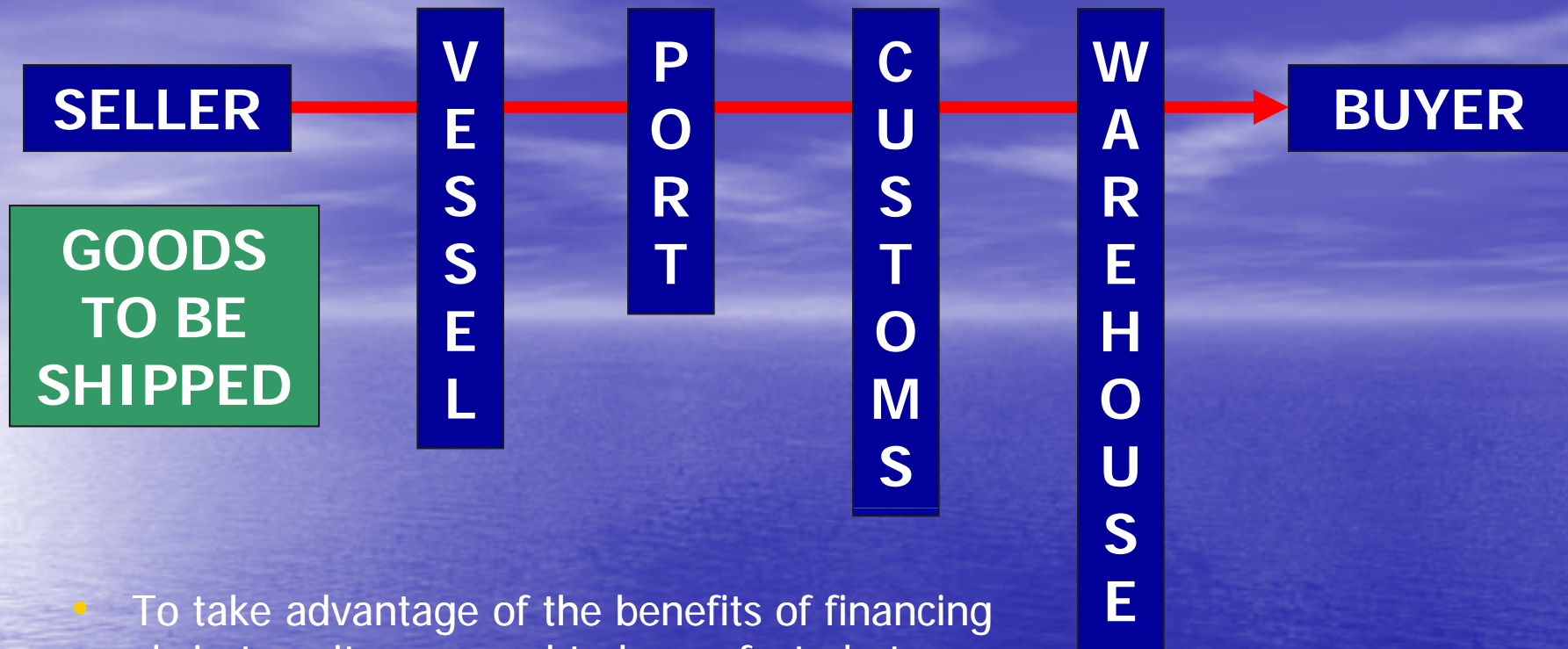
*Presented via webinar for Strafford Publications
March 31, 2010*

Financing Goods in Transit

- Competitive Advantages for your Lender clients
 - Provides additional liquidity for borrowers
 - If done properly, risk profile is comparable to a letter of credit structure
 - Enhanced collateral position for the Lender
 - Reduces credit risk resulting from interruptions in borrower's supply chain

Practical Example

- Damascus Steel Transaction
 - \$135,000,000 credit facility
 - Steel being transported from China and other countries to the United States was the primary source of raw materials for the borrower
 - The lender was able to perfect its interest in the in-transit steel and provide up to \$40,000,000 additional availability
 - The ability to do the deal allowed the lender to establish a business relationship that can now be extended into other banking products



- To take advantage of the benefits of financing goods in transit, you need to be perfected at every point in this chain

- Not every financial institution has this capability, but by mastering this material, you can be prepared to assist your clients with their opportunities to finance goods in transit
- Note that goods in transit can also be financed through a letter of credit structure, which does not present the same issues as the types of transactions we will discuss today

Basics of Goods in Transit

- Common Modes of Transportation
 - Ocean Vessel, Aircraft, Rail and Motor Truck



Basics of Goods in Transit

- Terminology
 - Seller and Buyer
 - Shipper, Consignor, Consignee
 - Vessel Owner, Carrier, NVOCC, Charter Party
 - Customs Broker
 - Customs Bonded Warehouse and Free-Trade Zone

Basics of Goods in Transit

- Documentation
 - Bill of Lading (Clean On Board)
 - Sets forth the contractual terms of carriage
 - Possibly evidences title to the goods
 - Straight Bill of Lading – Not Negotiable
 - Order Bill of Lading – Negotiable and Title is “Locked Up” in the Bill
 - Carrier obligation to deliver
 - Master bills vs. house bills

Basics of Goods in Transit

- Documentation
 - Certificate of Origin of the Goods
 - Commercial Invoice
 - Certificate of Inspection
 - Evidence of Insurance
 - Arrangements with Other Parties Expected to Receive Possession of the Goods
 - Freight Forwarders
 - Customs Brokers
 - Storage Companies

Potentially Applicable Laws

- Many laws can govern the rights of the parties in the goods
- Here's what we need to know:
 - Where are the goods coming from?
 - Where are they going?
 - How are they getting there?
 - How do the parties plan to document their arrangement?
 - Where will the documents be located?

Potentially Applicable Laws

- UCC Articles 2, 7 or 9
 - We are seeing more discussion of electronic bills of lading as Revised Article 7 has been adopted by more states
- U.N. Convention on Contracts for the International Sale of Goods (“CISG”)
 - Addresses contract formation, risk of loss, delivery and payment obligations and rights of parties upon breach
- U.N. Convention on the High Seas

Potentially Applicable Laws

- Law of the Sea
 - Though not ratified, the United States generally complies with this body of law
- U.S. Carriage of Goods by Sea Act
- International Commercial Terms (“Incoterms”) adopted by the International Chamber of Commerce
 - Be aware that defined terms in international commerce are very different than those used in domestic commerce.

Perfecting a Security Interest in Goods in Transit

- Attachment with respect to the goods
 - The choice of law, extraterritorial reach of applicable law and commercial standards will determine when the Borrower obtains “rights” in the goods
- Perfection of a security interest in the goods
 - Perfection by filing under the UCC
 - Perfection by possession of the goods
 - These may be affected by the applicability of 11 U.S.C. §544

Perfecting a Security Interest in Goods in Transit

- Generally, the laws of most countries will recognize the rights of a secured lender that is:
 - The holder of an order bill of lading
 - The consignee of a straight bill of lading
 - A party to an attornment letter where the buyer is a consignee of a straight bill of lading
- Controlling the package of documents is important in protecting the secured lender's interest in the goods

Competing Claimants to Goods in Transit

- In any transaction, expect that there will be competing interests for the goods
 - Manufacturer/Seller
 - Carrier
 - Customs Broker
 - Other Secured Creditors
 - NVOCC
 - Lien Creditors and Title Retention Creditors
 - Borrower (sometimes known as the "trustee in bankruptcy")

Common Complications

- Claims of sellers and the creditors of sellers
 - Stoppage in transit
 - Reclamation
 - Possible impact of §2-505 of the UCC
 - Title retention laws and conditional sales contracts
 - Possible implications of CISG and Incoterms
- Dealing with logistics providers
 - Letters of indemnity may help smooth this process
- Double-pledging of goods or documents
- Customs problems
- Political risk

Bankruptcy Concerns

- Lien Avoidance Issues
 - If you have considered the applicable law and taken the appropriate perfection actions, the Trustee in Bankruptcy will not be able to avoid your lien
- Motion for Adequate Protection
- DIP Financing and Third-Party Priming Liens
- These issues will typically arise in the bankruptcy of a seller or buyer, but the bankruptcy of a carrier, broker or other logistics provider can also be a problem

Strategies for Goods in Transit Transactions

- Recognize that it may be impossible to maintain a pristine first priority lien at all times and in all places
- Control the shipping documents and all duplicate originals, if possible
- Utilize insurance to the extent practical

Strategies for Goods in Transit Transactions

- Utilize intercreditor agreements to the extent practical to neutralize claims of third parties
 - Lien priorities
 - Indemnification issues
 - Bailee issues
 - Extent of obligations secured by custom broker's/NVOCC's/carrier's liens
 - Consent of Borrower

Strategies for Goods in Transit Transactions – Due Diligence

- Understand the involvement of third parties
- Understand the sale terms and governing law
 - If the transaction is significant, retain local counsel to provide analysis of governing law
- Understand the shipping terms
- Review the standard forms of the shipping documents
 - Bills of Lading
 - Invoices and sales documents
 - Evidence of insurance

Strategies for Goods in Transit Transactions – Loan Documentation

- Carefully define each of the following:
 - Eligible foreign vendors
 - Attempt to obtain a vendor agreement
 - Eligible in-transit goods
 - Eligible NVOCC
 - Attempt to obtain an imported goods agreement
 - Acceptable Bill of Lading

Parting Thoughts

- Obtaining a perfected security interest in goods in transit can provide a significant benefit to your lender clients
- Always identify where the goods and documents will be at all stages of the transaction
- By mastering this material, you can be prepared to assist your clients with their opportunities to finance goods in transit

All Questions Answered . . .

All Knowledge Shared

Thank You For Your Time and Interest!

For More Information Call Or E-mail:

James C. Chadwick

Patton Boggs LLP

2000 McKinney Avenue, Suite 1700

Dallas, Texas 75201

Telephone: (214) 758-1575

Facsimile: (214) 758-1550

Cell: (214) 704-5457

e-mail: jchadwick@pattonboggs.com

website: www.pattonboggs.com

C. Edward Dobbs

Parker, Hudson, Rainer &

Dobbs LLP

285 Peachtree Center Avenue, NE

1500 Marquis Two

Atlanta, GA 30303

Telephone: (404) 420-5529

Facsimile: (404) 522-8409

e-mail: ced@phrd.com

website: www.phrd.com

Thomas S. Hemmendinger

Brennan, Recupero, Cascione,

Scungio & McAllister, LLP

362 Broadway

Providence, Rhode Island 02909

Telephone: (401) 453-2300

Facsimile: (401) 453-2345

e-mail: themmendinger@brdsm.com