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Financing In-Transit Inventory: Perfecting Security Interests and Resolving Priority Disputes

Lender Due Diligence, Bankruptcy Risks, Intercreditor Agreements
With Third Parties With Competing Interests in the Goods

TUESDAY, NOVEMBER 24, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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***FINANCING IN-TRANSIT
INVENTORY: PERFECTING
SECURITY INTERESTS AND
RESOLVING PRIORITY DISPUTES***

C. Edward Dobbs
Thomas S. Hemmendinger

November 24, 2015

INTRODUCTION—the Typical Situation

- Goods shipped to the US
 - US buyer
 - Foreign seller
 - Buyer uses NVOCC or forwarder
 - Buyer uses customs broker

INTRODUCTION—the Typical Situation

- Key documents
 - Commercial invoice
 - Export and import documents
 - Bill of lading or other transport document
 - Intercreditor agreement

INTRODUCTION—the Players

- Seller (shipper)
- Buyer (borrower)
- Carrier (steamship line or airline)
- Intermediary (NVOCC, freight forwarder, Customs broker)
- Warehouse
- The Government
- Buyer's bankruptcy trustee

THE LAW—Agreement of Sale

- Uniform Commercial Code—Articles 2, 5, 7 and 9
- UN Convention on the International Sale of Goods (CISG)
- Foreign law
- INCOTERMS 2010

THE LAW—Contract of Carriage

- Admiralty law
- UCC Article 7
- Federal Bills of Lading Act (Pomerene Act),
49 U.S.C. §§ 80101 - 80116

THE LAW—Contract of Carriage

- Carriage of Goods by Sea Act (COGSA), Ch. 229, 49 Stat. 1207 (1936), formerly 46 U.S.C. App. §§ 1300 - 1315
- Harter Act, 46 U.S.C. §§ 30701 – 30707
- Warsaw Convention of 1929 and Montreal Convention of 1999
- Carmack Amendment, 49 U.S.C. § 11706
- UN Convention on the Law of the Sea
- Geneva Convention on the High Seas

FINANCING THE TRANSACTION

- Classic transaction—documentary letter of credit
- Asset-based model—more common now

BILL OF LADING BASICS

- Negotiable bill of lading
- Non-negotiable (straight) bill of lading
- Waybill
 - Air
 - Sea
- Express bill
- Forwarder's cargo receipt

ATTACHMENT

- Debtor's rights in the collateral
 - When title passes
 - UCC § 2-401(1)
 - CISG art. 4
 - When the seller completes its obligations
 - UCC § 2-401(2), CISG arts. 66-70, and INCOTERMS 2010

PERFECTION: Multiple Approaches

- File a financing statement as to the goods and the documents—UCC §§ 9-307, 9-309, and 9-312
- Bill of lading
 - Secured party named as consignee—UCC § 9-312(d)(1)
 - Notice to carrier—UCC § 9-312(d)(2)
 - Perfection in a negotiable document of title—UCC § 9-312(c)(1)
- 20-day automatic perfection—UCC §§ 9-312(e) and (f)
- Possession—UCC § 9-313

PERFECTION: Governing Law

- UCC § 1-301 (formerly UCC § 1-105)
- UCC § 9-301(3)(C)
- UCC § 9-307
- The flag of the vessel—is the vessel a “floating island”?

PERFECTION: the Practical Solution

- Understand the process and the documents
- Set reasonable expectations for the lender
- Control over what happens to the goods
 - Possession
 - Agency
 - Bill of lading basics

PERFECTION: the Practical Solution

- File financing statements
- Intercreditor agreements
 - With the one who gets the goods moved
 - With the vendor if possible

PERFECTION: Due Diligence

- Logistics chain
 - Who is in the logistics chain and what do they do?
 - Who is who on the transport documents?
 - What are the terms of the transport documents?

PERFECTION: Due Diligence

- The agreement of sale
 - Who is the seller? Is the seller related to the borrower?
 - What are terms of sale?
 - Is there cargo insurance?

PERFECTION: Intercreditor Issues

- Negotiate intercreditor terms
 - With the Seller
 - With the logistics providers
 - Carrier or NVOCC
 - Forwarder
 - Customs Broker

INTERCREDITOR AGREEMENTS: Vendors

- General approach
- Passage of title
- Lien or title retention
- Stoppage
- Reclamation

INTERCREDITOR AGREEMENTS: Carriers and Intermediaries

- General approach
 - What each party needs
 - What each party brings to the table
 - You're both on the same side

INTERCREDITOR AGREEMENTS: Carriers and Intermediaries

- Liens
 - Scope
 - Extent
 - Priority

INTERCREDITOR AGREEMENTS: Carriers and Intermediaries

- Enforcement
 - Advance notice
 - Lender's right to cure

INTERCREDITOR AGREEMENTS: Carriers and Intermediaries

- Indemnities
- Lender's ability to direct the goods

INTERCREDITOR AGREEMENTS: Loan Documentation Issues

- Borrowing base
 - Lower advance rate on in-transit goods
 - Carve-out for amounts owed to intermediaries

INTERCREDITOR AGREEMENTS: Loan Documentation Issues

- Borrowing base defined terms
 - Eligible foreign vendors
 - Eligible in-transit inventory
 - Acceptable logistics providers
 - Acceptable bill of lading
- Reporting requirements

PRIORITY DISPUTES

- Seller
- Carrier or intermediary
- Warehouse
- Another secured party
- Bankruptcy trustee

PRIORITY DISPUTES: Seller

- Stoppage in transit—UCC § 2-705; CISG art. 71
 - Crocker Nat'l Bank v. Ideco Div., 839 F.2d 1104 (5th Cir. 1988) (rigs); cf. Crocker Nat'l Bank v. Ideco Div., 889 F.2d 1454 (5th Cir. 1989) (engines)
 - Ramco Steel, Inc. v. Kesler, 620 F.2d 767 (10th Cir. 1980)
 - Kellstrom Indus., 282 B.R. 787 (Bankr. D. Del. 2002)
- Bill of lading—UCC §§ 2-505, 7-502, and 9-312(c)(2)

PRIORITY DISPUTES: Seller

- Reclamation—UCC § 2-702
- Security interest or retained title
 - UCC §§ 2-401 and 9-110
 - Chartered Bank v. Chrysler Corp., 115 Cal. App.3d 755, 171 Cal. Rptr. 748 (1981); cf. Hongkong and Shanghai Banking Corp. v. HFH USA, Inc., 805 F. Supp. 133 (W.D. N.Y. 1992)

PRIORITY DISPUTES: Carrier or Intermediary

- Carrier's lien
 - UCC § 7-307
 - Maritime law
- Security interest
 - First-to-file-or-perfect—UCC § 9-322
 - Purchase-money security interest—UCC §§ 9-103 and 9-324

PRIORITY DISPUTES: Other Secured Party

- First-to-file-or-perfect—UCC § 9-322
- Purchase-money security interest (PMSI)—UCC §§ 9-103 and 9-324

PRIORITY DISPUTES: Bankruptcy Trustee

- Turnover—11 U.S.C. § 542
- Strong-arm power—11 U.S.C. § 544
- Preference—11 U.S.C. § 547
- Limitations
 - Automatic stay—11 U.S.C. § 362(b)(3)
 - Other limitations—11 U.S.C. § 546

OTHER RISKS

- Seizure of goods
- *Force majeure* events
- Anti-corruption laws

All questions answered . . .

All knowledge shared

RESOURCES

- Neil B. Cohen and Edwin E. Smith, INTERNATIONAL SECURED TRANSACTIONS AND REVISED UCC ARTICLE 9, 74 Chi.-Kent L. Rev. 1191 (1999)
- Arnold Rosenberg, WHERE TO FILE AGAINST NON-U.S. DEBTORS: APPLYING UCC 9-307(c) [REV] TO FOREIGN FILING, RECORDING AND REGISTRATION SYSTEMS, 39 UCC L.J. 109 (2006)
- IN-TRANSIT INVENTORY - LOAN DOCUMENTATION AND PRACTICAL CONSIDERATIONS, ABA Section of Business Law Spring Meeting, April 2009, Vancouver, BC
- UCC v. INTERNATIONAL LAW: CLASH OF THE TITANS, ABA Section of Business Law Spring Meeting, April 2006, Tampa, FL

Thank you for your time and interest. For more information, please call or email:

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C. EDWARD DOBBS is a partner in the Atlanta office of Parker Hudson Rainer & Dobbs LLP, where he serves on both the commercial lending and bankruptcy practice groups. For more than 41 years, Ed has counseled financial institutions in syndicated lending arrangements, many of which involve borrower entities located in multiple countries. In addition, he frequently serves as counsel for bank groups and debtors in Chapter 11 business reorganization cases filed in bankruptcy courts throughout the United States. He is the author of two books and numerous law review articles, and is a frequent lecturer on commercial law topics. Ed is a fellow of the American College of Commercial Finance Lawyers, the American College of Bankruptcy, the Lawyers Foundation of Georgia and the American Bar Foundation. Moreover, he is the 2012 recipient of the Lifetime Achievement David W. Pollard Award, awarded by the Bankruptcy Section of the Atlanta Bar Association. Ed received his B.A. from Davidson College (1971) and his J.D. from Vanderbilt University School of Law (1974).



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THOMAS S. HEMMENDINGER is of counsel to Brennan, Recupero, Cascione, Scungio & McAllister, LLP, of Providence, Rhode Island, and Taunton, Massachusetts. He counsels financial institutions, logistics companies, and other businesses on Uniform Commercial Code matters, commercial loan documentation, commercial transactions, workouts, and commercial and bankruptcy litigation. He is the author of *Hillman on Commercial Loan Documentation* (Practising Law Institute, New York).

Tom is a member of the Uniform Law Commission (National Conference of Commissioners on Uniform State Laws) and a Fellow of the American College of Commercial Finance Lawyers. He is also a member of the American Bankruptcy Institute, the American Bar Association, and the Association of Commercial Finance Attorneys.

He received his A.B. from Brown University and his J.D. from the University of North Carolina School of Law, and is admitted to practice in Massachusetts and Rhode Island.