



Events

CLE

Shop ABA

Member Directory

Join

Log In

BUSINESS LAW SECTION
HOME

Practice Areas ▾

Section Events

Resources ▾

About ▾

Search Business Law ▾

[ABA Groups](#) | [Business Law Section](#) | [Business Law Resources](#) | [Business Law Today](#) | [May 2020](#)

Business Law Today May 2020

Cross-Border Lending: A Brief Guide for U.S. Secured Creditors to the UCC Rules for Perfecting Security Interests in Assets of Foreign Obligor

[Tracy Springer](#) and [Roshelle A Nagar](#)

May 14, 2020 ⌚ 6 min read



Commercial Transactions

UCC Article 9, Secured Transactions

Bankruptcy & Finance

Summary

- In today's global economy, cross-border lending activity is on the rise, with an increase in both the number of loans made to foreign borrowers and the number of participating foreign jurisdictions.
- A secured lender in the U.S. entering into a transaction with a foreign obligor(s) must comply with the provisions of the UCC in order to perfect its security interests in the foreign obligors' assets pledged as collateral.
- This article provides a brief guide to applicable UCC provisions and highlights some of the other enforcement and conflict-of-laws challenges lenders should understand when structuring and evaluating the merits of a proposed cross-border secured transaction.





iStock.com/vitacopS

In today's global economy, cross-border lending activity is on the rise, with an increase in both the number of loans made to foreign borrowers and the number of participating foreign jurisdictions. A secured lender in the United States entering into a transaction with one or more foreign obligors must comply with the complex provisions of the Uniform Commercial Code (UCC) in order to perfect or crystallize its security interests in the assets of foreign obligors that are pledged as collateral. This article provides a brief guide to applicable UCC provisions and highlights some of the other enforcement and conflict-of-laws challenges lenders should understand when structuring and evaluating the merits of a proposed cross-border secured transaction.

Under UCC Section 9-301, the "location" of an obligor determines the proper place for filing a UCC-1 financing statement to perfect a security interest in personal property. Section 9-307 sets out the rules for determining the "location" of U.S. and foreign obligors based on entity type, jurisdiction of formation, and place of business. As a general rule under section 9-307(b), for purposes of filing a UCC-1 financing statement, an obligor that is an organization with only one place of business is located at its place of business, and an obligor that is an organization with more than one place of business is located at its chief executive office.

However, section 9-307(e) provides an exception to this general rule for organizations formed under the laws of the United States. U.S. organizations are deemed to be "located" in the state in which they are formed. Accordingly, U.S. secured creditors file UCC financing statements in the state of formation of domestic obligors in order to perfect their security interests in such obligors' collateral.

Section 9-307(c) provides another exception to the general rule of section 9-307(b) for certain foreign obligors. It limits the applicability of section 9-307(b) to foreign obligors with a place of business or chief executive office "located" in a jurisdiction with a UCC-style public recordation system for tracking security interests and establishing priority against other secured parties. Foreign obligors whose place of business or chief executive office is not "located" in a jurisdiction with a UCC-style public recordation system are deemed to be "located" in Washington, D.C. Two key policy considerations underlying this section 9-307(c) exception for foreign obligors are: (1) an interest in providing a reliable and streamlined framework for U.S. secured parties to search, perfect, and protect the priority of their security interests in collateral of foreign obligors; and (2) facilitating lower transactional costs for borrowers and U.S. lenders.

A few hypotheticals are useful to understand the filing rules for foreign obligors:

In the first hypothetical, the obligor is a Canadian company with its chief executive office in Toronto, Ontario. Given that Ontario has a UCC-style public recordation system, a U.S. lender making a loan secured by the assets of such Canadian obligor would file a financing statement in Ontario to perfect its security interest in such

Bankruptcy & Finance

Personal Property Secured

Transactions

Nov 08, 2023

Bankruptcy & Finance, Business of Law

Business Law 101 — What You Should Know about Uniform Laws

Sep 07, 2023

Bankruptcy & Finance

July 2023 in Brief: Bankruptcy & Finance

Jul 31, 2023

Bankruptcy & Finance

In the Ditch: Remedies and Enforcement upon Default under the UCC

Mar 02, 2023

assets. As a precautionary measure, the U.S. lender may also choose to file a financing statement with the Recorder of Deeds in Washington, D.C., although such filing technically would not be required.

In the second hypothetical, the obligor is a Spanish company with its sole place of business or chief executive office in Spain. Assuming Spain does not have a UCC-style public recordation system, a U.S. lender making a loan secured by the assets of such Spanish obligor would file a financing statement in Washington, D.C. to perfect its security interest in such assets.

The analysis becomes more complex with hypotheticals involving foreign obligors with offices in the United States. In the third hypothetical, the obligor is a Canadian company organized under the laws of Toronto, Ontario, with its sole place of business in New York or with more than one place of business and its chief executive office in New York. Under section 9-307(b), for purposes of the UCC, the Canadian obligor would be deemed to be “located” in New York—the location of its sole place of business or chief executive office—and the exception set forth in section 9-307(c) for a filing in Washington, D.C. would not apply. A U.S. lender making a loan secured by the assets of such Canadian obligor would file a financing statement in New York to perfect its security interests in such obligor’s assets. The lender may also want to file a financing statement in Washington, D.C. as a precautionary measure, although such filing technically would not be required under either U.S. law or Ontario law.

In the fourth hypothetical, the obligor is a Spanish company with its sole place of business or chief executive office in New York. Under section 9-307(b), the Spanish obligor would be deemed to be “located” in New York, the location of its sole place of business or chief executive office. Given that New York, as the location of the obligor, has a UCC-style public recordation system, the exception set forth in section 9-307(c) for filing in Washington, D.C. would not apply regardless of whether Spain, as the obligor’s home country, has a UCC-style public recordation system. A U.S. lender making a loan secured by the assets of such Spanish obligor would file a financing statement in New York to perfect its security interests in such obligor’s assets. Again, the lender may also want to file a financing statement in Washington, D.C. as a precautionary measure, although such filing technically would not be required.

How does a U.S. secured lender determine whether a foreign jurisdiction has a UCC-style public recordation system? Some questions to consider are as follows: Does the foreign jurisdiction have a filing, recordation, or registration system for nonpossessory security interests in personal property? Does the foreign jurisdiction generally require filing in its registration system to achieve priority over competing lien creditors? Is filing information in the foreign jurisdiction’s system available to third-party searchers? Although there is no definitive list of jurisdictions with UCC-style public recordation systems, it is generally accepted and understood that such a list includes Canada, Australia, and New Zealand. For some foreign jurisdictions, the analysis may not be straightforward due to the limited scope of collateral covered, an inability to establish or determine priorities among competing secured creditors, or an inability to perform lien searches.

In addition to the UCC analysis regarding rules for perfecting security interests in foreign obligors’ assets, U.S. secured lenders in cross-border transactions should also consider, among other matters, potential enforcement risks and conflict-of-

laws issues. A U.S. secured lender cannot assume that a foreign court would recognize the validity or priority of a security interest created under the UCC and perfected by filing in Washington, D.C. or in another U.S. jurisdiction. In addition, under applicable conflict-of-laws principles for most tangible collateral, the “location of the debtor” rule only governs perfection and not the effect of perfection or nonperfection, or the priority of security interests. If a security interest in inventory of a foreign obligor is perfected by a UCC filing in Washington, D.C., but the inventory is located in the foreign country of the obligor’s formation, priority would be governed by applicable foreign law and not the Washington, D.C. UCC. For most intangible collateral of such a foreign obligor, the Washington, D.C. UCC would determine whether a security interest is properly perfected and whether it has priority over other security interests, but there still may be potential enforceability issues in the foreign obligor’s jurisdiction of formation. Accordingly, when structuring cross-border loans to foreign obligors with collateral located outside the United States, U.S. lenders should engage external counsel in the jurisdiction where the foreign collateral is located, in addition to following UCC requirements.

Authors



Tracy Springer

Tracy Springer is Counsel in the Finance Practice of Zukerman Gore Brandeis & Crossman, a full-service boutique law firm in New York City. Tracy specializes in finance transactions representing banks, direct lenders...

[View Bio →](#)



Roshelle A Nagar

Weil Gotshal & Manges LLP

Roshelle Nagar is of counsel in the Miami office of Weil, Gotshal & Manges LLP and a member of the firm’s Banking and Finance Group. Her practice focuses on the representation of financial institutions, private equity...

[View Bio →](#)

Business Law Section

Bankruptcy &
Finance

Internet Law &
Cybersecurity

Business Litigation
& Dispute
Resolution

Legal Opinions &
Ethics

Business
Regulation &
Regulated
Industries

Mergers &
Acquisitions

Securities Law

Corporations, LLCs
& Partnerships

Business of Law

Join

Events

Resources

Contact

Leadership

Authors

ABA Resources

ABA Journal

ABA-Approved Law Schools

Law School Accreditation

Bar Leadership

Legal Resources for the Public

ABA Career Center

Model Rules of Professional Conduct

The ABA

About the ABA

Work at the ABA

ABA Member Benefits

Office of the President

ABA Newsroom

Connect

Contact Us

Contact Media Relations

Web Staff Portal

    

Terms of Use

Copyright & IP Policy

Code of Conduct

Advertising & Sponsorship

Privacy Policy

Cookie Settings

®

®

© 2024 American Bar Association, all rights reserved.

