

## When Goods Are Shipped from Overseas, When Are They Considered “Received by the Debtor” for Purposes of Asserting a Section 503(b)(9) Administrative Claim?

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A bankruptcy court in Pennsylvania recently held that trade creditors who supplied goods to a debtor prior to its bankruptcy filing were not entitled to administrative priority status under Bankruptcy Code section 503(b)(9) because the goods were “received by the debtor” at the time they were placed on the vessel at the port overseas more than 20 days before the debtor’s bankruptcy filing, although the debtor took possession of the goods within the 20 day period. *In re World Imports, Ltd.* — B.R. —, 2014 WL 2750258 (Bankr. E.D. Pa., June 18, 2014).

Normally, trade creditors who have not received payment for their goods before the company’s bankruptcy filing can assert only unsecured claims for the value of those goods. This means that such trade creditors have a last-in-line position to recovery for their claims after creditors holding secured and priority claims. However, section 503(b)(9), added by the 2005 amendment to the Bankruptcy Code, enhances the position of trade creditors who supplied the debtor with goods during the 20-day period prior to the bankruptcy filing. Pursuant to section 503(b)(9), such creditors can assert an administrative claim for “the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.”

Despite its seemingly straightforward requirements, section 503(b)(9) has been the subject of litigation by debtors and creditors alike. In particular, several courts have had to address when goods are “received by the debtor.” The timing of when the debtor “received” the goods is critical because it functions as the cutoff date whereby no administrative priority status is available on account of goods delivered before that date. According to the Court in *World Imports*, this cutoff date with respect to goods shipped FOB from overseas is the date when the goods are loaded on the vessel at the port of shipment, not later when the debtor took actual possession of the goods.

In *World Imports*, the goods were shipped FOB (Free on Board) to the debtor from Shanghai and Xiamen. In both cases the goods were loaded on the vessel of the port of shipment more than 20 days before the debtor filed bankruptcy, but the debtor took physical possession of the goods in the United States during this 20-day period.

The creditors took the position that, because the Bankruptcy Code does not define the word

“receive,” the Court should apply the definition of the term “receipt” provided in the Uniform Commercial Code article that deals with sales of goods (the “UCC”). The UCC defines “receipt” as taking physical possession of the goods, which was within the 20-day period in *World Imports*.

The debtor and the creditors’ committee argued that the relevant law was international commercial law, whereby the transfer of the property to the buyer in an FOB sale occurred once the goods were put on the ship, not at the time the buyer took physical possession of the property.

The Court agreed with the debtor and the creditors’ committee and denied the creditors’ motions. It found that the transaction was governed by the Convention on Contracts for the International Sale of Goods (CISG), not the UCC. The Court’s conclusion was buttressed by the fact that there was nothing in the record (which included a “Purchase Order, Packing List, Commercial Invoice, and Bill of Lading”) to indicate that the parties agreed to exclude it. Because under the CISG the risk of loss or damage passes to the buyer at the time the goods are placed on the vessel, the Court concluded that the debtor “received” the goods at that time.

The decision in *World Imports* is yet another reminder of the ambiguity of section 503(b)(9). The decision also serves as a cautionary tale to parties in international sale of goods transactions involving U.S. buyers. Like the creditors in *World Imports*, foreign sellers in such transactions may not be able to utilize 503(b)(9). When determining whether to provide goods on credit to U.S. buyers, it behooves such sellers to take into account the applicability of the CISG. In doing so, such sellers could explore the possibility of opting out of the CISG or consider negotiating specific terms more tailored to their expectations.

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