



International Secured Transactions Involving Accounts : A
Case Study for a Priority Dispute with a Judgment Creditor of
a Debtor located in the United States and The Legal Scheme

June 4, 2012



LAW OFFICES
ULLMAN & ULLMAN
PROFESSIONAL ASSOCIATION



Factoring in US Dollars of:

- USA-domestic accounts
- International accounts
- Recourse / non-recourse factoring

Incorporated in 2003, CVCredit is the affiliate financial company of Credivalores for the United States. Credivalores' 50-year-old holding company has participation in other industrial sectors such as: sugar mills, brokerage firms, gas stations, energy power plants and financial services.

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Ullman & Ullman, P.A. was formed in 1980 and is a boutique law firm that focuses on the specific needs of each client. Its areas of practice have centered on domestic and international commercial transactions, arbitration and litigation with a special focus on asset-based lending, factoring and forfeiting. The firm's principal, Michael Ullman, has throughout the years published numerous articles involving aspects of factoring which include: *You Heard Right: You Can Factor a Client Who Sells You Invoices for its Real Estate Construction Jobs, You Just Have to Watch Out for...*; *Bankruptcy: To Be Or Not To Be – Preferred; Banks Beware: You May Owe Your Customer's Factor! Or Hey Factors: Does Your Client's Bank Owe You Money?*, and, *Factoring Specialized Industries and Stories From the Trenches*, and has served and currently serves as co-counsel to and is a frequent lecturer for an organization called the International Factoring Association which has over 600 members consisting primarily of factoring associations, banks and asset-based lenders.

AGENDA

- Actual Case Study
- How the Actual Priority Dispute was Handled
- Documentation and Procedures
 - UCC1
 - Notification Letter
 - Priority Lien Rights
- The Legal Scheme

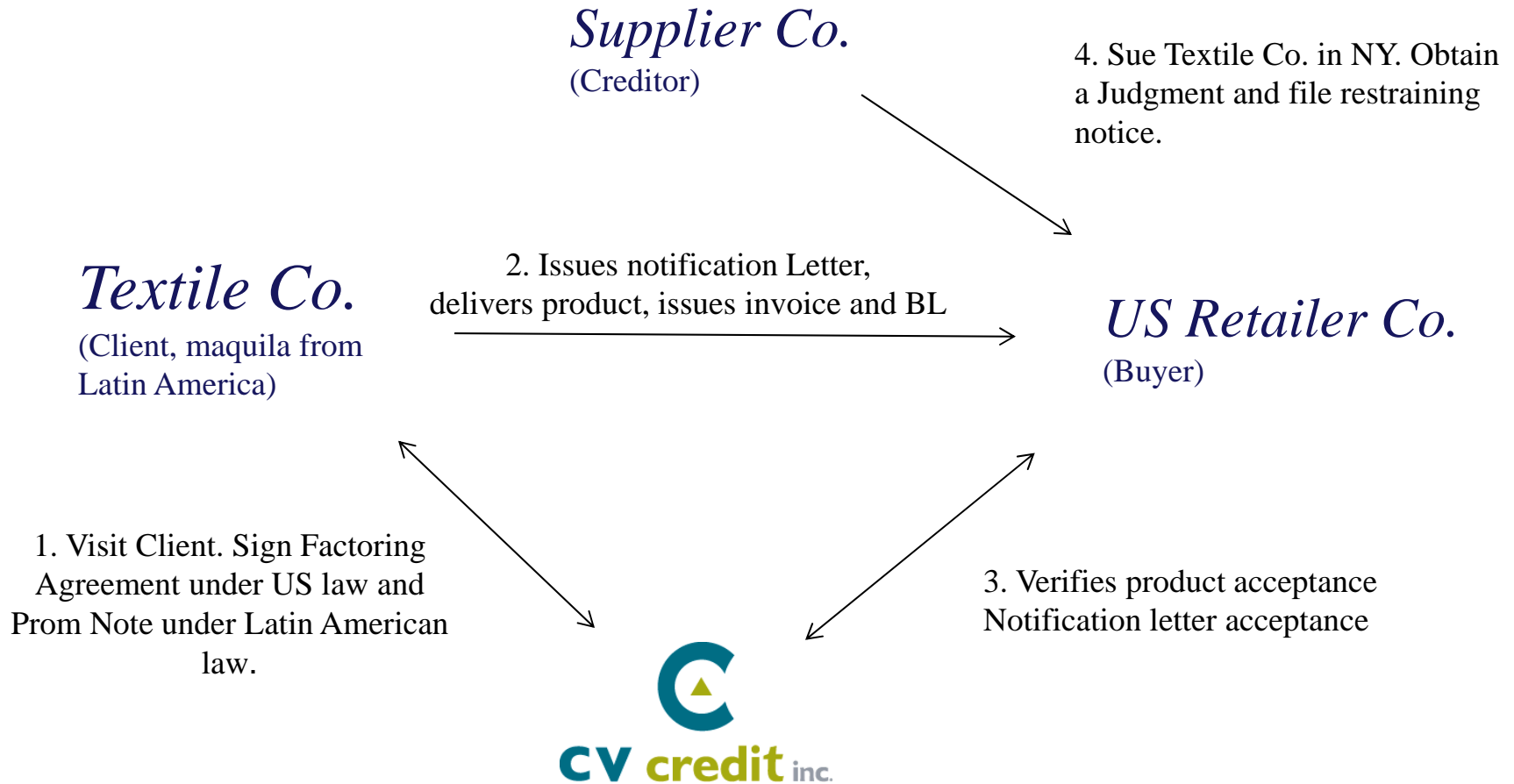
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CASE PRESENTATION



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Supplier Co.

Plaintiff,

- against -

Textile Co.

Defendant.

Index No.

Hon. Jeffrey K. Oing

RESTRAINING NOTICE

RE: *Textile Co.*
Judgment Debtor

THE PEOPLE OF THE STATE OF NEW YORK

TO: *US Retailer Co. (Buyer)*

WHEREAS, in an action in the Supreme Court of the State of New York, County of New York between *Supplier Co.* as plaintiff and *Textile Co.* or “Judgment Debtor”) as respondent, who are all the parties named in said action, a judgment was entered on the 20th day of January, 2012 in favor of *Supplier Co.*, judgment creditor, and against *Textile Co.* in the amount of \$743,702.80 of which \$743,702.80, together with interest thereon from January 20, 2012, remains due and unpaid; (a copy of the judgment, and the notice of entry thereof, is annexed hereto as Exhibit A);

WHEREAS, it appears that you have funds of Judgment Debtors;

TAKE NOTICE that pursuant to subdivision (b) of Section 5222 of the Civil Practice Law and Rules, which is set forth in full herein, you are hereby forbidden to make or permit any sale, assignment or transfer of, or any interference with, the Judgment Debtor’s property that may be in your custody or possession to any person other than the Sheriff or Marshall except upon direction of the Sheriff or Marshall or pursuant to an order of the court, until the judgment is satisfied or vacated, except as provided in CPLR §5222(b).

TAKE FURTHER NOTICE that this notice also covers all property in which the judgment debtor has an interest hereafter coming into your possession or custody, and all debts hereafter coming due from you to the judgment debtor.

CIVIL PRACTICE LAWS AND RULES § 5222(b) provides:

Effect of restraint; prohibition of transfer; duration. A judgment debtor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor is effective only if, at the time of service, he owes a debt to the judgment debtor or he is in the possession or custody of property in which he knows or has reason to believe the judgment debtor has no interest, or if the judgment creditor has stated in the notice that a specified debt is owed by the person served to the judgment debtor or that the judgment debtor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him, or until the judgment is satisfied or vacated, whichever event first occurs. A judgment creditor who has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor in an amount equal to twice the amount due on the judgment, the restraining notice is not effective as to other property or money.

**DISOBEDIENCE OF THIS RESTRAINING NOTICE
IS PUNISHABLE AS A CONTEMPT OF COURT.**

HOW WE HANDLED IT

The facts:

- We had a Security Interest, and we filed our UCC1.
- There were no other creditors who had perfected liens prior to ours, therefore we were in senior position.
- We notified the account debtor (US Retailer Co.) of our assignment prior to the entry of the judgment.

The proposed dispute resolution:

- We offered our reserves (20% of invoice amount) plus non-factored accounts in exchange for a termination of the Restricting Notice and our being paid in full.
- Alternatively, we considered entering into a tripartite agreement with supplier and Textile Co so that a portion of the advances we would make to Textile Co would instead be made to Supplier.

Our Rights Under Our Factoring/Security Agreement:

- As per our Factoring Agreement, the fact that our client (Textile Co) had permitted a judgment to be entered and failed to inform us of the dispute allowed us to declare the Factoring Agreement in Default. Our Factoring Agreement also allowed us to settle and negotiate reserves and non-factor accounts in order to protect our interest in case of default. Therefore, we were legally able to settle releasing the reserves and non-factor account to Plaintiff (Supplier).

The result:

- We did not lose a dollar.

DOCUMENTATION AND PROCEDURES

UCC1:

- Why it is essential?
- In order to be authorized, you first need to be granted a Security Interest under the Factoring Agreement, which will be governed by USA's Article 9 of the Uniform Commercial Code.
- Where to file it? (generally for non-USA clients you file it in Washington DC)
- How to file it? (CT Liens, by yourself, others)

Notification Letter:

- Why is it important?
- How do you send it?
- How can you prove that the debtor was notified?
- Why should notification be a part of your verification process?

Priority rights:

- Senior liens (you need to perform a search prior to first disbursement).
- Restraining notices causing competing liens: who wins?
- Tax liens: when do they take priority?
- Bankruptcy cases: what are your options?

RECOMMENDATIONS:

- Use legal counsel in the country of your client (exporter) and in the country of your debtor (importer/buyer) (Maybe they should both communicate!!)
- If you are not opening a US branch, consider entering into a re-factoring agreement with a local factor to have due diligence, verification of the local buyers and collection of the accounts performed.

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LEGAL SCHEME

I. Introduction:

- An international secured transaction in respect to accounts involves a transaction between a seller of goods and/or services in one country and a buyer of goods and/or services in another country. The location of the asset-based lender or Factor is not pertinent.
- For this conference we are going to define the term “**Account**” to mean a right to payment of a monetary obligation, whether or not earned by performance, for property that has been or is to be sold, leased, licensed or assigned or for services rendered or to be rendered . . . The term does not include rights to payment evidenced by chattel paper or an instrument.

II. Other important defined terms that generally apply to a domestic or international transaction involving accounts include the following:

1. “**Account debtor**” - a person obligated on an account.
2. “**Collateral**” - the property subject to a security interest . . . and includes proceeds to which a security interest attaches and Accounts.
3. “**Debtor**” - a person having an interest in the collateral, whether or not the person is an obligor; or a seller of accounts.
4. “**Financing Statement**” - a record or records composed of an initial financing statement and any filed record relating to the initial financing statement.
5. “**Goods**” - all things that are movable when a security interest attaches.
6. “**Inventory**” - goods which are held by a person for sale or lease.
7. “**Organization**” - a person other than an individual.
8. “**Registered Organization**” - an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.
9. “**Secured Party**” - a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding; a person to whom accounts have been sold.
10. “**State**” - a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

You will need to periodically refer back to these definitions as we discuss our concepts so we have made them a separate exhibit to our PowerPoint presentation.

III. Choice-Of-Law and Perfection Issues.

When any transaction involves parties that are located in different states or countries, choice-of-law questions always arise.

Choice-of-law questions mean that we have to analyze which of the party's jurisdictional substantive law applies to the transaction.

If an international transaction involves an agreement between a seller and buyer that does not involve the sale of goods, Article 2 of the Uniform Commercial Code would not apply and instead common law principles apply. Under common law, courts consider two differing concepts in order to come to a determination as to which law applies to contract disputes:

- (1) the law of the place where the contract is executed, or the law of the place of performance, and
- (2) six (6) factors to determine which jurisdiction's interests are the most significant .

§ 671.105. Territorial Application of the Code; Parties' Power to Choose Applicable Law.

- (1) Except as provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation will govern their rights and duties. Failing such agreement, this code applies to transactions bearing an appropriate relation to this state.
- (2) When one of the following provisions of this code specifies the applicable law, that provision governs; and a contrary agreement is effective only to the extent permitted by the law (including the conflict-of-laws rules) so specified:

* * * * *

- (f) **Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests . . . (ss. 679.3011 - 679.3071)**

-and-

§ 679.3011. Law Governing Perfection and Priority of Security Interests.

Except as otherwise provided . . . the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, **while a debtor is located** in a jurisdiction, the local law of that jurisdiction governs **perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.**

(2) **While collateral is located** in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a **possessory security interest** in that collateral.

§679.3071 entitled “Location of Debtor” is the general statute that tells us how to determine where a debtor is located and it reads, in relevant part:

(2) Except as otherwise provided in this section, **the following rules determine a debtor’s location:**

(a) A debtor who is an individual is located at the individual’s principal residence.

(b) A debtor that is an **organization** and has only one place of business which means a place where a debtor conducts its affairs, is located **at its place of business.**

(c) A debtor that is an **organization** and has more than one place of business is located **at its chief executive office.**

* * * *

(5) A **registered organization** that is organized under the law of a state **is located in that state.**

§ 679.3071(3) states:

Subsection (2) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. **If subsection (2) does not apply, the debtor is located in the District of Columbia.**

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