Bankruptcy Code, 
International Trade Treaty Collide over Expense Status

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Global commerce makes the world a smaller place every day. It is therefore inevitable that the Bankruptcy Code will sometimes intersect with international trade law, as it has done for decades with domestic commercial law. Those three domains recently came together in the context of a creditor’s Section 503(b)(9) administrative expense claim, and a federal district court was called upon to sort out which body of law took precedence.

While agreeing with the court’s final ruling, we question its mode of analysis, and in this article, we suggest what we believe to be a better methodology. Indeed, this might prove significant, since the matter is already on appeal.

**In Re World Imports, Ltd.**

The case is Fujian Zhangzhou Foreign Trade Co., Ltd., et al. v. World Imports, Ltd. (In re World Imports, Ltd.), 549 B.R. 820 (E.D. Pa. 2016) (World Imports), wherein two vendors sought to have their respective claims recognized as administrative expenses pursuant to Bankruptcy Code Section 503(b)(9), and thereby receive a higher priority of payment in the debtor’s reorganization case.

Essentially, the entire case pivoted upon the precise meaning of the word “received,” as found in Section 503(b)(9). The Bankruptcy Code’s supposed lack of clarity in that subsection compelled an examination of a triad of legal enactments. For that reason, like the World Imports court itself, we address each codification *seriatim*.

**The Bankruptcy Code**

Commencing with the modern Bankruptcy Code, Section 503(b)(9) grants a creditor a priority of payment where the creditor can demonstrate that goods it sold the debtor were received by the latter in the 20 days preceding the bankruptcy filing. 11 U.S.C. § 503(b)(9). If so, then the related indebtedness is classified as an administrative expense, and accordingly receives a priority of payment. 11 U.S.C. § 507(a).

To be sure, the statute is deeply rooted in a seller’s common-law right to the reclamation of goods in the event of a buyer’s insolvency. Indeed, the Code’s current iteration was promulgated as a more straightforward mechanism for vindicating the right to reclaim, its impact strictly measured by the pre-bankruptcy 20-day period, and its sole inquiry being were the goods “received” by the debtor within that time frame.

World Imports revealed one impediment to this otherwise explicit proviso. Nowhere does it define “received” for its purposes. Actually, the Bankruptcy Code does not expound upon that commonplace term at all (its ordinariness being the most likely explanation).

**The U.C.C.**

So goes the Bankruptcy Code; now for the contribution made to the instant controversy by the Uniform Commercial Code (U.C.C.). A state law codification of reclamation, U.C.C. Section 2-702 requires the seller/creditor to first discover the debtor/buyer’s insolvency, and then make a demand for reclamation of the goods within 10 days of the debtor’s receipt of same. Indeed, it was the U.C.C.’s dependency upon the creditor making a timely reclamation demand, combined with a much shorter allowance of the time in which the creditor must act, that contributed to the promulgation of the more straightforward Section 503(b)(9), as above-noted.

Yet the commonality remains thus: What does “received” mean? To answer that question under domestic law, the U.C.C. imparts further instructions in some of its most influential provisions, those regulating the delivery of goods, the passing of title to same, and the transfer of the concomitant risk of loss. To be certain, the first event is nominally unethered to its companions, whereas the second and third terms of art are indivisible.

U.C.C. Section 2-319, *et seq.* provides substance to the ubiquitous commercial terms F.O.B. (Free on Board), F.A.S. (Free Along Side), and C.I.F. (Cost, Insurance, Freight). An F.O.B. term designates a precise location (a ship, a warehouse) where the seller has completed its duties, and all right, title and interest, not to mention the attendant risk of loss, passes to the buyer. Delivery is wholly divorced from the above, especially since in the modern world the buyer unquestionably owns the goods when title and risk pass, but days or even weeks may elapse before the buyer takes physical possession.

Therefore, in a typical domestic case, determining if the goods were “received” within 20 days prior to bankruptcy, and the claim thus qualifies for administrative expense status, can be easily accomplished by reference to the U.C.C.’s F.O.B. terminology. If *World Imports* was a more prosaic Chapter 11, the matter would have ended there.

**The CISG**

The international flavor here demanded an examination of yet a third body of law, that being the United Nations Convention on Contracts for the International Sale of Goods, long known as “CISG.” In brief, the CISG is an international treaty, promoted by the U.N. to encourage international trade, and thereby foster peace among nations. See CISG Preamble.

Simply put, when sellers and buyers reside in different nations that have signed the compact, the terms of the CISG displace their respective

*continued on page 4*
World Imports
continued from page 3

domestic commercial laws. See CISG Article 1. Since it became effective in the late 1980s, the CISG has been adopted by well over 80 nations, including, significant here, the United States and the People’s Republic of China.

Not surprising for a multinational treaty of this scope, the CISG makes many compromises. In order to accommodate the oft-conflicting commercial law regimes of the signatory nations, it does not address every scenario nor does it define every term. To alleviate those gaps, the CISG expressly provides that the parties (unless they have expressly provided otherwise) bind themselves to usages “widely known to, and regularly observed” by those engaged in global trade. See CISG Article 9.

BACKGROUND

Now equipped with more than enough law, we may finally turn to the World Imports case itself. The pertinent facts were not in dispute. The debtor World Imports filed for Chapter 11 reorganization on July 3, 2013.

Creditors Fujian and Haining had sold goods to the debtor in the ordinary course of business (interestingly, the nature of the goods is never revealed). In a parenthetical, the court discloses that the Haining goods were shipped from Shanghai on May 26, and the debtor took possession in the U.S. on June 21. Fujian’s goods were shipped from Xiamen on three separate dates, the first two in mid- and late May, while the last shipment was made on June 7 (about 26 days before the debtor filed for Chapter 11). The exact date the debtor received the Fujian goods was never ascertained to a certainty, but the point was eventually rendered moot by the implicit agreement of Fujian and World Imports that the debtor physically received those particular goods within the 20-day period prior to the bankruptcy filing.

Probably the most significant fact adduced by the district court was that all these transactions were explicitly contracted to be F.O.B. Shanghai and Xiamen, respectively. That distilled the controversy down to this singular point of law: For purposes of asserting a Section 503(b)(9) claim, were the goods “received” by the debtor at the F.O.B. point in China, or when physical possession took place some weeks later?

If the former, then the creditors’ shipments fell outside the 20-day zone demanded by Section 503(b)(9). If the latter, then the value of the goods qualified for priority of payment as an administrative expense under the same Bankruptcy Code statute.

Chief District Judge Petrese B. Tucker followed the same course as articulated above, addressing each of the three pertinent bodies of law in order. First, the bench briefly exposted Section 503(b)(9), highlighting that the Bankruptcy Code provides no guidance as to the meaning of the term “received” in Section 503(b)(9) or elsewhere. The court was even more terse in finding that the U.C.C. was equally lacking in illuminating the meaning of “received” for purposes of domestic commercial law.

Yet the district court was largely unconcerned by these deficiencies. Chief Judge Tucker opined that the U.C.C., as venerable as it is, remains a codification of state law, and, as with any state enactment, it must yield to the supremacy of federal law. The latter, of course, incorporates any treaty to which the United States is a signatory. For that reason, the court was required to delve into the text and meaning of the CISG.

THE CISG

As a threshold matter, World Imports first affirms that the CISG applies where the seller and buyer reside in different nations that have each signed the treaty. See CISG Article 1. Since both the U.S. and China were signatories, it was beyond cavil that the CISG applied to the underlying contracts between this debtor and its two vendors. Next, while the treaty does permit contracting parties to disclaim the applicability of the CISG, provided they explicitly do so in their agreement, (see CISG Article 6), that was not the case here. Thus, the debtor and both of its creditors were bound to the strictures of the multinational accord.

Upon examining the treaty, Chief Judge Tucker ran into a now familiar problem. The CISG also lacks a per-se definition of “received.” Undaunted, the court sought guidance from the promulgations of the International Commerce Commission (the ICC), which, among other things, has published commonly accepted definitions of terms widely used in international commerce.

Yet again, the court admitted that even the ICC lexicon does not expressly define “received.” Nonetheless, the Commission does employ a definition of the F.O.B. term that, for all intents and purposes, is identical to that found in the U.C.C. Both codifications imply that “received” means succession by the buyer to all rights of ownership and the concomitant risk of loss of the goods.

On that basis, Chief Judge Tucker concluded that the debtor “received” the goods from both creditors at their respective F.O.B. points in China. Since those events were well before the 20-day period set out in Section 503(b)(9), the claims of these creditors were ineligible for recognition as administrative expenses. Thus, the World Imports court overcome the lack of an explicit definition of “received” within in Section 503(b)(9), by turning to the CISG, and then using that as a launching point for connecting to the ICC’s prevailing terminology.

ANALYSIS

For our analysis, none can doubt that the World Imports court reached the correct holding. But we respectfully ask if the court ventured too far in doing so, and unnecessarily relied upon provisions well beyond U.S. law overall, let alone the Bankruptcy Code.

Without question, Section 503(b)(9) does not explicitly define the term “received.” Granted, “received”
can mean different things to different people. But clearly, the outcome of the instant case would have been no different had the court simply taken the term at its plain English meaning, and defined “received” for purposes of this statute as the point when the debtor has unfettered ownership of the goods. Thus, its foray into international law would have been wholly unnecessary.

Second, the Bankruptcy Code and the U.C.C. are both creatures of American law. The interaction between the two is legion. Even with the lack of a definition for “received” within the body of the insolvency law, it is a much shorter journey to look to the companion U.C.C., borrow its widely accepted expostulations of F.O.B. and similar terms, and then decide any controversy on that basis.

We do not dispute the international aspect of the underlying transactions here, and that the CISG undeniably applied to the dealings between this debtor and these creditors. Yet the CISG was equally unavailing in this case, since it too fails to define “received.” Hence, it was necessary for the World Imports court to search the promulgations of the ICC, a nongovernmental body, and, significantly, not a signatory nation.

We respectfully ask if the district court went too far? With all due respect for the ICC and its nomenclature, at the end of the day the World Imports court came to rely upon identical definitions just as easily found in domestic law, and just as much well established and respected. If one winds up in the same place, then why make the journey, particularly when analyzing a body of law as distinctly American as the modern Bankruptcy Code?

A federal appeals court shall now have the last word on World Imports. To be sure, the judgment must be upheld, for it is undeniably correct. And while we agree that the CISG is an invaluable tool in resolving disputes concerning international trade, we suggest jurists interpret the very American Bankruptcy Code with more of a view toward its equally American compatriots, such as the U.C.C., before resorting to international accords.

Successor Liability

Appeals for the Third Circuit’s decision in In re Trans World Airlines, Inc. (TWA), 322 F.3d 283, 288-89 (3d Cir. 2003), which advanced “a broad reading of ‘interests in property’,” the court noted that “the trend … toward a more expansive reading of ‘interests in property’ which encompasses other obligations that may flow from ownership of the property.” Id., quoting 3 Collier on Bankruptcy ¶363.06(1).

Other lower courts had previously taken a narrower approach. See, e.g., In re Schwinn Bicycle Co., 210 B.R. 747, 761 (Bankr. N.D. Ill. 1997) (held, § 363(f) “in no way protects the buyer from current or future product liability; it only protects the purchased assets from lien claims against those assets”).

In TWA, the Third Circuit held that employment discrimination claims and a voucher program given to flight attendants to settle a class action are “interests” in property governed by Code § 363(f). 322 F.3d at 285. It explained that “to equate interest in property with only in rem interests such as liens would be inconsistent with § 363(f) (3),] which contemplates that a lien is but one type of interest.” Id. at 290. Accord, In re Leckie Smokeless Coal Co., 99 F.3d 573, 582 (4th Cir. 1996) (held, Coal Act Premium Payment Obligations owed to employer-sponsored benefit plans constituted interests in property governed by § 363(f)); Myers v. United States, 297 B.R. 774, 781-82 (S.D. Cal. 2003) (TWA applied to tort claimants asserting personal injury claims). According to the Third Circuit in TWA, “the trend [among courts] seems to be toward a more expansive reading of ‘interests in property’ which ‘encompasses other obligations that may flow from ownership of the property.’” TWA, 322 F.3d at 289. To the extent it approved the substance of the sale order, Motors Liquidation is consistent with this trend and follows Chrysler.

FACTS

Asset Sale: This dispute arose out of the General Motors Chapter 11 case. Immediately after filing its Chapter 11 petition in June 2009, the debtor sought to sell its core assets to a new entity “owned predominantly by [the U.S.] Treasury (over 60 percent).” Id. at 11. “The proposed sale order provided that [the buyer] would acquire [the debtor’s] assets ‘free and clear of all liens, claims, encumbrances and other interests of any kind or nature whatsoever, including rights of claims based on any successor or transferee liability.’” Id. Other than a few liabilities that the buyer agreed to assume, “this ‘free and clear’ provision would act as a liability shield to prevent individuals with claims against [the debtor] from suing [the buyer].” Id. The buyer could then “immediately begin operating the [debtor’s] business, free of [the debtor’s] debts.” Id. at *12.

Notice: The bankruptcy court ordered the debtor to “provide notice of the proposed sale order” by “direct mail … to numerous interested parties, including ‘all parties who are known to have asserted any lien, claim, encumbrance, or interest in or on [the to-be-sold assets]’ and to post publication notice … in major publications,” specifying a deadline for “interested parties … to submit … responses and objections to the proposed sale order.” Id. at *13. The product liability claimants here received only “mere publication notice.” Id. at *26.

Bankruptcy Court Hearing on Sale Order: The bankruptcy court addressed and dismissed 850 objections to the proposed sale order. “Among those objections were