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Navigating Intercreditor Arrangements in Commodities and Trade Finance: A Practical Guide – Part I

By Peter J. Lahny, IV*

In this multi-part article, the author examines various issues created by different forms of intercreditor agreement in detail, with a specific focus on how the priority of each lender's lien over the assets of the applicable debtor is established. In this first part, the author discusses transactional commodities financing transactions. In the second part, to be published in the next issue of The Banking Law Journal*, the author will review additional issues with the form of transactional intercreditor agreement, borrowing base commodities finance lending transactions, and typical provisions negotiated into the form of transactional intercreditor agreement. The final part, to be published in the following issue of* The Banking Law Journal*, will contain the article's conclusion as well as the typical form of intercreditor agreement to be used in connection with transactional loan facilities (the Form of Transactional Intercreditor Agreement) and the typical form of intercreditor agreement to be used in connection with borrowing base loan facilities (the Form of Borrowing Base Intercreditor Agreement).*

In typical bi-lateral commodities and trade financing transactions, secured loan facilities are made to the applicable debtor(s) by one or more separate lenders, either on a transactional basis or based on a borrowing base formula. It is not unusual for a debtor to maintain several loan facilities with several different lenders.[1] Secured lenders operating in commodities and trade finance typically rely on two standardized forms of intercreditor agreement to define their rights and priorities. This article examines various issues created by each of these forms of intercreditor agreement in detail, with a specific focus on how the priority of each lender's lien over the assets of the applicable debtor is established.

The typical form of intercreditor agreement to be used in connection with transactional loan facilities (the Form of Transactional Intercreditor Agreement), where certain financial accommodations will be made by each creditor (most often on an uncommitted, discretionary basis) on a proposed transaction by transaction basis, is shown in Exhibit A, which will be published with Part III of this article. The typical form of intercreditor agreement to be used in

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[1] See Yair Galil & J. Eric Wise, Unitranche "Agreements Among Lenders," Bloomberg Law 1 (2018), https://www.gibsondunn.com/wp-content/uploads/2018/11/Wise-Galil-Unitranche-Agreements-Among-Lenders-Bloomberg-Law-11-20-2018.pdf (discussing the "agreement among lenders" where there are multiple loan facilities with different lenders).

connection with borrowing base loan facilities (the Form of Borrowing Base Intercreditor Agreement), where certain financial accommodations will be made by each creditor (also, typically on an uncommitted, discretionary basis) based on a borrowing base formula that has been agreed to in advance by all of the creditors, is shown in Exhibit B, which will be published with Part III of this article. The use of each of these forms has become standardized throughout the industry as a way to minimize the negotiation of complex intercreditor issues and to keep legal costs down for the applicable debtors.[2]

While the loan facility documentation in a typical commodities financing transaction may look similar to the typical middle market loan facility documentation, there are many subtle differences based on the nature of the assets being financed and the cross-border components of the typical commodities financing transaction. This article assumes that all of the creditors will have obtained an "all assets" security interest[3] against the assets of the applicable debtor located within the United States, pursuant to a standard form of security agreement[4] and the filing of a UCC-1 financing statement in the appropriate jurisdiction.[5]

This article provides a practical guide for secured lenders operating in commodities and trade finance, detailing how to establish a first priority "Specific Security Interest" in goods financed by the applicable lender. It also examines key risk areas within the commodities and trade finance intercreditor framework, where certain creditor actions could threaten recoveries, and offers insights on additional provisions commonly incorporated to enhance protections.

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[2] Paul R. Wiener, Intercreditor Agreements in Commodities and Trade Finance Transactions, 112 Banking L. J. 549, 550 (1995).

[3] Section 9-504(2) of the Uniform Commercial Code, as adopted in the State of New York (U.C.C.) states that "A financing statement sufficiently indicates the collateral that it covers if the financing statement provides: . . . (2) an indication that the financing statement covers all assets or all personal property." U.C.C. § 9-504(2).

[4] Section 9-203(b)(3)(A) of the U.C.C. states that "a security interest is enforceable against the debtor and third parties with respect to the collateral only if . . . (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned. . . ." U.C.C. § 9-203(b)(3)(A). Please also note that the collateral description in the Security Agreement must be specific. Section 9-108(c) of the U.C.C. states that "A description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using words of similar import does not reasonably identify the collateral." U.C.C. § 9-108(c).

[5] Section 9-307(e) of the U.C.C. states that "A registered organization that is organized under the law of a State is located in that State." U.C.C. § 9-307(e).

I. TRANSACTIONAL COMMODITIES FINANCING TRANSACTIONS

While the Form of Transactional Intercreditor Agreement has been drafted to be clear and, most importantly, concise, certain of the operative provisions can be difficult to understand in their real-world applications.[6] The provisions setting forth the relative lien priorities can be reduced to a general statement that the creditor holding a "Specific Security Interest" in certain collateral has priority over other creditors holding a "General Security Interest" or a lesser "Specific Security Interest" in the same collateral.[7] Please also note that pursuant to Paragraph 6 of the Form of Transactional Intercreditor Agreement, the "General Security Interest of each Creditor in Collateral ranks equally in priority with the General Security Interest of each other Creditor in the same Collateral."[8] The terms "Specific Security Interest" and "General Security Interest" are defined as follows:

> 2. "Specific Security Interest" means a perfected and enforceable security interest of a Creditor in any of the following Collateral, including the products and proceeds thereof and accessions thereto:
>
> (a) Collateral in the possession of the Creditor (or an agent or bailee on its behalf); or
>
> (b) Collateral made available to the Debtor by the Creditor (or its agent or bailee) pursuant to a trust receipt or other security agreement the effect of which is to create and/or continue the Creditor's security interest therein, or the acquisition of which by the Debtor is enabled by any loan, documentary or standby letter of credit or other facility extended or issued by the Creditor to or for the account of the Debtor; or
>
> (c) Collateral covered by a non-negotiable document issued in the name of the Creditor or as to which the Creditor (or an agent or bailee on its behalf) controls possession through a negotiable document; or
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> (d) Collateral which is an obligation owed by the Creditor to the Debtor; or
>
> (e) Collateral which is specifically identified in a Security Agreement,

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[6] See generally Wiener, supra note 2.

[7] See generally Form of Transactional Intercreditor Agreement, Exhibit A.

[8] Id. at 2 ¶ 6.

> or in another writing, delivered to the Creditor at or about the time the security interest attaches.[9]
>
> 3. "General Security Interest" is any perfected and enforceable security interest of a Creditor in Collateral, however arising, other than a Specific Security Interest.[10]

The priority of different creditors' Specific Security Interests in the same collateral are set forth in Paragraph 5 of the Form of Transactional Intercreditor Agreement.[11] Paragraph 5 reads as follows:

> 5. If Specific Security Interests of two or more Creditors attach to the same Collateral, the Specific Security Interest which is a purchase money security interest under Paragraph 2(b) has priority over any other Specific Security Interest, except that a Specific Security Interest of the type referred to in Paragraph 2(c) hereof has, in the absence of notice of another paramount security interest stamped on or affixed to the document (notwithstanding anything in Paragraph 7 relating to notice), priority over any Specific Security Interest of the type referred to in Paragraph 2(b), and Specific Security Interests of two or more Creditors of the type referred to in Paragraph 2(b) rank equally in priority[12]

It can be argued that the interplay between the definition of "Specific Security Interest" and Paragraph 5 of the Form of Transactional Intercreditor Agreement is unclear and can be confusing in its application. This Section I will attempt to clarify the actions that a creditor must take to have its security interest fall within each category of the definition of "Specific Security Interest," and how Paragraph 5 of the Form of Transactional Intercreditor Agreement would rank such "Specific Security Interest" in relation to each of the other categories set forth in the definition of "Specific Security Interest."

It is important to note that the priorities of the creditors will be determined based on (x) how a creditor financed the purchase of certain goods, and/or (y) the steps each creditor took to perfect its security interest in the debtor's applicable assets.[13] The determination of priority will often rest on the evidence

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[9] Id. at 1 ¶ 2.

[10] Id. at 2 ¶ 3.

[11] Id. at 2 ¶ 5.

[12] Id. at 2 ¶ 5.

[13] See generally Exhibit A.

that each creditor can provide to support its assertions in respect of clauses (x) and (y).[14]

The following will address each category of "Specific Security Interest" in the order of priority set forth in Paragraph 5.

(a) Negotiable and Non-Negotiable Documents

Pursuant to Paragraph 5, a Specific Security Interest of the type referred to in Paragraph (c) of the definition of "Specific Security Interest," in the absence of notice of another paramount security interest stamped on or affixed to the document,[15] will have priority over all other Specific Security Interests.[16] Paragraph (c) of the definition of "Specific Security Interest" lists "Collateral covered by a non-negotiable document issued in the name of the Creditor or as to which the Creditor (or an agent or bailee on its behalf) controls possession through a negotiable document."[17]

Pursuant to (i) Section 9-312(d)(1)[18] of the Uniform Commercial Code, as adopted in the State of New York (the U.C.C.), a security interest in goods in the possession of a bailee that has issued a non-negotiable document covering the goods, may be perfected by a non-negotiable document of title issued in the name of a secured creditor, and (ii) Section 9-313(a)[19] of the U.C.C., a security interest in goods in the possession of a bailee that has issued a tangible negotiable document covering the goods, may be perfected by a secured creditor taking possession of the tangible negotiable document. Accordingly, pursuant to Articles 7 and 9 of the U.C.C., the creditor in possession of a tangible negotiable document of title, or the creditor in whose name a non-negotiable document of title has been issued, holds the first-priority security interest in respect of the underlying goods.[20] Therefore, with respect to goods covered by

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[14] Id.

[15] See generally U.C.C. § 7-104 (addressing a legend on a document of title).

[16] Exhibit A, at 2 ¶ 5.

[17] Id. at 2 ¶ 2(c).

[18] Section 9-312(d)(1) of the U.C.C. states "While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by . . . (1) issuance of a document in the name of the secured party." U.C.C. § 9-312(d)(1).

[19] Section 9-313(a) of the U.C.C. states ". . . a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral." U.C.C. § 9-313(a).

[20] U.C.C. §§ 7-104, 9-301 (providing rules for determining perfection and priority of a security interest), 9-303 (providing the same but for goods covered by a certificate of title), 9-304 (providing the same but for security interests in deposit accounts), 9-306 (providing the same but

negotiable and non-negotiable documents of title, this provision seeks to align the priorities under the Form of Transactional Intercreditor Agreement with the priorities set forth in the U.C.C.

This provision makes clear that, to the extent that documents of title are being issued with respect to the debtor's goods, it is essential that the creditor financing those goods either (i) take possession of any tangible negotiable documents of title issued with respect thereto, or (ii) have any non-negotiable document of title issued in the name of such creditor. In this case, the documents of title themselves are the evidence of the creditor's Specific Security Interest and compliance with Paragraph (c) of such definition will always ensure that such creditor will have the most senior Specific Security Interest in those specific goods and the proceeds thereof.

However, issues often arise (i) when the way in which the debtor operates its business, or the length of time that the goods will be subject to the applicable document of title, makes it impractical for the original negotiable documents of title to be furnished to the creditor, or for any non-negotiable document of title to be issued in the name of the creditor (neither of which is uncommon in the typical commodities finance transaction); or (ii) during the period when the documents of title must be returned to the debtor to accept delivery of the underlying goods, or to remove the underlying goods for delivery to a customer. To illustrate this point, let's use negotiable bills of lading as an example. It is not uncommon for a creditor to agree to finance the debtor's goods based on copies of the negotiable bills of lading and the furnishing by the debtor of a trust receipt to the creditor with respect to the original documents of title pursuant to a master trust receipt agreement.[21] The financing of the goods based on the delivery of the trust receipt setting forth a description of the document of title and the underlying goods would fall directly into Paragraph (b) of the definition of "Specific Security Interest."[22] Accordingly, so long as no one else has financed

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for security interests in letter of credit rights), 9-312, 9-313, 9-314 (providing that security interests in investment property, deposit accounts, letter of credit rights, or electronic chattel paper may be perfected by control of the collateral).

[21] A master trust receipt agreement is a very specific type of security agreement that acknowledges that a secured party has been furnished with original documents of title to perfect its security interest in certain underlying goods, and provides for the return of the documents of title to the debtor under specific circumstances. The provisions of the master trust receipt agreement will grant the secured party a security interest in the underlying goods during the period that the documents of title are being used by the debtor for the specific purposes set forth therein. See Wiener, supra note 2, at 551 n 5.

[22] Exhibit A, at 2 ¶ 2(b).

the same goods and obtained possession of the original negotiable bills of lading with respect thereto, this creditor would still have the most senior Specific Security Interest in those goods.

To further mitigate the potential risks when dealing with documents of title, (i) the creditor should enter into a master trust receipt agreement with the debtor in respect of documents of title covering the underlying goods and always receive and retain trust receipts in respect of any goods with respect to which the documents of title are either returned to debtor for specific purposes (i.e. offloading the goods from a vessel, etc.) or permitted to remain with the debtor for any reason, and (ii) to highlight this issue, the creditor should also try to include a negative covenant in its loan facility documentation restricting the debtor's ability to provide any original documents of title in respect of goods financed by such creditor to any other creditor.

However, please note that the fact that the negotiable documents of title exist but will not be held by the creditor financing the underlying goods (as required by Paragraph 5 of the Form of Transactional Intercreditor Agreement), creates an environment where an unscrupulous debtor could fraudulently provide one creditor with a trust receipt in respect of the original documents of title, and then provide the original negotiable documents of title to another creditor.[23] This would potentially both double finance the underlying goods, and also grant the second creditor to finance the goods the more senior Specific Security Interest in those goods (senior to the Specific Security Interest of the first creditor to finance the same goods relying on a trust receipt). This potential double financing is the typical fraud risk that is inherent in lending against goods being shipped to or from the United States on international waters.[24]

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[23] See James Steven Rogers, Negotiability as a System of Title Recognition, 48 Ohio State L. J. 197, 204 n. 28 (1987) (stating that for a creditor to prevail over another creditor in debt embodied in a written instrument, the creditor "must attach or levy on the instrument itself"); see also Elaine A. Welle, An Introduction to Revised Article 9 of the Uniform Commercial Code, 1 Wyoming L. Rev. 555, 575 ("Revised Article 9 provides that a secured party that perfects in investment property by control will prevail over a secured party that perfects only by filing, even if control occurred after the filing. Thus, a secured creditor that fears double financing should not rely on filing alone to perfect its security interest").

[24] See Spiro V. Bazinas, An International Legal Regime for Receivables Financing: UNCITRAL's Contribution Symposium: International Issues in Cross-Border Securitization and Structured Finance, 8 Duke J. Comp. & Int'l L. 315, 345 n. 183 (1998) ("Double financing, such as the transfer of the same receivables by the same assignor to several financiers, may be a fraudulent transaction on the part of the assignor").

(b) Acceptance of a Trust Receipt; or the Acquisition of Which by the Debtor Is Enabled By the Creditor

Pursuant to Paragraph 5 of the Form of Transactional Intercreditor Agreement, a Specific Security Interest which is a purchase money security interest[25] under Paragraph (b) of the definition of "Specific Security Interest" has priority over any other Specific Security Interest, other than a Specific Security Interest of the type referred to in Paragraph (c), as more specifically described in Section I(a).[26] Paragraph (b) of the definition of "Specific Security Interest" lists "Collateral made available to the Debtor by the Creditor (or its agent or bailee) pursuant to a trust receipt or other security agreement the effect of which is to create and/or continue the Creditor's security interest therein, or the acquisition of which by the Debtor is enabled by any loan, documentary or standby letter of credit or other facility extended or issued by the Creditor to or for the account of the Debtor."[27]

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[25] Section 9-103(b) of the UCC defines a purchase money security interest in goods as follows:

> (b) Purchase-money security interest in goods. A security interest in goods is a purchase-money security interest:
>
> (1) to the extent that the goods are purchase-money collateral with respect to that security interest;
>
> (2) if the security interest is in inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase- money obligation incurred with respect to other inventory in which the secured party holds or held a purchase-money security interest; and
>
> (3) also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.
>
> obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest.

U.C.C. § 9-103(b). For purposes of this section, the following terms have the following definitions:

> (1) "purchase-money collateral" means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and
>
> (2) "purchase-money obligation" means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

Id.

[26] See supra Section I(a).

[27] Exhibit A, at 2 ¶ 2(b).

Paragraph (b) of the definition of "Specific Security Interest" will define the most senior Specific Security Interest when (i) the documents of title with respect to the applicable goods remained in the possession of the debtor or were returned to the debtor by a creditor for a specific purpose, in each case, pursuant to a trust receipt in favor of a creditor,[28] or (ii) documents of title were not applicable to the goods at issue and a creditor has enabled the acquisition of such goods by extending credit to or for the account of the debtor.[29] With respect to goods made available pursuant to "a trust receipt or other security agreement the effect of which is to create and/or continue the Creditor's security interest therein," please see the discussion set forth in Section I(a).[30]

One source of potential confusion with this provision is the use of the term "purchase money security interest" in Paragraph 5 of the Form of Transactional Intercreditor Agreement.[31] As set forth in the definition of "Specific Security Interest," the term Specific Security Interest includes "a perfected and enforceable security interest" in "[c]ollateral the acquisition of which by the Debtor is enabled by any loan, documentary or standby letter of credit or other facility extended or issued by the Creditor to or for the account of the Debtor."[32] The requirement of "a perfected and enforceable security interest" in the definition of "Specific Security Interest" begs the question as to whether the creditor would need to comply with Section 9-324(b) of the U.C.C.[33] to properly

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[28] See supra Section I(a).

[29] See supra Section I(a).

[30] See supra Section I(a).

[31] Exhibit A, at 2 ¶ 5.

[32] Exhibit A, at 2 ¶ 2.

[33] Section 9-324(b) of the U.C.C. reads as follows:

> (b) Inventory purchase-money priority. Subject to subsection (c) and except as otherwise provided in subsection (g), a perfected purchase-money security interest in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in Section 9--330, and, except as otherwise provided in Section 9--327, also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if:
>
> (1) the purchase-money security interest is perfected when the debtor receives possession of the inventory;
>
> (2) the purchase-money secured party sends an authenticated notification to the holder of the conflicting security interest;
>
> (3) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

perfect its "purchase money security interest" with respect to the acquired collateral each time it finances a transaction, in order to comply with the requirements of Paragraph 5 of the Form of Transactional Intercreditor Agreement. While this is an interesting theoretical question, given the fact that (x) the creditor's "all assets" security interest will generally create a "perfected and enforceable security interest" in all after acquired collateral of the debtor,[34] (y) Paragraph 5 of the Form of Transactional Intercreditor Agreement does not require a "properly perfected and enforceable" purchase money security interest,[35] and (z) this would lead to unnecessary expense and complexity each time the debtor requested a credit extension to acquire new goods, the answer is no. That said, to the extent that a creditor followed the requirements of Section 9-324 of the U.C.C. with respect to any acquisition of collateral by the debtor to be enabled by a credit extension under such creditor's loan facility, such collateral would clearly be included within Paragraph (b) of the definition of "Specific Security Interest" for the purpose of determining priority.

The second clause of Paragraph (b), "or the acquisition of which by the Debtor is enabled by any loan, documentary or standby letter of credit or other facility extended or issued by the Creditor to or for the account of the Debtor," is a very commonly used argument that creditors will make when trying to establish priority over certain of the applicable debtor's goods. As such, the evidence provided by the creditor of having enabled the acquisition of certain goods by extending credit to or for the account of the debtor becomes critical.

In my experience, the argument that a creditor made an advance at or near the time that the applicable goods were acquired by the debtor will not suffice. While it is easy for a creditor to definitively establish the date and amount of an advance to the applicable debtor, that does not establish a connection between the funds being provided to the debtor and the acquisition of the goods at issue. Accordingly, in order to establish priority under this provision of the Form of Transactional Intercreditor Agreement, it is important for the applicable creditor to fund the requested advances directly to the applicable supplier to establish definitively that the advance was made solely to acquire those specific goods from that specific supplier.

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(4) the notification states that the person sending the notification has or expects to acquire a purchase-money security interest in inventory of the debtor and describes the inventory.

U.C.C. § 9-324(b).

[34] U.C.C. § 9-204.

[35] Exhibit A, at 2 ¶ 5.

To that end, the creditors' transactional loan facility agreements should require, as a condition precedent to the making of each extension of credit, receipt by the creditor of each of the following additional documents:

(i) a borrowing request, in the form required by the creditor in its sole discretion, listing (A) the requested amount as the purchase price set forth in the invoice from the applicable supplier and (B) the wire transfer instructions set forth in the invoice from the supplier;

(ii) a copy of the invoice from the applicable supplier (within a specified time frame from the invoice date), setting forth the purchase price and wire instructions to remit payment;

(iii) original negotiable bills of lading, warehouse receipts or other documents of title acceptable to the creditor in its sole discretion, in each case consigned or assigned to the order of the creditor, if applicable;

(iv) a copy of a valid and binding sales contract or purchase order between the debtor and a customer acceptable to the creditor in its sole discretion, containing specific prices and delivery dates; and

(v) a copy of an invoice issued by the debtor to a customer, satisfactory to the creditor in its sole discretion, upon which the debtor's right to receive payment is absolute and not conditional, and requiring the remittance of payment to the applicable creditor's collection account.[36]

Each of the required documents serves a specific purpose. The invoice from the applicable supplier provides the creditor with the purchase price and the appropriate write transfer instructions for the supplier to allow the creditor to confirm that each are correctly set forth in the applicable borrowing request. To the extent applicable, the original negotiable bills of lading, warehouse receipts or other documents of title would allow the creditor to use Paragraph (c) of the definition of "Specific Security Interest" to establish its senior Specific Security Interest, as more specifically addressed in Section I(a).[37] The sales contract and invoice issued by the debtor to a customer allow the creditor to confirm that the payment in respect of the goods, the purchase of which it has financed, will be made to a collection account designated by such creditor.

By collecting all of the underlying documentation and funding the supplier directly, the creditor creates a detailed paper trail evidencing the fact that the creditor has enabled the acquisition of those specific goods, and thereby

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[36] This is an example of requirements that I have seen in my own practice.

[37] See supra Section I(a).

establishing the creditor's senior Specific Security Interest under Paragraph (b) of the definition thereof. Also, by requiring payment in respect of the purchase of the underlying goods directly into the applicable creditor's collection account, the creditor limits the risk that the payment in respect of the debtor's goods that are subject to such creditor's Specific Security Interest would be paid into a collection account maintained at a different creditor, and thereby avoids potential collection issues for the financing creditor.

(c) Collateral in the Possession of the Creditor

Paragraph (a) of the definition of "Specific Security Interest" lists "Collateral in the possession of the Creditor (or an agent or bailee on its behalf)."[38] It is generally understood that this provision refers to collateral in the possession of a creditor that can be perfected by possession. Pursuant to Section 9-313(a) of the U.C.C., "a secured party may perfect a security interest in negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral."[39]

Paragraph (a) of the definition of "Specific Security Interest" can, however, create some confusion. First, "negotiable documents" includes negotiable documents of title in the possession of a creditor, which are expressly covered by Paragraph (c) of the definition of "Specific Security Interest" (as more specifically addressed in Section I(a)).[40] Therefore, the applicable creditor would rely on Paragraph (c) to establish its more senior Specific Security Interest, rather than rely on Paragraph (a). Also, the other categories, particularly money, could be the proceeds or products of collateral listed in Paragraphs (b) or (c) of the definition of "Specific Security Interest." To the extent that a creditor is in possession of collateral that is the proceeds of another creditor's Specific Security Interest under Paragraph (b) or (c), such creditor's Specific Security Interest in the applicable collateral would be junior to that creditor's Specific Security Interest established under Paragraph (b) or (c).

One very common argument that often occurs between creditors centers around funds that are the proceeds of one creditor's Specific Security Interest that are mistakenly deposited into the collection account of another creditor.[41] Which creditor wins this priority argument will be determined based upon the

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[38] Exhibit A, at 1 ¶ 2(a).

[39] U.C.C. § 9-313.

[40] See supra Section I(a).

[41] See infra Section II(b).

sufficiency of the evidence that the creditor claiming to have financed such goods is able to provide to support its Specific Security Interest under Paragraph (b) or (c) of the definition thereof.[42]

This paragraph generally acts as a catch-all for other collateral in the possession of a creditor (that can be perfected under Section 9-313(a) of the U.C.C.) that is not covered by other paragraphs of the definition of "Specific Security Interest" and keeps such collateral from being included in the General Security Interest of all creditors. For example, this provision would be used in respect of instruments or tangible chattel paper that the creditor has chosen to perfect by taking possession,[43] so long as such instruments or tangible chattel paper are not the identifiable proceeds of another creditor's collateral listed in Paragraphs (b) or (c) of the definition of "Specific Security Interest."

(d) Collateral Which Is an Obligation Owed by the Creditor to the Debtor

Paragraph (d) of the definition of "Specific Security Interest" lists "Collateral which is an obligation owed by the Creditor to the Debtor."[44] Obligations owed by a creditor to the debtor can include amounts owed to a debtor under hedging or cash management arrangements with the applicable creditor.[45] It is not uncommon for both hedging and cash management arrangements to be provided to the debtor by the creditor in the typical commodities financing transaction.

Unfortunately, adding to the potential confusion, together with certain other obligations owed by a creditor to the debtor, cash maintained in a deposit account at the creditor (as addressed in Section I(c)) would also fit into this Paragraph of "Specific Security Interest."[46] As previously discussed, to the extent that such cash is the identifiable proceeds of another creditor's collateral listed in Paragraphs (b) or (c) of the definition of "Specific Security Interest," it would also be subject to that creditor's more senior Specific Security Interest.

(e) Collateral Specifically Identified in a Security Agreement Delivered to the Creditor at the Time the Security Interest Attaches

This is another provision that tends to create some confusion. A security interest cannot attach until a debtor has rights in the collateral, and a debtor

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[42] See supra Section I(a) and I(b).

[43] U.C.C. §§ 9-314, 9-104.

[44] Exhibit A, at 2 ¶ 2(d).

[45] See Wiener, supra note 2, at 560-61.

[46] See supra Section I(c).

does not have rights in the collateral until it has acquired such collateral.[47] Paragraph (e) of the definition of "Specific Security Interest" requires the creditor to enter into a new security agreement expressly describing the collateral to be acquired every time it provides a credit extension to allow the debtor to obtain additional collateral.[48] Since we have assumed, as would be typical in these types of financings, that each creditor already has an "all assets" security interest covering all of the debtor's personal property located in the United States, (x) additional security agreements would not be necessary to perfect such creditor's security interest in such after acquired property,[49] and (y) the collateral description set forth in the initial security agreement would not be specific to the collateral financed in any subsequent transaction.

This provision simply appears to provide another, more onerous way to create documentary evidence of the fact that the creditor has enabled the acquisition of certain specific collateral. Also, if the creditor is financing the acquisition of the applicable collateral, this would fall into Paragraph (b) of the definition of "Specific Security Interest" (as more specifically described in Section I(b)), and as such, would already be covered by a more senior Specific Security Interest in favor of such creditor.[50] Accordingly, Paragraph (e) of the definition of "Specific Security Interest" is rarely used to establish a creditor's Specific Security Interest.

It is important to note that, with respect to Paragraphs (a), (d) and (e) of the definition of "Specific Security Interest," Paragraph 5 of the Form of Transactional Intercreditor Agreement does not address the priority of those Specific Security Interests in relation to each other.[51] While the provision makes clear that (i) a Specific Security Interest under Paragraph (c) will be the most senior Specific Security Interest, and (ii) in the absence of a Specific Security Interest under Paragraph (c), a Specific Security Interest under Paragraph (b) will be the most senior Specific Security Interest, the provision does not address the priority of Specific Security Interests under Paragraphs (a), (d) and (e).[52] Accordingly, to the extent that two creditors are found to have Specific Security Interests in the same collateral under any two of Paragraphs (a), (d) or (e), those Specific Security Interests would be senior to the General Security Interest of all

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[47] U.C.C. § 9-203.

[48] Exhibit A, at 2 ¶ 2(e).

[49] U.C.C. § 9-204.

[50] See supra Section I(b).

[51] Exhibit A, at 2 ¶ 5.

[52] Id.

creditors, and in all likelihood, would be deemed to be equal in priority with respect to those two creditors, although this continues to be an open issue.

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Editor's note: This article will continue in the next issue of *The Banking Law Journal*.