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Security Interests in Railcars: A Canadian Overview

Jennifer Wasylyk, Jonathan Fleisher

January 9, 2013

Based on industry reports, it is expected that railcar leasing activities in Canada and throughout North America will continue to increase in 2013. This is a result of several factors, including the aging and gradual failure of current fleets of railcars and the desire to implement newer technology. This article provides an overview of the process for registering security interests over railcars in Canada, which is similar in many respects to the process for registering railcar security interests with the Surface Transportation Board in the United States. This article also outlines several considerations to be mindful of when registering security interests over railcars in Canada.

Registrations/Deposits

The registration of security agreements, leases and other documents relating to railcars is governed in Canada by the *Canada Transportation Act*[1] (the "CTA"). To obtain a security interest in railcars, the underlying document which grants the security interest must be deposited with the Registrar General of Canada (the "Registrar") pursuant to either section 104 or 105 of the CTA.

Section 104 permits the deposit of (a) a mortgage or hypothec issued by a railway company, (b) a security agreement entered into by a railway company and (c) an assignment or other document affecting a mortgage or hypothec issued by a railway company. A document deposited under section 104 must contain the full text of the document.

Section 105 permits the deposit of a document (a) evidencing a lease, sale, conditional sale, instalment sale, mortgage, hypothec, bailment, leasing, deposit or security agreement relating to rolling stock or any accessories or appurtenances relating to rolling stock or (b) an amendment, assignment or discharge of a document referred to in (a). Deposits under section 105 may be submitted via a memorandum or summary filing in place of the full text of the document.

Searches

Before entering into a transaction involving railcars, it is prudent to perform a search of the database of deposits maintained by the Registrar. Searches must be conducted in person at the offices of Corporations Canada in Ottawa, Ontario. Searches may be conducted against a company name or specific collateral.

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Considerations

- **Memoranda or summary filings under section 105:** Registration by memoranda or summary filings can be advantageous, especially if there is a desire to keep the underlying document (which may include confidential information or deal terms) private. As a result, it is important to consider the classification of documents under sections 104 and 105 and whether a memorandum or summary filing is possible. If proceeding by way of a memorandum or summary filing, it should be noted that there are specific procedures relating to the information which must be included in the memorandum or summary filing
- **Method of delivery:** Registration may be effected by courier, mail or fax. However, if documents are being sent by fax, the Registrar must receive original copies of the documents to be registered within five business days of the original fax.
- **Effective date:** Documents presented for deposit can bear any effective date, even an effective date which occurs after the date of delivery to the Registrar. It is recommended that the effective date be clearly stated in the first paragraph of each document presented for deposit. At a minimum, the effective date must be stated on the face of the document.
- **Primary vs. Secondary Documents:** The Registrar makes a distinction between "primary" and "secondary" documents. A primary document is the first document in a transaction or relationship whereas a secondary document is either (a) a document related to a primary document being filed concurrently or (b) an amendment, assignment, release or discharge of a previously-filed document. There are slightly different procedures and fees associated with filing primary and secondary documents, so it is important to understand which category each document being deposited relates to.
- **Considerations when performing searches:** The records maintained by the Registrar may not reflect amalgamations or other transactions involving changes in corporate name. Accordingly, where a transaction involves a company with predecessors, searching against specific collateral, if possible, is best practice. Alternatively, searches can be conducted against all prior names.
- **Registrations under the *Personal Property Security Act* (the PPSA):** A deposit made under either section 104 or 105 is valid against all persons. Sections 104 and 105 state that once a deposit is made under the CTA, the underlying document need not be deposited, registered or filed under any other law or statute respecting real or personal property. However, there is some commentary that suggests that where railcars are used solely within one province, the regulation of those railcars would fall within provincial jurisdiction. While there is no case law as to whether this view is correct, it would be prudent to register under both the CTA and the relevant PPSA out of an abundance of caution. In addition, where railcars have additions to them, such as racking or detachable assets, it is common practice to make additional registrations under the PPSA (or the Quebec equivalent) at the chief executive office of the obligor.

If you have any questions on railcar security in Canada or would like to receive additional information on this issue, please contact the authors of this article or any member of our Banking & Specialty Finance Group.

[1] S.C. 1996, c.10