

The Nature and Structure of Marine Terminal Leases – Part 2

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FINANCIAL RISKS/PROTECTIONS

UNDER TERMINAL LEASES

RISKS DISCUSSED AS PART OF SESSION #2:

This session focuses on leasing provisions or practices that offer protection or leverage in situations where tenant becomes insolvent or bankrupt in these areas:

- NON-PERFORMANCE/PAYMENT
- TENANT BANKRUPTCIES
- ENVIRONMENTAL COMPLIANCE AND LIABILITIES

KEY LEASE PROVISIONS

- LEASE PROVISIONS THAT HELP MANAGE FINANCIAL AND OTHER RISKS:
 - DEFAULT, particularly surrender of improvements
 - Keep default provisions simple without ambiguity
 - TERMINATION, rights to recapture/regain property
 - Track state law eviction procedures or waive such procedures
 - Should preserve remedy to either recapture property (accelerate rent) or to continue lease in full force to continue collecting rent
 - CONTROL PROVISIONS, assignment and permitted use
 - Assignments subject to review of qualifications
 - Assignor/original lessee remain liable
 - INSURANCE/INDEMNIFICATION
 - LEASEHOLD MORTGAGE/LENDER PROTECTIONS
 - ENVIRONMENTAL
 - Adopt standard environmental provisions

FINANCIAL RISKS/PROTECTIONS

- RISK OF NON-PERFORMANCE/NON-PAYMENT
- PROTECTIONS:
 - DUE DILIGENCE – “credit tenant”/financial statements
 - Beware the LLC’s and foreign corporations
 - SECURITY DEPOSITS: is a debtor asset in bankruptcy
 - GUARANTEES:
 - Should be unconditional, preferably not conditioned on default
 - Guarantee of payment, not collections
 - Waiver of separate statutory protections (especially waiver of requirement to proceed against tenant’s assets first)
 - Joint and several liability of all guarantors
 - LETTERS OF CREDIT: Is NOT debtor asset, so free from bankruptcy, but careful of conditions to draw that may be prevented from happening because of bankruptcy stay (i.e. notice of default).
 - PERFORMANCE AND PAYMENT BONDS: difficult to enforce

BANKRUPTCY RISKS/PROTECTIONS

- GOVERNED BY FEDERAL BANKRUPTCY CODE, 11 USC 365
 - Forum, choice of law issues (frequently dealing with Delaware or foreign corporations)
 - Automatic stay of enforcement of lease provisions: making declaration of default difficult or untimely
 - Trustee/debtor option to assume or reject lease (delay in knowing possession issue)
 - Recovery of rent limited in case of rejection
 - “Clawback” of preference or fraudulent payments: payments under lease should be structured to avoid recapture

Case Study of Bankruptcy

- Ports America declared bankruptcy in Oakland in 2015.
 - Make sure tenant has “skin in the game”: investment up front, letter of credit, guarantees, etc.
 - Enforce all tenant obligations on time (lapsed maintenance or other uncompleted obligations are difficult to recover once bankruptcy is declared)
 - Understand the corporate structure and control of your tenant entity
 - Monitor your tenant’s financial situation; retain bankruptcy counsel practicing in your tenant’s state of incorporation as soon as sign of financial insolvency
 - If bankruptcy is filed, act quickly – go to the very first hearing because your rights may be compromised quickly!

ENVIRONMENTAL RISKS/PROTECTIONS

- ENVIRONMENTAL ISSUES
 - STORMWATER CONTROL AND MANAGEMENT
 - FUGITIVE DUST CONTROL AND MANAGEMENT
 - AIR QUALITY AND EMISSIONS
 - SHORELINE EROSION AND DREDGING
 - SPILLS, LEAKS, OTHER TYPES OF CONTAMINATION
 - ENVIRONMENTAL SUSTAINABILITY – “GOING GREEN”