The Nature and Structure of Marine Terminal Leases – Part 2

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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”