

PERFORMING LIEN AND COURT SEARCHES OUTSIDE THE U.S.



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Due diligence tasks such as ordering lien and court searches are a common feature of U.S.-based financial transactions. These tasks, which fall under the Uniform Commercial Code’s (UCC) Article 9—as well as searches for non-consensual liens, such as tax liens—can be complicated. Yet the difficulty level can rise significantly when due diligence must be performed outside the country.

Given that UCC Article 9 only applies domestically, law firms and in-house counsel must contend with a patchwork of varying laws and regulations governing lien and court searches across global jurisdictions. When dealing with foreign filings and debtors, law firms must reconcile these varying jurisdictional requirements, and be aware of local nuances. Differences in business culture and local laws require the exercising of special consideration when entering into a global transaction.

In order to secure the assets and interests of their clients in a global economy, law firms must understand how to do two key things: effectively search for secured assets, and then secure those assets under the laws governing their jurisdiction.

In practice, this means learning the processes that govern the ordering of asset filings, non-consensual liens and court and bankruptcy searches. This is no small challenge; these laws and processes are often opaque and confusing to outsiders, and coordinating with local partners is often both costly and time-consuming.

Yet it’s important that law firms and in-house counsel rise to the occasion, as failing to perform due diligence in this regard can have a serious impact on the success or failure of an international transaction.

INTERNATIONAL DUE DILIGENCE: KEY THINGS TO CONSIDER

It’s important to be cognizant of the fact that cross-border due diligence processes are typically more complex and offer a greater number of potential pitfalls. Law firms must take steps to ensure that everything is finished in a timely and accurate manner.

Some of the most important elements of which to be aware include the following:

- › **Turnaround time.** Expected turnaround time can vary significantly between jurisdictions. While Canada and the U.S. may operate on similar timelines, Mexico, for example, may require you to wait three-to-six weeks for requested information. National holidays also play a role, so it’s important to determine whether requests fall during a holiday period,

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as limited hours or staffing may slow the process to an even greater degree. For example, you will find that many countries have extended holiday periods in December and January, with major closures or limited staffing.

➤ **Varying time zones.** While domestic time zones generally require little accommodation, managing multiple international time zones is a far greater challenge. Tokyo, for example, is 13 hours ahead of New York City. Law firms with requests in multiple time zones need to stay on top of these differences.

➤ **Language barriers.** While English may be the lingua franca of global business, it's not universally accepted in the realm of lien and court searches. In Japan, for example, to perform a search at the Real Property Register and Legal Affairs Bureau, you would need to have the spelling of the name and address in Japanese characters. Other jurisdictions also require use of the national language, and will return documents written in the language of the country of origin, which will require additional resources for translation.

➤ **Expense.** The cost of due diligence processes can vary considerably between countries. One example: Some jurisdictions may not have the required documents located on an online server, necessitating the hiring of a person to physically retrieve the needed materials.

FEW NATIONS MEET THE REQUIREMENTS OF ARTICLE 9

Article 9 was created in order to make the process of filing and searching within the U.S. easier and more efficient. It does this, in part, by requiring the secured party to file according to the debtor's location. This means that if the debtor is incorporated or resides in California, the secured party must use that state's filing office.

Section 9-307(c) of Article 9 sets forth the requirements where the debtor is a non-U.S. entity. In such cases, a country's filing system is evaluated for equivalence with the U.S. system.

There are, however, only a handful of nations that fully meet this standard. (According to Article 9 scholars, it seems that Canada, New Zealand and Australia would meet the test.) This means that filings and searches in these countries can generally be done with high confidence, as it's likely they will be properly recorded.

This isn't a guarantee, however. Though these systems may be roughly equivalent, there are still issues that can lead to potential stumbling blocks. One example: In Canada, no copies of filings are submitted. Electronic filing is the sole option, and collateral descriptions may be less precise or shorter than in those seen in the United States.



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SECURING LIEN AND COURT DATA OUTSIDE THE U.S.

Though the majority of countries do not meet the standards set forth in 9-307(c), law firms aren't without options for lien searches. Among the most commonly used of these options are the following:

- Charges, mortgages and other asset filings
- Bankruptcy searches
- Credit reports
- Court/judgment searches
- Property searches

One more thing to note: The names used for documents often vary between jurisdictions, so it's important to find and use the proper nomenclature. The way information is structured may also depart from the norm, necessitating the retrieval of multiple, different documents.

In terms of attributes such as ease of use and timeliness, jurisdictions may also vary considerably. The United Kingdom, for example, offers fast turnaround, easy submission processes and clear report language. France offers one search that covers lien, judgment and bankruptcy searches, but it takes two to four weeks to receive the results. (And they will be in French.)

Law firms and in-house counsel should be aware that there are some common situations where due diligence could become more difficult to navigate. A bankruptcy search in a country without bankruptcy courts is one good example.

Additionally, there may not be precise equivalents for certain roles or designations (such as a bankruptcy trustee) in every jurisdiction. Requirements for perfection of security interests

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may depart dramatically from those found in Article 9, and these requirements may be material to the interests of those involved. Filing, too, may be required for priority over one but not others depending on the jurisdiction.

CONCLUSION

Navigating the complex web of international filings and searches is a significant challenge for any law firm or in-house counsel. Keeping track of the myriad differences that exist between jurisdictions—and learning how to master the process of filing and searching within each one—requires patience and careful consideration. Failure to do so can lead to costly delays and other setbacks.

There is, however, a solution: A service provider can help simplify even the most complex multi-jurisdictional deal through a single point of contact. Instead of worrying about

reconciling time zones and local turnaround times, law firms and in-house counsel can rely on the expertise of the service provider, one with the experience and global and local presence to ensure a smooth transaction.



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