

WHAT IF MY DEBTOR IS A NON-US ENTITY?

We're glad you asked! It's a question that comes up more regularly with the increase in cross-border transactions. In this article, we discuss the proper location for filing a UCC financing statement when the debtor is a non-US entity. Contrary to what many have been led to believe, Washington DC is not always the correct location for filing. As a matter of fact, the correct location to file a UCC financing statement (or its foreign equivalent) may be in another country, with no filings in the United States at all! We discuss this further below.

A non-US entity is not a “registered organization” under Article 9 of the UCC. This is true even if the entity’s name includes a term such as corporation, company, etc.

The term registered organization is defined in Section 9-102 as:

- *“an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized”.*

It further defines the term State as:

- *“a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States”.*

For the purposes of determining the debtor’s location under section 9-307, a non-US entity is considered a non-registered organization. As a result, its location for the purpose of filing a UCC financing statement is either its place of business (if it has only one location) or its chief executive office (if it has more than one location). However, nowhere in Article 9 does it state that its place of business or chief executive office must be in the United States.

If the debtor’s place of business or chief executive office is in the United States, the financing statement is filed in the State in which it is located. If the debtor’s place of business or chief executive office is in a foreign country, a filing must be made in that country. However, filing in a foreign country is not always possible, as not all foreign countries have systems for doing so.



Section 9-307 provides that the filing must be made in the foreign country **only** if that country is

- *"a jurisdiction whose law generally requires information concerning the existence of a non-possessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral."*

In other words, if the foreign country has a system similar to Article 9 of the UCC, and that system requires a form of public notice be filed/recorded in order to perfect an interest in the collateral, a filing should be made in that country. If the country does not have such a system, Article 9 designates Washington DC as the location of the debtor for the purpose of filing a financing statement.

THREE EXAMPLES TO ILLUSTRATE

Example One:

The debtor is a company formed in Ecuador but has its chief executive office in Florida. The UCC financing statement should be filed in Florida.

Example Two:

The debtor is a company formed in New Zealand, has several offices in New York and California, and its chief executive office is located in New Zealand. Since New Zealand has a filing system requiring public notice/filing of secured interests, New Zealand is the appropriate location for filing. Article 9 of the UCC does not require any filings to be made in the United States. However, many secured parties choose to file in Washington DC as a precautionary measure (see recommendations below).

Example Three:

The debtor is a company formed in Ecuador, has offices in Texas, and has its chief executive office in Ecuador. As Ecuador does not have a public filing system similar to Article 9 of the UCC, the secured party should file in Washington DC.



DO DILIGENCE, LLC RECOMMENDATIONS

When dealing with a non-US entity, do not assume that the only location for filing and searching for UCC financing statements is in Washington DC! Non-US entities are by definition “non-registered organizations”. The relevant facts will determine whether a filing must be in a US State, the entity’s home country, or Washington D.C.

Due to the fact that it can be difficult to determine the chief executive office for a non-US entity, and the location of the chief executive office can change at any time without notice, many secured parties frequently file in multiple locations. This often includes a filing in Washington DC, a filing in the US State in which its primary operations occur, as well as a filing in its home country (when available). For due diligence purposes, it is important to remember that searches should be conducted in multiple locations as well.



Do Diligence, LLC, is the only national service company dedicated exclusively to providing legal due diligence services to law firms. We'd love to hear from you! If you have any questions about this article, please contact us at ILoveUCC@ddsimplified.com or visit our website at www.ddsimplified.com.

