

Blake Dawson

Funding the Golden Fleece Some PPSA considerations

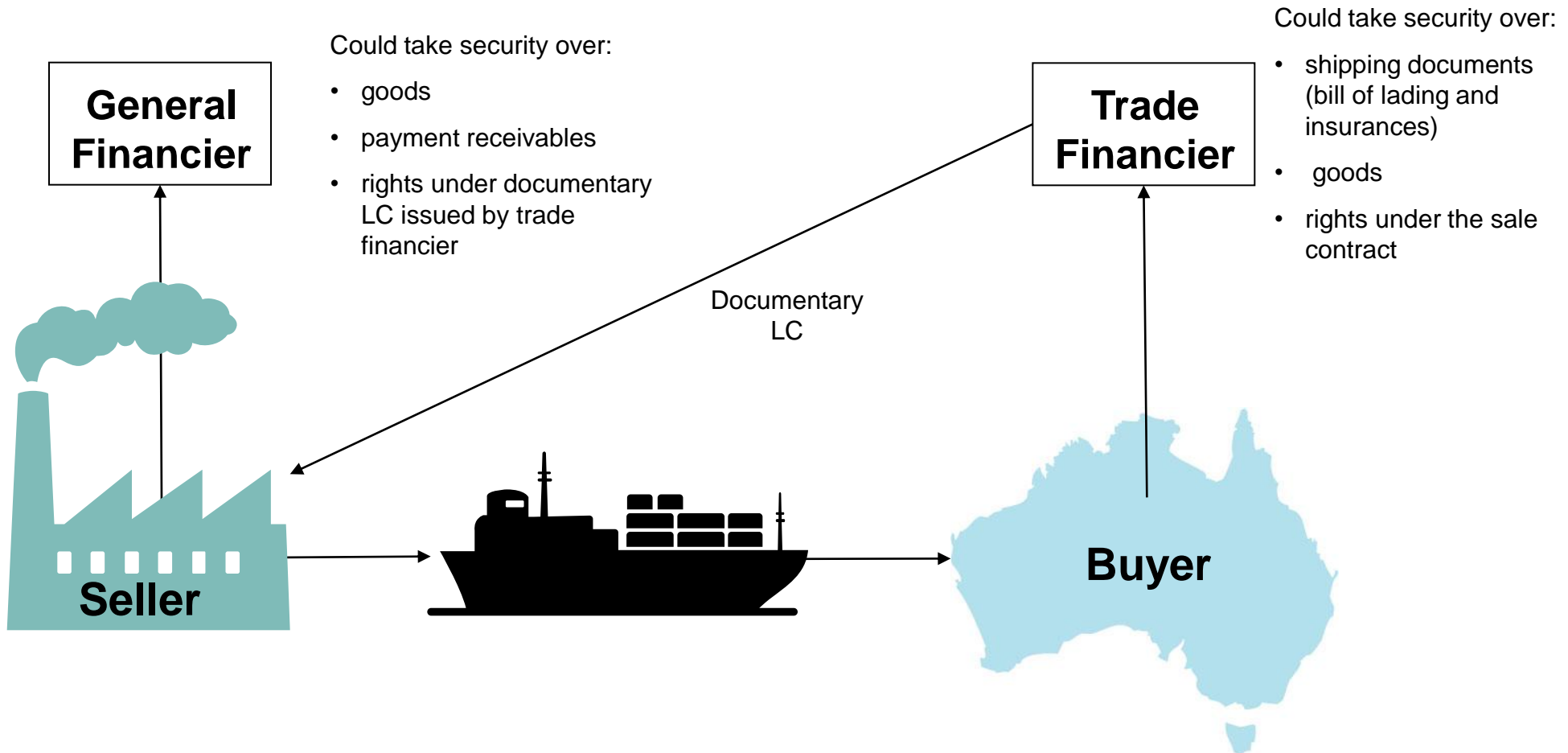
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Topics covered

- Import transactions
- Inventory financing

Import transactions



Import transactions (cont'd)

Nexus tests – does the PPSA apply?

- section 6 – depends on factors such as:
 - nature of the property
 - location of the property
 - whether the grantor is an "Australian entity"
 - place of performance
- nexus test will always be satisfied if the grantor is an Australian entity

Import transactions (cont'd)

Governing law

- Even if the PPSA applies, the choice of law rules in Part 7.2 may still direct you to apply non-Australian law
- Choice of law rules only apply to "validity, perfection and effect of perfection or non-perfection of the security interest"
 - don't affect the law that governs the contractual obligations

Import transactions (cont'd)

| Governing law rules | | | | |
|---------------------|--|---|--|---|
| | Bill of lading ("financial property") | Insurances ("intangible property") | Goods ("goods") | Purchase contract ("intangible property") |
| Validity | <p>Location of grantor (s240(1))</p> <p>Unless bill is "non-negotiable", in which case – location of goods at time of attachment (s 240(6))</p> | <p>Location of grantor at time of attachment (s 239(1))</p> | <p>Location of goods at time of attachment (s 238(1))</p> <p>Unless reasonable to believe at time of attachment that goods would be moved to another jurisdiction, in which case – that jurisdiction (s 238(2))</p> | <p>Location of grantor at time of attachment (s 239(1))</p> |

Import transactions (cont'd)

Governing law rules

| | Bill of lading ("financial property") | Insurances ("intangible property") | Goods ("goods") | Purchase contract ("intangible property") |
|------------|---|---|---|--|
| Perfection | <p>Location of grantor (s 240(4))</p> <p>Unless bill is "non-negotiable", in which case – location of goods at time of attachment (s 240(6))</p> | <p>Location of grantor (s 239(2))</p> | <p>Location of goods at the time (s 238(1A))</p> <p>Unless reasonable to believe at time of attachment that goods would be moved to another jurisdiction, in which case – that jurisdiction (s 238(2))</p> | <p>Location of grantor (s 239(2))</p> |

Import transactions (cont'd)

Perfection options

| Bill of lading | Insurances | Goods | Purchase contract |
|----------------|--------------|---|-------------------|
| Possession | Registration | Registration or Possession of the bill of lading, if it's negotiable (s 22) | Registration |

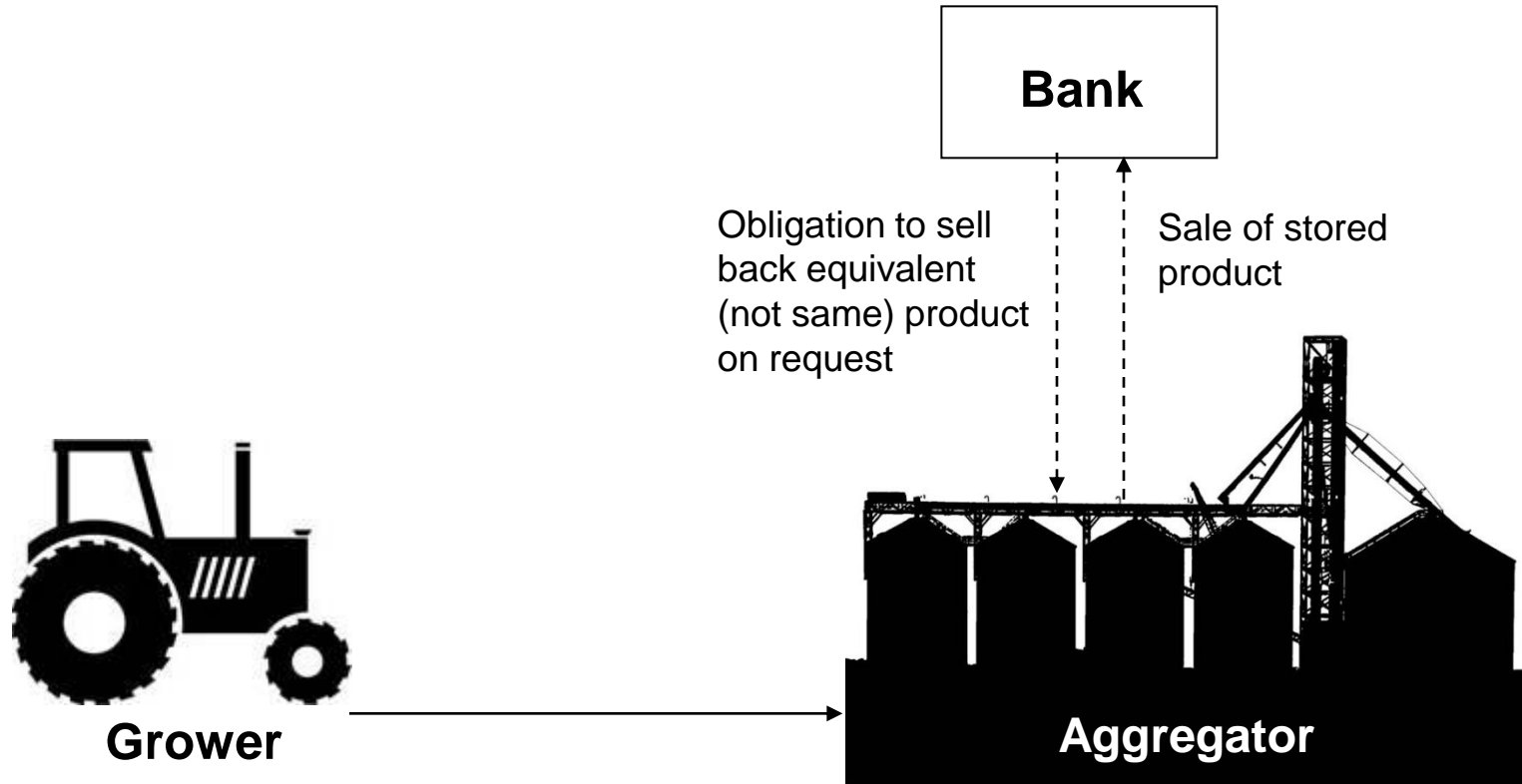
Financier may have a registered GSA anyway, in which case that registration will perfect these security interests too.

Import transactions (cont'd)

What happens if the security interest of the seller's financier continues in the goods?

- perhaps unlikely to arise often in practice
- section 32 – seller's financier may have authorised the sale
- section 39 – if collateral is relocated to Australia, pre-existing security interest is temporarily perfected for up to 56 days
- section 52 – buyer of goods for new value takes free of temporarily-perfected security interests

Inventory financing



Import financing (cont'd)

Does the bank have a security interest?

- Arguments against
 - transfer of the product to the bank doesn't secure any obligation – rather, it causes the obligation to arise
 - bank's right to deal with the product make it hard to see what any security interest could be said to be attached to
- Arguments in favour
 - commercial intent is to provide finance, with ownership of the product as "security"
 - s 12(2)(k) says a security interest can be by way of "transfer of title"
 - would otherwise be a triumph of form over substance?

Import financing (cont'd)

If the bank does have a security interest

- it should be perfected by possession
- it will however be subject to prior-ranking security interests