



ADR IN SECURED TRANSACTIONS: THIRD PARTY RIGHTS

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Summary

- Enforcement of secured transactions
- Arbitration versus courts in secured transactions
- Third party rights in secured transaction
- Arbitration and Insolvency in secured transactions
- The evolving role of arbitration in secured transactions

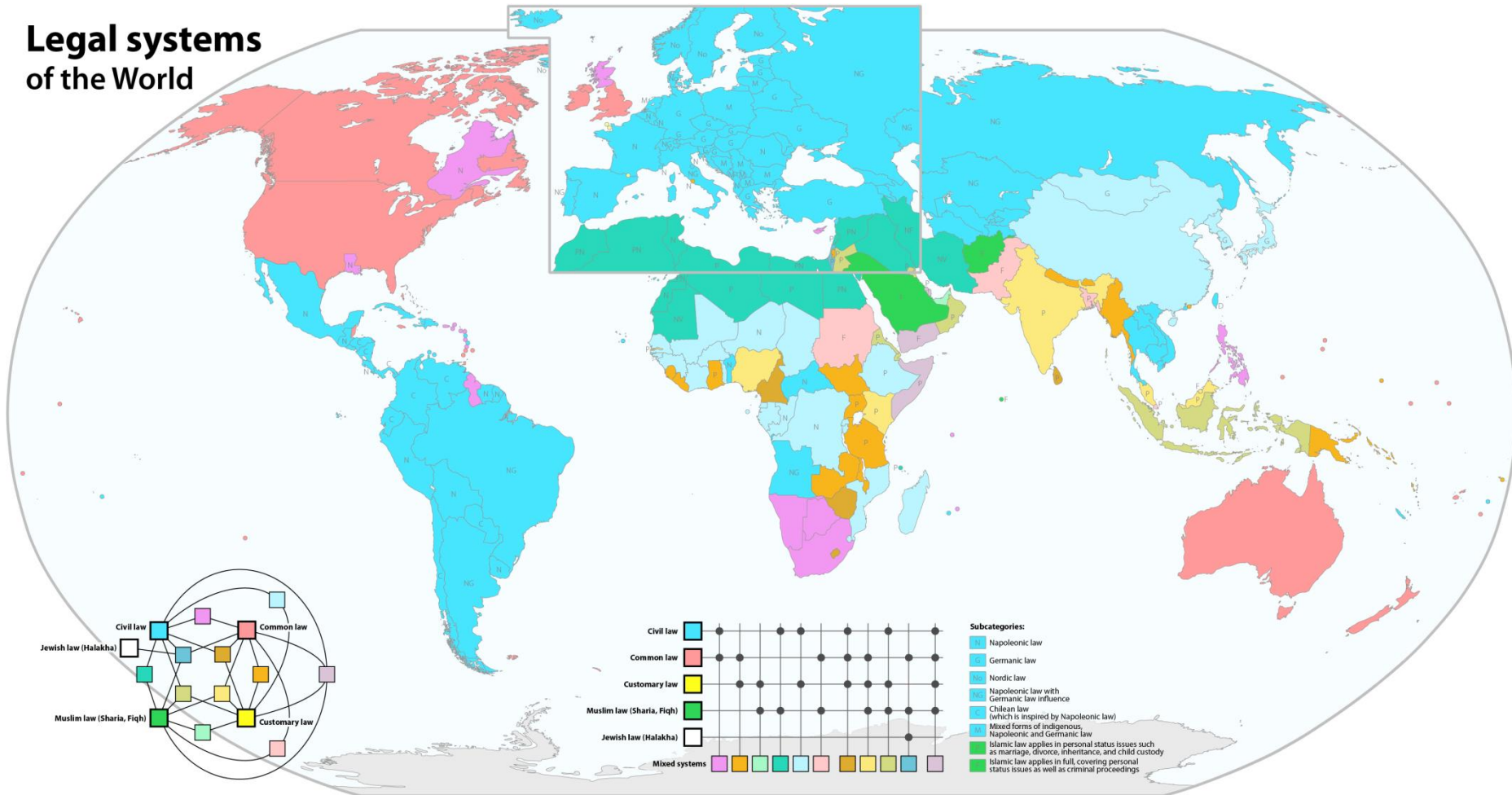
Enforcement of secured transactions

- Enforcement of security interest:
 - Simplicity versus Complexity
 - Amount: cost of enforcement
 - Time: time to enforce

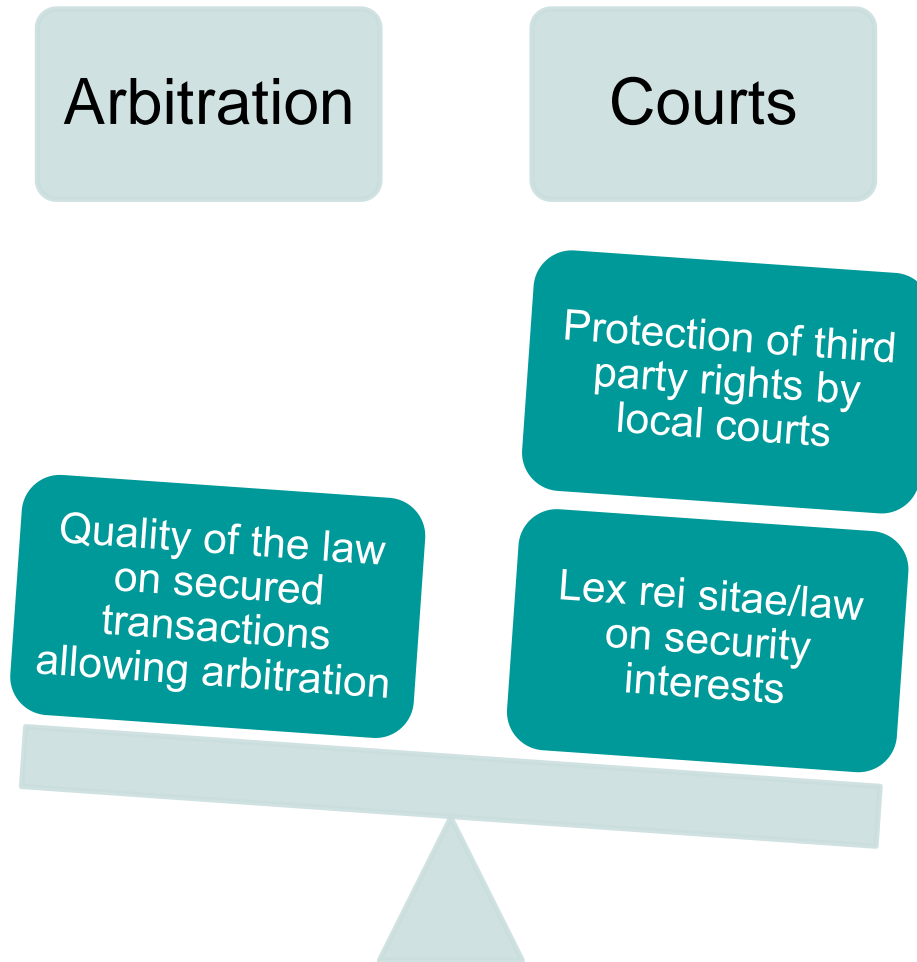
 Value of security interest
- The evolution of enforcement rules between history, legal traditions and economic goals

The different families of legal systems in the world

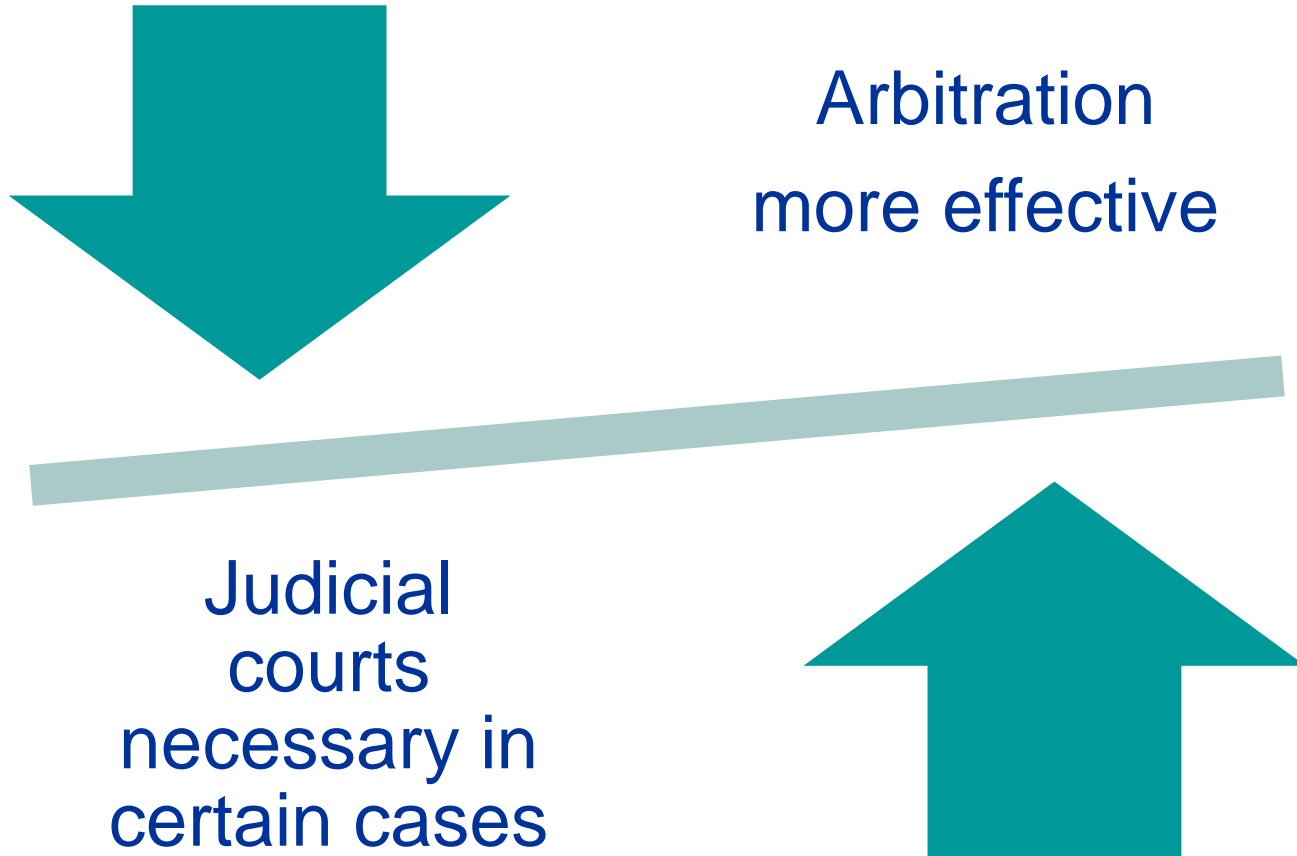
Legal systems of the World



Arbitration versus Courts



Arbitration versus judicial courts in secured transactions



Arbitration in security interest?

1

- Freedom of contract

2

- Arbitration clause

3

- Contractual issues/Third party issues

Is enforcement of secured transactions possible through arbitration?

- Contractual issues:
 - The relationship between the grantor and the secured creditor
- Third party issues:
 - Enforcement of the security
 - Conflict of priority between creditors
 - Proprietary issues
- Local law enforcement rules

Third party rights in secured transactions

- Perfection of security interest → enforceable against third parties
- Enforcement of security interests may bring third parties having interest over the secured asset
- Third parties should have adequate protection of their interests.

Secured transactions and third party rights

Priority rights

- Hierarchy among security interests
- Right of a higher-ranking secured creditor to take over enforcement
- Can priorities between security interests be settled by arbitration ?

Conflicting rights

- How to solve conflicting rights between creditors (secured creditors, unsecured creditors)

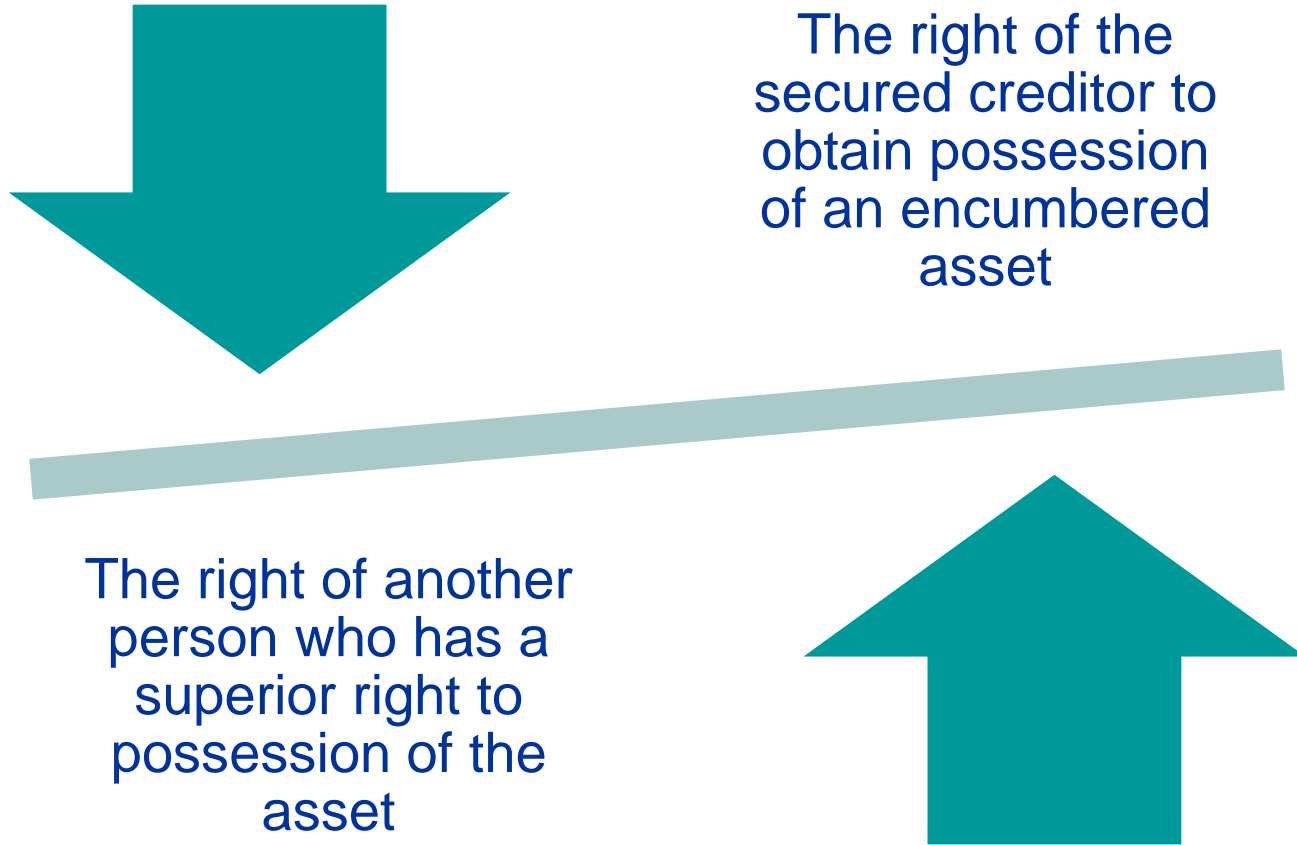
Proprietary rights

- How to deal with ownership protection rules on real estate?
- Appearance before local courts can remain mandatory for the validity and enforceability before third parties
- Is arbitration possible?

Priority rights

- The possibility to create many different types of security interests as a result of various special laws
- Priority rules:
 - Priority between secured creditors on the same collateral
 - Priority between secured and unsecured creditors
- Simplifying priority rules and setting up clear mechanism?

Conflicting rights



Proprietary issues in security interest

- Perfection/ Dispossession/Registration
- Real estate issues
- How third party rights are protected?
- Can arbitration protects third party rights ?

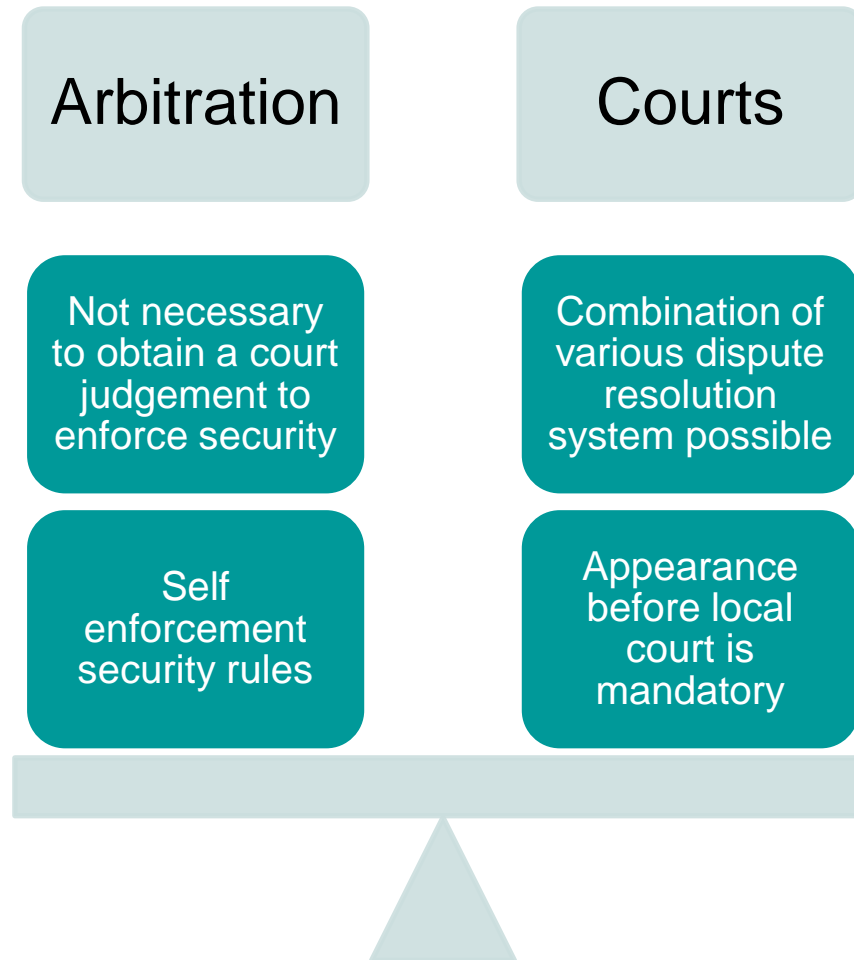
Can arbitration resist to third party rights?

- Third party rights joining the enforcement process:
 - Is ground for enforcement satisfied?
 - Enforcement proceeds are below the fair value of the secured assets
 - Inter-creditor disputes and priority rules

Favouring arbitration in secured transactions laws

- Laws providing arbitration as a mode of settlement of disputes in secured transactions:
 - Article 68 of the Model Inter-American Law on Secured Transactions : *“Any controversy arising out of the interpretation and fulfillment of a security interest may be submitted to arbitration by the parties, acting by mutual agreement and according to the legislation applicable in this State.”*
- Developing out-of court settlements and self enforcement rules in secured transactions

Arbitration or not in security interest?



Arbitration versus Litigation

Self enforcement
of security,
including on real
property



Mechanism to
determine the
enforcement
price



Arbitration is
more attractive
than litigation

Security and insolvency

- The meeting of two needs: the debtor's and the creditors needs, how to balance these two needs?
- The stress test of securities
- The ranking of secured creditors
- The consequences of the opening of an insolvency proceedings:
 - The preference period
 - The automatic stay

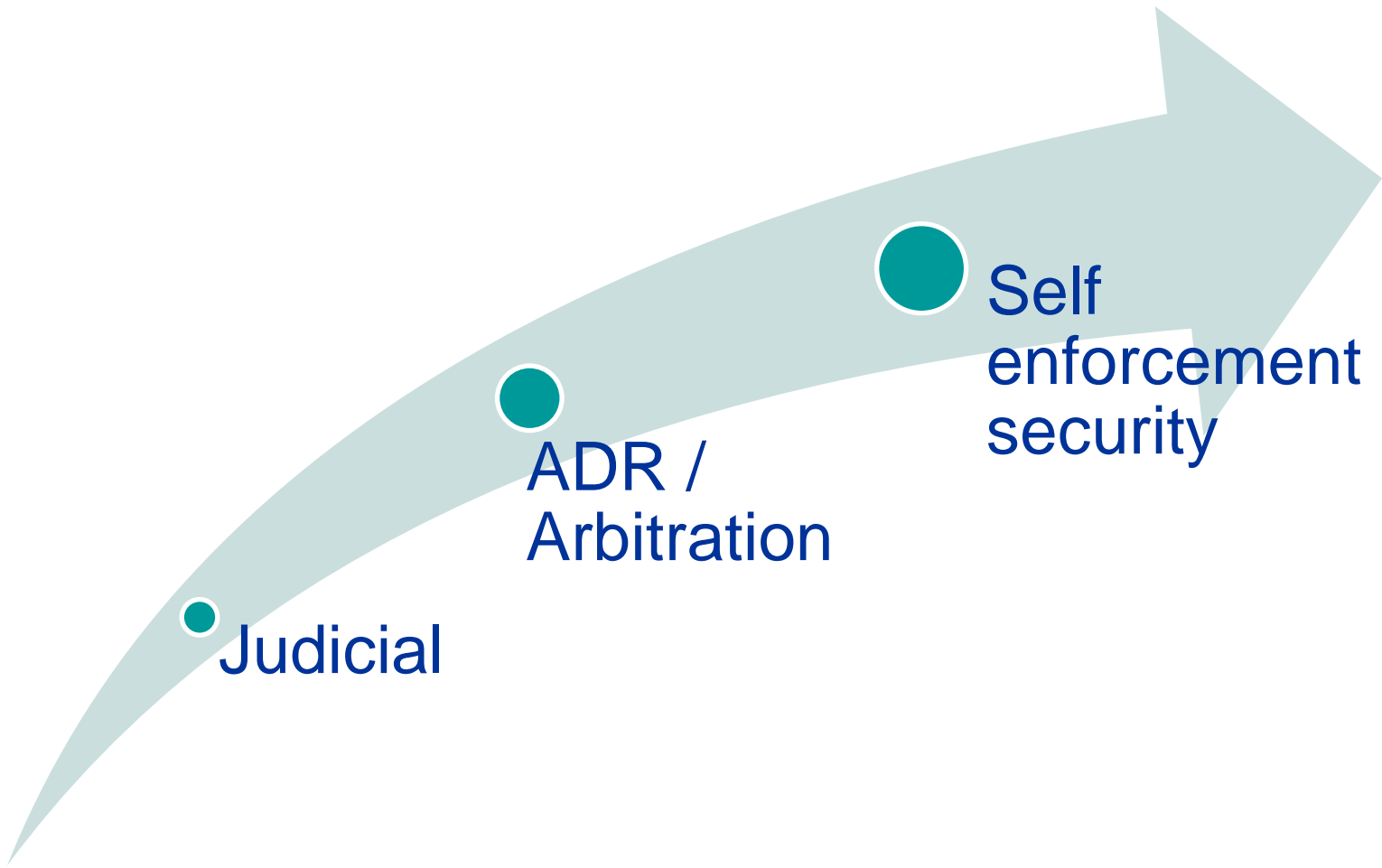
The limits of insolvency

- The general principle of most insolvency regimes is that creditors should be treated equally although secured creditors are allowed to have a preference to certain assets
- Primacy of insolvency rules and insolvency courts decisions: conflicting rules between insolvency and security interests.
- The imposition of a “stay” on enforcement proceedings by secured creditors. security interests and preference period

New trends in insolvency

- New rules favoring out of court settlements
- To save security interests and allow arbitration, security right should continue to be effective and enforceable after the bankruptcy or insolvency of the person who has given it.

The future of enforcement rules in secured transactions



Can arbitration overcome third party rights protections?

- Yes... if modern laws are put in place favouring:
 - Simple and clear perfection and enforcement rules
 - Self enforcement of security and mechanism to determine enforcement price
 - Clear rules on priority rights
 - Limiting the power of insolvency protection rules

Any question?



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