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

Subcategories:
- Napoleonic Law
- Germanic Law
- Nordic Law
- Scandinavian Law with Continental Law influence
- Jewish Law
- Islamic (inspired by Napoleonic Law)
- Mixed forms of Indigenous
- Muslim law applies in personal status issues such as marriage, divorce, inheritance, and in family matters
- Muslim law applies in full covering personal status issues as well as criminal proceedings
Arbitration versus Courts

Arbitration

Courts

- Protection of third party rights by local courts
- Lex rei sitae/law on security interests

Quality of the law on secured transactions allowing arbitration
Arbitration versus judicial courts in secured transactions

Arbitration more effective

Judicial courts necessary in certain cases
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 \(\rightarrow\) 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

The right of the secured creditor to obtain possession of an encumbered asset

The right of another person who has a superior right to possession of the asset
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:
- Not necessary to obtain a court judgement to enforce security
- Self enforcement security rules

Courts:
- Combination of various dispute resolution system possible
- Appearance before local court is mandatory
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

- Judicial
- ADR / Arbitration
- Self enforcement security
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?