Mediation in Enforcement Related Disputes

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ADR IN SECURED TRANSACTIONS

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Synopsis

I. Introduction
II. The Nature and characteristics of Mediation
III. The use and impact of mediation in disputes related to the enforcement of security interests
    I. Joinder or participation of third parties in the mediation of enforcement of security interests
    II. Enforceability of mediated settlement agreement against third parties
    III. Examples of legislations regarding the use of mediation in enforcement related disputes
    IV. Critique of using mediation in enforcement related disputes and the possibility of affecting third party rights
IV. Tentative Conclusions

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Introduction

- Rise of mediation in commercial disputes
  - Flexible, voluntary, consensual, cost and time effective method of resolving disputes by reaching a negotiated settlement with the help of a neutral third party, but non-binding.
- Mediation - Fairly new within the context of exercising post-default rights.
- Extrajudicial enforcement
- Efficient enforcement of secured creditor's rights – Key objective of Legislative Guide ((h), para 56, p. 21) and the Model Law
- Out-of-court/extra-judicial enforcement is a fundamental policy under
  - Legislative Guide ((k) para. 71, p. 26); Recs. 1 and 142
  - Model Law (article 73)

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Mediation in Transnational Secured Transactions Law texts

- Transnational secured transactions law texts are largely silent on this.
- UNCITRAL Model Law on International Commercial Conciliation – transnational general text.
- OAS Inter-American Model Law on Secured Transactions **only** '…arbitration or private settlement.' article 4(V)
  - But not ADR or mediation
- UNCITRAL Model Law on Secured Transactions
  - 49th Session of the UNCITRAL Commission
    - 'the question whether disputes arising from security agreements could be resolved through ADR mechanisms'

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ADR

Alternative to Litigation

Some of many types of ADR

- Arbitration – the only binding one.
- Negotiation
- Mediation/Conciliation
- Mediation/arbitration (med-arb)
- Early neutral evaluation
- Adjudication
- Expert determination

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Mediation

- Commercial Mediation
  - mediator ‘works with the parties to resolve their dispute by agreement, rather than imposing a solution.’
  - *Facilitative* or *evaluative mediation/mediator*
- History – Ancient Greece, China (Confucianism) , Ancient Egypt, Judaism all preferred mediation - Non-adversarial hence the choice.
- Comparison with arbitration (private adjudication) and litigation (public adjudication)

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Mediation

	Binding	Voluntary	Consensual	Adversarial
Litigation	Yes, subject to appeal	No	No	Yes
Arbitration	Yes, final and binding, subject to review under NY Convention.	Yes	Yes	Yes
Mediation	No, facilitates communication, but agreement may be made enforceable as contract or court order	Yes	Yes	No
Conciliation	No, but non-binding recommendations from the conciliator, also *see above mediation.*	Yes	Yes	No

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Mediation

Advantages

- flexible procedure applicable to a wide range of disputes, appropriate for complex disputes;
- creative solutions not available in court adjudication may be achieved
- reduces conflict especially when the business relationship is a long standing one
- can achieve a reconciliation between parties;
- less stressful for parties than court procedures;
- saves legal costs and lead to speedier settlements when compared with litigation procedures.
  - Genn and others (2007)
- Confidential proceedings and settlement agreement.
- Non-transparent

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Mediation

Disadvantages

- Unsettled mediation may increase the cost of enforcement and cause delays – parties may have to move to arbitration or litigation (*importance of a well drafted dispute resolution clause*)
  - Subsequent proceedings may be troublesome – mediator may not be able to act as arbitrator; admissibility of evidence.
- Willingness of parties is needed.
- Confidentiality – prevents progress of law
- Non-transparent process–
  - third party problem – Grantor and Secured Creditor can't agree on how to dispose of the asset during the mediation as this will affect third parties' rights.
  - Access to justice issue
- Coerced consent, absence of trial and judgment,
- Voluntary nature of mediation may be lost due to automatic referral or compulsory mediation.

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Mediation in context – its use and impact in enforcement related disputes

- Cost of credit is lowered as the secured creditor is given the right to take the asset without the assistance of courts or execution office.
- Risk: the grantor may relocate, hide or damage the asset to reduce the value.
- Different methods of extrajudicial enforcement:
  - Seizure by the secured creditor – proof of security agreement and default by the grantor, seizure of the asset from the grantor without the assistance of execution office – consent may be post-default or pre-default.
  - Mediation adds a layer of dispute resolution mechanism to reach a speedy and amicable solution between the parties, but only present in developed legal/regulatory and institutional frameworks.

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Mediation in context – its use and impact in enforcement related disputes

- Model Law article 3(3)
  - 3. Nothing in this Law affects any agreement to use alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution.
- Model Law Article 73 Methods of exercising post-default rights
- The report of the Thirtieth Session of Working Group VI (Security Interests):
  - "There was general agreement … as to the value of ADR,… it was agreed that, in view of the complexity of the matter and the need to coordinate with Working Group II and to discuss the matter on the basis of a detailed proposal, no reference to ADR should be made in article 67 (now art. 73) ["*Methods of exercising post-default rights*"] or other part of the draft Model Law (A/CN.9/871, para. 85)." (see A/CN.9/899, para. 123)

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Mediation in context – its use and impact in enforcement related disputes

- Why use mediation?
  - Courts may be biased,
  - Litigation may be expensive and can take years,
  - Protection of the collateral,
  - Reduces the cost of credit and creates legal certainty.
- How to make mediation more widely used?
  - Joinder of other creditors of the grantor to the mediation process.
  - Enforceability of mediated settlement agreements.

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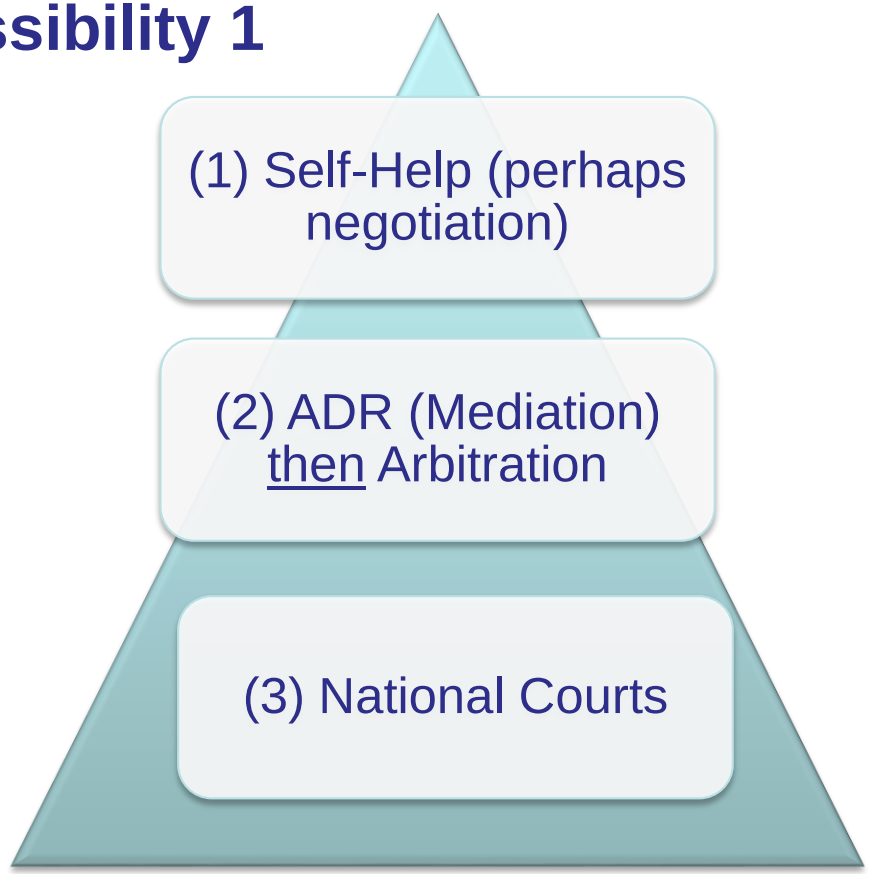
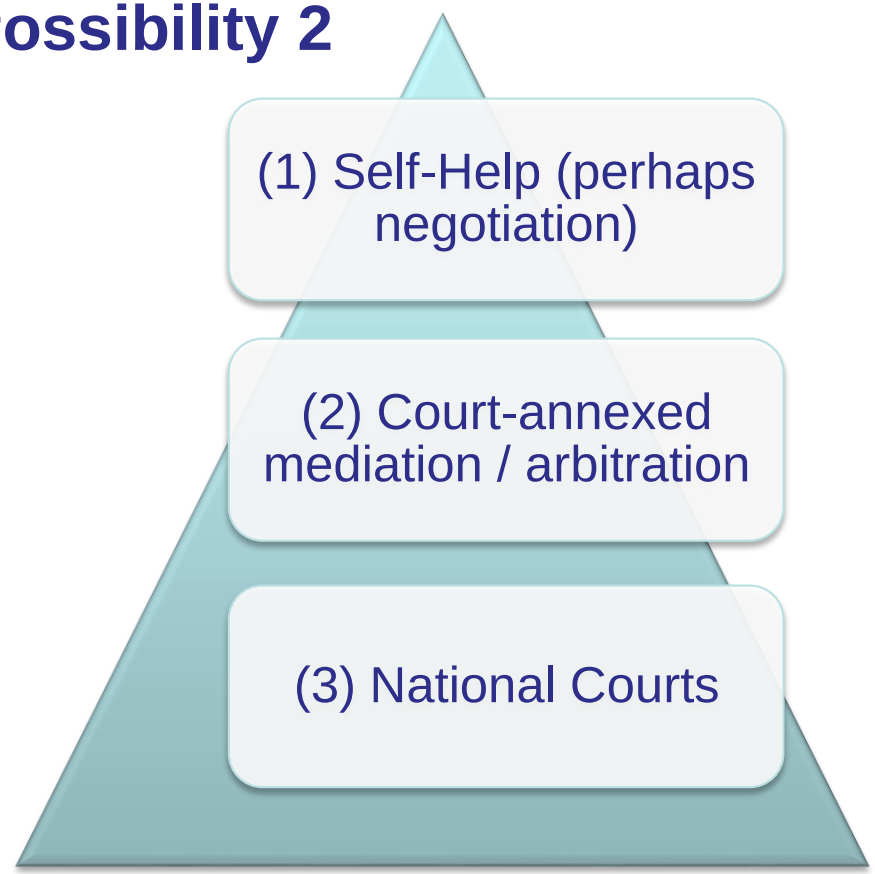
Mediation in context – possible use

Possibility 1



Possibility 2



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Mediation in context – possible use

- Possibility 1
  - If privately operated mediation and arbitration system, inequality of bargaining between the grantor and the secured creditor may cause problems – lending in return for agreeing to mediate in cases of default ('I will make him an offer which he can't refuse'). But also problems with the use of mediator as arbitrator in subsequent proceedings.
- Possibility 2
  - More feasible. Use of court-annexed mediation does not necessarily violate the nature of mediation (voluntary and consensual). Because parties are not under the pressure to resolve the dispute and it also saves both time and cost without the need to resort to arbitration. If no settlement is reached, the dispute can go directly back to court. All parties have to attend in good faith. Example of use in New South Wales, Australia.

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Joinder

- Common in many arbitral rules.
- Very rare in Mediation rules.
- Possible to include third parties in the mediation process
  - Identifying/informing the other third party creditors should be the grantor's responsibility.
  - Both original parties should provide consent for the joinder of third parties.
  - Mediator may have to meet in private caucuses and then jointly to protect confidential information and interests of parties.
- In arbitration - The main approach is that until the confirmation or appointment of an arbitrator third parties can join. However, after that period the consent of parties is necessary for the joinder and that the tribunal should not find that joinder may prejudice parties.
- Model Law is silent on this. Para. 74 (A/CN.9/WG.VI/WP.73) left it to the local law.
- OAS Inter-American ML on ST – article 54 *enforcement registration form '… to any person who has publicized a security interest in the same collateral.'*

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Enforceability of the mediated settlement agreement

- Settlement agreement is a contract and binding on the parties.
- Agreement may be embodied in a court judgment to be binding on third parties.
- The agreement may contain dispute resolution clause in order to resolve any disputes related to the interpretation, amendment or implementation of obligations arising under the settlement agreement.
- If mediation is a court referred mediation – court order.
- European Mediation Directive written settlement agreement is enforceable upon the request of one or more parties to the mediation. (article 6(1) and Preamble 19).
  - Enforceability may be refused if the content of that agreement is contrary to the law of the MS where the request is made or the law of that MS does not provide for its enforceability.
  - It may still be possible to render a settlement agreement enforceable directly by utilising the enforcement procedures in the MS where the enforcement is sought.
    - either by authentication of the settlement agreement by a notary public or
    - by submitting the settlement agreement to the court to render it enforceable as a judgment (*homologation*).
- UNCITRAL Working Group II on International Commercial Conciliation

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Examples from various jurisdictions where mediation is used in the enforcement process

- Out of court enforcement is used in more than 100 countries.
- Mediation is used in many countries as part of commercial dispute resolution
- **BUT** in the enforcement of security interests mediation's use is rare:
  - Australia (mandatory farm debt mediation in NSW and Victoria, voluntary scheme in WA).
  - Canada (e.g. Farm Debt Mediation Act 1997)
  - United States
    - E.g. Minnesota
      - in order to enforce a security interest the secured creditor first needs to serve mediation notice (UCC §9-601(h)-(i))
      - Utah – Agricultural Credits Act 1987 – mediation of farm debts *voluntary mediation programme.*
  - Colombia – mediated settlement agreements have the same value as court orders.
  - South Africa - National Credit Act 34 of 2005 section 134
  - Kazakhstan- debtor/creditor repayment of loans
  - Other countries include Serbia, Bosnia & Herzegovina, Montenegro and Pakistan.

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Critique

- Transparency concerns
  - *Organisational transparency*, arbitral institutions to be more proactive in becoming transparent in their management and decision making;
  - *legal transparency*, publicity of arbitral decisions; and
  - *transparency of proceedings*, public proceedings and hearings.
- Values that transparency serves for: “human rights; access to justice; fairness of dispute resolution process; effectiveness, credibility and legitimacy of dispute settlement mechanism, and assessment and accuracy of dispute resolution on small businesses.”
- Transparency reduces corruption and provides accuracy in the implementation of decisions.
- Mediation in this field has to be carefully devised to respond these.

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Tentative Conclusions

- Mediation is a feasible method to reduce the tensions between parties.
  - Clearly used in contractual disputes almost everywhere.
- Mediation in secured transactions law cannot replace the status of courts in both creating precedents and fairness.
- Copy & paste solutions from different jurisdictions in the context of use of mediation in enforcement disputes may not be useful.

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Tentative Conclusions (Cont'd)

- The borrower must be given the chance to bargain/negotiate the terms of the contract.
  - Otherwise contradicts with the voluntary and consensual nature of mediation.
- Possible Solution:
  - mediation (and potentially arbitration) in this area are kept within the judicial enforcement system (similar to *court annexed mediation*) of the state but called *hybrid private enforcement* according to which parties are kept within the state's supervisory system;
  - enforcement of security interests may be specifically channelled through court-annexed mediation (e.g. Adjudication in the UK construction disputes);
  - This type of approach may eliminate public policy issues and transparency concerns during enforcement.

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Tentative Conclusions (cont'd)

- Multi-tiered dispute resolution clause (negotiation – mediation – arbitration) is necessary, just in case one of the parties walk away from mediation.
- A system that clearly informs third parties during the mediation to protect their rights needs to be established.
- Training of borrowers/SMEs on mediation is necessary.

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Thank you

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