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UNCITRAL

Fourth Colloquium on Secured Transactions

Vienna, 15-17 March 2017

Panel 2:

Contractual guide on secured transactions (Part Two):
transactional advice and regulatory considerations

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OUTLINE

I.- Enforcement of a security rights: **legal and contractual framework**

II.- **Methods** of exercising post-default rights/remedies: Effective and efficient judicial procedures (or alternative dispute resolution mechanisms) to facilitate enforcement of rights in secured transactions

III.- **Out-of-court repossession** of tangible collateral

IV.- **Out-of-court disposition** of collateral

V.- **Secondary markets** – electronic platforms and limitations

I.- Enforcement of a security rights: legal and contractual framework

Remedies/rights provided under applicable legal provisions

Remedies/rights provided in the security agreement

- 1.- Contractual terms providing for adequate remedies in case of defaults
- 2.- Before default, no agreement waiving or varying the post-default rights
- 3.- Compatibility of rights if their exercise is not inconsistent.

II.- Methods of exercising post-defaults rights

COURT

I.- Applicable legislation may specify different methods or proceedings for types of assets, types of security rights or condition of parties involved: **SELECTING AVAILABLE METHODS**

OTHER AUTHORITY

II.- Previous requirements to access to available proceedings could be a prerequisite: **CARE IN DRAFTING SECURITY AGREEMENT**

NO COURT OR OTHER
AUTHORITY

III.- EFFECTIVE AND EFFICIENT PROCEDURES

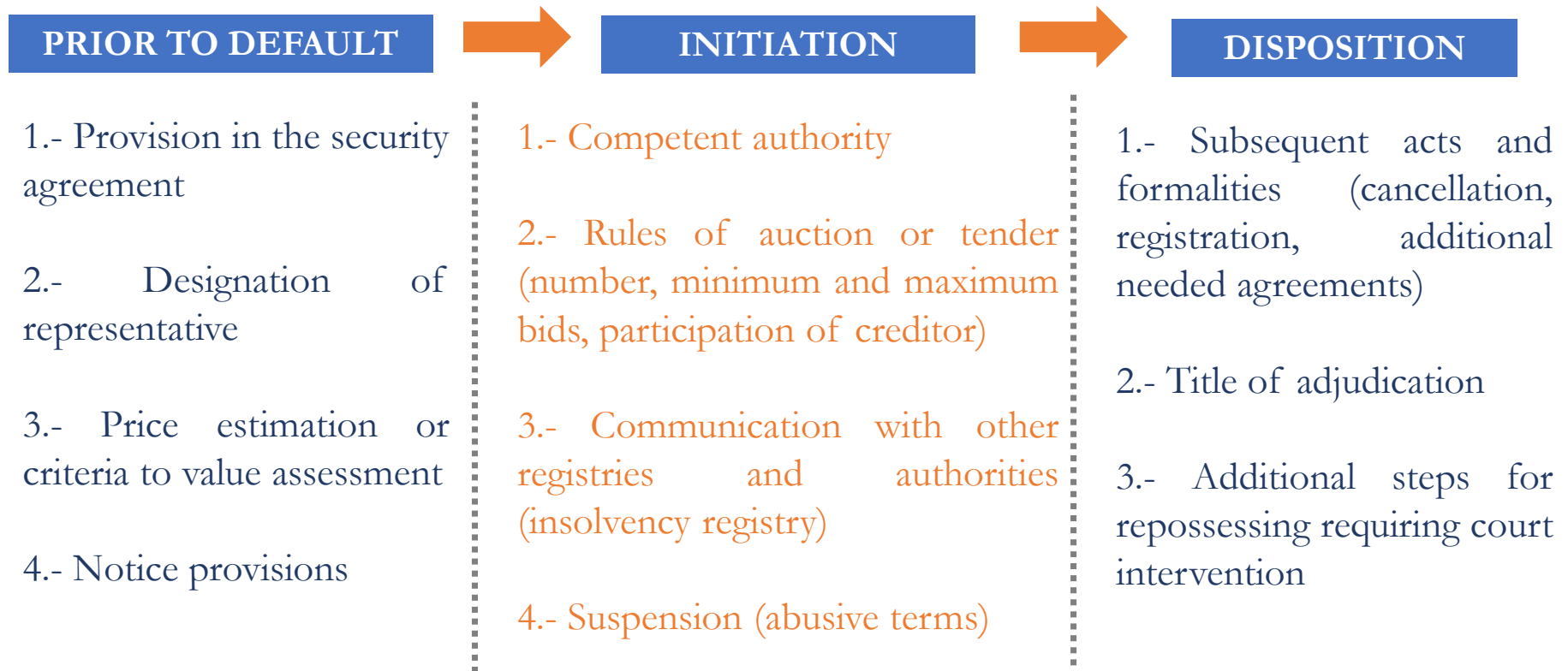
A). Court proceedings

- *Declarative / Executive*
- Specific expeditious proceedings

B). Arbitration:

- Arbitrability of disputes arising under a security agreement or associated with,
- Enforceable arbitration agreement,
- Protection of third parties rights

Effective and efficient procedures to enforce rights:
possible relevant transactional issues in a model out-of-court
enforcement procedure



III.- Non-judicial repossession of tangible collateral

Essential preconditions:

Grantor's consent: SECURITY AGREEMENT (typically)

Notice of default and intent to obtain possession

No objection from the person in possession

Transactional advice:

- A). Drafting the security agreement including clear consent
- Clearly specifying defaults and related remedies
 - Establishing a process detailing the grantor's collaboration – deterrence mechanisms
 - Caution to ensure non-abusiveness of terms
 - Possible limitations on Standard Terms
 - Value estimation and distribution of proceeds (*pacto marciano*)
 - Smart Contracts and automatic-enforcing devices (i.e. ignition-suspension, AI-based solution, autonomous machines, cancellation of passwords, etc)



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A). Drafting the security agreement including clear consent

B). Notice of default:

B.1. Contractual practices (in the security agreement)

- Specifying addresses and method to notify
- Fixing a period for prior notice
- Obligation to notify change in possession and location coordinates

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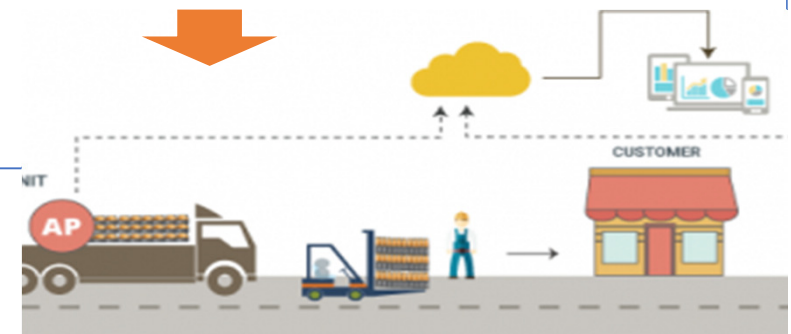
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- Fixing a period for prior notice
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B.2.- Market and institutional measures

- Including in the Registry electronic addresses of creditors (higher-ranking/lower-ranking)
- Automatic location and tracking facilities (*IoT applications*)



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C). Objection

- Specifying steps for the repossession process
- Standards of good faith and commercial reasonableness

IV.- Non-judicial disposition of tangible collateral

DRAFTING A PROTOCOL for disposition: method, manner, time, place and conditions, actions for disposition (sale, lease, license), form of disposition (assets individually, in groups or altogether)



PREPARING THE NOTICE contents, wording, language, time



GIVING NOTICE: identifying recipients, method, time, and

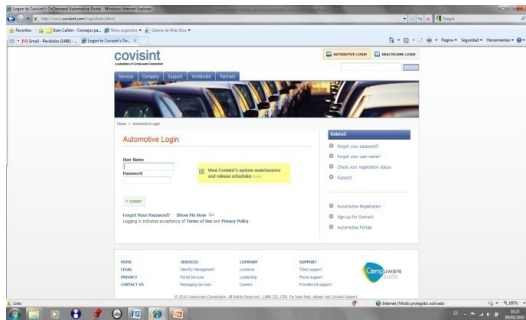


GOOD FAITH AND COMMERCIAL REASONABLENESS

- adequate method (public or private sale, auction or tender, lease or license)
- target market
- value assessment

V.- Secondary markets – electronic platforms: opportunities and limitations

MODEL 1: ELECTRONIC NOTICE BOARD



Advantages:

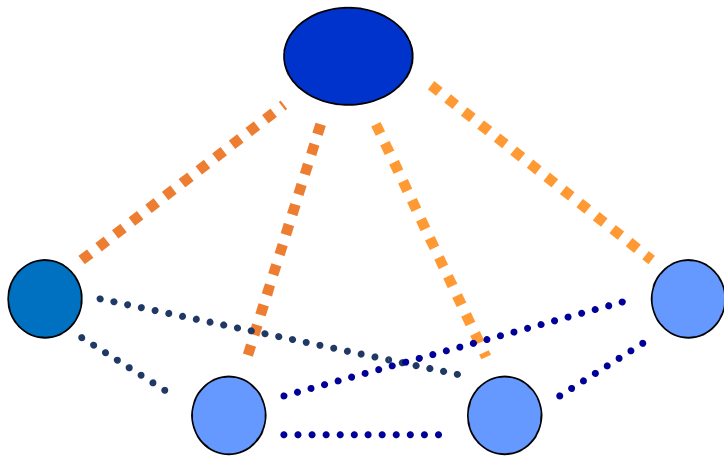
- centralization
- critical mass
- visibility enhancement
- wide but undefined territorial scope
- main entrance to platform (Model 2)

Limitations:

- disposition is conducted to traditional methods: fragmentation, territorial limitation and *de facto* decentralization
- no identification of users
- no tracking potential
- secondary market is not created

V.- Secondary markets – electronic platforms: opportunities and limitations

MODEL 2: ELECTRONIC SECONDARY MARKET – PLATFORM



Advantages:

- centralization
- critical mass
- pre-determined territorial scope
- trust generation
- **CREATION OF SECONDARY MARKET**
- identification of users
- tracking facilities
- **INTERNAL RULES:** negotiation and transactions
- efficiency, segmentation and personalization

Limitations:

- technology dependence
- initial investment
- high level of penetration and experience in use and application of technology



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