

# Session on the Intersection of Secured Transactions and Insolvency Law Regimes and Practices

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Cooperation

# Why is the intersection important?

- ▶ Consider the position of enforcement under secured transactions legislation, is it:
  - ▶ self help?
  - ▶ court order?
- ▶ Can it be delayed/prevented?

Cooperation

# Why is the intersection important? (cont.)

- ▶ Consider the position of enforcement under insolvency legislation:
  - ▶ in a liquidation, is there a need for stay/suspension of enforcement?
  - ▶ In a reorganisation, is there a need for stay/suspension of enforcement?

Cooperation

# Why is the intersection important? (cont.)

- ▶ Is it that the emergence and development of reorganisation process makes the intersection important?
- ▶ If enforcement is weak/inefficient, does this help to promote a stay/suspension in an insolvency case?

Cooperation

# Secured transactions and insolvency generally

- ▶ Common desired benefits -
  - ▶ both are concerned with debtor creditor relationships
  - ▶ strong secured transactions regimes and insolvency law regimes exercise an influence on corporate governance
  - ▶ they each contribute to the concept of the “credible threat”
  - ▶ they support the banking and finance sector

Cooperation

# Secured transactions and insolvency generally (cont.)

## ▶ Areas of tension -

- ▶ each postulates a different approach to debt
  - ▶ insolvency may be viewed as a system of law that endeavours to deal with the circumstance in which debts cannot be paid
  - ▶ secured transactions may be viewed as a system of law that endeavours to assure that debts will be paid

Cooperation

# Secured transactions and insolvency generally (cont.)

- ▶ Areas of tension (cont.) ....
  - ▶ Each endeavours to uphold different rights
    - ▶ insolvency is concerned with preventing a destructive race between individual creditors
    - ▶ secured transactions is concerned with maintaining enforcement rights of an individual creditor

Cooperation

# Secured transactions and insolvency generally (cont.)

- ▶ Areas of tension (cont.) ....
  - ▶ each has a different stakeholder constituency
    - ▶ insolvency looks to maximising value for the benefit of all creditors
    - ▶ secured transactions looks to maximising value for an individual creditor

Cooperation

# CREATION of a secured property interest

- ▶ Insolvency viewpoint
  - ▶ support a secured transactions regime that enables appropriately defined third party security interests in property to be created and identified with certainty
  - ▶ helps to clarify and provide certainty in the identification of all security interests

Cooperation

# CREATION of a secured property interest (cont.)

- ▶ particularly relevant to ‘quasi-security’ devices, such as:
  - ▶ retention of title ‘security’ interests
  - ▶ finance lease ‘security’ interests
- ▶ avoids time and cost in endeavouring to determine the legal effect of such commercial devices

Cooperation

# CREATION of a secured property interest (cont.)

- ▶ query the position of secured property interests created or which arise by operation of law?
- ▶ What is the likely attitude of the banking and finance sector to these issues?

Cooperation

# REGISTRATION or perfection of secured property interests

- ▶ Insolvency viewpoint -
  - ▶ Support a registration system that is all embracing and provides a certain, efficient and cost effective search base
    - ▶ provides an insolvency representative with certainty by being able to recognise and identify secured property and the holder of a security

Cooperation

# REGISTRATION or perfection of secured property interests (cont.)

- ▶ assists an insolvency representative in determining validity and enforceability
- ▶ assists an insolvency representative in determining priority between competing security interests over the same property

Cooperation

# Intervention on registration/perfection

- ▶ Should insolvency law intervene and invalidate or avoid otherwise valid and perfected secured property interests by application of provisions relating to:
  - ▶ creditor preferences?
  - ▶ undervalue transactions?
  - ▶ fraudulent transactions?

Cooperation

# Intervention on registration/perfection (cont)

- ▶ Should insolvency law intervene and invalidate unregistered or unperfected secured property interests?
- ▶ What would be the attitude of the banking and finance sector to these issues?

Cooperation

# ENFORCEMENT of secured property interests

- ▶ Insolvency viewpoint -
  - ▶ Supports strong and effective secured transactions enforcement process because it contributes to:
    - ▶ good corporate governance
    - ▶ credible threat in face of actual or impending insolvency
  - ▶ However, in the event that an insolvency case commences in respect of a debtor before a secured property interest has been fully enforced, should insolvency law intervene on enforcement?

Cooperation

# ENFORCEMENT of secured property interests (cont.)

## ▶ Liquidation -

- ▶ In a case of liquidation (bankruptcy) should the insolvency law:
  - ▶ not impose any stay or suspension on enforcement of a secured property interest?
  - ▶ impose an initial, but short term, stay?
  - ▶ impose the same stay as for reorganisation?
  - ▶ a sub-issue is to what extent, if any, the insolvency representative should be involved in the realisation of the secured property?

Cooperation

# ENFORCEMENT of secured property interests (cont.)

## ▶ Rescue -

- ▶ In a case of rescue should there be a stay or suspension on enforcement of a secured property interest?
- ▶ Are the justifications for such a stay that it:
  - ▶ provides the possibility of enhanced value through rescue?
  - ▶ avoids dismemberment of the insolvency estate?
  - ▶ provides possible greater value to secured creditors?

Cooperation

# ENFORCEMENT of secured property interests (cont.)

- ▶ Rescue (cont.) ....
  - ▶ does not affect substantive secured property interests, but rather postpones the exercise of rights in relation to those interests?
  - ▶ What would be the attitude of the banking and finance sector to these issues?
  - ▶ Are there other sectors that might be interested in these issues (labour relations, fiscal authorities, etc.)?

Cooperation

# ENFORCEMENT of secured property interests (cont.)

- ▶ Nature and length of stay -
  - ▶ Should a stay operate automatically or only as a result of a court order?
  - ▶ Should a stay apply to all secured creditors?
  - ▶ Should a stay apply to a secured creditor that has embarked upon but not completed a process of enforcement?
  - ▶ Should a stay be for a definite, precise period of time?

Cooperation

# ENFORCEMENT of secured property interests (cont.)

- ▶ Nature and length of stay (cont.) ....
  - ▶ Should a court/tribunal have power to extend the duration of a stay?
  - ▶ What would be the attitude of the banking sector to these issues?

Cooperation

# ENFORCEMENT of secured property interests (cont.)

- ▶ Use of secured property during a stay -
  - ▶ Should secured property be simply retained during the duration of a stay?
  - ▶ May it be used for the purpose of carrying on the business of the debtor?
  - ▶ May it be sold, disposed of?
  - ▶ What conditions, if any, should govern the retention/use/sale of secured property during a stay?

Cooperation

# ENFORCEMENT of secured property interests (cont.)

- ▶ Lifting of any stay or suspension -
  - ▶ Should a secured creditor be entitled to apply to lift the stay?
  - ▶ Should the court govern the lifting of a stay or should the insolvency representative be entitled to lift the stay?
  - ▶ What conditions should be shown to exist before such a stay may be lifted?

Cooperation

# Binding a secured creditor to a rescue plan -

- ▶ What voting powers should a secured creditor have?
- ▶ Should secured creditors be regarded as a separate class for voting purposes?
- ▶ Should secured creditors be entitled to veto a rescue plan?
- ▶ If a majority of a secured creditor class votes in support of a rescue plan, should all members of that class be bound by the will of the majority?

Cooperation

# Post-insolvency commencement finance -

- ▶ Should the law support the possible need for urgently needed ‘working capital/ finance in a case of reorganisation?
- ▶ If so, should this take the form of:
  - ▶ a ‘super priority’ that might affect holders of existing secured property interests?
  - ▶ a ‘super priority’ confined to unsecured assets?

Cooperation

# Post-insolvency commencement finance (cont.) ....

- ▶ Should a court order be required for the creation of such a priority?
- ▶ Should the creditor body be consulted regarding the provision of such finance?
- ▶ What would be the attitude of the banking/finance sector to such issues?

Cooperation

# Application of priority claims provisions upon secured transactions recovery -

- ▶ In an insolvency case, should the proceeds of the realisation of secured property be subject to the priority provisions of the insolvency law (e.g., taxes, employee claims, etc.)?
- ▶ What would be the attitude of the banking/finance sector to such an issue?

Cooperation

# Indirect benefits of a balanced approach between the two regimes -

- ▶ How would domestic trade, commerce and finance benefit from a balanced approach?
- ▶ Would the benefit be such that greater foreign investment/finance might be attracted?
- ▶ Is there any benefit in promoting a regional ‘common guidelines’ approach to the issue of the appropriate balance?

Cooperation

# Civil/common law differences

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- ▶ Are there any significant issues concerning differences between civil and common law traditions when considering a balanced approach?