INTERNATIONAL COORDINATION OF SECURED TRANSACTIONS LAW REFORM

Problems in Coordination, Implementation and Quality of Reforms

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PROBLEMS RE THE FUNCTIONING OF ST SYSTEM

• Digitalization key: (i) to lower cost (MSME); (ii) to reduce corruption; but…
  – The capacity problem (enough done on this front by donors?)
  – The passivity problem (too many donors: lack of ownership; ex. Kenya)

• Failure at implementation finds poor substitutes:
  – The use of preventive prison in Africa as collection mechanism
  – The use of post-dated cheques (Bangladesh)
  – The “Fiducia”: problems of characterization and scope
  – Receivables as the preferred asset. The problem of lack of formality/difficulties in notification/the need for a registry

• The often forgotten importance of the banking regulatory framework:
  – At inception (% of non-collateralized lending; follow up; generates info)
  – When provisioning
PROBLEMS RE THE FUNCTIONING OF ST SYSTEM II

• Problems of enforcement:
  – Problems of notification
  – Problems to repossess the asset. A police/bailiff problem
  – Problems in valuation
  – Problems of speed: the constant appeal practice (Latin America: Peru, Mexico)
  – Alternative depends on who to trust: supervision/agencies or judiciary?
ENDURANCE OF ST REGIME AT THE THRESHOLD

• ST system and contractual remedies: the endurance of covenants and their destructive potential
  – Examples: information/ratios/affecting performance. Reason for a difference?
  – Overprotection of financial collateral? The EU Directive example

• New kid on the Block: the EC Directive Proposal
  – Stay affects pre-insolvency, out of court
  – The contours of the Directive
  – Application of general regime of executory contracts outside the court
  – The expected practical effect of the novelty
ST SYSTEMS AND INSOLVENCY PROCEEDINGS

• GR: respect + absolute priority + exceptions
  – The problem of the AP vis a vis administration costs/other priorities
  – The Proposal: priority over SR by new financing?
  – The stay of executions according to the standard (limited in time and scope)
  – Protection against avoidance

• Problems in practice:
  – Preserving the value of the collateral (always takes longer to release execution; procedural problems to get release)
  – Makes sense to have different rules depending on the asset
  – Rules for the sale of the business as a going concern
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