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Talking points for Panel #5

- My focus today is on broad-scope secured transactions reforms rather than instruments such as the Cape Town Convention that address only a particular type of property or particular type of transaction
- Producing such broad-focused instruments requires agreement both on the basic outline of a modern secured transactions regime and on the detail-level exposition of that outline. The former announces a concept, while the latter is necessary for a smoothly functioning system that has sufficient predictability and certainty to generate new or lower cost credit.
- In crafting a soft-law instrument, such as a legislative guide or model law, it is important to distinguish between –
 - Details that must be done in a particular way in order for the statute to function in accordance with its goals
 - Details that address situations for which the statute requires a clear answer, but many different answers would suffice. In such cases, the desire for harmonization suggests picking a uniform solution, but individual statutes could function well with different answers.
- My experiences have been with early-stage secured transactions reform (1990s), intermediate stage (2000s), and later-stage reforms (2010s)
 - In early stage reforms (e.g., UN Convention on the Assignment of Receivables in International Trade), there was heated debate over major policy points and difficulty in reaching consensus.
 - The resulting instrument contains minimal substance (but including some important matters such as override of many anti-assignment clauses).
 - The biggest advance is in choice of law, where the Convention significantly adds predictability and certainty to determination of which State's law governs key issues such as perfection/priority.
 - Intermediate stage exemplified by UNCITRAL Legislative Guide on Secured Transactions
 - Broader scope, much more comprehensive than Assignment of Receivables Convention
 - More agreement in Working Group on broad outlines of comprehensive secured transactions legislation than was the case for Receivables Convention
 - But important and forceful disagreements on some issues (e.g., treatment of retention of title transactions)
 - Recommendations include significant detail
 - Later stage exemplified by UNCITRAL Model Law
 - High degree of consensus on major issues
 - With respect to detail level, biggest attribute of deliberations not expression of views by States with most to gain, or dialog between States with modern law and those without. Rather, most common motif is

dialog, and sometimes dispute, on rather narrow issues, between representatives of States of States with similar, modern secured transactions law.

- Result: technically fleshed out instrument, but perhaps not much “ownership” by States for whose benefit it is drafted

- What have I learned?
 - International law reform process produces good to excellent instruments that can provide the basis of modern secured credit economy. However, they play a limited role in creating that economy. They may be necessary but they are not sufficient.
 - In this context, a good statute is like a good set of carpenters’ tools. They work best when used by an experienced professional. If you give me great tools, though, I still won’t be able to build a house. Capacity-building is critical!
 - If an enacting State has active secured credit markets, and its goal is to allow and facilitate transactions that lenders are itching to engage in, reforms will have a lot of traction.
 - If, on the other hand, a State’s goal is to get primary or secondary benefits of Doing Business rankings or the like, or to do what the State believes will bring about an active secured credit market (but without full understanding of why and how), then the law is being parachuted in from the heavens rather than being thoughtfully developed; most likely, it is being asked to do more than mere law can accomplish.
 - Two examples in Caribbean:
 - State A – faced pressure by international funders to modernize secured transactions law as a condition of receiving financial assistance. Consultant retained, who drafted a statute than combined elements of OAS and instruments; statute was sold politically as enabling borrowers to obtain significant new credit based on “new types of collateral” and enacted rather quickly. Borrowers expected expanded availability of credit on day one. The reality on the ground is that, last time I checked, not much new credit has been generated. Regulatory caution, limited capacity of lenders to use the tools made available by the new statute, and some defects in statute all contributed to what might be considered to be underwhelming results
 - State B – reform in progress with help of IFC. Initial decision to use UNCITRAL Model Law as template. Drafting is proceeding apace. But there is significant deference to IFC expertise and somewhat limited local engagement in decisions. A rather small number of experts is following the drafting at a detail level. Hope for engagement to grow as drafting continues.
 - My current bottom line:

- Drawing on international best practices and existing instruments (such as UNCITRAL Model Law) in drafting a domestic statute is a good technique
- Lack of lender capacity and expertise and regulatory over-caution are impediments to even an excellent secured transactions law having the desired effects
- Well-crafted law is essential, but local buy-in, regulatory understanding of how modern secured transactions law changes risk profile, and capacity-building are necessary as well. Without those, the law has academic value but limited practical impact.