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## **BEST PRACTICES OF EFFECTIVE ENFORCEMENT**

(Document for first round of consultations prepared by the UNIDROIT Secretariat)

### **I. INTRODUCTION TO THE FIRST ROUND OF CONSULTATIONS ON THE PROJECT**

1. This document is a discussion paper developed by the UNIDROIT Secretariat in relation to the project on “Best Practices of Effective Enforcement”, as a basis for a first round of **consultations with selected international experts**. It responds to the mandate received by the UNIDROIT Governing Council at its latest remote session ([C.D. \(99\) A.8](#), paras. 43-44) to set up an exploratory Working Group in order to better refine the scope of the project. In view of the current pandemic, this first leg of the consultations will be held through an email exchange. **The Secretariat would be grateful if experts could send their comments on any part of the document, and specifically their feedback on the list of questions, by 14 July 2020.** If needed, the Secretariat would be happy to additionally set up a conference call with any of the experts involved. It is envisaged that the outcome of the consultation be discussed during an **Exploratory Workshop with the participation of experts and Governing Council members**, which is now tentatively planned for **21 September 2020**.

2. The following three sections of this document provide a brief overview on: (II) the history of the project; (III) common challenges to enforcement against the backdrop of the economic importance of effective enforcement of contractual claims; and (IV) existing and planned global and regional international instruments dealing with enforcement, concluding that there is a need for an international instrument that sets global standards in a comprehensive and practice-oriented manner, and is capable of offering guidance to national legislators.

3. Section V contains a list of questions to be considered by the exploratory Working Group members in relation to the project, which are the core of the consultation, and focus in particular on the type of instrument, its goals, and its appropriate scope. The questions reflect the comments received during the remote session of the UNIDROIT Governing Council and are accompanied by the Secretariat’s preliminary answers presented for discussion. Finally, the last two questions go back to some of the substantive issues referred to in Sections III and IV, which may be suitable topics for discussion at the Exploratory Workshop.

### **II. BACKGROUND AND HISTORY OF THE PROJECT**

4. In 2016, the Secretariat included a proposal to undertake a project on “Principles of Effective Enforcement” in the draft Work Programme 2017-2019. The proposal was initially designed to fill a gap in existing UNIDROIT instruments, particularly the ALI/UNIDROIT Principles of Transnational Civil Procedure, prepared by a joint American Law Institute / UNIDROIT Study Group and adopted in 2004. It was accompanied by a **preliminary Feasibility Study** conducted by Rolf Stürner, Emeritus

Professor at the University of Freiburg (Germany) and former co-reporter of the ALI/UNIDROIT Principles of Transnational Civil Procedure ([UNIDROIT 2016 – C.D. \(95\) 13 Add. 2](#)). The preliminary Study provided an overview of some of the obstacles created by the lack of general principles on enforcement mechanisms in transnational civil procedure and highlighted the insufficiency of existing national and international legal frameworks in this respect. It underscored that the right to effective enforcement represents an integral part of a fair and effective procedure. Moreover, it pointed to the economic significance of effective enforcement mechanisms, both in decision-making and in contractual execution. International financial institutions, as well as national governments, increasingly consider them as a fundamental criterion for the assessment and evaluation of national economies and for credit rating purposes. A general guidance document at an international level would address the most relevant issues and provide a detailed set of principles embodying best practices. It would provide helpful guidance for legislators wishing to improve their domestic law, while contributing to the emergence of common minimum standards for domestic procedures as a necessary basis for improvement of international cooperation in this area.

5. The topic was included in the UNIDROIT Work Programme for the 2017-2019 triennium with low priority, pending the completion of the European Law Institute (ELI)/UNIDROIT Rules on Civil Procedure. In December 2018, the Secretariat received a proposal for the 2020-2022 Work Programme by the **World Bank** regarding a joint project on the **“Development of a Working Paper to Outline Best Practices on Debt Enforcement”**, which the Secretariat presented in the context of the discussion of the 2020-2022 Work Programme at the 98<sup>th</sup> Session of the Governing Council. The proposal was discussed as a continuation, and a refinement, of the scope of the “Principles of Effective Enforcement” project. The project was included in the new Work Programme by the General Assembly ([A.G. \(78\) 12](#), paras. 41 and 51, and [A.G. \(78\) 3](#)), confirming the recommendation of the Governing Council ([C.D. \(98\) 17](#), para. 245). While there was substantial agreement on the importance of the topic and on the legal, social and economic impact of the work to be conducted, the Secretariat was asked to produce a more refined scope of the project to be presented at the 99<sup>th</sup> session of the Governing Council in 2020. During the remote session of the Governing Council held in April/May 2020, Council Members commented on the revised paper and authorised the setting up of an exploratory Working Group to receive expert feedback on the questions raised.

### **III. CURRENT CHALLENGES FOR ENFORCEMENT**

6. It goes without saying that effective enforcement of commercial claims is of high economic importance for any State. It is recognised as vital for a developed credit market and improved access to credit, for an increase in trade and investment and for overall economic development and sustained growth.<sup>1</sup> Market participants are more willing to invest where they are confident that, if their debtors fail to perform, there will be reliable mechanisms to obtain satisfaction of their claims with predictable outcomes. A significant step towards achieving this goal is represented by an improvement of the effectiveness of commercial dispute resolution by the judicial system. For example, studies show that firms are larger and more competitive, have greater access to credit, and feel more secure in investing in countries with efficient court systems.<sup>2</sup> Moreover, particularly with regard to credit markets, the introduction of a modern legal framework for secured transactions is also viewed as fundamental to increasing credit availability and investment, especially if well-

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<sup>1</sup> The crucial importance of well-functioning enforcement procedures and remedies in domestic laws to foster availability of credit and boost investments is recognised by international financial organisations generally, and in relation to specific regions or countries. See among others: World Bank, *Doing Business, Enforcing Contracts – Why it matters?*, at <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/why-matters>; World Bank, *Doing Business 2020*, at <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>; European Bank for Reconstruction and Development (EBRD), *Discussion paper, Building an Effective Debt-Enforcement Framework* (2019), available at <https://www.ebrd.com/news/events/debt-enforcement-in-europe-and-beyond.html>.

<sup>2</sup> See e.g. OECD (2013), *What makes civil justice effective?*, OECD Economics Department Policy Notes, No. 18 June 2013.

coordinated with insolvency legislation.<sup>3</sup> While there is certainly a need for reform in these areas, it must be accompanied by a timely, predictable and affordable enforcement phase, which concretely ensures unsecured and secured creditor satisfaction. Many jurisdictions in the world, however, face a number of challenges in this phase specifically; and it is these challenges that the project seeks to overcome.

7. A traditional challenge at the national level is that, as a rule, several legal systems rely on judicial enforcement proceedings. The formalities that such proceedings entail usually derive from the need to introduce sufficient safeguards for debtors and third parties, but often result in insurmountable obstacles to effective enforcement. In many instances, creditors must obtain a court decision before commencing the enforcement phase, which means that two procedural phases are needed. However, even where legal systems allow for certain deeds to be enforceable *per se*, the proceedings triggered by the deed may still be excessively formalised and time-consuming. For example, recourse to public auctions for the realisation of the value of all or some types of assets, as well as stringent requirements for, or unavailability of, alternative means to realise such value, not only lead to delays in creditor satisfaction, but often result in depreciation and a loss of potential value. While this may be, at least in part, connected to other factors, e.g. the lack of reliable secondary markets for certain assets, procedural bottlenecks do play a determinant role. Another problem connected with judicial enforcement proceedings is their cost, which is amplified in systems involving a plethora of different actors (courts, notaries, expert valuers, enforcement agents...). Depending on the value in dispute, such costs and delays may even act as a deterrent for creditors to embark on a procedure to obtain satisfaction. Thus, there is a need to find an appropriate balance between providing protection for debtors and third parties, and avoiding inefficiencies due to excessive delays and costs of the proceedings which result in detriment not only to creditors but to the entire debtor-creditor relationship.

8. Further obstacles at a more general level are posed by weak court infrastructure and a lack of commercial specialisation, which in turn impact on the effectiveness of proceedings, including those for the valuation of debtors' assets. In some legal systems, lengthy proceedings with participation of a plurality of actors may also engender limited transparency and accountability.

9. In order to avoid lengthy and costly judicial procedures and rely on the commercial expertise of the parties themselves to maximise realisation value, some legal systems already provide varying degrees of extrajudicial enforcement, particularly for monetary claims secured by collateral. Such mechanisms are considered an integral part of any modern secured transaction regime and are especially important for countries with less efficient judicial enforcement procedures to attract investment. On the other hand, the interests of debtors and third parties should be protected from possible abuses by creditors. The main challenge is indeed how to reach the proper balance between achieving prompt and effective enforcement of creditors' claims, while at the same time safeguarding debtors' and third parties' basic rights. A common problem arises when, in an effort to balance the interests of all parties involved, the normative framework allows debtors to raise objections or to appeal orders or decisions at any stage of the proceedings and without meaningful control or sanctions for abusive behaviour, thereby forcing creditors to follow the ordinary judicial route. Moreover, commencement of insolvency proceedings may, depending on the applicable legal regime, severely limit or impede the exercise of out-of-court enforcement by secured creditors. Thus, there is a clear need to consider the limits posed by legal systems to creditors' enforcement (and which may derive from the constitutional legal framework in a specific jurisdiction) and consider the suitability of alternative mechanisms in order to reach an appropriate balance between effectiveness and fairness (see also below, Question 2).

10. More recently, new challenges to effective enforcement of commercial claims derive from the changed asset structure of firms and companies. The legal framework for civil enforcement in numerous countries still mirrors an economic and social reality where most debtor assets consisted

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<sup>3</sup> See e.g. World Bank, *Secured Transactions, Collateral Registries and Movable Asset-Based Financing Knowledge Guide* (2019), at <https://openknowledge.worldbank.org/handle/10986/32551>.

of tangible property. Today, however, other assets often represent the most substantial value on which a creditor can rely. While many States have enacted special provisions to facilitate enforcement against specific assets (e.g. legislation on collateral arrangements in financial markets), there are still obstacles and uncertainties in relation to other values (e.g. receivables) (see also below, Question 7).

11. Finally, the rapid spread of digitalisation and the use of technological innovations have introduced new scenarios. Most notably, legislators are faced with the question of how to conduct enforcement procedures against new types of assets (e.g. digital assets). Moreover, emerging mechanisms allow for the automatic – partial or total - performance of agreements, including enforcement of obligations, such as payment obligations (often referred to under the label of “smart contracts”).<sup>4</sup> Thus, technology poses additional issues facing national legislators that, in view of the global reach of commercial transactions in this field, may benefit from the development of international best practices. On the other hand, technology would appear to be a promising tool to tackle traditional challenges to effective enforcement, in particular those linked to excessive delays and costs as well as lack of transparency (see Question 8 below).

12. The above-mentioned challenges have motivated many countries around the globe to modernise their enforcement laws. Many States have introduced some important reforms (e.g. China, France, Germany, England, Spain, Ukraine...) and reforms are still ongoing in numerous States. Yet, as will be seen in the next section, there is little guidance at global and regional levels for national legislators regarding options to address these challenges.

#### **IV. EXISTING GLOBAL AND REGIONAL INSTRUMENTS ON ENFORCEMENT AND CURRENT PROJECTS**

13. Preliminarily, it should be noted that the term “enforcement” is commonly used in treaties and regional legislation addressing the cross-border effectiveness of judicial decisions,<sup>5</sup> arbitral awards,<sup>6</sup> and more recently settlements deriving from mediation,<sup>7</sup> or the cross-border recognition and enforceability of other documents.<sup>8</sup> Those instruments, however, stop short of regulating the domestic law procedures and mechanisms that are triggered upon recognition of the enforceability of such decisions or documents, and are therefore outside of the scope of our analysis. Thus, this study will focus on existing international instruments dealing with the specific enforcement phase, irrespective of whether it derives from a cross-border or a purely domestic situation.

##### **Existing international instruments on enforcement**

14. The importance of ensuring effective and adequate enforcement of claims is recognised in general terms in a number of existing international instruments, dealing with either procedural law or secured transactions. Only a few existing global and regional instruments, however, do specifically address mechanisms and procedures for enforcement.

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<sup>4</sup> The expression “smart contract” is however increasingly criticised for being misleading and not technology neutral, see most recently UNCITRAL, *Legal issues related to the digital economy – artificial intelligence*, A/CN.9/1012/Add.1, para.24 and also below, Question 8.

<sup>5</sup> E.g. at regional level the *Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (N° 1215/2012 recast) as well as the 2007 *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*; see also the conventions of the Inter-American Specialized Conferences on Private International Law of the Organization of American States, and at global level, the most recent 2019 *HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (not yet in force).

<sup>6</sup> E.g. the 1958 *New York UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.

<sup>7</sup> See the most recent 2019 *UN Convention on International Settlement Agreements Resulting from Mediation* (“Singapore Convention”, not yet in force).

<sup>8</sup> See e.g. the Regulation (EC) N° 1896/2006 creating a European order for payment procedure (OJ L 399, 30.12.2006).

15. An example of the first scenario is represented by the *ALI/UNIDROIT Principles of Transnational Civil Procedure*, adopted in 2004 with the goal to reduce the impact of differences between legal systems in lawsuits involving transnational commercial transactions through a model of universal procedure in line with the essential elements of due process of law.<sup>9</sup> In relation to enforcement, Principle 29 merely states that procedures should be available for “speedy and effective enforcement of judgments”, without, however, providing further guidance on such procedures. The comment to that provision makes it clear that the topic as such was beyond the scope of the Principles. Likewise, the draft *ELI-UNIDROIT Rules on European Civil Procedure*,<sup>10</sup> which represent the first regional project adapting the ALI/UNIDROIT Principles to a specific regional legal culture, do not address enforcement issues in detail. These Rules are more comprehensive and detailed than the ALI/UNIDROIT Principles and cover additional issues such as means of review including appeals. The most interesting part of the Rules in regard to enforcement is the section on “Provisional and Protective Measures” (Part X). The section’s goal is, inter alia, to “ensure or promote effective enforcement of final decisions concerning the substance of the proceedings (...) including securing assets” and “preserve the existence and value of goods or other assets” (cf Rule 184). The ELI/UNIDROIT Rules, however, also stop short of covering procedures and mechanisms for enforcement.

16. International instruments providing for general guidance on domestic secured transactions law reforms also contain references to enforcement procedures, in light of the recognition of the importance of ensuring proper satisfaction of secured creditor rights. For instance, the 2010 *UNCITRAL Legislative Guide on Secured Transactions* sets down general principles, discusses various issues related to enforcement of security rights and contains some recommendations.<sup>11</sup> The most recent *UNCITRAL Model Law on Secured Transactions* (2019)<sup>12</sup> also dedicates a whole part (Chapter VII) to the “enforcement of a security right” which sets out post-default rights of the secured creditor, balancing effectiveness with the protection of all parties involved.<sup>13</sup> In relation to general collateral, such rights, ranging from the right to obtain possession of the encumbered asset to sell or otherwise dispose of, lease, or license it, or to propose its acquisition, can be exercised either by applying to a national court or other national authority, or not. In the first case, the Model Law suggests the introduction of expedited procedures, however without further specifications; in the second case, it provides some guidance on the exercise of such rights and the limits thereto, again however without specifying the modalities of the procedures to be followed, particularly in case of objection.

17. In relation to UNIDROIT’s specialised instruments on secured credit, the *Cape Town Convention and its Protocols* contain detailed provisions on creditor remedies upon debtor default.<sup>14</sup> The conventional regime does not generally address issues of enforcement of such remedies. Contracting States can however make use of declarations to strengthen creditor rights, which impact on their

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<sup>9</sup> ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004, at <https://www.unidroit.org/instruments/transnational-civil-procedure>.

<sup>10</sup> On this project see UNIDROIT, Study LXXVIA - Transnational Civil Procedure - Formulation of Regional Rules, at <https://www.unidroit.org/work-in-progress-eli-unidroit-european-rules>.

<sup>11</sup> UNCITRAL *Legislative Guide on Secured Transactions* (2010), at [https://www.uncitral.org/pdf/english/texts/security-lq/e/09-82670\\_Ebook-Guide\\_09-04-10English.pdf](https://www.uncitral.org/pdf/english/texts/security-lq/e/09-82670_Ebook-Guide_09-04-10English.pdf)

<sup>12</sup> UNCITRAL, *Model Law on Secured Transactions* (2016), at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779\\_e\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf).

<sup>13</sup> See also UNCITRAL, *Model Law on Secured Transactions - Guide to Enactment* (2017), paras 76 *et seq.*; 421 *et seq.*

<sup>14</sup> *Convention on International Interests on Mobile Equipment* (CTC), at <https://www.unidroit.org/instruments/security-interests/cape-town-convention>; *Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Aircraft Equipment* (AP), at <http://www.unidroit.org/instruments/security-interests/aircraft-protocol>; *Luxembourg (Rail) Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Railway Rolling Stock* (RP), at <https://www.unidroit.org/instruments/security-interests/rail-protocol>; *Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Space Assets* (SP) at <http://www.unidroit.org/instruments/security-interests/space-protocol>; *(Pretoria) Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Mining, Agriculture and Construction Equipment* (MAC Prot.), at <https://www.unidroit.org/instruments/security-interests/mac-protocol-2019>.

enforcement, e.g. allowing for out-of-court creditor's action; imposing strict timeframes to obtain relief within debtor's insolvency, including repossession of the asset; excluding discretion by the relevant authority in granting the remedy; limiting or excluding oppositions or counter-actions.<sup>15</sup> In addition to these provisions, there is an interesting ad hoc mechanism in the Space Protocol, which takes into account the physical impossibility of repossession in the case of satellites and other space assets, and recognizes the importance of revenue streams in relation to the asset for the creditor.<sup>16</sup> Through the "ITT&C" enforcement mechanism (Tracking, Telemetry and Control), the Protocol allows the parties to specifically agree to the placement of command codes and related data and materials with a third party so that the creditor may establish control over, or operate the space asset (subject to certain safeguards imposed by Contracting States). This provision, irrespective of the specific context of asset-based space financing, may offer an interesting model for enforcement against assets for which traditional repossession mechanisms would not work.

18. As noted above, a limited number of international instruments specifically address the national legal framework for enforcement.<sup>17</sup> In particular, a comprehensive general guideline at a global level is represented by the *Global Code of Enforcement*, developed within the International Union of Judicial Officers (*Union internationale des huissiers de justice*, UIHJ).<sup>18</sup> Its 34 articles lay down general principles that should govern enforcement procedures and their institutions and actors. Thus, the Code's aim is to set global fundamental standards of enforcement that could be implemented at the national level, rather than providing a concrete and detailed guidance to legislators for designing enforcement legislation.

### **New proposals at regional and global level**

19. *Proposal of an EU Directive on Accelerated Extrajudicial Collateral Enforcement Mechanism.* While the law of enforcement is, in principle, within the competence of each Member State in the EU, it has enacted legislation facilitating cross-border debt recovery and, in the framework of its strategy to address the issue of non-performing loans (NPLs) to ensure market stability, focused on the operation of secondary markets and the recovery of debts in Member States. Following an EU Commission proposal for a Directive on *Credit servicers, credit purchasers and the recovery of collateral*,<sup>19</sup> a proposed text for a *Directive on Accelerated Extrajudicial Collateral Enforcement Mechanism* was agreed upon at the Council level and is currently pending negotiation in Parliament.<sup>20</sup> The most interesting aspect of the proposed directive is that it would set out a minimum common framework and a set of requirements for an accelerated extrajudicial collateral enforcement mechanism in respect of secured credit agreements, in order to help prevent further accumulation of non-performing loans in the banking system. The directive should apply to credit agreements concluded between credit institutions and business borrowers that are secured by identifiable immovable or movable assets (excluding, inter alia, enforcement in relation to financial instruments and insolvency proceedings). The enforcement mechanism should be based on an agreement between the credit institution and the business borrower, with transparency requirements, and the procedure should be triggered without the need to obtain an enforceable title from a court. On the

<sup>15</sup> See Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects*, *Official Commentary*, 4<sup>th</sup> ed. (UNIDROIT 2019).

<sup>16</sup> Article XIX SP.

<sup>17</sup> At the regional level, an example of an instrument which aims at introducing streamlined and simplified effective enforcement procedures within Member States of an organisation is the 2008 *OHADA Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution (Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution)*, available at <https://www.droit-afrique.com/uploads/OHADA-Uniform-Act-1998-simplified-recovery-procedures.pdf>.

<sup>18</sup> UIHJ, *Global Code of Enforcement*, 2015, available at [http://uihj.com/archive-uihj/en/global-code-of-enforcement\\_2165010.html](http://uihj.com/archive-uihj/en/global-code-of-enforcement_2165010.html). The organs of the Council of Europe have also issued general recommendations on enforcement, see e.g. the Recommendation Rec(2003)17 and the most recent *Good practice guide on enforcement of judicial decisions* adopted by the European Commission on Efficiency of Justice (CEPEJ) in 2015.

<sup>19</sup> 14.3.2018 COM (2018) 135 final.

<sup>20</sup> ST 14261 2019 REV 1 COR 1.



other hand, Member States would be allowed great flexibility, particularly in deciding upon the participation of a public official or other professional in the procedure, the method of enforcement and debtor's right to challenge any aspect of the enforcement mechanism.

20. *Proposal to undertake work in the area of civil asset tracing and recovery (UNCITRAL)*. At its 52<sup>nd</sup> session in 2019, the UN Commission on International Trade Law (UNCITRAL) discussed proposals to explore the possibility to undertake legislative work on civil asset-tracing and recovery particularly in the context of cross-border insolvency.<sup>21</sup> The Commission mandated the UNCITRAL Secretariat to organize a Colloquium which was held in Vienna on 6 December 2019,<sup>22</sup> the conclusions of which will be transmitted to the Commission in a report for its 53<sup>rd</sup> session (to be held in 2020). While no decision has been taken as yet by the Commission, the Colloquium discussed existing legal tools to identify, locate and return assets to their legitimate claimants in various contexts, and the challenges and opportunities connected to the use of modern technology, with a view to better define the scope of possible future work of the organisation.

### **Conclusions on the need to develop global standards**

21. The brief review of existing international instruments and proposals presented above confirms that there is a growing interest, at global and regional levels, in undertaking work in the area of enforcement. The importance of providing a sound domestic legal framework, particularly in relation to enforcement of commercial claims, is recognised in a number of instruments addressing civil procedure as well as secured transactions, and single instruments may contain specific mechanisms or procedures. The most encompassing instruments to date, however, provide general guidance in the form of key principles to be considered in domestic legislation. Thus, it appears that there is a lack of an instrument setting out global standards in a comprehensive, detailed, and practice-oriented manner, which would provide national legislators with guidance on how to design national rules for efficient, cost-effective, timely and fair judicial and extra-judicial enforcement of commercial claims. The emergence of common minimum standards and best practices for domestic procedures would offer such options, as well as introducing a higher level of predictability and certainty in cross-border transactions as a necessary basis to improve cooperation and boost investments. The "Best Practices of Effective Enforcement" project aims at filling in this gap.

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<sup>21</sup> Report of the United Nations Commission on International Trade Law at its 52<sup>nd</sup> session, A/74/17, para. 200 *et seq.* The discussion was a follow up on proposals received from the United States of America: A/CN.9/996 and A/CN.9/WG.V/WP.154.

<sup>22</sup> Concept Note, Colloquium on Asset Tracing and Recovery 6 December 2019, available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/concept\\_note\\_20191127.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/concept_note_20191127.pdf).

## **V. QUESTIONS TO BE DISCUSSED**

### **A. *TYPE OF INSTRUMENT TO BE DEVELOPED***

**Q. 1 – WHAT TYPE OF INTERNATIONAL INSTRUMENT WOULD BE MORE APPROPRIATE/  
USEFUL IN THIS CONTEXT?**

22. The general aim of the project is to develop a legal tool to address the current challenges to a well-functioning domestic law system for enforcement. The envisaged instrument is intended to offer guidance at a global level, in line with UNIDROIT's worldwide mandate, particularly to domestic lawmakers wishing to modernise, in whole or in part, their legal system. This would include enforcement deriving from a purely domestic situation, but also from a cross-border scenario (bearing in mind that, as already noted, existing instruments addressing cross-border decisions stop short of regulating the domestic law procedures and mechanisms that are triggered upon recognition of the enforceability of such decisions) When designing and implementing such a framework, there is no "one-size-fits-all" approach as enforcement is strongly influenced not only by the broader legal context and by the interconnection with other areas of the law (such as constitutional law, procedural law including alternative dispute resolution, secured transactions, insolvency, ...), but also by the specific socio-economic realities in each jurisdiction. A mechanism used in one jurisdiction may well fail or not perform adequately in another one because of the interplay with this broader landscape (one example being the use of private enforcement agencies which may have a different impact on the level of fairness, transparency and efficiency of the procedure depending on the national context).

23. In light of the above, the Secretariat, following the proposal of the World Bank, suggests that the Working Group develop a document akin to a legal guide, which would: highlight examples of present obstacles to effective enforcement; point to relevant potential issues to be considered in reforming or further developing this area of the law; suggest examples of best practices drawn from existing models; and also consider recent developments linked to the use of technology as possible mechanisms to make enforcement more efficient using innovative tools. This type of instrument appears to be better suited to provide useful guidance where there are – and partly where there should continue to be – significant differences among legal systems, and where legislators may benefit from more information on the pitfalls and advantages of different options and their interaction. Moreover, this type of instrument would be better suited to tactfully deal with sensitivities related to State sovereignty.

24. The Secretariat would be favourable to continue to refer to "best practices" in the title of the instrument. The expression "best practices" should be understood as referring to procedures and mechanisms that facilitate enforcement and improve its effectiveness, while at the same time ensuring appropriate ways of balancing the different competing interests. The instrument should provide examples of how such interests could be concretely taken into account, without undermining the goal of effectiveness.

### **B. *ISSUES RELATED TO THE SCOPE OF THE PROJECT***

25. In line with the proposal of the World Bank, the envisaged instrument should cover both judicial enforcement and extrajudicial enforcement. In the Secretariat's view, limiting the scope of the instrument to either of them would not serve the purpose of developing best practices in this area of the law.



**Q. 2 – SHOULD THE INSTRUMENT COVER BOTH EXTRA-JUDICIAL AND JUDICIAL ENFORCEMENT? WOULD THIS DICHOTOMY BE AN OVERSIMPLIFICATION OF EXISTING PROCEDURES AND MECHANISMS?**

26. Legal systems should provide for a degree of party autonomy in designing enforcement mechanisms in their contracts and allow prompt and efficient action by the creditor. This is particularly the case for secured debt. Out-of-court enforcement, if appropriately designed, can reduce the length and cost of the procedure, ease the burden on the courts and maximise creditor satisfaction in the interest of all parties involved, including third parties holding claims against the debtor.

27. As noted above, the main challenge faced by legal systems in relation to extra-judicial enforcement lies, in fact, in how to reach the proper balance between prompt and effective realisation, on the one hand, and protection of debtor and third party interests on the other. Mechanisms such as transparency requirements (notice and information duties) and the introduction of standards of conduct subject to an ex-post evaluation are among the best practices that can offer possible solutions. On the other hand, granting ample and unfettered opportunities to debtors to introduce opposition claims and resort to ordinary judicial proceedings, both on the merits of the dispute and on procedural issues, may defeat the goal of effective enforcement. Best practices may include, for example, the use of specific fast-track procedures to deal with oppositions. This latter point emphasises the fact that there is an inextricable link between the judicial and the extrajudicial route.

**Q. 3 – SHOULD THE INSTRUMENT BE LIMITED TO SECURED AND UNSECURED DEBT ENFORCEMENT, OR SHOULD THE ENFORCEMENT OF OTHER CONTRACTUAL CLAIMS BE COVERED?**

28. The proposal received from the World Bank in 2018 specifically focused on debt enforcement, both secured and unsecured. In line with the World Bank's proposal, the Secretariat suggests that the project should devote particular attention to enforcement of commercial unsecured and secured debts, which is indicated as the main focus of the instrument. This limitation would work well particularly when we look at secured credit, where the main concern in relation to enforcement is to ensure satisfaction of creditors' claims while taking into account the interests of debtors and relevant third parties. At the same time, the Secretariat preferred not to exclude *a priori* a more ample consideration of contractual claims. For example, in the case of a contract of sale, if the project only focused on the enforcement of the claim of the party owed a monetary obligation, this may introduce an imbalance in the respective positions of the parties. It is true, however, that consideration of contractual claims other than monetary obligations may give rise to additional complex issues, such as the extent of specific performance and its enforcement, or even enforcement of the obligations to do or not to do something.

29. Taking these arguments into account, the Secretariat would see merit in limiting the *initial* scope of the future instrument more explicitly to debt enforcement, but would welcome the views of the experts on the pros and cons of this choice.

**Q. 4 – SHOULD CONSUMER CLAIMS BE EXCLUDED?**

30. Another possible issue of scope concerns coverage of the enforcement of consumers' debts.<sup>23</sup>
31. Should such debts be expressly excluded from the scope of the project on the basis of a substantial difference in the policy that is applied, or should be applied, to these situations in domestic law when it comes to enforcement proceedings?
32. The Secretariat's proposal would be to focus on issues deriving from the enforcement of commercial debts, though best practices developed in this area may be considered to be useful also in the case of consumer claims.
33. In this respect, it is worth mentioning that the Proposal of an EU Directive on Accelerated Extrajudicial Collateral Enforcement Mechanism mentioned above (para. 18) limits its scope of application to credit agreements concluded between credit institutions and business borrowers (which are secured by identifiable immovable or movable assets). This is linked to the stated aims of the proposed Directive, though it is envisaged that Member States should be free to apply the same or similar extrajudicial enforcement mechanisms also in the case of agreements concluded by creditors other than credit institutions, as well as agreements concluded by debtors who are not business borrowers.

**Q. 5 – SHOULD THE INSTRUMENT INCLUDE ENFORCEMENT OF DEBTS IN INSOLVENCY?**

34. During the remote session of the Governing Council, some members questioned whether insolvency-related enforcement should be included within the scope of the project. For this reason, the Secretariat seeks advice from the experts on whether excluding such situations would result in a detrimental impact on the potential usefulness of the instrument.
35. Though aware of the special status and nature of insolvency legislation in domestic laws, the Secretariat had suggested that enforcement in insolvency be included in the scope of the project in view of its fundamental importance to ensure creditor satisfaction, particularly of secured creditor claims. Security rights - and, a fortiori, their realisation via enforcement - are often worth only as much as their value in insolvency. As suggested in the World Bank's proposal, mechanisms outside of insolvency should be designed to work in harmony with the insolvency. Thus, excluding insolvency enforcement altogether from the scope of the analysis may limit the usefulness of any enforcement procedure and mechanism that is not insolvency specific.
36. Moreover, the Secretariat believes that there would be no problem in coordinating and avoiding duplication of efforts should the UNCITRAL Commission adopt the proposal to work in the area of asset tracing and recovery. The latter project would have a more specific and limited scope; in any case, UNCITRAL would be invited to participate to the meetings of the Working Group as observer.

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<sup>23</sup> We refer here to the definition of "consumer" as "a party who enters into the contract otherwise than in the course of its trade or profession" (2016 UNIDROIT Principles of International Commercial Contracts, Preamble, comment 2).

**Q. 6 – SHOULD THE INSTRUMENT INCLUDE CONSIDERATION OF PROVISIONAL AND PROTECTIVE MEASURES?**

37. Provisional and protective measures, as forms of interim relief used to secure effective enforcement of judicial decisions, or to otherwise preserve rights and prevent (additional) detrimental consequences to creditors prior to the commencement of proceedings or pending final judgment, are relevant to a project on effective enforcement for a number of reasons. First of all, one of the purposes of such measures is to facilitate enforcement of final judgments (e.g. by freezing assets or allowing other asset-preservation actions). Secondly, they themselves need mechanisms to ensure effectiveness of the relief. Moreover, exceptionally they may take the form of “advance relief” which effectively guarantees creditors’ satisfaction.<sup>24</sup> On the other hand, approaches to types, scope, requirements, and consequences of provisional and protective measures differ significantly across jurisdictions, while there are a number of supranational and international sources offering further models. Thus, the Secretariat would see merit in the project considering the impact of provisional and protective measures on debt enforcement.

**Q. 7 – SHOULD ENFORCEMENT IN SPECIFIC CATEGORIES OF ASSETS BE EXCLUDED?**

38. As noted above (para. 10), assets other than tangible property often represent the most substantial value on which a creditor can rely to enforce its claims (and which is used by secured creditors as collateral when permitted under the applicable law). Thus, the instrument should address enforcement against a variety of assets including receivables and other intangibles.

39. In specific areas specialised legislation has been enacted at the domestic level covering also enforcement matters, such as for example legislation regulating financial collateral arrangements. It is suggested that enforcement related to financial assets, while not constituting the focus of the analysis, may offer useful inputs in developing common minimum standards and best practices for enforcement.

40. Greater challenges may be encountered when dealing with enforcement against digital assets (be they in the form of cryptocurrencies or asset-backed tokens). This issue, presented here in the context of the determination of the scope of the project, is connected to the more general Question 8 below.

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<sup>24</sup> An example is offered by the Cape Town Convention system of relief pending final determination of the dispute, see Roy Goode, *Official Commentary* (above fn 14), 343 *et seq.*, 508 *et seq.*

**C. OTHER ISSUES**

**Q. 8 – TECHNOLOGY PLAYS AN INCREASINGLY RELEVANT ROLE IN ENFORCEMENT PROCEEDINGS, BOTH JUDICIAL AND EXTRAJUDICIAL. WHAT ARE CONCRETE EXAMPLES OF MECHANISMS BASED ON THE USE OF TECHNOLOGY WHICH WERE PARTICULARLY SUCCESSFUL IN RENDERING ENFORCEMENT MORE EFFECTIVE? WHAT ARE THEIR LIMITS AND CHALLENGES?**

41. A more innovative approach to solving enforcement issues at the national level may come from the developments of technology. We refer here to some examples among those that can be found in national laws and international instruments.

42. Recently, the possibility to hold electronic public auctions to realise the value of debtors' assets has been tested in a number of jurisdictions. Digital public auction platforms are considered a useful tool to respond to various challenges of judicial sales, in particular lack of transparency, limited competition and loss of value. On the other hand, issues arise in respect to the appropriate legal design of such platforms and their practical operation.

43. Regarding enforcement mechanisms, as mentioned above (paragraph 17) the "control" provision contained in the Space Protocol to allow creditors to repossess the revenue stream deriving from collateral, with appropriate adaptations, may be applied in other contexts, where traditional "repossession" of an asset would not work.

44. Another mechanism is represented by programs which may be used, among other things, when written on the distributed ledger system, to perform a contract in an automated manner (so called "smart contracts", see also above, paragraph 11). While automated systems to perform a contract are not new and predate recent developments in technology, their widespread use in commercial activity represents a new phenomenon. Key legal issues include the fact that when the system is applied to a distributed ledger system, the performance cannot be stopped once deployed.

45. Are there any other concrete examples of the use of technology to facilitate enforcement? What are the advantages and drawbacks of such mechanisms? What could be the most appropriate conditions and requirements for their application?

**Q. 9 – SHOULD THE PROJECT SPECIFICALLY CONSIDER FACTORS WHICH ARE OUTSIDE OF THE INSTITUTIONAL FRAMEWORK OF THE ADMINISTRATION OF JUSTICE BUT MAY INDIRECTLY INFLUENCE THE OPERATION OF ENFORCEMENT PROCEEDINGS, SUCH AS, FOR EXAMPLE, THE EXISTENCE OF DEBTORS’ REGISTRIES? ARE THERE OTHER FACTORS THAT MAY MORE DIRECTLY INFLUENCE THE SUCCESS OF ENFORCEMENT?**

46. As noted above (paragraphs 21-22) , the operation of enforcement procedures in a specific jurisdiction can be strongly influenced by the broader legal context and by the interconnection with other areas of the law. While the envisaged instrument cannot address the specificities of each legal system, it should at least point to those factors that may play a significant role.

47. Many jurisdictions have introduced mechanisms that may serve as an incentive not to default on obligations, thereby limiting the need to resort to enforcement proceedings, such as, for example, debtor registries (either kept by the State or by private companies). These mechanisms could also serve to facilitate compliance with enforcement orders, though they would not be part of the procedure as such.

48. Recent reforms of enforcement laws have however introduced more specific tools that could be used by bailiffs to be able to successfully enforce claims. For example, bailiffs may be authorised to obtain information about the debtor's financial circumstances, and a defaulting debtor can be obliged to disclose his or her income and financial situation at the beginning of the enforcement proceedings.

49. Would these mechanisms be generally recommendable in order to facilitate enforcement?