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**Best Practices for Effective Enforcement
Working Group**

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ISSUES PAPER

1. This document provides a preliminary presentation of issues, related particularly, though not exclusively, to the scope of the project, that the Best Practices for Effective Enforcement Working Group may wish to consider in starting the preparation of the prospective instrument.
2. The issues laid out in this document were identified: (a) in preparatory work undertaken for the project on Principles of Effective Enforcement during the UNIDROIT Work Programme 2017-2019 period, and particularly in the Feasibility Study conducted by Prof. Rolf Stürner); (b) by individual experts and organisations involved in the consultation procedure started in summer 2020; (c) by the participants in a Consultation Workshop held on 21 September 2020; (d) through the feedback received at the 99th session the UNIDROIT Governing Council, first part (April/May 2020) and second part (23 – 25 September 2020); (e) by the Secretariat.
3. This document is not intended to provide an exhaustive list of issues nor a full legal analysis of each issue. The purpose of the document is to provide a starting point for the Working Group's deliberations, enabling the Working Group to take stock of fundamental issues of scope and structure of the instrument and to reach preliminary conclusions. It should be noted, moreover, that discussion of issues related to the impact of technology in enforcement will be contained in a separate preliminary report (Study LXXVIB – WG 1 – Doc 3).
4. The document is divided into three main sections: (I) Preliminary matters; (II) Issues related to the scope of the instrument; (III) Relevant international instruments and projects. The document raises some questions, mainly dealing with scope and structure issues, that the Working Group may wish to consider in its deliberations.

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I. PRELIMINARY MATTERS

A. Background

5. At the 95th Session of the Governing Council in 2016, the Secretariat included in the draft Work Programme 2017-2019 a proposal to undertake work in the field of enforcement, developing “Principles on Effective Enforcement” (UNIDROIT 2016 – C.D. (95) 13 rev.). The proposal was designed to fill in the gap of 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 General Assembly at its 75th session endorsed the recommendation of the Governing Council to include this topic in the UNIDROIT Work Programme for the triennium 2017-2019 with a low level of priority in view of the priority given to the completion of the ELI- UNIDROIT project on regional rules of civil procedure.

6. In December 2018, the Secretariat received a proposal for the 2020-2022 Work Programme by the World Bank regarding a 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 98th Session of the Governing Council. The proposal was presented 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 99th session of the Governing Council in 2020.

7. During the first part of that session, held in remotely April/May 2020, Council Members commented on the revised Secretariat’s paper ([C.D. \(99\) A.3](#)), and authorised the setting up of an Exploratory Working Group to receive expert feedback on the questions raised (C.D. (99) A.8, paras. 43-44).

8. In response to this mandate, the UNIDROIT Secretariat developed a [Consultation Document](#) containing a set of questions based on the comments received during the session. The document was designed to better define the most appropriate guidance for the future Working Group in determining the type of envisaged instrument and the scope of the project, and formed the basis for a first round of remote consultations with selected international experts and organisations. The Secretariat received answers and feedback from several individual experts in comparative civil procedure, secured transactions, insolvency, contract law, and technology as applied to law, and from a number of intergovernmental and international organisations. In addition, the Secretariat organised an Internal Consultation Workshop with participation of experts, relevant organisations and members of the Governing Council, which was held on 21st September 2020 and focused on issues of scope of the future instrument and the impact and relevance of technological developments for enforcement.

9. At the September meeting of its 99th session (23-25 September 2020), the Governing Council discussed the revised Secretariat’s document including the outcome of the consultations ([C.D. \(99\) B.3](#)), approved the guidelines provided by the Secretariat regarding the proposed scope of the project, confirmed the high priority status assigned to the project, and authorised the establishment of a Working Group.

B. Target audience

10. 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. It would do so by offering to national legislators a set of global standards and best practices designed to improve the domestic normative framework applicable to enforcement. Thus, the primary addressees would be legislators seeking to reform, or refine, their enforcement laws. It is envisaged that international organisations actively supporting legal reform in various regions of the world may channel implementation of the best practices in specific jurisdictions.

Question for the Working Group

- *Can other potential addressees of the instrument be identified at this stage?*

C. Format of the instrument

11. There was general agreement among participants in the consultation process that it would not be appropriate or feasible to draft a binding international instrument (i.e. a Convention), nor a legislative instrument such as a model law, or detailed Principles or Rules structured as a comprehensive code. A guidance document containing best practices avoiding “one-size-fit-all” solutions was considered to be a better option. The following main reasons were cited for choosing this type of instrument: the close interconnection of enforcement with several areas of the law (e.g. property law, insolvency, constitutional law...) where there is a divergence of national legal concepts and approaches; divergent national cultural, social and economic situations; the dynamism of technological developments applied to enforcement. It was not excluded, however, that non-binding guidance instrument may, with time, pave the way for future international legislative activity.

12. It was also noted that there should be a sufficient level of detail in suggesting potential regulations to national legislators (e.g. potential model rules for some specific issues). This would render the instrument more useful and attractive and reach beyond the existing guidance documents (e.g. the UIHJ Code of Enforcement). It was also proposed that the level of detail of the suggestions of best practices may be differentiated in relation to the various issues which will be addressed by the instrument.

13. Taking these considerations into account, the Working Group faces different options in regard to the most suitable format of the envisaged instrument. In view of the aim of the project, i.e. to identify best practices in the field, particularly addressing legislators (see above, B.), a discursive format with no explicit list of legislative recommendations would not appear to be sufficient, even if drafted in a thorough and comprehensive manner (e.g. the examples of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming; or the UNIDROIT/FAO/IFAD Legal Guide on Agricultural Land Investment Contracts). Another type of model is represented by the UNCITRAL Legislative Guides, which contain an analysis and discussion of each topic in a discursive style, and a final list of more detailed recommendations (e.g. UNCITRAL Legislative Guide on Secured Transactions; UNCITRAL Legislative Guide on Insolvency). Finally, another alternative model would consist in developing “principles” or “best practices” accompanied by comments (possibly assisted by an introductory part with more general considerations). This is the model chosen by the ALI- UNIDROIT Principles on Transnational Civil Procedure and by the ELI- UNIDROIT Model Rules on Civil Procedure. While at this stage any decision on the format of the envisaged instrument would be premature, the Secretariat would welcome a tour de table among participants on this matter also to identify additional potential model formats.

Questions for the Working Group

- *Would a discursive "legal guide" type instrument with analysis and discussion of each topic and a final list of "best practice recommendations" be suitable for the envisaged instrument (see e.g. the examples of the UNCITRAL Legislative Guide on Secured Transactions)?*
- *Would an instrument providing for "principles" or "best practice model rules" accompanied by comments (and assisted by an introductory part) be a suitable model for the envisaged instrument?*
- *Are there any other potential model formats to consider?*

D. Title of the instrument

14. As mentioned above, it is anticipated that the instrument will be in the form of a soft best practice guide in the area of enforcement. The suggested provisional title of the instrument, which modifies the title of the previous project, is "Best Practices for Effective Enforcement". Once the project has advanced sufficiently, the Governing Council's endorsement will be sought, if necessary, for any revisions of the title.

E. Terminology

15. One of the challenges of uniform law is how to ensure that the planned instrument adopt a terminology which is sufficiently technical and precise, but also as neutral as possible in respect to specific legal systems, and accessible to users with different legal and linguistic backgrounds (or at least capable of translation in different languages). This is particularly important in the case of instruments aimed at providing guidance to national legislators. Moreover, there should be consistency with the terminology used in other UNIDROIT instruments and current projects (for example, the project on Private Law and Digital Assets).

Questions for the Working Group:

- *Would the compilation of a glossary, or set of "defined terms", be useful for the development of the project?*
- *If so, should this exercise "follow" the development of the instrument, with drafters of the various parts highlighting potentially difficult terminological issues, or be discussed / prepared at the outset?*
- *If so, should it be then formally added to the final instrument?*

F. Organisation of the work

Working Group

16. Consistent with UNIDROIT's established working methods, a Working Group is set up, composed of participants selected in their personal capacity for their expertise in the fields of comparative procedural law, contract law, secured transactions, insolvency and technology and the law. A representation of different systems and geographic regions of the world is sought for. As consistent with UNIDROIT practice, the Working Group will not adopt any formal rules of procedure and will seek to make decisions through consensus under the Chair's guidance.

17. UNIDROIT has invited several global and regional organisations with expertise in this and related fields to participate as observers in the Working Group. The participation of these organisations should ensure that different regional perspectives are considered in the development and adoption of the instrument. Such organisations can also channel relevant input from experts with a specialised background, which would allow among other for interdisciplinary synergies. Moreover,

it is anticipated that the cooperating organisations may assist in the regional promotion, dissemination, and implementation of the guidance document once it has been adopted. Finally, UNIDROIT may also invite professional associations to participate as observers in the Working Group or in subsequent consultations.

Consultation procedure with additional experts

18. Thus far, the individual experts involved well represent both common law and civil law jurisdictions and possess knowledge of comparative law. As mentioned, more input may be needed to reflect useful and necessary additional information from regions not (yet) represented in the Working Group, as well as from persons who have a specific professional expertise. The Secretariat, in cooperation with the World Bank Group (WBG) and the European Bank for Reconstruction and Development (EBRD), is in the process of conducting consultations in the form of interviews and questionnaires in order to gather data on challenges, regulatory options and practices for effective enforcement in diverse jurisdiction to better identify the most suitable addressees. The Secretariat would be open to broaden this exercise in cooperation with other interested organisations. Such consultations may further represent the means to identify a pool of relevant experts who could be invited to share their expertise in an *ad hoc* way at one or more Working Group meetings.

Provisional timetable

19. The preparation of Best Practices for Effective Enforcement is a high priority project on the UNIDROIT Work Programme 2020-2022.

20. At this stage, the Secretariat is envisaging that the preparation of a first draft of the proposed instrument be conducted over four sessions of the Working Group (the present one in December 2020, two in 2021, and one in 2022, possibly in connection with a wider consultation event). The Working Group sessions should preferably be in person. Given the present extraordinary international circumstances, however, one or more of the planned in-person meetings may be replaced by remote webinars or conducted as hybrid meetings. Intersessional work is suggested as a good way to move the project forward. It is envisaged that remote meetings/consultations may be conducted in between sessions when deemed necessary. This tentative calendar may be revised in view of different factors, including the evolution of the current extraordinary international context and the extent of research needed to develop a practically useful instrument in this complex area of law.

Dates and venue of the second meeting of the Working Group

21. The Secretariat suggests two alternative sets of dates for the second meeting of the Working Group: **12-14 April 2021 / 19-21 April 2021**. An early decision on the date is strongly encouraged. The next meeting of the Working Group will be held in Rome, at the seat of UNIDROIT. In consideration of the uncertainties on the possibility or advisability to travel in spring, the Secretariat is currently planning the meeting as a hybrid one but will inform participants of any developments in this regard.

II. ISSUES RELATED TO THE SCOPE OF THE INSTRUMENT

A. General mandate received

22. The Working Group is invited to develop a best practice instrument on mechanisms and procedures of enforcement of creditor's claims. A more precise determination of the type of procedures and the type of claims to be included in the scope of the project is left to the appreciation of the Working Group, subject to the initial guidance deriving from the outcome of the preliminary consultations conducted by the Secretariat and from the input of the Governing Council at its 99th session. Such guidance is contained in the following paragraphs of this part, devoted to the determination of the general, and more specific contours of the project.

23. The background of the project lies in the recognition of the need to ensure a timely, predictable and affordable enforcement of contractual rights for a developed credit market and an improved access to credit, for an increase in trade and investment and for overall economic and social development and sustained growth in all jurisdictions. The Working Group is thus invited to consider the current challenges for effective enforcement, and the most suitable solutions (procedures, mechanisms) to overcome such challenges. The goal of the project is to improve the effectiveness of enforcement combating excessive length, complexity, costs and lack of transparency, while at the same time ensuring a sufficient protection of all parties involved.

Question for the Working Group:

- *Should the prospective instrument contain an introductory or general part stating the underlying principles and goals of the best practices, or should those principles be embodied in the best practices themselves (in the form of general recommendations)?*
- *Would the instrument need to address the intersection between constitutional principles applicable to enforcement practices (contained both in national and international legislation) and the proposed best practices?*

B. Definition of the meaning of “enforcement” in relation to the project

24. One of the issues discussed during the consultation procedure and at the Consultation Workshop regarded the meaning of the term “enforcement”. It was suggested that the future Working Group should preliminarily discuss and reach a common understanding of what is meant by “enforcement” for the purposes of the project, since this term may refer to different issues when used in an international or national context, which could lead to potential misunderstandings. Though the matter was the subject of the consultation procedure and was further addressed during the Internal Consultation Workshop, the Secretariat would welcome a discussion on these general contours of the project by the Working Group at its first session. A suggestion to shape this discussion which emerged during the consultation process was to use a functional notion of enforcement, that does not necessarily coincide with the technical meaning of the term in any specific domestic law. This notion may embrace a number of different procedures and mechanisms through which a creditor can obtain satisfaction of its claim over assets of the obligor or collateral, be it by reaching and applying the value of the asset or by obtaining rights on, or control of, the assets. The usefulness of developing best practices in relation to each of those procedures should be assessed on the basis of the concrete obstacles and challenges they face at present in various jurisdictions.

Procedures falling within the scope of the project and issues connected with them

25. Different types of procedures falling within the scope of the project were identified during the consultation:

- (i) A typical case is that of a creditor that has obtained a judicial decision against a non-performing obligor: the decision will trigger a procedure to allow the creditor to obtain satisfaction, usually by applying to assets of the obligor). The project would focus on this execution procedure, usually termed “judicial enforcement”.

NB - The question of whether the execution of a different type of decision, e.g. an arbitral award, should be considered in the project was raised during the consultation and received a tentatively positive response.

- (ii) Another case may occur when a legal system recognises the right of a creditor to proceed to execution against the defaulting obligor without having to first obtain a judicial decision on the merit (usually termed “extra-judicial enforcement”). There appears to be a wide variety of approaches in different jurisdictions as to basis for the legitimation to enforce in this case.

(iii) Yet another case falling within the scope of the project is that of a secured creditor who seeks to enforce its rights on the collateral, which may follow different procedures depending on the applicable law, and may therefore overlap with the first or the second of the preceding categories. In view of their economic and practical importance, however, it is suggested that secured claims should be treated separately from unsecured ones, even when arising from the same type of contract (e.g. a loan).

26. In relation to judicial enforcement, it was clarified that the project would have to address a vast array of questions both connected with the concrete mechanisms of judicial enforcement, as well as with its governance and organisation. Here is a non-exhaustive list of potential issues:

- (i) who are the actors involved in the judicial enforcement (judges? public officials other than judges (with or without judicial supervision)? private actors (if so, what are the procedures for selection/appointment/ control? Is a professional organisation involved? what are the professional standards required? What is the relationship with the court?))
- (ii) how is access to information and transparency granted?
- (iii) what are the mechanisms to locate and seize debtor's assets?
- (iv) what are the available means of enforcement, and what is the extent of party autonomy allowed in their exercise?
- (v) what are the means of recourse/opposition for the debtor/third parties?

27. There was unanimous support during the consultations for covering both judicial and extra-judicial enforcement, but most commentators were not in favour of using a strict dichotomy. It was noted that the distinction between judicial and extrajudicial enforcement is becoming difficult to establish in several legal systems (e.g. many jurisdiction have introduced hybrid proceedings with participation of private actors, or public/private actors, or with enhanced party autonomy); a dichotomy would hamper the development of hybrid enforcement models.

28. Another reason to cover the whole spectrum is that there are significant interconnections between judicial and extrajudicial enforcement. For example, extrajudicial enforcement mechanisms may provide for the possibility for the debtor to resort to a court in order to solve issues related to the enforcement process. On the other hand, there is a clear need to find a proper balance between debtor's (and third parties') protection and the right to prompt and effective enforcement. The drafters of the instrument may wish to consider alternative ways to balance these competing interests, e.g. promoting the use of specific fast-track procedures to deal with oppositions.

29. Finally, there was unanimous support during the consultations for the idea to cover both enforcement of secured claims (e.g. the procedure through which a creditor secured by collateral can exercise its rights on the collateral) and enforcement of non-secured claims. It was mentioned that secured debt plays an important role in all economies but is especially relevant for emerging economies and in developing credit markets, which present higher risks and fewer options. It was also mentioned that innovative and useful best practices of extra-judicial enforcement can be found in modern secured transactions laws. Their suitability for a wider application could be considered by the Working Group.

Questions for the Working Group

- *Does the Working Group agree that these three broad categories sufficiently define the core procedures to be addressed by the instrument?*

- *Should the project address enforcement of decisions other than judicial decisions (e.g. arbitral awards)? Is enforcement of arbitral awards in a specific jurisdiction generally subject to a special regulation, or would it ordinarily follow the same procedure than enforcement of judicial decisions?*

Questions on terminology/structure of the project

- *Would the term "judicial enforcement" correctly cover the first case (i)?*
- *Would it make sense to organise the instrument still following the dichotomy judicial /extrajudicial enforcement for reasons of expediency (and introduce any necessary nuance where needed)?*
- *Should the term "extra-judicial enforcement" be avoided because not sufficiently precise, or can it be used in the project for reasons of expediency?*
- *Should enforcement of secured claims be treated separately in the instrument than enforcement of unsecured claims arising from the same type of contract?*

Substantive questions

- *In respect to the issues listed in para. 26 above (judicial enforcement): are they appropriate/relevant for the purposes of the project? Are there additional general points that should be addressed in a part on "judicial enforcement"?*
- *Are "hybrid" enforcement models (i.e. enforcement proceedings relying on participation of courts and private actors, or public/private actors) a winning model in the experience of Working Group participants?*
- *Are Working Group participants aware of fast-track procedures introduced to facilitate the resolution of opposition claims or disputes arising during extra-judicial enforcement?*

Exclusion of recognition and enforcement of foreign decisions

30. All participants in the consultation agreed that the project would not cover the rules and mechanisms through which a decision rendered in one country is recognised as enforceable in another country (for example through the operation of a treaty or regional legislation dealing with the recognition and enforcement of judicial decisions (e.g.: *Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, N° 1215/2012 recast; *2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*; *1958 New York UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards*; *2019 UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention)*). Those instruments (or the otherwise applicable domestic international procedural rules), however, stop short of regulating the domestic law procedures and mechanisms that are triggered upon recognition of the enforceability of such decisions. Thus, the project needs to address the specific "execution" or enforcement phase of the decision, irrespective of whether it derives from a cross-border or a purely domestic situation. In this way, the future instrument would be complementary to the existing regulation on the international recognition and enforcement of decisions and would contribute to the practical implementation of the goals of such instruments.

Question for the Working Group

- *Is this characterisation of the scope of the above-mentioned instruments correct? Are there any "grey" areas to discuss?*

- *Should the project deal with issues related to the extraterritorial operation of national enforcement orders when admitted by national laws?*

Relationship with the procedure to obtain a decision against a defaulting obligor

31. The “execution” phase was distinguished from a potentially broader concept of enforcement of a creditor’s claim against the obligor. “Enforcement” in a broad sense could cover the process of obtaining a legal judgment against a defaulting obligor (e.g. initiating a law suit against the buyer to obtain payment of the outstanding monies and being granted by the court the right to payment). This falls outside of the scope of the project and is indeed covered by other instruments developed by UNIDROIT, such as the ALI-UNIDROIT Principles of Transnational Civil Procedure and the newly approved ELI- UNIDROIT Model Rules on Civil Procedure. It was noted, however, that the project should consider the possible relationship with the process of determination of the merits (i.e. whether the creditor’s claim is founded, or whether the obligor can exercise a defence against the creditor’s claim). In other words, the Working Group should address the extent to which best practices on the interconnections of these different phases can be developed.

Question for the Working Group:

- *Should the project address any other situation where there is a relationship between the enforcement phase and a “declaratory” phase (i.e. the judicial phase deciding on the right of the creditor to proceed to enforcement), for example:*
 - *What happens to the enforcement phase when a judicial decision is appealed, and the appeal is wholly or partly successful?*
 - *What happens where extraordinary motions for review are granted?*

Relationship with contractual remedies

32. Another broader interpretation of the term “enforcement” would equate it with “exercise of a remedy”, and cover the exercise of contractual remedies by the creditor in the case of non-performance by the obligor (e.g., claiming liquidated damages for non-performance on the basis of a contractual clause). This would cover the exercise of contractual remedies by the creditor in the case of non-performance by the obligor (e.g., the creditor is entitled to claim liquidated damages for non-performance on the basis of a contractual clause). It is surmised that remedies on the one hand, and the mechanisms of enforcing such remedies on the other hand are different issues. It should be however ascertained whether there are any instances where creditor’s rights to obtain payment or to apply to the value of an asset included in a contract give rise to a direct legitimation for the creditor to proceed to enforcement, without the need to obtain a court decision or any other additional legitimation. This situation would amount to an extra-judicial enforcement legitimation and should be covered by the project.

Question for the Working Group:

- *Does it make sense to sharply distinguish between contractual remedies, on the one hand, as a matter excluded from the scope of the project, and enforcement of creditor’s rights, on the other hand, as a matter covered by the future instrument, or are there examples, to the knowledge of the Working Group, of more nuanced situations?*

C. Types of claims included in the scope of the project

33. During the consultation procedure, the scope of the project was discussed also in relation to the types of claims that would be covered.

34. Generally, the participants in the consultations were wary of limiting the scope of the project *a priori* on the basis of the type of claim to be enforced. The need to identify core elements in the

project scope that would be prioritised was however also reflected in the discussions. There was a common understanding that the project would focus on commercial contractual claims, as opposed to claims deriving from other sources, such as extra-contractual claims (e.g.: a claim by an injured party to recover money damages owed by the person whose tortious conduct caused the injuries), or claims related to family or succession. It was highlighted, however, that the different type of claim may play a less relevant role in the case of judicial enforcement, as the enforcement procedure would likely be the same. For consumer contracts see below, Section D.).

35. A first distinction was drawn between contractual monetary and non-monetary claims. In relation to monetary claims, a more granular subdivision was suggested, in order to decide on whether all, or only some, should be included in the scope of the project. The Working Group is invited to consider them and discuss whether any of them should be excluded, or whether any of them should be prioritised in respect to the others:

- (i) Claims for repayment of loans (usually covered also by the term “debt”);
- (ii) Claims for payment for goods (or services) provided on credit;
- (iii) Claims for money damages for breach of non-monetary promises (e.g.: a claim that goods do not satisfy a warranty included in the contract of sale);
- (iv) Claims deriving from a contractual clause providing for liquidated damages.

36. The Consultation Document further asked whether the instrument should cover enforcement of contractual claims other than monetary claims (e.g.: claims to obtain the delivery of assets, or to enforce an obligation to do something, or not to do something). Including such claims would entail looking at mechanisms of enforcement that are likely to be more complex. The majority of the participants, however, suggested that contractual claims as a whole (as opposed to only monetary claims) should be included in the discussion and, if the Working Group subsequently realised that the formulation of best practices exceeded the limits of a feasible outcome, the scope of the instrument might be narrowed. Moreover, in view of the non-binding nature of the instrument it could be envisaged that the detail of the best practices may vary depending on the situation.

37. In support of the majority approach, it was noted that while enforcement of monetary claims is the most common modality of execution in commercial relationships, other modalities are also important for daily commercial life and should therefore not be excluded for the following reasons: (a) in practice, enforcement may be hybrid (i.e. enforcement of monetary claims coupled with injunctions); (b) specific performance is often transformed into monetary claims in the course of enforcement proceedings (e.g. *astreintes*, fines or *Zwangsgeld* are used to force specific performance; compensation for losses is the ultimate remedy when specific performance has become impossible); (c) enforcement of provisional measures may often concern orders for sequestration or injunctions not to dispose of assets or accounts. At a more general level, including enforcement of contractual claims other than debt would improve fairness and protection of wider categories of creditors, including those who are more vulnerable than institutional lenders.

Questions for the Working Group:

- *Would the Working Group agree on prioritising commercial contractual claims as opposed to claims deriving from other sources (e.g., extracontractual claims) or connected to other matters (e.g. family, succession)?*
- *Would an express exclusion of extra-contractual claims, or claims related to family and succession, from the scope of the instrument be inappropriate or not useful, at least for judicial enforcement?*
- *The Working Group is invited to consider the different types of contractual monetary claims in para. 35, and discuss whether to prioritise the consideration of claims deriving from loans*

and from the supply of goods or services ((i) and (ii)) as opposed to other monetary claims, or whether such a course of action would not be appropriate/useful, at least for judicial enforcement.

- *Would the Working Group also agree on considering, alongside monetary claims, more generally other contractual claims of non-monetary nature? Would enforcement procedures in relation to such claims raise issues that are radically different than those for monetary claims?*

D. Consumer claims

38. The inclusion of enforcement against consumer debtors in the scope of the instrument was supported by a number of commentators, who noted that, in practice, enforcing claims against consumers played a vital role in an economy and excluding those claims would reduce the importance of the instrument. It was also noted that a sharp distinction between enforcement of consumer and non-consumer transactions may turn out to be artificial. Other experts, however, expressed concerns in including enforcement against consumers because of the impact of asymmetry and the existence of domestic mandatory provisions. Some members of the Governing Council also suggested caution in dealing with consumer contracts, but the express exclusion of the topic was not supported.

Questions for the Working Group:

- *Would the Working Group agree on prioritising commercial claims as opposed to claims deriving from a consumer contract (considered as a whole, i.e. both when the consumer is a debtor and when it is a creditor), with a view of reconsidering the issue at a later stage?*
- *Would more research on consumers as creditors be helpful to determine whether best practices for the enforcement of consumer claims may be a useful and feasible addition to the instrument?*

E. Insolvency related enforcement

39. Different opinions were expressed during the consultation on the question of whether to include or exclude insolvency related enforcement from the scope of the project. Most commentators supported the inclusion of enforcement of claims in insolvency, because coherence and consistency between insolvency-related and non-related mechanisms were instrumental to effective creditor protection, and because excluding insolvency proceedings from the scope would undermine the usefulness of the project and send a wrong message. Some concerns were however also expressed, and reiterated during the discussion at the Governing Council, in particular regarding the relationship with existing instruments that already set standards in insolvency proceedings, such as the UNCITRAL Legislative Guide on Insolvency Law and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes.

40. The Secretariat clarified that insolvency was not the focus, but an ancillary part, of the enforcement project. The aim of the project would be to analyse enforcement generally and turn to insolvency related enforcement in a later phase, and with caution. The project would not seek to introduce or modify substantive insolvency-based rules, nor would it contradict the standards already contained in the above-mentioned instruments but be complementary to them. The Working Group may consider, at a later stage of the project, whether specific procedural mechanisms already used or identified as best practice for general enforcement would be also useful in the different context of insolvency to facilitate liquidation (such as, for example, platforms for the liquidation of the value of the assets), and, if so, how to adapt the general enforcement mechanisms to the concrete insolvency procedure. Another potential area where it was suggested that best practices may be useful is enforcement against an insolvent debtor conducted outside of an opened insolvency proceeding. This

would pose, mainly, matters of coordination between proceedings, both from an institutional and legal standpoint.

Question for the Working Group:

- *Would the Working Group agree on focusing on enforcement in general and reverting to the issue of insolvency related enforcement in a later stage of the project?*

G. Enforcement of provisional and protective measures

41. The experts unanimously supported the proposal to include consideration of provisional and protective measures in the instrument, considering the great practical importance of interim relief and the close interconnections with general enforcement proceedings. Particularly in relation to provisional and protective measures it was noted that limiting the scope of the project to monetary claims would not cover some of the most effective and relevant remedies, such as orders for sequestration, or injunctions not to dispose of assets or accounts.

42. The project would have to be coordinated with existing UNIDROIT instruments covering provisional and protective measures, in particular the most recent ELI- UNIDROIT Rules which devoted an entire chapter (Part X) to model rules accompanied by comments on this topic. Best practices on the enforcement of provisional and protective measures should be sufficiently detailed as to constitute an added value in respect to this instrument. Another existing regime concerning interim or advance relief pending final determination of the case, and dealing with enforcement matters, is contained in the Cape Town Convention on International Interest on Mobile Equipment and its Protocols (Art. 13 Conv.; Arts X Aircraft Prot., VIII Rail Prot., XX Space Prot., IX MAC Prot.). While this latter regulation presents peculiarities linked to the specialised nature of the treaty, it could provide interesting elements for discussion when considering enforcement of secured debt.

Questions for the Working Group:

- *Does the Working Group confirm the need to include enforcement of provisional and protective measures in the scope of the instrument, and to deal with it early on in the deliberations of the WG?*
- *Does enforcement of provisional and protective measures raise different questions / issues than those arising for the general enforcement of claims? Should enforcement of provisional and protective measures be treated separately from general enforcement, or should the instrument follow a different structure (e.g. based on the type of remedy, irrespective of the provisional or final nature of the decision, or on the type of asset?)*

H. Additional factors influencing enforcement procedures

43. The operation of enforcement procedures in a specific jurisdiction is 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, the consultation confirmed that it should at least point to those factors that may play a significant role in shaping enforcement. Many jurisdictions have, for example, introduced mechanisms that may serve as an incentive not to default on obligations, thereby limiting the need to resort to enforcement proceedings, such as 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.

44. Recent reforms of enforcement laws have 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.

Questions for the Working Group:

- Does the Working Group confirm that those factors should be considered as part of the scope of the instrument?
- Are Working Group participants aware of any effective national law mechanisms/ regulations specifically supporting enforcement procedures (as opposed to general mechanisms incentivising contractual compliance)?

III. INTERNATIONAL INSTRUMENTS AND PROJECTS

UNIDROIT instruments

- ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004, at <https://www.unidroit.org/instruments/transnational-civil-procedure>;
- ELI/UNIDROIT Model Rules on European Civil Procedure, 2020, at <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules>;
- Cape Town Convention on International Interests on Mobile Equipment, 2001, and its Protocols (Aircraft Protocol, 2001; Luxembourg Rail Protocol, 2007; Space Protocol, 2012; Mining, Agricultural and Construction Protocol, 2019), at <https://www.unidroit.org/instruments/security-interests/cape-town-convention>;

UNIDROIT WP 2020-2022 (current projects)

Digital assets and private law, info at <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law>

Other international instruments

CEPEJ Good practice guide on enforcement of judicial decisions, 2015, at <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf>;

UIHJ Global Code of Enforcement, 2015, at <https://www.uihj.com/downloads/global-code-of-enforcement/>;

UNCITRAL Legislative Guide on Secured Transactions, 2010, info and text at https://www.uncitral.org/pdf/english/texts/security-lq/e/09-82670_Ebook-Guide_09-04-10English.pdf;

UNCITRAL Model Law on Secured Transactions, 2016, info and text at https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions;

UNCITRAL Model Law on Secured Transactions - Guide to Enactment, 2017, info and text at https://www.uncitral.org/pdf/english/texts/security/MLST_Guide_to_enactment_E.pdf;

UNCITRAL Legislative Guide on Insolvency, info and texts at https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law;

World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2016, info and texts at <https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>;

Current projects of other organisations related to enforcement

EU: *Proposal of an EU Directive on Accelerated Extrajudicial Collateral Enforcement Mechanism*, ST 14261 2019 REV 1 COR 1

UNCITRAL: Proposal for work on *Civil Asset Tracing and Recovery*, info at <https://uncitral.un.org/en/assettracing>.