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**UNIDROIT Working Group
on Best Practices for Effective Enforcement**

First meeting (hybrid)
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Study LXXVIB – W.G.1 – Doc. 4
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REPORT

1. The first session of the Working Group established to prepare Best Practices for Effective Enforcement (hereafter: the “Working Group”) took place in hybrid format (remotely and at UNIDROIT) between 30 November and 2 December 2020. The Working Group was attended by 26 participants, comprising experts, observers from international and regional intergovernmental organisations, as well as from other international and academic organisations, guest reporters and members of the UNIDROIT Secretariat (the List of Participants is available in Annexe II).

Item 1. Opening of the session and welcome by the UNIDROIT Secretary-General

2. *The Secretary-General*, acting as provisional Chair, opened the session and welcomed all participants, regretful for not being able to open the first session in person. He recalled that the project on Best Practices for Effective Enforcement had been included in the UNIDROIT Work Programme 2020-2022 upon proposal of the World Bank, also as a continuation of the existing low priority project on Principles of Effective Enforcement and a redefinition of its scope. Acknowledging that, despite its importance, enforcement did not work well in most jurisdictions, he stated that the project aimed to address the challenges facing effective enforcement, identify existing problems and develop a set of best practices and standards, going beyond existing international instruments, which could be used by countries to improve their current systems. He summarised the actions taken so far by the Secretariat since the approval of the project by the UNIDROIT General Assembly in December 2019, mentioning in particular the consultation procedure on the refinement of the scope of the project launched as a follow up on the remote April-May 2020 meeting of the 99th session of the Governing Council, and the Workshop held immediately before its second hybrid meeting in September 2020. The Secretary-General announced that the Working Group would be composed by a number of core participants, with other experts being invited for specific purposes. He stressed the importance of collecting data on the functioning of enforcement procedures in several jurisdictions, to be used as a basis and a justification for the best practices.

Item 2. Formal appointment of the Chair of the Working Group

3. *The Secretary-General*, recalling that in accordance with UNIDROIT practice, Working Groups were to be presided over by a Member of the Governing Council wherever possible, suggested the appointment of UNIDROIT Governing Council member Ms Kathryn Sabo, Deputy Director General and General Counsel at the Constitutional, Administrative and International Law Section of the Department of Justice in Canada. The proposal was unanimously approved by the Working Group.

Item 3. Adoption of the agenda and organisation of the session

4. In accepting her appointment, *the Chair* thanked the Working Group for the vote of confidence and the Secretariat for the documents produced so far. She introduced the annotated draft agenda and suggested that the Group start by considering Section II of Doc. 2, on the scope of the project and the issues to be covered, while Section I on preliminary matters could be addressed on the last day of the session. The second day of the session would be devoted to a presentation of a study conducted by the European Banking Authority (EBA) and to the discussion of Doc. 3 on the impact of technology in enforcement. In conclusion, the draft agenda was unanimously adopted, with the corrigendum of a material error on the name of the EBA.

Item 4. Consideration of matters identified in the Issues Paper (Study LXXVIB – W.G.1 – Doc. 2)**(a) Scope of the future instrument and issues to be covered**

5. *The Chair* introduced Section II of Doc. 2, highlighting that it contained, for the most part, the results of the consultations held over summer on the determination of the scope of the project, accompanied by questions posed by the Secretariat.

6. *The Deputy Secretary-General* explained that most of the questions concerned the definition of the scope of the planned instrument which had been left to the appreciation of the Working Group, subject to the guidance deriving from the outcome of the preliminary consultations and the input of the Governing Council. The Working Group was invited to express its views on the meaning of “enforcement” for the purposes of the project, and on the extent to which certain topics would be considered with priority, while others could be addressed at a later stage of the project, bearing in mind that issues of scope would likely be revisited during the course of the work. A few questions dealt with the determination of specific aspects to be addressed within the scope of the project, requiring the initial guidance from the Working Group. Finally, some questions pertained to the structure of the planned instrument and on suitable terminology, on which a preliminary discussion would be welcomed.

7. The general mandate of the Working Group was to identify current challenges for the enforcement of creditors’ rights, particularly in relation to contractual rights, and develop solutions in the form of global best practices. Such best practices should consider the impact of modern technology on enforcement, both as an enabler of suitable solutions and as a potential source of additional challenges to be addressed.

8. *The Chair* opened the discussion on the first two questions in Doc. 2, addressing whether the prospective instrument should contain an introductory or general part stating the underlying principles and goals of the best practices, as opposed to such principles being embodied in the best practices themselves (e.g., in the form of recommendations); and whether the instrument would need to address the intersection between constitutional principles applicable to enforcement and the proposed best practices.

9. In the ensuing discussion, the importance of drafting an introduction to the best practices was acknowledged. The experts noted that such an introduction could fulfil various functions: set forth the underlying reasons and drivers for the development of the best practices; state the goals of the instrument; and contain the general principles on which the best practices would be based, which could be used as parameters for the interpretation of the instrument. It was also noted that the introduction should be written in consideration of its intended audience and the need to explain the purposes and goals of the instrument as well as their practical importance. In respect of the general principles, experts highlighted that their identification process ought to be iterative, since on the one hand, the principles would at least in part derive from the discussions on the content of the best practices whereas, on the other hand, there would be the need to strike the right balance in the

level of detail between the introduction and the best practices themselves. Furthermore, the need to consider existing sets of principles dealing with enforcement, such as the UIHJ Global Code of Enforcement as well as the statements produced by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, in particular the “Good practice guide on enforcement of judicial decisions”, was also flagged. Finally, one observer referred to the right to a fair trial and the State’s responsibility to develop a functioning enforcement system as important general principles to be considered while drafting the instrument.

10. The Working Group then addressed the relationship between constitutional principles and the proposed best practices. In summarising this discussion, *the Chair* noted that there was general agreement that the instrument would have to address the interaction with constitutional principles and particularly with fundamental rights and principles related to access to justice, though it was considered premature to decide on their content, and whether such principles should be included in an introductory part or elsewhere. Some experts had flagged the need to exercise caution because of the global reach of the instrument and the existence of a variety of constitutional models. Other experts had noted that constitutional benchmarks would be especially important in evaluating the impact of emerging technologies on enforcement. More generally, the benchmark role of the protection of fundamental rights had been highlighted: when proposing best practices facilitating enforcement, their compatibility with existing constitutional frameworks should be tested. Finally, the Chair clarified that this was a preliminary exchange of views, and the topic of the interaction with constitutional principles would undoubtedly surface in an iterative manner during the development of the project.

11. One expert raised the issue of whether enforcement against assets of a foreign authority would be included in the scope. *The Secretary-General* noted that such topic would be, at least for the time being, outside of the mandate received from the Governing Council and likely to raise political issues that would go beyond the goals of the project.

12. *The Chair* introduced the next point, i.e., the definition of the meaning of “enforcement” for the purposes of the project, since it was important for the Working Group to reach a preliminary common understanding of the general contours of the project and of what was meant by “enforcement”.

13. *The Deputy-Secretary General* recalled that this issue had been one of the core questions in the consultation procedure and in the Consultation Workshop, leading to two fruitful general suggestions. The first was to use a functional notion of enforcement: this notion would not necessarily coincide with the technical meaning of the term in any specific domestic law but would embrace various different procedures and mechanisms through which a creditor could obtain satisfaction of its claim over assets of the obligor or collateral, be it by using the value of the assets or by obtaining rights on, or control of, the assets. The second suggestion was to develop typical examples of enforcement procedures that were thought to represent core cases to be included in the scope of the project. Following this latter proposal, three typical cases were presented in para. 25 of Doc. 2: (i) a creditor obtained a judicial decision against a non-performing obligor: the decision would trigger a procedure to allow the creditor to obtain satisfaction, which would be the focus of the project (provisionally termed “judicial enforcement”); (ii) another case would occur when a legal system recognised the right of a creditor to proceed to execution against the defaulting obligor without having to obtain a judicial decision on the merit first (usually termed “extra-judicial enforcement”); (iii) another, more specific, case was that of a secured creditor seeking to enforce its rights on the collateral, which may follow different procedures depending on the applicable law. The Deputy Secretary-General further noted that those examples did not expressly refer to the use of emerging technologies in enforcement proceedings, since that issue would be more thoroughly discussed later in the session. Finally, she noted that, for this topic, Doc. 2 contained a series of questions raising different issues, ranging from the determination of the core scope of the project, to the envisaged structure of the future instrument, to the use of a sufficiently clear terminology, to the identification of specific points to be addressed in developing the instrument.

14. *The Chair* opened the floor for discussion, focusing on the first six questions on pages 8 and 9 of Doc. 2 in particular.

15. In the ensuing debate, concerns were raised on the provisional terminology found in Doc 2, which was considered potentially misleading. Moreover, different opinions were expressed on the most appropriate taxonomy to be used as a working tool for the project, and for the structure of the final instrument.

16. In relation to the terminology, the expression “judicial enforcement” was criticised for being misleading, as it could imply that the execution procedure should always be conducted by a judge or a court. Other expressions were suggested, among which “enforcement of adjudicated claims”, or “enforcement following a judgment against the debtor”, or “post-adjudication enforcement”, which would more precisely reflect the common elements of the constellation of cases under para. 25 (i). The use of the term “extra-judicial enforcement” was also questioned, since it could be understood as referring to a number of different situations, ranging from out-of-court enforcement allowed to creditors during a court procedure, to the exercise of self-help remedies. Moreover, in this latter case, recourse to a court could still be envisaged as a way of dealing with the debtor’s oppositions, and to the extent allowed by the legal system. It was however agreed that the Group should focus on the determination of the scope of the project and on the most useful categories to be used at this stage to organise the discussion, while issues of terminology could be revisited.

17. Different opinions were expressed on the most appropriate taxonomy for enforcement proceedings. Several experts agreed that while such proceedings should be seen as a continuum with variables going beyond the “judicial” and “extra-judicial” dichotomy, general categories would help organise the discussion around major themes. One expert suggested to divide concepts between enforcement based on public authority (encompassing enforcement of judgments, as well as public or private document to which the legal system conferred public “force”), and self-help enforcement based on a contractual agreement. The use of these two simple general categories would highlight the similarity of the procedures in the first group irrespective of court intervention. Another expert suggested classifying enforcement proceedings into four “boxes”, combining the element of time (i.e., whether the enforcement followed a judgment against the debtor or could be initiated without such judgment) with the element of public/private authority (“public” or “private” actors, including in the latter category the creditors themselves). Other experts noted that these elements could be combined differently depending on the situation, and that additional variables such as the type of claim to be enforced may need to be factored in.

18. As regards the second question posed in Doc 2 after para. 29, experts generally agreed that enforcement of arbitral awards should not be excluded from the scope in principle. There would be no substantial difference in respect of enforcement of a judicial decision once the arbitral award was recognised in a jurisdiction.

19. In relation to the situation described in para. 25 (ii), experts noted that it would be very important for the project to include enforcement procedures based on a document, other than a court decision, to which the legal system conferred a special authority (e.g., notarial deeds; specific types of invoices in certain legal systems, etc.). It was however questioned whether the project should go into the details of the various types of documents used in different jurisdictions, and of how the legal system conferred legitimation (e.g., need for a notarial signature, other conditions to be fulfilled, etc.). It was also discussed whether enforcement based on other “enforceable titles”, such as judicial settlements, should be included in the project. In relation to these issues, one expert pointed to possible misunderstandings in the use of terms such as “enforceable title” or “titre exécutoire” and “judicial settlement” and flagged the need to pay special attention to the use of a neutral terminology bridging the differences among legal systems.

20. The question of whether “pure” self-help enforcement should be included in the project was also raised. While there was substantial consensus that it should not be excluded, a few participants

highlighted the potential difficulties in drawing a clear distinction between issues determined by substantive contract and secured transactions law, and issues connected to the mechanisms for the execution of creditors' rights. This was particularly true for self-help remedies based on a security agreement, for which attention should be paid to the possible overlap with existing international instruments. Other experts referred to remedies that a creditor could directly enforce according to the applicable law on the basis of a contractual clause (e.g., a right to set-off). Technology applied to enforcement would be another area where clear distinctions might prove difficult to implement. Most experts however noted that these issues would have to be concretely addressed when dealing with each situation.

21. In relation to the question of whether enforcement of secured claims should be treated separately than enforcement of unsecured claims, irrespective of the type of procedure at the creditor's disposal, a few experts noted that this option would be expedient in the phase of the development of the project, but that there would be numerous intersections with the other parts entailing the need to introduce cross-references. It was premature to take a decision on how these questions would be presented in the final document.

22. In summing up the discussion, *the Chair* noted that the experts had expressed different opinions on how to classify enforcement proceedings. There was, however, substantial consensus on the fact that the three scenarios described in para. 25 of Doc. 2 were examples of situations that would be included in the scope of the project. They could be used as a practical starting point for the discussions of the Group, irrespective of what the final structure of the instrument would be, bearing the other distinctions and caveats raised by the experts in mind. She further noted that experts had expressed concerns on the terminology used in Doc 2. She finally noted that it was important not to be caught in theoretical questions of categorisation, and to try to solve practical problems encountered in enforcement proceedings.

23. *The Chair* opened the floor on the substantive questions in Doc 2, page 9, particularly focusing on para. 26. In the ensuing discussion, while the experts generally agreed on the list of topics in that paragraph, they provided a number of comments. In relation to point (i), it was highlighted that there would not be much difference in the mechanisms for enforcement whether the procedure involved a court, or a public or private enforcement agent. It was also noted that "judicial supervision" would be the usual way to deal with oppositions by debtors during enforcement proceedings, while the monitoring and control of enforcement agents' activities would usually be demanded to other authorities (e.g., the executive branch of the government). An expert suggested that as regards enforcement organs, the instrument should distinguish between centralised and decentralised systems. This topic was connected to the following issues of access to information and transparency, and of the tracing of debtor's assets, the latter being a very important element for which the impact of technology would be particularly relevant (e.g., electronic registries would facilitate tracing of assets). The relevance of data protection was also highlighted. As to point (iv), the need to look at models from a comparative perspective was strongly advocated, building on existing comparative studies. Another expert raised the issue of the criteria to be applied in the evaluation of assets, especially during out-of-court enforcement. Finally, experts discussed whether the project should deal with the issue of priorities among creditors when considering how third parties could raise oppositions during an enforcement procedure (under point (v)). *The Secretary-General* explained that such issue would be outside of the scope of the project since it pertained to substantive secured transactions law, as would the application of rules such as *nemo dat* or *bona fide* acquisition in respect to third party buyers. *The Chair* noted that the concrete mechanisms through which entitled third parties could raise their opposition during enforcement proceedings would be included in the scope.

24. A number of experts questioned why settlement during enforcement proceedings was not expressly included in the list. An observer noted that so-called "soft" enforcement measures such as post-enforcement mediation, acceptance of payment in instalment or time periods for voluntary performance were not easy in many legal systems and may be particularly useful in a Covid-19 and

post Covid-19 economy. Another observer provided examples of existing post-enforcement mediation mechanisms.

25. *The Chair* moved on to the consideration of para. 30 of Doc. 2. *The Deputy Secretary-General* introduced the issue, which had already been discussed during the consultation phase. All participants in the consultation had agreed that the project would not cover the procedure through which a decision rendered in one country was recognised as enforceable in another country but would have to address the “execution” or enforcement phase of the enforceable decision, irrespective of whether it derived from a cross-border or a purely domestic situation. This decision was based on the fact that existing international instruments (or the otherwise applicable domestic international procedural rules) did not regulate the domestic law procedures and mechanisms triggered upon recognition of the enforceability of such decisions. The future instrument would thus be complementary to the existing regulations on the international recognition and enforcement of decisions and would contribute to the practical implementation of the goals of such instruments.

26. In the ensuing discussion, experts agreed on the position expressed in the Secretariat’s document. One observer mentioned the general principle of non-discrimination as a basis for dealing with the enforcement of recognised foreign decisions. Another observer noted the complementarity with HCCH Conventions, which left the regulation of the enforcement procedure to domestic law, and added the Choice-of-Court Convention to the list of instruments. An expert mentioned mediated settlements (the international recognition of which was now facilitated by the Singapore Convention) and noted that legal systems may differ in the way they enforce such decisions.

27. One expert addressed the second question under para. 30 of Doc 2, i.e., whether the project should deal with issues related to the extraterritorial operation of national enforcement orders when admitted by national laws. While the question was intriguing, if it was meant to refer to remedies such as worldwide injunctions it should be excluded from the scope of the future instrument.

28. *The Secretary-General* posed the issue of the inclusion of the mechanisms for the enforcement of foreign administrative decisions, resolutions of authorities dealing with a bank insolvency, or resolutions of other national regulatory agencies. Although their importance was growing, there was no international instrument dealing with them. He posited that the matter may be too complex and be outside of the Working Group’s mandate. *The Chair* noted that such resolutions were sometimes assimilated to judgments, and the project could deal with their enforcement if they had already been recognised as enforceable in a legal system.

29. Upon a question raised by the Secretary-General, *the Chair* opened a debate on whether the outcomes of the discussion on the categorisation of enforcement procedures and on the scope of the project would apply also to the enforcement of digital assets, with the caveat that this topic would be more thoroughly addressed on the following day. The experts participating in the discussion confirmed that digital assets would not in principle need an alternative framework, while the issue would be how to best integrate technology in existing procedures, which may influence the nature of the proceedings. As to the possible structure of the future instrument in relation to the impact of technology, experts expressed a preference not to include a separate part on technology. One expert raised the possibility of offering different options to legislators. This suggestion was however criticised as it could lead to championing one specific type of technology, while the future instrument should be technology neutral.

30. *The Chair* and *the Deputy Secretary-General* introduced the next topic, referring to para. 31 of Doc. 2. Experts agreed on the premise embodied in that paragraph, i.e. that the project should not address the process of obtaining a legal judgment against a defaulting obligor but should consider the possible relationship between the execution procedure and the process of determination of the merits. Experts then focused on whether the project should address enforcement of claims subject to appeal or other extraordinary motions for review. In the following discussion, the experts recognised the importance of dealing with such issues, and noted that the Group should avail itself

of existing comparative studies and instruments on the relationship between appeals and enforcement. One expert referred to national laws providing security for the debtor when the right to enforce was stayed until the conclusion of the appellate procedure. Another expert, while agreeing that the interaction between ongoing procedures for the determination of creditor's rights and enforcement should be addressed, suggested prudence in determining the scope of this project.

31. *The Chair* adjourned the session to the next day.

Item 6. Presentation and discussion of the European Banking Authority's Report on the benchmarking of national loan enforcement frameworks (EBA/Rep/2020/29)

32. *The Chair* resumed the session, inviting the representatives of the European Banking Authority to present their Report on the benchmarking of national loan enforcement frameworks.

33. Mr Olli Castren and Mr Samuel Da Rocha Lopes summarised the results of the Report, which stemmed from a request of the EU Commission to collect data from around 160 banks in 27 EU Member States on the outcome of debt recovery, and represented the first analysis of this kind for Europe. The Report focused on the performance of loans from various sources (retail loans, loans to small-to-medium enterprises as well as bigger companies, both collateralised and non-collateralised), after the opening of a formal insolvency procedure against the debtor. Its aim was to study the features of national loan enforcement procedures, considering in particular recovery rate, time for recovery, and costs of recovery. The representatives of the EBA first presented the results of the collection of data from the banks, drawing some aggregate conclusions on the recovery rate of loans as well as the time needed to conclude the enforcement procedure. They then moved on to the econometric analysis included in the Report, which aimed at identifying the key characteristics of the legal framework and of the judicial capacity in order to improve debt recovery. The analysis was based on the findings of studies conducted by, or on behalf of, the EU Commission. The presentation was followed by a lively discussion on various aspects of the Report, including its scope, the variables used to reach the outcomes, and the relevance of technological innovations on recovery. *The Chair* and the Secretariat thanked the guest presenters, referring to the complete Report for further information. As additional material to be considered by the Working Group, the Secretariat circulated the results of the survey that Felix Steffek had conducted at the EU Commission's request, containing an "Analysis of individual and collective loan enforcement laws in the EU Member States" (November 2019).

Item 4. (continued) Consideration of matters identified in the Issues Paper (Study LXXVIB – W.G.1 – Doc. 2)

34. *The Chair* resumed consideration of the points in Part II of Doc 2 that had not been discussed on the previous day. *The Deputy Secretary-General* referred the Working Group to paras 33-37, addressing the types of claims to be included in the project's scope. She recalled that, during the consultations, experts had preferred not to limit *a priori* the types of claims to be considered in the project. Particularly for enforcement following a judicial decision, it had been noted that the procedure would not substantially differ depending on the type of claim. Experts had agreed, however, that there was a need to identify the core issues to be addressed with priority by the Working Group. There had been consensus on the fact that the project should cover, "commercial contractual claims" at a minimum. She clarified that "commercial" was to be understood to refer to non-consumer debtors as opposed to consumers, and recalled that the question of including or excluding consumer transactions was considered separately in a later part of the document (Section D). The expression "contractual", on the other hand, referred to claims deriving from a contractual agreement, as opposed to extra-contractual claims (tortious claims), and to claims arising from family or succession matters (even if within these latter categories there could be claims classified in domestic laws as deriving from a contractual relationship). The Deputy Secretary-General finally

referred to the first two questions on page 11 of Doc. 2, which invited the Working Group to consider the Secretariat's suggestion to prioritise commercial contractual claims as opposed to claims deriving from other sources (e.g., extra-contractual claims) or connected to other matters (e.g., family, succession), without excluding these claims from the scope of the instrument.

35. In the ensuing discussion, while there was substantial agreement on the approach followed in Doc. 2, a number of issues and concerns were raised by the experts.

36. In relation to the term "commercial", two experts flagged the possibility of misunderstandings: there was a risk that this term might be interpreted parochially, e.g., as opposed to "civil" or "private", instead of referring to the dichotomy non-consumer v. consumer debtors. The use of the expression "B2B" was suggested (with the caveat of its being potentially difficult to translate in other languages). Another expert questioned the sharp distinction between non-consumer and consumer debtors, as those categories may vary depending on the legal system. The *Deputy Secretary-General* clarified that the term "commercial" had been used in the meaning it had in international instruments such as CISG and the UNIDROIT Principles on International Commercial Contracts, which were well-established and did not rely on a taxonomy present in specific legal systems. *The Chair* deferred to Section D for further discussion on the inclusion of enforcement of consumer contracts.

37. In relation to the questions posed by the Secretariat, while the experts agreed not to limit the scope of the project by expressly carving out specific types of claims, they discussed whether, and to what extent, enforcement of claims deriving from a contract should be prioritised. One expert noted that "priority" could mean two different things: priority in time (i.e., the Working Group should first address certain issues and then move to others) but also degree of analysis (i.e., how detailed the guidance offered by the instrument should be). He posited that the discussion should focus on the second meaning, giving as an example the difference between enforcement of claims for the repayment of loans, which gave rise to a limited and repeated set of issues and could be addressed in more detail, and enforcement of other claims, including those relating to family and succession. For the latter, post-adjudication enforcement was not likely to raise substantially different questions, while initiating enforcement without the need to obtain a court order may touch upon more sensitive matters. Other experts and observers concurred in considering the nature of the claim irrelevant in most cases when the claim was adjudicated or where there was an enforceable title. Another expert recalled the general aim of the project stated in para. 23 of Doc. 2, which appeared to speak for focusing on B2B contractual claims, while the other claims, albeit not excluded, did not need to be the focus of the best practices.

38. With specific reference to enforcement of extra-contractual claims, *the Chair* noted that it would be potentially difficult to distinguish between contractual and extra-contractual issues when they appeared in the same proceedings. *The Deputy Secretary-General* added that the distinction between contractual and extra-contractual obligations was formalistic and depended on domestic law categorisations. Two experts argued that the real distinction should be made between monetary and non-monetary claims, irrespective of whether they derived from a contract or another source.

39. *The Chair* noted that experts did not wish to exclude the enforcement of claims other than contractual from the scope of the project, but that the logical place to start working would be to focus on contractual B2B claims, with the caveat that especially for post-adjudication enforcement distinguishing between types of claims would not appear to be justified. The opportunity to develop special best practices for family or succession matters could be addressed at a later stage of the project.

40. *The Chair* opened the floor on paras 36-37 and related question (inclusion of non-monetary claims in the scope of the project), that had already been touched upon in the previous general discussion. Experts agreed not to exclude non-monetary claims from the scope of the project, but highlighted the need to proceed with caution when dealing with them. One expert recalled the

difficulties encountered in the negotiation of the Judgments Convention in respect of issues crossing the boundary between monetary and non-monetary obligations, such as the enforcement of a penalty for failure to comply with a non-monetary order. Another expert noted that the difficulty would be to decide on the degree of detail to be provided for specific best practices for the enforcement of non-monetary claims, while other best practices would find a more general application to all types of claims.

41. *The Chair* moved to the following set of questions, dealing with enforcement and consumers as debtors vs. consumers as creditors. *The Deputy Secretary-General* recalled that the general mandate for the Working Group was not to exclude consumer transactions, for the reasons set forth in para. 38 of Doc 2; in the consultations, as well as the discussion during the Governing Council session, however it had been suggested that this matter ought to be addressed with caution. The Secretariat's proposal to the Working Group was therefore to keep the enforcement of claims against a consumer, or of a consumer, within the scope of the project, but not to consider it the focus of the analysis.

42. In the following debate, experts agreed not to exclude consumer debtors or creditors from the scope of the project, but to consider at a later stage whether their inclusion warranted the development of specific best practices, or whether, as a number of experts suggested, a more general mention of possible limitations or restrictions at domestic law level, particularly for the case of consumer debtors, would suffice. In this regard, one observer noted that the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes had approached this issue by inserting a footnote on the need to consider adaptations of the principles in the case of consumers as debtors. The same observer pointed to the existence of an important body of research and best practices on consumers as creditors filing claims against financial service providers. Other experts stated that there did not seem to be any need to develop special best practices for the case where consumers were creditors. It was however noted that the possibility of counterclaims on the part of a consumer debtor could make it more difficult to distinguish between consumers as debtors and as creditors. One observer noted that the main difference in the case of a consumer debtor would not be in the procedures to be applied, but on how to grant access to justice. The best practices may provide examples of mechanisms for facilitating access to enforcement, or at least the general principles should refer to the need not to exclude anyone from enforcement. Other experts, however, raised concerns in dealing with such sensitive matters as legal aid.

43. Another issue raised by the experts, particularly in connection with technology as applied to enforcement, was the inclusion of peer-to-peer contracts (P2P). It was noted that in a P2P scenario a consumer could be either a creditor (including a lender) or a debtor, and it would be moreover difficult to distinguish between consumers and non-consumers. The P2P scenario had also raised the need to revisit traditional notions of vulnerability and protection of the weaker party, on which the special regimes in domestic laws to protect consumers were based. The experts agreed not to exclude P2P scenarios from the project, and to consider them in the context of digital technology.

44. *The Chair* introduced the next topic, i.e., insolvency related enforcement, referring to Section E of Doc. 2. *The Deputy Secretary-General* recalled that this issue had elicited much debate during the consultation phase and at the Governing Council September session. While most commentators had supported the inclusion of enforcement of claims in insolvency for the reasons set forth in para. 39 of Doc. 2, concerns had also been expressed, particularly regarding the relationship with existing instruments that had 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. In Doc. 2 the Secretariat had therefore clarified that the aim of the project would be to analyse enforcement generally and turn to insolvency related enforcement only in a later phase, and with caution. At a later stage of the project, the Working Group would consider whether specific procedural mechanisms already used or identified as best practices for general enforcement could also be useful in the different context of insolvency, e.g., to facilitate liquidation, and, if so, how to adapt the general enforcement mechanisms to the concrete insolvency procedure. The project

would however not seek to introduce or modify substantive insolvency-based rules, nor would it contradict the standards already contained in the abovementioned instruments, rather be complementary to them. Another potential area where it was suggested that best practices may be useful was enforcement against an insolvent debtor conducted outside of an opened insolvency procedure.

45. *The Chair* opened the floor for discussion. Experts and observers agreed on the suggestion to focus on enforcement in general, and to revert to insolvency-related enforcement at a later stage, and with caution. One expert noted that it would be difficult to know *ex ante* whether enforcement would be individual or collective; moreover, insolvency may be the result of a choice by the debtor but may also be triggered by the intervention of other parties, leaving room for strategic behaviour. The representatives of two observer organisations welcomed the clarifications provided by the Secretariat in relation to the focus of the project. Emphasis should be placed on those issues which are common to general enforcement and enforcement in insolvency, and on mechanisms more than conditions, while bearing in mind that the distinction between substantive law and procedural mechanisms may not always be clear. It was also suggested that the users of international best practices in the area of insolvency would benefit from having one principal point of reference, i.e., the package provided by the World Bank and UNCITRAL, but that the identification of mechanisms and practices that may also work in insolvency would be helpful. Other observers noted that it would be interesting to consider the role of enforcement agents in relation to the transition from individual enforcement to insolvency. In the case of personal bankruptcy or debt rescheduling, existing solutions included the conclusion of agreements with the aim to avoid insolvency. *The Secretary-General* confirmed that the project should avoid issues of material insolvency law, but that the identification of efficient mechanism to transition between individual and collective enforcement could be, among others, a good topic to address at a later stage.

Item 5. Consideration of work in progress on support documents

(a) Preliminary Report on the impact of technology on enforcement (Study LXXVIB – WG 1 – Doc 3)

46. *The Chair* turned to the consideration of Doc. 3, *Preliminary Report on the impact of technology on enforcement*, expressing the gratitude of the Working Group and the Secretariat to the Reporter, Teresa Rodriguez de las Heras Ballell, for producing an excellent starting point for the discussion within the very limited time at disposal. She invited the Reporter to give a brief presentation.

47. After highlighting that the document was a work-in-progress, *the Reporter* noted that it had four main objectives: 1. To underline the relevance of technology for enforcement; referring to technology was important to not only to draft a future-proof instrument, but also because technology was to be seen both as one of the solutions to enhance enforcement, and as a challenge since it had created specific new problems; her first question to the Working Group in relation to this first objective was whether technology-related issues should be placed in a separate part of the future instrument or should permeate the whole text of the best practices; 2. To gather examples of procedures and mechanisms, in order to better understand what the current uses of technology were; while enforcement had traditionally been permeable to technological developments, the emergence of new technologies and A.I. may have a stronger impact; the question posed to the Working Group was whether the instrument should provide a definition of the different mechanisms of application of technology to enforcement, or a factual description of them. 3. To set forth the potential policy issues to be addressed; her question to the Working Group was whether the issues listed in the document covered all legal concerns or not; 4. To make a proposal of a taxonomy identifying the different levels or layers of impact of technology; such an exercise might be helpful as an analytical framework to conduct the work, or as a guidance for the final structure of the instrument.

48. In her oral presentation the Reporter focused on the taxonomy, which had been structured in four parts or layers. The first one was devoted to the new architectures relevant for enforcement provided by technology (with particular regard to platforms and DLT-based systems); the second layer covered processes and procedures, including “smart performance”, “self-enforcement”, and “dynamic enforcement”; the third part concerned digital assets, both as object of enforcement and as tools assisting enforcement; the last layer covered technology-based remedies enhancing effectiveness.

49. In relation to the new architectures, a first model was the development of electronic platforms that could fulfil different tasks: provide information, enable access to conduct specific tasks and actions, create a secondary market (e.g., through electronic auctions to sell the collateral), or manage the entire dispute resolution, including the enforcement process from the identification of the asset or the collateral to the remedies. On the other hand, DLT-based systems offered, in conjunction with smart contracts, the possibility to enforce on certain assets, ensuring immutability, traceability, and effectiveness of enforcement measures, including provisional and protective ones, on digital assets or tokens representing physical assets. Relevant legal issues in this context were, among others, how to reconcile the essentially contract-based infrastructure of commercial platforms and DTL with an appropriate supervision or control, and the identification of appropriate connecting factors to determine the applicable legislation and/or regulation. The second layer concerned “automation” of enforcement proceedings. In this respect, out of the many legal issues deriving from “full automation” of the enforcement process, the Reporter highlighted the concern about the “opacity” of decisions, and the question of the need, and the extent, of judicial supervision. She also queried whether the instrument should include recommendations on how to design the algorithms governing the automated decisional process. Finally, she flagged the possibility of designing “dynamic processes”, best exemplified by the digital tracing of assets in the context of secured transactions or registrations through systems that are automatically updated. The third layer covered the emergence of new assets, with particular regard to digital assets. The question here was whether adaptations to existing enforcement proceedings were necessary when dealing with these new types of assets. The final layer dealt with of technology as a tool to enable or re-enforce traditional remedies, which posed the questions of the categorisation of such remedies and the limits of self-help enforcement measures enhanced by technology.

50. *The Chair* opened the floor for discussion. Two experts queried whether a taxonomy based on the functions of enforcement may not be clearer and more useful for the project. It was suggested to focus on functional equivalents more than on different architectures, which did not necessarily lead to different problems. The Reporter noted that different architectures (e.g., centralised or decentralised platforms) would play a role particularly from a regulatory point of view. In this respect, one expert noted that the project should take into account the shift of enforcement functions from the State to private actors through the use of technology and help legislators deal with these rapid changes.

51. On the question related to the structure of the future instrument, while it was recognised that any decision would be premature at this stage, experts seemed to prefer an integrated approach, noting that technology would play a role throughout the instrument. Other experts however suggested that technology applied to enforcement raised different issues, and while some of them could easily be incorporated in the general best practices, a separate treatment could be necessary, also for the sake of clarity, for others. A few participants in the discussion suggested that it would be important to consider the relationship with the general principles (e.g., transparency) and the compatibility with constitutional values, as discussed on the first day. Experts also commented on the question of whether the instrument should provide definitions of the different mechanisms of application of technology to enforcement. The advice was not to insert a list of definitions in the document itself, since definitions would be difficult to draft and agree upon, and the instrument should be as technology neutral as possible. However, it would be important to have a list of

definitions or descriptions for the internal discussion of the Working Group, to all be on the same page.

52. A group of questions addressed the scope, extent, and challenges of automated enforcement mechanisms. One expert warned that automation should be distinguished from A.I. and did not necessarily imply recourse to artificial intelligence (e.g., smart contracts). Another expert asked whether there were concrete examples of decisions affecting enforcement that would be conducted through automation in the context of a post-adjudication procedure. The Reporter mentioned the decisions attributing a certain value to an asset for liquidation but noted that automation could take place at any stage and level of the procedure. She recognised, however, the difficulty of applying general principles such as “reasonableness” without human intervention, since automation worked well when based on specific and pre-determined criteria. She also noted that automated systems generally posed issues of transparency, vulnerability, and access to justice (non-discrimination) that had to be taken into account. One challenge was how to ensure appropriate monitoring of the proceedings, raising different opinions on how challenging such monitoring would be. One expert posited that these cases were commonplace in her jurisdiction and did not raise specific challenges, provided that judges had the correct analytical framework and access to expert evidence. An observer noted that the level of automation of the proceedings differed widely among jurisdictions, and that monitoring was generally easier in those where the case management of enforcement fell on the executive branch of government. As to the question posed by the Reporter on the appropriateness of developing best practices for the design of the algorithms at the basis of automated procedures, one expert expressed a negative view, since the Working Group should not substitute itself to the experts in technology writing the algorithms; the guidelines developed by such experts may however be useful for the Working Group.

53. In relation to existing projects dealing with enforcement and technology, one observer listed a number of ongoing initiatives that would be relevant for the Working Group, including the Council of Europe CyberJustice project focusing on court case managing system, online resolution and e-enforcement, due in spring 2021; two projects conducted by the ELI on blockchains and smart contracts, and on access to digital assets; and the planned UIHJ global code on the use of technology in enforcement, which would be discussed at the next UIHJ Congress in 2021. He also referred to the reports of the EU, particularly concerning financial services and data. Another observer mentioned the UNIDROIT-UNCITRAL joint project on a taxonomy on AI and digital assets, and the need to ensure full coordination with the UNIDROIT project on Digital Assets and Private Law was also recalled.

54. In summing up the debate, *the Chair* noted that the discussion had mostly been conducted at an abstract level, and that it might be helpful to have more concrete examples on how technology is put to use. *The Deputy Secretary-General*, building upon a point raised during the discussion, underlined that this document was meant to accompany the Working Group in its deliberations, showing where technology impacted on enforcement and providing concrete examples of how it had already been implemented. She referred to Item 8 on the agenda for more information on the work planned by UNIDROIT with the support of other organisations (in particular the EBRD) to identify knowledgeable experts who might contribute such knowledge.

Item 4. (continued) Consideration of matters identified in the Issues Paper (Study LXXVIB – W.G.1 – Doc. 2)

55. *The Chair* invited the Working Group to conclude the second day of the session by briefly reverting to Doc. 2, starting with Section G on the inclusion of the enforcement of provisional and protective measures in the project, a suggestion that had gained unanimous support during the consultation period. *The Deputy Secretary-General* recalled that the topic of provisional and protective measures had already been addressed in the ELI-UNIDROIT Rules, which could provide a useful basis for a taxonomy and for uniform terminology, though they did not treat enforcement issues in any detail. She also referred to existing international instruments dealing with secured

transactions, particularly the Cape Town Convention and its Protocols, which contained a specialised regime on advance relief pending final determination of a dispute. She finally referred to the two questions prepared by the Secretariat: the first one asked for confirmation that enforcement of provisional and protective measures should be included as a priority issue; the second one queried whether enforcement of such measures raised special issues. A third additional question would be whether this matter should be placed in a separate part of the final instrument.

56. All experts agreed that enforcement of provisional and protective measures should be included in the scope of the project. As regards their place in the structure of the future instrument, an expert suggested a mixed approach, since some procedures and remedies for the enforcement of post-adjudicated claims would also apply to provisional and protective measures, while other substantive issues would need to be addressed separately. Other experts confirmed that there would be issues specific to provisional and protective measures that placed emphasis on the custody of the assets and the reversibility of the remedies. One expert queried whether provisional measures could be enforced outside of a court procedure. The examples of a suspension of a user account as a self-help measure, as well as specific remedies in the context of the Cape Town Convention were mentioned as a reply. Another expert asked whether it would be necessary to refer to the different types and content of the provisional measures, and whether, to this end, a reference to the ELI-UNIDROIT Model European Rules would be inappropriate in the context of a global instrument. It was however noted that this situation would arise in all instances where the project relied on substantive law, either national or international, or on the laws applicable to the proceedings to determine the creditor's right to enforcement. The project should start with the assumption that a certain type of provisional measure had been granted, and look at how to properly enforce that measure. The ELI-UNIDROIT Model Rules would be one example of existing soft law developed at international level that could offer a suitable taxonomy and/or terminology.

57. *The Chair* adjourned the session to the next day.

58. In resuming the session, *the Chair* opened the floor to discuss Section H of Doc 2, on the coverage of additional factors influencing enforcement procedures. She noted that some of the issues treated under this heading had been at least indirectly addressed in previous days. *The Deputy Secretary-General* introduced the topic, referring to the two questions posed at the end of the section, namely whether the Working Group confirmed the outcome of the consultations that these elements should be considered within the scope of the instrument and at least the most specific ones be embodied in a best practice; and whether experts could provide examples of additional national mechanisms that would directly impact on the effectiveness of enforcement.

59. One observer listed a number of issues, such as: the existence of "soft" enforcement methods like post-judicial mediation, or mediation after obtaining an enforceable title; the role played by debtor registries, or attachment registries, which were organised differently depending on the legal system (e.g. whether they allowed public or restricted access); the importance of ensuring effective information on the potential outcome of an enforcement procedure, to avoid unnecessary expenses. The introduction of a pre-enforcement phase to gather information and identify any assets was mentioned as a possible way of achieving this objective. This point was highlighted by other experts in the more general context of the mechanisms to collect sufficient information before initiating enforcement proceedings. Another possible way of avoiding unnecessary expenses that was mentioned was to introduce an efficient mechanism for the termination of an enforcement under certain circumstances (e.g. lack of assets). Finally, experts remarked on the importance of providing effective notification procedures, which would benefit from the use of technology.

60. Several experts agreed that the project should address the topic of the cost of enforcement. *The Secretary-General* took up this point and emphasised that one of the aims of the project was to reduce the cost of enforcement, which depended on a series of factors including the recovery rate and the length of the proceedings. One observer remarked that the representatives of her

organisation involved in the project had done a lot of work on these issues as justice reform experts in several countries.

61. A few experts reverted to the dividing line between incentivising performance, and providing a tool to facilitate enforcement or at least to incentivise compliance to a judgment, noting that the additional elements mentioned in this section could fulfil the one or the other aim. The difficulty of drawing the line with clarity was reaffirmed, especially when technology was at play. In this context, one expert expressed the concern that dealing with all these topics would enlarge the scope of the project to debt recovery, while it should focus on enforcement. *The Chair* concluded that these issues of scope were inevitable and would be addressed when the work was more advanced, but that the discussion had been very helpful for the Secretariat and for the development of the project.

62. *The Chair* invited the Working Group to revert to Part I of Doc. 2 on Preliminary matters. She focused on Section B, on the target audience, according to which the primary addressees would be national legislators, whereas the instrument should also be useful for international organisations assisting in law reforms. She referred to the question under Section B, asking whether there would be other potential addressees. The outcome of the discussion, as summarised by *the Chair*, was that the instrument would be addressed to policy makers in general, including also entities and organisations with the authority to develop secondary legislation or regulations, or other stakeholders that may be influential in the development of law reform. Widening the spectrum of potential direct addressees would otherwise make it more difficult to strike the right balance in the terminology and the structure of the instrument.

63. One observer raised the issue of combating corruption in enforcement proceedings, emphasising the need to minimise such a risk in the design of the instrument. Another observer noted that strengthening the monitoring and control on enforcement agents may indirectly work against corruption. *The Secretary-General* underlined the importance, but also the political sensitivity, of the topic. Recognising that anti-corruption mechanisms may lead to additional inefficiencies, he invited the Working Group to devise innovative ways of reducing the risk of specific procedures or mechanisms being manipulated. *The Chair* expressed some concern in addressing this issue directly in the best practices. *The Deputy Secretary-General* suggested, as a possible option for the Working Group, that this issue be flagged in the introduction, without directly mentioning specific country examples, and be taken into account in the development of the best practices, while a list of more specific studies or reports produced by other organisations could be included among additional informational sources.

64. *The Chair* moved to Section C on the format of the future instrument. *The Deputy Secretary-General* noted that, while any decision on the format of the envisaged instrument would be premature, a discussion on this matter would be welcome. She referred to the possible options for the final structure mentioned in para. 13, mentioning in particular the two different examples of a discursive text accompanied by final recommendations (more akin to the style of the UNCITRAL legislative guides), and of specific best practices preceded by an introduction and accompanied by comments (similar to the structure of the ELI-UNIDROIT Rules). She finally invited the Working Group to express its preliminary views on the two models, or to suggest yet an alternative format.

65. The majority of the experts were inclined to favour the second type of format, i.e. best practices followed by comments explaining and justifying them, while according to one expert the choice may depend on how clear and self-explanatory the best practices would be. The Working Group further discussed the possible content of the comments, mentioning that they may explain the background and provide the reasons why one particular best practice was followed. In this regard, one observer queried whether the comments should also explain how to implement the best practices and what the pitfalls and potential problems in their application might be, and whether they should further contain specific references to national laws. In relation to this point, *the Secretary-General* noted that giving advice on the practical implementation of the instrument would be more appropriate in an instrument such as a Guide to Enactment (used by UNCITRAL), something useful that could be

developed after the conclusion of this project with an additional mandate from the Governing Council. Another issue that was raised concerned the level of detail of the best practices, considering that they were intended to be used by legislators. It was noted that producing actual language that could be directly used by a legislator would be challenging. Instead, the instrument should aim at describing the best practices as clearly as possible. In this regard, it was recalled that during the consultations, experts had suggested that the best practices be drafted with more or less detail, depending on the topic and on the possibility of reaching a wide consensus. On the other hand, the best practices should generally be more detailed than general principles, such as the ALI-UNIDROIT Principles, otherwise they would not fulfil the purpose of providing a more practical guidance for legislators.

66. *The Chair* reverted to Sections D and E of Part I. In relation to the title of the project, one expert queried whether the term “effective” should be substituted with “efficient”. *The Chair* noted that this was a working title that could be revisited at a later stage. In respect to terminology, *the Chair* referred to the discussion during the first day of the session and suggested, for the sake of expediency, that the Working Group move on to the consideration of the organisation of future work.

Item 7. Organisation of future work

67. In order to facilitate the organisation of the work, *the Chair* suggested setting up informal sub-groups that would be active during the intersessional period. They would be structured as open-ended, and both experts and observers would be invited by the Secretariat to signal their interest in participating in one or more of them. The subgroups, which would be supported by the Secretariat as necessary, should identify problems in existing procedures and start looking at possible solutions. The creation of three groups was proposed, with the following provisional titles: 1. Execution following an adjudicated claim (or post-adjudication); 2. Execution of secured claims; 3. Impact of technology on enforcement. *The Deputy Secretary-General* added that the subgroup topics were not meant to be exhaustive, nor to reflect the final structure of the instrument, but they represented a starting point for the work. While it would be difficult to come up with a complete outline of the topics to be addressed at this early stage of the work, the Secretariat would provide a list of topics that would fall within each of the subgroup’s scope. In response to a question posed by one observer on the need to focus on the organisational part of enforcement proceedings, *the Chair* noted that this important topic should be addressed, and would be allocated to one of the proposed subgroups.

68. *The Deputy Secretary-General* then informed the Working Group on the consultations that the Secretariat had been conducting to gather relevant information from practitioners and experts active in various jurisdictions. The first round of consultations had been organised with the kind and very effective support of the EBRD; the Secretariat would be keen on continuing this work involving the World Bank Group and possibly other organisations. The Secretariat would also provide an initial list of background literature and materials, which could be integrated with the help of Working Group participants. One observer suggested the use of a drop-box accessible to all Working Group participants. *The Chair* invited the Working Group to provide suggestions for possible experts from the Asian or the African region. She finally recalled that the Secretariat had suggested two alternative sets of dates for the next Working Group session in spring 2021.

Items 8 and 9. Any other business. Closing of the session.

69. In the absence of any other business, *the Chair* thanked the Working Group and the UNIDROIT Secretariat for a most fruitful and interesting three-day discussion, and declared the session closed.

ANNEX 1**First Meeting of the UNIDROIT Working Group
on Best Practices for Effective Enforcement
Rome, 30 November – 2 December 2020****AGENDA**

1. Opening of the session and welcome by the Secretary-General
2. Formal appointment of the Chair of the Working Group
3. Adoption of the agenda and organisation of the session
4. Consideration of matters identified in the Issues Paper (Study LXXVIB – W.G.1 – Doc. 2):
 - (a) Preliminary issues
 - (b) Scope of the future instrument and issues to be covered
 - (c) Relationship with the work of other organisations
5. Consideration of work in progress on support documents:
 - (a) Preliminary Report on the impact of technology on enforcement (Study LXXVIB – WG 1 – Doc 3)
6. Presentation and discussion of the European Banking Authority's Report on the benchmarking of national loan enforcement frameworks ([EBA/Rep/2020/29](#))
7. Organisation of future work
 - (a) Working Group
 - (b) Consultation procedure with additional experts
8. Any other business
9. Closing of the session

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