INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

EN

Best Practices for Effective Enforcement
Working Group

Second session (remote)
Rome, 20-22 April 2021

UNIDROIT 2021
Study LXXVIB – W.G.2 – Doc. 2
English only
March 2021

SECRETARIAT'S REPORT ON THE BACKGROUND, STATUS OF THE PROJECT AND INTERSESSIONAL DEVELOPMENTS

1. This report provides an update of Doc LXXVIB – W.G. 1 – Doc. 1 (Issues Paper) in respect to Preliminary Matters (Part I) and Scope of the Project (Part II).

2. The update is based on the outcome of the First Session of the Working Group which was held on 30 Nov-2 Dec 2020, and which discussed, for the most part, issues of scope and structure, as well as the organisation of the way forward. It also refers to the developments deriving from the intersessional work of the Working Group and the Secretariat.

3. This report is accompanied by three additional documents, that represent the outcome of the intersessional work of Working Group participants and that will be the main object of the deliberations of the second session:

- Report of Subgroup 1 "post-adjudication" enforcement (Study LXXVIB – W.G. 2 – Doc. 3)
- Report of Subgroup 2 on enforcement of secured claims (collateral) (Study LXXVIB – W.G. 2 – Doc. 4)
- Report of Subgroup 3 on the impact of technology on enforcement (Study LXXVIB – W.G. 2 – Doc. 5)

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I. PRELIMINARY MATTERS

A. Background

Preparatory Work

4. 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.

5. 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 of, 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.

6. 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).

7. 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.

8. 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.

First Working Group session (Nov-Dec 2020)

9. The first meeting of the Working Group was held in Rome and on Zoom on 30 November – 2 December 2020. Ms Kathryn Sabo, Deputy Director General & General Counsel, Constitutional, Administrative and International Law Section, Department of Justice (Canada), and member of the UNIDROIT Governing Council, was appointed as the Chair. The Working Group discussed a document prepared by the Secretariat (LXXVIB – W.G. 1 – Doc. 2 (Issues Paper)), which focused, for the most part, on the scope of the project, as well as methodology and organisation of the work. The Working Group further discussed a document on the impact of technology in enforcement (LXXVIB – W.G. 1 – Doc. 3). The Report of the first Working Group session is available on the UNIDROIT website and was circulated for ease of reference with the documents for the present session.

Intersessional work: informal subgroups

10. At the first Working Group session, in order to facilitate the organisation of the work, the Chair suggested setting up informal subgroups that would be active during the intersessional period. They would be structured as open-ended, and both experts and observers were to be invited by the Secretariat to express their interest in participating in one or more of them. The subgroups, supported by the Secretariat as necessary, would nominate one or more focal points for organisational purposes, identify problems in existing procedures, and start looking at possible solutions.

Three subgroups were set up accordingly, with the following provisional titles:

1. Enforcement of adjudicated claims;

2. Enforcement of secured claims;

3. Impact of technology on enforcement.

Subgroup topics were not meant to be exhaustive, nor to reflect the final structure of the instrument, but to represent a starting point for the deliberations of the Group.

11. During the intersessional period, the three subgroups set up an intense working schedule through email exchanges and remote meetings to discuss drafts. Documents 3, 4 and 5, respectively, represent the outcome of the intersessional progress of the work by subgroup members.

B. Target audience

12. 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. The Working Group agreed that the primary addressees would be legislators seeking to reform, or refine, their enforcement laws. The instrument would also be, however, addressed to policy makers in general, including entities and organisations with the authority to develop secondary legislation or regulations, other organisations actively supporting legal reform in specific regions of the world, and stakeholders that may be influential in the development of law reform. It was noted that the spectrum of potential direct addressees should not be widened further, otherwise it would be more difficult to strike the right balance in the terminology and the structure of the instrument.

C. Format of the instrument

13. 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.

14. Participants in the consultations noted that there should be a sufficient level of detail in suggesting potential regulations to national legislators (e.g., potential model rules or sufficiently detailed best practices 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.

65. While any decision on the format of the final instrument was considered to be premature, the majority of the experts at the first Working Group session favoured the development of best practices followed by comments explaining and justifying them. The comments would explain the background and provide the reasons why one particular best practice was followed. Whether 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, was debated. In relation to this point, it was noted that giving advice on the practical implementation of the instrument would be more appropriate in an instrument such as a Guide to Enactment, that could be developed after the conclusion of this project with an additional mandate from the Governing Council.

Question for the Working Group:

- *The Working Group is invited to reflect on the need to provide more specific indications on the format and particularly the content of the comments that will accompany the Best Practices, in order to harmonise the work of the different subgroups going forward.*

D. Title of the instrument

15. As mentioned above, the Working Group confirmed that the instrument should be in the form of a soft best practice guide. The Working Group accepted the suggested provisional title of the instrument, i.e., "Best Practices for Effective Enforcement". Once the project has made sufficient progress, the Governing Council's endorsement may be sought, if necessary, for any revisions of the title.

E. Terminology and translations

16. 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.

17. More specifically, while the Group's only working language is English, consistent with UNIDROIT's practice, the final instrument will be approved in two language versions: English and French. Bearing this in mind, thought should be given to the best way to ensure that a consistent text of the Best Practices is developed in both languages by the time of final approval of the instrument.

18. Moreover, there should be consistency with the terminology used in other UNIDROIT instruments (in particular, the ELI-UNIDROIT Model Rules) and current projects (for example, the project on Private Law and Digital Assets).

Questions for the Working Group:

- *The Working Group is invited to reflect on the best way to ensure consistency in terminology, particularly with current projects such as the Digital Assets project.*
- *The Working Group is invited to consider the extent to which terminology should be aligned to the one used in existing global instruments developed by sister organisations (in particular UNCITRAL's instruments on secured transactions).*
- *The Working Group is invited to consider how best to ensure that a French text of the Best Practices (black letter rules) is agreed upon within the Working Group and is produced by the time the instrument will be finalised and subject to approval.*

F. Organisation of the work

Working Group

19. Consistent with UNIDROIT's established working methods, a Working Group has been 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. The members were also selected based on representation of different systems and geographic regions of the world. As consistent with UNIDROIT practice, the Working Group did not adopt any formal rules of procedure, and will seek to make decisions through consensus under the Chair's guidance.

20. UNIDROIT has invited several global and regional organisations with expertise in this and related fields to participate as observers in the Working Group. While observers do not have voting rights, they are entitled to full participation in the Working Group's discussions and are considered an integral part of the working team. 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, also allowing 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.

21. The Working Group is currently composed of the following members: Kathryn SABO (Chair) - Deputy Director General & General Counsel, Constitutional, Administrative and International Law Section, Department of Justice (Canada); Jason Grant ALLEN, Senior Research Fellow, Humboldt-Universität zu Berlin Centre for British Studies, Berlin (Australian National); Neil COHEN - Jeffrey D. Forchelli Professor of Law, Brooklyn Law School (US); Fernando GASCÓN INCHAUSTI - Professor Procedural and Criminal Law Department, Faculty of Law Universidad Complutense de Madrid (Spain); Carla L. REYES - Assistant Professor of Law, SMU Dedman School of Law, Dallas (US); Fábio ROCHA PINTO E SILVA Pinheiro Neto Advogados, São Paulo (Brazil); Teresa RODRIGUEZ DE LAS HERAS BALLELL Associate Professor of Commercial Law, Universidad Carlos III Madrid (Spain); Geneviève SAUMIER - Peter M. Laing Q.C. Professor of Law, Faculty of Law, McGill University (Canada); Felix STEFFEK - University Senior Lecturer, Faculty of Law, University of Cambridge, Co-Director of the Centre for Corporate and Commercial Law, Senior Member & Director of Studies, Newnham College (German National); Rolf STÜRNER - Emeritus Professor of Law, Albert-Ludwigs-Universität Freiburg (Germany).

22. The following organisations are also part of the Working Group as observers: European Bank for Reconstruction and Development (EBRD) - Catherine BRIDGE ZOLLER, Senior Counsel, and Veronica BRADAUTANU, Principal Counsel - Corporate Governance); European Commission (DG JUST); European Law Institute (ELI) - Xandra KRAMER, University of Rotterdam, and Paul OBERHAMMER, University of Vienna; Hague Conference on Private International Law (HCCH) - Ning ZHAO, Senior Legal Officer; International Association of Legal Science (IALS) - J.H.M. (Sjef) van Erp, emeritus Professor of Civil Law and European private law, Maastricht University (Netherlands), Visiting professor, Trento University (Italy) and Secretary-General IALS; Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law - Burkard HESS, Founding and Executive Director, Professor of Civil Law, Civil Procedure, Private International Law, and Wiebke VOSS, Senior Research Fellow); Organization of American States (OAS) – Jeannette TRAMHEL, Senior Legal Officer, Department of International Law, Secretariat for Legal Affairs; Secured Finance Network - Richard KOHN, Goldberg Kohn Ltd.; Union Internationale Huissiers de Justice (UIHJ) - Jos UITDEHAAG, Secretary; United Nations Commission on International Trade Law (UNCITRAL) - Jose Angelo ESTRELLA-FARIA, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, and Alexander KUNZELMANN, Legal Officer); World Bank Group (WBG) - Nina PAVLOVA MOCHEVA, Senior Financial Sector Specialist, Finance, Competitiveness & Innovation Global Practice, and Klaus DECKER, Senior Public Sector Specialist); Zemgale Regional Court (Līna LONTONE, Latvia).

Consultation procedure with additional experts

23. Thus far, the individual experts involved well represent both common law and civil law jurisdictions and possess ample knowledge of comparative law. As mentioned, however, 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. Besides providing valuable information, such consultations may 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.

24. The Secretariat, following up on the mandate received from the Working Group, and in cooperation with the European Bank for Reconstruction and Development (EBRD), has conducted 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 (among others, Egypt, Greece, Kazakhstan, Latvia, Mongolia, Ukraine)

25. The Secretariat is open to broaden this exercise in cooperation with other interested organisations.

Research conducted by the Secretariat in the intersessional period

26. The Secretariat has conducted background research in relation to additional specific legal systems (among others Brazil, Finland, France, Portugal, Singapore), and produced informational documents that were shared with subgroup members.

Provisional timetable

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

28. The Secretariat has envisaged that the preparation of a first draft of the proposed instrument be conducted over four sessions of the Working Group (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, the first two sessions have been conducted remotely, and one or more of the planned meetings may be replaced by remote webinars or conducted as hybrid meetings. Intersessional work was suggested

as a good way to move the project forward, through remote meetings/consultations when useful. 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 third meeting of the Working Group

29. The Secretariat has suggested a set of dates for the third meeting of the Working Group: **29 Nov – 1 Dec 2021.** An early decision on the date is strongly encouraged, though adjustments of the overall length of the session as well as its timetable may be necessary. The next meeting of the Working Group will be, by preference, held in person, in Rome, at the seat of UNIDROIT. In consideration of the uncertainties on the possibility or advisability to travel in autumn 2021, however, other formats may be appropriate. The Secretariat will inform participants in advance of any developments in this regard.

II. ISSUES RELATED TO THE SCOPE OF THE INSTRUMENT

A. General mandate received

30. 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 was 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.

31. The background of the project lies in the recognition of the need to ensure a timely, predictable and affordable enforcement, particularly 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 has thus been 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 draft best practices designed 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. 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.

32. The importance of drafting an introduction to the best practices was acknowledged at the first Working Group session. 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.

33. The Working Group held a preliminary discussion on the role to be played by general principles and by constitutional principles in the development of the best practices. For a summary of the discussion see UNIDROIT 2020 – LXXVIB – W.G.1 – Doc. 4 (Report of the first session), paras 10 and 11.

B. Definition of the meaning of "enforcement" in relation to the project

34. One of the issues discussed during the consultation procedure regarded the meaning of the term "enforcement". 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

35. At the first Working Group session, experts expressed different opinions on how to classify enforcement proceedings for the purpose of defining the scope of the project, and some concerns on the exact definition of the contours of the project as well as on the terminology used in the Issues Paper (for a summary of the discussion see the Report of the first session, LXXVIB – W.G.1 – Doc. 4, paras 12-22). There was, however, substantial consensus on the fact that the three basic scenarios described in para 25 of LXXVIB – W.G.1 – Doc. 2 (Issues paper), were examples of situations that would be included in the scope of the project. These scenarios were to be used as a practical starting point for the Group's deliberations, irrespective of what the final structure of the instrument would be. It was also agreed that the use of emerging technologies in enforcement proceedings should be an integral part of the project.

36. In relation to enforcement following an adjudication, it was clarified that the project would have to address a vast array of questions both connected with the concrete mechanisms of the enforcement, as well as with its governance and organisation. A non-exhaustive list of potential issues was discussed by the Working Group (see Report, paras 18-19 and 23-24), and considered as a starting point in developing the report of subgroup 1 (see Doc. 3).

37. There was unanimous support for the idea of covering both judicial and extra-judicial enforcement. In this regard, it was noted that many jurisdictions have introduced hybrid proceedings with participation of private actors, or public/private actors, or with enhanced party autonomy. It was also noted that there are significant interconnections between judicial and extrajudicial enforcement, and that the drafters of the instrument may wish to consider alternative ways to balance the competing interests in the latter, e.g., by promoting the use of specific fast-track procedures to deal with oppositions.

38. Finally, there was unanimous support for the idea to cover both enforcement of secured claims 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. Because of its importance, enforcement of secured claims was identified as the subject matter of subgroup 2 (see Doc. 4).

Exclusion of recognition and enforcement of foreign decisions

39. It was 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, do not regulate 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.

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

40. 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 lawsuit 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, with some prudence, the extent to which best practices on the interconnections of these different phases can be developed (see Report, para. 30).

Relationship with contractual remedies

41. At the first Working Group session, 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 were highlighted. This was considered to be 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. It was noted that a clear-cut distinction may not always be possible, and that these issues would have to be concretely and carefully addressed when dealing with each situation.

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

42. The scope of the project was discussed also in relation to the types of claims that would be covered.

43. The Working Group agreed not to limit a priori the types of claim to be enforced. There was a common understanding, however, that the logical place to start working would be to focus on contractual B2B claims, with the caveat that especially for enforcement of adjudicated claims distinguishing between types of claims would not appear to be wholly justified. The opportunity to develop special best practices for family or succession matters could be addressed at a later stage of the project (for the inclusion of B2C, C2B or P2P claims see below, para. D).

44. The Working Group agreed to include non-monetary claims from the scope of the project but highlighted the need to proceed with caution when dealing with them. It was 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.

D. Consumer transactions

45. At its first session, the Working Group agreed not to exclude consumer debtors or creditors from the scope of the project. However, in line with the mandate received by the Governing Council to proceed with caution in this matter, it agreed to consider at a later stage of the project 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 (for more details on the debate see Report, para. 42). 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 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.

E. Insolvency related enforcement

46. 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 Group Principles for Effective Insolvency and Creditor/Debtor Regimes.

47. The Working Group agreed on the suggestion to focus on enforcement in general, and to revert to insolvency-related enforcement at a later stage, and with some caution. Emphasis should be placed on those issues which are common to general enforcement and enforcement in insolvency, and on mechanisms more than conditions. 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. It was confirmed that the project should avoid issues of material insolvency law, while bearing in mind that the distinction between substantive law and procedural mechanisms may not always be clear, and any future work in this area should proceed with caution. Finally, 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.

G. Enforcement of provisional and protective measures

48. 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.

49. 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. 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. In relation to this coordination, experts noted that 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, but that 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. For more details on the debate see the Report, paras 55-56.

H. Additional factors influencing enforcement procedures

50. 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. 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.

51. The Working Group agreed that additional factors and mechanisms should be considered. A list of potential issues was provided, including 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; the importance of ensuring effective information on the potential outcome of an enforcement procedure; the topic of the costs of enforcement. For more details see Report, paras 58-61.

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;

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

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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.