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Item No. 2 on the agenda: Matters concerning the 2020 – 2022 Work Programme

(b) i. Best Practices for Effective Enforcement

(prepared by the Secretariat)

<i>Summary</i>	<i>Refining the project scope</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to approve the proposed scope of the project and to reassess upwards the priority status given to the project, allowing the Secretariat to establish a working group</i>
<i>Mandate</i>	<i>Implementation of the decision of the General Assembly in relation to the Work Programme 2020-2022</i>
<i>Priority</i>	<i>Original priority – medium – to be reassessed and high priority given</i>
<i>Related documents</i>	<i>Work Programme for the 2017-2019 triennium (UNIDROIT 2016 – C.D. (95) 13 rev., paras 74-79, and UNIDROIT 2016 – C.D. (95) 13 Add. 2); Report of C.D. 98th session (UNIDROIT 2019 – C.G. (98) 17; C.D. (98) 6(b); C.D. (98) 14); Work Programme for the 2020-2022 triennium (UNIDROIT 2019 – A.G. (78) 12, paras 41 and 51, and UNIDROIT 2019 – A.G. (78) 3)</i>

I. BACKGROUND AND HISTORY OF THE PROJECT

1. At the 95th Session of the Governing Council (18-20 May 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.

2. The proposal 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 Study provided an overview of some of the obstacles created by the lack of general principles on enforcement mechanisms in transnational civil procedure and highlighted the insufficiency of existing national and international legal frameworks. It underlined that the right to effective enforcement represents an integral part of a fair and effective procedure. Moreover, it pointed to the economic

significance of effective enforcement mechanisms, both in decision-making and in contractual execution. International financial institutions as well as national governments increasingly considered them as a fundamental criterion for the assessment and evaluation of national economies and for credit rating purposes. A general guidance document at the international level would address the most relevant issues and provide a detailed set of principles embodying best practices. It could provide helpful guidance for legislators wishing to improve their domestic law, while at the same time contributing to the emergence of common minimum standards for domestic procedures as a necessary basis for improvement of international cooperation in this area.

3. The Governing Council decided to recommend this topic for inclusion in the UNIDROIT Work Programme for the triennium 2017-2019 by the General Assembly, proposing to assign it 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. The General Assembly endorsed this recommendation at its 75th session, on 1 December 2016.

4. During the triennium 2017-2019 the Secretariat undertook limited research work on this topic, in line with its low priority status. In particular, it produced basic internal documents focusing on existing international instruments addressing, one way or the other, issues of enforcement.

5. In December 2018, the Secretariat received a proposal for the 2020-2022 Work Programme by the World Bank regarding a joint project on the "Development of a Working Paper to Outline Best Practices on Debt Enforcement". The Secretariat presented it in the context of the discussion of the 2020-2022 Work Programme at the 98th Session of the Governing Council, as a continuation, and at the same time a refinement of the scope, of the "Principles on Effective Enforcement" project.

6. The Governing Council, at its 98th session, agreed to recommend to the General Assembly to assign medium priority to this proposal (C.G. (98) 17, para. 245). The assigned level of priority was merely formal. The Council asked the Secretariat to conduct further research and provide a more defined scope for the project, as well as an enhanced feasibility analysis. There was substantial agreement on the importance of the topic and on the impact of the work to be conducted. Subject to agreement with the Secretariat's enhanced note to be presented at the 99th session, the Governing Council would consider giving the project a high priority status.

7. The General Assembly, at its 78th session, approved the inclusion of the project in the Work Programme of the Organisation for the 2020-2022 triennium as recommended by the Governing Council (A.G. (78) 12, paras. 41 and 51, and A.G. (78) 3). The General Assembly asked the Secretariat to more precisely determine the scope of the project. The present paper was developed to comply with the mandate received from the General Assembly.

II. CURRENT CHALLENGES FOR ENFORCEMENT

8. Effective enforcement of commercial claims is of high economic importance for any State. It is recognised as vital for a developed credit market and improved access to credit, for an increase in trade and investment and for overall economic development and sustained growth.¹ Firms and other market participants are more willing to invest where they are confident that, if their debtors fail to perform, there will be reliable mechanisms to obtain satisfaction of their claims with predictable outcomes. A significant step towards achieving this goal is represented by an improvement of the efficiency of judicial systems in solving a commercial dispute. For example, studies show that in countries with efficient court systems, firms are larger and more competitive, have greater access to

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

credit, and feel more secure in investing.² On the other hand, particularly with regard to credit markets, the introduction of a modern legal framework for secured transactions, especially if well-coordinated with insolvency legislation, is also viewed as fundamental to increase credit availability and investment.³ While reforms in these areas of the law are certainly needed, they have to be accompanied by a timely, predictable and affordable enforcement phase which concretely ensures unsecured and secured creditors' satisfaction. It is in relation to this phase, however, that many jurisdictions in the world face a number of challenges that the envisaged project seeks to overcome.

9. A traditional challenge at the national level is that several legal systems rely, as a rule, on judicial enforcement proceedings. The formalities characterising such proceedings are conceived as safeguards for debtors and third parties, but most often result in insurmountable obstacles to effective enforcement. In many instances, creditors must obtain a court decision before commencing the enforcement phase, which means that two procedural phases are needed. But even where legal systems allow for certain deeds to be enforceable *per se*, the proceedings triggered by the deed may still be excessively formalised and time-consuming. For example, recourse to public auctions for the realisation of the value of all or some types of assets, as well as stringent requirements for, or unavailability of, alternative means to realise such value, not only lead to delays in creditor's satisfaction, but often result in depreciation and a loss of the value that could be obtained. While this may be, at least in part, connected to other factors, e.g. the lack of reliable secondary markets for certain assets, procedural strictures do play a determinant role. Another problem connected with judicial enforcement proceedings is their cost, which is amplified in systems where a plethora of different actors is involved (courts, notaries, expert valuers, enforcement agents...). Depending on the value in dispute, such costs and delays may even act as a deterrent for creditors to embark in a procedure to obtain satisfaction.

10. Further obstacles at more general level are posed by weak infrastructures and lack of commercial specialisation, which in turn impacts on the efficiency of proceedings, including those for the valuation of debtor's assets. In some legal systems, lengthy proceedings with participation of a plurality of actors may be also engender limited transparency and accountability.

11. In order to avoid lengthy and costly judicial procedures and rely on the commercial expertise of the parties themselves to maximise realisation value, some legal systems already provide varying degrees of extrajudicial enforcement, particularly for monetary claims secured by collateral. Such mechanisms are considered an integral part of any modern secured transaction regime and are especially important for countries with less efficient judicial enforcement procedures to attract investment. They are also, however, not always effective. This is particularly the case where, in an effort to balance the interests of all parties involved, the normative framework allows debtors to raise objections or to appeal orders or decisions at any stage of the proceedings and without meaningful control or sanctions for abusive behaviour, thereby forcing creditors to follow the ordinary judicial route. Moreover, commencement of insolvency proceedings may, depending on the applicable legal regime, severely limit or impede the exercise of out-of-court enforcement by secured creditors.

12. More recently, new challenges to effective enforcement of commercial claims derive from the changed asset structure of firms and companies. The legal framework for civil enforcement in numerous countries still mirrors an economic and social reality where most debtor's assets consisted in tangible property. Today, however, other assets often represent the most substantial value on which a creditor can rely. While many States have enacted special provisions to facilitate enforcement on specific assets (e.g. legislation on collateral arrangements in financial markets), there are still obstacles and uncertainties in relation to other values (such as for example receivables).

13. Finally, the rapid spread of digitalisation and the use of technological innovations have introduced new scenarios. Most notably, legislators are faced with the question of how to conduct

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

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

enforcement procedures on new types of assets (e.g. digital assets). Another challenge is represented by the growing practice of mechanisms which allow agreements to be performed, wholly or in part, automatically, including enforcement of obligations, such as for example payment obligations (so called “smart contracts”). Thus, technology poses additional issues that national legislators are asked to consider and that, in view of the global reach of commercial transactions in this field, may benefit from the development of international best practices. On the other hand, as will be seen below, technology would appear to be a promising tool to tackle traditional challenges to effective enforcement, in particular those linked to excessive delays and costs as well as lack of transparency.

14. The above-mentioned challenges have motivated many countries around the globe to modernise their enforcement laws. Many States have introduced some important reforms (e.g. Japan, China, France, England, Spain, Germany) and in numerous States reforms are still in process.⁴ Yet, as will be seen in the next section, there is little guidance at the global and regional levels for national legislators on options to address these challenges.

III. EXISTING GLOBAL AND REGIONAL INTERNATIONAL INSTRUMENTS ON ENFORCEMENT AND CURRENT PROJECTS

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

Existing international instruments on enforcement

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

17. An example of the first scenario is represented by the *ALI/UNIDROIT Principles of Transnational Civil Procedure*, adopted in 2004 with the goal to reduce the impact of differences between legal systems in lawsuits involving transnational commercial transactions through a model of universal procedure in line with the essential elements of due process of law.⁹ In relation to enforcement, Principle 29 merely states that procedures should be available for “speedy and effective enforcement of judgments”, without, however, providing further guidance on such procedures. The comment to that provision makes it clear that the topic as such was beyond the scope of the

⁴ UNIDROIT 2016 – C.D. (95) 13 Add. 2.

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

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

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

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

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

Principles. Likewise, the draft *ELI-UNIDROIT Rules on European Civil Procedure*,¹⁰ which represent the first regional project adapting the ALI/UNIDROIT Principles to a specific regional legal culture, do not address enforcement issues in detail. These Rules are more comprehensive and detailed than the ALI/UNIDROIT Principles and cover additional issues such as means of review including appeals. The most interesting part of the Rules in regard to enforcement is the section on “Provisional and Protective Measures” (Part X). The section’s goal is, inter alia, to “ensure or promote effective enforcement of final decisions concerning the substance of the proceedings (...) including securing assets” and “preserve the existence and value of goods or other assets” (cf Rule 184). Also the ELI/UNIDROIT, however, stop short of covering procedures and mechanisms for enforcement.

18. A reference to enforcement procedures is further contained in international instruments providing for general guidance on domestic secured transactions law reforms, in light of the recognition of the importance of ensuring proper satisfaction of secured creditors’ rights. For example, the most recent UNCITRAL *Model Law on Secured Transactions* (2019)¹¹ dedicates a whole part (Chapter VII) on the “enforcement of a security right”, which sets out post-default rights of the secured creditor, balancing effectiveness with protection of all parties involved.¹² In relation to general collateral such rights, ranging from the right to obtain possession of the encumbered asset, to sell it or otherwise dispose of, lease or license it, or to propose its acquisition, can be exercised either by application to a national court or other national authority or without such an application. In the first case, the Model Law suggests the introduction of expedited procedures, however without further specifications; in the second case, it provides some guidance on the exercise of such rights and the limits thereto, again however without specifying the modalities of the procedures to be followed, particularly in case of objection.

19. In relation to UNIDROIT’s specialised instruments on secured credit, the Cape Town Convention and its Protocols contain detailed provisions on creditors’ remedies upon debtor’s default.¹³ The conventional regime does not generally address issues of enforcement of such remedies. Contracting States can however make use of declarations to strengthen creditors’ rights, which impact on their enforcement, e.g. allowing for out-of-court creditor’s action; imposing strict timeframes to obtain relief within debtor’s insolvency, including repossession of the asset; excluding discretion by the relevant authority in granting the remedy; limiting or excluding oppositions or counter-actions.¹⁴ In addition to these provisions, there is an interesting ad hoc mechanism in the Space Protocol, which takes into account the physical impossibility of repossession in the case of satellites and other space assets, by recognising the importance for the creditor of revenue streams in relation to the asset.¹⁵ Through the “ITT&C” enforcement mechanism (Tracking, Telemetry and Control), the Protocol allows the parties to specifically agree to the placement of command codes and related data and materials with a third party so that the creditor may establish control over, or operate the space asset (subject to certain safeguards imposed by Contracting States). This provision, irrespective of its intended

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

¹¹ UNCITRAL, *Model Law on Secured Transactions* (2016), at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf.

¹² See also UNCITRAL, *Model Law on Secured Transactions - Guide to Enactment* (2017), paras 76 *et seq.*; 421 *et seq.*

¹³ *Convention on International Interests on Mobile Equipment* (CTC), at <https://www.unidroit.org/instruments/security-interests/cape-town-convention>; *Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Aircraft Equipment* (AP), at <http://www.unidroit.org/instruments/security-interests/aircraft-protocol>; *Luxembourg (Rail) Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Railway Rolling Stock* (RP), at <https://www.unidroit.org/instruments/security-interests/rail-protocol>; *Protocol to the Convention on International Interests on Mobile Equipment on Matters Specific to Space Assets* (SP) at <http://www.unidroit.org/instruments/security-interests/space-protocol>; *Pretoria Protocol to the Convention on International Interests in Mobile Equipment on matters specific to Mining, Agricultural and Construction equipment* (MAC Prot.), at (...).

¹⁴ See Roy Goode, *Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Aircraft Objects*, Official Commentary, 4th ed. (UNIDROIT 2019)(...).

¹⁵ Article XIX SP.

sphere of application, may offer an interesting model for enforcement on assets for which traditional repossession mechanisms would not work.

19. As noted above, a limited number of international instruments specifically address the national legal framework for enforcement.¹⁶ In particular, a comprehensive general guideline at global level is represented by the *Global Code of Enforcement*, developed within the International Union of Judicial Officers (*Union internationale des huissiers de justice*, UIHJ).¹⁷ Its 34 articles lay down general principles that should govern enforcement procedures and its institutions and actors. Thus, the Code's aim is to set fundamental global standards of enforcement that could be implemented at the national level, rather than providing a concrete and detailed guidance to legislators for designing enforcement legislation.

New proposals at regional and global level

20. *Proposal of a EU Directive on Accelerated Extrajudicial Collateral Enforcement Mechanism.* While in the EU the law of enforcement is, in principle, within the competence of each member State, the EU enacted legislation facilitating cross-border debt recovery and, in the framework of its strategy to address the issue of non-performing loans (NPLs) to ensure market stability, focused on the operation of secondary markets and the recovery of debts in Member States. Following a EU Commission proposal for a Directive on *Credit servicers, credit purchasers and the recovery of collateral*,¹⁸ a proposed text for a *Directive on Accelerated Extrajudicial Collateral Enforcement Mechanism* was agreed upon at the Council level and is currently awaiting negotiation with the Parliament.¹⁹ The most interesting aspect of the proposed Directive is that it would set out a minimum common framework and requirements for an accelerated extrajudicial collateral enforcement mechanism in respect of secured credit agreements, in order to help prevent further accumulation of non-performing loans in the banking system. The directive should apply to credit agreements concluded between credit institutions and business borrowers which are secured by identifiable immovable or movable assets (excluding, inter alia, enforcement in relation to financial instruments and insolvency proceedings). The enforcement mechanism should be based on an agreement between the credit institution and the business borrower, with transparency requirements, and the procedure should be triggered without the need to obtain an enforceable title from a court. On the other hand, Member States would be allowed great flexibility, particularly in deciding upon the participation of a public official or other professional in the procedure, the method of enforcement and debtor's right to challenge any aspect of the enforcement mechanism.

21. *Proposal to undertake work in the area of civil asset tracing and recovery (UNCITRAL).* At its 52nd session in 2019, the UN Commission on International Trade Law (UNCITRAL) discussed proposals to explore the possibility to undertake legislative work on civil asset-tracing and recovery particularly in the context of cross-border insolvency.²⁰ The Commission mandated the UNCITRAL Secretariat to organize a Colloquium which was held in Vienna on 6 December 2019,²¹ the conclusions of which will be transmitted to the Commission in a report for its 53rd session (scheduled for July

¹⁶ At regional level, an example of an instrument which aims at introducing streamlined and simplified effective enforcement procedures within Member States of an organisation is the 2008 *OHADA Uniform Act Organizing Simplified Recovery Procedures and Measures of Execution (Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution)*, available at <https://www.droit-afrique.com/uploads/OHADA-Uniform-Act-1998-simplified-recovery-procedures.pdf>.

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

¹⁸ 14.3.2018 COM(2018) 135 final.

¹⁹ ST 14261 2019 REV 1 COR 1.

²⁰ Report of the United Nations Commission on International Trade Law at its 52nd session, A/74/17, para. 200 *et seq.* The discussion was a follow up on proposals received from the United States of America: A/CN.9/996 and A/CN.9/WG.V/WP.154.

²¹ Concept Note, Colloquium on Asset Tracing and Recovery 6 December 2019, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/concept_note_20191127.pdf.

2020). While no decision has been taken as yet by the Commission, the Colloquium discussed existing legal tools to identify, locate and return assets to their legitimate claimants in various contexts, and the challenges and opportunities connected to the use of modern technology, with a view to better define the scope of possible future work of the organisation.

Conclusions on the need to develop global standards and UNIDROIT's comparative advantage

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

23. The "Best Practices of Effective Enforcement" project aims at filling in this gap. UNIDROIT appears to be well suited to the task. The topic of enforcement is already included in UNIDROIT's mandate since 2016, and the World Bank's 2018 proposal has provided further endorsement and justification for this project. UNIDROIT's comparative advantage with regard to developing an international instrument in this area is based not only on its expertise in developing international civil and commercial law instruments generally, but particularly on its previous work in the field of civil procedure, as well as in the fields of secured transactions and capital markets. Moreover, existing UNIDROIT instruments on commercial contracts would benefit from an improved environment in enforcing contractual claims. As will be detailed below, any project undertaken by UNIDROIT will necessarily entail coordination and cooperation, as appropriate, with other international organisations active in this area. In particular, UNIDROIT will closely monitor any developments with regard to legislative initiatives that may be undertaken by UNCITRAL in the specific area of asset tracing and recovery and involve UNCITRAL representatives in its work on enforcement, with a view to coordinate and avoid duplication of efforts.

IV. PROPOSED SCOPE OF THE PROJECT AND ISSUES TO BE CONSIDERED

24. The following paragraphs, based on the analysis conducted in the previous parts, set out the Secretariat's proposal on the most appropriate scope for this project, taking into account that further refinements should be entrusted to the experts who will be selected as members of the Working Group for the project.

25. Preliminarily, we should recall that 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 of contractual claims.

26. Thus, the envisaged instrument is intended to offer guidance at a global level, in line with UNIDROIT's worldwide mandate, without addressing the specificities of each legal system. It has been rightly pointed out that when designing and implementing such a framework, there is no "one-size-fits-all" approach, and that enforcement is strongly influenced not only by the broader legal context and by the interconnection with other areas of the law (such as constitutional law, procedural law including alternative dispute resolution, secured transactions, insolvency, ...) but also by the specific

social and economic realities in each jurisdiction.²² The same mechanism used in one jurisdiction may well fail or not perform adequately in another one, because of the interplay with this broader landscape.

27. On the other hand, the challenges outlined above, such as adapting traditional enforcement laws to debtors' changed asset structures, considering best practices on extrajudicial enforcement, and drawing upon the opportunities offered by technological developments, are faced, to different degrees, by all legal systems. Thus, a global legal instrument can address them by setting out minimum standards and singling out those examples of procedures and mechanisms which appear more suitable to achieve the goal of an efficient, cost-effective, timely and fair enforcement of contractual claims.

28. The project is meant to cover enforcement of a broad range of contractual claims;²³ in line with the World Bank's proposal, however, it is suggested that particular attention be devoted to enforcement of commercial unsecured and secured debts. At this stage, though the Secretariat is aware of the special status and nature of insolvency legislation in domestic laws, it would advise that enforcement in insolvency be included in the scope of the project, in view of its fundamental importance to ensure satisfaction of secured creditors' claims. Moreover, specialised legislation enacted in domestic laws which covers enforcement matters (such as for example legislation regulating financial collateral arrangements), while not constituting the focus of the analysis may offer useful inputs in developing common minimum standards and best practices for enforcement.

29. The envisaged instrument should cover both judicial enforcement, and extrajudicial enforcement. Limiting the scope of the instrument to either of them would not serve the purpose of developing best practices in this area of the law.

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

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

32. In relation to judicial enforcement proceedings, there are traditional issues that should be addressed in order to reach a reasonable balance between effectiveness on the one hand, and adequate protection of affected interests on the other (e.g. requirements for commencement, respective role of actors involved in the proceedings, the range of available measures for the realisation of the value of debtor's assets, implementation of transparency and information duties...). There are also best practices that may be found in those legal systems which introduced fast-track procedures to deal with opposition claims or with claims based on specific legal titles. Moreover, the Working Group may wish to consider the relevance of the interplay between enforcement proceedings

²² See EBRD *Discussion paper* (above fn 1) 13.

²³ It remains to be seen whether contracts concluded with "consumers" should be expressly excluded from the scope of the project on the basis of a substantial difference in the policy that is applied, or should be applied, to these situations in domestic laws when it comes to enforcement proceedings. We refer here to the definition of "consumer" as "a party who enters into the contract otherwise than in the course of its trade or profession" (2016 UNIDROIT Principles of International Commercial Contracts (UPICC), *Preamble*, comment 2).

per se, and judicial procedures permitting creditors to obtain advance relief pending final determination of the dispute which exist, to different degrees, in many jurisdictions.

33. A more innovative approach to solving enforcement issues at national level may come from the developments of technology. We refer here to two examples among those that can be found in national laws and international instruments. Recently, the possibility to hold electronic public auctions to realise the value of debtor's assets has been tested in a number of jurisdictions. Digital public auctions' platforms are considered a useful tool to respond to various challenges of judicial sales, in particular lack of transparency, limited competition and loss of value. On the other hand, issues arise in respect to the appropriate legal design of such platforms and their practical operation. Regarding enforcement mechanisms, in a previous paragraph reference was made to the "control" provision contained in the Space Protocol to allow creditors to repossess the revenue stream deriving from collateral, a mechanism which, with appropriate adaptations, may be applied in other contexts. The Working Group set up for this project may be asked to look into existing examples of the use of technology to facilitate enforcement, and consider advantages and drawbacks of such mechanisms as well as appropriate conditions and requirements for their application.

V. ACTION TO BE TAKEN

34. The UNIDROIT Secretariat would invite the Governing Council to approve the proposed scope of the project and to reassess upward the priority status given to the project, allowing the Secretariat to establish a Working Group.