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Item No. 7 on the agenda: Best Practices for Effective Enforcement

(prepared by the Secretariat)

<i>Summary</i>	<i>Update on the Best Practices for Effective Enforcement project status and connected activities</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the progress of the project</i>
<i>Mandate</i>	<i>Implementation of the decision of the Governing Council in relation to the Work Programme 2020-2022</i>
<i>Priority level</i>	<i>High</i>
<i>Related document</i>	<i>Work Programme for the 2020-2022 triennium (UNIDROIT 2019 – A.G. (78) 12)</i>

I. UPDATE ON THE STATUS OF THE PROJECT

A. Preparatory Work

1. In December 2018, the Secretariat received a proposal by the World Bank concerning 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 discussed as a continuation, and a refinement, of the scope of the “Principles of Effective Enforcement” project, which was already part of the 2017-2019 Work Programme. 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 requested to produce a more refined scope of the project to be presented at the 99th session of the Governing Council in 2020.

2. During the first meeting of the 99th session of the Governing Council held remotely in 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). In response to this mandate, the UNIDROIT Secretariat

developed a Consultation Document which formed the basis for a first round of remote consultations with selected international experts and organisations. On 21 September 2020, the Secretariat organised an internal Workshop to discuss the outcome of the consultation. The Workshop sought input from experts with different backgrounds, international organisations working in the field and members of the UNIDROIT Governing Council, on the determination of the most appropriate guidance to a future working group on the scope for the project and on the impact of technology on enforcement. The agenda of the Workshop is available [here](#).

B. Establishment of the Working Group

3. At the second meeting of its 99th session, held in a hybrid format on 23-25 September 2020, the Governing Council discussed the document presented by the Secretariat ([C.D.\(99\) B.3](#)), approved the proposed guidelines regarding the scope of the project, confirmed the high priority status assigned to the project, and authorised the establishment of a Working Group ([C.D.\(99\) B.21](#), paras 57-58).

4. The Best Practices for Effective Enforcement Working Group is currently composed of the following experts: Ms Kathryn Sabo (Chair) - Deputy Director General & General Counsel, Constitutional, Administrative and International Law Section, Department of Justice (Canada), member of the UNIDROIT Governing Council; Ms Geneviève Saumier (Coordinating Expert) - Peter M. Laing Q.C. Professor of Law, Faculty of Law, McGill University (Canada); Mr Jason Grant Allen - Senior Research Fellow, Humboldt-Universität zu Berlin Centre for British Studies, Berlin (Australian National); Mr Neil Cohen - Jeffrey D. Forchelli Professor of Law, Brooklyn Law School (USA); Mr Fernando Gascón Inchausti - Professor, Civil and Criminal Procedural Law Department, Faculty of Law Universidad Complutense de Madrid (Spain); Ms Carla L. Reyes - Assistant Professor of Law, SMU Dedman School of Law, Dallas (USA); Mr Fábio Rocha Pinto e Silva, Pinheiro Neto Advogados, São Paulo (Brazil); Ms Teresa Rodriguez de las Heras Ballell, Associate Professor of Commercial Law, Universidad Carlos III Madrid (Spain); Mr Felix Steffek - Senior Lecturer, Faculty of Law, University of Cambridge, Co-Director of the Centre for Corporate and Commercial Law, (German National); Mr Rolf Stürner - Emeritus Professor of Law, Albert-Ludwigs-Universität Freiburg (Germany).

5. The Working Group also counts on a number of Institutional Observers: European Bank for Reconstruction and Development (EBRD - Ms Catherine Bridge Zoller, Senior Counsel, and Ms Veronica Bradautanu, Principal Counsel, Corporate Governance); European Commission (DG JUST); European Law Institute (ELI - Ms Xandra Kramer, Professor, University of Rotterdam, Mr Paul Oberhammer, Professor, University of Vienna); Hague Conference on Private International Law (HCCH - Ms Ning Zhao, Senior Legal Officer); International Association of Legal Science (IALS - Mr J.H.M. (Sjef) van Erp, Secretary General, Professor (em.) Maastricht University, visiting professor Trento University; Max-Planck-Institute Luxembourg for International, European and Regulatory Procedural Law (Mr Burkard Hess, Founding and Executive Director, Professor of Civil Law, Civil Procedure, Private International Law, and Ms Wiebke Voss, Senior Research Fellow); Organization of American States (OAS - Ms Jeannette Tramhel, Senior Legal Officer, Department of International Law, Secretariat for Legal Affairs); Secured Finance Network (Mr Richard Kohn, Goldberg Kohn Ltd.); Union Internationale Huissiers de Justice (UIHJ - Mr Jos Uitdehaag, Secretary); United Nations Commission on International Trade Law (UNCITRAL - Mr José Angelo Estrella-Faria, Principal Legal Officer and Head, Legislative Branch, International Trade Law Division, Office of Legal Affairs, and Mr Alexander Kunzelmann, Legal Officer); World Bank Group (WBG - Ms Nina Pavlova Mocheva, Senior Financial Sector Specialist, Finance, Competitiveness & Innovation Global Practice, and Mr Klaus Decker, Senior Public Sector Specialist); Zemgale Regional Court, Latvia (Ms Lina Lontone).

C. First session of the Working Group (30 November – 2 December 2020)

6. The first session of the project Working Group was held in Rome and remotely on 30 November–2 December 2020. The Working Group mostly focused on the more precise determination of the scope of the project, as well as on methodology and organisational issues, and discussed a specific document prepared by a Working Group member on the impact of technology in enforcement.

7. The project was based on 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 had therefore been invited to consider the current challenges for effective enforcement, and the most suitable solutions (procedures, mechanisms) to overcome them. The Working Group agreed that the goal of the project would be 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.

8. In relation to the scope of the project, the Working Group addressed several issues that had been raised during the exploratory consultations and at the 99th Governing Council session. There was unanimous support for covering both post-adjudication enforcement (i.e., enforcement following a judicial decision rendered in favour of the creditor) as well as situations where the creditor is entitled to proceed to enforcement without first obtaining a court decision. In relation to enforcement following an adjudication, it was clarified that the project would have to address both the concrete mechanisms of the enforcement, as well as its governance and organisation. The Working Group discussed a non-exhaustive list of potential issues (see [Report](#), paras 18-19 and 23-24). The diversity and complexity of the latter group of cases, initially labelled “extra-judicial” enforcement, was recognised, as well as the need for – but also the challenge of – having to provide for different best practices depending on the situation, and to deal with the significant interconnections between adjudication and “extra-judicial” enforcement (e.g., by promoting the use of specific fast-track procedures to deal with oppositions during the latter). Finally, there was unanimous support for the idea of covering enforcement of both secured and non-secured claims.

9. Other matters of scope related to the type of claim to be enforced. The Working Group agreed to prioritise contractual claims as opposed to claims deriving from other sources, with the caveat that distinguishing between types of claims would not appear to be wholly justified, especially for enforcement of adjudicated claims. The Working Group further agreed not to exclude consumer debtors or creditors from the scope of the project, but to proceed with caution in this matter, leaving consideration on whether their inclusion warranted the development of specific best practices to a later stage of the project. Another issue raised by the experts, particularly in connection with technology as applied to enforcement, was the need to include peer-to-peer contracts (P2P). Moreover, 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, placing more emphasis on issues that are common to general enforcement and enforcement in insolvency. 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. The Working Group highlighted the need to ensure coordination with the work of other intergovernmental organisations active in the area of insolvency law, particularly UNCITRAL and the World Bank Group. Moreover, the Working Group unanimously agreed to include the enforcement of provisional and protective measures in the scope of the project.

10. The Working Group finally discussed a *Preliminary Report on the impact of technology on enforcement*, which aimed to: underline the relevance of technology for enforcement; gather examples of existing procedures and mechanisms, including the emergence of new technologies and automation; set forth the potential policy issues to be addressed; and make a proposal of a taxonomy identifying the different levels or layers of impact of technology.

11. In relation to the format of the envisaged instrument, while any decision at that early stage was considered to be premature, the majority of the experts favoured the development of a non-binding set 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. The importance of drafting an introduction to the best practices was also acknowledged at the first Working Group session, intended to 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.

12. For more information see the documents [Study LXXVIB – W.G.1 – Doc. 1 rev.](#); [Study LXXVIB – W.G.1 – Doc. 2](#) and the [Report](#) of the first Working Group session.

D. Intersessional work

13. At its first session, the Working Group, had created three sub-groups to advance the work on the project during the intersessional period: Subgroup 1 on “post-adjudication” enforcement; Subgroup 2 on enforcement of secured claims (collateral); Subgroup 3 on the impact of technology on enforcement. Sub-group 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 entire Working Group.

14. In the intersessional period, the Chair and most Working Group members and observers were involved in an intense working schedule set up by the focal points of each sub-group and supported by the Secretariat, which included exchanges of drafts and comments through emails and virtual meetings to facilitate the discussions. In particular, Sub-group 1 met virtually on 14 January and 16 March 2021, respectively to plan its activity and discuss comments received on the first draft Report; Sub-group 2 met virtually on 11 January 2021 to determine the scope of its work, methodologies and expected outcomes, on 5 February 2021 to discuss an outline of questions prepared by the focal points and to create four “working teams” to address them, and several other times in February and March to discuss the drafts that were produced by the teams; Sub-group 3 discussed the Preliminary Report presented at the first Working Group session at virtual meetings on 2 February and 9 March 2021. Moreover, the Secretariat set up coordination meetings between representatives of Sub-group 3 and the other two Sub-groups, to discuss common issues and coordinate the documents for the second session of the Working Group.

15. The Secretariat, following up on the mandate received from the Working Group, and in cooperation with the European Bank for Reconstruction and Development (EBRD), conducted consultations in the form of interviews and questionnaires to gather data on challenges, regulatory options and practices for effective enforcement in diverse jurisdictions. The Secretariat also conducted additional research on selected jurisdictions that were not covered by the consulted experts. The outcome of this work was put together in two documents, one containing the answers to the Questionnaire on General Enforcement, and the other one grouping together the answers to the Questionnaire on Technology and Enforcement. While this work is still in progress (see below, para III, Future Steps), a first draft of the Questionnaire on Technology and Enforcement was shared with Sub-group 3 in advance of the second session of the Working Group.

E. Second session of the Working Group (20-22 April 2021)

16. The second session of the Working Group took place remotely on 20–22 April 2021, and its deliberations focused on the Reports prepared by the three sub-groups mentioned above.

17. Sub-group 1, on post adjudication enforcement, had prepared a detailed document focusing on the issues to be discussed, and providing some recommendations on the possible way forward. Among other issues, the discussion covered the treatment in the project of documents or titles recognised by national law which give creditors the right to enforce (“enforceable titles” or “enforceable documents”); the challenges posed by the enforcement of claims for payment on tangible assets (among others, the need for the legal system to provide information on judicial liens and execution liens, the setting of fair and expedited procedures for the valuation of goods, when necessary, or ways to make participation in public sales more attractive); the simplification and increased efficiency of the enforcement regarding third-party debt orders or garnishment proceedings; the proportionality of enforcement of claims for payment and incentives for the debtor to cooperate in the enforcement; exemptions; the disclosure of the debtor’s assets; creditor’s, debtor’s and third party’s remedies; and post-adjudication settlement. The Working Group also considered the organisational aspects of enforcement.

18. In order to render the discussion on recommended best practices more effective, the focal points of Sub-group 1 and Sub-group 3 (Impact of Technology in Enforcement) had coordinated their input in advance. For this reason, the Report of Sub-group 3 was organised in such a way as to follow the structure of the Report of Sub-group 1, and the related parts of the former Report were discussed in connection with the corresponding issues in the latter. The Working Group focused its attention on the use of platforms to conduct auctions and create secondary markets (governance of the platforms; limitations as to their use; questions of applicable law) and on the use of technology to enhance notifications and communications. The relevance of automation was also emphasised, but not discussed in detail.

19. Finally, the Working Group considered the Report prepared by Sub-group 2 on enforcement of security rights. The Subgroup had particularly focused, for the time being, on enforcement of security rights on movables, and had drafted proposals for recommendations of best practices in the form of answers to a list of practical questions, which had been allocated to different teams among Sub-group members. As a general working method, the Sub-group had started from the assumption that while the Working Group would be free to develop the most appropriate best practices in this field, the rules on enforcement that had already been developed in instruments that had achieved consensus through intergovernmental negotiations at a global level (such as the instruments adopted by UNCITRAL, e.g. the Legislative Guide or the Model Law on Secured Transactions) should be treated as presumptively valid when addressing issues within the scope of the project. The Working Group would therefore bear the burden of justifying any inconsistencies between the recommendations of the Working Group and those of prior instruments. At its second session, the Working Group focused on the recommended best practices for obtaining possession of tangible collateral, the recommended best practices for realising upon collateral without judicial process, and the recommended best practices for the variation of the rules governing realisation of collateral.

20. For more information see the documents [Study LXXVIB – W.G.2 – Doc 1](#); and the [Report](#) of the second Working Group session.

II. OTHER ACTIVITIES RELATED TO THE PROJECT

21. For the activities that took place in 2020, please see the Annual Report 2020 (C.D. (100) B.2).

22. On 20 January 2021, UNIDROIT was invited to participate in an online course on “Technology and Legal Innovation”, a joint initiative of Hitotsubashi University and the University of Cambridge, coordinated by Professors Felix Steffek (University of Cambridge) and Mihoko Sumida (Hitotsubashi University). Secretary-General Ignacio Tirado and Deputy Secretary-General Anna Veneziano participated in a panel entitled “Innovating Access to Justice”, in particular focusing on the enforcement of creditor’s claims, which was the closing event of the course. The workshop included representatives of the Ministries of Justice of Germany and Japan, of the OECD, and the coordinators of the “Pathfinders” research programme as panelists. It was attended by the undergraduates of the course, but also by senior Japanese academics and researchers.

III. FUTURE STEPS

23. Pursuant to the mandate received at the second session of the Working Group, the Secretariat is continuing to provide support to the Chair and Working Group members and observers for the organisation of intersessional sub-groups meetings to advance the preparation of documents and drafts. More general informal coordination meetings to ensure consistency of the output of the sub-groups are envisaged for the intersessional period. The Secretariat is also working to ensure the necessary coordination between this project and the UNIDROIT project on Digital Assets and Private Law, for the issues concerning enforcement on digital assets. Finally, the Secretariat is continuing to conduct internal research and engage experts from different jurisdictions to provide practical information on general enforcement laws and practices as well as the use of technology in enforcement. The outcome of this ongoing work, in the form of responses to the two Questionnaires developed by the Secretariat, will be shared with sub-group focal points as background material for the deliberations of the sub-groups.

24. The third session of the Working Group is expected to take place on 29-30 November and 1 December 2021.

IV. ACTION TO BE TAKEN

25. *The UNIDROIT Secretariat would invite the Governing Council to take note of the status and development of the project.*