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

***Second meeting (remote)***  
**Rome, 20-22 April 2021**

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Study LXXVIB – W.G.2 – Doc. 6  
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**REPORT**

1. The second session of the Working Group established to prepare Best Practices for Effective Enforcement (hereafter: the “Working Group”) took place remotely between 20-22 April 2021. The Working Group was attended by 28 participants, comprising experts, observers from intergovernmental organisations, other international and academic organisations, and members of the UNIDROIT Secretariat (the List of Participants is available in Annexe II).

**Item 1. Opening of the session and welcome by the Chair of the Working Group and the Secretary-General**

2. *The Chair* opened the session and welcomed all participants.

3. *The Secretary-General* added his welcome and expressed his regrets for not being able to hold the session in person. He noted that much intersessional work had been done during the past months and thanked all members and observers who had contributed to this outstanding achievement. He acknowledged the participation of new observer organisations, noting that the representatives of some of them had already been involved in the very fruitful intersessional work: Mr Richard Kohn, from the Secured Finance Network; Ms Lina Lontone, from the Zemgale Regional Court of Latvia; and Ms Jeannette Tramhel, representing the Organization of American States (OAS). He further acknowledged the presence of Prof. Paul Oberhammer as additional representative of the European Law Institute, together with Prof. Xandra Kramer. From the Secretariat’s side, the Secretary-General introduced Ms Valeria Confortini, independent researcher at UNIDROIT; Ms Gabriella Boger Prado, Consultant, and Mr Stéphane Grossin, Legal Intern.

**Item 2. Adoption of the agenda and organisation of the session**

4. *The Deputy Secretary-General* introduced the organisation of the session. *The Chair* pointed out that item 4, sub-items “a” (Doc 3 - Report of Subgroup 1) and “c” (Doc 5 - Report of Subgroup 3) would be discussed together, since the Reporter of Subgroup 3 had very helpfully drafted Doc 5 in such a way as to follow the structure of Doc. 3; Doc 5 would therefore be used to integrate the discussion on each relevant topic. Sub-item “b” (Doc 4 - Report of Subgroup 2) would be addressed separately.

5. The agenda was adopted unanimously.

**Item 3. Update on intersessional work and developments since the first Working Group session (Study LXXVIB – W.G.2 – Doc. 2)**

6. *The Deputy Secretary-General* referred to Doc. 2. providing the update on the intersessional work and developments that had taken place since the first Working Group session. This document contained an update of the Issues Paper ([Study LXXVIB – W.G.1 – Doc. 2](#)) that had been presented and discussed at the first Working Group session, in relation to Part I (preliminary matters) and Part II on the scope of the instrument. The Deputy Secretary-General briefly referred to the additional questions introduced in Part I of Doc. 2 (which dealt, among other things, with terminology and translation issues) asking the Chair for permission to postpone the discussion of these questions in order to focus on the substantive issues in Documents 3, 4 and 5.

7. In relation to the intersessional work, she recalled that, as suggested by the Chair, three subgroups had been created, with the following provisional titles: (a) Subgroup 1 on enforcement of adjudicated claims (with Fernando Gascón and Rolf Stürner as focal points); (b) Subgroup 2 on enforcement of secured rights (with Neil Cohen as focal point); and (c) Subgroup 3 on impact of technology on enforcement (with Teresa Rodríguez de las Heras Ballell as focal point). The Subgroups had set up an intense working schedule, which had produced the Reports included in Docs 3, 4 and 5 presented for consideration at the second session of the Working Group.

8. She finally reported that the Secretariat, with the support of the EBRD, had conducted intersessional consultations with experts from different jurisdictions on technology and enforcement, and on enforcement in general. The results of the consultations, which had partly already been shared with the Subgroups, while not purporting to offer a comparative overview contained useful data especially regarding some legal systems that are less well-known.

9. *The Chair* first thanked the Secretariat for the helpful report contained in Doc. 2. She further agreed to postpone the discussion of the Working Group on the questions contained in the document – which could be addressed between the present and next Working Group session – and to focus on the Reports presented by the three Subgroups.

**Item 4. Consideration of work in progress:**

**(a) Report of Subgroup 1 “post-adjudication” enforcement (Study LXXVIB – WG 2 – Doc. 3)**

**(c) Report of Subgroup 3 “impact of technology on enforcement (Study LXXVIB – WG 2 – Doc. 5)**

10. *The Chair* opened the discussion on Doc 3, noting that the Subgroup had done a tremendous job and had brought many issues for consideration by the Working Group.

11. *Professors Fernando Gascon Inchausti and Rolf Stürner*, focal points for Subgroup 1 (Reporters), having explained that this document had received previous feedback from the experts participating in Subgroup 1, presented the structure and methodology of the Report. It was noted that the Report did not contain finalised best practices, but questions regarding the issues that should be addressed and some recommendations on the possible way forward. It was also recalled that some of the topics treated in Doc. 5 (Report of Subgroup 3) were directly related to Doc. 3 and thus, following the Chair’s suggestion, those shared points would be analysed together.

***Enforceable documents or titles***

12. The Reporters suggested that a preliminary discussion on the part on “enforceable titles” would be welcome, since a number of issues in this regard had been raised during the meetings of Subgroup 1. While there appeared to be consensus on not providing a precise definition of

“enforceable title”, nor a precise list of the types of documents that would be classified as such, one concern voiced during the Subgroup meetings had been the level of trustworthiness or reliability an enforceable document should have. It had been flagged that jurisdictions generally adopt different approaches to this matter. While effective and quick enforcement would be fostered if a wider array of non-judicial enforceable titles could be speedily obtained, lack of reliability would give rise to abuse and ultimately an increase in judicial challenges against enforcement. The recommendation suggested by the Report was thus to allow for quick procedures to obtain an enforceable title for undisputed claims, however requiring a “high level” or trustworthiness of the document, particularly considering the model of the payment order, alongside the more traditional notarised authentic document or the intervention of other public authority.

13. In summing up the outcome of the discussion which followed the presentation, *the Chair* noted that substantial consensus had been expressed on the recommendation by Subgroup 1 that the Working Group should not provide a definition of “enforceable document” or “title”, nor issue an exhaustive list of acceptable documents. Furthermore, it had been flagged that for the sake of efficiency, it was important to permit alternatives to judicial decisions, and to allow for rapid alternative procedures to obtain an enforceable title.

14. Experts had however expressed different opinions on how to ensure this result. It had been noted that legal systems varied considerably in determining the threshold for enforceability of a non-judicial document. Several countries considered an invoice – at least as long as not contested – as sufficient title, while several others required different forms of authentication (with different degrees of participation of a public authority). It had also been pointed out that there might be different implications depending on whether the claim to be enforced was liquid or not, and whether the debtor had acknowledged the debt or not. Attention had also been brought on the opportunity to differentiate commercial parties from consumers in relation to enforceable titles.

15. A number of experts, on the other hand, had referred to the costs (also in terms of time) that the failure to require a high level of reliability of the enforceable document entailed, since there was room for abuse, especially on the part of large companies, as well as for an increase of parallel judicial challenges. There had however been no agreement on the fact that the recommendations would have to provide for a “high level” of reliability, as the expression was deemed hard to define objectively, and introducing a requirement to involve public authorities might be seen as limiting the existing options in some legal systems.

16. It had been further suggested that, in view of the terminological and legal differences among jurisdictions, and the goal of the future instrument to provide States with best practices to improve their legislation, it would be helpful if the future instrument could provide a narrative on the reasons for the recommendations to be adopted. Should the Working Group decide to introduce (minimum) requirements for an enforceable title, it would be useful to clarify how and to what extent such requirements would apply to documents which were not originally issued by a public authority.

17. In relation to the points raised, *the Reporters* noted that a good solution might be found by giving guidance to legislators on the opportunity to develop procedures and mechanisms that would ensure an acceptable standard of consent in relation to the enforceable document. In this regard, the role of technology in simplifying procedures to produce an enforceable document had been highlighted. Computerised procedures could help create executable documents, particularly in the case of liquid monetary claims, and also facilitate the intervention of a public authority (including, but not limited to, notaries). Concerning technology, it had also been noted that including a reference to the possibility for enforceable documents to be in a digital form or to be electronically signed could be helpful for many States, including guidance on whether enforceable titles may be data units.

18. Finally, *the Deputy Secretary-General* expressed the Secretariat’s support for solutions that would respond to the project’s main goal to facilitate enforcement, and not introduce rules that might discourage it, while at the same time providing a sufficient level of protection for the parties involved.

***Enforcement of claims for payment on tangible assets – use of technology in such proceedings***

19. *The Reporters* for Subgroup 1 presented the recommendations under this item, focusing in particular on the recommendations regarding the enforcement of claims for payment, especially on movable goods (tangible personal property). They highlighted that they were meant to promote simplification and increased efficiency of the enforcement. The recommendations focused on: (i), the establishment of digitalised registers for judicial liens (in so far as existent) and execution liens; (ii), the setting of fair and expedited procedures for the valuation of goods, if necessary; and (iii), the abolition of rights of redemption to make participation in public sales more attractive. In relation to this latter point, they posed the question of whether the proposed abolition of rights of redemption was acceptable to the Working Group, since it represented an innovation in respect to several existing legal systems (this point was discussed later in the session, see paras 37-39 below). They also highlighted the fact that the order in which the recommendations were presented did not reflect a decision on how the issues should be addressed in the finalised document. Finally, they noted that there was a digital component to be considered, related to Doc 5.

20. *Professor Teresa Rodriguez de las Heras Ballell*, focal point for Subgroup 3 (Reporter), referring to Doc. 5, highlighted the importance of architectures created by technology to enhance the effectiveness of enforcement and implement the recommendations included in Doc. 3. She recalled the specific examples contained in Doc. 5 which show that technology is already fulfilling this role in several jurisdictions, particularly looking at the use of centralised platforms to conduct auctions and create secondary markets, of DLT structures based on blockchain, and of centralised electronic registries the purpose of which, differently from platforms, was to provide information in a reliable manner, without allowing parties to conclude transactions directly.

21. She further emphasised that these structures had already generated some legal challenges and referred to two issues in particular: the governance of platforms, and the applicable law. In relation to governance, the crucial question would be to what extent platforms could be self-regulated or self-governed, whether they should be subject to some form of public supervision, and what level of flexibility could be offered to legal systems in this regard. As to applicable law, she pointed to the difficulty in finding a suitable connecting factor with the country where enforcement proceedings would be implemented. These challenges, particularly in relation to on-line sales or auctions, were not only theoretical but also practical, as shown by the example of the most recent legislation in France.

22. In the ensuing discussion concerning the use of technology, one expert noted that the Working Group should adopt a functional approach and not focus on specific types of technology. It was also clarified that a transactional platform could integrate the role of a registry at the same time, irrespective of the technology used, though the legal implications of fulfilling these two roles would differ. Moreover, it was clarified that platforms for judicial or extrajudicial enforcement should be regulated by external legal rules limiting how the platform is created and functions.

23. The issue of the applicable law to platforms elicited an ample debate. There was substantial consensus on the complexity of the issue, which also related to the system of governance of the platform. Some experts highlighted the need for legal certainty regarding the applicable law and manifested their agreement with the application of *lex fori*, i.e. the law of the country where the enforcement is carried out. In this respect, however, it was queried how to determine the applicable law when (some of the) assets to be sold through auction were not located in the State of the country of enforcement, especially where immovable assets were concerned; or when the auction was made known and conducted by a private international platform that did not operate in a single country. The question of the link between the platform and the recognition or exequatur of foreign judgements was also raised. Another point raised was the potential application of more than one law to the operation of the platform; to avoid this complexity, one expert suggested that the control of on-line platforms be exercised only by the authorities of the State where the enforcement is taking place,

which would facilitate the determination of the applicable law. It was also noted that different actors (public and private) could be involved in the operation of a platform, which might raise additional issues in relation to the applicable law. Following this discussion, it was suggested that in relation to the applicable law it would be necessary to distinguish between the operation of the platform and the enforcement procedure as such. The law applicable to the former could differ from the law applicable to the latter.

24. Some experts warned that the questions raised should not lead to the interdiction of the use of electronic platforms to conduct sales during enforcement proceedings, and that States should be offered a flexible approach allowing their use. The economic purpose of such platforms was to enhance the number of potential bidders and obtain a better price. For instance, the use of platforms in public procurement was widespread. Another example was made of a model to maximise value in insolvency proceedings, whereby if debtor's assets remained unsold, the electronic auction operated by a licensed private entity could be opened to external bidders and transform itself into a privately operated on-line platform for auction sale.

25. Other experts however noted that an international electronic platform may lead to a circumvention of mandatory procedural rules. Several experts agreed that platforms ought to comply with specific regulations in order for the auction to be recognised as a public auction. A warning was voiced against displacing State sovereignty in regard to enforcement. It was also noted that enforcement through an agent should be distinguished from self-enforcement proceedings.

26. In summing up the discussion, *the Chair* recalled that experts had generally agreed on the recommendations listed on Doc. 3 related to the enforcement of moveable goods (tangibles). She also noted that there had been a fruitful discussion on the digital aspects of this kind of enforcement, particularly regarding the use of electronic platforms. She further noted that experts had expressed different opinions regarding the use of such platforms, which would be a matter for further consideration by the Working Group. She also recalled the legal challenges mentioned in Doc. 5, in particular in para. 19. She mentioned the different arguments raised in the discussion on the applicable law and the distinction between the law applicable to the enforcement proceedings and the applicable law to the platform itself. Moreover, she flagged that some experts had expressed concern as regards the use of private platforms for enforcement, with no public authority supervision, and that further thought should be given in relation to the constraints posed by the exercise of State sovereignty.

### ***Third party debt orders or garnishment proceedings***

27. *The Reporters for Subgroup 1* introduced the next item, i.e. the recommendations for the simplification and increased efficiency of the enforcement regarding third-party debt orders or garnishment proceedings (Doc. 3, IV.1 (b) (bb)). They recalled that this topic also had important intersections with Doc. 5.

28. In the ensuing discussion, it was noted that in relation to the enforcement on bank accounts, the UNCITRAL Legislative Guide on Secured Transactions may offer helpful insights as to terminology and substance (particularly on page 308 of the Guide). A further question was raised regarding the relationship between the seizure of individual accounts and a freezing order, and their relation to provisional measures. The Reporters explained that while provisional measures were not a part of enforcement, it was sometimes necessary to resort to them during enforcement proceedings because of their excessive length. It was also noted that some legal systems preferred freezing orders to ensure this protective function, while others preferred the tangible seizure of individual accounts. Thus, the recommendations contemplated the possibility of combining both to enhance protection (i.e., the possibility of a parallel application of seizure and freezing order). Experts generally agreed on the importance of the availability of provisional measures within enforcement.

29. Regarding the link with technology, *the Reporter for Subgroup 3* noted that this topic was clearly related to paras. 22 and 23 of Doc. 5, highlighting that notifications and communications in garnishment proceedings could be highly improved by the application of technology. One of the simplest and most conspicuous uses of digital technology was its use as a tool to enable expedited communications, dramatically reducing the costs and length of procedures related to sending of notices, the simplification of personalised communications, the verification of acknowledgements of receipt, etc., as already implemented in some jurisdictions. In connection to this point, she further referred to the general issue of automation, noting the importance of this development and the need to consider its implications. Finally, in relation to the point made in the Report of Subgroup 1 (Doc. 3) that in most legal systems, for monetary claims, third party debt order or garnishment is the preferred kind of enforcement rather than enforcement in movables, she queried whether the use of digital assets or "tokenisation" of values would blur the difference, and which would be the actual applications and the expected implications of the use of tokens in this scenario.

30. Attention was drawn by some experts to the legal problems of electronic attachment on bank accounts, such as the limitations imposed by many jurisdictions on the attachment of certain sums (e.g., debtor's salary), but also to the application of automated enforcement to protect certain categories of creditors. The more general issue of the need for information on the part of the enforcing officers on the existence of a bank account of the debtor was further raised. In relation to this latter point, it was mentioned that the Report prepared by Subgroup 1 contained a specific part on disclosure by the debtor.

31. *The Chair* noted that experts agreed to further consider the use of digital tools in enforcement and enforcement of digital assets, including the extent to which automation could facilitate effective enforcement.

#### ***Complex enforcement of special assets and receivership***

32. *The Reporters for Subgroup 1* addressed the topic of complex enforcement on special assets and receivership. They referred to the state of development in this area and to their proposals for recommendations regarding enforcement on special assets, including digital assets, but also regarding the use of receivership as a special tool in certain cases (e.g., when enforcing on securities). Experts generally agreed on the proposals and on postponing the debate on enforcement on digital assets.

#### ***Charging orders on land, order for sale or orders for receivership***

33. *The Reporters for Subgroup 1* introduced the topic of charging orders on land and focused on the issue of the abolition of the "right of redemption", which was still contemplated in some jurisdictions (civil and common law countries alike) i.e., the right of the debtor, upon repayment of the debt, to re-acquire title to the asset sold to a third party in the case of enforcement on land, usually within a specific timeframe. It was explained that the proposal to abolish this right aimed at improving certainty and predictability for third parties participating in a sale and at facilitating the disposal of the assets at an acceptable price.

34. In the ensuing discussion, the policy behind the proposal was generally welcomed. One expert queried whether this right, where it exists, would be classified as part of substantive law and thus be considered beyond the Working Group's mandate. Another expert noted that the expression "right to redemption" might be interpreted differently depending on the legal system (e.g., it could refer to the right of the debtor to prevent the disposition of the asset before it occurred by settling the outstanding debt, or to the right of the debtor to unwind a disposition that had already taken place). The possibility to clarify the difference in respect to other rights such as the right to reinstatement was also raised. Another expert suggested including a recommendation on specific rules regarding the identification of real estate, especially in the absence of registration in a national registry. It was further questioned whether a more modulated approach (instead of a wholesale

abolition) based on the type of asset or the type of debtor would be more acceptable in some legal systems.

35. In summing up the discussion, *the Chair* noted that the Working Group had agreed on the underlying policy of the recommendation but had flagged the need to clarify the meaning of the expression “right of redemption” and to further reflect on the scope of the proposal (wholesale abolition or limitation of its application where this right is recognised).

36. The session was adjourned to the next day.

**Item 4. (continued) Consideration of work in progress:**

**(a) Report of Subgroup 1 “post-adjudication” enforcement (Study LXXVIB – WG 2 – Doc. 3)**

**(c) Report of Subgroup 3 “impact of technology on enforcement (Study LXXVIB – WG 2 – Doc 5**

37. Before resuming the consideration of the work in progress, *the Chair* gave the floor to the representative of the OAS to briefly present the Inter-American Juridical Committee project on the enforcement of foreign judicial decision. *The Deputy Secretary-General* recalled that a link to the relevant page with the Reports of the project had already been circulated to the Working Group: ([http://www.oas.org/en/sla/iajc/current\\_agenda\\_extraterritorial\\_validity\\_foreign\\_judgments\\_arbitral\\_awards.asp](http://www.oas.org/en/sla/iajc/current_agenda_extraterritorial_validity_foreign_judgments_arbitral_awards.asp)).

38. *The Chair* reverted to Doc. 3, giving the floor to the Reporters for Subgroup 1 to address the next issue in the Report.

***Priority or equality governing the satisfaction of multiple unsecured creditors of claims for payment***

39. *The Reporters for Subgroup 1* presented the two principles of priority and equality and focused on the proposed recommendations. The Subgroup had expressed a preference for the priority principle, however accompanied by measures to avoid, as much as possible, the consequent race to enforcement by unsecured creditors, and to increase the transparency and predictability of the priority of judgment or execution creditors. Moreover, they had suggested reducing the number of legal privileges (arising by operation of law) and to render privileges (or preferential claims) registrable, and had further emphasised the advantages of the use of technology (e.g., electronic registries of priorities accessible by enforcement organs).

40. *The Chair* opened the floor for discussion. The first issue concerned the substantive or procedural nature of the issue at hand, and whether or not the best practices for enforcement should cover it. *The Reporters* acknowledged the difficulty of precisely characterising what falls within substantive law and what is part of enforcement. Another issue regarded the relationship with insolvency proceedings, and the limited practical relevance of rules on multiple solvent unsecured creditors, since the more common conflict cases would fall under secured transactions or insolvency laws and, in the case of solvent debtors, enforcement agents would generally avoid conflicts by enforcing on different assets. *The Reporters* agreed, but emphasised that an instrument on effective enforcement could not avoid addressing the conflict of multiple unsecured creditors.

41. Participants generally agreed on the recommendation to reduce the number of privileges (or preferential claims), and on the introduction of more transparency on the time and extent of existing ones. It was recalled that an analogous recommendation was contained in the UNCITRAL Legislative Guide on Secured Transactions in respect to security rights. On the other hand, it was noted that

priorities arising by operation of law were a sensitive topic related to areas such as labour and tax law, and any recommendation should be carefully drafted.

### ***Proportionality of enforcement of claims for payment – exemptions***

42. *The Reporters for Subgroup 1* explained that the proposed recommendations regarding proportionality of enforcement of claims for payment generally allowed creditors to choose the mode of execution as well as the assets on which to enforce, in order to create an incentive for the debtor to cooperate in the enforcement. In relation to this point, one observer emphasised the role of the enforcement agents in providing advice on the modalities of execution and the choice of assets. The proposed recommendations further addressed the relationship between the value of the claim and the cost of enforcement, as well as the need for the parties to be fully informed on the costs of enforcement.

43. According to the proposed recommendations, limitations to enforcement based on proportionality or exemptions should be restricted to situations in which the debtor would suffer an intrusion upon its fundamental rights in the absence of any alternatives. *The Reporters* stated that the best practices in this regard should be limited to formulating basic principles. In the ensuing discussion, a number of experts noted the relationship between the limitations on enforcement and its efficiency, and pointed to possible midway solutions, such as the possibility of replacing a high value asset with a less valuable one that fulfils the same basic function.

44. The Working Group further discussed whether to develop best practices in relation to enforcement on public or State property, which could be envisaged for situations in which a State participated in the market alongside private actors, and enforcement could be exercised without intruding upon State sovereignty. However, some caution was expressed in this respect in view of the specific legislative, budgetary and organisational issues related to the enforcement against public property.

### ***Disclosure of the debtor's assets***

45. In presenting this issue, *the Reporters for Subgroup 1* outlined the importance of information and communication technology for the purpose of enforcement, facilitating, for example, the access to different registries and their interconnections. *The Reporter for Subgroup 3* pointed out the connection of this topic with the Report of on the impact of technology on enforcement (Doc. 5) and more particularly with the part relating to the disclosure of the debtor's assets. The Report provided illustrations and presented the main legal challenges of using technology to gather information, namely: the respect of the debtor's right to privacy; the debtor's consent; the availability, accessibility and accuracy of the data; and the impact of automation on enforcement. Further issues concerned the hosting and administration of the system.

46. In the following discussion, experts noted that some jurisdictions still limited direct access to information regarding debtor's assets, particularly bank accounts. According to an observer, the Report might have addressed this issue more explicitly, following the model of the European Account Preservation Order Regulation. Other experts referred to examples of jurisdictions which had instituted central bank account holder registers, and jurisdictions which had set up execution case registries. Other experts, however, raised concerns in relation to the protection of privacy and data, and expressed a preference for placing an obligation to disclose relevant information on parties when requested by an enforcement officer. A number of participants suggested that access to digitally stored information should be differentiated, depending on the type of information (e.g., registries, or bank accounts) and/or on the requesting party (e.g., enforcement officer, or private parties). In relation to the protection of the private sphere, one expert suggested to use the functional equivalence between entering physical spaces such as business premises, and entering a digital space, such as a digital account, as a starting point.



47. *The Chair* echoed the comments in relation to the protection of data and indicated that the Working Group ought to be careful on how far it decided to go into this matter, as it appeared to be beyond the scope of the Best Practices project.

### ***The organisational aspects of enforcement***

48. In the interest of time, *the Chair* suggested to leave the part of the Report related to non-monetary execution measures aside and move on to the organisational and procedural issues. She recalled that Working Group participants were encouraged to send written comments on any part of the documents, including those that had not been discussed during the session.

49. *The Reporters for Subgroup 1* briefly presented the main issues and further outlined that the formulation of recommendations was a difficult process, since every country had different structures, traditions, and professionals. *The Chair* opened the debate on the choice between private and public organization of enforcement organs.

50. An observer highlighted that one of the shortcomings of state-based enforcement was that States were in principle unable to invest sufficient funds in the strengthening and development of their enforcement system, and the same was true for court-based enforcement systems. This constituted a difference compared to self-employed enforcement agents, where the fees received were used to increase quality and efficiency of the proposed service. Two other observers expressed caution with regard to mixed systems, as practice showed that one or the other authority would prevail in the end. One of the Co-Reporters for Subgroup 1, however, noted that mixed structures were not always organised along competitive lines and worked efficiently in a number of jurisdictions.

51. *The Chair* opened the floor on the centralisation or decentralisation of structures. *The Reporters for Subgroup 1* explained that there were two different systems: the first one relied on a central organisation deciding the steps to be taken, whereas the second did not rely on a central office, but rather on the organs themselves, which decided upon application of the creditor. They further pointed out that this section was interdependent with the section on Party driven or Ex Officio procedure, with platform and exchanges of data, as well as with the organisation of States as such. Finally, the Co-Reporters acknowledged that they were in favour of a more deregulated system.

52. *The Reporter for Subgroup 3* emphasised the relation with Doc. 5. She mentioned platforms, which could, among other things, work as organisational models and combine decentralised actors into the same structure to avoid duplication or exchange of data.

### ***Creditor's, debtor's and third party's remedies***

53. *The Reporters* briefly presented the recommendation to follow the modern trend and provide one uniform kind of remedy of the debtor against enforcement, while allowing the court to issue provisional measures in case of urgency.

54. A number of participants recognised the importance of the topic and were in favour of streamlining and simplifying the procedures. An observer expressed the view that the Best Practices should invite States to list the grounds for objections and appeals. Finally, he drew attention to the fact that the use of legal remedies should not automatically lead to the stay of enforcement proceedings.

55. Two participants queried whether the recommendation ought to make distinctions depending on the type of process, namely if a court was already involved in the enforcement process or if it was an out of the court process. Whether the setting up of specialised court could be a hurdle for States who did not have the flexibility to change the way their courts were organized was also questioned.

56. *The Deputy Secretary-General* noted that part of this issue would be treated from a different angle in relation to the Report of Subgroup 2 (Doc 4). She also took up a comment made by one expert in reference to the term "remedy" and asked whether the terminology could be revised to

avoid any misunderstanding. *The Reporters* agreed to do so since the term appeared to be too general.

***Pre-commencement party disposition; settlement after commencement***

57. *The Reporters* indicated that a distinction had been made between settlements before and after the commencement of enforcement, and that they were in favour of making recommendations concerning the latter situation. No comments were raised on this part.

58. An expert indicated that feedback from the Working Group would be welcome on the question of the use of automation, which had not been discussed. *The Chair* agreed to the importance of this issue and recalled that written comments could be submitted in case there was no time to discuss during the session.

59. *The Chair* thanked the Reporters of Subgroup 1 and adjourned the session to the next day.

**Item 4. Consideration of work in progress:**

**(b) Report of Subgroup 2 on enforcement of security rights (collateral)  
(Study LXXVIB – WG 2 – Doc. 4)**

60. In welcoming back all participants, *The Chair* noted that the third day of the session would be devoted to the discussion of the Report of Subgroup 2 (Doc. 4) and to the organisation of the future work. *The Deputy Secretary-General* recalled that the Secretariat had circulated the content of the chat as well as the documents shared by some experts for consideration by the Working Group. *The Chair* invited the focal point for Subgroup 2 to present the report on the enforcement of security rights (collateral), thanking him and the whole Subgroup for all the work done in the preparation of the session.

61. *Professor Neil Cohen* (Reporter), introduced the Report of Subgroup (Doc. 4). He noted that the existing rules governing enforcement of security rights were typically very closely interrelated with the substantive law of secured transactions, and placed in the same body of law that contained the substantive law governing security rights. Accordingly, he highlighted that one of the challenges for the Working Group had been to determine the boundaries between substantive and enforcement law, an issue the Report attempted to address for each topic.

62. Regarding terminology, he noted that that the original title of Subgroup 2 had been “Enforcement of Secured Claims”, and that the Subgroup had proposed a change in the title to distinguish the claim from the security right that secures the claim. As explained in the Report, the term “security right” was used for consistency with the UNCITRAL Model Law on Secured Transactions (2007) and related instruments.

63. The Reporter referred to the large number of relatively recent instruments already issued by intergovernmental organisations in the area of secured transactions, particularly those promulgated at global level by UNCITRAL (UNCITRAL Legislative Guide on Secured Transactions (2007); UNCITRAL Model Law on Secured Transactions (2016)), as well as the Cape Town Convention and its Protocols adopted by UNIDROIT. All those instruments contained some form of treatment of enforcement of security rights. In this regard, the position taken by the Subgroup had been that the rules already developed in such instruments should be treated as presumptively valid when addressing issues within the scope of the project, and that the Working Group would bear the burden of justifying any inconsistencies between the recommendations of the Working Group and those of prior instruments which had achieved consensus through intergovernmental negotiations. It was explained that the justification for deviating from such instruments should be more robust than merely stating that the Working Group disagreed with the earlier decision. It was flagged that any inconsistencies between the recommendations of the Working Group and those in the prior

instruments should be justified by arguments based on, e.g., changed circumstances, experiences on the ground suggesting that practices incorporated in previous instruments were not workable, or evolving views in a significant number of States, among others.

64. The Reporter for Subgroup 2 highlighted that this would not diminish the importance of the task of the Working Group. On the one hand, the goal of Subgroup 2 was to identify best practices that would apply to the enforcement of security rights, not only in States that had reformed substantive secured transactions law in line with UNCITRAL's recommendations (or whose law was already aligned with those recommendations), but also in other States which might still consider reforming enforcement practices so that they better match the economic and social policies of secured transactions. Thus, it was noted that Subgroup 2 had looked to UNCITRAL for guidance and precedent, but not necessarily as a rigid framework for the method of presentation of best practices in the area of enforcement. Moreover, it was flagged that many of the UNCITRAL standards concerning enforcement could be characterised as somewhat vague and open-ended rather than providing detailed guidance. Accordingly, Subgroup 2 had seen its task as including basic principles adopted in previous instruments and, where appropriate, going beyond those precedents mostly to add detail or address issues that had not been addressed.

65. Furthermore, the Reporter for Subgroup 2 explained that the Subgroup had primarily focused on security rights in movable assets, since the substantive law governing those security rights had been subject to extensive work on harmonisation and modernisation by UNIDROIT and its sister organisations; this had led the Subgroup to believe that international best practice standards regarding enforcement of those security rights might prove more acceptable than international best practice standards for enforcement of rights in immovable assets, in relation to which many states had solid local policies which were quite protective. It was also noted that the Subgroup had not devoted significant attention to issues that were unique to consumer transactions, whereas these matters had been briefly addressed in some parts of the Report.

66. Regarding the working method, he noted that the Report contained a list of practical questions and sub-questions and that five teams of Subgroup members had provided specific reports on groups of questions. The answers consisted in proposals for recommendations of best practices and did not include justification behind these recommendations. This approach, which differed from the Report of Subgroup 1, did not purport to offer a finalised structure of the best practices, but had been considered the most appropriate to start the discussion for this part of the project. Three of the sub-reports had been extensively discussed within the Subgroup (Annexes A, B and D); another had been drafted but not yet thoroughly discussed (included for completeness and information in Annex C); and one had deliberately been left to a later time (Question 3 c) on digital assets).

***Doc 2, Annex A: Recommended best practices for obtaining possession of tangible collateral***

67. *Professors Teresa Rodriguez de las Heras Ballell and Neil Cohen, as team Co-Reporters, gave an introduction to Annex A, Recommended best practices for obtaining possession of tangible collateral. Firstly, they referred to the recommendations on the right of the creditor to obtain possession of a tangible collateral after default, without applying to a court or other authority and without the need to first obtain a judgment, and explained that those rules had been inspired by existing international standards, such as the ones contained in the UNCITRAL Legislative Guide, Model Law and regional instruments. Concerning the first element – "(a) circumstances under which the secured creditor may exercise this right" – they noted that this element, inspired by Art. 77 of the UNCITRAL Model Law, was divided into three main components, which, in summary, required: (1) an agreement by the grantor, in writing; (2) prior reasonable notice of default given by the grantor (except in specific and well determined circumstances); and (3) respect of any additional measures related with consumer protection. For the second element of this first set of recommendations – "(b) conduct of the secured creditor in exercising this right" – the Subgroup had suggested a formulation that crystallised a standard of conduct, within the general concepts of*

“breach of the peace”, or “breach of public order”, or other similar concepts aiming at avoiding any action by the secured creditor that would be considered invasive, intrusive, or harmful. Moreover, the Subgroup’s proposal was that the law should consider addressing whether and to what extent the parties may agree, before or after default, within reasonable limits, on concrete acceptable methods of obtaining possession of the collateral. It was highlighted that those recommendations were to be considered additional to the contents of existing international instruments, such as the UNCITRAL Model Law.

68. In the ensuing discussion, several points were raised, and were addressed by the Co-Reporters in their subsequent clarifications and comments. One observer noted that the recommendation under (a)(2) placed extreme reliance on debtor’s cooperation, as the requirement of giving prior notice could entail, in practice, the risk of the disappearance of the collateral. It was therefore suggested that language could be inserted to protect the creditor, which was a solution already accepted by many jurisdictions particularly in relation to the use of provisional measures. The Co-Reporters noted that this question had been heavily debated during the development of the UNCITRAL instruments, and that some exceptions to the general rule had already been envisaged. They suggested that this point would be particularly important when addressing expedited procedures and their connection to provisional measures. Another comment in relation to the requirement of prior notice was to consider clarifying how notice should be given, in order to avoid the uncertainties in this regard which arise in practice in some jurisdictions.

69. It was also suggested that this part could be more openly linked to the subsequent recommendations on how to dispose of the collateral after repossession, valuation of tangibles and accounting for any surplus. The Co-Reporters noted that these questions had been addressed in Annex B, and that cross-references would be helpful. In response to the additional suggestion that the recommendations ought to expressly mention creditors’ representatives or agents, which played a very important role in practice, the Co-Reporters noted that they were already included in Recommendation 1(c)(1), but that an express and more detailed statement regarding this topic might be useful. In connection with the possibility of creditors to avail themselves of representatives or agents, the critical role that could be played by enforcement agents and bailiffs was noted by two observers. In this regard, the existence of different standards applicable to enforcement agents in relation to obtaining possession was flagged, as well as the potential connections with the work of Subgroup 1.

70. Working Group participants further discussed the concepts of “breach of the peace” and similar concepts present in various jurisdictions as a standard for creditor’s action in obtaining possession of tangible assets. It was noted that, while such general concepts were accepted in all legal systems, their interpretation and the extent of parties’ autonomy varied depending on the jurisdiction. One expert mentioned that the prohibition of the direct exercise of force against possessors was a fundamental principle, which entailed a monopoly of the State, and thus, a direct exercise of force by a private person (legal entities and private persons alike) should not be permitted. In agreeing with the general principle of the prohibition to exercise direct force by creditors against debtors, and with the need to be sensitive to policy concerns about the exercise of intrusive acts such as taking possession, the Co-Reporters noted that para. (b)(1) should be consistent with, and respectful of, this fundamental principle. They also noted that thoughts could be given to the opportunity to make additional examples of inadmissible behaviour. *The Chair* referred to the consent requirement in para. (a)(1) as an additional limitation.

71. One expert, referring to the relationship between paras 1 (b)(1) and 1(a)(1), suggested that the agreement of the parties could extend to specific procedures or a specific manner in which the creditor could exercise this right, thereby concretising the requirement in para 1(b) (1). The Co-Reporters agreed that this was a fundamental issue, and that if the recommendation in para. 1(b)(1) were not considered sufficient, it would be advantageous to be more explicit on this point.

72. The Working Group further discussed whether the best practices should distinguish between categories of creditors, granting institutional investors such as banks (that are subject to regulatory constraints) stronger rights to exercise extra-judicial enforcement than those granted to other creditors. Several other experts however did not support the introduction of a privileged position for a specific class of creditors, mentioning that this could negatively affect the supply side of credit and more generally competition in credit markets. The Co-Reporters noted that the Subgroup had not recommended such a distinction and had assumed – following the model of the UNCITRAL instruments – that these provisions should be available to all parties. The comments to the best practices, however, could contain a reference on the pros and cons of limiting extra-judicial repossession to specific categories of creditors. Another issue in relation to the definition of “secured creditor” regarded the inclusion of State creditors in the scope of the recommendations; it was noted that this question had not been addressed yet by the Subgroup, but could be discussed in future work.

73. In thanking the participants and the Co-Reporters for a fruitful exchange, *the Chair* invited the Working Group to consider that a number of the policy points that had been raised had been addressed in the negotiations leading to the approval of the UNCITRAL *Legislative Guide*, and the Reports of these sessions could provide helpful material.

74. The *Co-Reporters for Annex A* briefly referred to para. 1(d) of the Annex, noting that this recommendation contained an option for legislators to consider whether, as an instance of the general obligation of good faith, the secured creditor should be obliged to take possession of those items that did not exceed the “repossession value” (i.e., that did not exceed the amount of the secured obligation) when there were multiple items of collateral. The Co-Reporters further noted that there were points of contact with the issue of proportionality of the enforcement discussed in the context of the Report of Subgroup 1. The Co-Reporters clarified that the obligation of proportionality could be included and more specifically defined by the parties in their contract, but should also be applicable when parties did not expressly include it in their agreement.

75. The Co-Reporters then moved to Recommendation No. 2 of Annex A, regarding the right of a secured creditor to obtain possession of tangible collateral after default by order from a court or other authority. After pointing to para. (b), which listed the reasons why a creditor may wish to opt for this route, the Co-Reporters focused the attention on para. (c) on expedited procedures, which could offer creditors an alternative way to obtain effective enforcement should extra-judicial repossession not be available or feasible. It was noted that this set of recommendations, and particularly the part on expedited procedures, went beyond existing international instruments.

76. *The Chair* opened the floor for discussion on this topic. Comments ranged from the need to consider the application of a different rule when the collateral is in the possession of a third party, to the meaning of the expression “temporary order” and the consequences for the disposition of the collateral of such an order, to the meaning of the expression “credible evidence of default” and the difficulty, if not impossibility, in bringing evidence of a negative fact, as in this case. The Co-Reporters recognised that they had not addressed the first point and would do so. They further clarified that the expedited procedure entailed different phases, starting with a temporary order by the court for the prevention of the disposition of the collateral, which would require credible proof of the existence of the obligation and of the debtor’s default; this phase could be followed – after the lodging of an opposition by the debtor, if any, and a hearing of the debtor – by an order for the delivery of the collateral; the last phase would see the court’s power to realise the value of the collateral. They finally agreed with commentators that the language used to refer to the standard of evidence might give rise to concerns and not capture the flexibility that the recommendation was aiming to achieve.

**Doc 2, Annex B: Recommended best practices for realising upon collateral without judicial process**

77. *Richard Kohn and Fábio Rocha Pinto e Silva* (Co-Reporters of the team for Annex B) presented the first set of recommendations in Annex B.

78. In the ensuing discussion, *the Co-Reporters* clarified that this part was meant to apply both to tangible and intangible assets. The team had focused, for the time being, on movables, though some comments referred to the disposition of immovable assets. The Co-Reporters further noted that the proposed best practices had largely been based on the UNCITRAL models, but introduced additional details when they had deemed it appropriate to do so. The best practices intended to maximise flexibility for the parties in relation to the choice of disposition of the collateral, subject to certain requirements.

79. Several comments were made on the notice of disposition by the creditor and the identification of the parties that would be entitled to receive such notice. The Co-Reporters underlined the importance of these rules for effective enforcement, and pointed to the limited exceptions to the notice requirement (when the collateral is perishable or is the subject of a recognized market). They also clarified that this notice related to all acts of disposition, both for tangibles and intangibles. In the ensuing discussion, it was suggested to add the judgment creditor who made an attachment on the collateral to the list of those entitled to receive the notice. Another question regarded the reasons for the provision of a timeframe for the search of the registry on the part of the creditor. The Co-Reporters explained that they had introduced a distinction between States that had a secured transaction registry and those that did not; this part of the recommendation applied to States that had a secured transactions registry and was aimed at ensuring a fair treatment of creditors, creating a “safe harbour” period. An observer suggested to make express reference to the registry which would have competence within a State in respect to a specific type of asset, if that State did not have a centralised all-encompassing secured transactions registry. In relation to the timeframes for notice in general, and in answer to comments, the Co-Reporters noted that they had proposed that the best practices, differently from the UNCITRAL instruments, should contain a specific timeframe rather than leave States free to decide on this matter, and should further allow parties to agree on a time for notice, which should, however, not be less than a specified number of days. As to the form of notice, experts suggested that the best practices should refer to the use of electronic notices, especially when already permitted in other contexts within enforcement/civil procedure.

80. Moving onto the next set of recommendations regarding the ways of disposition of collateral, the Co-Reporters explained that the aim of the provision was to offer maximum flexibility to the creditor (and to parties) as to the time, place, and manner of disposition, subject to certain requirements. They clarified that they had included the option of a “public auction” even if the recommendation dealt with a non-judicial process, in order to offer this alternative to creditors, which might be appealing especially in States that offered an expedited judicial enforcement procedure. One observer suggested that public sales were not necessarily conducted under judicial supervision but could be supervised by an enforcement agent. It was further suggested to include the right of the secured creditor to purchase at a public sale by using its debt as currency (credit bidding).

81. An expert asked whether the same provision on proportionality that had been discussed in relation to Annex A should also apply to the choice of collateral for the purpose of disposition, in cases where more than one asset was involved. The Co-Reporters highlighted that the standard of commercial reasonableness mentioned in the recommendation, and imposing a very high standard of conduct for the creditor, could be used more generally for different situations. In relation to the standard of commercial reasonableness, particularly as applied to the price obtained in a sale, one observer queried whether an independent third-party evaluation was advisable. The Co-Reporters referred to their comments on this point in Annex B, recommendation 7, however noting that in many circumstances this third-party evaluation might be superfluous. More generally, the desirability

of introducing further examples of commercially reasonable, and unreasonable, behaviour was voiced.

82. The Co-Reporters went through the remaining recommendations and questions. *The Secretary-General* noted that there was a need for coordination with the recommendations regarding post-adjudication enforcement (Subgroup 1) in regards to the relationship between senior and junior creditors. As to recommendation 14 – which addressed the situation where the secured creditor may, in the interest of the grantor, but only by agreement with the grantor given at any time after default, retain the collateral in full or partial satisfaction of the secured obligation, rather than disposing of the collateral - one expert flagged that there was an alternative suggestion in Annex D, which was to be discussed later in the session.

83. In summarising the discussion on Annex B, and thanking the Co-Reporters for their presentation and clarifications, *the Chair* noted that the recommendations had generally met with favour, and that Subgroup 2 would consider all comments and suggestions raised during the discussion.

***Doc 2, Annex D: Recommended best practices for the variation of the rules governing realization of collateral***

84. *Professor Felix Steffek*, Reporter for Annex D introduced the Annex noting that these recommendations gave relevance to private ordering and distinguished contracts between commercial parties from consumer contracts. With regard to the first recommendation (commercial parties), Annex D presented some innovative ideas as compared to existing international standards, such as those contained in UNCITRAL instruments on secured transactions. Annex D clearly indicated where the recommendations deviated from UNCITRAL work, and provided economic justifications for such variations. Instead of prohibiting certain agreements before default, the recommendation included general principles that would limit the exercise of party autonomy: no contradiction with commercial reasonableness; no infringement of legitimate third-party interests; no disproportional costs to public institutions involved in the process of realization. As to the second recommendation (consumer contracts), the Reporter highlighted that such a rule, which was consistent with UNCITRAL's work, would be useful even in the context of commercial loans between a financial institution and a commercial borrower that might be secured by a consumer's asset.

85. In the ensuing debate, it was queried why recommendations 3 and 4 used a different language to refer to the standard of conduct (commercial reasonableness; duty to act reasonably and in good faith). Furthermore, the question as to whether commercial reasonableness included proportionality, as discussed in relation to Annex B, was raised. Clarification of the meaning of legitimate third-party interests was also requested. More generally, experts questioned the acceptability of a rule permitting parties to contract out of the enforcement legal framework to such an extent, especially in light of the animated intergovernmental discussions that had accompanied this issue within UNCITRAL, and the mandatory nature of most enforcement provisions in many legal systems. As an alternative, it was suggested that the examples mentioned in Recommendation No. 1 be considered as possible options that enforcement laws could offer to parties in relation to enforcement of security rights.

86. In summing up the debate, *the Chair* noted that Subgroup 2 was invited to reflect on the outcome of the discussion in reconsidering the recommendations in Annex D. She further noted that similar discussions had taken place during the elaboration of UNCITRAL's instruments and highlighted that they reflected the need to provide a balance between different approaches to the extent of party autonomy in enforcement. It was also a question of finding an appropriate balance between the economic objectives and the acceptability of the text.

**Item 5. Organisation of future work**

87. *The Deputy Secretary-General* noted that the Working Group had provisionally agreed on 29 November to 1 December 2021 as the dates for the third Working Group session. It was hoped that the third session could be organised as an in-person meeting at UNIDROIT headquarters in Rome. Because of the difficulty to predict the evolution of the current pandemic, however, the option of a hybrid or entirely virtual meeting could not be excluded *a priori*.

88. She further noted that the topic of enforcement on digital assets had not been addressed yet by the Working Group, but that Subgroup 3, in coordination with the other Subgroups, would have to consider it for the next session, bearing in mind that this work should also be coordinated with the UNIDROIT project on digital assets and private law. In this regard, an observer referred to the projects undertaken by ELI on digital assets as a security, and by the UIHJ on, among other, digitisation of enforcement, the latter of which would be published at the next UIHJ international Congress in Dubai.

89. *The Deputy Secretary-General* expressed the Secretariat's strong wish that the Working Group continue with its very fruitful intersessional work, in view of the long period of time between the current session and the next one. The Subgroups were informal and their structure, and composition and scope could be modified, if the Chair and the Working Group so preferred. It was also suggested that some issues could be prioritised in order to maximise the outcome of the next session of the Working Group.

**Items 6 and 7. Any other business. Closing of the session**

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



**ANNEX 1**

**Second Meeting of the UNIDROIT Working Group  
on Best Practices for Effective Enforcement  
Rome, 20 – 22 April 2021**

**AGENDA**

1. Opening of the session and welcome by the Chair of the Working Group and the Secretary-General
2. Adoption of the agenda and organisation of the session
3. Update on intersessional work and developments since the first Working Group session (Study LXXVIB – W.G.2 – Doc. 2)
4. Consideration of work in progress:
  - (a) Report of Subgroup 1 “post-adjudication” enforcement (Study LXXVIB – WG 2 – Doc. 3)
  - (b) Report of Subgroup 2 on enforcement of secured claims (collateral) (Study LXXVIB – WG 2 – Doc. 4)
  - (c) Report of Subgroup 3 on the impact of technology on enforcement (Study LXXVIB – WG 2 – Doc. 5)
5. Organisation of future work
6. Any other business
7. Closing of the session

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