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

***Third meeting (hybrid)*
Rome, 29-30 November – 1 December 2021**

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REPORT

1. The third session of the Working Group established to prepare Best Practices for Effective Enforcement (hereafter: the “Working Group”) was held in a hybrid format (in person in Rome and remotely via Zoom), between 29-30 November – 1 December 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 Secretary-General* opened the session and welcomed all participants. He noted that much intersessional work had been done in preparation for the session and thanked the Chair and all the members and observers who had contributed to this achievement and to the extensive agenda to be discussed.

3. *The Chair* expressed her regret for being unable to join the session in person in Rome. She echoed the Secretary General’s reference to the rich agenda for the third session of the Working Group, and noted that much progress had been made since the first Working Group session, which had addressed the scope of the project, and the second Working Group session, which had addressed several substantive issues. This had been achieved thanks to the remarkable work conducted by members and observers as well as the Secretariat in several virtual meetings in which she herself had participated during the intersessional period.

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

4. *The Chair* introduced the organisation of the session and noted that the core part of it would be devoted to in-depth discussions of specific topics that required the input of all three subgroups. The selected topic for the initial discussion was the impact of automation on enforcement proceedings over a third party debt (receivable), which was the subject matter of Agenda Items 4 (a) (i) and (ii), and (b). After that the Working Group would be invited to consider, time permitting, additional issues of the Report of subgroup 1 that had not been adequately addressed at the second session (Agenda Item 4 (c), specifically Doc. 3, Annex 1, parts IV 1 (c) and (d)) as well as additional issues in the revised Report prepared by subgroup 2 on enforcement of security rights (Agenda Item 4 (d)). The Chair finally explained that, pending the preparation of a specific document on enforcement on digital assets, this matter could be taken up under Agenda Item point 4 (c) (Doc 3, Annex 1, part IV 1 (d) complex enforcement) but a more thorough discussion would have to be deferred to a later time.

5. The Agenda with its annotations was unanimously adopted with the correction of a clerical error.

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

6. Upon invitation by *the Chair*, the Deputy Secretary-General referred to Doc. 2 on intersessional work and developments since the second Working Group session. This document contained an update of the Issues Paper (Study LXXVIB – W.G.2 - Doc 2) that had been presented at the second Working Group session.

7. In relation to Preliminary Matters, Format of the instrument and Terminology and Translations, she noted that those paragraphs contained the preliminary decisions taken by the Working Group on such matters and had been flagged as a reminder for future discussion. As regards 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 Inchausti and Rolf Stürner as focal points); (b) Subgroup 2 on enforcement of secured rights (Neil Cohen as focal point); and (c) Subgroup 3 on impact of technology on enforcement (Teresa Rodríguez de las Heras Ballell as focal point). The Subgroups had set up an intense working schedule, the outcome of which were the Reports included in Docs 3, 4 and 5 that had been presented for consideration at the (second and) third session of the Working Group. She recalled the need for coordination between the groups and underlined the work that had already been undertaken in this direction. She finally referred to the work the Secretariat had undertaken with the support of the EBRD to set up two Questionnaires for experts coming from various jurisdictions, one general and one specifically related to technology and enforcement.

8. *The Chair* thanked the Secretariat for the helpful Report contained in Doc. 2.

Item 4 Consideration of work in progress:

Item 4 (a) (i) - Report of Subgroup 1 – Study LXXVIB – W.G. 3 – Doc. 3, Annex 1, part IV 1 (b) (Third Party Debt Orders or Garnishment Proceedings)

9. *Fernando Gascón Inchausti* and *Rolf Stürner* (Reporters of Subgroup 1) noted that although Document 3 had already been presented during the previous Working Group session, further input from the plenary was needed in order to proceed with the work. They suggested to address the topic of third party debt orders or garnishment proceedings in view of its practical relevance, and to combine it with the special focus on the use of automation contained in Document 4, Annexes 1 and 2, which had resulted from their coordination with the focal point of subgroup 3.

10. Addressing the more general points on third party debt orders listed in Document 3, they began by posing the question of whether or not the sale of the receivable should be permitted as an alternative method of enforcement, generally upon creditor's choice and not only in special cases.

11. In the ensuing discussion, it was noted that the sale of a receivable could be part of different processes. It could be an action of an enforcement agent or other authority in an enforcement procedure against the debtor, by attaching a receivable (third party debt) included in the debtor's assets; it could be an alternative way for a creditor to dispose of a receivable that is the collateral in a security agreement; it could be part of a factoring operation, where the receivable is sold by the account creditor (the creditor of the claim) either with or without recourse, and usually at a discount. One expert warned that in the first situation there would be technical issues in the selection and evaluation of the asset, as well as a potential loss in value when selling the claim as opposed to collecting payment. Others pointed out that a creditor might prefer the sale (outright assignment) of a receivable in certain situations (such as underperforming debt, when the account debtor is not in

a position to pay immediately; or the case of a long-term debt that is not yet due, where the enforcing creditor might prefer to receive (part of) its value in advance). It was also noted that there would be similarities with enforcement on other assets by way of sale.

12. There was consensus that sale (outright assignment) of the receivable could be an alternative method of disposal for the enforcement agent or other enforcing party alongside the collection of the debt. The Reporters were invited to consider the outcome of the discussion in drafting best practices and explanatory comments to them.

13. *The Reporters* moved on to the question of whether the best practices should expressly endorse the principle of priority or the principle of equality of creditors. They introduced the issue referring to the comparative overview in the Report and the pros and cons of the two systems, concluding that their choice would be for a priority principle, also considering the potential application of automation to these proceedings. The Chair opened the floor for discussion. There was agreement that in general, the rule of priority would be more advantageous. At the same time, it was noted that automation would work well in some cases even with the equality principle, and that the principle of priority might have an adverse effect (e.g., create a race to enforcement). One expert suggested that it would be helpful to gather more information on the practical effect of the principle of priority on creditors' behaviour. Whether or not a specific best practice on this matter would be needed in the instrument was also questioned, in light of the fact that there would be no problem to the extent that assets were sufficient for all creditors. Should that not be the case, the debtor would be insolvent and thus the substantive law of insolvency would apply to determine priorities among creditors (usually with equality as point of departure).

Item 4 (a) (ii) (1) - Report of focal points of Subgroups 1 and 3 for the third session (Study LXXVIB – W.G.3 – Doc 4 - Annex 1): Paper on necessary steps in the enforcement of monetary claims by third party debt orders to integrate automation

14. *The Deputy Secretary-General* explained the methodology and structure followed in Study LXXVIB – W.G.3 – Doc 4, which had resulted from the cooperation between the focal points of subgroups 1 and 3. She recalled that this document contained a "test case" regarding the interplay between enforcement procedures and automation, with particular focus on enforcement of monetary claims by third party debt order. Annex 1 was a preparatory paper with the aim of understanding where automation should play or already played a role in enforcement procedures. Annex 2 had been prepared on the basis of Annex 1 and contained general and specific draft recommendations on the subject. Neither document should be understood as suggesting a finalised order in the treatment of issues regarding automation in enforcement.

15. *The Reporters of Subgroup 1* presented Annex 1, summarising the different steps of the enforcement procedure in which technology could, or did, play a role. First, enforcement had to start upon application of a party. In this respect, it was noted that creditors would be expected to have varying degrees of digital literacy, which may warrant a different treatment of commercial creditors or creditors assisted by a professional as opposed to individuals. Secondly, the debtor of the receivable (third party debtor or account debtor) had to be informed of the existence of an enforceable title, which would require the existence of an electronic registry where all enforcement titles are registered regardless of when they are produced. It was further noted that registration of such enforceable titles would presuppose a decision on which types of enforceable titles were considered to be registrable, which was a question that had been discussed and had remained open during the second session of the Working Group. In an automated system, the next step would be an automatically generated attachment order notified to the debtor (creditor of the receivable) and to the account debtor. Finally, the system had to allow a period of time for the debtor or account debtor to react and challenge the enforcement before it was carried out automatically. If challenged, enforcement was to be interrupted entailing the possible end of the automated process. In the absence of a challenge, the automated process would be carried out and the amount due would be transferred automatically from the account debtor to the enforcing creditor.

16. In the ensuing discussion, the functional approach of the paper was considered to be useful. It was suggested that there would be an additional step to consider, i.e., provide information that the claim had been satisfied once the system had successfully completed the steps. *The Reporters* noted that this would reverse the usual burden of proof on the debtor. *The Chair* suggested to find suitable examples of how this issue is regulated in practice in existing automated systems.

17. Another issue presented by *the Reporters* concerned the need for the creditor to access information on the debtor's assets. They emphasised that such information was often difficult to obtain in current legal systems, and access to it would be facilitated by the use of an interconnected platform to gather information from banks, social security and tax authorities etc. This topic elicited an ample discussion within the Working Group, which raised the questions on how, to what extent, and when, information should be accessible. It was highlighted that information on the debtor's assets (e.g., bank accounts) should be available in advance, so as to allow a judicial officer to decide on the enforcement action (such as in the automated pre-enforcement phase that had been introduced in one jurisdiction). *The Reporters* said that situations where the creditor is already in possession of the information should be distinguished from those where the creditor is not and would have to apply to the enforcement authorities, with different results depending on the legal system.

18. A more general issue discussed by the Working Group was compliance with privacy and fundamental rights in this context. In this respect, the question was raised of whether the debtor would be obliged to fully disclose all its assets outright, as opposed to this obligation falling only as a second step (after a first attempt to enforce). Whether or not parties should be allowed to use their contract to vary the obligations to disclose information was also questioned, as was the appropriateness of including sanctions for non-compliance of the debtor. Some experts suggested introducing an option for the debtor to choose to provide information on certain assets only, to avoid undue intrusion on the debtor's privacy. Other experts, however, argued that this could affect the effectiveness of the enforcement, as the debtor might strategically choose to disclose assets against which it was difficult to enforce.

19. There was general agreement that this fundamental issue was not exclusive to automation but would be exacerbated by it in this context, due to the additional risks for the debtor's privacy because of information stored in registries accessible to a wider audience, or in the case of enforcement on specific assets such as digital assets. Moreover, problems could ensue because of the automated and potentially irreversible enforcement on certain assets on the basis of the information provided by the debtor or/and available to the automated enforcement system. It was also highlighted that of the issue was addressed in one of the recommendations proposed in Annex 2, which suggested a possible balance between the need to provide information and that of ensuring protection of debtor's privacy. In conclusion, *the Reporters* highlighted that the system should avoid putting non-performing debtors in the privileged position of choosing whether, and to what extent, to provide information, but should at the same time ensure adequate protection of debtor's data.

Item 4 (a) (ii) (2) - Report of focal points of Subgroups 1 and 3 for the third session (Study LXXVIB – W.G.3 – Doc 4 - Annex 2): Paper suggesting best practices for automation in the enforcement of monetary claims by third party debt orders

20. *The Chair* gave the floor to *Teresa Rodríguez de las Heras Ballell*, Reporter for Subgroup 3, who explained that Annex 2 contained five general recommendations on automation, followed by more specific automation recommendations that followed the steps described in Annex 1. She described the scope of "automation" as not being limited to the use of electronic means to submit documents and send and receive communications, but extended to cover algorithmic decision making including the use of artificial intelligence.

21. The general idea in the first recommendation was to introduce a higher threshold of protection for individual parties that were not legally represented. While there was general support for the proposal, in order to give a clearer recommendation to legislators, there was a discussion on

whether the best practices would have to be more detailed or if such a level of generality would be the only achievable outcome. There was consensus that more details and concrete examples could be provided, at least in explanatory commentaries to the best practices; an expert, however, suggested that even a general provision should contain some guidance on how the full exercise of rights of parties would be protected, e.g., through more specific provisions on notifications. In this regard it was noted that it would be appropriate to distinguish between debtors that would be legally required to participate in an automated system (e.g., commercial enterprises, professionals) and individuals who would not be under such an obligation. It was further suggested that the best practices should provide incentives for debtors to be registered or otherwise formally recognised in the case of commercial parties. This would entail having electronic access and traceability, a formal recognition which was not yet widespread in many emerging markets. The need for the instrument to refer to this issue and to possible practical solutions at some point was highlighted. One expert noted that electronic service would have to be treated differently than general electronic communications, and would require a confirmation of receipt in order to be effective, in application of the general rules for service, and by way of protection against potential failures of electronic communication. Another expert noted that if a party had the choice of opting into an automated process, it would usually bear the responsibility of being reachable through the means provided by the automated system. In practice, participants opting into automated decision-making processes are often not legally represented in a traditional sense, however this would not necessarily entail the need for special protection if there were no issue of access to justice. Yet another expert warned that opt-in mechanisms could conceal a lack of choice (e.g., in the case of adhesion contracts with consumers).

22. *The Reporter* acknowledged that the principle embodied in the first recommendation was expression of a general policy that could be accompanied by more detailed suggestions, not necessarily however in the black letter rules. She also specified that the best practices only covered automated proceedings, and not simple electronic communications. Referring to later recommendations, particularly on notifications, she noted that on the one hand one could rely on existing best practices already developed at international level (e.g., UNCITRAL instruments on electronic commerce), on the other hand one should consider all existing and now prevailing technological alternatives in the context of automated proceedings (e.g., digital accounts instead of more traditional communications sent by one party and received by the other). The Reporter acknowledged the importance of protecting parties in specific circumstances.

23. The Working Group went on to address the issue of whether the debtor should be granted the right to object to the use of full automation affecting its rights. *The Reporter* noted that this was not a novel issue (e.g., it was covered in European legislation on the protection of data) but that granting an unfettered right to object to the use of automation when it was generally applied might not work if there were no reasonable alternatives (e.g., if the legal system had moved to totally automated proceedings).

24. *The Reporter* addressed the second recommendation, which was specifically linked to an automated system. The operator of the system should ensure that the user be aware that it was interacting with an automated system with no human intervention. It was noted that the recommendation referred only to the existence of an automatic procedure and not to its functioning. The recommendation was generally accepted, however was suggested that it should be made clear when notices or information were to be provided. An expert noted that in automated proceedings of attachment of receivables, an agreement would usually be concluded in advance as to all aspects of the automation (its use, its specific functioning, the time of inception...).

25. *The Reporter* then moved to the third recommendation on the identification of parties. The purpose of this best practice was to ensure that parties were duly identified through a reliable and appropriate method. For example, requiring electronic signature or complex biometric identification would not be appropriate in all circumstances, if a simpler and more trustworthy alternative could be adopted. While there was unanimous agreement on the substance, the recommendation was

considered to be too general by some experts, who called for more granularity in the best practices themselves. The Reporter however expressed a concern that there would have to be an excessive level of detail in the black letter provision, making it difficult to draft a technologically neutral text, and suggested that more detailed illustrations and examples should be included in the commentary in this specific case. One of the experts suggested that the comments could be structured in such a way as to facilitate visibility of such content.

26. *The Reporter* went on to illustrate the more specific recommendations based on Annex 1, starting with the automated generation of the attachment order (step 3). First of all, if the attachment order were automatic, it should ensure that the system incorporated reference to all rights or preferences or exceptions deriving from substantive or procedural law. According to the Reporter, the best practice should not restate such rights or preferences as they would depend on the applicable law but should impose that the system be designed in such a way as to take them into account before issuing the attachment order. Secondly, the system should include expeditious complaint-handling mechanisms to mitigate the risk of errors in a potentially irreversible situation, for example review processes. Finally, in the case of automation the law should provide liability rules for damages and losses caused by automated decision-making, as a new recourse procedure within the system itself.

27. The discussions revealed differences of interpretation by the experts, and a general agreement on the need to reword certain expressions in the recommendations. From a substantive point of view, it was queried whether an automated system could really include all the legal provisions that should be considered, particularly since the current text of the black letter rule did not recognise that the burden of raising certain objections or defences under procedural law might lie on different parties (e.g., the debtor itself). Other experts read the first and third best practice as a way to ensure full compliance with any applicable domestic law, making it clear that an automated system would not be placed outside of the generally applicable substantive or procedural rules, while in the second recommendation on complaint-handling mechanisms they identified an innovative element providing an ad hoc protection of the parties in automated systems. *The Reporter* agreed that the recommendations could cover different situations and that a new formulation could be useful; it additionally noted that a distinction was to be made between recommendations that did not purport to modify existing rules from those providing additional protection required due to the automated nature of the proceedings.

28. Next, the Working Group discussed the special provision on the possibility for the debtor or the third party debtor to challenge the attachment order (step 4). To that end, *the Reporter* noted that a number of steps would be appropriate from a technological point of view: (i) the debtor and third party debtor should be notified; (ii) the third party should be notified before the debtor in order to avoid abusive or opportunistic behaviour by the debtor; (iii) a mechanism to challenge the attachment should be implemented and available; (iv) the system should be programmed to delay the effectiveness of the attachment order until a specific period had elapsed without challenge. The ensuing discussion focused on the benefits and potential risks of granting a period of two weeks before the attachment order became effective, in order to avoid irreversible effects for the parties involved.

29. To conclude, *the Reporter* presented the general best practice on human oversight and human review (recommendation E). In the ensuing discussion, it was agreed that the drafting of the recommendation should be more articulated and clarified in order to avoid misunderstandings. In particular, it should be clarified that the recommendation did not purport to introduce specific rights to individuals to raise objections interrupting the automatic process, but worked at a more general level, referring to oversight at systemic level to avoid such risks as unexpected, unpredictable or discriminatory outcomes. It was further noted that the term “human intervention or oversight”, based on the EU legislative terminology, was not sufficiently clear, as it could be construed to be referring to the building of the algorithm and the auditing of its results, or to imply human intervention on the computational aspects informing the decision.

Item 4 (b): Special focus on enforcement of security rights over receivables and automation (Report of Subgroups 2 and focal point Subgroup 3 - Study LXXVIB – W.G.3 – Doc 5, Annex C)

30. *Neil Cohen, Reporter for Subgroup 2*, was asked to present Annex C of the Report of Subgroup 2 on enforcement of security rights over receivables and automation (Study LXXVIB – W.G.3 – Doc 5). Document 5 was the result of the intense intersessional work of the subgroup members and observers, and Annex C had been developed in coordination with the focal point of Subgroup 3 for the part on automation. At the outset, he recalled the specific context of the law of secured transactions and in particular the work that had already been done in the field by sister organisations, particularly UNCITRAL, which provided consensus-based benchmark standards for the current project. In respect to receivables, he noted that this type of collateral raised specific questions that were addressed in Annex C, which had been developed by a team composed of Fábio Rocha Pinto e Silva and Teresa Rodríguez de las Heras Ballell (Reporters for Annex C).

31. *The Reporters for Annex C* addressed the main policy decisions discussed by the subgroup in relation to enforcement on receivables.

32. The definition of the term “receivable” had given rise to considerable debate in drafting the document. During the discussion, the experts noted that there had been two different issues: the coverage of the term “receivable”, which was deliberately restrictive in the international instruments developed by UNCITRAL, and the scope of the enforcement project, regardless of the terminology used to refer to specific types of assets. It was proposed by several experts to narrow down the definition of receivable to address their most common forms. However, no consensus was reached on whether enforcement on other more sophisticated assets should be excluded from the project, or included but subject to special rules. Experts warned of the risk of repeating existing international rules applying to such specific assets less comprehensively, without providing added value, which should focus on enforcement issues. This matter was deferred to further consideration by the Working Group.

33. The interconnection between the general rules on disposition of collateral and the special rules on enforcement on receivables was further discussed. *The Reporters* explained that Annex C focused on the methods of enforcement that were specific to receivables but did not suggest a preferential method to the legislator or the parties. It was also recalled that Annex C should not be read alone, but in conjunction with what was provided in the other parts of the Report, including the extent and limits of party autonomy. Experts suggested that the relationship between general and special rules should be better clarified in the structure of the document.

34. The discussion then turned to the additional note on automation which covered a different scenario than the one that had already been discussed for third party debt orders, explaining the difference in the proposed best practices. The Reporter dealt with fully automated systems for the enforcement of receivables and the particular hypothesis of smart contracts to execute, in case of default, the corresponding remedies.

Item 4 (c): Additional issues from the Report of Subgroup 1 for the second session (Study LXXVIB – W.G.3 – Doc. 3, Annex 1, part IV 1 (d) - charging orders on land)

35. *The Reporters for Subgroup 1* introduced the topic on the basis of part IV 1 (d) of Document 3, noting at the outset that legal systems differed on the subject matter, which made it more difficult to develop harmonised rules.

36. A first intensive discussion took place on the issue of registers, which the Reporters considered to be a recommended feature of the legal system to facilitate enforcement, to allow for the proper functioning of automation among other things. The Reporters recommended the introduction of a form of record entry or registration of the land in order for enforcement to proceed most effectively. The participants of the Working Group unanimously agreed on the need to formulate

a recommendation on this issue, advocating the requirement of some form of registration. Several experts pointed to the difficulties of suggesting a specific type of registry system; the Working Group underscored the desirability of introducing a system that would, in the absence of centralisation, allow for interoperability and accessibility of different registries to the extent possible, while at the same time recognising the constitutional and political obstacles that might arise in practice. One expert suggested adopting a "progressive" best practice that formulated degrees of completeness of the register up to the most complete degree of automation. The connection between registries and enforcement through sale (public or private) was also discussed. The Working Group discussed whether there would be good reason to provide buyers with special protection in public sales, and experts expressing different views on the matter, which was deferred to a later decision.

37. The Reporters then shifted the discussion onto the matter of e-auctions for the sale of land. One expert suggested that the project should focus on the governance or management of the platform, its localisation (link to a specific jurisdiction) and the compliance of the system with existing substantive and procedural law. In relation to the design of the platform, another expert questioned the efficiency of building a dedicated platform for public sales on specific types of assets in smaller jurisdictions as opposed to creating more encompassing platforms. This led the discussion to the financing and maintenance of the system, which would fall on the authority designated for the platform's management. Several experts agreed on the suggestion that the Working Group should opt for a general best practice including a minimal requirement for the need for supervision or other means of control by public bodies, but not imposing public ownership or direct management by public authorities, nor a specific manner of supervision or control.

38. A general agreement on the use of automation in the framework of public enforcement over land emerged from the debate. It was noted that there would have to be a distinction between automated platforms that prepared a sale without completing it (providing information and matching parties), and e-auctions that were transactional, enabling the sale of the asset. There was a discussion on the appropriate degree of automation in the field of enforcement over land, in view of the existence of several public law requirements (authorisations, licenses or restrictions on transferability or use of land, etc.) and special rules on the transferability of immovables that should be taken into account, among other things. The Working Group agreed that an automated system would have to be fully compliant with the requirements of the applicable law, which was deemed difficult to achieve in practice at present but not to be excluded in light of technological developments.

Item 4 (c): Additional issues from the Report of Subgroup 1 for the second session (Study LXXVIB – W.G.3 – Doc. 3, Annex 1, part IV 1 (c) - Complex Enforcement on Special Assets and Receivership)

39. *The Reporters for Subgroup 1* introduced the subject of complex enforcement, indicating that the recommendations were still general for the time being, and needed the input of the Group. They advocated a functional approach to the topic avoiding conceptual definitions. They also noted that the enforcement procedure should mirror all transactional steps necessary to transfer the asset.

40. A debate ensued on what should be included in this section. It was argued that it was intended to address different forms of complexity that would require different treatment or at least a more precise identification of the type of complexity. Factual complexity depended solely on the factual circumstances of the enforcement, whereas there were also situations of legal complexity deriving from special rules generally applicable to the transfer of the asset. Another kind of complexity was linked to the particular nature of the asset that made traditional enforcement rules more difficult to apply (as it might be the case for digital assets). It was queried whether or not it would be sufficient to solve the second type of complexity by referring to the law governing the transfer instead of going into specific requirements.

41. With regard to digital assets, it was pointed out that they could not be bundled together as a single category, and that enforcement mechanisms should consider such diversity depending on

the type of digital asset (for example, native cryptocurrency, or tethered digital assets representing another right such as a license or a valuable asset...) and on the technology used, which would in turn influence the way assets were transferred. Experts then discussed the problem of tracing of, and access to, digital assets for the purpose of enforcement. It was suggested that in many legal systems enforcement agents lacked the means to trace digital assets without the debtor's cooperation, especially when they were kept in a personal wallet with no intermediary, and that other means of putting the non-compliant debtor under pressure should be considered.

42. In conclusion, *The Chair* thanked the participants for a very informative discussion and supported the Secretariat's proposal to address this issue at a dedicated intersessional workshop in January 2022.

Item 4 (d): Additional issues from Report of Subgroup 2 for the third session (Study LXXVIB – W.G.3 – Doc 5 – Annex B)

43. *The Reporter for Subgroup 2* introduced Annex B of Study LXXVIB – W.G.3 – Doc 5, which was a revised version of the text that had already been presented and discussed at the second Working Group session. He suggested that the Working Group address two sections, Annex B (disposition of collateral) and Annex D (variation or adaptation of enforcement rules through private agreement between the parties).

44. *Richard Kohn and Fábio Rocha Pinto e Silva, Reporters for Annex B*, noted that the recommendations in Annex B should not be controversial to a large extent because they were based on well-respected international guidance instruments on the subject matter developed by UNCITRAL that promoted investment and financial stability for all companies, particular small and medium enterprises. They were however necessary for several reasons: the new instrument should be comprehensive and include rules on disposition of collateral; guidance on disposition could be particularly useful for those countries that had not implemented a fully-fledged reform of secured transactions law based on international best practices but could still be reminded of their existence and in any case take advantage of effective rules for enforcement on collateral; such fundamental principles governing disposition would have to be considered when implementing technology-based innovations; finally, the instrument would introduce additional guidance, partly deriving from the application of new technologies, that could be useful for legislators.

45. The Reporters went through the proposed recommendations in Annex B, which did not raise comments, and went on to focus on the aspects of the best practices that contained added value in respect to existing UNCITRAL guidance documents. In the ensuing discussion the Working Group debated the possibility for the creditor to be the purchaser in a public sale using credit bidding, or else to appropriate the collateral. The Reporters noted that the Model Law authorised credit bidding in a public sale only if all the creditors agreed to resort to it, but did not provide for appropriation at evaluation in a public sale. They also explained that this was a different issue than that provided for in Best Practice 5, which was a modified form of agreed-upon appropriation post-default through the transfer of the asset by the debtor in lieu of enforcement, to satisfy the creditor's claim. *The Chair* warned that great care should be taken when departing from the Model Law. The *Deputy Secretary-General* suggested to ask the experts to provide more arguments after the session.

46. The Working Group further discussed the proposal to make use of "expedited" judicial proceedings for debtor's oppositions. Some experts noted that the best practices referred to expedited judicial proceedings in other contexts, and that a more precise description of what was meant with this expression would be useful. Relevant examples were requested from the Reporters in order to better understand the issue. The *Secretary-General* noted that more information should be gathered on what would usually hinder effective enforcement in many countries and on existing special proceedings to deal with oppositions in enforcement, and emphasised the need to give more guidance to legislators on these matters in a propositive and non-prescriptive way.

47. One expert finally suggested that the introductory language of the best practices in this Annex ("The law should provide") would benefit from simplification; while acknowledging this point, *the Chair* noted that this suggestion should be retained and applied when undertaking a revision of the style of all best practices for their harmonisation.

Item 4 (c): Additional issues from Report of Subgroup 2 for the third session (Study LXXVIB – W.G.3 – Doc 5 – Annex D)

48. *Felix Steffek, Reporter for Annex D*, was asked to introduce the revised best practices on the extent of party autonomy in enforcement. They were based on the assumption that party autonomy can reduce the cost of enforcement, though the discussion during the second Working Group session had also shown that limitations to party autonomy should be included and carefully drafted so as to not constitute an obstacle to effective enforcement. The proposals had been amended accordingly to reflect the Working Group's preference to limit ex-ante party autonomy and follow existing international legislative guidance texts more closely.

49. He focused on Recommendation No. 3 in particular, which had been modified substantially to accommodate a limitation of ex ante party autonomy. Recommendation No. 5 was discussed next, with particular attention to the meaning of the expression "may not adversely affect". It was suggested that the policy underlying this text should be better explained. *The Chair* concluded that there appeared to be a generalised consensus on the policy of the amended recommendations.

Item 5: Organisation of future work

50. Before addressing this agenda item, *the Chair* gave the floor to the *representative of UNCITRAL*, who recalled the organisation's interest in this project as an observer because of its relationship with UNCITRAL's work, particularly the newly approved project on Asset Tracing and Recovery in Insolvency, as well as UNCITRAL's current work on Artificial Intelligence. She expressed satisfaction that the work of UNCITRAL was referred to in the documents but warned against inadvertently deviating from UNCITRAL instruments when citing parts of them outside of their context or changing terminology to refer to the same concepts.

51. The *Deputy Secretary-General* suggested some possible actions for the future, emphasising the need to continue with the fruitful intersessional work and that the Working Group should consider prioritising several topics. First, there was the need to further address enforcement on digital assets in cooperation with the Digital Assets Working Group. Secondly, it would be necessary to continue to deal with innovations in legislation and practice, particularly concerning the use of technology. Finally, it would be important to provide a first draft outline articulating the relationship between the general framework of the project and its more specific aspects.

52. In relation to the dates for the next sessions of the Working Group, she noted that the UNIDROIT Governing Council had agreed to allow an additional year to the project in view of the intense work carried out and the ample scope of the project. Two official sessions had been envisaged for 2022: one in Spring and the other one at the end of the year. The Secretariat would reach out to the Working Group to ensure an early determination of the dates for the sessions.

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

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

ANNEX 1**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 status of the project and intersessional work (Study LXXVIB – W.G.3 – Doc. 2)
4. Consideration of work in progress:
 - (a) Special focus on enforcement of monetary claims by third party debt orders and automation
 - i Report of Subgroup 1 for the second session - Study LXXVIB – W.G.3 – Doc. 3, Annex 1, parts IV 1 b (Third Party Debt Orders or Garnishment Proceedings)
 - ii Report of focal points of Subgroups 1 and 3 - Study LXXVIB – W.G.3 – Doc 4):
 - 1 Annex 1: Paper on necessary steps in the enforcement of monetary claims by third party debt orders to integrate automation
 - 2 Annex 2: Paper suggesting best practices for automation in the enforcement of monetary claims by third party debt orders
 - (b) Special focus on enforcement of security rights over receivables and automation (Report of Subgroups 2 and focal point Subgroup 3 (Study LXXVIB – W.G.3 – Doc 5, Annex C, p 18- 24)
 - (c) Additional issues from Report of Subgroup 1 for the second session (Study LXXVIB – W.G.3 – Doc. 3, Annex 1, parts IV 1 b (Third Party Debt Orders or Garnishment Proceedings); IV 1 c (complex enforcement) and IV 1 d (charging orders on land))
 - (d) Additional issues from Report of Subgroup 2 for the third session (Study LXXVIB – W.G.3 – Doc 5)
5. Organisation of future work
6. Any other business
7. Closing of the session

ANNEX 2**LIST OF PARTICIPANTS****CHAIR**

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(remotely)

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