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Item No. 5 on the agenda: Ongoing legislative activities

(b) Best Practices for Effective Enforcement

(prepared by the Secretariat)

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

I. BACKGROUND

A. History of the project and establishment of the Working Group

1. The project on Best Practices for Effective Enforcement was included in the 2020-22 Work Programme by the General Assembly ([A.G. \(78\) 12](#), paras. 41 and 51, and [A.G. \(78\) 3](#)), confirming the recommendation of the Governing Council ([C.D. \(98\) 17](#), para. 245). At the first meeting of the 99th session of the Governing Council, held remotely in April/May 2020, Council Members commented on the revised Secretariat's paper ([C.D. \(99\) A.3](#)), and authorised the setting up of an Exploratory Working Group to receive expert feedback on the questions raised ([C.D. \(99\) A.8](#), paras. 43-44). In response to this mandate, the UNIDROIT Secretariat developed a Consultation Document which formed the basis for a round of remote consultations with selected international experts and organisations and for an internal Workshop held on 21 September 2020. At the second meeting of its 99th session, held in a hybrid format on 23-25 September 2020, the Governing Council approved the proposed guidelines regarding the scope of the project, confirmed the high priority status assigned to the project, and authorised the establishment of a Working Group ([C.D.\(99\) B.3](#) and [C.D.\(99\) B.21](#), paras 57-58).

2. The Best Practices for Effective Enforcement Working Group was invited to consider the current challenges for effective enforcement and the most suitable solutions (procedures,

mechanisms) to overcome them. It was agreed that the goal of the project would be to draft best practices designed to improve the effectiveness of enforcement combating excessive length, complexity, costs, and lack of transparency, while at the same time ensuring a sufficient protection of all parties involved. Such best practices should consider the impact of modern technology on enforcement, both as an enabler of suitable solutions and as a potential source of additional challenges to be addressed.

3. The Working Group is currently composed of the following experts: Ms Kathryn Sabo (Chair) - Deputy Director General & General Counsel, Constitutional, Administrative and International Law Section, Department of Justice (Canada), Member of the UNIDROIT Governing Council; Ms Geneviève Saumier (Coordinating Expert) - Peter M. Laing Q.C. Professor of Law, Faculty of Law, McGill University (Canada); Mr Jason Grant Allen - Senior Research Fellow, Humboldt-Universität zu Berlin Centre for British Studies, Berlin (Australian National); Mr Neil Cohen - Jeffrey D. Forchelli Professor of Law, Brooklyn Law School (USA); Mr Fernando Gascón Inchausti - Professor, Civil and Criminal Procedural Law Department, Faculty of Law Universidad Complutense de Madrid (Spain); Ms Carla L. Reyes - Assistant Professor of Law, SMU Dedman School of Law, Dallas (USA); Mr Fábio Rocha Pinto e Silva, Pinheiro Neto Advogados, São Paulo (Brazil); Ms Teresa Rodriguez de las Heras Ballell, Associate Professor of Commercial Law, Universidad Carlos III Madrid (Spain); Mr Felix Steffek - Senior Lecturer, Faculty of Law, University of Cambridge, Co-Director of the Centre for Corporate and Commercial Law, (German National); Mr Rolf Stürner - Emeritus Professor of Law, Albert-Ludwigs-Universität Freiburg (Germany). Starting with the fourth session of the Working Group held in Rome on 19-21 April 2022, the Working Group counts an additional member: He Qisheng, Professor of International Law at Peking University Law School.

4. The following organisations are also part of the Working Group as observers: European Bank for Reconstruction and Development (EBRD) - Catherine Bridge Zoller, Senior Counsel, and Veronica Bradautanu, Principal Counsel - Corporate Governance - the latter, on leave as of 2021, will continue to participate as individual observer; European Commission (DG JUST); European Law Institute (ELI) - Xandra Kramer, University of Rotterdam, and Paul Oberhammer, University of Vienna; Hague Conference on Private International Law (HCCH) - Ning Zhao, Senior Legal Officer; João Ribeiro-Bidaoui, First Secretary (until 2021); International Association of Legal Science (IALS) - J.H.M. (Sjef) van Erp, emeritus Professor of Civil Law and European private law, Maastricht University (Netherlands), Visiting Professor, Trento University and Secretary-General IALS; Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law - Burkard Hess, Founding and Executive Director, Professor of Civil Law, Civil Procedure, Private International Law, and Wiebke Voß, Juniorprofessorin, Julius-Maximilians-Universität Würzburg, Germany; Organization of American States (OAS) - Jeannette Tramhel, Senior Legal Officer, Department of International Law, Secretariat for Legal Affairs; Secured Finance Network - Richard KOHN, Goldberg Kohn Ltd.; Union Internationale Huissiers de Justice (UIHJ) - Jos Uitdehaag, Secretary; United Nations Commission on International Trade Law (UNCITRAL) - Samira Musayeva, Senior Legal Officer and Secretary of Working Group V (Insolvency) and Thomas Traschler, Legal Officer (until 2021); World Bank Group (WBG) - Nina Pavlova Mocheva, Senior Financial Sector Specialist, Finance, Competitiveness & Innovation Global Practice, and Klaus Decker, Senior Public Sector Specialist; Zemgale Regional Court - Lina Lontone, Latvia. The Supreme Court of China was invited to join as observer as of the fourth session of the Working Group (Zhu Ke, Judge at the Fourth Civil Division of the Supreme People's Court of the People's Republic of China). The Working Group avails itself, finally, of one individual observer (Ms Valeria Confortini, Orientale University, Naples), and routinely hosts ad hoc presentations by additional experts.

B. First session (30 November-2 December 2020) and second session of the Working Group (20-22 April 2021)

5. The first session of the project Working Group was held in Rome and remotely on 30 November and 1-2 December 2020. The Working Group mostly focused on the more precise determination of the scope of the project, as well as on methodology and organisational issues, and discussed in addition a specific document prepared by a Working Group member on the impact of technology in enforcement. For more information see [Study LXXVIB – W.G.1 – Doc. 1 rev.](#); [Study LXXVIB – W.G.1 – Doc. 2](#); and the [Report](#) of the first Working Group session.

6. At its first session, the Working Group created three sub-groups to advance the work on the project during the intersessional period (Subgroup 1 on “post-adjudication” enforcement, later named “enforcement by way of authority” - focal points Fernando Gascón Inchausti and Rolf Stürner; Subgroup 2 on enforcement of secured claims, later re-named “enforcement of security rights” – focal point Neil Cohen; and Subgroup 3 on the impact of technology on enforcement, focal point Teresa Rodríguez de las Heras Ballell), which were involved in an intense working schedule set up by the focal points of each sub-group and supported by the Secretariat. In parallel the Secretariat, following up on the mandate received from the Working Group and in cooperation with the European Bank for Reconstruction and Development (EBRD), conducted consultations in order to gather data on challenges, regulatory options and practices for effective enforcement in various jurisdiction (Egypt, Greece, Japan, Kazakhstan, Latvia, Mongolia, Ukraine); additionally, the Secretariat conducted background research in relation to other legal systems (Brazil, China, Finland, France, India, Mozambique, Portugal, Russia, Rwanda, Singapore). The outcome of this consultation was put together in two internal documents, one on general enforcement issues and the other on technology and enforcement.

7. The second session of the Working Group took place remotely on 20-22 April 2021, and its deliberations focused on the detailed Reports prepared by the three sub-groups mentioned above. For more information see [Study LXXVIB – W.G.2 – Doc 1](#); [Study Group LXXVIB – WG.2 – Doc. 2](#); and the [Report](#) of the second Working Group session.

II. WORKING GROUP ACTIVITIES SINCE THE 100th SESSION OF THE GOVERNING COUNCIL

A. Third session of the Working Group (29 November-1 December 2021)

8. The third session of the Working Group was held in hybrid format between 29 November and 1 December 2021.

9. As agreed in the intersessional period, a special focus on enforcement over receivables was the subject matter of the first day of deliberations of the Working Group, in view of the commercial relevance of this type of asset and the connection with the use of automated procedures. The discussion was conducted on the basis of detailed documents prepared by Working Group members that addressed: (a) third party debt orders or garnishment proceedings in enforcement by way of authority; (b) necessary steps in the enforcement of monetary claims by way of authority by third party debt orders in order to integrate automation; (c) suggested best practices for automation in the enforcement of monetary claims by way of authority by third party debt orders; and (d) revised best practices on enforcement of security rights over receivables and automation.

10. In relation to enforcement by way of authority of third party debt orders, the Working Group generally agreed with the substantive issues that were presented, including methods for disposal additional to the collection of the debt ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), paras 10-13). Concerning enforcement on receivables and automation, an issue that elicited much discussion

concerned the need for the creditor to access information on the debtor's assets and the desirability of using an interconnected platform facility to gather information from relevant authorities. In this context, a more general point was raised on how to balance such a need to obtain information with the necessary data protection, as well as protection of other fundamental rights. In conclusion, the Working Group agreed that the automated system should avoid putting non-performing debtors in the privileged position of choosing whether, and to what extent, to provide information, while ensuring adequate protection of debtor's data ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), paras 15-19). The Working Group then had the opportunity to consider a set of tentative best practices in relation to automation, namely general recommendations on the use of automated systems, partly based on existing international and regional best practices, and more specific best practices for automated enforcement on receivables. While the fundamental principles embodied in the best practices were generally supported, the Working Group agreed that more details and concrete examples could be helpful, at least in explanatory commentaries; the Working Group also felt that more specific issues related to automation in enforcement proceedings needed to be explored and discussed in greater depth ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), paras 20-29).

11. With regard to the revised best practices on enforcement of security rights over receivables, the revised draft was generally well received. The discussion focused on two main points: (i) the definition of "receivable" for the purposes of the Best Practices, and the scope of the enforcement project in relation to the coverage of other intangibles ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), para 32); (ii) the interconnection between the general rules on disposition of collateral and the special rules on enforcement on receivables ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), para 33).

12. The Working Group considered two additional sets of issues from the Report of Subgroup 1 for the second session, in particular those contained in the parts on charging orders on land and on complex enforcement on special assets. Regarding the first topic, the Working Group agreed on the desirability of including a recommendation that the legal system introduce some form of registration of rights over immovables to facilitate enforcement, and to allow for the proper functioning of automation, though the difficulties of suggesting a specific type of registry system were underscored ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), para 36). There was also agreement on the inclusion of a general best practice providing for minimal requirements on supervision or control by public bodies over e-auctions on immovables but not imposing public ownership or direct management by public authorities, nor a specific manner of supervision or control ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), para 37). The Working Group further agreed on the desirability to enhance the use of automation in the framework of public enforcement over land, while various positions were expressed on the appropriate degree of such automation ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), para 38). Concerning complex enforcement on special assets, there was an informative discussion on the proposed content of this section as well as on enforcement on digital assets; for the latter, the Secretariat's suggestion to hold a dedicated workshop was endorsed ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), paras 39-42).

13. The Working Group finally addressed additional issues from the Report of Subgroup 2 for the third session, namely revised best practices on disposition of collateral and on the extent of party autonomy in enforcement. As regards disposition of collateral, the revised recommendations were, to a large extent, not controversial, being based on well-respected international guidance instruments on the subject matter. The Working Group discussion centred on the possibility for the creditor to be the purchaser in a public sale using credit bidding, or else to appropriate the collateral, and on the desirability and practical feasibility to introduce a more precise description of the "expedited judicial proceedings" that would facilitate dealing with oppositions in enforcement ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), paras 44-47). Concerning the role of party autonomy, the Working Group generally agreed on the policy of the revised recommendations, that had been amended to reflect the Working Group's preference, expressed at the second session, to introduce more limitations to ex-ante party autonomy ([see Report, Study LXXVIB – W.G.3 – Doc. 6](#), paras 48-49).

B. Intersessional work after the third session of the Working Group

14. Following up on the mandate received at the third session of the Working Group, the Secretariat continued to support Working Group participants in the advancement of the project and to produce research materials on specific topics.

15. In particular, the Secretariat organised two Workshops to discuss issues related to the interaction between technology and enforcement:

- On 19 January 2022, an internal Workshop on Enforcement on Digital Assets, in which participants discussed two papers provided by Carla Reyes and Teresa Rodríguez de las Heras Ballell, respectively on “Technology-Enhanced Enforcement: Issues Related to Digital Assets”, and on “Illustration of Electronic Warehouse Receipts enforcement”. The Secretariat produced a Summary Report of the Workshop. The three documents were used for the development of Study LXXVIB – W.G.4 – Doc. 6 on “Enforcement on Digital Assets” that was discussed at the fourth session of the Working Group in April 2022 (see below under C).
- On 8 March 2022, a virtual Workshop on “Technology in Enforcement: recent developments and opportunities”, with participation as speakers of Amna Al Owais, Chief Registrar, DIFC Courts (UAE); Working Group observer Lina Lontone, Council of Sworn Bailiffs of Latvia; Working Group observer Jos Uitdehaag, Secretary, UIHJ; Working Group observer Veronica Bradautanu, Ministry of Justice Moldova (on leave from EBRD); Working Group member Teresa Rodríguez de las Heras Ballell, University of Carlos III Madrid and UNIDROIT; Diana Talero, Secretaria Técnica- Comité de Implementación de Garantías Mobiliarias, Colombia; and Carlos Riaño, Confecámaras, Colombia. Several other members and observers of the Working Group participated as discussants. The video of the Workshop is available on the UNIDROIT YouTube Channel.

16. Following up on the internal Workshop on digital assets, the Secretariat drafted a Research Memo on Digital Assets and Enforcement¹, as a joint activity supporting both the Digital Assets and Private Law and the Best Practices for Effective Enforcement Working Groups. The Memo contained selected cases on enforcement-related issues regarding digital assets which had been rendered in countries other than United States of America and, as requested by the BPEE Working Group, including civil law jurisdictions. The underlying idea was to find relevant examples and cases of enforcement on digital assets which are outside of the typical US situation, in order to steer the discussion away from a civil law/US – common law contraposition and help find a reasonable best practice. The research paper not only summarised the selected cases and the main legal issues addressed, but also provided a first indication of potential issues specifically related to the execution of creditors’ rights.

C. Fourth Session of the Working Group (26-28 April 2022)

17. At its fourth session, which was held in hybrid format on 26-28 April 2022, the Working Group discussed draft best practices regarding enforcement by way of authority, a position paper on enforcement on digital assets, a document regarding on-line auctions, and substantive and practical issues regarding the way forward for the activities of the subgroups and the Working Group in general.

18. Regarding enforcement by way of authority, Subgroup 1 had prepared detailed draft best practices based on the position papers presented and discussed at previous sessions. The Working Group focused its deliberations on the more specific parts of the document regarding: electronic registries (recommendations for the setting up of registries for enforcement orders, for the outcome

¹ Prepared by UNIDROIT intern Kateryna Bovsunovska under the Secretariat’s supervision.

of disclosure of debtor's assets and for enforcement measures and their results); minimum requirements for enforceable documents; recommendations on rights and duties of information and disclosure of debtor's assets; and recommendations on enforcement on third party debt orders (receivables), a topic which had been already addressed at the third session of the Working Group. While a common understanding on the recommendations on central registries for enforcement orders could not yet be reached, there was general agreement in relation to the policies underpinning the best practices on enforcement on third party debt orders, as well as on the desirability of introducing mechanisms based on technology to facilitate access to information on debtor's assets and enforcement measures.

19. The Secretariat had prepared a discussion paper with the aim to explore the key legal issues that may arise in the enforcement of rights on digital assets, and to highlight the aspects that might deserve the attention of the Working Group in formulating best practices and recommendations. Such document was based on the outcome of the Workshop on Enforcement on Digital Assets held on 19 January 2022 and the papers that had been presented for that Workshop, the Research Memo prepared by the Secretariat, and additional sources referring to international case-law on the topic. The Working Group agreed that a broader concept of digital assets than the one accepted for the Digital Assets project would be better suited for the goals of the BPEE project and discussed whether this would imply that enforcement should be addressed differently depending on the type of digital asset. The Working Group further discussed typical use cases as well as the main legal issues that arose from them regarding tracing, seizing, selling/transferring digital assets, and evaluating them for the purpose of enforcement. It also discussed the need to combine different enforcement mechanisms, *in rem* and *in personam*, in order to adapt enforcement procedures to the special characteristics of certain types of digital assets (e.g., cryptocurrencies).

20. As regards online auctions, the Secretariat had prepared a discussion paper – based on comparative research conducted within the Secretariat² – with the aim to identify issues related to the use of online auctions for foreclosure and sale of different types of assets in enforcement, in order to propose draft recommendations or to facilitate the future development of more detailed best practices. The discussion was enriched by participation of experts from Colombia, who presented the model implemented in their jurisdiction regarding online auctions for the enforcement of security rights over movables and more generally for the judicial execution of creditors' rights. The suggestions were generally well received, and constructive input was given to proceed with the revision of the draft best practices along the indications given by the Working Group.

21. The Working Group further discussed the future development of the work of subgroup 2 on enforcement of security rights, for which draft best practices on repossession of tangible assets, on the disposal of assets, on the enforcement of security rights on receivables and on the role and limits of party autonomy had already been drafted and discussed at previous sessions. The Working Group agreed on the need to proceed with the redaction of more ample comments to the best practices, to address specific open issues, and to consider the extent to which recommendations for enforcement of security rights on immovables were feasible.

22. Finally, in relation to the future steps of the entire project, the need to proceed as speedily as possible with the development of draft best practices for all core parts of the project was emphasised. The usefulness to set up a Drafting Committee that would work alongside the Working Group was also highlighted. For the future steps of the project see also below, para. IV.

² The comparative research was conducted by Philipp Schlüter under the Secretariat's supervision, within the framework of his internship at UNIDROIT.

III. OTHER ACTIVITIES RELATED TO THE PROJECT

23. Since the last session of the Governing Council (second meeting of the 100th session in September 2021), the project on Best Practices for Effective Enforcement was the object of a number of presentations by the Secretariat, either focusing specifically on enforcement, or in the context of the more general theme of the impact of technology on uniform law. In particular, the Secretariat participated in the ASADIP Conference on international private law and modern technology, co-sponsored, among other organisations, by the Organisation of American States (OAS), the Centro de estudio de derecho, economía y política (CEDEP) and UNIDROIT (remote, 4-5 November 2021). Professor Anna Veneziano participated in a panel entitled "Technology, private international law, and codification fora" with Dante Negro (Director, OAS), Anna Joubin Bret (Secretary, UNCITRAL), and Gérardine Goh Escolar / Ignacio Goicoechea of the HCCH. UNIDROIT also participated in a Workshop on "Excellence and Innovation... Our Profession – COVID and beyond", in the context of the 24th International Union of Judicial Officers (UIHJ) Congress on Cyber Justice, sponsored by the Government of Dubai and hosted by Dubai Courts (23 November 2021). Moreover, the Secretariat participated in a Webinar on "UNIDROIT's Projects and Technology", co-sponsored by UNIDROIT together with the University of Turin and the International Training Centre of the International Labour Organization (ITC-ILO) on 10 December 2021 (see the Annual Report 2021 (C.D. (101) 2 for further details on these events).

24. Deputy Secretary-General Anna Veneziano and Roy Goode Scholar and UNIDROIT Consultant Teresa Rodríguez de las Heras Ballell further contributed to the Written Works of the 24th Congress of the International Union of Judicial Officers (UIHJ) with a paper on "The relevance of technology for the UNIDROIT Project on Best Practices for Effective Enforcement".

25. Anna Veneziano and Teresa Rodríguez de las Heras Ballell also made a pre-recorded contribution to a Webinar on the Implementation of Secured Lending Reform and Access to Credit during the COVID-19 Pandemic in APEC Economies (Singapore/remote, 10 December 2021) on the relevance of new technology in the project.

IV. FUTURE STEPS

26. Pursuant to the mandate received at the fourth session of the Working Group, the Secretariat will continue to provide support to the Chair and Working Group members and observers for the organisation of intersessional sub-groups meetings to advance the preparation of the best practices. More general coordination meetings to ensure consistency of the output of the sub-groups are envisaged for the intersessional period. At its fourth session, the Working Group further agreed that a Drafting Committee should be set up to work on those parts of the Best Practices on which agreement on the substantive issues was reached.

27. The Secretariat is also working to ensure the necessary coordination between this project and the UNIDROIT project on Digital Assets and Private Law, for the issues concerning enforcement on digital assets. To this end, a Special Workshop has been organised by the Chairs of the two Working Groups to discuss matters concerning enforcement of rights on digital assets as part of the current session of the Governing Council and will be held on the last day of the session (10 June 2022). The Workshop will see the participation of experts from the two Working Groups, Governing Council Members and members of the Steering Committee of the Digital Assets Working Group.

28. In relation to the timetable of the project, the Secretariat originally envisaged that the preparation of a first draft of the proposed instrument be conducted over four sessions of the Working Group (one in December 2020, two in 2021, and one in 2022, possibly in connection with a wider consultation event). This calendar was however already indicated as tentative and subject to revision in view of various factors, including the fact that the first Working Group session was held at the end

of 2020, the unpredictable evolution of the extraordinary international context during which work had begun, and the extent of research needed to develop a practically useful instrument in this complex area of law. The Governing Council of UNIDROIT, at its 100th session (second meeting) in September 2021, already authorised the Working Group to postpone, where necessary, the completion of a full draft of the instrument of one year. The Secretariat has invited the Governing Council at its 101st session to recommend the continuation of the project during the 2023-2025 Work Programme to the General Assembly, to ensure its completion during the first part of the next Triennium. The fifth session of the BPEE Working Group is planned for 12-14 December 2022. At its fourth session, the Working Group agreed that work be continued throughout 2023 with a view of presenting a finalised draft in 2024.

V. ACTION TO BE TAKEN

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