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

Fifth meeting (hybrid)
Rome, 12-14 December 2022

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Study LXXVIB – W.G.5 – Doc. 7
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REPORT

1. The fifth session of the Working Group established to prepare Best Practices for Effective Enforcement (hereafter: the “Working Group”) was held in hybrid format (in person in Rome and remotely via Zoom) on 12-14 December 2022. The Working Group was attended by 28 participants, comprising members, observers from intergovernmental and other international and academic organisations, independent observers, 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 attending in person and remotely. *The Deputy Secretary-General* echoed the Chair’s welcome to all participants, referring in particular to the most recently added observer to the Working Group, the representative from the Kozolchyk National Law Center (NatLaw), Mr Spyridon Bazinas.

Item 2 Adoption of the agenda and organisation of the session

3. *The Chair* proposed the organisation of the session as follows: the first day of the session would be devoted to discussing the draft best practices on enforcement by way of authority (W.G.5 – Doc. 3), with any remaining discussions to be continued on the morning of the third day of the session. The second day of the session would focus on considering: the draft best practices regarding enforcement of security rights (W.G.5 - Doc. 4), which contained revised best practices on repossession, disposition, and judicial recourse in extra-judicial enforcement of security rights; the update of the discussion paper on online auctions (W.G.5 – Doc. 5); the presentation by the representative of the World Bank Group, Ms Mocheva, on the use of alternative dispute resolution in enforcement; and the updated paper on enforcement on digital assets (W.G.5 – Doc. 6).

4. The agenda, as proposed and laid out in Annexe 1, was unanimously adopted.

Item 3 Update on intersessional work and status of the project (Study LXXVIB – W.G.5 – Doc. 2)

5. Upon invitation by *the Chair*, *the Deputy Secretary-General* referred to Document 2 on intersessional work and status of the project. She noted that the document contained a summary of the issues that had been discussed at the fourth session, as well as earlier sessions, and of the intersessional work that had been carried out by the Working Group since then. She further noted

that the discussions at the fourth session had been elaborated in more detail in that session's report, and that the outcome had been taken into account by the respective drafters in their preparation of the papers presented for this session.

6. She focused particularly on the joint workshop that had been organised in the intersessional period by the chairs of the Digital Assets and Private Law and the Best Practices for Effective Enforcement Working Groups to shed light on various issues linked to enforcement on digital assets, which had seen the participation of their respective experts as well as external invited experts. The workshop had been held on the last day of the 101st session of the Governing Council on 10 June 2022, and had been instrumental, together with additional research, to the development of Document 6 on "Enforcement on Digital Assets". The workshop had featured three roundtables: one examining the generally available remedies in relation to digital assets, a second focused on enforcement of creditors' rights in digital assets, and a third focused on judicial enforcement of digital assets, with closing remarks delivered by the Co-Chairs. *The Deputy Secretary-General* pointed out that as the Digital Assets and Private Law Working Group was already at an advanced stage in their project, the consideration of enforcement on digital assets needed to be prioritised by the Working Group to ensure a coordinated approach between the two projects.

7. *The Deputy Secretary-General* further noted that Document 5 contained an update of the discussion paper on online auctions based on research conducted by the Secretariat, which confirmed the suitability of the direction adopted by the draft recommendations on the topic.

8. *The Chair* thanked the Secretariat for the helpful Report contained in Document 2 and welcomed the intersessional work advanced by the subgroups.

Item 4 Consideration of work in progress:

Item 4 (a) - Draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.5 – Doc. 3)

9. *The Chair* introduced the next item on the agenda, referring to Study LXXVIB – W.G.5 – Doc. 3, on enforcement by way of authority, thanking Reporters Fernando Gascón Inchausti and Rolf Stürner for their work. She asked the Working Group to focus on policy issues rather than formulation, to get a better understanding of, and reach consensus on the policy underlying the draft best practices. She further suggested to start with Section III in the document, which contained a revised part on enforceable instruments.

10. *Professors Fernando Gascón Inchausti and Rolf Stürner (Reporters)* confirmed that Section III had been modified and partly restructured to take the Working Group's plenary discussion in April into consideration.

Section III (enforceable documents)

11. *The Reporters* briefly introduced section III, starting with Recommendation 1 which had been drafted to impress upon legislators the need to clarify with sufficient certainty which documents would constitute a sufficient basis to proceed with enforcement by way of authority, and to establish specific requirements as to their content, authenticity, and form.

12. They further noted that Recommendation 1 (III) contained an enumeration of the most common directly enforceable instruments in various jurisdictions. In this respect, they highlighted that "authentic notarial documents" were mentioned as enforceable documents, which was very common in civil law jurisdictions but not unknown in common law jurisdictions (the equivalent concept being a cognovit note by which a debtor authorises its creditor's attorney to submit a confession in court allowing judgment against the debtor).

13. The Reporters then focused on 1 (IV), addressing “private” documents as enforceable instruments. They did not envisage to apply the same procedure that would apply for the documents listed in 1 (III) to these documents, but proposed instead a two-step approach whereby the creditor should first apply for a warning notice, possibly electronic or based on a pre-printed form to be served on the debtor, of the issuance of an execution notice by the court in the absence of the debtor’s objection or fulfillment of the obligation by the debtor; should neither situation arise, the execution would be treated as an enforceable instrument. This different approach would both avoid an excessive burden on the register for enforceable instruments, as in most cases the debtor would either pay or oppose the notice, and would also provide a way for private documents to become enforceable when not opposed.

14. In the ensuing discussion, one expert questioned why arbitral decisions were not expressly listed among the examples of enforceable documents under Recommendation 1 (III) and suggested to replace the expression “public authority” with “other authorities”. Other experts asked whether “notarial documents” would encompass documents drafted by private parties and validated by a notary as to the authenticity of their provenance (e.g., validation of signatures), or would only refer to documents whose content was validated by a notary or similar public official. *The Reporters* clarified that the paragraph was meant to refer to the latter type of documents.

15. It was further queried whether enforcement agents would be considered public authorities entitled to check whether the document received from the creditor satisfied the required standard of reliability, such as in the very common case of utility invoices in some legal systems. *The Chair* commented that the qualification of judicial officers as public authorities might depend on the legal system. *The Reporters* noted that the public utility invoice would be considered a private document under Recommendation 1 (IV) and judicial officers would be entitled to enforce it only if it were admitted in the register provided for in Section V, after fulfilment of the pre-condition of a “warning procedure” according to Recommendation 1 (IV).

16. The main part of the discussion focused on the treatment of private documents under Recommendation 1 (IV).

17. One expert shared the cautious approach towards private instruments in enforcement by way of authority chosen by the draft text, while at the same time acknowledging that the language of Recommendation 1 (IV) should be amended to reflect the clearer and more positive language already provided in the commentary to the provision.

18. Some experts, on the other hand, expressed concern over the seemingly restricted scope of Recommendation 1 (II) and spoke against differentiating “public” and “private” documents, with arguments based on the existing, successful practice in some countries of direct enforcement based on private documents that fulfilled certain threshold requirements provided by the domestic legal system. If such instruments were not covered by 1 (II) and (III), the best practices would propose a less efficient and workable solution than the existing ones. As a drafting proposal, it was suggested to refer to “other private documents that the enacting State recognises as enforceable instruments” while other private documents would be subject to the procedure under 1 (IV), and to provide all necessary additional guidance for enacting States in the commentary. Reference was made, in this respect, to mediation agreements, as witnessed by international developments in this field (Singapore Convention).

19. Additionally, one expert recalled that the decision to provide guidance on the matter had originated as a reaction to the problems created by the practice in some legal systems to include documents such as simple invoices in the category of enforceable instruments. In light of the concerns expressed above, it was suggested that the current draft provision of Recommendation 1 (II) might be amended to include certain types of signed private documents that domestic law considered authentic and reliable, while keeping the differentiation with other documents such as invoices. As an alternative, it was suggested that reality was more nuanced than the very clear-cut

distinction between “public” and “private” documents, and that there might be merit in considering a middle category of documents reaching a sufficient threshold in terms of reliability that legal systems could add to the list.

20. *The Reporters* reiterated that the purpose of the recommendation was not to discriminate against private documents but to provide a different procedure for documents that are often opposed by the debtor, rendering them registrable only after a preliminary step to verify the debtor’s consent (or lack of opposition) and thereby avoiding an excessive burden on the register. If the difference between public and private documents were cancelled, and the provision were to defer to domestic laws, it would amount to leaving the situation as it is without improving the current scenario.

21. Another issue raised in the discussion regarded the debtor’s opposition to enforcement of private documents. It was pointed out that, according to the current draft, the debtor’s opposition would entail the need for the creditor to resort to ordinary civil proceedings, which would be a step back for legal systems that had introduced a more limited form of opposition for certain types of reliable private agreements. *The Reporters* replied that it would be possible to think about raising the threshold for oppositions, but that it was important to distinguish between the different types of opposition that were envisaged in the draft best practices, including Recommendation 1 (V), which regarded the merits of the underlying claim, and complaints against admission in the register based on formal grounds under Section V, Recommendation 1.

22. In summing up the debate, *the Chair* noted that there was consensus on the suggestion to improve the current text of Recommendation 1 (IV) in light of the language contained in the commentary. There was still, however, a difference in opinion among participants as to whether Recommendation 1 (II) should be amended to include some types of private documents that had sufficient elements of reliability according to the laws of the enacting State (specifying a common minimum threshold), or whether it should be limited to public documents. There were also some queries regarding the interconnection with the requirement for registration, and whether this would constitute an additional obstacle and add further steps to the actions required by the creditor to execute its claim, be it on the basis of a traditionally recognised authoritative enforceable document such as a court decision, or on the basis of a private document. She suggested that since the issue of enforceable documents was strictly connected to the issue of registration of such documents, which was envisaged as a cornerstone of the part on enforcement by way of authority, it would be expedient to address Section V on electronic registers before coming back to the issue of enforceable documents. Moreover, considering that the draft best practices provided for interconnected steps that were differentiated according to the factual situation, she asked the Reporters to kindly support the deliberations of the Working Group by drafting a visual flowchart with the actions required by the creditor to fulfil all threshold requirements to initiate the execution of its claim in the different situations. In addition, the flowchart should clarify who would be responsible for taking decisions along the procedure. This chart would not be part of the final instrument but would be very useful in assisting the Working Group in reaching a common understanding of the issues. *The Reporters* agreed to provide such a chart.

Section V (electronic registration)

23. *The Reporters* clarified that the registration system proposed in the draft best practices was designed to promote cooperation between enforcement organs and would facilitate the procedure when different organs or different enforcement measures were involved. It was based on the fundamental rule of party disposition (Section I, Recommendation 2), reflected in the obligation of enforcement organs to start from, and consider, a party’s application for the execution of claims. A second function of the registration would be to provide the parties in an enforcement procedure and their representatives with information, taking into account, however, the fact that creditors to a proceeding would not usually have a legitimate interest to be informed of other proceedings. Another function of the registration system was to replace existing formal pre-conditions for enforcement, and replace paper-based documents with an electronic format.

24. *The Chair* opened the floor for a first round of comments. One issue raised was whether “all enforceable instruments” needed to be registered under Recommendation 1 (I), regardless of the time when enforcement was sought. *The Reporters* clarified that registration would only take place where the creditor intended to apply for enforcement, cross-referencing Recommendation 4 of Section III (enforceable instruments) which provided that the registration of enforceable electronic instruments be a mandatory precondition for the commencement of enforcement proceedings.

25. *The Chair* and some experts expressed concern that requiring the setting up of the electronic register as a mandatory precondition for enforcement would deter States who were not (yet) prepared for the costly investment to implement such a solution, or undergo the digital transformation required to obtain electronic data for the register, from using the finalised best practices to improve their enforcement laws. As such, the Working Group discussed the possibility of leveraging existing registers/registries and databases, such as attachment registers, or case-management registers, for the electronic enforcement registers. It was agreed that the possibility for a State to adapt an existing well-functioning register to be fully consistent with the best practices, if it did not wish to completely revamp its entire registry system, would be included in the commentary.

26. Some participants raised a further point of concern on Recommendation 1 (I), according to which the envisaged registers should be administered by court magistrates, since this would be likely to impose an additional, and possibly unwelcome, heavy burden on judicial authorities. They suggested adopting more generic language in the draft, to allow legal systems to consider different modes of management and/or supervision of the register involving public authorities. *The Reporters* explained that registers ought to be administered by a court magistrate to ensure independent and neutral handling of sensitive data. They cautioned against the possibility of a private party administrator storing the register data on the cloud, which would adversely affect the implementing State’s sovereignty over such data. This led to a discussion on the relationship between the extent of control and sovereignty public authorities had over data, and the technical design of the registers, which affected not only the general management of the registers, but also issues concerning the approval of modifications or deletions of data. In light of the practical implications, it was suggested that the issue of whether the data could be stored on the cloud would have to be left to the implementing State, and that such details would not be covered in the best practices. *The Chair* summarised the discussion and observed that there was support for the use of electronic registers, and that while there was merit in the view that they should be under the administration of a court magistrate, it was considered more practical to state that they be administered or supervised by a public authority, leaving the arguments in support of administration by the courts to the commentary.

27. In relation to cloud storage, a number of experts agreed that the best practices should be formulated in a technologically neutral manner, since while functional recommendations could be made for the registers, the project should avoid giving any specific technological recommendations.

28. There was a brief discussion on the extent of the information which should be made available in the registers and on whether they should contain only selected information from the files of the enforcement authority. *The Reporters* explained that, according to Recommendation 1 (III), all relevant data on ongoing enforcement proceedings should be made available in the registers.

29. This point led to a discussion on the issue of access to the information in the registers. In relation to *who* could access the information, some experts suggested that anyone who was a party to the enforceable instrument (and their legal representatives) should have access, as well as the enforcement authority. Whether or not enforcement officers could access information created by other enforcement officers was debated, leading to a discussion on how to safeguard enforcement officer activity, particularly when it was conducted in a regime of competition. There was general agreement that, given the sensitive nature of the information stored in the registers, pertaining to the assets of a debtor for instance, they should not be wholly publicly available. The more specific

issue of competing or conflicting proceedings could then be addressed when discussing the modalities of access to the information.

30. Discussions on the matter of *how* the information could be accessed focussed on whether creditors, debtors, and their lawyers should be able to access the data of their own enforcement proceedings directly, or whether the registration office should need to manage such access. When some experts asked to clarify the meaning of “admission by the registration office” in Recommendation 1 (IV), *the Reporters* explained that it was intended to cover the scenarios of admission by the court magistrate as well as admission in an automated format. It was agreed that relatively stricter rules would govern the access to data concerning competing or conflicting enforcement proceedings.

31. The discussion proceeded to examine *what* the ability to “access” information should entail. While *the Reporters* pointed out that applicable data protection rules may already cover what information should be accessible, there was general agreement that the recommendations should set out in further detail the extent to which different users were able to view information, add new information, and modify existing information (whether submitted by the same user or by a different user) in the registers. It was also suggested that reference could be made to comparable guidelines or best practices on access to information relating to other types of electronic platforms. *The Chair* concluded that the wording in Recommendation 1 should be refined to cater for the discussion on the access to information.

Item 4(b) - Draft best practices regarding enforcement of security rights (Study LXXVIB – W.G.5 – Doc. 4)

32. *Professor Neil Cohen, Reporter*, introduced Document 4, containing revised and augmented recommendations as well as commentary that had been developed by Subgroup 2 regarding enforcement of security rights. He recalled that the goal of the subgroup was not to reform the substantive law of security transactions, but rather to focus on the phase of their enforcement, therefore producing recommendations that should be useful in a particular State, whether or not it had already introduced a full-scale reform or modernisation of its secured transactions law following international standards. The intention was to provide benefits both to States that had reformed their secured transactions law regime, and to those that had preferred to maintain their substantive secured transactions laws unaltered, or that had introduced a partial reform, but would still be interested in having an effective and efficient enforcement regime. *The Reporter* highlighted that the work that had already been produced was, in any case, very strongly guided by current international standards on secured transactions law, particularly those developed by UNCITRAL, and recalled that the Working Group’s consensus was to not deviate from those standards in the absence of a strong reason to proceed otherwise.

33. *The Reporter* also noted that the Working Group had previously approved the drafted recommendations in principle and had agreed that the goal for this session was to produce commentary to the recommendations. Therefore Subgroup 2 had focused on adding commentaries to the recommendations, which had generally remained unaltered since the last session. He pointed out that while the black letter recommendations were useful, they very often required commentary containing convincing justifications as well as explanations in more accessible language and illustrations on their potential application.

34. *The Deputy Secretary-General* recalled that the Drafting Committee would make the final adjustments to the draft text, and that the Working Group should focus on reaching agreement on the policy issues underlying the best practices during its current session. The Drafting Committee would then focus on achieving uniformity and harmonising the language, as well as making revisions to coordinate the different parts of the instrument (such as finding suitable alternatives to the opening phrase of the recommendations, as had been discussed at previous sessions).

Annex 1 – Repossession of tangible collateral

35. *The Reporter* proceeded to present Annexe 1 of Document 4, which contained the recommended best practices for obtaining possession of tangible collateral (sub-team *Professors Neil Cohen and Teresa Rodríguez de las Heras Ballell*). He explained that they had focused on extra-judicial enforcement in particular, but had also included situations requiring the assistance of the judiciary. He then presented Recommendation 1, pointing out that the last sentence of the recommendation had been added to clarify that the Working Group was not suggesting that extra-judicial repossession would be the only path available to the creditor, and that judicial repossession would be available as well. He also noted that the additions to the commentary had been drafted to provide a solid explanation of the advantages of extra-judicial repossession and the reasons why it should be recommended. In particular, while comment (d) set out the economic rationale underlying the choice for extra-judicial repossession, comment (e) balanced this right by pointing out that its operation would be subject to an important set of limitations particularly designed for the protection of the grantor of the security right.

36. When one participant queried the potential effects the best practices may have on the UNCITRAL Model Law on Secured Transactions, *the Reporter, the Chair, and the Deputy Secretary-General* all intervened highlighting the difference in nature between the UNCITRAL Model Law on Secured Transactions and the envisaged instrument on best practices for effective enforcement, clarifying that the latter were designed to augment and provide additional guidance regarding those aspects of enforcement of security rights not addressed by UNCITRAL instruments.

37. *The Reporter* moved on to present the commentary to Recommendation 2, noting that the Working Group had discussed it in previous meetings. He explained that the commentary was designed to provide further details on the requirement that the secured creditor be able to obtain possession extra-judicially of tangible collateral after default only if agreed with the grantor in the security agreement or otherwise in writing. One expert queried if the expression “or otherwise in writing” should differentiate between subsequent written agreements concluded before or after the debtor’s default. *The Reporter* clarified that the expression had been used to reflect the language adopted by the UNCITRAL Model Law on Secured Transactions, and suggested that the Drafting Committee might address this issue.

38. In the ensuing discussion, the commentary received general support by the Working Group. One expert expressed his particular support for expanding the last sentence in comment (c) under Recommendation 2, which was in brackets. This would be useful to address the issue that had been raised on the possibility for the grantor to agree with extra-judicial repossession of the collateral before or after default, in order to explain the economic rationale and practical consequences of the recommendation. *The Chair* concluded that the brackets could be deleted, calling for emphasis and further elaboration of the policy point expressed therein.

39. *The Reporter* then presented Recommendation 3, which provided for a second procedural protection for the grantor. According to this provision, the creditor could not exercise the right to repossess the collateral unless it gave reasonable notice of default to the grantor. In particular, comment (b) had been designed to explain the rationale and the advantages of the recommendation, which was in fact not provided for in some legal systems. Comment (c), in turn, had been inserted to clarify that both the grantor’s interests and the secured creditor’s economic interests should be protected. The commentary was therefore the result of balancing these interests, and had been drafted to emphasise the economic impact of the rules on enforcement, entailing that the harder it is for the secured creditor to repossess, the lower the risk reduction for the secured credit, which increases the cost of credit and decreases its availability. Finally, the Reporter referred to comment (d), which described an exception already contained in the Model Law on Secured Transactions.

40. The Working Group discussed whether the expression “reasonable amount of time”, in comment (c) could be drafted in more detail to provide guidance on the exact amount of time which

would be considered reasonable. Summarising the discussion, *the Deputy Secretary-General* suggested that it would be useful to add illustrations of what, given the circumstances, would constitute a clearly unreasonable amount of time, and of what would be understood as clearly reasonable in the circumstances. The Secretariat also highlighted that it would be useful if the illustrations made it clear that what is reasonable depended on the context, highlighting that there were also in-between situations that would need a more specific scrutiny. An expert further pointed out that instead of specifying a reasonable amount of time in the law itself, it could be left to the judiciary to decide on this matter if the legal system of the implementing State deemed it more appropriate. *The Reporter* agreed with the suggestions, pointing out that the commentary could refer to legislative techniques such as using the expression “not to exceed [X] number of days, but no less than [X] number of days”. It was agreed that the subgroup would draft more illustrations on the matter.

41. *The Reporter* then addressed Recommendation 4, noting that it had been designed to acknowledge that it was common for legal systems to provide for additional measures to protect grantors who were consumers. Comment (b) described some of the common mechanisms used by legal systems in this regard. Such measures were very often considered matters of local domestic public policy, rather than matters for which a worldwide standard could easily be developed. As with some of the previous recommendations, comment (b) had been drafted so as to provide economic guidance, by noting that a balance should be achieved, since creditors should retain an incentive to extend credit.

42. *The Deputy Secretary-General* recalled that such recommendation was aligned with the scope of the project and noted that, despite the project being specifically focused on business-to-business transactions, a provision acknowledging the deference of the instrument to national consumer law was advisable. The Working Group further discussed whether the deference to national consumer law should be stated in a more general manner, as it might also apply to other parts of the best practices. Nevertheless, it was highlighted that it was advisable to retain such specific recommendation in the part of extra-judicial repossession, as it might have a particular impact in this area of the law. Considering the support of a number of experts for the recommendation, while at the same time mindful of the Working Group’s mandate to focus on business-to-business transactions, *the Chair* concluded that it would be advisable to adhere to the present formulation of the best practice.

43. *The Reporter* moved on to present Recommendation 5, which the Working Group had already discussed but which was likely to need further input. The recommendation elicited a lot of discussion, in particular on the use of expressions such as “breach of the peace” and “breach of public order”, given that a “breach of public order” could exist in the absence of an objection from the grantor, and conversely a reasonable behaviour by the creditor could be met by objections from the grantor.

44. *The Reporter* and *the Chair* summed up the discussion stating that Subgroup 2 would further consider how to redraft the recommendation and the commentary to provide useful guidance both on the aspect of the objection of the grantor (or the person in possession) and from the perspective of the standard of behaviour on the part of the secured creditor seeking to take possession. It was also stated that the Working Group had found the expressions “breach of the peace” and “breach of public order” helpful and that it was left to the Drafting Committee to consider whether these expressions should be mentioned in the recommendation itself or whether they should be included in the commentary. Finally, there was also general consensus on the need to insert some illustrations on these matters.

45. *The Reporter* then moved on to present Recommendation 7, noting that it would be advisable to discuss Recommendation 6 at a later stage, as it concerned judicial relief in the extra-judicial repossession process. He noted that the Working Group had already discussed the black letter text of Recommendation 7, which provided that the grantor is entitled to recover compensation for the damage it suffered as a result of a violation undertaken by the secured creditor, and that comments

(b) and (c), in particular, had been designed to explain such rule in a more detailed manner. In this regard, comment (b) emphasised the compensatory rather than punitive nature of the damages, while comment (c) acknowledged that some States have, in limited ways, deviated from this approach.

46. *The Deputy Secretary-General* raised the issue of whether the commentary should refer to the fact that legal systems may characterise the conduct of the creditor as a criminal violation or another violation, giving rise to remedies not rooted in private law. This issue was mentioned since the recommendation, as currently drafted, could lead the reader to conclude that the only remedies available were in damages. The Working Group agreed with the suggestion, clarifying that the instrument would not draft best practices on other kinds of violations since those were not within the scope of the instrument, but would rather acknowledge that, depending on the applicable law, there might be other consequences not stated in the black-letter recommendation. *The Reporter* agreed that the Drafting Committee should propose a short paragraph on the matter, to be included in the commentary.

47. There was also general consensus among Working Group members in relation to the drafting of the last sentence of comment (b), which did not exclude that a legal system could provide for remedies going beyond compensatory damages (e.g., punitive damages) in special circumstances.

48. Finally, a number of experts questioned whether Recommendation 7 should address the issue of the costs of repossession of collateral and recovery of the debt. In general, it was agreed that this was an important issue that should be dealt with, noting that the matter was within the scope of the instrument. It was agreed that Subgroup 2 would propose language on this point to be included in the commentary, at the very least acknowledging the fact that this issue is typically dealt with in the contract between the parties. *The Reporter* also noted that, once this was done, the Working Group could decide on whether such inclusion would be appropriate.

49. *The Reporter* moved on to address Recommendation 8. He recalled that Working Group members had previously suggested to include such a provision explicitly. A discussion ensued on whether the text should be placed in the recommendation or in the commentary, and on how to avoid touching upon domestic agency law or national law on civil proceedings rather than enforcement. *The Chair* summed up the conclusions by suggesting that it might be a question of formulation: the recommendation could be drafted to say it was understood that the applicable law would cover the actions of the agents of the secured creditor. It was agreed that the subgroup or the Drafting Committee would take such issue into account and make drafting proposals.

50. *The Reporter* then moved on to Recommendation 9, noting that the square brackets had been added because no final conclusion had been reached the last time this recommendation had been discussed by the Working Group, though there had been general agreement to consider this issue. *Teresa Rodríguez de las Heras Ballell, Co-Reporter* on this part of Document 4, presented the recommendation, explaining that it was innovative as it did not have an antecedent in the UNCITRAL Model Law on Secured Transactions. The purpose of the provision was to offer a specific illustration of what good faith and commercial reasonableness meant in the specific scenario where there was an oversecured obligation (meaning that the value of the collateral was significantly greater than the amount of the secured obligation) and the collateral was composed of tangible assets which could be divided. It was suggested that, as a best practice, the secured creditor should selectively and partially take into possession only those items that were sufficient to repay the loan and cover other expenses. The commentary provided further explanations on the need to achieve a balance of the competing interests at stake.

51. Several concerns were raised on this recommendation, partly related to the policy and partly to practical issues in its implementation. It was pointed out that the provision assumed that there would be a reasonable objective evaluation of the collateral, which should be carried out by the secured creditor beforehand. The provision also assumed the existence of a secondary market in

which such an evaluation would prove to be correct. In the ensuing discussion, another expert supported the recommendation, noting that it was in line with the principle of proportionality that was one of the founding principles of the whole instrument, and suggested that the issue be solved by shifting the burden of the proof to the grantor, as it would be easier for the grantor to provide proof that the creditor could have proceeded in a more reasonable manner. Other experts supported the recommendation, noting that in such an extreme case it would be unfair for the secured creditor to dispose of all the assets. It was pointed out, however, that there could be some cases in which such an assessment was not that clear and a possible solution would be, as noted previously, to work on the burden of proof. Some questions were also raised regarding what the remedy for the debtor might be if the creditor did not comply with the recommendation; whether the recommendation might create uncertainty for the creditor and raise the cost of access to credit; whether it would also be useful to include the scenario where there was only one asset with a value significantly higher than the debt (which was a more difficult case than the one envisaged in the recommendation); and whether the recommendation could be approached from the perspective of the debtor's duty to cooperate or the principle of proportionality.

52. It was further highlighted that such a provision should not create any risk of the secured creditor not being paid in full, pointing to the expression "amount that can reasonably be expected" used in the draft text. There was also agreement that the provision worked in cases where it was absolutely clear that the secured creditor could be fully paid by disposing of only some assets. Furthermore, experts added that the provision could also encompass the scenario where, should the realisation efforts differ in relation to different items of collateral, the creditor should not decide for the realisation that took longer, or that was more difficult.

53. Finally, *the Secretary-General* noted that the term "oversecured" could bear another meaning compared to what was meant in Recommendation 9 and that it might be better to avoid using the term.

54. It was finally agreed that the Drafting Committee would review the recommendation and attempt to identify a means to clarify the limited scope of the recommendation (no broader than the initial example), to avoid problems in other scenarios.

Annex 2 – Disposition of the collateral

55. *The Chair* referred to Annexe 2, which contained the draft recommendations on disposition of collateral. She recalled that the Working Group had previously discussed and approved the draft recommendations contained in Annexe 2 and suggested that the Working Group focus on the commentary to those recommendations. She further noted that the discussion should be focused on the provisions of Annexe 2 dealing specifically with the extra-judicial methods of disposition, recalling that the Working Group would address the issue of the interconnection between the judicial and extra-judicial methods of enforcement at a later stage.

56. *Mr Richard Kohn and Mr Fábio Rocha Pinto e Silva, Reporters for Annexe 2*, introduced the updated version of the document, pointing out that it had been revised to better reflect the language of the UNCITRAL Model Law on Secured Transactions, as mandated by the Working Group. They also noted that the team had added commentaries and illustrations to the recommendations in the revision.

57. *The Reporters* asked the Working Group to consider if there should be a recommendation providing a non-exhaustive list of the types of extra-judicial disposition methods available to secured creditors, considering that some methods could be novel to many jurisdictions, with the caveat that the creditor might deem other types of enforcement commercially reasonable. They noted that such a provision had been included in the commentary to the first recommendation, but that it may be useful to consider whether such a list should be the subject of a specific "black-letter" recommendation.

58. The Working Group reached a general consensus in relation to the substance of the drafted list, which provided for examples of extra-judicial disposition methods, but the experts did not reach a final solution regarding the location of the provision. *The Chair* noted that this issue amounted to a drafting matter and proposed that the subgroup be asked to briefly explain each type of extra-judicial disposition method and existing best practices related to them, instead of merely listing the available methods. It was also suggested that the newly drafted material should be later discussed by the Drafting Committee, which would then propose the best way of presenting it in the instrument. The Working Group agreed on the proposed way forward.

59. *The Reporters* then addressed the issue of whether the recommendations should provide for more guidance relating to time periods, which were addressed rather generically in the UNCITRAL Model Law on Secured Transactions. *The Chair* noted that time periods depended on the circumstances of the case and this should be made clear in the comments. She also suggested to apply the same solution that had been adopted for previous recommendations, that is to provide illustrations of what would constitute a clearly unreasonable time period as well as a range of situations that would be considered as reflecting reasonable time periods.

60. Finally, *the Reporters* referred to Recommendation 10, which addressed the question of who may seek relief when there was alleged non-compliance with the provisions relating to enforcement, providing two options. Option A provided that relief may be sought by the grantor, any other person with a right in the encumbered asset whose rights were affected by that non-compliance, or the debtor. Option B, on the other hand, provided that any person affected by the alleged non-compliance would be entitled to seek relief. This could include a competing claimant and a guarantor of the secured obligation, alongside a co-owner of the encumbered asset.

61. The Working Group agreed to only retain Option B in the recommendation, as it included non-compliance not only by the secured creditor, but also by the debtor and by any other relevant party. Nevertheless, it was also agreed to tentatively maintain a reference to Option A in the commentary, should it be considered appropriate. There was also general agreement concerning the need to expand the comments to include injunctive relief, subject to a decision on how such a reference would intersect with Annexe 3 of Document 4 and possibly with the broader picture of Document 3.

Annex 3 – Judicial action in the context of extra-judicial enforcement

62. *Professor Neil Cohen, Reporter for Document 4*, addressed Annexe 3 on judicial action in the context of extrajudicial enforcement of security rights. He briefly presented the four drafted illustrations, which described the events in the course of extra-judicial enforcement of security rights that may require judicial action. He noted that input was sought particularly from Subgroup 1.

63. *The Reporter* noted that Subgroup 2 was comfortable in asserting that, in all these situations, the interested party should be able to seek judicial relief, highlighting, however, that an ordinary judicial proceeding could substantially diminish the extent and possibility of creditor's recovery. In this regard, the Reporter pointed out that a common understanding had been reached on the need to provide recommendations regarding possible "expedited" proceedings, though there was no agreement on the exact terminology to be used to refer to such proceedings.

64. It was agreed that the Secretariat would facilitate a discussion on Annexe 3 between interested participants of the Working Group, and that the Working Group would receive an updated document in a timely fashion. *The Reporter* also invited other participants in the Working Group who had not yet been directly involved in the discussions to provide their comments on Annexe 3 in writing.

Item 4 (e) - Enforcement on digital assets (Study LXXVIB – W.G.5 – Doc. 6)

65. *Professor Teresa Rodríguez de las Heras Ballell, Reporter for Document 6*, explained that the document had been updated with some illustrations of possible best practices in Annexe 1 for the purpose of discussion by the Working Group. She briefly explained that the first proposal (item II.1) concerned the issue of whether the best practices should include a very general principle on enforcement of digital assets, drafted as a non-discrimination principle or as a functional equivalence principle. She then noted that the document contained three drafting options for such a principle for the Working Group to consider. She clarified that the first option was very much aligned with the definition of digital asset provided in UNIDROIT's Digital Assets project, while the second focused on the idea that existing methods for enforcement on digital assets should be applied to the fullest possible extent, taking into account the functional characteristics of digital assets. She finally explained that the third option was very similar to a working draft developed for the ELI Principles on Enforcement of Digital Assets. The idea underlying the third option was that the enforcement of digital assets should not be denied solely on the grounds of the digital nature of such an asset. The Reporter then posed to the Working Group the question of whether it was necessary to explicitly state such a basic principle in the best practices, or whether it amounted to an evident assumption.

66. In relation to the general principles and the options, several experts pointed out that the three options were not necessarily mutually exclusive, as they addressed different issues. In particular, the recommendation that existing methods for enforcement would apply taking into account the functional characteristics of digital assets was considered to be an important point to be clarified in the best practices.

67. *The Reporter* went through the second drafting illustration on the duty to cooperate (item II.2), highlighting the principle that parties have to cooperate in order to render the identification and the tracing of the digital asset feasible and effective. In particular, she drew attention to a set of issues to be considered, which included the need to ensure debtors' cooperation, as much information was usually protected or confidential or under the exclusive control of the debtor (e.g., information on a private key or where the assets were stored). In cases in which cooperation by the debtor was insufficient or ineffective, it would be necessary to provide for a duty of third parties to cooperate (e.g., custodians, marketplaces, platforms, intermediaries, etc.). The Reporter asked the Working Group to comment on the scope and extent of such a duty to cooperate.

68. *The Reporter* moved on to the third drafting illustration (item II.3), pointing out that it covered another problem that was typical of digital assets: search measures to access information on digital assets for enforcement. She highlighted that the Working Group should consider how these assets were searched in an effective and efficient way, and to which extent procedural law already provided for enforcement methods that were effective for searching purposes.

69. The Reporter then addressed the fourth drafting illustration (item II.4), noting that it attempted to make a distinction between the need for cooperation in identifying and tracing the asset and the need for cooperation in enabling the transfer of control necessary for the purpose of seizure. In practical terms, the judicial or enforcement officer may need to have access to the private key in order to proceed with the attachment and the subsequent seizure or sale of the asset – a step that differed from the previous phase related to the mere tracing of the asset.

70. The Reporter went on to introduce the last three illustrations on which the draft text was yet to be formulated, noting that feedback on these matters would be very useful. The fifth drafting illustration (item II.5) addressed the issue of digital assets in custody. The Reporter clarified that the purpose was to ensure that the court and all the other authorities involved in enforcement possessed the technical mechanisms that were necessary to effectively implement custody of the assets. Furthermore, such digital assets should be properly protected and cybersecurity measures should be implemented accordingly. For example, the recommendation should raise awareness on the possibility of non-authorized disposition of the digital asset by the court or an enforcement agent. In

this regard, the Reporter raised the issue of the level of detail to be provided by the best practices, especially concerning the liability issues that may arise in such cases. She also raised the issue of the level of detail that the best practices should provide in relation to the sixth drafting illustration (realisation of value), emphasising the volatile nature of the value of digital assets. Finally, the Reporter referred to the seventh drafting illustration (item II.7), raising the issue of whether there should be a specific best practice for the enforcement of digital assets that are used as collateral, since the project covered the enforcement of secured transactions.

71. In the ensuing discussion, one expert queried on the type of issues the recommendations were designed to address, that is cases in which the rights of a party with respect to the digital asset were interfered with in some way and the person was seeking protection of such rights by enforcing on the digital assets; or cases in which the claimant had a monetary claim originally unrelated to the digital asset, which would be enforced against the digital asset as part of the debtor's patrimony. *The Reporter* clarified that the recommendations on enforcement of digital assets should be applied to the same enforcement situations that are to be covered by the whole project (e.g., the project would cover the situation where the enforcement official is seeking to attach the debtor's bitcoin account to enforce an unrelated claim against the debtor).

72. Another expert noted that some of the proposed best practices specifically drafted to address enforcement of digital assets were similarly provided for by the general best practices on enforcement, such as the best practice of cooperation. This led to a discussion on whether the project should contain a dedicated section on digital assets, even if that section would reference, or build upon, general enforcement rules. It was suggested that the part of the project on enforcement on digital assets could refer to the general part, when necessary, with a description of how the different modes of enforcement could be combined to suit the particular nature of digital assets.

73. *The Chair* confirmed that there were good reasons to have a section that dealt specifically with digital assets in the future instruments, and highlighted the particular importance of the commentary for this part of the project. She pointed out, however, that the presentation was a drafting issue which should be further addressed by the Drafting Committee after agreement on the policy issues.

Item 4 (c) - Update of discussion paper on online auctions (Study LXXVIB – W.G.5 – Doc. 5)

74. *The Deputy Secretary-General* explained that the Secretariat had developed an updated version of the discussion paper. She noted that the purpose of the updated version was three-fold: first, to provide additional research on online auctions in some non-European jurisdictions; second, to include the relevant discussion from the fourth session of the Working Group; third, to provide some initial ideas of the possible topics for which best practices might be useful. A general question addressed to the Working Group was whether the best practices should address online auctions in the general part on enforcement by way of authority only, or whether it made sense to reference this issue also separately in the part on secured transactions, as it might be particularly useful in the scenario of extra-judicial enforcement.

75. In view of the limited time at its disposal, the Working Group was invited to send comments and any feedback on Document 5 to the Secretariat, especially considering whether the direction adopted in the suggested best practices was deemed adequate. It was also pointed out that feedback on the location of these rules would be kindly appreciated.

76. One expert noted that the Commission for the Efficiency of Justice of the Council of Europe was in the process of preparing best practices on online auctions involving an inventory of the practices in its member countries. *The Secretary-General* also noted that the European Commission had recently published a Directive Proposal which included paragraphs on online auctions in the area of insolvency. *The Deputy Secretary-General* then highlighted that, while these works would certainly be relevant for the project, it was important to decide on the Working Group's preferred policy

direction, as the research already conducted by the Secretariat had shown that legal systems differed from each other on the matter.

Item 4 (d) - The use of alternative dispute resolution in the enforcement of security rights (presentation by Ms Nina Pavlova Mocheva, Senior Financial Sector Specialist, WBG)

77. *The Deputy Secretary-General* introduced Ms Nina Pavlova Mocheva (Senior Financial Sector Specialist, World Bank Group representative and Special Reporter) and thanked her for acting as a special reporter for the Working Group session.

78. *The Special Reporter* presented on the use of alternative dispute resolution (ADR) and online dispute resolution (ODR) in the context of enforcement proceedings, with a focus on the use of ADR and ODR as mechanisms for resolving debt-related disputes. She informed the Group that the pandemic had exacerbated household indebtedness around the world, bringing unprecedented economic challenges to many countries. In face of the upcoming debt crisis for micro-, small-, and medium-enterprises in many countries, she highlighted the urgency for policy makers to have efficient debt enforcement tools at their disposal, and to contemplate suitable alternatives if their existing systems were too slow to meet demands.

79. The Special Reporter presented on the possibility of using ADR and ODR when the debtor does not comply with its obligations, especially as a case management tool for courts or to deal with objections by the debtor. The use of ODR could assist virtual negotiations or communications without the need for the parties to be physically present, and although traditionally it had been used for contractual disputes, ODR was a useful tool for facilitating multi-party negotiation-based processes in general. She pointed out that the platform could be designed to fit the specific needs of the users, allowing States to refine the platform to achieve their specific goals. That said, such mechanisms would require the prior agreement of the parties unless they were court-mandated, and the outcome could still require some form of court intervention if the parties did not comply voluntarily. In some cases, the outcome of ADR could in turn become the subject of a challenge before a court. The different models of ODR platforms, and the benefits and challenges of using ADR and ODR were discussed at length (see slides attached to this Report as Annexe 3).

80. Following the presentation, the Special Reporter and an expert noted that some countries had a post-judicial mediation mechanism in place in their enforcement procedure, described by some as participatory enforcement, to enable the debtor to assist in the enforcement procedure and to identify a mutually convenient solution.

81. Another issue raised following the presentation concerned whether an automated system which made its own decisions would be defined as an ADR mechanism. *The Special Reporter* concurred that this was an issue with which the World Bank Group was grappling and spoke on the potential challenges this posed for traditional legal frameworks.

82. *The Chair* thanked the Special Reporter and suggested that the Working Group consider whether ODR should be mentioned in the best practices in the context of judicial and/or extra-judicial enforcement, also recalling the presentations that had been made by special reporters Ms Diana Lucia Talero and Mr Carlos Riaño and guest participant eBRAM at the fourth session of the Working Group.

Item 4 (a) - Draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.5 – Doc. 3) (resumed)

83. *The Chair* resumed consideration of Document 3, suggesting that the issue of enforceable documents (section III of Document 3), which had been discussed on the first day of the session, be tabled for the intersessional work of a smaller group.

84. The Working Group addressed section IV on disclosure of debtors' assets, which had been revised and provided with comments by the Reporters. Regarding the other outstanding sections of Document 3, *the Chair* noted that section V on registration had been fruitfully discussed in relation to the main policy issues, though some questions on various points of detail remained open, for which *the Secretariat* asked the Working Group to send written comments. Concerning section I on general provisions, *the Reporters* confirmed that it was an initial draft and the final version would be drafted after completion of most of the work on the other sections. Finally, *the Deputy Secretary-General* underlined the importance of section II on the organisational aspects of enforcement, which was part of Document 3 but that the Reporters had not completely finalised. For that section, she suggested that it would be useful for the instrument to highlight the obstacles to and advantages of implementing the different existing models depending on the specific legal, but also economic and social, system of a given country.

85. The discussion focused on the policy issues underlying section IV, starting with Recommendation 1. *The Reporters* noted that this section intended to balance the principle of proportionality with the need to ensure the effectiveness of enforcement proceedings, as stated in Recommendation 1 (I). Concerning Recommendation 1 (IV), it was clarified that its aim was to ensure that competent enforcement organs made use of publicly accessible registers, among others, in fulfilling their task of searching for debtor's assets, but could also apply for access to other registers that required a case-by-case application demonstrating a legitimate interest. There was consensus in the Working Group that such a provision would not impose a case-by-case application unless it was required by the register to be consulted, and that it would be useful to incentivise a more complete acquisition of information regarding debtor assets.

86. On the other hand, this led to a discussion of whether the best practices should suggest that limited-access registers be made more accessible to enforcement organs, should their access be more restricted. One expert pointed out that legal systems differed regarding the extent of judicial officers' right to access information stored in specific registers, such as, for example, tax registers. Several participants agreed that access to information in tax registers, for the limited use in a specific enforcement procedure and under protection of confidentiality, would be very helpful not only to gain a fuller picture of debtors' assets but also to locate debtors, as those registers were updated regularly, as opposed to other public registries. In this regard, it was noted that restricting access to tax authority registers would amount, in practice, to granting a privilege to the tax creditor even in the absence of such a privilege or lien in the ranking of priorities of a given jurisdiction. Other experts underlined that it would be important to protect confidentiality and abide by data protection rules.

87. It was further noted that access to information by an enforcement officer would be facilitated by the interoperability of different registries. In this regard, some experts suggested that the instrument should look at those legal systems which had developed a well-functioning digitised and interoperable storage of information accessible to courts, particularly regarding bank information. Experts reiterated, however, the need to protect personal data and confidentiality.

88. This discussion led to consideration of the "duty to cooperate" provided in Recommendation 1 (II) and (III), as such provision referred to cooperation by the debtor but also by third parties in the disclosure of debtor's assets. In more general terms, one expert questioned the usefulness of the concept of a "duty to cooperate" in relation to the debtor in the context of enforcement by way of authority of unsecured debt, which by definition did not rely on the debtor's consent. *The Reporters* noted that there was a growing tendency in legal systems to expect cooperation from the debtor even if the system did not ultimately depend on it, as a cooperating debtor would be bestowed with advantages, or with additional sanctions if it did not cooperate. This trend was generally present in civil procedure, as witnessed, for example, by the role of the principle of cooperation in the 2020 ELI-UNIDROIT European Model Rules on Civil Procedure. There was however agreement in the Working Group that the comments should be more explicit on the positive duties entailed, especially when the duty to cooperate was expressed in general terms, and that the relationship between Recommendation 1 (II) and (III) should be clarified.

89. Some experts referred to specific instances where the debtor's cooperation (and adequate sanctions for non-compliance) was essential to gain access to information, such as for digital assets. *The Chair* took note of these comments and tabled the issue for the continuation of the discussion on Document 6.

90. The discussion moved on to Recommendation 2 (II), which was a practical application of the principle of proportionality. This provision was the object of much debate, particularly regarding the meaning of "invasive measures", which were considered inadmissible in the factual circumstances mentioned in the recommendation, and the limits to the action of enforcement authorities at the stage of disclosure in more general terms. *The Reporters* clarified that this recommendation was aimed at avoiding unnecessary disclosure and covered two situations: the case where the voluntary disclosure of specific assets by the debtor was sufficient to proceed with attachment, and the case where the enforcement authorities had good reason to assume that assets that were already known would be sufficient to permit full execution. For the latter situation, the comments referred to creditors such as banks, which are usually already aware of debtors' assets that might be sufficient to cover enforcement. In the ensuing discussion, experts noted that some legal systems permitted enforcement authorities to proceed with a fully-fledged search using all electronically available information in a pre-enforcement phase, and queried whether this would be admissible under the draft best practices and why. *The Reporters* referred to Recommendation 2 (I) according to which the search for a debtor's assets would commence when there was a registered enforcement instrument.

91. *The Chair* summed up the discussion stating that the current wording of the provision gave rise to doubts as to its meaning, particularly because of the reference to "invasive" measures which would seem to imply that other measures towards discovery of assets were still admissible, while the provision's aim was to avoid recourse to the actions envisaged in Recommendation 3. She deferred the matter to the Drafting Committee, after which the provision and its commentary would come back to the Working Group to ascertain consensus on the policy.¹

92. *The Reporters* then asked for the Working Group's input on the role of mediation in the phase of disclosure, which could facilitate the debtor's cooperation in disclosing assets. Mediation was mentioned in the comments to Recommendation 2, while an express reference to it was contained in the General Provisions (Recommendation 2 (II)). There was a broad consensus in the Working Group that mediation could play a useful role in enforcement, and that there was a trend in legal systems towards a wider use of ADR tools including mediation and arbitration in the enforcement phase, which was often referred to as "participatory enforcement". The mediation role of the judicial officer in finding a commonly agreeable solution between creditor and debtor was referred to as an example (e.g., a creditor accepting fulfilment of the debt in instalments). Experts noted, however, that a best practice recognising the potentially positive effect of allowing mediation in enforcement would be better placed in the General Provisions on enforcement by way of authority. One expert referred to the findings of her work as (Co-) General Reporter for the International Academy of Comparative Law on the use of ADR systems in debt enforcement and insolvency. She noted that mandatory mediation did not appear to be recommendable, and that elective mediation appeared to be particularly useful for systems with poor enforcement laws or practices, or for situations where negotiations led to the acceptance of the enforcement instrument by the debtor as a result of negotiations. She also noted that mediation played a useful role in post- self-enforcement disputes.

93. The latter issue triggered a discussion on whether a best practice on the use of ADR would be useful in more general terms, including for the enforcement of security rights, as witnessed by developments in secured transactions laws (and registries) in various countries. Some experts noted

¹ Question by the Secretariat: what is the relationship between Recommendation 2 (II) and Recommendation 1 (III); would Recommendation 2 (II) preempt actions under Recommendation 1 (III)? Should this be clarified?

that the type of mediation in the enforcement of unsecured claims might be different than in the context of enforcement of security rights.

94. *The Chair* concluded that there seemed to be clear support for developing the idea of mediation, particularly in conjunction with Recommendation 2 (II) of the General Recommendations, while the question of adequate cross-references throughout the best practices and adequate treatment of the issue in the part on enforcement of security rights was more open. She suggested that more thought go into this matter.

95. The Working Group moved on to address Recommendation 3. One expert expressed concern on its application in practice, since requiring a specific court order for searches conducted by judicial officers could paralyse their activities. *The Reporters* acknowledged that this was a policy decision they had taken based on recent developments in some jurisdictions, which had stemmed from concerns about the constitutional limits of searches in places of residence or offices. They clarified that this provision did not apply to the situation where the enforcement authority enters private property to seize assets with a known location, but only to situations where the only purpose of entering is to search for potentially available assets, e.g. by looking into company records or other storage places, including computers. Several experts however queried whether it was possible to clearly demarcate the two activities, as in practice judicial officers might enter a debtor's premises to seize assets and contextually find other suitable assets, or find assets which would then be contextually seized on the strength of the same enforceable instrument. It was also queried whether the nature of the enforcement agent (i.e., public or private) might have implications on the need to obtain a court order.

96. In her conclusions, *the Chair* acknowledged the Reporters' concern that there might be situations where constitutional imperatives restricted a search unless it was done on the basis of a specific court order, but cautioned against using language that could be interpreted broadly and unduly limit the effectiveness of enforcement procedures. She asked Working Group participants to share their thoughts and practical examples in writing. She further requested written comments on the remaining recommendations in section IV.

Item 4 (e) - Enforcement on digital assets (Study LXXVIB – W.G.5 – Doc. 6) (resumed)

97. *Professor Teresa Rodríguez de las Heras Ballell, Reporter for Document 6*, continued to present the Annexe to the document which contained an initial draft of illustrations for possible best practices on digital assets, based on previous work. The idea was to present enforcement issues in language that was related to the specific practical problems linked to enforcement on digital assets, without necessarily assuming, however, that digital assets were *per se* different from other types of assets. As the intent was to enable lawmakers to rely on this as a consolidated, structured set of rules pertaining to digital assets, the best practices had been drafted with the purpose of considering the technical and operational problems arising from digital assets.

98. *The Reporter* then went back to the second drafting illustration in Annexe 1 of Doc. 6 (item II.2) on the duty to cooperate in relation to identification and tracing of a digital asset, pointing out that it did not refer to attachment and seizure or sale. She noted that paragraph 4 covered the issue of court orders addressed to foreign service providers, as in most of the digital assets enforcement cases there was a cloud-based wallet controlled by a service provider located outside of the particular jurisdiction in which enforcement was sought. She highlighted that it was not difficult for the debtor to adopt opportunistic behaviour by changing the wallet from one service to another, and raised the issue of whether and to what extent such a situation might be contemplated in paragraph 4. In relation to paragraph 5, she explained that when the enforcement authority compelled the disclosure of a private key or account information, there was a potential risk of exposing the account to cybersecurity risks or the risk that a third party might transfer the digital asset, causing it to be lost.

99. *The Chair* opened the floor and referred to the previous discussion on the relationship between the general enforcement recommendations and the part on digital assets. She reiterated

that, ultimately, the part on digital assets could rely on a strong commentary explaining how the general enforcement recommendations applied to the particular case of digital assets.

100. The Working Group expressed support for the structure adopted by the drafting illustrations, with an expert highlighting that the different steps of tracing, seizure and realisation of value all had their own specific problems relating to digital assets.

101. Another expert referred to the issue concerning foreign entities and suggested that it would be more practical not to focus on forcing the foreign entity to release control of the asset, as this would entail jurisdiction problems, but to compel the debtor to take the steps necessary to transfer the control of the digital asset located in another jurisdiction. *The Reporter* acknowledged the relevance of such a measure and clarified that paragraph 1 of the drafting illustration under item II.4 addressed this issue.

102. In the ensuing discussion, one expert raised the issue of whether paragraph 2 of item II.2 should be redrafted to contemplate two distinct situations which did not seem to be encompassed by the current drafted text. One was a scenario in which a party, other than the debtor who had control of the digital asset, had to cooperate, and another was a scenario in which the debtor did not have control of the digital asset but nevertheless should cooperate in providing information. He also noted that the use of the adjectives “adequate”, “proportional” and “effective” should be harmonised throughout the text, as using them in different combinations could lead future readers to draw inadequate inferences from the absence of one of the terms. *The Chair* noted that this should be taken care of by the Drafting Committee.

103. The Working Group proceeded to consider whether there was any merit in singling out the issue of valuation, since digital assets such as bitcoins were typically subject to an intense fluctuation in value. It was however questioned how such a case would differ, for instance, from a sale of securities, with suggestions that the existing principles as applicable to (other) intangible assets could be analysed for adaptation to digital assets. This led to a discussion on whether special rules were indeed necessary to address the case of digital assets, or whether the existing general rules would be sufficient. One expert noted that one of the main problems would be linked to custody of digital assets by enforcement officers and their related liability, in case these topics were not addressed by the general part on enforcement.

104. There was broad agreement that Document 6 provided a methodological approach for the Working Group to organise its considerations and proceed in a thorough manner, drawing from it that there could be three possible scenarios: (i) issues for which a recommendation already provided for in the general part could be applied the same way in this different context; (ii) issues for which the general recommendation would need to be fine-tuned to cater for some practical obstacles particularly relevant in the context of digital assets; and (iii) issues for which there was a need to craft a specific recommendation because there was no available analogy. Further, it was considered that grouping all recommendations relevant to digital assets together would be useful for pedagogical reasons, to address the need of States for guidance in this area, as well as the difficulties faced by courts that did not know how to proceed with regard to digital assets. While remedies applicable to digital assets might not be dissimilar to those for other assets, it was considered valuable to have at least specific commentary to address how the remedies could work in the different factual instances encountered in scenarios involving digital assets, which might also entail a difference in terminology.

105. In summing up the discussion, *the Chair* recalled that the task of the Working Group was not to develop an exhaustive “code” of civil enforcement, but rather to address certain obstacles to enforcement that required special attention at the global level. In this regard, if one of the issues concerned valuation because stakeholders did not know whether they should use the normal rules or they should look at different ways to protect the interests of the parties involved, then it would make sense to insert a specific best practice, even if the general part of the project did not address the issue of valuation for enforcement on other assets. She further noted that it had been considered

helpful to deal with digital assets specifically, not because digital assets necessarily required different recommendations, but due to the need to explain how enforcement remedies would apply in the context of digital assets.

Item 5 Organisation of future work and discussion on way forward

106. *The Chair* recalled that the sixth session of the Working Group would be held on 14-16 March 2023 and emphasised that a great amount of work would have to be done intersessionally before that session, as well as immediately after the sixth session prior to the meeting of the Governing Council, where it would be important to present the state of development of the project. She impressed upon the Working Group the great value of members' and observers' contributions to the process, thanking them for their continued support.

107. *The Deputy Secretary-General* echoed the suggestion that the Working Group should commence intersessional work immediately after the fifth session. She noted that the Drafting Committee would take on the important role of reviewing the texts which had been agreed upon by the Group in terms of policy. Intersessional virtual workshops would be organised to resolve specific outstanding issues. *The Secretariat* thanked the Working Group for the overall spirit of cooperation demonstrated during the discussion, and urged participants to kindly send the Secretariat their comments on any issue of substance or form pertaining to the shared documents in a timely manner.

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

108. In the absence of any other business, *the Chair* thanked the Working Group and the Secretariat for the great amount of work accomplished during the fifth session, and declared the session closed.

ANNEXE 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 intersessional work and status of the project (Study LXXVIB – W.G.5 – Doc. 2)
4. Consideration of work in progress:
 - (a) Draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.5 – Doc. 3)
 - (b) Draft best practices regarding enforcement of security rights (Study LXXVIB – W.G.5 – Doc. 4): Revised best practices on: repossession; disposition; judicial recourse in extra-judicial enforcement of security rights
 - (c) Update of discussion paper on online auctions (Study LXXVIB – W.G.5 – Doc. 5)
 - (d) The use of alternative dispute resolution in the enforcement of security rights (presentation by Nina Mocheva, Senior Financial Sector Specialist, WBG)
 - (e) Enforcement on digital assets (Study LXXVIB – W.G.5 – Doc. 6)
5. Organisation of future work and discussion on way forward
6. Any other business
7. Closing of the session

ANNEXE 2**LIST OF PARTICIPANTS****EXPERTS**

Ms Kathryn SABO (Chair)	Deputy Director General & General Counsel Constitutional, Administrative and International Law Section Department of Justice Canada
Mr Neil COHEN	Jeffrey D. Forchelli Professor of Law Brooklyn Law School USA
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Mr HE Qisheng (<i>remotely</i>)	Professor of International Law Beijing University China
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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 Sir Roy Goode Scholar, UNIDROIT
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Mr Felix STEFFEK	Associate Professor Faculty of Law University of Cambridge United Kingdom
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OBSERVERS

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) <i>(remotely)</i>	Ms Gérardine GOH ESCOLAR Deputy Secretary General Ms Ning ZHAO Senior Legal Officer Mr Harry CHENG Legal Officer
INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE (IALS)	Mr J.H.M. (Sjef) van ERP Secretary-General, IALS Emeritus Professor of Civil Law and European Private Law, Maastricht University (The Netherlands) Visiting Professor, Trento University (Italy)
KOZOLCHYK NATIONAL LAW CENTER (NatLaw)	Mr Spyridon BAZINAS Lead Adviser
SECURED FINANCE NETWORK	Mr Richard KOHN Goldberg Kohn Ltd.
SUPREME PEOPLE'S COURT OF CHINA <i>(remotely)</i>	Ms ZHU Ke Judge Fourth Civil Division
UNION INTERNATIONALE HUISSIERS DE JUSTICE (UIHJ)	Mr Jos UITDEHAAG First Vice President
WORLD BANK GROUP (WBG) <i>(remotely)</i>	Ms Nina Pavlova MOCHEVA Senior Financial Sector Specialist Finance, Competitiveness & Innovation Global Practice <i>Special Reporter</i>

INDIVIDUAL OBSERVER

Ms Diana Lucia TALERO <i>(remotely)</i>	Secretaria Técnica – Comité de Implementación de Garantías Mobiliarias, Colombia
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STATE OBSERVER

Republic of Korea	Ms Jungyeon KANG Judge
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UNIDROIT

Mr. Ignacio TIRADO	Secretary-General
Ms Anna VENEZIANO	Deputy Secretary-General
Ms Michelle FUNG	Legal Officer
Ms Philine WEHLING	Legal Officer
Ms Luiza LATINI (<i>remotely</i>)	Intern
Ms Stephanie ZHAI	Intern

ANNEXE 3

ADR and ODR as Debt RESOLUTION mechanisms: Implementational challenges
(PowerPoint Presentation by Nina Pavlova Mocheva)