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**GOVERNING COUNCIL**  
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**Item No. 5 on the agenda: Ongoing legislative activities carried over from the  
2020-2022 Work Programme**

**(a) 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 2023-2025</i>
<i>Priority level</i>	<i>High</i>
<i>Related document</i>	<a href="#">UNIDROIT 2019 – A.G. (78) 12</a> and <a href="#">UNIDROIT 2022 – A.G. (81) 9</a>

**I. BACKGROUND**

**A. History of the project**

1. The project on Best Practices for Effective Enforcement, based on a proposal of the World Bank, was included in the 2020-2022 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 99<sup>th</sup> session of the Governing Council, Council Members 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). Following remote consultations with selected international experts and organisations and an internal Workshop, the Governing Council, at its 99<sup>th</sup> session (second meeting), held on 23-25 September 2020, approved the proposed guidelines regarding the scope of the project, confirmed the high-priority status assigned thereto, and authorised the establishment of a Working Group ([C.D.\(99\) B.3](#) and [C.D.\(99\) B.21](#), paras. 57-58). At its 81<sup>st</sup> session ([A.G. \(81\) 9](#), paras. 55 and 67), the General Assembly endorsed the recommendation of the Governing Council at its 101<sup>st</sup> session ([C.D. \(101\) 21](#), para. 187) to keep the project in the 2023-2025 Work Programme, in order to ensure its completion in the first part of the next Triennium.

## **B. Working Group**

2. The Best Practices for Effective Enforcement Working Group was invited to consider 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 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), and 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); Ms Valeria Confortini, Assistant Professor, Orientale University, Naples (Italy); 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); Mr He Qisheng, Professor of International Law, Peking University Law School (China); 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 Rodríguez 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, and Co-Director of the Centre for Corporate and Commercial Law, (German National); Mr Rolf Stürner - Emeritus Professor of Law, Albert-Ludwigs-Universität Freiburg (Germany).

4. The following organisations also play an active part of the Working Group as observers: the European Bank for Reconstruction and Development (EBRD); the Hague Conference on Private International Law (HCCH); the International Association of Legal Science (IALS); Kozolchyk National Law Center (NatLaw); the Organisation of American States (OAS – until 2022); Secured Finance Network (Richard Kohn, Goldberg Kohn Ltd.); the Supreme Court of China; *Union Internationale Huissiers de Justice* (UIHJ); the United Nations Commission on International Trade Law (UNCITRAL); the World Bank Group (WBG); and the Zemgale Regional Court - Latvia. The Comité de Implementación de Garantías Mobiliarias (Colombia) is also represented by Ms Diana Lucia Talero, *Secretaria Técnica*.

5. Finally, the Working Group routinely hosts ad hoc presentations by additional experts.

## **C. Summary of the activities of the Working Group from the first session (30 November-2 December 2020) to the fourth session (26-28 April 2022)**

6. Between its establishment at the end of 2020 and the 2022 Governing Council session, the Working Group had met in plenary four times. At its first session (30 November and 1-2 December 2020), the Working Group mostly focused on a more precise determination of the scope of the project, as well as on methodology and organisational issues, and discussed a specific document prepared by a Working Group Member on the impact of technology in enforcement. For more information, see the [Report](#) of the first Working Group session. 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 subgroups created to advance the work on the project during the intersessional period (subgroup 1 on “Enforcement by way of authority”, with focal points Profs. Fernando Gascón Inchausti and Rolf Stürner, which had prepared a first, extensive position document encompassing all the main issues that general recommendations on enforcement by way of authority should

address; subgroup 2 on “Enforcement of security rights”, with focal point Prof. Neil Cohen, which had prepared preliminary draft recommendations for repossession and disposition of collateral; and subgroup 3 on “Impact of technology on enforcement”, with focal point Prof. Teresa Rodríguez de las Heras Ballell). For more information, see the [Report](#) of the second Working Group session.

7. At its third session (held in hybrid format on 29-30 November and 1 December 2021), the Working Group focused on enforcement over receivables, suggested best practices for automation in the enforcement of monetary claims by way of authority, and revised best practices on enforcement of security rights over receivables and automation. It also considered charging orders on land and complex enforcement on special assets, as well as revised best practices on disposition of collateral in enforcement and on the extent of party autonomy in enforcement of security rights. For more information, see the [Report](#) of the third Working Group session. Finally, at its fourth session, which was held in hybrid format on 26-28 April 2022, the Working Group discussed a first set of recommendations for the following issues: the setting up of registers for enforcement orders, for the outcome of disclosure of debtor’s assets and for enforcement measures and their results; minimum requirements for enforceable documents; and rights and duties of information and disclosure of debtor’s assets. The Working Group also discussed a position paper on enforcement on digital assets, based on intensive intersessional research, and a document regarding online auctions, based on research conducted by the Secretariat. Furthermore, it had addressed substantive and practical issues regarding the way forward for the activities of the Working Group, in particular the setting up of a Drafting Committee. For more information see the [Report](#) of the fourth Working Group session.

8. During this period, Working Group Members and selected observers were involved in intersessional work conducted virtually and supported by the Secretariat. In parallel, the Secretariat conducted consultations and research in order to gather data on challenges, normative options and practices for effective enforcement in various jurisdictions. Moreover, seminars and workshops were held on specific issues related to technology and enforcement. Regarding the intersessional work after the fourth session in particular, the Chairs of the Digital Assets and Private Law and the Best Practices for Effective Enforcement Working Groups took the initiative of a joint Workshop, with participation of experts from the two Groups, as well as additional experts, which was held on the last day of the previous UNIDROIT Governing Council session (10 June 2022). Featuring three roundtables, the Workshop shed light on various issues linked to enforcement on digital assets.

## **II. WORKING GROUP ACTIVITIES SINCE THE 101<sup>ST</sup> SESSION OF THE GOVERNING COUNCIL**

### **A. Fifth session of the Working Group (12-14 December 2022)**

9. The fifth session of the Working Group was held in a hybrid format on 12-14 December 2022, and its deliberations focused on the following topics:

- (i) Enforcement by way of authority, in particular draft best practices, accompanied by extensive comments, relating to general provisions, organisation of enforcement, enforceable documents, disclosure of debtor’s assets, and central electronic registers;
- (ii) Enforcement of security rights over movables, in particular redrafted best practices and comments on extra-judicial repossession of tangible movable collateral, redrafted best practices and comments on disposition of collateral, and a position paper on policy issues regarding “expedited” judicial procedures in the context of extra-judicial enforcement;
- (iii) Preliminary best practices on enforcement on digital assets; and
- (iv) An updated paper on online auctions.

10. The Working Group further benefited from a presentation by Ms Nina Mocheva, Senior Financial Sector Specialist, World Bank Group, on the use of alternative dispute resolution in the enforcement of security rights.

11. For more details on the specific issues discussed, see [Report](#) of the fifth session of the Working Group.

## **B. Intersessional work after the fifth session of the Working Group**

12. After the fifth session of the Working Group, the Secretariat continued to support the Working Group's development of the project.

13. In particular, the following activities were carried out, among others, by those Working Group participants who had been active in drafting texts within subgroups, the Chair, the Coordinating Expert and the Secretariat:

- (i) Coordination meetings with representatives of the Working Group on Digital Assets and Private Law regarding enforcement on digital assets (14 and 16 December 2022);
- (ii) First (virtual) Drafting Committee (31 January 2023) and subsequent work by Committee members (for more information, see paras. 22-25 below);
- (iii) Meetings on judicial proceedings in the context of extra-judicial enforcement of security rights (21 and 23 February 2023);
- (iv) Coordination meetings among focal points of different subgroups and among members within subgroup 2; and
- (v) Drafting of support documents for the Working Group, as mandated to the Secretariat at its fifth session (namely, documents presented at the fifth session annotated with comments and decisions taken by the Working Group; collated drafts on enforcement of security rights, annotated with comments and decisions made at different sessions of the Working Group; flowchart on Sections III and V of the best practices for enforcement by way of authority, regarding enforceable instruments and registers; and summary reports of intersessional meetings).

## **C. Sixth Session of the Working Group (14-16 March 2023)**

14. The sixth session of the Working Group was held in hybrid format (in person in Rome and remotely via Zoom) on 14-16 March 2023.

15. The Working Group considered several documents containing best practices and comments thereto at different stages of development. First, it directed its attention to the documents recently reviewed by the Drafting Committee, where agreement on the underlying policy issues had for the most part been attained, i.e., the draft best practices on "Secured creditor's right to obtain possession of tangible collateral after default", the draft best practices on "Realisation of the value of the collateral", and the section on "Information regarding debtor's assets" in the part on enforcement by way of authority.

16. Secondly, it fruitfully discussed further sections in the part on enforcement by way of authority that had been extensively revised in light of comments received at Working Group sessions, in particular the sections on "Enforceable instruments" and on "Electronic registers". While a few points still remained open (e.g., the level of detail to be suggested for the governance of the registers), and some revisions were deemed necessary (among others, to clarify the possibility of registering data or sets of data in addition to documents), general consensus was reached as to the underlying policies and most of the specifics of the recommendations.

17. Thirdly, the Working Group considered a complete set of revised draft best practices on enforcement on digital assets (with comments), which had resulted from the input provided in intersessional meetings and further coordination with the Chair of the Digital Assets and Private Law Drafting Committee. The Working Group agreed that this document would have a more discursive and explanatory style of drafting and structure than other parts of the project, due to its subject matter and potential addressees of the recommendations. There was substantial agreement with the general approach of the document and with most of the suggested best practices; at the same time, the need for better coordination with the general part on enforcement by way of authority was underscored.

18. In addition, the Working Group considered a wholly new set of draft best practices on a special expedited procedure for resolution of disputes in extra-judicial enforcement. There was agreement on the desirability of introducing a (set of) recommendation(s) on such a procedure, with questions on the appropriate scope and the relationship with (existing) provisional and protective measures being flagged for future attention in ad hoc intersessional meetings.

19. The session was further enriched by a presentation on draft best practices on online auctions by Mr Massimiliano Blasone, an international expert in the Cyber-Justice working group responsible for developing Guidelines for judicial e-auctions for the Commission for the Efficiency of Justice of the Council of Europe. The draft Guidelines (which would be submitted for approval in June 2023), appeared to be in line, generally speaking, with the interim conclusions reached by the Working Group in the discussion documents prepared for the fourth and fifth Working Group sessions. The Working Group agreed that while the best practices would not cover the issue in great detail, there was merit in cross-referencing the more detailed work of the Council of Europe, where appropriate.

20. The Working Group also addressed the topic of mediation and other alternative dispute resolution mechanisms in enforcement. It was decided that while the best practices should contain reference to such an important development as a general matter, with cross-references being made as necessary, the best practices would not propose recommendations on the design of the ADR/ODR procedures themselves.

21. Finally, the Working Group considered the general outline of the future instrument, in light of both the limited timeframe of the project and the relevance of the issues to be addressed. It was reaffirmed that the instrument should not be a complete “code of enforcement” nor contain a coherent set of model legislative provisions, but would rather suggest best practices, in various degrees of detail depending on the specific issue, accompanied by explanatory and illustrative comments, for selected questions that were deemed to be of particular importance to ensure the effectiveness of enforcement procedures.

#### **D. Drafting Committee**

22. At its fifth session, the Working Group agreed to set up a Drafting Committee to review the draft best practices on which an agreement on policy was attained. The Secretariat was mandated by the Chair to reach out to selected experts to invite them to be part of the Drafting Committee, and it received a positive answer from Profs. Neil Cohen, Teresa Rodríguez de las Heras Ballell, Geneviève Saumier, Rolf Stürner, and Fernando Gascón Inchausti.

23. The Drafting Committee started to work remotely and met in its full composition, including the Chair and the Secretariat, on 31 January 2023. It discussed preliminary matters of tone, style, structure, and procedure, on the basis of documents prepared by the Coordinating Expert (namely, a suggested re-draft of the Sections on organisation of enforcement organs and on information duties for the part of enforcement by way of security, and a suggested re-draft of the section on obtaining possession of collateral extra-judicially for enforcement of security rights). In particular, the Drafting

Committee had tried to promote conciseness, clarity, and readability, while at the same time maintaining sufficient precision of technical terms. The Drafting Committee had also, consistent with the nature of the document being a set of best practices (and not a Model Law), used standardised language in the nature of recommendations and made recourse, in some instances, to a more descriptive turn of phrase. The Drafting Committee furthermore began working on the comments to the recommendations, suggesting that illustrations should be added, where appropriate, to enhance the usefulness of the instrument.

24. The Drafting Committee continued its work through email exchanges, including bi- or trilateral exchanges between the reviewer(s) and the original authors. Time for (mostly in-person) work was further scheduled before and after the sixth session of the Working Group (specifically, on 14, 16, and 17 March 2023).

25. Annexes I and II to this document (shared on a confidential basis as work in progress) provide two examples of texts which are the result of the thorough linguistic and structural revision by the Drafting Committee. Though these texts are still works in progress and may be subject to further revisions for the purpose of ensuring consistency throughout the instrument, as well as the addition of concrete illustrations, they are attached to this document in order to give a general idea of how the finalised best practices would look.

### **III. FUTURE STEPS**

26. Pursuant to the mandate received, the Secretariat will continue to provide support to the Chair and Working Group Members and observers for the organisation of intersessional meetings to advance the work on the best practices and for the activity of the Drafting Committee, as well as through the preparation of support documents.

27. The Secretariat has also been asked to present the project on best practices for effective enforcement at a workshop on UNIDROIT's instruments and projects (co-organised with the Government of India) for governmental officials, which will be held in Delhi on 1-2 May 2023, in the framework of enhanced cooperation during the Indian Presidency of the General Assembly.

28. In relation to the timetable of the project, the seventh session of the Working Group is planned for 29-30 November and 1 December 2023. It is envisaged that a final full session of the Working Group be held the following spring, with a view of presenting a finalised draft to the Governing Council at the 2024 session.

### **IV. ACTION TO BE TAKEN**

29. *The Governing Council is invited to take note of the status and development of the project.*