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

***Fourth meeting (hybrid)***  
**Rome, 26-28 April 2022**

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Study LXXVIB – W.G.4 – Doc. 7  
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**REPORT**

1. The fourth 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 26-28 April 2022. The Working Group was attended by 30 participants, comprising members, observers from intergovernmental organisation 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 Secretary-General* opened the session and welcomed all participants present in person and remotely, referring in particular to the most recent additions to the Working Group Mr HE Qisheng, Professor of International Law at the Beijing University, China, joining as a member, and Ms Ms ZHU Ke, Judge at the Fourth Civil Division, representing the Supreme Court of the People's Republic of China as an observer. He noted that a lot of intersessional work had been completed in preparation for the session and thanked the Chair and all the members and observers involved.

3. *The Chair* expressed her delight in being able to participate in person to the session for the first time since the beginning of the project. She echoed the Secretary General’s welcome to all participants including the new ones. She also referred to the extensive intersessional work carried on since the third session, in which she herself had participated as well, and to the rich agenda facing the Working Group for the fourth session.

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

4. *The Deputy Secretary-General*, upon invitation by the *Chair*, referred to Doc. 1 (Annotated draft agenda) and presented the other documents for the meeting: Doc 2, prepared by the Secretariat, containing an update on intersessional work; Doc 3, prepared by the focal points of Subgroup 1, containing best practices on enforcement by way of authority which were developed on the basis of the discussions on the issues paper drafted for previous sessions of the Working Group, and which would be addressed on the first day; Doc 6, prepared by the Secretariat and the focal point of Subgroup 3 in response to a mandate received by the Working Group, focusing on enforcement on digital assets, which would be addressed in the morning of the second day; Doc 5, prepared by the Secretariat and the focal point of Subgroup 3, focusing on online auctions, which would be discussed in the afternoon of the second day; Doc 4, prepared by the focal point of Subgroup 2, presenting the way forward for the work on enforcement of security rights, which would

be considered in the morning of the third day. This latter document was meant to pave the way for the discussion on the way forward of the entire project, which was also scheduled to take place on the last day. Finally, the last day would be opened by a brief presentation by E-Bram regarding the application of technology to enforcement.

5. The agenda with its annotations was unanimously adopted.

**Item 3 Update on intersessional work and status of the project (Study LXXVIB – W.G.4 – Doc. 2)**

6. Upon invitation by *the Chair*, the Deputy Secretary-General referred to Doc. 2 on intersessional work and status of the project, which contained an update of the Issues Paper (Study LXXVIB – W.G.3 - Doc 2) that had been presented at the third Working Group session.

7. She noted that the document contained a summary of the issues that had been discussed at earlier sessions, and of the intersessional work that had been carried out by the Working Group. She focused particularly on the two Workshops that had been organised by the Secretariat in the intersessional period to advance the discussion on the interplay between technology and enforcement: an internal Workshop on Enforcement on Digital Assets, which formed the basis for the development of Study LXXVIB – W.G.4 – Doc. 6 on “Enforcement on Digital Assets”, and a Workshop more generally devoted to recent developments in the use of technology for enforcement proceedings, with participation of speakers from different jurisdictions, that was now available on the YouTube channel of UNIDROIT. She expressed the Secretariat’s gratitude to all experts who participated in intersessional work, highlighting the active role played by Teresa Rodríguez de las Heras Ballell as resident Roy Goode Scholar and UNIDROIT consultant in supporting the preparation for the fourth session of the Working Group. Finally, she referred to the need to agree on the way forward in the project, recalling that the suggestion was to discuss it on the last day of the session.

8. *The Chair* thanked the Secretariat for the helpful Report contained in Doc. 2, agreeing to postpone the consideration of how to move forward on the project until the last day, whilst cautioning the Working Group to be mindful of this issue when discussing the previous agenda points for the session.

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

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

9. *Fernando Gascón Inchausti* and *Rolf Stürner* (Reporters) were asked to present Document 3 containing draft best practices on enforcement by way of authority.

10. *The Reporters* first of all explained the structure of the document, which was construed to suggest an outline for the final instrument in relation to its Part 1 on enforcement by way of authority. The draft already contained proposals for general recommendations (Section I) on which the more specific best practices were based, and suggested general best practices on the organisation of the enforcement proceedings and organs of enforcement (Section II), on central electronic registries (Section III), on enforceable documents (section IV) and on disclosure of debtor’s assets (Section V).

11. In relation to the general part, the Reporters proposed to focus on Sections III, IV and V. They started with Section III on central electronic registries, which provided guidance on the setting up of three different registries that were meant to ensure the necessary transparency and information for enforcement proceedings to be undertaken also in automated or semi-automated manner. Such registries, which should preferably be accessible from a single-entry point, were the following: a

registry for enforceable documents; a registry for results of disclosure (collecting the outcome of inquiries on the assets of the debtor); and a registry for enforcement measures and their outcome.

### **Section III (registries)**

12. *The Chair* opened the floor for a first round of comments. One issue raised by a number of experts concerned the recommendation that the envisaged registry of enforcement documents be “administered” and supervised by a judicial authority. Whether the two other registries contemplated in the draft best practices would also be subject to judicial management and supervision was queried, as was whether this provision could be more general, allowing legal systems to consider different models of management and/or supervision of the registry involving public authorities. Some experts pointed to the fact that in some legal systems the responsibility for execution was rooted at different sub-levels of the judiciary or other public authorities, which would make the application of the recommendation more challenging.

13. A related issue raised during the discussion concerned the recommendation that the registry be centralised. The Reporters explained that there should be a single access point regardless of the structure of the registry, and referred to Recommendation 1 para. 6 that provided a special rule for Federal States. In this regard, comments were made noting that the term “centralised” could have different meanings and it would be necessary for the commentary to provide clarification. It was also noted that the term “centralised” appeared to imply the choice of a specific technology for the registry (centralised platform as opposed to decentralised technology models such as DLT). Finally, it was suggested that centralisation would have different results and degrees of complexity in its implementation depending on whether it applied to the first or also the other two registries envisaged by the Reporters.

14. Another question regarded access to the registry (or registries). The Reporters explained that access to the first registry (registry of enforceable documents) would be limited to all enforcement authorities, while it was envisaged that access to the registry of results of disclosure of debtor’s assets (including sanctions against the debtor for failure to comply) could be opened to other parties having a legitimate interest, always considering the need to ensure data protection (which is regulated very differently in domestic laws). In particular, access via special application could be granted to the debtor’s lawyer as well as third parties that demonstrate a legitimate interest to access data documenting the debtor’s participation in the disclosure proceedings and sanctions for non-compliance. Questions were raised by commentators on the justification to provide different access rules for the different registries.

15. *The Reporters* noted that the recommendations in Section III had to be read together with those pertaining to the content of the registries, e.g., the best practices on enforcement documents and disclosure that were proposed in Sections IV, V, and the best practices on modes of enforcement in Section VI, as this would better clarify the function of the suggested registries and better justify the reason why three registries were proposed.

16. Much discussion was elicited by Recommendation 3 para 3, in relation to the third registry proposed by the Reporters (recording all enforcement measures levied against a specified debtor and their outcome), and the need to ensure that such registry be “interlinked” with other existing domestic registries of contractual and legal liens on debtor’s assets.

17. *The Reporters* explained that the purpose of this provision was twofold: to assist enforcement authorities in deciding whether and how to enforce as against debtor’s assets, based on the likelihood that such assets be available and not subject to third parties’ rights; to facilitate automated enforcement proceedings, since the system would be able to determine in advance and in an automated way whether assets were subject to prior encumbrances. In both cases, the effectiveness of enforcement proceedings would be enhanced.

18. It was understood that the purpose of Recommendation 3 para 3 was not to determine priorities as among rights or liens on debtor's assets, nor to allow for simultaneous registration in two or more different registries, but to provide (automated and electronic) information to enforcement authorities and select third parties in relation to the content stored in existing domestic registries set up for different purposes (e.g., secured transactions registries, land registries).

19. In the ensuing discussion, it was asked what the relationship of the proposed third registry would be to existing credit information systems that already recorded this type of information (and for which best practices already existed).

20. Moreover, the use of the term "interlinked" was questioned, as it could have different meanings and be easily misconstrued. It was proposed that it could be replaced with language that would not mandate a specific way in which registries should interconnect but clarify the purpose for which the interconnection between registries was suggested as a best practice. This approach was also preferable given the presence of different technological mechanisms to automatically access and retrieve information contained in other registries when consulting one registry, so emphasis on the purpose of the recommendation would be more appropriate. It was also noted that a common system of data management would facilitate the operation of the three registries and their interconnection with data contained in other registries.

21. Additional practical challenges mentioned by commentators concerned the fact that existing domestic registry systems that could be relevant for this provision were structured differently (e.g., they recorded rights as against the debtor or as against assets) and were not yet interconnected or interoperable. Moreover, modern secured transactions registries would show limited information on existing or potential encumbrances in relation to specific assets, as their main purpose was to determine priorities and not to provide a complete picture.

22. *The Chair* summed up the discussion stating that a few issues as well as terminology might have to be revisited, and that more clarity would have to be provided, including explanations in the accompanying commentary, which could mention examples and additional issues to be considered by the legislator.

#### **Section IV (enforceable "instruments")**

23. Upon *the Chair's* invitation, *the Reporters* moved on to present Section IV on "enforceable instruments". They explained that this section's purpose was to accommodate the practice that existed in a number of legal systems granting enforceability to private documents (e.g., invoices or other comparable documents), while at the same time preserving the need for such enforceable documents to achieve a degree of trustworthiness. An additional purpose of this section was to promote the use of electronic enforceable documents that could be used in automated proceedings. They noted that a central role was to be played by the centralised register of enforceable instruments regulated in Part III, Recommendation 1, since private documents would acquire enforceability only if they had satisfied the requirements set forth in Recommendation 2 and had achieved "authenticity" through final registration (that would be granted lacking debtor's opposition within the reasonable period indicated in Recommendation 6 (I)).

24. In the ensuing discussion, commentators raised some concerns regarding the correct interpretation of the recommendations in Part. IV. It was noted that the whole system depended on the implementation of the registry (according to the requirements set forth in Part. III, Recommendation 1), providing no apparent alternative solution for legislators that had not opted to implement the registry. This would also have an impact on the enforceability of judgments according to the suggested best practices. *The Reporters* clarified that the registry would be equally useful for judgments, as it would allow enforcement agents to find all the relevant information in one place (which would also facilitate automatic retrieval), and to check the continued effectiveness of enforcement documents. They acknowledged however that in legal systems that did not recognise the enforceability by way of authority of other documents, such a registry would not be as essential

as it would be in legal systems where private documents are granted direct enforceability, since for the latter documents the registry would perform the additional task of granting formal enforceability in the absence of debtor's opposition.

25. Another query regarded the way Recommendation 1 had been drafted, that is apparently excluding registration for some enforceable documents (i.e., "authentic documents"). The meaning of the expression "authentic documents" was also considered in need of clarification. Moreover, the use of the term "registry" could give rise to misunderstandings since it was not a public registry or a registry for publicity in the civil law tradition. Regarding this latter point, *the Reporters* replied that the alternative term "cadastre" had not been deemed a good solution, but that they would welcome proposals for a different term.

26. The Reporters were further asked to clarify the relationship between Recommendations 1, 2 and 3 and Recommendation 5, as the latter appeared to contain a prerequisite to proceed with registration and authentication of all enforceable documents. Moreover, it was queried what the difference was between "electronic" documents, for which registration was prescribed as "mandatory", and "paper-based" documents which should be digitised before registration according to Recommendation 5. *The Reporters* explained that Recommendation 5 was merely meant to draw a distinction between an electronic document and a paper-based document that should be reduced to metadata in order to be registered in electronic format. Should those documents be enforceable per se, they would be filed in the registry; should the document be a private document that the creditor wished to enforce and that satisfied the requirements set forth in Recommendations 2 and 3, notice would have to be given to the debtor who could file opposition within four weeks (as suggested in the text). Failing such opposition, the registration of the document would be considered final.

27. Upon further questions by commentators in relation to legitimated access to the registry, the threshold requirements for private documents, and the way the debtor's opposition would work, *the Reporters* clarified that they had proposed two filters: Recommendation 2 was directed to legislators that would make a "pre-selection" of private documents deemed enforceable; private parties (the creditor) would be responsible for presenting the document for registration, which was a further requirement for their enforceability; while the authority managing the registry (judicial authority) would verify the requisites and would also have the possibility to "exclude creditors in case of evident abuse of registration by registering unreliable documents". Final confirmation of the registration and consequent enforceability of such documents would be subject to the absence of opposition on the part of the debtor. *The Reporters* further clarified that the intention of Recommendation 6 was to distinguish between the debtor's opposition to the formal enforceability of the document, as opposed to the merits.

28. One expert referred to the mediated settlements resulting from the application of the Singapore Convention (The 2019 Singapore Convention on Mediation) as a possible test case for private documents that are granted enforceability by the legislator.

29. *The Chair* noted that the language of the recommendations gave rise to many doubts as to their interpretation, and suggested that it should be revised in order for those provisions to be finally discussed at the next session. *The Reporters* agreed, and also concurred on the fact that the order of the recommendations would need to be revised in order to clarify the proposal.

30. Further questions were posed regarding Section IV when the session resumed. In particular, clarification was sought on the meaning of Recommendation 1 (III). *The Reporters* explained that this was a provision directed to legislators to guide them in their choice of enforceable documents, and that the correct term was "reliability". Another question concerned Recommendation 2 (I) and the need for enforceable instruments to indicate the identity of the debtor and the creditor with sufficient clarity, which might be problematic for instruments created by emerging technologies.

31. *The Chair* earmarked the above-mentioned question for consideration in the intersessional period, as along with other questions that were raised on the practical functioning of the registries and the decision-making process of acceptance or denial of registration, so they could be properly addressed in the course of the revision of the draft best practices.

### **Section V (disclosure of debtor's assets)**

32. The Reporters presented the four recommendations that addressed disclosure of debtor's assets. They noted that the effort they had made was to transform such rights, duties and obligations that were generally accepted in relation to this matter into best practices, finding a good balance between efficiency and fairness, applying the general principle of proportionality, compelling public authorities to share information, and restricting debtor's actions so as to prevent frauds. They noted that the principles embodied in Recommendation 1 had become common ground for European countries, including continental legal systems, while they were already applied in practice in common law jurisdictions.

33. Commentators noted that Recommendation 1 (I) would require further explanations in the comments or perhaps additional language in the black letter text (e.g., mentioning the underlying values, which would be balanced). *The Reporters* pointed to the general principle of proportionality contained in Section I Recommendation 3, as well as to Recommendation 2, which specified the general principle by referring to limitations in the enforcement authority's action based on a criterion of proportionality. Regarding Recommendation 1 (IV), the reference to the competent enforcement bodies was considered unclear, as was the issue of whether the enforcement authority should be compelled to access registries to gather information or should be allowed to do so as deemed appropriate. In relation to the expression "under oath", it was suggested that it be removed from the black-letter recommendation, which should be drafted to convey the underlying policy. *The Chair* summed up this discussion asking the Reporters to revise the language of the provisions.

34. It was further noted that Recommendation 1 (II) had been drafted very broadly in terms of the range of entities and persons that had a duty of cooperation with the enforcement bodies, and that this could encompass situations where persons would be obliged to provide general information that was already accessible or would be asked to divulge internal information. The Reporters noted that the principle of proportionality would be applied by enforcement bodies also in this case, and that Recommendation 1 (V) provided for protection throughout all recognised privileges of civil procedural law.

35. A more general question was raised on the relationship between the registry provided for in Section III, Recommendation 2, and the provisions in Section V. Because the aim of the registry was to provide up-to-date information on debtor's assets for the benefit of enforcement authorities, the issue of whether or not the information stored in the registry should be deleted at the conclusion of each specific procedure was raised. *The Reporters* noted there would be good reason to keep such information on the registry for a longer period: many legal systems had set up a "black-list" registry that would convey information to prospective creditors on debtor's failures to cooperate and disclose for a limited period of time (e.g., 2 to 5 years), and would also work as a powerful sanction for failure to disclose. Commentators noted that this latter aim was not clear in the way the registry was organised under Section III, Recommendation 2, and that such an aim was usually fulfilled by credit bureau agencies (be they private or public).

36. A number of additional points were made regarding the duty to disclose and its limits. It was highlighted that this was a question of central importance for many jurisdictions, as most frauds against creditors involved the difficulty to obtain information about debtor's assets. While the general principles were fine, they appeared to be too general and to provide excessively ample opportunities for debtors to create obstacles to disclosure. Other commentators noted that legislators would not be very keen on lifting privileges of governmental bodies such as, for example, tax authorities. *The Reporters* explained that the underlying policy of this Section was to enlarge existing duties of

cooperation rather than limit them, as Recommendation 1 (II) implied that if an enforcement authority asked for cooperation, the listed entities would be obliged to offer such cooperation.

37. In relation to the sanctions for non-compliance, *The Reporters* further pointed to Recommendation 4, which contained very strong sanctions including personal ones. In this regard, commentators noted that Recommendation 4 would only apply to the extent that the duty to disclose and cooperate applied. Another question posed by the Working Group concerned the reason why there was no differentiation between the debtor who had a duty to disclose information on its own assets, and other third parties who were obliged to cooperate.

38. The discussion moved to Recommendation 3 on “search for assets”. It was noted that Recommendation 3, differently from earlier best practices, was very precise and prescriptive. In this regard, it was suggested that the content could be expressed in terms of policy rather than using specific examples, which could be put into the comments or in non-exhaustive lists in the text itself. This would apply, for example, to the reference to times and places where access is only permitted with court order. It was also suggested that Recommendation 3 referred to different situations: while breaking into locked places would clearly require a court order, deciding on the time in which to proceed with enforcement may represent a smaller threat. Finally, it was noted that the issue of searching and seizing debtor’s assets had also been addressed by Subgroup 2 in relation to enforcement of security rights.

39. In relation to Recommendation 3, *the Reporters* noted that it was an example of application of the principle of proportionality, as a search for assets would only be allowed upon demonstration that other, less invasive attempts had already been made. It would be up to the enforcement authority to decide when to resort to a court order, since this decision would depend on the facts of the case. They also pointed out that most of the examples in this recommendation derived from general principles contained in human rights conventions and analogous texts, and were generally applied in many legal systems. They agreed however that the specific references in Recommendation 3 (I) to holidays (as well as the expression “under oath” in Recommendation 1 (III)) could be mentioned in the comments or avoided altogether, while the recommendation would explain the underlying policy.

40. A number of questions were raised on Recommendation 3 (II) and (III), regarding the meaning of the reference to “digitised platforms” and more generally, whether gaining access to digital assets should be treated differently than breaking into locked buildings or vaults. Moreover, improvement of the drafting of Recommendation 3 (III) was suggested, since the current text referred only to access to a computer, which would not solve the issue of accessing digital assets stored elsewhere.

41. In summing up the discussion on Section V, *the Chair* suggested that the central role of Recommendation 1 (II) should be clarified, as the current text of the best practices referring to “all existing privileges” did not convey the message to legislators that they should be cautious in introducing exceptions to the general rule. She seconded the idea that it would be useful to provide some examples of balance between the general rule and the exceptions in the comments, as well as examples of current practices that the recommendations sought to overcome. More generally, she noted that it was important to find the right balance between being sufficiently general, so that legislators would be able to use the best practices, and the need to be more detailed and prescriptive (for example, singling out the debtor from third parties in terms of obligations to disclose or cooperate and related sanctions). In respect to Recommendation 3, she noted that there seemed to be consensus on policy goals, but that the draft best practices needed to be reformulated, considering the opportunity of referring to the underlying policy reasons for requiring a court order, and perhaps adding specific examples as a non-exhaustive list.

**Section VI (Modes of enforcement – enforcement of third party debt orders)**

42. *The Chair* opened this part of the session thanking the two Reporters for their work and their kind availability to take the results of the discussions on board. She then introduced Section VI, noting that the Reporters had drafted six best practices but had also proposed an outline with placeholders for the different sections on modes of enforcement. *The Reporters* noted that the recommendations in Section VI were the transposition of the discussion papers prepared for the third session of the Working Group and the feedback received on them. They also noted that the purpose of this section was to address those issues for which best practices would be useful and not to address all aspects of enforcement over receivables, which were purposely not mentioned.

43. In relation to Recommendation 2 (I), it was queried whether it was possible to add some examples to clarify the meaning of “other circumstances decisive for future satisfaction of the creditor”, one possible illustration being a third party debtor that had already received a notice by a secured creditor to direct the debtor to pay to the secured creditor. *The Chair* suggested drafting illustrations in the black letter recommendations in order to not to lose track of them, bearing in mind that they might be placed in the commentary at a later stage.

44. In relation to Recommendation 3 (III), it was asked why the cost of the procedure was to be borne by the creditor and not the debtor. *The Reporters* explained that Recommendation 3 allowed creditors to sell the receivable, instead of proceeding with the usual direct collection from the third party debtor. While this would give creditors more flexibility on the one hand, on the other it would usually produce a loss of value to the detriment of the debtor. This was the reason why they had suggested to place the cost on the creditor. In relation to this point, however, other commentators noted that there might have been two different situations as had been discussed during the previous session of the Working Group, i.e., selling the receivable before the debt was due, and selling it as a means to enforce when the debtor fails to perform. Moreover, it was mentioned that the sale of the receivable by the creditor would not always entail a loss of value and detriment to the (judgment) debtor. They queried whether the recommendation could be drafted in such a way as to convey this nuance. Another way of solving this issue would be to allow the creditor free choice on the manner of enforcement, subject to it being commercially reasonable, and to be sanctioned only for abusive enforcement if the method chosen entailed unreasonable costs for the debtor. To this latter point, it was opposed that not all situations covered in Recommendation 3 would necessarily be qualified as “abusive” under the general rule of commercial reasonableness.

45. Participants in the discussion further noted that these provisions would have to be compared and, as the case may be, harmonised with the set of recommendations that had already been drafted by Subgroup 2.

46. Moreover, it was pointed out that in many civil law jurisdictions the receivable would not be sold but assigned, which should also be mentioned as a functional alternative in Recommendation 3.

47. Furthermore, it was suggested that the commentary should explain what was meant by the expression “commercial cases” in Recommendation 1 (I), which could be interpreted differently by national legislators unfamiliar with the term-of-art “commercial” used in international instruments.

48. *The Chair* asked the Working Group to discuss Recommendation 7 on “freezing orders”. *The Reporters* explained that the freezing order originated in English law and was an order *in personam*, as opposed to *in rem*, which forbids the debtor to use its bank accounts and may also extend to third party debtors in so far as they have knowledge of the freezing order. While this order had been developed to make up for the lack of interim attachments, it gained significance because its relatively high fines for non-compliance put pressure on the debtor to ensure compliance, wherever its accounts were held, overcoming the difficulties incurred in using *in rem* remedies in cross-border situations. The Reporters noted that other jurisdictions were beginning to accept such orders because, despite being an invasive remedy, they had the advantage of being effective. The Reporters also noted that Recommendation 7 was a general rule contained in Subsection 1 (Monetary Enforcement), which in



substance stated that freezing orders could be used in parallel with measures working *in rem*, but that the details of such orders would be found in Subsection 3 (Mandatory and Prohibitive Injunctions – Enforcement of Obligations to Do or Not to Do Something).

49. In the ensuing discussion, it was asked why freezing orders were treated together with interim measures (injunctions), in spite of the fact that they were different remedies. A question of terminology was also raised (regarding the use of the term “attachment of receivables” that had a different meaning in existing uniform law instruments, particularly those by UNCITRAL). It was further noted that the verb “should be combined” used in Recommendation 7 seemed to impose the use of freezing orders instead of admitting their use by judges. It was finally queried whether the comments would contain examples of the situations where the use of freezing order would be appropriate and justified by the special circumstances of the case (as requested in Recommendation 3). *The Reporters* noted that these questions had no straightforward answers but could be easily solved by improving the drafting and adding illustrations in the commentary, while the suggested tentative outline could be further discussed by the Working Group.

50. *The Chair* thanked the Reporters for their most useful work and moved to item 4 (d) in the agenda.

**Item 4 (d) - Discussion paper on enforcement on digital assets (Study LXXVIB – W.G.4 – Doc. 6)**

51. *The Chair* referred to Document 6, thanking the Secretariat for the preparation of a very good set of materials for consideration by the Working Group.

52. *The Deputy Secretary-General* introduced the document. She recalled that consideration of enforcement on digital assets had started at the first session of the Working Group and had continued at the second and third sessions, reaching the conclusion that more research was needed on practical examples to better determine a need to develop different best practices for different types of digital assets, and the extent to which existing enforcement measures should be adapted to ensure effective enforcement on such assets. She further explained that Document 6 built upon the materials and outcomes of the internal Workshop that had been organised in January 2022 (the two papers prepared by members of the Working Group and the summary of the Workshop, all contained in Annex I), as well as the Research paper that had been prepared in cooperation with the Secretariat’s team responsible for the Digital Assets and Private Law Working Group (attached as Annex II). She finally noted that the paper had been divided into two parts, the first looking at the scope of the project and definition of digital assets, and the second part containing use cases based on the Secretariat’s Research paper and additional research done by experts. The purpose of the paper was to try to agree on what the main legal questions that should be the object of best practices in this field were.

53. *Teresa Rodríguez de las Heras Ballell* (focal point of Subgroup 3 and *Reporter* for Document 6) briefly addressed the first part of the document, noting that the paper was meant as a collective exercise to understand the topic and reflect on the possibility of developing best practices. The paper suggested to adopt a broad concept of digital assets, or assets in digital form, including big data and software as well as cryptocurrencies, without offering a definition but considering that they all had economic value for the purposes of enforcement. She further noted that existing enforcement methods applied for some of these assets under a functionally equivalent principle, and should not be modified by the best practices, while for other assets (such as, for example, cryptocurrencies) different measures, or a combination of different measures, might be needed.

54. In the ensuing discussion, Working Group participants agreed on the use of a broad concept of digital assets. They also agreed to avoid unhelpful discussions on definitions and focus instead on the economic – or potential economic – value of the assets, and to postpone issues of terminology (i.e., whether all such assets should be called “digital assets” or whether other terms should be preferred for some of them). One expert, seconded by others, cautioned against developing new

best practices where existing rules were already established, such as, for example, in the case of IP rights.

55. *The Reporter* then addressed the first of the three hypotheticals contained in part 2 of the document. It concerned the insolvency of a bitcoin trading exchange, and the legal questions raised regarded the legal status of the assets (particularly whether the account holders could ask for segregation of the assets, and whether the assets were subject to a monetary or non-monetary claim); the valuation of the assets; the need to ensure the cooperation of all parties involved, including the provider, to ensure an effective enforcement. The Reporter noted that this case might present new issues, such as the interoperability of platforms, for an order to transfer the digital assets to another account.

56. In the ensuing discussion, different positions were expressed on the relevance of defining the legal nature of the digital asset for the purposes of executing creditor's rights against the debtor in the case of judicial enforcement. According to one opinion, the issue of identifying what cause of action the creditor may have against the debtor, which was linked to the definition of the legal nature of the asset and was prominent in case-law, seemed to be outside of the scope of the best practices, which should focus solely on the execution phase. Other experts considered that the determination of the legal status of the digital assets would be relevant because it would impact on the means of enforcement at the creditor's disposal. Following up on this, it was proposed that the best practices did not need to take a position on the domestic law approach to the legal characterisation of the digital asset, but they could be nuanced depending on the domestic law choice in this regard. It was further suggested that the best practices follow a functional and pragmatic approach instead of focusing on legal characterisation: in the case of digital assets, the position of the debtor would be a complex bundle of rights and duties, and the execution phase should aim at putting the creditor in the same position of the debtor, giving the creditor the possibility to use combined means of enforcement.

57. *The Reporter* went on to consider the legal issues in connection to the use cases presented in the paper. She referred to the fact that depending on the way digital assets were managed and stored, it would be necessary to ensure the cooperation of different parties to be able to access the value of the digital assets (debtors, custodians, providers). She identified location as a first question to be addressed, which would be relevant not only for jurisdiction and applicable law, but also for tracking and seizure of the assets. In the ensuing discussion, it was noted that the issue of location was not new, as it was also a feature, for example, in the case of enforcement on regular bank accounts; nor would the need to ensure cooperation of more than one party be a totally new issue (e.g., it was relevant for financial instruments). Other experts warned that the relevant location for the purposes of tracing and seizure would be that of the key and not of the assets, and that discovering assets on a block-chain would be easier than finding assets that had been hidden by the debtor. *The Chair* concluded that the best practices should refer to issues related to location, perhaps in the commentary to a more general best practice (such a recommendation containing a duty of cooperation on parties).

58. The more general issues of identification and tracing of the assets, and existing mechanisms to ensure access to the value of digital assets were then discussed by the Working Group, such as multi-signature arrangements, escrow accounts, or surrender of control by the debtor. It was also noted that identification could refer to the assets, but also to the parties that were not always immediately identifiable. The Working Group further discussed the usefulness of combining more traditional *in rem* measures with personal sanctions (including contempt of court in case of failure to cooperate, or freezing orders).

59. *The Chair* thanked the Reporter and all the contributors for a fruitful debate.

**Item 4 (c) Discussion paper on online auctions (Study LXXVIB – W.G.4 – Doc. 5)**

60. The *Deputy Secretary General* introduced the topic of online enforcement auctions, explaining that the Secretariat had developed a short discussion paper because the use of this mechanism as a means to enhance the effectiveness of enforcement sales was gaining relevance in many jurisdictions, but legal systems still differed on how to regulate them (and even whether to consider them admissible or not). Whether or not to develop best practices on online sales that would integrate the output of all subgroups was a matter for consideration. The Secretariat had also invited the two Colombian experts who had participated in the Technology and Enforcement Workshop on 8<sup>th</sup> March to speak about the secured transactions legislation recently introduced in Colombia, which contained a modern and efficient regulation of online auctions.

61. *The Chair* introduced Diana Lucia Talero (Secretaria Técnica – Comité de Implementación de Garantías Mobiliarias, Colombia) and Carlos Riaño (Confecámeras, Colombia), who presented the Colombian model, and particularly two models of e-auctions for enforcement of security rights, the one managed by a financial institution and the other (more recent) by the Chamber of Commerce (see slides attached to this Report as Annexes 3 and 4).

62. The presentation by the special Reporters elicited a lively discussion within the Working Group. It was clarified that for the online auctions offered by the Chamber of Commerce, the platform would capture information from the secured transactions registry platform (such as the identification of the registry users, the description of the asset, the amount of the debt etc., but also the information contained in the enforcement notice that the creditor is obliged to file in the secured transactions registry), while the creditor would add any other information needed to proceed with the online auction.

63. Experts noted that the enforcement notice was a special feature of the Colombian secured transactions registry, which followed the Inter-American Model Law, while the UNCITRAL instruments provided for notice of enforcement to be sent to selected parties, but no filing of such notice in the registry was required. In the UNCITRAL model, interested parties would have the option to object upon receiving notice, should they consider the enforcement measure commercially unreasonable. Experts further pointed out that the usefulness of populating the online auction platform with information derived from the secured transactions registry depended on the type of registry and the model of secured transactions implemented in domestic law.

64. *The special Reporters* further clarified that while the supervisory authorities (Financial Superintendence and Superintendence of Companies) were in charge of the operation and function of the platforms (regulated by general principles such as those of transparency and efficiency), the direct sale was the responsibility of the secured creditor once it had repossessed the asset and the asset had been evaluated. Thus, the online auction system was triggered by the creditor's initiative after the creditor had exercised its (extra-judicial) right to repossess the collateral. A query was also raised on whether there could be a conflict of interest if the bank providing the auction facility used its own online auction platform as a creditor, to which the special Reporters answered that the general principle of transparency and the possibility of raising oppositions would be sufficient to guarantee a fair auction.

65. Another issue raised by experts concerned the possibility and consequences of an opposition to the online auction by the debtor. It was clarified that oppositions would be dealt with through a separate, special proceeding that could also be held online, and that the third party purchaser was protected by the law.

66. *The Chair* thanked the special Reporters for their availability and a most useful contribution and asked the Secretariat to continue the illustration of Document 5.

67. *The Secretariat* introduced the issue of platform governance for online auctions, and asked whether, considering the diversity of models of governance of platforms, the Working Group should

suggest an optimal model of governance ensuring the achievement of certain goals (such as sufficient impartiality, effectiveness, additional control against abuses), or should avoid choosing a model and provide a list of minimum prerequisites, while the comments would incorporate the analysis and discussion on existing models. This latter approach appeared to be the option preferred by the Working Group.

68. *The Secretariat* then presented the first general best practice, according to which enforcement e-auctions should be promoted, considering the advantages deriving from their use in terms of maximisation of price and transparency. It was noted that in its research, the Secretariat had been unable to find convincing legal reasons for not admitting complete e-auctions for all types of assets (including immovables). This proposal was well received, though experts warned that specific issues should be addressed (such as the need for the system to take any legal restrictions on the sale or purchase of certain assets into account, an issue that had already been discussed at the third session of the Working Group). It was also suggested that these questions would be better addressed in a general part on automation, as they did not appear to be unique to online auctions.

69. The final point presented by the Secretariat regarded the requirement that assets be sufficiently and accurately described, and the issue of who would be responsible for the filing and accuracy of such information. It was suggested that the best practices should not decide on a specific model of responsibility, but rather provide minimum criteria (e.g., recommend that there should be sanctions for incorrect information). In this regard, however, experts doubted that such questions were unique to online auctions, at least in the case of enforcement of security rights, and considered that they would be common to all situations of disposition of the asset through an auction (be it in person or remote).

70. A further issue raised by one expert concerned the opportunity of providing prospective buyers with the option to inspect the asset before committing to acquire it. A reasonable procedure should allow such inspection at least for high value items. The Secretariat noted that technology already provided useful viewing and appraisal tools for remote assessment of the status of assets, through geolocation tools, photographs, and sufficiently detailed images. In respect of the sale of collateral, it was proposed to solve the issue at a more general level (for all auctions) applying the standard of “commercial reasonableness” that would be violated whenever the collateral was disposed in a way that deprived buyers from the right to fully inspect the asset(s), if this had had an adverse effect on the disposition price. The creditor could resort to several possibilities in order to demonstrate the reasonableness of the enforcement means (e.g., warranties of authenticity, recourse to external inspectors etc.). Best practices could however propose other mechanisms, e.g., a minimum requirement for the notice of the auction to state how and under which conditions inspection would be allowed if commercially reasonable.

71. *The Chair* thanked the Secretariat and the participants and suggested that the draft best practices be reconsidered in light of the fruitful discussion.

72. Day 3 of the Working Group session began with a presentation by Mr Nick Chan, Vice Chairman, eBRAM (Electronic Business-Related Arbitration and Mediation) International Online Dispute Resolution Centre, an NGO registered in Hong Kong dedicated to promoting the use of technology to assist with deal-making and cost-effectively resolve disputes, including facilitating enforcement of creditors’ rights also cross-border (see the presentation attached as Annex 5). The presentation was followed by a discussion on how technology could assist in enforcement, particularly facilitating identification of parties, tracing of assets and assessing ex ante whether an enforcement action would be worthwhile or too risky. *The Chair* thanked eBRAM for offering a very interesting perspective and moved to the consideration of the proposed structure of the best practices contained in Document 3.

**Item 4 (a): Draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.4 – Doc. 3) (resumed – general discussion of the proposed outline for the instrument)**

73. *The Deputy Secretary-General* introduced the topic by referring to the tentative outline proposed in Document 3, which had been divided into three parts (Part I, Enforcement by public authorities – Enforcement of adjudicated claims; Part. II, Technology, digitisation and artificial intelligence applied to enforcement; Part. III, Enforcement of security rights). The first part was composed of seven Sections (Section I: General recommendations (pertaining to Part I); Section II: Organization of enforcement proceedings and organs of enforcement; Section III: Central electronic registers; Section IV: Enforceable instruments; Section V: Disclosure of the debtor's assets; Section VI: Modes of Enforcement; Section VII: Creditor's, debtor's and third-parties' remedies; Section VIII: Enforcement Organs; Section IX: Insolvency and Civil Enforcement; Section X: International Cooperation). She noted that Document 3 had already provided tentative best practices for Sections I to V, as well as for Section VI (b) relating to enforcement on third-party debt orders, and that the draft recommendations in Sections III to V and VI (b) had already been discussed by the Working Group. The remaining points in the outline were to be understood as placeholders for the development of recommendations, which would be partly based on the discussion documents already prepared by Subgroup 1 for previous sessions of the Working Group. The outline was to be considered a first proposal, subject to any needed adjustments in relation to placement of items, subject matters as well as terminology.

74. *The Reporter* for Document 3 noted that issues concerning technology in enforcement had been placed in a separate section, though it remained to be discussed whether general recommendations on technology should belong to the general part of the instrument. He further highlighted the importance of dealing with creditor, debtor and third party remedies, for which many legal systems had inefficient and obsolete provisions, and pointed to the first two subsections of that part, respectively addressing infringement of formal rules of execution, and infringement affecting substantive law. Concerning Section IX, the Reporter recalled that the Working Group had decided early on not focusing specifically on insolvency-related matters, but to consider addressing the relationship between civil enforcement and insolvency in general terms, which could be done through a limited number of general recommendations. Finally, issues of international cooperation, particularly relating to the retrieval of information, would be addressed in Section X. *The Chair* expressed appreciation for the work done by the Reporters on the proposed structure and opened the floor for comments.

75. *The Secretary-General* recognised the importance of the topics listed in the proposed outline, while at the same time expressing some concern on the feasibility of the project, should all such topics be addressed by the Working Group. *The Reporter* acknowledged this point and referred to the technique that had already adopted for other sections, which combined an introductory text offering the context, with recommendations focusing only on the issues for which international guidance would make sense, thereby drastically limiting the number of recommendations for each section. He further noted that the outline was a work-in-progress that could be further reduced and adjusted depending on the decisions of the Working Group.

76. Several participants commented on the proposed structure, suggesting various modifications (e.g., Part III on enforcement on security rights would be better be placed immediately after Part I; Section X on international cooperation might apply to all Parts and not be limited to enforcement by way of security). It was further suggested to include consideration of the use of ADR and ODR as means to facilitate the solutions of conflicts in enforcement. Moreover, it was noted that the terminology used in the outline might have to be revised.

77. A question that elicited much discussion was the placement of the recommendations relating to the impact of technology in enforcement. It was recognised that technology was pervasive and would crosscut most topics. The opportunity to introduce high-level recommendations on artificial

intelligence and automation in a general part of the instrument was highlighted, while specific rules could be placed in each section as required. One expert noted that while technology offered useful mechanisms to facilitate enforcement, in some procedures the trade-off between allowing human intervention, and ensuring effective enforcement might be reconsidered.

78. A number of participants in the discussion raised the issue of coordination between Parts I and III (in the current proposal), which the Chair postponed to the next point in the agenda (consideration of Document 4).

**Item 4(b): Update on draft best practices regarding enforcement of security rights (Study LXXVIB – W.G.4 – Doc. 4)**

79. *Neil Cohen, Reporter for Document 4*, introduced the document that contained a suggested way forward for the future work of Subgroup 2 regarding enforcement of security rights. He recognised that the work on this topic was well advanced thanks to the engagement of Subgroup members, who had already produced draft recommendations on obtaining possession of tangible goods (particularly focusing on extra-judicial means but including also the situations where the assistance of the judiciary was needed), on disposition of collateral, on enforcement on receivables, and on the possibility for the parties to negotiate enforcement measures, which had already been discussed in detail during previous sessions of the Working Group. Several issues however remained to be addressed. From a formal point of view, he highlighted, in particular, the need to provide for internal harmonisation of the document. From a substantive point of view, he listed three main tasks that the Subgroup had to accomplish in the intersessional period before the next session of the Working Group: enlarging the commentary; drafting recommendations regarding enforcement of security rights on immovables; inserting provisions on the impact of technology on enforcement of security rights.

80. Concerning the work on the commentary to the recommendations, the Reporter noted that comments should contain a convincing justification for the recommended best practice, as well as an explanation in a more accessible language, illustrations on the potential application of the proposed recommendations and finally a list of sources that would support the acceptability of the best practice. As regards security rights over immovables, which was an area of the law where there had not been any development of internationally accepted rules so far, the Reporter recalled that some initial work had already been done by a team composed of Mr Fábio Rocha Pinto e Silva and Professor Dale Whitman, who had identified a number of topics on which best practices could be developed. Finally, the draft had to be integrated with recommendations on the use of technology to enforce security rights, as well as best practices on enforcement of security rights on digital assets, to be developed in coordination with the Digital Assets Working Group.

81. *The Chair* opened the floor for comments, acknowledging that in relation to the commentary to the best practices, not all recommendations would need the same amount of detail but there could be different approaches where appropriate.

82. In the ensuing discussion, Working Group members were generally supportive of the drafted recommendations and the proposed way forward. In relation to the style of the recommendations, it was recalled that they should be revised to avoid the initial expression “the law should provide”. As regards the commentary, the usefulness of inserting appropriate cross-references to other best practices was noted. Furthermore, the Secretariat pointed out that, while UNIDROIT instruments did not generally cite specific domestic law sources, as opposed to international ones, language could be inserted to refer to different models or prevailing solutions.

**Item 5: Organisation of future work and discussion on way forward**

83. *The Chair* transitioned to a more general discussion on the organisation of future work and way forward for the project.

84. One expert pointed out that there was some inevitable overlap in the scope of the two subgroups, since Subgroup 1 covered all situations of enforcement by way of authority, while Subgroup 2 dealt with enforcement of security rights (which encompassed both extra-judicial and judicial enforcement). It was also noted that the Working Group may wish to address extra-judicial enforcement of unsecured claims, which was an unassigned topic for the time being. Several Working Group members suggested that there were topics for which a closer intersessional coordination between Subgroup 1 and Subgroup 2 would be needed, for example judicial enforcement of security rights.

85. *The Secretariat* emphasised that the subgroups would need to continue to work separately, however that coordination sessions should be intensified. One expert recommended that virtual intersessional meetings be targeted to specific topics so as to enhance their efficiency. The Secretariat also suggested following the examples of other projects by setting a Drafting Committee entrusted with the revision of the texts from a linguistic point of view, to achieve a coherent whole. As to the timetable of the project, it was noted that the Governing Council had recommended the continuation of the project in the new Triennial Work Programme with high priority until its completion in 2024. While this time framework was reasonable in view of the complexity and ample scope of the project, the Secretariat underscored the need to keep the instrument manageable and continue to work with the same commitment and engagement as before in order to meet the targeted deadline. Finally, the Secretariat confirmed the date of the fifth session of the Working Group which had been chosen with a view to avoid overlap with UNCITRAL Working Group V (December 12-14).

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

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

**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.4 – Doc. 2)
4. Consideration of work in progress:
  - (a) Draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.4 – Doc. 3)
  - (b) Update on draft best practices regarding enforcement of security rights (Study LXXVIB – W.G.4 – Doc. 4)
  - (c) Discussion paper on online auctions (Study LXXVIB – W.G.4 – Doc. 5)
  - (d) Discussion paper on enforcement on digital assets (Study LXXVIB – W.G.4 – 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****CHAIR**

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(*in person*)

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(*remotely*)

Ms ZHU Ke  
Judge  
Fourth Civil Division

UNION INTERNATIONALE HUISSIERS DE  
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**GUESTS**

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**UNIDROIT**

Mr. Ignacio TIRADO <i>(in person)</i>	Secretary-General
Ms Anna VENEZIANO <i>(in person)</i>	Deputy Secretary-General
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