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**Best Practices for Effective Enforcement
Working Group**

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**SECRETARIAT'S REPORT ON THE BACKGROUND, STATUS OF THE PROJECT
AND INTERSESSIONAL DEVELOPMENTS**

1. This report provides an update of [Doc LXXVIB – W.G. 5 – Doc. 2](#) (Secretariat's Report on the Background, Status of the Project and Intersessional Developments).
2. The update is based on the outcome of the fifth session of the Working Group held on 12-14 December 2022, which discussed substantive issues on the basis of revised Reports and draft recommendations prepared by Working Group members. It also provides information on the intersessional work of the Working Group and the Secretariat following the fifth session. Updates are provided, particularly, in the following paragraphs: 28-30 (fifth Working Group session); 31 (Intersessional work after the fifth Working Group session); 37 (Format of the instrument); 53 (Date and venue of further sessions); 54-55 (Drafting Committee); 97-105 (Substantive issues arising from the fifth Working Group session).
3. This report is accompanied by additional documents that will be the main object of the deliberations: (a) Draft best practices on enforcement by way of authority and accompanying Explanatory flowchart on Sections III and V of Study LXXVIB – W.G.6 – Doc. 3 (Study LXXVIB – W.G.6 – Doc. 3, and Annexe 1); (b) Collation of draft best practices on enforcement of security rights (Study LXXVIB – W.G.6 – Doc. 4); (c) Draft best practices regarding secured creditor's right to obtain possession of collateral after default – revised after Drafting Committee meeting (Study LXXVIB – W.G.6 – Doc. 4, Annexe 1); (d) [Tentative] draft best practices regarding special expedited procedure to resolve disputes concerning the right to possession of tangible collateral (Study LXXVIB – W.G.6 – Doc. 4, Annexe 3); (e) Draft best practices on enforcement on digital assets [...and tokens] (Study LXXVIB – W.G.6 – Doc. 6).

Working Group participants have also received the Report of the fifth session of the Working Group ([Study LXXVIB – W.G. 5 – Doc. 7](#)) that was approved through email confirmation procedure.

Finally, Working Group participants received the slides for the presentation by Mr Massimiliano Blasone on behalf of the CEPEJ (Study LXXVIB – W.G.6 – Doc. 5).

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I. PRELIMINARY MATTERS

A. Background

Preliminary work

4. At the 95th Session of the Governing Council in 2016, the Secretariat included a proposal to undertake work in the field of enforcement, developing “Principles on Effective Enforcement” in the draft Work Programme 2017-2019 (UNIDROIT 2016 – C.D. (95) 13 rev.). The proposal was designed to fill in the gap of existing UNIDROIT instruments, particularly the ALI/UNIDROIT Principles of Transnational Civil Procedure, prepared by a joint American Law Institute/UNIDROIT Study Group and adopted in 2004. It was accompanied by a preliminary Feasibility Study conducted by Rolf Stürner, Emeritus Professor at the University of Freiburg (Germany) and former co-reporter of the ALI/UNIDROIT Principles of Transnational Civil Procedure ([UNIDROIT 2016 – C.D. \(95\) 13 Add. 2](#)). At its 75th session the General Assembly endorsed the recommendation of the Governing Council to include this topic in the UNIDROIT Work Programme for the 2017-2019 triennium with a low level of priority in view of the priority given to the completion of the ELI-UNIDROIT project on regional rules of civil procedure.

5. In December 2018, the Secretariat received a proposal for the 2020-2022 Work Programme by the World Bank regarding a project on the “Development of a Working Paper to Outline Best Practices on Debt Enforcement”, which the Secretariat presented in the context of the discussion of the 2020-2022 Work Programme at the 98th Session of the Governing Council. The proposal was presented as a continuation of, and a refinement of the scope of, the “Principles of Effective Enforcement” project. The project was included in the new 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). While there was substantial agreement on the importance of the topic and on the legal, social and economic impact of the work to be conducted, the Secretariat was asked to produce a more refined scope of the project to be presented at the 99th session of the Governing Council in 2020.

6. During the first part of that session, held in remotely April-May 2020, Council Members commented on the revised Secretariat’s paper ([C.D. \(99\) A.3](#)) and authorised the setting up of an Exploratory Working Group to receive expert feedback on the questions raised (C.D. (99) A.8, paras. 43-44).

7. In response to this mandate, the UNIDROIT Secretariat developed a [Consultation Document](#) containing a set of questions based on the comments received during the session. The document was designed to better define the most appropriate guidance for the future Working Group in determining the type of envisaged instrument and the scope of the project, and formed the basis for a first round of remote consultations with selected international experts and organisations. The Secretariat received answers and feedback from several individual experts in comparative civil procedure, secured transactions, insolvency, contract law, and technology as applied to law, and from a number of intergovernmental and international organisations. In addition, the Secretariat organised an Internal Consultation Workshop with participation of experts, relevant organisations and members of the Governing Council, which was held on 21 September 2020 and focused on issues of scope of the future instrument and the impact and relevance of technological developments for enforcement.

8. At the September meeting of its 99th session (23-25 September 2020), the Governing Council discussed the Secretariat’s revised document, including the outcome of the consultations ([C.D. \(99\) B.3](#)), approved the guidelines provided by the Secretariat regarding the proposed scope

of the project, confirmed the high priority status assigned to the project, and authorised the establishment of a Working Group (for the composition of which, see below, **subsection F**).

First Working Group session (November-December 2020)

9. The first meeting of the Working Group was held in Rome and on Zoom on 30 November–2 December 2020. Ms Kathryn Sabo, Deputy Director General and General Counsel of the Constitutional, Administrative and International Law Section of the Department of Justice (Canada), and member of the UNIDROIT Governing Council, was appointed as the Chair. The Working Group discussed a document prepared by the Secretariat ([LXXVIB – W.G. 1 – Doc. 2 \(Issues Paper\)](#)), which focused, for the most part, on the scope of the project, as well as methodology and organisation of the work. The Working Group further discussed a document on the impact of technology on enforcement (LXXVIB – W.G. 1 – Doc. 3). The [Report of the first Working Group](#) session is available on the UNIDROIT website. For the deliberations regarding the scope of the project, see below, **section II**.

Intersessional work after the first Working Group session (December 2020 – March 2021)

10. At the first Working Group session, in order to facilitate the organisation of the work, the Chair suggested setting up informal subgroups that would be active during the intersessional periods. They would be structured as open-ended, and both experts and observers were to be invited by the Secretariat to express their interest in participating in one or more of them. The subgroups, supported by the Secretariat as necessary, would nominate one or more focal points, identify problems in existing procedures, and start looking at possible solutions. Subgroup topics were not meant to be exhaustive, nor to reflect the final structure of the instrument, but to represent a starting point for the deliberations of the Group.

11. Three subgroups were set up accordingly, with the following provisional titles: Subgroup 1 - Enforcement of adjudicated claims or post-adjudication (later renamed Enforcement by way of public authority), with focal points Fernando Gascón Inchausti and Rolf Stürner; Subgroup 2 - Enforcement of secured claims (later renamed Enforcement of security rights), with focal point Neil Cohen); and Subgroup 3 - Impact of technology on enforcement, with focal point Teresa Rodríguez de las Heras Ballell.

12. In the intersessional period, the Chair, most Working Group members, and a number of observers were involved in an intense working schedule set up by the focal points and supported by the Secretariat. Moreover, the Secretariat set up coordination meetings between representatives of Subgroup 3 and the other two subgroups to discuss common issues and coordinate the documents for the second session of the Working Group.

Second Working Group session (April 2021)

13. The second session of the Working Group took place remotely on 20–22 April 2021, and its deliberations focused on Reports prepared by the three subgroups.

14. Subgroup 1 had prepared a detailed document on post-adjudication enforcement, focusing on the questions to be discussed and providing some (alternative) recommendations on the possible way forward.

15. Moreover, the focal points of Subgroups 1 and 3 had coordinated their input in advance. As a result, the Report of Subgroup 3 was reorganised to follow the structure of the Report of Subgroup 1, and the related parts of each Report were discussed in connection with each other.

16. Finally, the Working Group considered the Report prepared by Subgroup 2 on enforcement of security rights. The Subgroup had particularly focused on enforcement of security rights on movables and had drafted a comprehensive set of proposals for recommendations of best practices in the form of answers to a list of practical questions, which had been allocated to different teams among Subgroup members.

17. For more information on specific issues discussed at the second Working Group session, see below, **section III**, and the [Report](#) of the second Working Group session.

Intersessional work after the second Working Group session

18. Pursuant to the mandate received at the second session of the Working Group, the Secretariat continued to provide support to the Chair and Working Group members and observers for the organisation of several intersessional subgroup meetings to advance the understanding of certain issues and/or the preparation of draft documents. More general, informal coordination meetings with participation of the Chair, the coordinating member and the focal points of the subgroups were organised to exchange views and advance consistency of outputs. Special virtual meetings were also held on specific issues such as automation. Moreover, the Secretariat liaised with the UNIDROIT Working Group on Digital Assets and Private Law, particularly with the chair of the subgroup on security rights over digital assets, to ensure coordination as regards enforcement of security rights on digital assets.

Third Working Group session (November-December 2021)

19. The third session of the Working Group was held in a hybrid format on 29 November–1 December 2021, and its deliberations focused on the following topics:

- Focus on enforcement by way of authority over receivables (Study LXXVIB – W.G.3 – Doc. 3, Annex 1, part IV 1 b - Third Party Debt Orders or Garnishment Proceedings);
- Focus on enforcement over receivables and automation (Study LXXVIB – W.G.3 – Doc. 4, Annexes 1 and 2 - Report of focal points of Subgroups 1 and 3);
- Focus on enforcement of security rights over receivables and automation (Study LXXVIB – W.G.3 – Doc. 5, Annex C, pp. 18-24 (Report of Subgroup 2 and focal point Subgroup 3); and
- Additional issues from Reports of Subgroups 1 and 2 (Study LXXVIB – W.G.3 – Doc. 3, Annex 1, parts IV 1 c and IV 1 d - enforcement and charging orders on land; Study LXXVIB – W.G.3 – Doc. 5 (Annex B on disposition of collateral and Annex D on variation of rules by party autonomy)).

20. For more information on the specific issues discussed at the third Working Group session, see below, **section III**, and the [Report](#) of the third Working Group session.

Intersessional work after the third Working Group session

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

22. In particular, the Secretariat organised two workshops to discuss issues related to the interaction between technology and enforcement, namely:

- an internal, virtual Workshop on Enforcement on Digital Assets on 19 January 2022, in which participants discussed two papers provided by Carla Reyes and Teresa Rodríguez de las Heras Ballell, respectively on “Technology-Enhanced Enforcement: Issues Related to Digital Assets” and on “Illustration of Electronic Warehouse Receipt Enforcement”. The Secretariat produced a Summary Report of the Workshop. The three documents will be sent to the Working Group as Annex II to Study LXXVIB – W.G.4 – Doc. 6 on “Enforcement on Digital Assets”; and
- a virtual Workshop on “Technology in Enforcement: recent developments and opportunities” on 8 March 2022, with the participation of Amna Al Owais, Chief Registrar, DIFC Courts (UAE); Lina Lontone, Council of Sworn Bailiffs of Latvia; Jos Uitdehaag, Secretary, UIHJ; Veronica Bradautanu, MoJ Moldova (on leave from EBRD); Teresa Rodríguez de las Heras Ballell; Diana Talero, Secretaria Técnica- Comité de Implementación de Garantías Mobiliarias, Colombia; and Carlos Riaño, Confecámaras, Colombia as speakers, and several members and observers of the Working Group as discussants. The video of the Workshop is available on [UNIDROIT’s YouTube channel](#).

Fourth Working Group session (April 2022)

23. The fourth session of the Working Group was held in a hybrid format on 26-28 April 2022, and its deliberations focused on the following topics:

- Discussion of first best practices on enforcement by way of authority, in particular relating to central electronic registries, enforceable documents, disclosure of debtors’ assets, and revised best practices on enforcement of third-party debt orders (Study LXXVIB – W.G.4 – Doc. 3);
- Discussion of a paper on enforcement on digital assets, which was based on the intersessional Workshop held in January 2022 and a research paper prepared by the UNIDROIT Secretariat (the Secretariat’s team for enforcement in cooperation with the Secretariat’s team responsible for the Digital Assets and Private Law Working Group) on case law regarding issues connected to the enforcement on digital assets (Study LXXVIB – W.G.4 – Doc 6);
- Discussion of a paper on online auctions, based on research conducted by the Secretariat (Study LXXVIB – W.G.4 – Doc. 5), with the discussion enriched by a presentation of two individual experts who were invited to act as special reporters for the Colombian legal system; and
- Discussion of a document containing the updated best practices on enforcement on security rights and presenting the way forward for this part of the project.

24. The Working Group also benefited from 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 to resolve disputes cost-effectively, including facilitating enforcement of creditors’ rights (including across borders).

25. For more information on the specific issues discussed, see below, **section III**, and the [Report](#) of the fourth Working Group session.

Intersessional work after the fourth Working Group session

26. After the fourth session of the Working Group, the Secretariat continued to support Working Group participants towards the advancement of the project and to produce research materials on specific topics.

27. In particular, the Chairs of the Digital Assets and Private Law and the Best Practices for Effective Enforcement Working Groups (Professor Hideki Kanda and Ms Kathryn Sabo, respectively) took the initiative of a joint Workshop, with participation of experts from the two Groups as well as additional experts. The joint Workshop was held on the last day of the UNIDROIT Governing Council session (10 June 2022). Featuring three roundtables, the Workshop shed light on various issues linked to enforcement on digital assets. The first roundtable, which examined remedies generally available in relation to digital assets, was led by Professor Carla Reyes and featured presentations from Hin Liu (Lecturer of Law at St Hugh's College, Oxford University, and a Legal and Business Consultant at Fusang), Professor Jason Grant Allen, and Andrew M. Hinkes (Partner at K&L Gates and Associate Professor at Leonard N. Stern School of Business). The second roundtable, which focused on enforcement of creditor rights in digital assets, was led by Professor Louise Gullifer, QC (Hon) FBA (Rouse Ball Professor of English Law at the University of Cambridge) and featured presentations from Dr Marek Dubovec (University of Arizona, James E. Rogers College of Law), Professor Neil Cohen, and Andrea Tosato (Associate Professor at the University of Nottingham and the University of Pennsylvania Law School). The third roundtable, which focused on judicial enforcement of digital assets, was led by Professor Geneviève Saumier and featured presentations from Professor Rolf Stürner, Patrick Gielen (Secretary International Union of Judicial Officers), and Professor Teresa Rodríguez de las Heras Ballell. The Workshop was concluded by closing remarks delivered by the two Chairs. The recording of the Workshop is available on the [UNIDROIT YouTube channel](#).

Fifth session of the Working Group (December 2022)

28. 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:

- (partly redrafted) best practices on enforcement by way of authority, accompanied by extensive comments, in particular relating to general provisions, organisation of enforcement, enforceable documents, disclosure of debtor's assets, and central electronic registries (Study LXXVIB – W.G.5 – Doc. 3);
- enforcement of security rights over movables, in particular:
 - o Redrafted best practices and comments on extra-judicial repossession of tangible movable collateral (Annexe 1),
 - o Redrafted best practices and comments on disposition of collateral (Annexe 2), and
 - o A paper on policy issues regarding "expedited" judicial procedures in the context of extra-judicial enforcement (Annexe 3);
- an updated paper on enforcement on digital assets, containing preliminary best practices (Study LXXVIB – W.G.5 – Doc 6); and
- an updated paper on online auctions, based on additional research conducted by the Secretariat (Study LXXVIB – W.G.6 – Doc. 5).

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

30. For more information on the specific issues discussed, see below, **section III**, and the [Report](#) of the fifth Working Group session.

Intersessional work after the fifth session of the Working Group

31. After the fifth session of the Working Group, the Secretariat continued to support the Working Group's development of the project. In particular, the following activities were carried out, among others, by those Working Group participants who had been active in drafting texts within subgroups and/or were part of the Drafting Committee, by the Chair and by 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) Drafting Committee work and meeting on 31 January 2023 (for more information, see paras. 54-55 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 and of members within Subgroup 2;
- (v) Drafting of support documents for the Working Group, as mandated to the Secretariat at the fifth session (W.G.5 Docs. 3 and 4, 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; flow-chart on Sections III and V of W.G.5 Doc. 3).

B. Target audience

32. The general aim of the project is to develop a legal tool to address the current challenges to a well-functioning domestic law system for enforcement by offering a set of global standards and best practices to national legislators, designed to improve the domestic normative framework applicable to enforcement. The Working Group agreed that the primary addressees would be legislators seeking to reform, or refine, their enforcement laws. However, the instrument would also be addressed to policy makers in general, including entities and organisations with the authority to develop secondary legislation or regulations, other organisations actively supporting legal reform in specific regions of the world, and stakeholders that may be influential in the development of law reform. It was noted that the spectrum of potential direct addressees should not be widened further, otherwise it would be more difficult to strike the right balance in the terminology and structure of the instrument.

C. Format of the instrument

33. There was general agreement that it would be neither appropriate nor feasible to draft a binding international instrument (i.e., a Convention), or a legislative instrument such as a model law, or detailed Principles or Rules structured as a comprehensive code. A guidance document containing best practices avoiding "one-size-fits-all" solutions was considered to be a better option. The following main reasons were cited for choosing this type of instrument: the close interconnection of enforcement with several areas of the law (property law, insolvency, constitutional law, etc.) where there is a divergence of national legal concepts and approaches; divergent national cultural, social and economic situations; and the dynamism of technological developments applied to

enforcement. It was not excluded, however, that a non-binding guidance instrument may, with time, pave the way for future international legislative activity.

34. Participants in the consultations noted that there should be a sufficient level of detail in suggesting potential regulations to national legislators (e.g., sufficiently detailed best practices for some specific issues). This would render the instrument more useful and attractive and reach beyond the existing guidance documents. It was also proposed that the level of detail of the suggested best practices may be differentiated in relation to the various issues which will be addressed by the instrument. It was clear, however, that best practices should be drafted only for issues that represented obstacles to and concerns in reaching the goal of effective enforcement in various jurisdictions; contextualisation should be provided, if and where necessary, in the comments to the best practices.

35. While any decision on the format of the final instrument was considered to be premature, the majority of the experts favoured the development of best practices followed by comments explaining and justifying them. The comments would explain the background and provide the reasons why one particular best practice had been followed. Whether comments should also explain how to implement the best practices and identify the potential pitfalls and problems in their application, and whether they should further contain specific references to national laws, was debated. In relation to this point, it was noted that giving advice on the practical implementation of the instrument within domestic law would be more appropriate in an instrument such as a Guide to Enactment, that could be developed after the conclusion of this project with an additional mandate from the Governing Council.

36. The need to harmonise the work going forward by agreeing on a tentative standard format of presentation was also raised. Additionally, the usefulness of including illustrations in the comments was suggested.

37. At the fifth session of the Working Group, participants agreed that the Drafting Committee should start its work intersessionally, with a preliminary discussion on the standard format and language of the best practices (see below, paras. 54-55).

D. Title of the instrument

38. As mentioned above, the Working Group confirmed that the instrument should be in the form of a soft best practice guide. The Working Group accepted the suggested provisional title of the instrument, “Best Practices for Effective Enforcement”. The Governing Council’s endorsement may be sought, if necessary, for any revisions of the title.

E. Terminology and translations

39. One of the challenges of uniform law is how to ensure that the planned instrument adopt sufficiently technical and precise terminology while also being as neutral as possible with respect to specific legal systems and accessible to users with different legal and linguistic backgrounds (or at least capable of translation into different languages). This is particularly important in the case of instruments aimed at providing guidance to national legislators.

40. More specifically, while the Group’s only working language is English, consistent with UNIDROIT’s practice, the final instrument will be approved in two language versions: English and French. Therefore, this should be kept in mind to ensure a consistent text of the best practices be developed in both languages by the time of final approval.

41. Moreover, there should be consistency, as far as possible and reasonable, with the terminology used in other UNIDROIT instruments and current projects. The need to align terminology to the one used in existing global standard-setting instruments developed by sister organisations (in particular UNCITRAL's instruments on secured transactions) was also raised, with particular regard to enforcement on security rights, bearing in mind, however, the different scope of the present project (which does not purport to harmonise substantive secured transaction laws).

42. Finally, the Working Group discussed the usefulness of developing a glossary of shared terms and definitions. While such a glossary was not considered to be a necessary addition to the final instrument, nor was it considered to be feasible at the present stage of development of the project, the need to keep track of the different terms used and to harmonise terminology was highlighted.

F. Organisation of the work

Working Group

43. Consistent with UNIDROIT's established working methods, a Working Group has been set up, and is composed of participants selected in their personal capacity for their expertise in the fields of comparative procedural law, contract law, secured transactions, insolvency, and technology and the law. The members were also selected based on their representation of different systems and geographic regions of the world. As consistent with UNIDROIT practice, the Working Group did not adopt any formal rules of procedure and will seek to make decisions through consensus under the Chair's guidance.

44. UNIDROIT has invited several global and regional organisations with expertise in the specific and related fields to participate as observers in the Working Group. While observers do not have voting rights, they are entitled to full participation in the Working Group's discussions and are considered an integral part of the working team. The participation of these organisations should ensure that different regional perspectives are considered in the development and adoption of the instrument. Such organisations can also channel relevant input from experts with a specialised background, also allowing for interdisciplinary synergies. Moreover, it is anticipated that the cooperating organisations may assist in regional promotion, dissemination, and implementation of the guidance document, once it has been adopted. Finally, UNIDROIT may also invite other experts or professional associations to participate as observers in the Working Group or in subsequent consultations.

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

46. The following organisations are also part of the Working Group as observers: European Bank for Reconstruction and Development (EBRD) - Catherine Bridge Zoller, Senior Counsel; Veronica Bradautanu, Principal Counsel - Corporate Governance (until 2021); European Commission (DG JUST); European Law Institute (ELI) - Xandra Kramer, University of Rotterdam, and Paul Oberhammer, University of Vienna; Hague Conference on Private International Law (HCCH) - Ning Zhao, Senior Legal Officer, and Melissa Ford, First Secretary (previously João Ribeiro-Bidaoui, until 2021); International Association of Legal Science (IALS) - J.H.M. (Sjef) van Erp, emeritus Professor of Civil Law and European private law, Maastricht University (Netherlands), Visiting professor, Trento University and Secretary-General IALS; Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law - Burkard Hess, Founding and Executive Director, Professor of Civil Law, Civil Procedure, Private International Law, and Wiebke Voß, Juniorprofessorin, Julius-Maximilians-Universität Würzburg, Germany (until 2021); Organization of American States (OAS) – Jeannette Tramhel, Senior Legal Officer, Department of International Law, Secretariat for Legal Affairs (until 2022); Secured Finance Network - Richard Kohn, Goldberg Kohn Ltd.; Union Internationale des Huissiers de Justice (UIHJ) - Jos Uitdehaag, Secretary; United Nations Commission on International Trade Law (UNCITRAL) – Samira Musayeva, Senior Legal Officer and Secretary of Working Group V (Insolvency) and Thomas Traschler, Legal Officer (until 2021); World Bank Group (WBG) - Nina Pavlova Mocheva, Senior Financial Sector Specialist, Finance, Competitiveness & Innovation Global Practice; Zemgale Regional Court - Līna Lontone, Latvia. As of the fourth session of the Working Group, the Supreme Court of China has been invited to join as observer (Zhu Ke, Judge at the Fourth Civil Division of the Supreme People’s Court of the People’s Republic of China).

47. The following experts were further invited to participate in the Working Group: Ms Valeria Confortini, Professor, Università degli Studi di Napoli "L'Orientale"; Mr Carlos Riaño, Confecámeras, Colombia; Ms Diana Lucia Talero, Secretaria Técnica – Comité de Implementación de Garantías Mobiliarias, Colombia.

Consultation procedure with additional experts and research conducted by the Secretariat

48. The individual experts originally involved in the Working Group represent both common law and civil law jurisdictions and possess ample knowledge of comparative law. As mentioned, however, more input may be needed to reflect useful and necessary additional information from other regions that are not (yet) represented in the Working Group, as well as from individuals who have a specific professional expertise. Besides providing valuable information, such consultations may represent the means of identifying a pool of relevant experts who could be invited to share their expertise on an *ad hoc* basis at one or more Working Group meetings.

49. The Secretariat, following up on the mandate received from the Working Group, and in cooperation with the European Bank for Reconstruction and Development (EBRD), has conducted consultations in the form of interviews and questionnaires in order to gather data on challenges, regulatory options and practices for effective enforcement in diverse jurisdiction (among others, Egypt, Greece, Japan, Kazakhstan, Latvia, Mongolia, and Ukraine). Moreover, the Secretariat has conducted background research in relation to additional legal systems (among others, Brazil, China, Finland, France, India, Mozambique, Portugal, Russia, Rwanda, and Singapore). The outcome of this consultation has been collected in two documents, one containing the answers to the Questionnaire on General Enforcement, and the other grouping together the answers to the Questionnaire on Technology and Enforcement. Finally, the Secretariat has organised *ad hoc* consultations with additional experts from various jurisdictions (including Colombia and UAE).

50. The Secretariat is open to broadening this exercise in cooperation with other interested organisations.

Provisional timetable

51. The preparation of Best Practices for Effective Enforcement is a high-priority project on the UNIDROIT Work Programme 2020-2022.

52. The Secretariat had originally envisaged that the preparation of a first draft of the proposed instrument be conducted over four sessions of the Working Group (one in December 2020, two in 2021, and one in 2022, possibly in connection with a wider consultation event). This calendar was, however, already tentative and subject to revision in view of various factors, including the evolution of the international context and the extent of research needed to develop a practically useful instrument in this complex and vast area of law. The Governing Council of UNIDROIT, at its 100th session (second meeting) in September 2021, authorised the Working Group to postpone, where necessary, the completion of a full draft of the instrument by one year. To this end, the Secretariat invited the Governing Council at its 101st session (June 2022) to recommend that the General Assembly allow for the continuation of the project during the 2023-2025 Work Programme, to ensure its completion in the first part of the next Triennium. The Governing Council approved the recommendation, which was adopted by the General Assembly at its 81st session (15 December 2022). The sixth session of the Working Group was scheduled for 14-16 March 2023. A seventh session is planned for November-December 2023, with a view to present a finalised draft to the Governing Council in 2024.

Dates and venue of further sessions of the Working Group

53. **The seventh session of the Working Group is planned for 29-30 November and 1 December 2023.** Working Group sessions will be, by preference, held in person at the seat of UNIDROIT, though the option of connecting remotely will be left open as an exception to the general rule. In-person participation is strongly encouraged, particularly at this advanced stage of the project. Intersessional work, as determined by the present Working Group session, including Drafting Committee work, will be also supported by the Secretariat.

Drafting Committee

54. At its fifth session, the Working Group discussed the setting up of a Drafting Committee to review the draft best practices on which an agreement on the 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 Prof. Neil Cohen, Prof. Teresa Rodríguez de las Heras Ballell, Prof. Geneviève Saumier, Prof. Rolf Stürner, and Prof. Fernando Gascón Inchausti.

55. The Drafting Committee started to work remotely and met in its full composition, including the Chair and UNIDROIT, on 31 January 2023. It discussed preliminary matters of tone, style, structure, and procedure on the basis of documents prepared by Geneviève Saumier (suggested re-draft of Section IV of W.G.5 Doc. 3, Section II of W.G.5 Doc. 3, and Annexe 1 (former Part A) of W.G.5 Doc. 4). The Drafting Committee agreed to continue its work through email exchanges, which would be preceded by bi- or trilateral exchanges between the reviewer(s) and the original authors. Time for (mostly in-person) Drafting Committee work, be it in its full composition or in smaller groups, was further scheduled before and after the sixth session of the Working Group in March 2023.

II. ISSUES RELATED TO THE SCOPE OF THE INSTRUMENT

A. General mandate received

56. The Working Group is invited to develop a best practice instrument on mechanisms and procedures of enforcement of creditors' claims. A more precise determination of the types of procedures and claims to be included in the scope of the project was left to the appreciation of the Working Group, subject to the initial guidance deriving from the outcome of the preliminary consultations conducted by the Secretariat and from the input of the Governing Council at its 99th session.

57. The background of the project lies in the recognition of the need to ensure timely, predictable and affordable enforcement, particularly of contractual rights, for a developed credit market, and an improved access to credit, for an increase in trade and investment and for overall economic and social development and sustained growth in all jurisdictions. The Working Group has thus been invited to consider the current challenges for effective enforcement and the most suitable solutions (procedures, mechanisms) to overcome such challenges. The goal of the project is 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.

58. The importance of drafting an introduction to the best practices was acknowledged at the first Working Group session. The experts noted that such an introduction could fulfil various functions: set forth the underlying reasons and drivers for the development of the best practices; state the goals of the instrument; and contain the general principles on which the best practices would be based, which could be used as parameters for the interpretation of the instrument. It was also noted that the introduction should be written in consideration of its intended audience and the need to explain the purposes and goals of the instrument as well as their practical importance.

59. The Working Group held a preliminary discussion on the role to be played by general principles and by constitutional principles in the development of the best practices. For a summary of the discussion, see UNIDROIT 2020 – LXXVIB – W.G.1 – Doc. 4 (Report of the first session), paras. 10 and 11.

B. Definition of the meaning of "enforcement" in relation to the project

60. One of the issues discussed during the consultation procedure regarded the meaning of the term "enforcement". A suggestion to shape this discussion that had emerged during the consultation process was to use a functional notion of enforcement, which did not necessarily coincide with the technical meaning of the term under any specific domestic law. This notion could embrace a number of different procedures and mechanisms through which a creditor may obtain satisfaction of its claim over assets of the obligor or collateral, be it by reaching and applying the value of the asset, or by obtaining rights on, or control of, the assets. The usefulness of developing best practices in relation to each of those procedures should be assessed on the basis of the concrete obstacles and challenges they face at present in various jurisdictions.

Procedures falling within the scope of the project

61. At the first Working Group session, experts expressed different opinions on how to classify enforcement proceedings for the purposes of defining the scope of the project, and some concerns on the exact definition of the contours of the project, as well as on the terminology used in the

Issues Paper (for a summary of the discussion see the Report of the first session, [LXXVIB – W.G.1 – Doc. 4, paras. 12-22](#)). There was, however, substantial consensus on the fact that the three basic scenarios described in para. [25 of LXXVIB – W.G.1 – Doc. 2 \(Issues Paper\)](#), were examples of situations that would be included in the scope of the project. These scenarios were to be used as a practical starting point for the Group's deliberations, regardless of what the final structure of the instrument would be. It was also agreed that the use of emerging technologies in enforcement proceedings should be an integral part of the project.

62. In relation to enforcement following an adjudication, it was clarified that the project would have to address a vast array of questions, both connected with the concrete mechanisms of enforcement, as well as with its governance and organisation. A non-exhaustive list of potential issues was discussed by the Working Group (see Report, paras. 18-19 and 23-24) and considered as a starting point in developing the report of Subgroup 1 (see Doc. 3).

63. There was unanimous support for the idea of covering both judicial and extra-judicial enforcement. In this regard, it was noted that many jurisdictions have introduced hybrid proceedings with participation of private actors, or public/private actors, or with enhanced party autonomy. It was also noted that there are significant interconnections between judicial and extrajudicial enforcement, and that the drafters of the instrument may wish to consider alternative ways to balance the competing interests in the latter, e.g. by promoting the use of specific fast-track procedures to deal with opposition.

64. Finally, there was unanimous support for the idea of covering the enforcement of both secured and non-secured claims. It was mentioned that secured debt plays an important role in all economies but is especially relevant for emerging economies and in developing credit markets, which present higher risks and fewer options. It was also mentioned that innovative and useful best practices for extra-judicial enforcement could be found in modern secured transaction laws. Because of its importance, enforcement of secured claims was identified as the subject matter of Subgroup 2 (see Doc. 4).

Exclusion of recognition and enforcement of foreign decisions

65. It was agreed that the project would not cover the rules and mechanisms through which a decision rendered in one country is recognised as enforceable in another country (for example through the operation of a treaty or regional legislation dealing with the recognition and enforcement of judicial decisions, e.g.: *Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, N° 1215/2012 recast; *2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*; *1958 New York UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards*; *2019 UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention)*). Those instruments (or the otherwise applicable domestic international procedural rules), however, do not regulate the domestic law procedures and mechanisms that are triggered upon recognition of the enforceability of such decisions. Thus, the project needs to address the specific "execution" or enforcement phase of the decision, irrespective of whether it derives from a cross-border or a purely domestic situation. In this way, the future instrument would be complementary to the existing regulations on the international recognition and enforcement of decisions and would contribute to the practical implementation of the goals of such instruments.

Relationship with the procedure to obtain a decision against a defaulting obligor

66. The "execution" phase was distinguished from a potentially broader concept of enforcement of a creditor's claim against the obligor. "Enforcement" in a broad sense could cover the process of obtaining a legal judgment against a defaulting obligor (e.g. initiating a lawsuit against the buyer to obtain payment of the outstanding monies and being granted by the court the right to payment).

This falls outside of the scope of the project and is indeed covered by other instruments developed by UNIDROIT, such as the ALI-UNIDROIT Principles of Transnational Civil Procedure and the ELI-UNIDROIT Model Rules on Civil Procedure. It was noted, however, that the project should consider the possible relationship with the process of determination of the merits (i.e., whether the creditor's claim is founded, or whether the obligor can exercise a defence against the creditor's claim). In other words, the Working Group should address, with some prudence, the extent to which best practices on the interconnections of these different phases could be developed (see Report, para. 30).

Relationship with contractual remedies

67. At the first Working Group session, the potential difficulties in drawing a clear distinction between issues determined by substantive contract and secured transactions law, and issues connected to the mechanisms for the execution of creditors' rights, were highlighted. This was considered to be particularly true for self-help remedies based on a security agreement, for which attention should be paid to the possible overlap with existing international instruments. Other experts referred to remedies that a creditor could directly enforce according to the applicable law on the basis of a contractual clause (e.g., a right to set-off). Technology applied to enforcement would be another area where clear distinctions might prove difficult to implement. It was noted that a clear-cut distinction may not always be possible, and that these issues would have to be concretely and carefully addressed when dealing with each situation.

C. Types of claims included in the scope of the project

68. The scope of the project was also discussed in relation to the types of claims that would be covered.

69. The Working Group agreed to not limit the types of claims to be enforced *a priori*. There was a common understanding, however, that the logical place to start working would be to focus on contractual B2B claims, with the caveat that, especially for enforcement of adjudicated claims, distinguishing between types of claims would not appear to be wholly justified. The opportunity to develop special best practices for family or succession matters could be addressed at a later stage of the project (for the inclusion of B2C, C2B or P2P claims, see below, **subsection D**).

70. The Working Group agreed to include non-monetary claims within the scope of the project but highlighted the need to proceed with caution when dealing with them. It was noted that the difficulty would be to decide on the degree of detail to be provided for specific best practices for the enforcement of non-monetary claims, while other best practices would find a more general application to all types of claims.

D. Consumer transactions

71. At its first session, the Working Group agreed not to exclude consumer debtors or creditors from the scope of the project. However, in line with the mandate received by the Governing Council to proceed with caution in this matter, it agreed to consider at a later stage of the project whether their inclusion warranted the development of specific best practices, or whether, as a number of experts suggested, a more general mention of possible limitations or restrictions at the domestic law level, particularly for the case of consumer debtors, would suffice (for more details on the debate, see Report of the first session, para. 42). Another issue raised by the experts, particularly in connection with technology as applied to enforcement, was the inclusion of peer-to-peer contracts (P2P). It was noted that, in a P2P scenario, a consumer could be either a creditor (including a lender) or a debtor, and it would be difficult, moreover, to distinguish between consumers and non-consumers. The P2P scenario also raised the need to revisit traditional notions of vulnerability and protection of the weaker party, on which special regimes to protect consumers in domestic law were

based. The experts agreed not to exclude P2P scenarios from the project, and to consider them in the context of digital technology.

E. Insolvency related enforcement

72. Different opinions were expressed during the consultation on the question of whether to include or exclude insolvency-related enforcement from the scope of the project. Most commentators supported the inclusion of enforcement of claims in insolvency because coherence and consistency between insolvency-related and non-related mechanisms were instrumental to effective creditor protection, and because excluding insolvency proceedings from the scope would undermine the usefulness of the project and send the wrong message. Some concerns, however, were also expressed, and reiterated during the discussion at the Governing Council, in particular regarding the relationship with existing instruments that already set standards in insolvency proceedings, such as the UNCITRAL Legislative Guide on Insolvency Law and the World Bank Group Principles for Effective Insolvency and Creditor/Debtor Regimes.

73. The Working Group agreed on the suggestion to focus on enforcement in general, and to revert to insolvency-related enforcement at a later stage, and with some caution. Emphasis should be placed on those issues which are common to general enforcement and enforcement in insolvency, and on mechanisms more than conditions. The Working Group may consider, at a later stage of the project, whether specific procedural mechanisms already used or identified as best practices for general enforcement would be also useful in the different context of insolvency to facilitate liquidation (such as, for example, platforms for the liquidation of the value of the assets) and, if so, how to adapt the general enforcement mechanisms to the concrete insolvency procedure. It was confirmed that the project should avoid issues of material insolvency law, while bearing in mind that the distinction between substantive law and procedural mechanisms may not always be clear, and any future work in this area should proceed with caution. Finally, the identification of efficient mechanisms to transition between individual and collective enforcement could be, among others, a good topic to address at a later stage.

F. Enforcement of provisional and protective measures

74. The experts unanimously supported the proposal to include consideration of provisional and protective measures in the instrument, considering the great practical importance of interim relief and the close interconnections with general enforcement proceedings. Particularly in relation to provisional and protective measures, it was noted that limiting the scope of the project to monetary claims would not cover some of the most effective and relevant remedies, such as orders for sequestration, or injunctions not to dispose of assets or accounts.

75. The project would have to be coordinated with existing UNIDROIT instruments covering provisional and protective measures, in particular the most recent ELI-UNIDROIT Rules, which devoted an entire chapter (Part X) to model rules accompanied by comments on this topic. Another existing regime concerning interim or advance relief pending final determination of the case, and dealing with enforcement matters, is contained in the Cape Town Convention on International Interests in Mobile Equipment and its Protocols (Art. 13 Conv.; Arts. X Aircraft Prot., VIII Rail Prot., XX Space Prot., IX MAC Prot.). While this latter regulation presents peculiarities linked to the specialised nature of the treaty, it could provide interesting elements for discussion when considering enforcement of secured debt. In relation to this coordination, experts noted that best practices on the enforcement of provisional and protective measures should be sufficiently detailed as to constitute an added value in respect to this instrument, but that the project should start with the assumption that a certain type of provisional measure had been granted and look at how to properly enforce that measure. For more details on the debate, see the Report of the first session, paras. 55-56.

G. Additional factors influencing enforcement procedures

76. The operation of enforcement procedures in a specific jurisdiction is influenced by the broader legal context and by the interconnection with other areas of the law. While the envisaged instrument cannot address the specificities of each legal system, the consultation confirmed that it should at least point to those factors that may play a significant role in shaping enforcement. Many jurisdictions have, for example, introduced mechanisms that may serve as an incentive not to default on obligations, thereby limiting the need to resort to enforcement proceedings, such as debtor registries (either kept by the State or by private companies). These mechanisms could also serve to facilitate compliance with enforcement orders, though they would not be part of the procedure as such. Recent reforms of enforcement laws have introduced more specific tools that could be used by bailiffs to be able to successfully enforce claims. For example, bailiffs may be authorised to obtain information about the debtor's financial circumstances, and a defaulting debtor can be obliged to disclose his or her income and financial situation at the beginning of the enforcement proceedings.

77. The Working Group agreed that additional factors and mechanisms should be considered. A list of potential issues was provided, including: the existence of “soft” enforcement methods like post-judicial mediation, or mediation after obtaining an enforceable title; the role played by debtor registries, or attachment registries; the importance of ensuring effective information on the potential outcome of an enforcement procedure; and the topic of the costs of enforcement. For more details, see Report of the first session, paras. 58-61.

III. SUBSTANTIVE ISSUES

78. **For the second session of the Working Group**, Subgroup 1 had prepared a detailed document focusing on general and specific issues to be discussed and providing options and several recommendations on the possible way forward. Among the substantive issues, the discussion at the second session covered: the treatment in the project of documents or titles recognised by national law which give creditors the right to enforce (“enforceable titles” - *summary of discussions in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 12-18](#)*); the challenges posed by the enforcement of claims for payment on tangible assets (among others, the need for the legal system to provide information on judicial liens and execution liens, the setting of fair and expedited procedures for the valuation of goods, when necessary, or ways to make participation in public sales more attractive – *summary of discussions in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 19 and 26](#)*); the simplification and increased efficiency of enforcement regarding third-party debt orders or garnishment proceedings - *summary of discussions in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 27-28](#)*; issues related to complex enforcement of special assets and receivership (for which the postponement of discussion on enforcement on digital assets was decided - *summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, para. 32](#)*); charging orders on land (*summary of discussions in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 33-35](#)*); Priority or equality governing the satisfaction of multiple unsecured creditors of claims for payment (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 39-41](#)*); the proportionality of enforcement of claims for payment and incentives for the debtor to cooperate in the enforcement, and exemptions (*summary of discussions in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 42-44](#)*); the disclosure of the debtor's assets (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 45-47](#)*); creditor, debtor and third party remedies (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 53-56](#)*); and post-adjudication settlement (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, para. 57-58](#)*). The Working Group also briefly considered the organisational aspects of enforcement (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 48- 52](#)*).

79. In order to render the discussion on recommended best practices more effective, the focal points of Subgroup 1 and Subgroup 3 had coordinated their input in advance. For this reason, the

Report of Subgroup 3 was organised in such a way as to follow the structure of the Report of Subgroup 1, and the related parts of the former Report were discussed in connection with the corresponding issues in the latter. The Working Group focused its attention on the use of platforms to conduct auctions and create secondary markets (with discussion on the structure of the governance of the platforms, possible limitations as to their use, and questions of applicable law - *summary of discussions in Report of WG2, Study LXXVIB – W.G.2 – Doc. 6, paras. 20-26*) and on the use of technology to enhance notifications and communications (*summary of discussions in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 29-31](#)*). The relevance of automation was also emphasised but not discussed in detail.

80. Finally, the Working Group considered the Report prepared by Subgroup 2 on enforcement of security rights. The Subgroup had particularly focused, for the time being, on enforcement of security rights in movables, and had drafted proposals for recommendations of best practices in the form of answers to a list of practical questions, which had been allocated to different teams among Subgroup members. As a general working method, the Subgroup had started from the assumption that, while the Working Group would be free to develop the most appropriate best practices in this field, the rules on enforcement that had already been developed in instruments that had achieved consensus through intergovernmental negotiations at a global level (such as the instruments adopted by UNCITRAL, e.g., the Legislative Guide or the Model Law on Secured Transactions) should be treated as presumptively valid when addressing issues within the scope of the project. The Working Group would therefore bear the burden of justifying any inconsistencies between the recommendations of the Working Group and those of prior instruments. At its second session, the Working Group focused on the recommended best practices for obtaining possession of tangible collateral (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 67-76](#)*), the recommended best practices for realising upon collateral without judicial process (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 78-83](#)*), and the recommended best practices for the variation of the rules governing realisation of collateral (*summary of discussion in Report of WG2, [Study LXXVIB – W.G.2 – Doc. 6, paras. 84-86](#)*).

81. **For the third session of the Working Group**, the experts focused in particular on enforcement on receivables, in view of the commercial relevance of this type of asset and the connection with the use of automated procedures. The discussion was conducted on the basis of detailed documents prepared by Working Group members that addressed: (a) third-party debt orders or garnishment proceedings, (b) necessary steps in the enforcement of monetary claims by third party debt orders to integrate automation, (c) suggested best practices for automation in the enforcement of monetary claims by third-party debt orders, and (d) revised best practices on enforcement of security rights over receivables and automation.

82. In relation to third-party debt orders, the Working Group generally agreed with the substantive issues that were presented. There was consensus on the fact that the best practices should include sale (outright assignment) of the receivable as an alternative method of disposal for the enforcement agent or other enforcing party, alongside the collection of the debt (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, paras. 10-12](#)*). The Working Group also addressed the question of whether the best practices should expressly endorse the principle of priority or the principle of equality of creditors. There was agreement that, in general, a rule of priority would be more advantageous, even if it could produce adverse effects on creditors' behaviour (e.g., race to enforcement); it was questioned, however, whether a specific best practice on this matter would be practically needed when the debtor was solvent (while the substantive law of insolvency would apply in case of insolvency) (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, para. 13](#)*).

83. Regarding enforcement on receivables and automation, an issue that elicited much discussion concerned the need for the creditor to access information on the debtor's assets and the desirability of using an interconnected platform facility to gather information from relevant authorities and bodies. In this context, the more general point of balancing such need to obtain

information with the necessary data protection, as well as protection of other fundamental rights, was raised. In conclusion, the Working Group agreed that the automated system should avoid putting non-performing debtors in the privileged position of choosing whether, and to what extent, to provide information, but should at the same time ensure adequate protection of debtors' data (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, paras. 15-19](#)*). The Working Group then had the opportunity to consider a set of tentative best practices in relation to automation (both general recommendations on the use of automated systems, partly based on existing international and regional best practices, and more specific best practices for automated enforcement on receivables). While the fundamental principles embodied in the best practices were generally supported, the Working Group agreed that more details and concrete examples could be helpful, at least in explanatory commentaries; it was also felt that more specific issues related to automation in enforcement proceedings needed to be further explored and discussed by the Working Group (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, paras. 20-29](#)*).

84. With regard to the revised best practices on enforcement of security rights over receivables, the draft was generally well received. The discussion focused on two main points:

(i) the definition of "receivable" and the scope of the enforcement project in relation to the coverage of other intangibles. No consensus was reached on whether the project should only focus on the most common forms of receivables or include other, more sophisticated assets for which special best practices would have to be developed. Experts warned of the risk of repeating existing international rules applying to such specific assets less comprehensively, without providing added value for enforcement issues (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, para. 32](#)*); and

(ii) The interconnection between the general rules on disposition of collateral and the special rules on enforcement on receivables, for which more clarity in the best practices themselves or in the comments was suggested (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, para. 33](#)*).

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

86. The Working Group finally addressed additional issues from the Report of Subgroup 2 for the third session, namely the revised best practices on disposition of collateral and on the extent of party autonomy in enforcement. As regards disposition of collateral, the revised recommendations were, to a large extent, not controversial, being based on well-respected international guidance instruments on the subject matter. The Working Group discussion centred on the possibility for the creditor to be the purchaser in a public sale using credit bidding, or else to appropriate the collateral,

and on the desirability and practical feasibility to introduce a more precise description of the “expedited judicial proceedings” that would facilitate dealing with opposition in enforcement (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, paras. 44-47](#)*). Concerning the role of party autonomy, the Working Group generally agreed on the policy of the revised recommendations, which had been amended to reflect the Working Group’s preference, expressed at the second session, to introduce more limitations to ex-ante party autonomy (*summary of discussion in [Study LXXVIB – W.G.3 – Doc. 6, paras. 48-49](#)*).

87. For the **fourth session of the Working Group**, the experts started their deliberations on the basis of the document produced by the focal points of Subgroup 1, which suggested 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, 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). It also provided revised best practices on enforcement of third-party debt orders (Section VI).

88. In relation to central electronic registries (Section III), the document provided draft 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 even in an automated or semi-automated manner: 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.

89. The Working Group discussed several issues connected with this topic, including: the authority that would administer and supervise them (for which a preference to allow legal systems to consider different models of management and/or supervision of the registry involving public authorities was expressed), structure of the registries (for which some clarification on the meaning of “centralised” entry point/registry was asked), and legitimation to access the different registries. For more details, see *Report of the fourth session, paras. 12-15*.

90. The Working Group further discussed the proposed third registry (recording all enforcement measures levied against a specified debtor and their outcome), as well as the need to ensure that such registry be interconnected with other existing domestic registries of contractual and legal liens on debtors’ assets. It was understood that the purpose of this registry was not to determine priorities as among rights or liens on debtors’ 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). The Working Group proposed that the best practices clarify the purpose for which the interconnection between registries was suggested, and did not mandate a specific way in which registries should interconnect. 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. Additional practical challenges were discussed, in particular the fact that existing domestic registry systems that could be relevant for this provision were structured differently, that they did not always provide a complete picture on existing or potential encumbrances in relation to specific assets, and that they were often not interconnected with each other. For more details, see *Report of the fourth session, paras. 16-22*.

91. Regarding enforceable documents (Section IV), it was clarified during the discussion 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. The Working Group addressed several issues with regard to Section IV, noting that the language of the recommendations gave rise to many doubts as to their interpretation (particularly regarding the relationship among the three registries, their practical functioning, and the decision-making process of acceptance or denial of registration) and suggested that it should be revised in order for those provisions to be discussed at the next session. For more details, see *Report of the fourth session, paras. 23-31*.

92. In relation to Section V on disclosure of debtors' assets, the Working Group discussed the four draft best practices provided in the document, which were meant 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 debtors' actions so as to prevent fraud. While the underlying policy of the provisions was generally well understood, the Working Group noted that some clarifications and reformulations should be introduced, and that it would be useful to provide a clearer reference to the general principles contained in the first part of the instrument, and 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. The challenge was 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). For more details, see *Report of the fourth session, paras. 32-41*.

93. As regards Section VI, it contained the transposition of the discussion paper prepared for the third session of the Working Group on enforcement on receivables and the feedback received, purposely addressing only those issues for which best practices would be useful. The proposed best practices were thoroughly discussed by the Working Group, which raised some queries and suggested the need for some reformulations and clarifications (for more details, see *Report of the fourth session, paras. 42-50*).

94. The Working Group further discussed Document 6, on enforcement on digital assets, which had been prepared by the focal point of Subgroup 3 on the basis of intersessional work and research work done by the Secretariat. The purpose of the paper was to find consensus on the main legal questions that should be the object of best practices in this field. Several key issues were discussed. The Working Group participants agreed on the use of a broad concept of digital assets, on avoiding the introduction of a specific definition, and on postponing issues of terminology. The Working Group further agreed 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, including consideration of combining *in rem* measures with personal sanctions, such as contempt of court in case of failure to cooperate, or freezing orders. On the issue of location of the digital asset, which would be relevant not only for jurisdiction and applicable law, but also for tracking and seizure of the assets, the Working Group concluded that the best practices should refer to issues related to location, but that this reference may be put in the commentary to a more general best practice (such a recommendation containing a duty of cooperation for the parties). On the more general issue of identification and tracing of the assets, the Working Group discussed existing mechanisms to ensure access to the value of digital assets, such as multi-signature arrangements, escrow accounts, or surrender of control by the debtor. For more details, see *Report of the fourth session, paras. 51-58*.

95. In relation to online auctions (Document 5 and presentation by the Colombian individual experts), the Working Group discussed several issues, including: platform governance for online auctions (for which the approach of providing a list of minimum prerequisites, while the comments would incorporate the analysis and discussion on existing models, was preferred); the opportunity to introduce a general best practice recommending that online auctions should be recognised; the

issue of whether the best practices should allocate the responsibility for the filing and accuracy of the information regarding the assets, and provide for sanctions for non-compliance; the introduction of a reasonable procedure to allow inspection of the assets; and the opportunity to introduce specific best practices for online auctions as disposition method for the enforcement of security rights. See *Report of the fourth session, paras. 60-71*.

96. The Working Group considered, moreover, the proposed structure of the future instrument, which was generally well received but was the object of several comments as well as suggestions for modification and reconsideration of terminology. In particular, no consensus was reached on the final placement of the recommendations relating to the impact of technology in enforcement, and this issue was left open for the Working Group to address at a later time. For more details, see *Report of the fourth session, paras. 73-78*.

97. The **fifth session of the Working Group** started with consideration of draft best practices on enforcement by way of authority, which had been revised after the fourth session and enriched by comments.

98. While the Working Group, following a suggestion of the drafters, decided to postpone consideration of Parts I and II of Document 3, some thought was given to Recommendation 2, para. (II), particularly in relation to the reference to mediation. There was clear support for developing the idea of mediation, particularly in conjunction with Recommendation 2 (II) of the General Recommendations, and of giving more thought on how the use of ADR could be useful in the extra-judicial enforcement of security rights (*Report of the fifth session, paras. 92-94*).

99. The Working Group devoted much time to redrafted Section III (enforcement instruments), both in order to obtain clarifications on the scope and functioning of the recommendations and their interaction with Section V on Registers, and to discuss specific policy issues, in particular regarding Recommendation 1 (IV) on “private” documents. 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, however, a common minimum threshold), or whether it should be limited to the public documents listed in the provision. See *Report of the fifth session, paras. 12-22*.

100. In relation to Section IV, the Working Group agreed on the policy expressed in Recommendation 1 and suggested that the comments should be more explicit on the positive duties entailed, and that the relationship between Recommendation 1 (II) and (III), as well as with Recommendation 4, should be better clarified. Regarding paragraph (III), 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 a useful best practice to incentivise a more complete acquisition of information regarding debtor assets. The Working Group also addressed the question of whether the best practices should suggest that limited-access registers be made more accessible to enforcement organs, as well as the usefulness of looking at those legal systems which have developed well-functioning digitised and interoperable storage of information accessible to courts. The Working Group further agreed on the importance of the reference to protection of confidentiality and to data protection rules.

101. Recommendation 2 (II) 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. It was agreed that though there appeared to be consensus on the policy of this recommendation, the current wording of the provision gave rise to doubts as to its meaning; thus, the matter was deferred to the Drafting Committee, which would then send the

provision and its commentary back to the Working Group. Finally, regarding Recommendation 3, it was clarified that this provision, which took constitutionally protected rights into account, 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. Doubts were raised, however, on the possibility to clearly demarcate the two activities in practice. It was suggested that language that could be interpreted broadly should be avoided. For more information, see *Report of the fifth session, paras. 84-96*.

102. Concerning the redrafted Section V, to which extensive commentary had been added, the Working Group generally supported the recommendation to introduce electronic registers. Two main issues were raised, however,. First of all, the Working Group 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, should be included, at least in the commentary. Secondly, it was suggested that, though the best practices could express a preference for the involvement of courts in the supervision and/or management of the registers, the language of the recommendation should allow legal systems to consider different modes of management and/or supervision of the register involving public authorities. Discussion on the specific functioning of the registers was postponed. For more details, and information on additional issues discussed by the Working Group on this topic, see *Report of the fifth session, paras. 23-31*.

103. As to the best practices on the taking of possession of tangible collateral and the disposition of collateral, which had been extensively redrafted and to which commentary had been added (Doc. 4 Annexes 1 and 2), the Working Group reiterated its general support for the best practices while, at the same time, pointing to the need to introduce some amendments, clarifications, and illustrations (the latter particularly regarding general expressions such as “reasonable amount of time”, or “breach of the peace” or “breach of public order”). Other issues addressed by the Working Group pertained to the optimal relationship between “black letter” best practices and the comments, as well as the need to consider the overall structure of the part of the project devoted to enforcement of security rights, and ensure coordination with the general best practices on enforcement by way of authority, particularly when referring to procedures such as injunctions. Finally, it was noted that the current texts had not yet integrated the impact of technology, which had been agreed upon. For more details on the comments and suggestions of the Working Group, see *Report of the fifth session, paras. 32-64*.

104. In relation to Document 4, Annexe 3, on “expedited” judicial procedures in the context of extra-judicial enforcement of security rights, a common understanding was reached on the need to provide recommendations along the lines suggested in the document. The Working Group agreed that the matter needed the cooperation of Subgroup 1 and asked the Secretariat to facilitate intersessional work on this topic. For more information, see *Report of the fifth session, paras. 62-64*.

105. The Working Group further briefly addressed the updated Documents 6 and 5. On Document 6, it was agreed that while general enforcement procedures and measures would be applicable to enforcement on digital assets, it was useful to develop specific best practices based on the extensive preparatory work already done and considering the outcome of the discussions at Working Group sessions. Such work was needed with some urgency, also to ensure optimal coordination with the project on Digital Assets and Private Law. In relation to Document 5, it was noted that there was a basic consensus that one best practice in the general part of the project, and possibly one in the part of enforcement of secured transactions, should be developed, without going into too many details as to the procedures. For more information, see *Report of the fifth session, paras. 65-73, and 74-76*.