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

Sixth meeting (hybrid)
Rome, 14-16 March 2023

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REPORT

1. The sixth 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 14-16 March 2023. The Working Group was attended by 32 participants, comprising members, observers from intergovernmental and other international and academic organisations, independent observers, and members of the UNIDROIT Secretariat (the List of Participants is available in [Annexe 2](#)).

Item 1 Opening of the session and welcome by the Chair of the Working Group and the Secretary-General

2. *The Chair and the Deputy Secretary-General* opened the session and welcomed all participants attending in person and remotely.

Item 2 Adoption of the agenda and organisation of the session

3. *The Chair* proposed the organisation of the session as follows: the first day of the session would involve discussion of one document recently reviewed by the Drafting Committee, i.e., the draft best practices on repossession of collateral in extra-judicial enforcement of security rights (W.G.6. – Doc 4, Annexe 1 rev). The Working Group would also consider the new draft best practices on a special expedited procedure for resolution of disputes over possession of collateral (W.G.6 – Doc 4, Annexe 3 rev). On the first day, the Working Group would, moreover, commence its review of the draft best practices on enforcement by way of authority (W.G.6 – Doc. 3) and its accompanying flow-chart (W.G.6 – Doc. 3 Annexe 1), with the discussion to be continued on the third day.

4. The second day of the session would include a presentation on draft best practices on online auctions by Mr. Massimiliano Blasone, an international expert in the Cyber-Justice working group, who was responsible for developing Guidelines for judicial e-auctions for the Commission for the Efficiency of Justice of the Council of Europe (slides available as W.G.6 – Doc. 5). This second day would further include discussion of the draft best practices on enforcement on digital assets (W.G.6 – Doc. 6).

5. The third day of the session would primarily involve continued discussion on the draft best practices on enforcement by way of authority (W.G.6 – Doc. 3), but would also include a review of the draft best practices on disposition of collateral in extra-judicial enforcement of security rights (W.G.6. – Doc 4, Annexe 2 rev). Finally, the organisation of future work would be discussed.

6. The agenda, as set out in [Annexe 1](#) and further detailed above, was unanimously adopted.

7. For the purposes of this Report, the discussion will be summarised per topics irrespective of the order of discussion during the Working Group session.

Item 3 Update on intersessional work and status of the project (Study LXXVIB – W.G.6 – Doc. 2)

8. Upon invitation by *the Chair*, the *Deputy Secretary-General* referred to Document 2 on intersessional work and status of the project. She noted that the document summarised the intersessional work which had been undertaken, which included coordinating work with the UNIDROIT Digital Assets and Private Law project (among others, a joint seminar held in July 2022), virtual meetings on specific topics (such on an expedited procedure in the context of extra-judicial enforcement of security rights), and virtual meetings among and within different sub-groups for the purpose of coordinating their respective outputs as well as advancing their work.

9. She further reported that the Drafting Committee, which was composed of the subgroup Reporters, the Chair, and the Coordinating Expert, and was supported by the UNIDROIT Secretariat, had commenced its work revising (in whole or in part) the text of various documents which would be presented to the Working Group for discussion.

10. *The Deputy Secretary-General* also referred to the presentation to be given by Mr. Massimiliano Blasone in relation to judicial e-auctions, which would complement the intersessional work done on online auctions which had been discussed at previous Working Group sessions.

11. *The Chair* thanked the Secretariat for the updates and welcomed the intersessional work advanced by the subgroups.

Item 4 Consideration of work in progress

Item 4 (a) - Documents revised by the Drafting Committee (Study LXXVIB – W.G.6 – Doc. 4, Annexe 1 rev. – repossession of tangible collateral)

12. *The Chair* introduced the next item on the agenda, referring to Study LXXVIB – W.G.6 – Doc. 4, Annexe 1 rev, on repossession of tangible collateral by secured creditors. She explained that the document had been revised by the Drafting Committee and was presented to the Working Group as an example of the approach taken by the Committee. She further noted that the Drafting Committee had already considered another part of the draft instrument, i.e., Section IV of Document 3, which would be addressed later in the Working Group session.

13. *Prof. Geneviève Saumier, the Coordinating Expert*, introduced the work done by the Drafting Committee. It was explained that one of the tasks of the Drafting Committee was to harmonise the styles used by the different subgroups. In particular, the Drafting Committee had tried to promote conciseness, and had also, consistent with the nature of the document being a set of Best Practices (and not a Model Law), used standardised language in the nature of recommendations (e.g., “should”) instead of mandatory, statutory language (e.g., “shall”).

14. *Prof. Neil Cohen, Reporter for Document 4, Annexe 1 rev*, after thanking the Drafting Committee and particularly Prof. Saumier for her work, summarised the new version of the document. He emphasised the importance of the secured creditor being able to obtain possession of collateral without a judgment on the merits of the underlying claim, as this could significantly impact the effectiveness of enforcement both in terms of speed and economic value. He further noted that

the new draft had slightly rearranged the order of the conditions under which a creditor would have the right to obtain possession extra-judicially, as well as the standards of behaviour to be observed by the creditor when doing so. Upon consideration, this decision had been made to improve the accessibility and readability of the text in light of the type of instrument (best practices), the scope (general recommendations on enforcement) and prospective readers (including non-specialists in the area of secured transactions). However, it was reiterated that the substance was intended to reflect the provisions of the UNCITRAL Model Law on Secured Transactions, except when more detailed recommendations were introduced, and that this was to be highlighted in the introduction and in the commentary. He finally explained that the new document would also have to be read in connection with Document 4, Annexe 3, which provided a special expedited procedure for speedily resolving disputes on the possession of collateral.

15. *The Chair* invited comments from the Working Group.

16. One expert queried whether there was overlap or repetition between paragraphs 1 and 2. In response, *the Chair* clarified that the two paragraphs addressed different aspects. Paragraph 1 focused on the debt or other secured obligation, embodying the principle that, upon default, a secured creditor does not need to first obtain a judgment on the merits before proceeding to enforce. On the other hand, paragraph 2 focused on the collateral, confirming that possession thereof may be obtained extra-judicially without the need to obtain an order from a court (or other authority). *The Chair* noted that the two paragraphs in fact dealt with two successive stages and complemented one another. *The Reporter* however observed that, insofar as the draft text could cause misinterpretations, it may be reconsidered by the Drafting Committee.

17. Next, a concern was raised that paragraph 1 may be too broad, encompassing also non-monetary or other unliquidated obligations. It was noted that such obligations may need to be liquidated before enforcement could occur. Examples were given of complex M&A transactions, in which secured obligations, when breached, give rise to claims for unliquidated damages. *The Reporter* acknowledged the point but suggested that it would be impractical to draft a different set of rules for non-monetary obligation, noting also that such a distinction was not drawn in the UNCITRAL Model Law. Instead, because the manner of extra-judicial enforcement was subject to parties' agreement, *the Reporter* suggested that whether possession of collateral could be obtained prior to liquidation of the underlying obligation was essentially a matter for private agreement between the parties. Following this discussion, the Working Group agreed to preserve the black letter recommendation but to add language in the commentary concerning enforcement of non-monetary or other unliquidated obligations.

18. The Working Group then turned to recommendation 3. *The Reporter* explained that the wording had been modified to clarify that obtaining possession extra-judicially requires satisfaction of two different conditions: first, there should be a prior agreement between the parties that possession can be obtained extra-judicially, and secondly, notice of the intent to proceed should be given upon default (albeit this second requirement would be exempted in specific circumstances). There was no change in the substance or policy of the recommendation as already agreed upon by the Working Group.

19. In the ensuing discussion, it was clarified that the revised text did not introduce any difference in policy in respect to the UNCITRAL Model Law. In this draft, the provisions on debtor's objection were contained in a subsequent paragraph, to follow the chronological order of actions (i.e., the debtor cannot object until after an attempt is made to obtain possession). It was confirmed that there was no intention to depart from the UNCITRAL Model Law. In order to avoid any misunderstandings, however, it was suggested that current recommendation 6 (which addressed debtor's objection) should be moved closer to recommendation 3. The Working Group agreed to reorder the text to move paragraph 6 closer to paragraph 3, possibly placing it after recommendation

4 (which addressed the standards to be observed by the creditor in obtaining possession extra-judicially), and deferred the matter to the Drafting Committee.

20. Moving on to recommendation 4, one expert focused on the expression “resistance to that attempt [of obtaining possession] by the grantor”, questioning whether there was a fundamental difference between resistance and objection. In response, *the Chair* and *the Reporter* noted that these Best Practices were meant to be addressed to a wider audience of policy makers and legislators which may not be experts in secured transactions law, which meant that any distinction between the meaning of resistance and objection could be unduly fine and should not be addressed in the recommendations, but better developed in the commentary.

21. It was further queried whether terms like “breach of the peace” or “breach of public order” may be more suitable for an *ex post* assessment by the court. Noting such concerns, *the Reporter* suggested that the structure of recommendation 4 could be clarified by separating it into two parts. The first part would concern over-aggressiveness by the creditor, which could occur even in the absence of resistance by the debtor. The second part would concern physical resistance by the debtor, which could occur even where the creditor is perfectly peaceable. The Working Group considered this suggestion and agreed to refer the matter to the Drafting Committee.

22. Various experts further suggested that mention should be made of domestic laws that would qualify the creditor’s behaviour as a criminal offence (citing as an example the law of trespass), as such laws apply to and regulate parties’ conduct in the course of obtaining possession. The Working Group agreed to consider including a reference to this issue in the commentary.

23. The Working Group then proceeded to discuss recommendations 5 to 7. On paragraph 5, one expert suggested that the text should be redrafted to state more clearly that it is the debtor’s burden to inform the creditor of the existence of more suitable assets for repossession and execution. In discussing this point, the Working Group revisited the policy decisions behind paragraph 5. *The Reporter* noted that the policy underpinning paragraph 5 was to avoid that the creditor took too much, but the recommendation was not meant to limit the creditor’s ability to decide which items of collateral to target for the execution. This latter step would be an additional limitation on creditors’ rights. The Working Group agreed that the drafting should reflect this policy decision. It was further suggested that in the drafting of paragraph 5 and/or the commentary thereon, reference could be made to jurisdictions where terms allowing debtors to make proposals regarding assets against which the creditor should execute are provided for in banking agreements.

24. On paragraph 6, one expert suggested that the paragraph as drafted was unduly narrow. Noting that the Working Group had discussed situations where disputes over possession could arise even where there was no resistance (e.g., where the debtor peaceably allows possession to be taken, but wishes to challenge the same immediately thereafter), the expert suggested that paragraph 6 should be more broadly redrafted.

25. On paragraph 7, it was noted that the law on consumer protection differed across legal systems and that this may affect the issue of the burden of proof. The Working Group agreed that no attempt should be made to define “consumer”, and that, if necessary, reference could be made in the commentary to examples of consumer protection law in different jurisdictions. Another expert noted that the principle of deference to consumer protection could be formulated in a more general manner, e.g., in a “general principles” section preceding all the substantive black letter recommendations, to apply to the entire Best Practice document. Consequently, paragraph 7 could be redrafted to be only a specific application of this general principle.

26. Addressing a more general issue, *the Secretary-General* observed that certain sections of the current draft text read almost as a Model Law. He noted that the current project, which aimed at producing a set of Best Practices, could benefit from having more discursive and flexible language.

The Working Group agreed with such observations and resolved to refer the text to the Drafting Committee for any appropriate reconsideration.

27. In addition, *the Deputy Secretary-General* pointed out that while these recommendations had already been considered by the Drafting Committee, the commentary still required adaptation to the new structure and to take into account the discussion at this session of the Working Group. She added that the purpose of presenting this draft was to show the direction that the Drafting Committee had been taking, and that it could still be improved based on comments and suggestions. She concluded noting that this part would be cross-referencing the part on an “expedited procedure”, and that the need to introduce additional recommendations regarding the impact of technology should be considered.

28. In conclusion, it was agreed that the Drafting Committee would review the text in the light of the comments and amendments agreed upon by the Working Group.

Item 4 (a) - Documents revised by the Drafting Committee (Study LXXVIB – W.G.6 – Doc. 4, Annexe 2 rev – realisation of collateral)

29. *The Chair* clarified that this part of the draft Best Practices, which had been repeatedly presented and discussed at Working Group sessions and had been approved, in principle, by the Working Group in relation to the underlying policies, had already been subject to revisions based on the indications of the Drafting Committee, though it had not been finally vetted by the Committee itself.

30. *Prof. Neil Cohen, Reporter for Subgroup 2*, explained that the latest revisions had been undertaken following the editing principles applied to Document 4, Annexe 1 rev. It was emphasised that no substantive changes had been made and that it remained the policy of this part of the instrument to stay consistent with the substance of the UNCITRAL Model Law, despite slightly departing from its structure. Further, it was noted that *Mr. Richard Kohn and Mr. Fábio Rocha Pinto e Silva, Reporters for Document 4, Annexe 2 rev*, had previously prepared a substantial body of commentary which would now be adapted and restructured to fit the new structure of the document.

31. *The Chair* invited the Working Group to submit written comments on the revised document for further consideration.

Item 4(b) - Draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.6 – Doc. 3)

32. *Profs. Fernando Gascón Inchausti and Rolf Stürner, Reporters for Document 3*, presented the new version of the document. It was explained that this version included refinement of the previous draft, which took into account comments made at the last Working Group session and in intersessional work, and also included wholly new materials (e.g., various parts of Section VI on different modes of enforcement).

33. Before analysing the modifications in the recommendations, *the Reporters* briefly discussed an accompanying flow-chart prepared by the Secretariat, setting out the operation of Sections III to V in diagram form (Study LXXVIB – W.G.6 – Doc. 3, Annexe 1), the usefulness of which was underlined by *the Chair*. Thereafter, it was proposed, and agreed, that the Working Group should begin looking in more detail at the specific sections in Document 3 which had been subject to refinement.

Section III (enforceable instruments)

34. *The Chair* invited discussion on Recommendation 1(IV), which provides for a procedure whereby private documents can be converted into an enforceable instrument by a preceding procedure of consolidation.

35. Several experts noted that the term “consolidation” could be confusing. *The Reporters* agreed that “consolidation” was necessarily a very broad term and invited alternative formulations. *The Chair* noted that this was a drafting issue, as there was general consensus as to the underpinning policy i.e., to implement a screening procedure to ensure that only those private documents which are realistically likely to be the subject of enforcement will be registered and thus avoid overwhelming the registry. It was agreed that the Drafting Committee would revisit the language of the provision.

36. *The Reporters* moved on to present Recommendation 1(V), a newly added provision, which provided co-owners of assets and creditors with security interests in specified assets with a right to apply for public sale of the asset. *The Reporters* explained that this provision was intended to reflect the rule, existing in various legal systems, that co-owners, lien-holders or secured creditors could directly commence public sales of the asset or collateral, without the need to first obtain an enforceable instrument by way of a court or notarial decision and proceeding through the various stages of the enforcement process. The procedure would shift the burden onto the debtor to object. One example given was the common law procedure of replevin, in which the court will speedily grant possession of the collateral to the secured creditor, who can then proceed to realise the same unless the debtor makes a court application to oppose. The new provision specifically acknowledged and preserved the possibility of direct and quick access to the right to public sale, so that the Best Practices would not be seen as unintentionally narrowing the rights of these creditors.

37. Various experts observed that the proposition to treat security rights as analogous to co-ownership for the purposes of enforcement may be understood as a modification to the substantive law in different domestic legal systems and could prove controversial, especially because legal systems differ in the formal characterization of the secured creditor’s right on the collateral. Such issue could be solved by avoiding reference to co-ownership in the recommendation, and explaining in the commentary that the recommendation was based on existing models of facilitated access to public sale in some legal systems.

38. Other experts considered that the placement and structure of recommendation 1(V) warranted discussion. They pointed out that the relationship between recommendation 1(V) and other provisions of the same section or provisions in other sections of the draft Best Practices could be made clearer and more explicit. In particular, it was noted that recommendation 1 sets out the list of possible enforceable instruments. As drafted, however, recommendation 1(V) did not make explicitly clear whether a (co-ownership title or) security interest was an enforceable title derived from “public documents” (as per recommendation 1(III)), from “private documents” (as per recommendation 1(IV)), or was a sui generis title that was neither a “public document” nor “private document”. In response, *the Reporters* noted that some legal systems would classify a security interest as a “private document” title. However, in other systems, a security interest can, depending on the facts, be either a “public document” title or a “private document” title.

39. It was further noted that, insofar as recommendation 1(V) was to be considered a sui generis exception, there was a need to make its exceptional nature clear. It was discussed and agreed amongst the Working Group that a secured creditor may have expedited remedies for realising the collateral, but should not have any preferential treatment insofar as it chooses to sue on the underlying obligation (and not the security agreement) and enforce against the debtor via other mechanisms. Various experts noted that recommendation 1(V) appeared to offer an expedited procedure for judicial enforcement of security rights and thus could be seen as a judicial counterpart of draft Document 4, Annexe 3. It was noted that the Working Group had not discussed the policy

implications of having such a judicial counterpart and that this was a matter which in any event ought to be addressed at least in the commentary. *The Reporters* explained that in light of the Working Group's general approval of the rationale underpinning Document 4, Annexe 3, the need for including recommendation 1(V) had indeed become less pressing.

40. In summary, while it was acknowledged that recommendation 1(V) could be a useful provision which merited further consideration by the Working Group, insofar as it facilitated access to a public sale in the case of a security right, it was suggested that the Working Group could reconsider the provision after the issues raised above had been clarified by way of redrafting.

41. *The Reporters* moved on to present recommendation 2, concerning the content requirements for enforceable instruments. While there was no disagreement on the policy of the recommendation, some queries were raised on its language. Some experts noted that the references to "safe determination" and "external settled data" could be confusing. Another expert queried if recommendation 2(III), which stated that legal rules should provide for the succession of enforcement by and against the successors-in-title of creditors and debtors, was intended to broaden the substantive law of States regarding succession law or merely reflect it. *The Reporters* acknowledged that the term "successor" could cause confusion and invited proposals for alternative wording. They also confirmed that this provision did not concern succession law in the probate and inheritance sense, but rather the succession-in-title of obligations (usually debts) by way of assignment or overtaking. Recommendation 2(III) was included to address the fact that certain legal systems are very restrictive concerning the rights of such successors-in-title in enforcing debts.

42. One expert queried whether a clearer distinction should be drawn between procedural and substantive law, with recommendation 2(III) more clearly confined to the former. *The Reporters* suggested, however, that it may be overcomplicating matters to refer to the procedural / substantive law distinction. Instead, the focus should be on the policy decision to discourage States from implementing additional or specific procedures which a successor-in-title of a debt is required to satisfy before being able to enforce the obligation.

43. Other experts pointed out that recommendation 2(III) was highly relevant in practice. It had application in, for example, cases of third-party acquisition of banks' non-performing loans and of syndicated loans involving a revolving class of lenders.

44. *The Chair* summarised the discussion on recommendation 2(III) by acknowledging the importance of the underlying policy, which was that the rules of enforcement proceedings should not be interpreted or applied restrictively in the context of "succession" of obligations. Noting that some drafting changes should be implemented, and that examples and use cases may need to be included in the commentary, it was proposed to redraft recommendation 2(III) as a standalone provision with a separate comment.

45. *The Chair* then invited discussion on recommendation 3 on the electronic form of enforceable instruments. One expert suggested that recommendation 3(I) was drafted too narrowly in stating that electronic documents can be used "as a support" for enforceable instruments. Instead, it was proposed to broaden the language to say that electronic documents can themselves be enforceable instruments.

46. Other experts also proposed that what could be registered could go further than electronic "documents". Electronic "data" could be rendered registrable. It was noted that the possibility of registering data as such was already envisaged in the commentary, and that it could be similarly reflected in the black letter text. An example was given of registering discrete data or data sets which themselves were not contained in a single document like a PDF file.

47. *The Reporters* noted that some caution was required. The reason why data per se was not included in the black letter text was because, in most countries, there was still a requirement to certify enforceability whether by the court or by another authority. The certification process would produce a document and it is this document, not the underlying data, which is executable.

48. In the ensuing discussion, several experts noted that there were developments in certain jurisdictions towards making data, or at least “data sets”, enforceable as such (for example regarding traffic violations which were communicated to enforcement organs simply as a data set without any specific PDF document for each violation). This was seen as a more efficient procedure for parties which have to handle a large volume of cases, such as public utilities. One expert also observed that the reference to “data” as opposed to “documents” was relevant not only at the registration stage but also at the attachment stage (e.g., by sending to the bank a data set of accounts against which garnishment was sought). Alternative drafting terminology, such as “data messages” (which had previously been used in UNCITRAL texts), were proposed. It was agreed that consideration of the language used in other uniform law instruments would be useful.

49. The Working Group agreed that it was important to make a reference to and include “data” in recommendation 3(I), if not in the black letter text then at least in the commentary. This would ensure that the Best Practices be forward-looking and remained relevant in light of existing or anticipated innovations in enforcement law and practice.

50. In light of the discussion, *the Chair* referred Recommendation 3(I) to the Drafting Committee.

51. Moving on to recommendation 3(II), which provides for linking multiple documents if the enforceable instrument consists of two or more related electronic documents, one expert queried if the wording was too narrow. Another expert, agreeing with this point, noted that it was possible to not only link documents to documents, but also document(s) with data. Another expert raised a more general query concerning the title of recommendation 3(I) (“form requirements of enforceable instruments”), noting that the substantive provisions were in fact suggestions, but not requirements, as to form. *The Reporters* explained that they had singled out the electronic form of enforceable instruments in the draft as it was the policy decision of these Best Practices to encourage the development and use of electronic documents / systems.

52. In summing up the discussion on recommendation 3, the *Deputy Secretary-General* noted that the Working Group had expressed agreement with *the Reporters’* suggestion to encourage use of electronic documents / systems. She observed that the text would benefit from redrafting to more strongly emphasise (as opposed to simply permit) this policy. She also recalled the Working Group’s agreement to adopt technology-neutral language and terminology. Finally, she suggested that recommendation 3 could be drafted in a more narrative manner to explain how it anticipates the future development of data-based systems.

53. *The Chair* opened the floor for discussion on recommendation 4. Two experts observed that there may be some inconsistency, at least at first glance, between the title and the first sentence of the recommendation, and the commentary (in particular paragraph 3). Other experts noted that the commentary clarified this issue by providing that all paper documents would need to be first digitised, whereupon the digitised (and hence “electronic”) version would be registered. As such, the potential discrepancy between the recommendation and the comment was a drafting issue which could be easily addressed. One expert suggested that the way to resolve this issue was to be less specific about the process of digitising and producing relevant records, and to simply state that the register ought to be maintained in electronic form.

54. Turning to the second sentence of recommendation 4, one expert asked about the role of the court in the registration process. It was noted that in current practice in many jurisdictions, an enforceable instrument would be issued by the court or notarial authority and received by the

creditor. The creditor would then contact the enforcement organ directly to commence the enforcement process without any further involvement of the court or notarial authority. The court or authority would have, in effect, closed its case. The expert therefore noted that, insofar as recommendation 4 required the court's or notarial authority's involvement in submitting the request for registration, this may be inconsistent with current practice. It was suggested that the phrase "court or other issuing public authority" could be modified or clarified to include an enforcement organ or authority, such that this body (and not only the court or notarial authority) may also submit requests to register an enforceable instrument.

55. In response, *the Reporters* explained that the registration system envisaged in the Best Practices was wholly new and as such the Working Group had a degree of leeway to innovate. They further explained that the current draft reserved a gatekeeper function to the court or notarial authority. *The Reporters* however acknowledged that the suggestion merited further consideration, particularly to ensure consistency with current State practice.

56. Other experts, agreeing with the proposal for reconsideration, observed that in many other jurisdictions, including non-European ones, courts would not usually perform any such gatekeeper function of reviewing, on their own motion, their own decisions. Instead, once a court handed down an enforceable instrument such as a judgment, the practice would be to allow enforcement to proceed, with the burden then shifted to the debtor to raise opposition to the enforcement proceedings insofar as there had been any intervening change of circumstances.

57. Turning to another aspect of the same recommendation, one expert queried if the text should provide for the possibility of automatic registration of enforceable instruments. Various experts expressed their views in the negative, noting that automatic registration would run contrary to the principle of party autonomy or party disposition (i.e., that a creditor can choose not to enforce an otherwise enforceable instrument), and also would defeat the policy objective of registering only those enforceable instruments for which enforcement was a real possibility, thus avoiding the overloading of the register.

58. An expert further raised the question of whether the commentary should make any reference to the type of technology which could be used for designing and operating the register, for example a specific reference to blockchain or distributed ledger technology. In this regard, it was further noted that certain jurisdictions were using distributed-ledger technology to serve as backup copies of centralised public registers. Another expert however urged caution, noting that to propose a specific technology could be not only contrary to a technology-neutral approach, but also unwise, given the pace of technological developments. *The Chair* observed that it was desirable to have a forward-looking document, and that it may be possible to state that the register should be based on appropriate technologies which included, as of the date of writing, distributed ledger technology.

59. The Working Group further generally agreed that there should be references in the commentary to data protection obligations concerning the register.

60. An expert also noted that, insofar as the Working Group would make reference to "data" or "data set" for the purposes of recommendation 3, then recommendation 4 should be updated to include references to the same for the sake of consistency.

61. Summing up the discussion on recommendation 4, *the Chair* acknowledged the difficulties of producing a description of a new system which nonetheless had to preserve sufficient flexibility to cater for existing accepted practices and needs in different jurisdictions. She observed that the discussion on recommendation 4 had highlighted issues regarding the respective roles of different actors in the system. *The Chair* also suggested that the Working Group may make reference to the UNCITRAL Guide on the Implementation of a Security Rights Registry, which addresses issues of establishing a register, albeit not in the enforcement context.

62. *The Chair* then invited the Working Group to move on to recommendation 5. One expert noted that the text could be drafted to more clearly spell out the relationship between the “enforcement organ”, the “execution court” and the “court competent to decide the case on the merits” (noting that this may refer to an appellate court as well). It was also suggested that recommendation 5 should more clearly spell out the differences, if any, between enforceable instruments which were “public” documents and those which were “private” documents.

63. *The Reporters* clarified that recommendation 5 was intended to refer to the situation where a debtor disputes the underlying merits of the case, whether in a new hearing or (if there had been no prior court decision) for the first time. Where the debtor does indeed raise such a challenge, the court hearing the case on the merits may decide to stay or dismiss the enforcement proceedings entirely, and issue appropriate orders to the execution court or enforcement organs. This decision of the court should itself be registered in the register. It was acknowledged, however, that the wording of recommendation 5 (including its title) should be revisited to better reflect this policy objective.

64. Building on this discussion, an expert noted that insofar as recommendation 5 provided for objections on the merits after an enforceable instrument had already been registered, a similar black-letter recommendation should perhaps be included in the text for objections made by a debtor in the course of consolidation proceedings which convert a “private” document to an enforceable instrument. This issue was currently only addressed by way of two sentences in the commentary to recommendation 1, but should be included in a black-letter recommendation. The Working Group agreed with the suggestion.

65. In summing up the debate, *the Chair* noted that there appeared to be general agreement with the policy objectives of the recommendation. The Working Group agreed to refer recommendation 5 to *the Reporters* for reconsideration and revision, in light of the comments received at the current session.

Section IV (information mechanisms on debtor’s assets)

66. *The Reporters* presented recommendation 1, which sets out general rules concerning information mechanisms. It was explained that recommendation 1 and the commentary thereon had been updated to reflect the Working Group’s previous comments, and they had been already subject to further revisions by the Drafting Committee.

67. The Working Group first discussed recommendation 1(II), which provides that “*the debtor and all natural persons, private entities and public authorities such as [examples]*” should have a duty to cooperate with the enforcement organs. Various experts raised queries concerning the structure of recommendation 1(II). It was noted that it may be useful to separate the recommendation into two provisions, one directed at the debtor and the other at third parties. This was suggested because the extent of the duty and the consequences for non-compliance may be different. There was also a more radical suggestion to reorganise recommendation 1. It was noted that recommendations 1(II), (III) and (V) dealt with the person who has to cooperate and the contents of cooperation, whilst recommendations 1(IV), (VI) and (VII) addressed a different issue, i.e., the conduct by the enforcement organ. It was suggested to separate the two into distinct provisions. In response, *the Reporters* advocated a holistic view, pointing out that the current draft follows a logical flow, identifying in turn who is to act, what acts are to be done, what privileges exempt one from performance, and then focusing on sanctions. It was posited that this was the general order of procedural rules.

68. Turning to a different point, other experts focused on the list of public authorities provided in recommendation 1(II) by way of example. *The Deputy Secretary-General* noted that it could be helpful, in a Best Practices document of this type, to provide concrete examples in the text instead of leaving it all to the commentary. Another expert noted that the list of examples could also include

anti money laundering authorities, given their importance. However, one expert pointed out that caution should be exercised when drawing up the list of examples, in particular because the list should not obscure the keyword “all”, i.e., that all persons other than the debtor are in principle subject to the duty to cooperate.

69. One expert drew the Working Group’s attention to the position of banks within recommendation 1(II), noting that the issue of disclosure of information by banks and its limitations through obligations of confidentiality and secrecy was highly important in practice. The Working Group was invited to consider whether banks should not be allowed to completely ignore a request for information from the enforcement organs but should be required to provide at least limited disclosure (e.g., the bank should confirm whether a debtor maintains an account at the bank even if it is not obliged to disclose all the details and balance of the account). More radically, one expert suggested that a positive policy recommendation could be warranted, in that the text could propose that more information should be disclosed, subject to the limits of data protection and the protection of important core interests (e.g., privileges).

70. *The Reporters* explained that they had specifically avoided discussing the issue of bank disclosure precisely due to the complexities of the legal position, which would vary across different legal systems. Hence, the draft text generally subjected the duty to cooperate to recognised privileges of civil procedure law (recommendation 1(V)). Banking authorities, on the other hand, could have a duty of cooperation under recommendation 1(II)) and could, as necessary, direct banks to provide disclosure. Detailed provisions concerning the position of banks could create controversy.

71. Noting *the Reporters’* explanation, one expert observed that whilst the current text did not positively give guidance on the extent to which banks could decline to cooperate, the structure of the text did at least put the onus on them to justify non-cooperation. She however noted that the phrase “*recognised privileges of civil procedural law*” in recommendation 1(V) may not, at least at first glance, be read as including bank secrecy.

72. Moving to a different issue, an expert queried if recommendation 1 could encourage the use of, or at least make some reference to, electronic communications and electronic databases. It was noted in particular that the references in recommendations 1(III) and 1(VI) to “written” statements could be read as referring to paper documents, and that the draft text could be revised with a view to improving technological neutrality. The Working Group agreed generally to include such revisions, albeit noting that the precise formulation and the placement thereof required further consideration. One proposal was to include a freestanding general principle in Document 3 (or even in the Best Practices generally) highlighting the importance of electronic communications and records, and to make a reference to such general principle in recommendation 1 of Section IV.

73. A similar suggestion was made concerning a specific reference to inter-connectivity between registers. *The Reporters* agreed with this recommendation and noted that a reference should be made, again subject to consideration of the precise formulation and placement thereof.

74. Turning to recommendation 1(IV), one expert noted that the draft text provided that enforcement organs should, as part of their search for information on the debtor’s assets, “*apply for access to registers where access is granted upon demonstration of special justifying interests only*”. The expert queried whether an enforceable instrument by itself sufficed to demonstrate such special justifying interests, and if so, whether this should be spelt out explicitly in the draft text.

75. *The Reporters* explained that the rationale behind recommendation 1(IV) was to distinguish between the two types of registers. For limited-access registers, it was the practice in some countries that notice be given to the person whose information was being accessed so that they could, if seen fit, take actions to object. As such, the draft text did not focus on how access to limited-access registers should be granted.

76. The Working Group continued to discuss whether a positive recommendation should be made that the possession of an enforceable instrument by itself sufficed to constitute a special justifying interest. No clear consensus was reached. One expert suggested that, absent a clear consensus, it may be preferable to say less and simply state that enforcement organs should search for information in limited-access registers without any reference to “special justifying interests”. Existing limitations would then apply. This proposal was seconded by another expert, who further proposed a qualification, i.e., that enforcement organs should search for information in limited-access registers “only for the purposes of enforcement”.

77. Further on recommendation 1(IV), various experts noted that the language of the draft text appeared to require the enforcement agencies to make an application to the relevant limited-access register every time a request for access is made. It was pointed out that this may be unduly cumbersome in practice. Reference was made to national practice where enforcement organs are granted access to limited-access registers, such as the motor vehicle register, by default. The justifying interests are verified by random spot checks and not for each and every single request.

78. In light of the above discussion, *the Reporters* referred to data protection rules, which should apply to enforcement organs once they obtain information about the debtor that was not publicly available. However, it was also emphasised that it was undesirable to provide unnecessary details regarding the precise obligations under data protection rules. It was noted that data protection rules were in a constant state of development and the text should be kept general in the interests of preserving its forward-looking nature.

79. The Working Group agreed that enforcement organs should be granted access to limited-access registers subject to applicable data protection obligations. The specific modalities of access to the limited-access registers would not be detailed in the recommendation itself. *The Chair* noted that the Drafting Committee could implement linguistic changes to clarify the policy.

80. The discussion then turned to recommendation 2(II), which provides that recourse to “coercive information mechanisms” is not justified where information about the debtor’s assets is already known, or where the debtor offers suitable assets for execution. In this respect, *the Coordinating Expert* noted that the terminology used had changed across various drafts and that different terms had been used. Since none of the proposed formulations had proven entirely satisfactory, she asked that the policy underpinning recommendation 2 be confirmed for the purposes of reconsidering the most appropriate language. *The Chair* agreed on the importance of understanding the policy, because, for example, “invasive information mechanisms” could be read to mean only those mechanisms which intrude on the debtor’s privacy (such as a search order), whilst “coercive” could be interpreted as having a broader scope. *The Reporters* explained that the primary consideration was the threat of sanctions.

81. An expert queried if recommendation 2(II) was drafted in an overly robust manner, in that recourse to information mechanisms may be precluded if it is known that the debtor has assets which suffice to permit full execution, but the value of which is excessively difficult to realise (e.g., the assets are located abroad). *The Reporters* referred to the phrase “suitable assets” used in recommendation 2(II)(b) which operated as a control mechanism; they further noted that the matter was in any event subject to the control and discretionary action of the enforcement organ. *The Chair* confirmed that the policy decision underlying the recommendation was to ensure that the known assets of the debtor, or the assets offered by the debtor, were realisable in a timely and practical manner, and that further consideration should be given to the most appropriate terminology to express such agreed policy.

82. Finally, one expert noted that the phrase “information about the debtor’s assets” in recommendation 2(II)(a) should be qualified by a description of the quality of the information. For example, the information should be “current”, or “up to date”.

83. *The Reporters* then presented recommendation 3. It was noted that no major policy changes had been made. *The Reporters* explained that recommendation 3 only came into play when there was debtor's resistance or non-cooperation in the enforcement process. For example, if the debtor's assets are known and made available to the creditor, then the creditor may in fact enter into the identified places to seize such assets without the need for a court order.

84. *The Chair* commenced the discussion by suggesting that the text should clarify that the examples were not an exhaustive list. The general idea was that this recommendation applied to assets located in places which are not normally accessible. One expert suggested using the all-encompassing term "*location*". Furthermore, *the Chair* suggested that the recommendation should contain examples of access being restricted by electronic means. There was general agreement on these points.

85. It was further suggested that, since the recommendation was meant to include locations both under the sole control of the debtor, and under the control of third parties, the recommendation should make reference also to the need to obtain the consent of such third parties prior to a search order being sought. It was, moreover, underlined that it would be undesirable to introduce an express and abstract limitation of search orders to locations under the sole control of the debtor, because any specific protection of the third party could be achieved through the application of recommendation 3(III) (*a search order can be granted only if it is proportionate and appropriate*).

86. The Working Group then turned to recommendation 3(II)(b). It was noted that this provision, and in particular the commentary thereon, referred to the role of an expert to be appointed by the search order to gain access to or information on the debtor's assets. Clarification was sought as to whether this expert was to be an independent expert, and whether it would be retained by the enforcement organ or by the court.

87. Moving on to recommendation 3(III), one expert asked how proportionality and appropriateness were to be established in practice, and which organ (court, enforcement authority) was primarily burdened with such determination. Moreover, it was queried whether the creditor had any role in this process.

88. *The Reporters* noted that this question was linked to the issue of which party or authority was to apply to the court for the search order. This in turn touched upon the broader and more fundamental issue of the creditor's and enforcement organ's respective roles in the enforcement process. They pointed out that different legal traditions had different conceptions of the creditor's involvement. The respective roles of the creditor and the enforcement organ had not yet been discussed by the Working Group. It was suggested that discussion on recommendation 3 could be more fruitfully conducted after the Working Group had first reached a broad consensus on these issues. Building on this observation, some experts noted that general principles such as the principle of proportionality, and general recommendations on the structure of the proceedings, such as on the relative roles of the creditor and enforcement organ, could be drafted as freestanding general principles applying not only to this provision but more broadly to the Best Practices. *The Chair* however noted that in relation to recommendation 3, the policy decision to be taken was whether the Working Group should make a positive recommendation regarding the respective roles of the different actors in the procedure as applied to search orders, or should leave different legal cultures to their own systems.

89. *The Chair* then opened the discussion on recommendation 4 (sanctions for non-cooperation). A first issue concerned the express reference to the position of a legal representative of a debtor which was a legal person, which could invite negative inferences in the rest of Document 3 (where the recommendations mentioned the "debtor" only). *The Reporters* explained that the legal representative was specifically mentioned here as it could be personally sanctioned. While acknowledging that the warning in recommendation 4 served a useful purpose, the Working Group

suggested that language should be used to limit the possibility of negative inferences. One suggestion was to express the concept of agency as a freestanding general principle, whilst specifying the role played by the reference to legal representative in the context of the recommendation on sanctions.

90. Moving on, various experts focused on the most suitable way to express the policy decision underpinning recommendation 4, which was to set a higher threshold for when liability would be triggered. In explaining the rationale of recommendation 4, *the Reporters* underlined that, in practice, disclosure obligations on debtors could be onerous and inaccuracies in disclosure were common. The recommendation intended to limit the debtor's liability to when it was clear that something had gone wrong, and in particular when there was an element of intentional fault. Observing that there appeared to be consensus on the policy and that this was largely a drafting issue, *the Chair* noted that the Drafting Committee could consider using a more descriptive turn of phrase to express the desired policy result. She further suggested to reconsider the terminology used in the first sentence of recommendation 4.

91. Finally, after some discussion, it was decided not to split the recommendation in two parts (one dealing with the debtor and the other with third parties), to maintain consistency with previous recommendations. *The Reporters* reiterated the role played by proportionality and appropriateness as benchmarks for the decision.

Section V (electronic registration)

92. *The Chair* opened the discussion on Section V, noting that the Working Group had generally welcomed the innovative policy underlying this Section, but that specific points had been left open for further discussion. Focusing on recommendation 1(II), and referring to the outcome of the exchanges at the previous Working Group session, she suggested that the recommendation should be drafted in more general terms. It was recalled that the Working Group had previously discussed whether the administrator of the register could be not only a court, but also another public authority with sufficient elements of integrity, reliability, independence and fairness. A more generic language would cater for differences across legal systems, in particular systems where the administrator would not likely be, in practice, a court, for organisational or cost-related reasons. The commentary could however express a strong preference for a court-administered register. It was further noted that at the very least, the excessive specificity of the reference to the "head of the general court administration" should be avoided. Other experts agreed with these suggestions, noting that it was important not to pre-empt how different States organised the relationship between courts and registers. Noting that many States had introduced, or were in the process of introducing, case-management platforms which included registers of enforcement actions, other experts foresaw that the register intended to be established under Document 3 would more likely be, in practice, an extension of an existing registry, or could be set up as an entirely new register but administered by the staff of existing registries. It was therefore important to allow for some flexibility in recommendation 1(II), so as to minimise disruptions to States that had recently implemented structural reforms, in order to facilitate enactment of the Best Practices into domestic law.

93. In terms of drafting suggestions, one proposal was that recommendation 1(II) could provide that the register should be administered by "*courts or public authorities*", with the necessary attributes of such public authorities being spelt out either in the black letter text or in the commentary.

94. *The Reporters* invited the Working Group to proceed cautiously, noting that the broad language approach could be read as making recommendations going further than current international best practices. *The Reporters* pointed out that, for example, placing potentially sensitive court records and documents in the hands of private entities could represent a radical development. It was pointed out that the ostensible safeguard of "*control and supervision*" by courts or public

authorities may, in practice, prove insufficient, as it was impractical for such bodies to review each and every action of a privately-operated registry.

95. One expert agreed with the need to exercise caution, noting that the envisaged register was not a purely passive register designed only to store information. The register was required, under Document 3, to make decisions as to whether to accept registration and to allow commencement of the enforcement process. As such, it was unlike a credit bureau or secured transactions registry, and its decision-making may be characterised as judicial or quasi-judicial.

96. In response to these points, *the Chair* agreed that the envisaged register had an active decision-making function and was different from commercial registries, though such decisions would not be necessarily qualified as judicial in nature, at least in common law jurisdictions.

97. In summing up the discussion, *the Chair* observed that there was agreement on the need to be cautious in respect to the use of a privately-operated register, even if placed under the court's supervision. She noted, however, that several experts had suggested that the language of the recommendation was too prescriptive and that more flexibility would enhance the potential application of the best practices in different jurisdictions, including developing economies. Reference to the possibility that the register be administered by "courts or public authorities", with the necessary attributes of such public authorities being clearly spelt out, had been flagged as a possible solution. She suggested that such flexibility should be considered at least in the commentary, where reference to existing case-management systems could be fruitfully introduced.

98. In concluding the discussion on Document 3, *the Chair* thanked *the Reporters* for their thorough work, and the Working Group for the fruitful discussion of the many complex issues. She noted that while some adjustments of the substance of recommendations (and consequential adjustments or clarifications in the commentary) had been deemed necessary, and improvements in the language had been suggested, broad agreement on the main policy decisions had been expressed.

**Item 4 (c) - Best practices regarding enforcement of security rights:
Collated documents (Study LXXVIB – W.G.6 – Doc. 4), Draft best
practices regarding special expedited procedures (Study LXXVIB –
W.G.6 – Doc. 4, Annexe 3)**

99. *Prof. Neil Cohen, Reporter for Document 4, Annexe 3*, introduced the document, which envisages an expedited procedure to resolve disputes over possession in cases of disputes when a secured creditor seeks to extra-judicially take possession of tangible collateral. He recalled that such a procedure would be consistent with the policy of minimising the risk of the value of tangible collateral depreciating over time. He explained that the envisaged procedure resolves only the time-sensitive issue of which party should have immediate possession of the collateral, but it does not foreclose the possibility of the parties further litigating their dispute on the merits, and the court making an award of damages if it is subsequently found that the initial decision concerning possession was incorrect. He finally noted that as this was a first draft, comments and improvements were particularly welcome.

100. *The Reporter* briefly explained the rationale underpinning each of the nine draft recommendations in this document. Upon invitation by *the Chair*, the Working Group then proceeded to discuss the recommendations one by one.

101. On recommendation 1, one expert suggested that the current language of "special expedited procedure to decide on possession" was too narrow. Indeed, it was posited that the focus on "possession" may be misleading. It was pointed out that the key issue in practice for secured creditors was not so much possession per se, but rather the subsequent power to realise or dispose of the

collateral. Possession was simply a means to the end of speedy realisation of the value of the security interest. An example was given: banks, in practice, were not concerned with obtaining possession (or control) of collateral per se, but rather with being able to speedily sell or otherwise realise it. The expert suggested that the language of recommendation 1, and more broadly the language of the entire document, ought to be reconsidered to place the focus on realisation.

102. On recommendation 3(a), one expert noted that the current draft provided that the suggested period for a mandatory stay upon the expedited procedure being invoked may be shortened by a court if the collateral is “perishable or is otherwise likely to quickly diminish in value”. It was queried whether the shortening of the mandatory stay would also apply if there is volatility i.e., the value of the collateral is fluctuating greatly. *The Reporter* replied that the current draft was not intended to cover the situation of volatility. In the ensuing discussion, it was noted that there was no need to expressly address volatility in this document, as its inclusion would further complicate an already novel and complex procedure. This issue could be covered in other sections of the Best Practices and reference could be made to those other sections, if necessary.

103. On recommendation 5, one expert queried if it would be desirable to explicitly state that damages were the only remedy available to the grantor, i.e., to confirm that the creditor’s possession of the collateral and any disposal of the collateral (to a third party) were final once the court had decided to grant possession to the creditor, and were not subject to the outcome of a (potential) litigation between the creditor and the grantor. Other experts asked whether the expression “actual damages” used in recommendation 5 was intended to confine the remedy to compensatory and not punitive damages, and whether certain types of damages such as reputational loss arising from being the subject of enforcement would be excluded. *The Reporter* noted that it was not the function and purpose of recommendation 5 to mandate a substantive theory of damages for domestic laws.

104. On recommendation 7, one expert noted that it enabled a creditor to make a subsequent attempt to obtain possession based on new developments even if its initial application under the expedited procedure had failed. The expert raised a question as to what evidence should the creditor be entitled to adduce on this second attempt. It was suggested that recommendation 7 as drafted (i.e., that the secured creditor could attempt to obtain possession again based on new factual developments occurring after the failed expedited procedure) may be too restrictive. Instead, it was proposed that the secured creditor may make a renewed application for possession based on evidence which was not available to the creditor at the time of the initial expedited procedure. This catered for the possibility of events occurring before the expedited procedure but which were not made known to the secured creditor or capable of being produced in evidence until afterwards. The point was tabled for further consideration.

105. On recommendation 9, one expert noted that the wording was rather cryptic and merited reconsideration. *The Deputy Secretary-General* underlined the importance of recommendation 9 from a policy perspective, as it emphasises that the goal is to create a procedure that is consistent with a State’s existing legal system, while at the same time considering the economic rationale of secured transactions. She agreed, however, that the structure and placement of recommendation 9 could be revisited, including whether it should be redrafted as an introduction to this topic or as a general principle of broader application in the Best Practices. It was agreed that, at a minimum, the commentary to recommendation 9 ought to be sufficiently detailed to provide States with necessary guidance.

106. The Working Group further considered more general issues regarding the expedited procedure as a whole. First, *the Secretary-General* raised a question as to the scope of the expedited procedure. Referring to earlier remarks in the discussion and to the example of the Cape Town Convention on International Interests in Mobile Equipment, he noted that the provisions in the latter instrument concerning interim relief pending final determination did not apply only to the issue of possession, but also to other types of disputes. As such, he asked if the Working Group

would consider if this expedited procedure could apply beyond the issue solely of possession. *The Coordinating Expert* also noted there could be other areas in these Best Practices where special or expedited procedures might be a desirable addition.

107. Second, one expert asked whether the court's decision on possession in the expedited procedure would be subject to appeal, noting that a long and slow appellate process was a very real problem in many legal systems. In this respect, it was noted that excluding the decision on possession from appeal would not be inconsistent with the general policy behind the expedited procedure, i.e., to have a final decision on possession rendered speedily whilst leaving the parties to seek other remedies by the usual litigation process. Another expert however observed that, in practice, appellate courts are usually slow to overturn decisions made by first instance courts on provisional or protective measures, and that first instance decisions may nonetheless be enforceable or executable pending appeal.

108. Third, various experts queried if the expedited procedure should be mandatory, optional or generally preferred over ordinary court proceedings. *The Reporter* suggested that the expedited procedure would be affirmatively recommended over other procedures. In the ensuing discussion, it was noted that the expedited procedure was not intended to preclude parties resorting to pre-existing procedures if they so wish, but was rather intended to provide a speedier option which may be of particular interest and utility to secured creditors. Various experts observed that the inter-relationship between, on the one hand, the expedited procedure, and on the other hand, pre-existing procedures (for enforcement, provisional and/or protective measures and for determining the case on the merits) may need to be further considered and addressed specifically in the draft. The experts discussed various examples, including if one party has already commenced a claim for provisional measures using pre-existing procedure, but then the other party wishes to invoke the expedited procedure to force a speedy decision on the issue of possession. It was noted that one possible response in such scenario would be for the first claim to be stayed whilst the expedited procedure ran its course. However, this was by no means the only response, and it was agreed that further critical consideration of this broad issue would be required.

109. Fourth, one expert raised the issue of whether the precise parameters of the expedited procedure, including the timeframe, could be agreed upon by contract. In response, various experts pointed out that party autonomy usually did not bind the court, and that parties could not by agreement create a court procedure that did not already exist. One expert noted that procedural party autonomy in this sense was common in arbitration, but usually did not extend to the judicial system. Another expert pointed out that there were jurisdictions in which procedural law could be subject to contract, but acknowledged that this was relatively rare. This expert nonetheless stated that, given these complexities, it was advisable for the document not to address in any detail whether the expedited procedure could be agreed upon by contract.

110. Fifth, various experts noted that certain provisions of this document, for instance recommendation 6, were very detailed, and queried if such detail was necessary or advisable in a Best Practices document. In response, *the Reporter* stated that the Working Group had a relatively free rein in deciding on how detailed to be, as the UNCITRAL Model Law did not address this issue. He further stated that it may be desirable to be relatively more detailed to provide States with more guidance, particularly as this was a novel provision. He did however acknowledge that the Working Group should decide on whether the provisions in this document should be in the nature of a recommended system, or only as an illustration of one possible system, as this may affect the tone and language of the text.

111. Sixth, it was queried whether the document should give any guidance as to the test which courts should apply in its decision. One expert suggested that the test to be applied here could conceivably be different from that used at least in some types of general provisional and protective measures, where the court would usually require the applicant to show a serious risk of prejudice if

the measure is not granted. In the special expedited procedure it may not be necessary to show such risk, in part because of the policy decision of favouring access to collateral by the creditor.

112. This remark triggered a more general discussion on the relationship between provisional and protective measures and the new procedure. It was noted that whilst this document addressed a very specific scenario and a very specific relief, the general principle underpinning provisional orders should apply, i.e., that the court should balance the interests of the competing parties and decide on who should carry the risk. It was suggested that this general principle was sufficiently flexible and should be applied also to this procedure.

113. In summing up the discussion, *the Chair* noted that whilst there appeared to be a general consensus that recommendations on an expedited procedure would be a useful and innovative element in the Best Practices, many important substantive issues had been raised. She urged further work to be undertaken intersessionally, so as to discuss a finalised draft by the next Working Group session.

114. Finally, the Working Group discussed, as exploratory points, electronic dispute resolution as well as alternative dispute resolution, and how these concepts could be reflected in this document. In this respect, it was suggested that there were two different issues to be considered: referring to the possibility (or the desirability) that the judicial process be conducted electronically or online (including in the context of the expedited procedure), and referring to the possibility to make use of an alternative dispute resolution system, online or off-line. It was clarified that the proposal was not aimed at designing a specific online or alternative dispute resolution procedure, but to refer to the fact that such mechanisms could (or should) be considered.

115. In relation to the first issue, an expert emphasised the need to refer to the use of technology as an enabler. Two aspects were highlighted: first, how technology changes the procedure and second, how it can be used to expedite the procedure. The expert observed that electronic communication could enable an expedited procedure, especially given the tightness of the envisaged timeframe, and to include explicit references to this in the black letter text and not just in the commentaries. There was general agreement on referring to the use of technology to expedite or streamline the procedure.

116. The Working Group then addressed the issue of the role of ADR and ODR in the enforcement context. One expert suggested that the draft text should include the possibility of enforcement by arbitration and not only by the court. This expert also proposed that the text of the recommendations, or at least the commentary, could include references to conciliation and mediation (online or offline), given the global trend of making use of ADR and ODR mechanisms (including by legislative efforts to include them in the enforcement process). An observer agreed with this proposal, as it reflected the practice in many jurisdictions in which her organisation had a presence.

117. *The Chair* and the *Deputy Secretary-General* both noted that ADR and ODR were important topics and that the Best Practices should refer to them. At the same time, they observed that these issues could be better addressed as a general matter in the Best Practices, with cross-references being made in this document as necessary. The Working Group agreed that further research on the role of ADR and ODR was useful, with several experts however sounding notes of caution. These experts observed that, if a debtor ultimately proved uncooperative in the ADR / ODR process, the creditor would have to resort once again to the public judicial authorities. They also pointed out that ADR and ODR incurred additional costs, and that the advantages from the use of ADR and ODR would have to outweigh the additional costs in order to justify recommending them as a general practice. Finally, it was clarified that the Best Practices would not propose recommendations on the design of the ADR / ODR procedures themselves.

118. Summarising the conclusions on Document 4, Annexe 3, *the Chair* thanked *the Reporter* and the Working Group for the insightful discussion and deferred revision of the document to intersessional work, along the lines suggested by the Working Group.

Item 4 (d) - Draft best practices and commentary regarding enforcement on digital assets (Study LXXVIB – W.G.6 – Doc. 6)

119. *Prof. Teresa Rodriguez de las Heras Ballell, Reporter for Document 6*, presented the new document, which had been significantly developed from the version presented to the Working Group at the last session and now contained a full set of draft best practices accompanied by comments. It was explained that Document 6 as now drafted contained seven recommendations, with two potential further recommendations more tentatively proposed for discussion with the Working Group. *The Reporter* further explained that, as one of the key principles in this document was that pre-existing enforcement mechanisms should be used to the extent possible for enforcement against digital assets, the approach underpinning the drafting of Document 6 was to achieve maximum alignment with Document 3.

120. *The Chair* further noted that this document had a somewhat different drafting style and structure than other parts of the project. This was because Document 6 was not merely aimed at legislators but could have other potential uses (e.g., making recommendations to practitioners as regards how to enforce against digital assets). As such, a more discursive and explanatory style of drafting may be justified.

121. Upon the invitation of *the Chair*, *the Reporter* presented recommendation 1 (general enforcement procedures applied to digital assets). It was explained that recommendation 1 was the policy foundation of the entire document. *The Reporter* further invited the Working Group's comments on whether the current draft recommendation 1(2) (recommending the combination of enforcement measures) and recommendation 1(3) (recommending consideration of how digital assets may be analogous to other kinds of assets in deciding upon the combination of measures deployed) should be kept as discrete black letter provisions or moved to the commentary.

122. One expert noted that, as a matter of logic, recommendations 1(2) and 1(3) would be better presented as part of the commentary. However, in the interests of adopting the discursive and explanatory style noted by *the Chair*, it could also be helpful to retain them as black letter provisions. *The Chair* observed that recommendation 1(3) may be a subset of recommendation 1(2). It was suggested that the two could be merged. *The Reporter* further sought the views of the Working Group on whether recommendation 1(2) should be confined to the situation of complex digital assets. Various experts observed that there was no need to so qualify the recommendation.

123. Moving on to a different point, one expert queried what was meant by "general" enforcement methods as referred to in recommendation 1. *The Reporter* agreed that the terminology could be improved as the word "general" had the unfortunate connotation that it was not a "specific" measure. However, it was confirmed that the underlying policy was that pre-existing, and hence "generally applicable", enforcement measures of a State should be applied. *The Coordinating Expert* noted that in terms of drafting, this recommendation or its commentary could refer the reader as much as possible back to the enforcement mechanisms to be provided for in Document 3. *The Chair* agreed with this observation and noted that the underpinning policy could perhaps best be expressed as follows: a State's (pre-)existing enforcement mechanisms should be applied, insofar as possible and subject to necessary modification, to digital assets.

124. Finally, one expert proposed a reconsideration of the structure of recommendation 1. It was pointed out that a different starting point for Document 6 should be the contents of the enforceable instrument, i.e., the nature of the claim to be enforced (e.g., payment of money, or specific delivery

of an asset). The mode of enforcement would depend on the contents of the obligation to be performed. It was suggested that this would provide a more concrete guidance to practitioners.

125. *The Reporter* noted that the current drafting approach retained flexibility in that it did not require the Working Group to provide detailed, case-specific recommendations in the black letter text. Instead, case studies and recommendations could be and had been included in the commentary. It was also suggested that the Working Group may not wish to present detailed recommendations for cases involving complex assets, for which international practice was still evolving. In response, it was observed that concerns about complex assets could be overblown. There were two conceptually distinct types of complexity: complexity in the nature of the assets itself, and complexity in the combination of enforcement mechanisms required. A complex asset could be enforced against in a simple manner, e.g., no matter how complex an asset, an order for obtaining control of the asset could be enforced in a relatively simple manner by the threat or execution of personal sanctions against the debtor.

126. Various other experts agreed that it could be useful to provide more concrete guidance in Document 6. It was however noted that caution must be exercised. The concern was that if Document 6 were redrafted in the suggested manner, this may require entering into the debate as to how digital assets were to be classified as a matter of domestic law, which the Working Group had agreed fell outside the scope of these Best Practices. For example, insofar as a creditor wished to enforce a monetary judgment against a debtor by realising the debtor's digital assets, this may require determining the prior issue of whether the debtor's digital assets constituted his "property" according to domestic law.

127. *The Reporter* then moved on to present recommendation 2, which suggested a combination of *in rem* and *in personam* measures for enforcement against digital assets. *The Coordinating Expert* observed that the drafting language needed to be consistent with Document 3.

128. Other experts discussed the structure of recommendations 2(1) and 2(2). One expert noted that recommendation 2(2) (explaining why *in personam* measures could be relatively more effective in the context of digital assets) was not drafted in the usual form of a prescriptive best practice, and wondered if it could be folded into recommendation 2(1) (stating the general principle that enforcement may require a combination of *in rem* and *in personam* measures), or moved to the commentary. Another expert however observed that it was recommendation 2(2) which introduced new concepts and rationales and thus added value.

129. *The Reporter* introduced recommendation 3, which contained the debtor's duty of disclosure in relation to digital assets which might be relevant for enforcement. It was explained that the structure and language of recommendation 3 paralleled those of the debtor's general duty to cooperate in Document 3. In particular, the mechanisms and measures for disclosure were similarly subject to the controlling concepts of "proportionality" and "adequateness". She further explained that the commentary made many references to practical solutions in different factual scenarios.

130. *The Coordinating Expert* noted that recent changes had been made to Document 3, and that recommendation 3 would need to be correspondingly updated.

131. There followed a discussion as to whether recommendation 3 was superfluous in that it simply repeated a general principle stated elsewhere. The point was however made that there was a special need for recommendation 3, as specialist knowledge and technical expertise are often required in seeking information concerning digital assets above and beyond what is generally required.

132. One expert explained that a technical expert may have a role as an independent third party (to keep the debtor's information secret from the creditor). Another expert observed that, given that a large amount of data and information concerning the debtor's private activities may be obtained in

the course of an electronic search, it might be advisable to recommend that such data and information should not be shared with the creditor but only with the enforcement organ. It was further noted that the Working Group had discussed the situation where a debtor wishes to cooperate but, because of technical limitations on its part, cannot actually perform disclosure as required. In this case, it would be the debtor inviting a technical expert to be appointed to help full compliance with its disclosure obligations. On the appointment of technical experts, it was queried whether it was necessary to provide further guidance, including who should take the initiative to assess the need for a technical expert, who is to make the application for the appointment, and who is to decide whether to grant the application. *The Reporters for Document 3* noted that this raised the same issue of the relative roles of the creditor and enforcement organ already flagged as an area for future work in Document 3 (see paragraph 88 above). It was however noted that in the present context there may be good reasons for reconsidering the respective role of the parties and organs involved.

133. *The Coordinating Expert* pointed out that recommendation 3 focused on the debtor's general duty to disclose information, while recommendation 5 addressed search orders, where the need for technical experts may arise most frequently. It may therefore be more appropriate to include the above discussion in recommendation 5.

134. Moving on, another expert focused on the commentary to paragraph 6, referring to sanctions for non-compliance. On the one hand, the need to coordinate this part with Document 3 was emphasised. On the other hand, it was noted that caution should be used in referring to imprisonment as a sanction for non-compliance.

135. Summing up the discussion on recommendation 3, *the Chair* noted that the main issue appeared to be practical in nature, e.g., the difficulty of obtaining information concerning digital assets. It was noted that recommendation 3 (or the commentary) could make more specific reference to the difficulties of clearly identifying not only the digital assets but also the debtor itself, custodians, and third parties with relevant information. The Working Group agreed that more specific examples or illustrations could be given in the commentary.

136. *The Reporter* introduced recommendation 4, concerning the duty of disclosure as applied to third parties. The views of the Working Group were invited as to whether the duty of disclosure should be limited to "identifying users and digital assets" as per the current draft, or whether a more general formulation should be adopted. *The Chair* expressed a preference for this second option.

137. On a different point, one expert noted that substantial parts of the digital industry had designed their systems on an architecture hiding information about users or their accounts from the system administrators. There was a distinction between requiring disclosure to the extent possible (subject to limitations imposed by the system architecture) and requiring positive reorganisation of the system architecture to enable useful disclosure to be made. It was noted that recommendation 2 appeared to take the former position but that this should be made more explicit. *The Reporter* agreed with these observation and pointed out that the degree of opaqueness in system architectures varied depending on national regulation, which was a very fast-developing area. In any event, the importance of the duty of disclosure was that it applied regardless of the degree of regulation in the relevant field. *The Deputy Secretary-General* confirmed that the commentary should state that these Best Practices were not intended to engage on regulatory issues, so as to clarify the Working Group's position on this topical issue. She also noted that inspiration for recommendation 4 in general could be sought from the UNIDROIT's Digital Assets and Private Law project.

138. *The Reporter* tabled several further issues for discussion. First, she queried whether the cooperation of third parties is subsidiary to cooperation by the debtor, i.e., whether recommendation 4 should provide that information can be sought from third parties only where efforts to seek the same information from the debtor has failed. Several experts disagreed with this approach, suggesting there should be no strict rule. The creditor should be free to choose from whom to seek

information. It was noted that jurisdictions which currently allow for information to be sought from third parties do not provide for such rule. It was also observed that courts would be able to take into account whether an attempt to seek disclosure against the debtor had been made under the principle of proportionality (recommendation 4(4)).

139. Second, *the Reporter* queried whether a judicial order should be required in order to seek third party cooperation. Various experts suggested that there should be no general requirement for judicial orders, and that such an order would be required, as per the general recommendations in Document 3, only where a search or other infringements of the third party's privacy was contemplated. However, another expert noted that the situation in practice may be more nuanced. For example, whilst the production of standard-form documents may be straightforward and could be easily done without judicial involvement, the position may be different when the party should provide an account of events by way of formal deposition. It was further suggested that a distinction could be drawn between the case where a creditor has grounds to believe that certain (digital) assets of a debtor are held by a third party but requires further information to confirm whether they are available for execution, and where a creditor is simply fishing for information as to the debtor's assets. *The Reporter* finally noted that, insofar as third parties were not cooperative, a court order would ultimately be needed to force compliance.

140. *The Reporter* made a follow-up inquiry into whether the recommendation should provide guidance as to the degree of specificity of the judicial order. It was strongly suggested not to endorse "machine gun attachments", i.e., where enforcement orders are distributed to all known third parties in the hope of identifying accounts held by the debtor. It was also noted that this issue was addressed more generally in Document 3.

141. Third, *the Reporter* invited the Working Group's views on whether to retain, and if so, how to improve, recommendation 4(3), on courts ordering foreign third parties to provide information. Ultimately, the Working Group decided to retain recommendation 4(3). One expert noted that the practical effectiveness of such orders may be enhanced due to recent developments such as the HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Another expert noted that despite the well-known concerns as to the effectiveness of such orders, courts routinely make them, and they may be complied with voluntarily, at least in practice, or have other practical utility.

142. *The Reporter* then presented recommendation 5, concerning search measures for access to information on digital assets. She explained that searching for information on digital assets required primarily electronic access (e.g., passwords, account information, seed phrases for cryptocurrency wallets), regardless of whether there was also a physical dimension involved (e.g., seizing an actual computer or hard drive). *The Reporter* also highlighted the importance of recommendation 5(2), which again emphasised the importance of proportionality and adequateness of search measures, and in particular introduced the need for a judicial order. One expert inquired if a debtor can agree *ex ante* with the custodian to allow a third party (a creditor), in the event of default, to conduct a search or to make inquiries with the wallet custodian where the debtor keeps its digital assets. *The Secretary-General* observed that there was no reason why *ex ante* consent should not be given effect. Insofar as there was inconsistency with the position in Document 3, however, this should be harmonised. *The Chair* noted that this was an issue which may require further reconsideration by *the Reporters of Documents 3 and 6*.

143. *The Reporter* further noted that there was a special dimension to search orders concerning digital assets. The provision of information concerning the asset may necessarily include the means of obtaining control over the asset. For example, in the case of a cold wallet, the only way for a debtor to provide verifiable information concerning the cryptocurrency held in the wallet was to provide a creditor with the private key thereto. However, once the creditor was in possession of the private keys, he obtained control over the assets. Therefore, consideration of a search order in

respect of such assets could require simultaneous consideration of the requirements for a seizure order (recommendation 6). Other experts noted, however, that the inability to dissociate information from possession is not truly unique to digital assets (e.g., it could occur in the case of a private safe in the possession of the debtor opened to verify its content, which act however implies the possibility to practically seize such content). This situation, however, appeared to occur more frequently, with greater speed, and in a less controllable and usually automated manner when digital assets were involved. The Working Group agreed that this issue merited discussion in the commentary.

144. *The Reporter* then introduced recommendation 6, on the duty of the debtor to cooperate for the seizure and transfer of digital assets. *The Reporter* inquired as to whether more elaboration was required regarding the phrase “effective seizure and transfer” in recommendation 6(3). She noted that, because digital assets could be easily accessed digitally, it may not be sufficient for the enforcement organ to have access to the asset, but the digital asset was to be removed from the control of the debtor, for example where an enforcement organ transfers a cryptocurrency from the debtor’s cold wallet to the enforcement organ’s own wallet. One expert suggested that the underpinning principle was simple: the seizure has to be practically effective, bearing in mind the attributes and characteristics of digital assets. It was noted that *the Reporter’s* point could be included in the commentary. Another expert noted that, for clarity, it may be better to separate “seizure” from “transfer” in recommendation 6. It was noted that different considerations may apply to each situation.

145. *The Reporter* then proceeded to discuss whether to allow seizure and transfer of the digital assets directly to the creditor in satisfaction of the debtor’s obligation. *The Reporter* explained that the proposal was related to recommendation 9, which proposed such direct transfer as a solution to the volatility of the value of digital assets. In this regard, one expert noted that, under usual enforcement procedures, the digital asset would first be transferred to the enforcement organ before onward transfer (pursuant to court order) to the creditor. The enforcement organ would still be in control of the digital asset for the interim period and be exposed to potential liability due to volatility. A direct transfer would avoid this difficulty. Several experts, however, expressed concern that a direct transfer may create other difficulties, for example in relation to third party interests on the digital assets. Other experts reiterated the point that volatility was not unique to digital assets. *The Chair* suggested that the intended direct transfer could be achieved by using the ordinary mechanisms of enforcement, i.e., by court order.

146. Summing up the discussion, *the Chair* noted the many insightful comments which would be considered and, be it the case, incorporated into future drafts of Document 6. The need to further coordinate this document with the general recommendations on enforcement was also acknowledged.

Item 5 Presentation of draft best practices on online auctions (by Mr Massimiliano Blasone, international expert in the Cyber-Justice working group developing Guidelines for judicial e-auctions in Council of Europe) (in connection with Study LXXVIB – W.G.6 – Doc. 5)

147. *The Chair* introduced Mr. Massimiliano Blasone and thanked him for agreeing to act as a special reporter for the Working Group session.

148. *The Special Reporter* gave a presentation on the draft Guidelines for judicial e-auctions, which had been developed for the Cyber-Justice working group for the Council of Europe (the detailed presentation is attached to this Report as [Annexe 3](#)). He explained that the draft Guidelines had been based on an extensive comparative study of the e-auction standards currently in force in all 46 Council of Europe States, and that they aimed at promoting a set of common standards (drawn from best

practices identified in the study) without attempting to harmonise the practice across different States. He further explained the methodology of the study.

149. *The Special Reporter* noted that the study had highlighted three main risk areas in the continued promotion and use of judicial e-auctions. This included firstly, general difficulties in accessing the auction by e-bidders; secondly, specific difficulties in accessing the auction on the part of foreign bidders (e.g., local tax numbers or social security numbers as a requirement to participate); and thirdly, the use of artificial intelligence in the auction process.

150. *The Special Reporter* identified areas of good e-auction practices where the forthcoming instrument would give specific guidance. The relevant areas included the nature of the platform, the mode of auction management, the advertising and bidding process, the protection of debtor's rights, and the relationship between the auctioneer and the successful bidder. Providing further detail about specific best practices, *the Special Reporter* also highlighted that, for example, the implementation of maps and virtual tours concerning the asset to be sold facilitated access to the platform for those with disabilities and special needs. Another area where a best practice could be implemented concerned the creation of a clear legal framework for the automatic transfer of the property to be auctioned to the successful bidder. *The Special Reporter* concluded his presentation by explaining that the upcoming study showed that e-auction systems required attention in three dimensions: first, the governance dimension; second, the operational aspect of the auction platform; and third, the organisational aspects of the e-auction system as a whole.

151. *The Chair* invited comments and questions from the Working Group.

152. In response to a question as to when the Guidelines would be published, *the Special Reporter* explained that the expected approval date was June 2023, and that it was customary for the Council of Europe to publish these instruments on its website once they had been approved.

153. An expert inquired as to the extent to which the Guidelines would go beyond existing practices. *The Special Reporter* explained that the Guidelines were based on existing good practices without suggesting any further reforms or harmonisation of rules. The Guidelines were intended to be very soft law and a first step on the path to further development of online auction practices. They were not to be seen as a roadmap for legislative reform such as a legislative guide.

154. One expert asked if the Guidelines included any analysis on the costs associated with sales by auction, especially in countries where enforcement costs are very high. *The Special Reporter* noted that no specific study on comparative costs had been undertaken, but that a small fee on bidders and creditors would help to manage the auction platform's costs, as was the practice in different countries.

155. Further, a question was raised as to whether the study would make any recommendations regarding the location of the platform and jurisdictional issues. *The Special Reporter* explained that States generally have a national authority that organises the auctions, but that delegation to private bodies (e.g., the chambers of a judicial officer) was also possible. He added that the European Union has been taking the first steps towards the creation of a unified, pan-EU auction platform.

156. An expert inquired as to whether the Guidelines addressed the use of artificial intelligence in e-auctions. *The Special Reporter* answered that at a general level, it was agreed that artificial intelligence could improve efficiency. However, he noted that the use of artificial intelligence should be limited and controlled by a human judicial officer to ensure adequate protection of all parties' rights.

157. Finally, *the Special Reporter* was asked whether the Council of Europe's study had found any significant differences in efficiency between States which used a state-based auction platform and

those which utilised private platforms. *The Special Reporter* answered that no significant difference in efficiency had been found. Furthermore, he explained that, in practice, even private platforms were usually under effective control and oversight of public bodies, and that there was no clear “better” option.

158. *The Chair* thanked *the Special Reporter* for his presentation and noted that the Working Group awaited the publication and adoption of the finalised Guidelines. *The Deputy Secretary-General* also noted that the main issues raised by *the Special Reporter* were of great interest and importance to the Best Practices and, generally speaking, appeared to be in line with the interim conclusions reached by the Working Group in the discussion documents prepared for the fourth and the fifth Working Group sessions. While the purpose, scope and style of the Best Practices were different than those of the Guidelines, and there was agreement within the Working Group that the recommendations on this issue should not be too detailed, there was much room for cross-referencing the work of the Council of Europe and for future collaboration between the Working Group and *the Special Reporter*.

Item 6 Organisation of future work and discussion on way forward

159. *The Chair* highlighted that the meeting of the Governing Council would be held from 10 to 12 May 2023 and noted that work would need to be done shortly in order to revise the documents in light of the discussion at this session of the Working Group in time for presentation of a meaningful progress Report to the Governing Council.

160. *The Deputy Secretary-General* agreed with the observation that work would need to continue immediately after the sixth session, in preparation both for the Governing Council, and for the seventh session of the Working Group, which would be held from 29 November to 1 December 2023. It was agreed that, after the Reporters and/or Drafting Committee had updated their respective documents, and a Report of the session had been prepared by the Secretariat, intersessional meetings would continue to be organised and held within and across the different subgroups to complete the drafts and to address open issues. The Drafting Committee, moreover, would continue its revisions of the texts on which agreement on the policy had been reached. With particular regard to the Governing Council session, it was agreed by the Working Group that the Drafting Committee would select examples of recommendations and commentary, to be submitted to the Council on a confidential basis with the purpose of exemplifying how the project was proceeding and how the Best Practices would look like.

161. In closing, *the Deputy Secretary-General*, on behalf of the Secretariat, once again thanked the Working Group and *the Chair* for their continued efforts and contribution to the progress of the project. She expressed her gratefulness to the members of the Drafting Committee and to members of Subgroup 2 who had participated, and would participate, in additional meetings around the Working Group session. She also invited all participants to send to the Secretariat any further written comments or observations on any of the shared documents in a timely manner.

Items 7 and 8 Any other business; Closing of the session

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

ANNEXE 1**AGENDA**

1. Opening of the session and welcome by the Chair of the Working Group and the Secretary-General
2. Adoption of the agenda and organisation of the session
3. Update on intersessional work and status of the project (Study LXXVIB – W.G.6 – Doc. 2)
4. Consideration of work in progress:
 - (a) Documents revised by the Drafting Committee (Doc. 4, Annexes 1 and 2)
 - (b) Draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.6 – Doc. 3)
 - (c) Best practices regarding enforcement of security rights: Collated documents (Study LXXVIB – W.G.6 – Doc. 4); Draft best practices regarding special expedited procedure (Study LXXVIB – W.G.6 – Doc. 4, Annexe 3)
 - (d) Draft best practices and commentary regarding enforcement on digital assets (Study LXXVIB – W.G.6 – Doc. 6)
5. Presentation of draft best practices on online auctions (by Mr Massimiliano Blasone, international expert in the Cyber-Justice working group developing Guidelines for judicial e-auctions in Council of Europe) (Study LXXVIB – W.G.6 – Doc. 5)
6. Organisation of future work and discussion on way forward
7. Any other business
8. Closing of the session

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

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Ms Valeria CONFORTINI	Professor of Law Università degli Studi di Napoli "L'Orientale" (Italy)
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Mr HE Qisheng (<i>remotely</i>)	Professor of International Law Beijing University (China) <i>Beijing</i>
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Visiting Scholar



1

AIMS OF THE GUIDELINES

- promote e-auctions as an efficient enforcement method
- provide concrete guidance to identify the legal principles and technical requirements to organise them
 - efficient
 - capable of improving the quality of justice
 - compatible with the European Convention of Human Rights
- provide specific examples highlighting good practices

2



- a practice that implements the "right" to effective justice, in compliance with the European Convention on Human Rights
- and that protects the rights of the parties (creditors and debtors) as well as of the bidders and the winner

WHAT IS A GOOD PRACTICE IN THE FIELD OF ONLINE JUDICIAL AUCTIONS?



3

RESEARCH OF GOOD PRACTICES ACROSS ALL EUROPE

- all 46 CoE member States were analysed
- there are more similarities than differences
- in each country, at least one good practice suitable to be an element of the Guidelines was identified



4

HOW WAS THE RESEARCH DONE?

The analysis of each of the 26 CoE member States with electronic judicial auctions follows the same pattern:

- a short summary
- description of the legal framework
- analysis of the platform (or in some cases of multiple platforms) following a same scheme



5

DESCRIPTION OF THE LEGAL FRAMEWORK

- TIME OF INTRODUCTION
- WHAT LAW REGULATES THEM
- FOR WHAT ASSETS THEY WORK
- WHETHER THEY ARE FACULTATIVE OR MANDATORY
- SUMMARY OF THE BIDDING PROCESS AND AUCTION MANAGEMENT



6

ANALYSIS SCHEME OF THE PLATFORMS

- INDICATION OF THE LINK TO THE WEBSITES
- TYPOLOGY OF THE PLATFORMS: PUBLIC OR PRIVATE
- WHO MANAGES THEM
- SCOPE: NATIONAL OR INTERNATIONAL
- LANGUAGE
- ACCESSIBILITY
- PRIVACY OF THE BIDDER: YES OR NO
- TYPOLOGY OF THE E-AUCTION
- MAP OF AUCTIONS: YES OR NO

7

NOT ONLY A COMPARATIVE RESEARCH

Selection
of good practices
around Europe

Potential
benefits
and risks
of e-auctions

Check list for
quality control
and efficient
systems



8

RISKS OF E-AUCTIONS

Access limits for e-bidders

difficult digital identification on the platform

complicated filling in the form with the bid

lack of assistance in submitting the bid

risk of unstable connection during the e-auction

lack of facilities in case of physical disabilities

limits by law on registration of foreign bidders

9

RISKS OF E-AUCTIONS

Limits by law on registration on the platform for foreign bidders

native language only (AM, AT, CZ, EN + WLS, FI, FR, DE, GE, HU, IT, LT, LV, LU, NL, PL, PT, RS, ES, SE, GH, TR, UA)

proxy residence (Greece) or a domicile (Italy, Portugal) in the place of enforcement

national bank account (Finland, Portugal)

local tax identification number (Italy, Portugal, Ukraine)

local social security number (Armenia, Sweden)

need for a national ID number (Finland, Georgia, Türkiye)

no access to users connected from abroad (Portugal)

10

RISKS OF E-AUCTIONS

**Ethic on the use
of artificial intelligence
in justice systems**

the entire process could be managed by a software

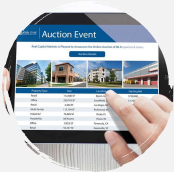
progressive reduction of human control

lack of a guarantor of the respect of the right of the parties



11

TOPICS OF GOOD PRACTICES



Platforms

- CONTENT
- ACCESSIBILITY
- REGISTRATION



Advertising

- MODALITY
- TIME
- PRIVACY



Bidding

- CONTROL
- MODALITY
- TIME



Auction management

- PROCEDURE
- AUCTIONEERS
- ASSISTENCE



Relationship with debtor

- COLLABORATION
- DATA PROTECTION
- RESPECT OF RIGHTS



Relationship with winner

- TRANSFER PROPERTY
- INTEROPERABILITY
- COSTS




12

This slide features a light gray background. On the left, there is a vertical stack of seven blue rounded rectangular buttons, each containing white text. To the right of these buttons, the title 'GOOD PRACTICES ON E-AUCTIONS' is written in a bold, blue, sans-serif font. In the bottom right corner, there is a small logo consisting of a stylized 'C' inside a circle, followed by the word 'ontosio'.

- only one platform per State
- platform reports national rules
- facilitated accessibility
- registration with eIDAS standards
- use of many languages
- map of assets, notifications and virtual tours
- helpdesk service

**GOOD
PRACTICES
ON E-AUCTIONS**




13

This slide features a light gray background. On the left, there is a vertical stack of seven blue rounded rectangular buttons, each containing white text. To the right of these buttons, the title 'GOOD PRACTICES ON E-AUCTIONS' is written in a bold, blue, sans-serif font. In the bottom right corner, there is a small logo consisting of a stylized 'C' inside a circle, followed by the word 'ontosio'.

- promotion of collaboration with debtor
- debtor's data protections
- promote the professionalism of auctioneers
- national database for auctions of real estate
- reduction of paper advertising
- hybrid form of auction management
- automatic transfer of the property

**GOOD
PRACTICES
ON E-AUCTIONS**



14

identification of the bidder before starting

simultaneous programming of auctions

time extension of the auction

automatic bidding system

saving the second highest bidder

small participant fee

promote the participation in the auctions

GOOD PRACTICES ON E-AUCTIONS



15

CHECK LIST OF SUGGESTED MEASURES



**Governance and
development
vectors**



**Operative aspects
of the platforms**



**Organisational
aspects of e-auctions**



16

