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

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REPORT

1. The seventh session of the Working Group established to prepare Best Practices for Effective Enforcement (hereinafter “the Working Group”) was held in person in Rome and remotely via Zoom from 29 November through 1 December 2023. The Working Group was attended by 36 participants, including members, observers from intergovernmental and other international and academic organisations, independent observers, and members of the UNIDROIT Secretariat. A full list of participants is available in [Annexe II](#).

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

2. *The Chair* opened the session and welcomed all participants. She drew attention to the addition of two new members of the Working Group, who had joined the project since the sixth session in March 2023: Professor Liu Junbo of China University of Political Science and Law and Professor John Sorabji of University College London. She expressed gratitude to all participants and contributors to the project, thanking them for all the progress carried out thus far and encouraging them to continue their hard work through the completion of the instrument.

Item 2 Adoption of the agenda and organisation of the session

3. *The Chair* explained that since the Drafting Committee had been in session the previous two days, revised versions of the draft best practices on enforcement by way of authority (W.G.7 – Doc. 3) and of the draft best practices on the secured creditor’s right to realise on collateral after default (W.G.7 – Doc. 4 – [Annexe II](#)) were being distributed, and that she would take care to explain whether reference was being made to the previously-distributed or updated drafts accordingly. The proposed agenda (available in [Annexe I](#)) was unanimously adopted.

4. *The Deputy Secretary-General* further introduced the session’s working documents, drawing attention to the most recent changes and circulated drafts.

Item 3 Update on intersessional work and status of the project (Study LXXVIB – W.G.7 – Doc. 2)

5. *The Deputy Secretary-General* referred to Document 2 and briefly summarised all the intersessional work carried out by the Working Group and the Secretariat. First, she highlighted that confidential excerpts from the project had been shared with the UNIDROIT Governing Council in May 2023 and that the Governing Council looked forward to receiving a fuller draft of the project at its next meeting in May 2024. Next, she underlined the UNIDROIT Secretariat’s cooperation with the European Bank for Reconstruction and Development (EBRD) in various fields and particularly in the field of enforcement, notably including a seminar held at the headquarters of the EBRD in London in

September 2023, and she thanked the EBRD for its helpful and practical input to the benefit of the project.

Item 4 Consideration of work in progress:

**(a) Revised draft best practices regarding enforcement by way of authority
(Study LXXVIB – W.G.7 – Doc. 3)**

6. *The Chair* introduced revised Document 3 which had been drafted by Subgroup 1 with the added input of Mr John Sorabji. The current draft of Document 3 encompassed completed Sections III on enforceable instruments, IV on information regarding the debtor's assets, and V on digital registration, while Subgroup 1 was continuing to develop the remaining sections. She recognised that most provisions had been substantially discussed in previous sessions and that there was general agreement on the policy they expressed, with a limited number of open points for further discussion. She clarified that the Document 3 rev. reflected the feedback from the Drafting Committee over the prior two days and cautioned that the commentary in the newly revised sections had not yet been adapted to reflect the changes in the black-letter draft recommendations.

Section III – Enforceable instruments

Recommendation 1 – The significance and regulation of enforceable instruments

7. With *the Chair* and *the Reporter of Subgroup 1* having explained that the changes to Recommendation 1 were merely drafting adjustments to improve clarity, *the Working Group accepted the Drafting Committee's recent redrafting of Recommendation 1.*

Recommendation 2 – Types of enforceable instruments

8. *The Reporter of Subgroup 1* explained that significant changes had been made to paragraph (II) to reflect examples of the various types of enforceable titles foreseen by different legal cultures. He pointed out that the comments to Recommendation 2 now better reflected the nature of notarial documents and their procedural implications.

9. In the ensuing discussion, some participants remarked that paragraph (II), while containing references to court-generated documents and notarial acts, was missing a reference to "private documents", which were mentioned in earlier drafts. A worry was expressed that this would imply an exclusion of uncontested private documents which are recognised in several legal systems as enforceable titles without court (or notarial) involvement. It was noted that Recommendation 1 of Section III, para. II stated that "[t]ypes of admissible enforceable instruments should be specified in reasonable detail by law", and that the following list of types of enforceable instruments could be seen as non-exhaustive, provided that the legislator sufficiently regulated the formalities for constituting them and their effects. It was further noted that for such instruments in some legal systems there was a limitation on the defendant's ability to present counterevidence, which discouraged unfounded opposition.

10. A proposal was made to transform current paragraph (III) into a new subparagraph (iv) within paragraph (II), to address such instruments. In order to address the concern that such a category be too wide, it was suggested that the best practices could describe a narrowly defined subset of private documents which provided a sufficient level of assurance, as opposed to private documents as an open-ended category. This would be in line with paragraph (II) of Recommendation 1, which stated, in reference to the types of admissible enforceable instruments, that "[s]ufficient guarantees of their authenticity and reliability should be required."

11. It was further asked whether the “public authority” issuing the enforceable instrument (as stated in Recommendation 3) must necessarily be either a court or a notary public or whether other authorities authorised by a State could be included. Another question was whether the policy underlying the Best Practices was to encourage use of enforcement through courts to the maximum extent, despite the trend in several jurisdictions in moving away from judicial enforcement to unburden limited court resources where possible.

12. *The Reporter of Subgroup 1* responded that this matter had been thoroughly discussed in earlier sessions, and this concern had been addressed by subparagraph (iii) of paragraph (II), which gave the example of “execution notices for monetary enforcement where a debtor did not take steps to challenge enforcement in light of prior judicial notice warning them of impending enforcement.” He explained that private documents were not excluded, provided that there was no opposition on the part of the debtor from the start. Moreover, a private document could be covered by subparagraph (ii) of paragraph (II), which referred to “enforceable provisional judgments that are *based on documentary evidence only* and which postpone evidence-taking by other means to later ancillary proceedings” [emphasis added]. He further referred to the European Court of Justice’s position in relation to directly enforceable documents in some EU countries.

13. Another participant, pointing to Recommendation 5 in Section III, referenced earlier discussions according to which allowing private documents to be registered would result in too many registrations for a system to manage.

14. *The Chair* proposed that the concerns expressed might be addressed by adding further explanations to the commentary. She proposed underscoring in the commentary that Recommendation 2 did not contain an exhaustive list but rather represented where consensus had been reached, mentioning the reasoning behind the Working Group’s choice not to expressly include all existing enforceable instruments in the black-letter best practice (including practical considerations such as avoiding overburdening the registration system).

15. While some participants continued to express a preference for addressing this issue in the black-letter recommendations, others suggested that the comments could clarify that the failure to include other possible forms of enforceable instruments in the Best Practices did not mean that they did not – or could not – exist in some legal systems but they would not be elevated to the status of recommended best practices. *The Reporter* acknowledged that more information could be inserted in the commentary regarding existing practices.

16. *The Chair concluded by proposing that this issue be finalised in the intersessional period, considering the points raised in the discussion at the Working Group and the need to better clarify the examples provided in the Recommendation.*

17. As to the potential overlap with Part 2 on enforcement of security rights, *the Chair* advised caution in drawing analogies with the issue of private enforcement instruments covered in Part 1 on Enforcement by way of authority, since Part 2 focused on extra-judicial enforcement. She further noted that the Best Practices did not cover all situations, for example they did not cover forms of extra-judicial enforcement of unsecured rights. *The Chair* recommended discussing the interaction with the provisions on the enforcement of security rights when discussing Document 4.

Recommendation 3 – Requirements concerning the content of enforceable instruments and of their actual enforceability.

18. It was flagged that Recommendation 3 paragraph (II)’s reference to “the public authority that issues the enforceable instrument” would need to be clarified according to what would be proposed for Recommendation 2.

Recommendation 4 – Digitisation of enforceable instruments and of documentation concerning their actual enforceability

19. *The Reporter of Subgroup 1* explained that paragraph (I) had been redrafted to reflect earlier feedback that digitisation of enforceable instruments should take into account the context of a greater system of digitised court records. *The Chair* noted that both paragraph (I) and paragraph (III) expanded on that idea. She clarified that the Drafting Committee had also modified the commentary to Recommendation 4 to avoid speculative references to future developments. *The Reporter of Subgroup 1* added that the Drafting Committee had eliminated a provision on challenges to registration, which was included in the challenges to overall enforcement. *The Chair* confirmed with the Working Group that there were no comments regarding the content or form of Recommendation 4.

Recommendation 5 – Registration procedure for enforceable instruments where enforcement is to be effected.

20. *The Reporter of Subgroup 1* presented Recommendation 5 as an anticipation of what was established in greater detail in Section V with further commentary. *The Chair* summarised the operative point as being that it was incumbent upon the creditor to initiate the registration procedure.

21. In the ensuing discussion, the Working Group expressed appreciation that the revised text had integrated many of the points raised in earlier sessions. One participant noted that registering all enforceable titles would be a novelty for many States, especially as a mandatory precondition for starting enforcement proceedings, and for this reason, consultations with practitioners would be useful to better anticipate the practical impact of such provisions and maximise the accuracy and the helpfulness of the future instrument. On the other hand, most countries had already established registries of seizures or attachments and Recommendation 3 envisaged the possibility of linking various types of such registries to the registry of enforceable instruments in order to avoid duplicating administrative work. *The Reporter of Subgroup 1* acknowledged that the best practices did not presume that States could follow all recommendations all at once, but rather that implementation of such recommendations would proceed gradually and that, in any case, the best practices ought not to be overly rigid.

22. There was further discussion on the correct placement of para. 3 of the commentary to Recommendation 5, which *the Chair* deferred to the Drafting Committee.

23. Finally, clarifications were sought on who would be responsible for digitising paper-based enforceable instruments, and whether a reference to signature or certification of such digitisation should be added. It was noted that when documents were directly issued in electronic format, which is a growing trend for courts or other authorities, such documents could be automatically linked with the registry of enforceable instruments.

Recommendation 6 – Challenges to commencement of enforcement or ongoing enforcement proceedings

24. *The Reporter of Subgroup 1* explained that the Drafting Committee had introduced some changes to clarify that depending on the timing of the challenges, different rules would apply.

25. In the following discussion it was underlined that many countries had a sizeable backlog of enforcement cases because of misuse of the legal remedies against them which had the effect to postpone proceedings. From the perspective of effective enforcement, automatic stays in case of challenges would be a perverse incentive for debtors to raise trifling issues. *The Reporter* explained that Recommendation 6 would be completed by a special chapter on means of review which would be later developed and specific rules on provisional measures in order to strike the right policy

balance in such cases. It was suggested to add a cross-reference to such provisions in Recommendation 6.

26. *The Chair* took note of the participants' comments regarding Recommendation 6 and deferred the matter to the Drafting Committee, which would consider whether adjustments of the language used in the Recommendation and in the comments (particularly para. 4) were indicated.

Section IV – Information regarding the debtor's assets

Recommendation 1 – The importance of effective means to obtain information

27. It was clarified that the right to refuse to provide information included in para. (6) only existed when already recognised by law (e.g., provisions against self-incrimination). *The Chair* noted that should Working Group participants have comments on the clarity of the provision, they were kindly asked to send them to the UNIDROIT Secretariat which would forward them to the Drafting Committee.

Recommendation 2 – Commencement of disclosure

28. It was queried whether commencement of disclosure upon registration of the enforcement instrument was a best practice, as some States allowed for a later commencement date including a period for voluntary fulfilment of the obligation. *The Reporter of Subgroup 1* responded that the possibility of beginning the process from an earlier time should not be excluded, but would depend on the circumstances, and referred to the limit of proportionality in para. 2 of the commentary. The provision was deferred to the Drafting Committee.

Recommendation 3 – Asset searches

29. In discussing this provision, a concern was reiterated that this Recommendation was overly restrictive of asset searches; a creditor should not have to provide evidence of the proportionality of its request, but proportionality should rather be an exceptional defence for the debtor. *The Reporter of Subgroup 1* clarified that resort to more intrusive search measures should only be allowed where "normal" search measures were unsuccessful (see para. 1). Returning to the question of proportionality, *the Chair* pointed out that the burden of proof was not clear. It was decided that the Drafting Committee should reconsider the Recommendation to clarify the questions of the relationship between "ordinary" and "intrusive" search measures and the burden of proof.

Recommendation 4 – Sanctions for non-cooperation

30. Two situations laid out in Recommendation 4 whereby monetary sanctions would be paid to the creditor were identified, namely where the debtor refused to cooperate (first sentence of Recommendation 4) and where the debtor provided false information (fourth sentence of Recommendation 4). In discussing this recommendation, disagreement was expressed by some participants on the fact that the provision of false information would result in merely compensatory damages, while refusal to cooperate could potentially result in damages beyond compensation ("includ[ing] fines or other penalties, which should be paid to the creditor (*astreinte*)"). It was further noted that many legal cultures were hostile to penalties being paid to the opposing party, and that a difference might have to be drawn between "fines" and "penalties". To this, *the Reporter of Subgroup 1* replied that wilful falsehood could only give rise to ex-post damages, and that countries with *astreinte* believed that having to pay the penalty to the creditor operated as a stronger coercion on the debtor.

31. *The Chair* concluded that the Drafting Committee would have to keep all these comments and considerations in mind for Recommendation 4.

32. The Working Group discussed the benefits of those enforcement systems that incentivised debtor cooperation through discounts (e.g., Belgium, Thailand). It was explained that such considerations would impact on how an enforcement fee system was designed – often in the form of avoiding a maximum fee in cases of voluntary fulfilment. The Working Group agreed that this option should be flagged, either adding a statement to the effect that there might be financial advantages for debtors who were completely cooperative, or that the cost and fee structure should be designed to promote compliance. It was further suggested that a section on costs be added at the end of the future instrument.

Section V – Digital registration

Recommendation 1 – Digital registers or registration systems

33. *The Reporter of Subgroup 1* remarked that there had been debate over whether to split the seven paragraphs (I-VII) of Recommendation 1 into various separate recommendations, but it had been decided to keep them together because of the high level of interdependence among them. He noted that data would be generated by public institutions and there should therefore be a higher level of protection in terms of access. As a result of a discussion within the Working Group, *the Chair* proposed to add to the commentary that a) where a case management system for enforcement was already in place, a State might consider adding the functionality of a register of enforceable instruments to that system, and b) States should also give consideration to the interconnectedness of various registers, as well as the different sources of enforceable instruments (in any given jurisdiction).

34. It was further pointed out that Recommendation 1 should be aligned to Recommendation 5 of Section III which had been amended to refer not to *all* enforceable instruments but rather to enforceable instruments where enforcement was sought. In this respect, *the Reporter* draw the Working Group attention to Section V's Recommendation 2, paragraph (I).

35. The issue of access to the data was also discussed, as the provision did not expressly mention agents of the court or enforcement authorities. *The Reporter* noted that the Recommendation included enforcement organs but laid out a slightly narrower access for them. In response to the question of ownership of the register's data, *the Reporter* stated it was doubtlessly owned by the State, which could authorise access thereto by private enforcement organs, which in turn would have to follow the same rules of conduct as public enforcement organs. It was recognised that the commentary to the Recommendation should be revised in relation to the storage of the data of the persons using the register.

36. *The Chair* concluded that the Drafting Committee had taken note of the various considerations and would revise the draft provisions accordingly.

Recommendation 2 – Registration of enforceable instruments

37. It was suggested that para (I)'s language could be misleading to readers, and that words like "prior to enforcement" or "as a condition to enforcement" should be added to clarify that these enforceable instruments would only enter the register for the purpose of enforcement.

38. The Working Group agreed with the policy proposal in the document not to require that a separate warning be sent to the debtor regarding each individual enforcement measure, but to prescribe a general notice of registration of the enforcement instrument which would clearly indicate that no further warning of pending individual, concrete enforcement measures would be given. It was argued, however, that certain measures might require a specific warning (e.g., measures *in personam*).

39. As to the preconditions for enforcement, it was clarified that such preconditions may vary depending on the requirements of the legal system (as explained in paragraphs 2 and 3 of the commentary to Recommendation 3 of Section III). For instance, writs of execution or certification of enforceability might be required as “necessary additional documents”, either forming part of the original enforceable instrument, or as separate documents external to the enforceable instrument itself.

40. In relation to the level of scrutiny of the register over the external preconditions for enforcement, *the Reporter* explained there was no margin for decision-making on the part of the register in the recording of the satisfaction of such preconditions. The register would however check the accuracy of the application, and the best practices referred to a first review carried out by means of artificial intelligence to weed out mistakes, which would then trigger a magistrate’s review. In this regard, however, it was suggested that the black letter recommendation should specify the level of the rigour of the check, while the role of technology would be mentioned in the comments. *The Chair* stated that the Drafting Committee would reconsider Recommendation 2 in light of this proposal and more generally to ensure clarity. Other drafting suggestions were recorded by the Chair (alignment of terminology).

Recommendation 3 – Registering disclosure

41. In discussing this provision, it was queried whether Recommendations 2, 3, and 4 of Section V, which used a slightly different terminology to refer to the register, were meant to refer to one integrated register or to three separate registers. *The Chair* confirmed that the references to registers in Recommendations 2, 3, and 4 were to one and the same, while the register mentioned in Recommendation 5 was a different concept.

42. As the remaining draft recommendations of Section V were not discussed by the Working Group, *the Chair* asked the Working Group to send any comments in writing, which would be then considered intersessionally by the drafters and the Drafting Committee.

(b) Best practices regarding enforcement of security rights (Study LXXVIB – W.G.6 – Doc. 4 rev.)

43. *The Reporter of Subgroup 2* introduced Document 4, which was composed of five separate annexes, and proposed presently focusing on the two annexes containing the highest proportion of new provisions, namely Annexe III, on enforcement of security rights over rights to receive payment and credit instruments, and Annexe V, on enforcement of security rights over immovables.

Annexe V – Recommended best practices for the enforcement of security rights over [immovables]

44. *The Reporter* introduced Annexe V of Document 4, explaining that even though the general provisions on enforcement of security rights were based on the UNCITRAL texts (such as the UNCITRAL Model Law on Secured Transactions) designed for movable collateral, many of those principles could also be *applicable* to immovables with slight variation. He referenced the difference between the lien and title theories of property and underlined that the draft provisions in Annexe V were designed to apply regardless of how security rights were conceptualised in various jurisdictions (“functional approach”).

45. It was *agreed* that the term “real estate” should be substituted with “immovables”.

Recommendation 1 – Taking of possession post-default

46. *The Reporter* pointed out that the first paragraph differed from its equivalent in the part on movable collateral since it added to the remedy of direct repossession the option to make recourse to receivership. The latter made more sense in a real estate context, especially when an immovable was leased to third parties; it may also be useful when the creditor believed the grantor would not voluntarily deliver possession of the property. He stated that the second paragraph reiterated the analogous rule for movable collateral, while the third paragraph might fall under the umbrella of possessory actions more than enforcement actions. He noted that the application of the fourth paragraph would vary depending on substantive law.

47. In relation to the second paragraph, it was clarified that Annexe V's approach mirrored Part II's general approach to enforcement of security interests in general, i.e., providing options for extrajudicial enforcement while also acknowledging the possibility of obtaining a judgment should the grantor refuse to grant possession to the creditor, with the Working Group not yet having settled on an approach to the latter (the Recommendation suggested to proceed by way of a special expedited procedure). In the ensuing discussion, it was argued that transfer or creation of rights on immovables required formalities in many legal systems (e.g., notarial deeds in civil law jurisdictions) that would amount to an enforceable instrument, on the basis of which enforcement would be sought. It was also posited that many countries would be reluctant to forego the necessity of enforceable titles vis-à-vis immovables, and that the draft should be understood as providing guidance to those States which contemplated admitting extra judicial enforcement for security rights over immovables. *The Reporter* replied that questions of formality in the conclusion of the agreement would be determined by substantive law, while the best practices indeed clarified that enforcement over the collateral would be triggered upon default without the necessity of first obtaining a judgment on the secured obligation (which could come later if the grantor refused to grant possession).

48. The Working Group then discussed the current structure of Annexe V and agreed that the structure should be revisited.

49. It was also discussed whether it made sense to integrate treatment of both movables and immovables, since according to *the Reporter* many issues were the same and many references to the section on movables would have to be made in the section on immovables. Ultimately, however, the Working Group agreed to keep the two sections separate, especially because of the strong connection of the section on enforcement of security rights over movables with existing uniform law instruments incorporating international standards, and conversely, because of the lack of such instruments in the area of enforcement of security rights over immovables. It was agreed to insert necessary and reasonable cross-references.

Recommendation 2 – Enforcement post-default and right of redemption

50. *The Reporter* explained that Recommendation 2 listed the enforcement mechanisms after default based on the section on movable collateral and provided an overview of the policy behind each paragraph. It was suggested that Recommendation 2 be subdivided since it encompassed many different concepts.

51. In relation to the comparison with the part on security rights over movable collateral, the following points were noted: 1. The right to cure (para. 7) did not appear in enforcing security rights in movables – therefore it would be important to justify its inclusion here (as well as specify for which categories of real estate it would apply); Para. 8 was parallel to the right of redemption for movables but the mechanics were slightly different than in Annexe II, so therefore explanation was needed if the policy difference was intentional; Para. 14 mentioned the creditor's right to a deficiency, whereas the equivalent provision in the section on movables also discussed the obligation on the creditor to

turn over any surplus [which Annexe V addressed in the commentary]. Further, on paragraph 9 the Working Group suggested that it should be limited to extra-judicial enforcement.

52. In reference to paragraph 12, it was noted that it permitted the creditor and the debtor to agree on the transfer of the immovable “[a]t any time after the execution of the security agreement”, whereas the provisions on movables limited this to after default. Paragraph 12 also envisioned such agreement as solely between the debtor and the creditor, whereas its equivalent in Annexe II recognised that other stakeholders could be implicated (and were therefore given a veto power). *The Reporter* noted that this agreement did not amount to an appropriation in satisfaction but constituted a payment in kind which should be admitted before default. The majority of the Working Group was however contrary to permitting such an agreement prior to default.

53. As to paragraph 10 on valuation, the Working Group acknowledged the importance of such topic and the need to provide some guidance. It was noted, however, that valuation methodologies varied according to the jurisdiction and therefore an excessively detailed guidance would not be recommended. It was also recalled that disputes on valuation were often a means to delay proceedings and they may facilitate collusions. In this regard, it was suggested, referencing a recent national reform, that challenges regarding the value of the immovable should not prevent the creditor from exercising its extra-judicial right of disposal but would be considered ex-post in determining damages. It was also suggested to expressly refer to the “independence” of the appraisal, to enhance the credibility of the process, though the *Reporter* noted that an appraisal based on the agreement between the creditor and debtor could be contemplated. It was resolved that the commentary to paragraph 10 should be reconsidered.

54. Next, the question of whether single-purpose real estate entities (shares in companies with only one (immovable) asset given as security) should be covered by Annexe V was brought up. The Working Group agreed that the existence of such structures should be recognised, without delving into too many details, and that some reference to the need to avoid circumvention of the recommendations on enforcement on immovable should be included.

Recommendation 3 – Relief available to the debtor or grantor, and rights assured to a purchaser

55. Recommendation 3 was presented as a grouping of provisions relating to relief available to the debtor/grantor and posed the general question to the Working Group of what would be sufficient to justify a stay. Considering the feedback received from the Working Group on other provisions, he proposed adding to paragraph 15 a line to the effect that only serious instances of noncompliance should warrant a stay.

56. *The Chair summarised the agreement of the Working Group that Annexe V would be restructured to reflect the Working Group’s feedback.*

Annexe III – Recommended best practices for the enforcement of security rights over rights to receive payment and credit instruments (including issues on automation)

57. *The Reporter* introduced Annexe III, acknowledging that the general structure had been previously discussed by the Working Group as well as the fact that the draft was largely informed by two UNICTRAL instruments, the Convention on the Assignment of Receivables in International Trade and the Model Law on Secured Transactions (MLST). It was explained that the draft had changed substantially since the previous session of the Working Group. The main novelties were found in Recommendation 4 (Disposition of funds deposited in a bank account), Recommendation 5 (Disposition of intermediated securities), and Recommendation 6 (Enforcement with use of automation), the lattermost not yet truly developed as a recommendation.

58. As a general remark, it was noted that in particular for this topic it was difficult to draw the line between substantive law and enforcement law, and that other instruments, such as the MLST and the UNIDROIT Model Law on Factoring (MLF), both considered collection before default within their respective chapters on enforcement.

Recommendation 1 – Realisation on the collateral post-default

59. On Recommendation 1 it was suggested that since the “new” element in respect to Annexe II was direct collection, it might make more sense to separate such provision from the rest of the recommendation.

60. The Working Group further discussed whether this section should extend to situations where the obligation was not an obligation to pay money but to deliver something else, and where what was received on account of a receivable was in non-monetary form. The current draft attempted to address both questions by stating “[i]f payment collected from the obligor is non-monetary...” as opposed to stating whether the obligation originally contemplated such payment. Paragraph 7 of Recommendation 1, containing the secured creditor’s right “to enforce any personal or property right that secures or supports payment of the collateral”, had been introduced as it was a common occurrence in receivables financing. The title of Annexe III had been changed to remove the term “receivable” and instead referred to “rights to receive payment and credit instruments” for the very purpose of avoiding confusion with the term as defined in the MLST. This was also clarified in the introductory note to Annexe III. *The Chair* and *the UNIDROIT Secretariat* recommended not deviating from the MLST’s definition of receivable and approved the current draft’s utilisation of alternative terminology to avoid creating confusion.

Recommendation 2 – Collection of payment before default

61. It was explained that Recommendation 2 differed from the treatment of tangible movables but was essentially aligned with the MLST, discussing the creditor’s possibility of collecting before default, a common situation in receivables financing. The Working Group did not generate feedback regarding Recommendation 2.

Recommendation 3 – Defences of the obligor and of third parties

62. Recommendation 3 was largely consistent with the MLST, with paragraph 13(d) referencing treatment of negotiable instruments. It was noted that paragraph 13(a) provided that a non-assignment provision was invalid as to the secured party but preserved the right of the obligor to sue the grantor for breaching the clause – which was in conformity with the MLST but not to the UNIDROIT Model Law on Factoring (MLF) which made non-assignment provisions invalid and unenforceable for all purposes (without such qualification). *The Chair* stated that the matter called for further reflection.

63. No comments were provided on Recommendation 4 and 5. *The Chair* asked the Working Group to consider Recommendation 6 during the intersessional period.

Annexe II – Secured creditor’s right to realise on collateral after default

64. *The Chair* recalled that this section had been reviewed various times by the Working Group but that there had been a recent reorganisation of certain provisions by the Drafting Committee, to be more in line with a guide on enforcement (as opposed to a comprehensive secured transactions law). *The Reporter* further pointed out that there were new provisions in the commentary which related to online auctions, and asked whether the Working Group might decide to elevate such provisions to the level of a black-letter recommendation.

65. *The Chair* proposed starting the discussion with the two unnumbered recommendations on, respectively, relief for non-compliance and the standard of commercial reasonableness, for which the question was whether to maintain them in the section on disposition of collateral (due to their fundamentality in such regard) or move them to a more general part. One suggestion was to keep a reference to such provisions in this section and to relocate the full provisions in a more general section once the Working Group had a better sense of the overall structure of the future instrument. Another view contended that repetition was generally more acceptable in a best practices guide (as opposed to a model law) with the goal of user-friendliness, and that particularly for the standard of commercial reasonableness, the very informative illustrations contained in the commentary would be more useful in the part on disposition of the collateral.

Recommendation [•] – Relief for non-compliance

66. *The Reporter* warned that the commentary had yet to be synchronised with the black-letter recommendations, as it still reflected two options while the black-letter recommendation had opted to only provide for the solution that any person whose rights were affected by the non-compliance of another person would be entitled to apply for relief. This was generally in line with the drafting of Annexe II, that sought to narrow the range of options, for example by proposing specific time periods (instead of leaving a reference to a “short period”), as such specific recommendations were considered more useful for enforcement. In this regard, some Working Group members noted that while the commentary did refer to the alternative option, a more robust justification of the chosen option would be needed, with reference to the usefulness of such provision to address the potential misbehaviour of secured creditors.

Recommendation [•] – The standard of commercial reasonableness

67. *The Reporter* suggested amending the title of this Recommendation to “General standards of conduct” because this provision was based on article 4 of the MLST, which contained two standards of conduct, commercial reasonableness and the obligation to exercise good faith. Next, he referenced that the commentary included the principle that commercial reasonableness did not necessarily mean obtaining the best price for the collateral. He noted that it was difficult to generate examples since cases were fact dependent.

68. *The Chair* tabled a number of questions for intersessional discussion, namely how this Recommendation would fit with Recommendation 1 of Annexe IV (“The law should provide that rights and obligations concerning the realisation of collateral must be exercised in a commercially reasonable manner”), and whether good faith was a standard applied as between the two parties or more generally to third parties (which could be mentioned in the commentary).

Recommendation 1 – Disposition of collateral

69. *The Reporter* pointed out that a reference to online auctions had been inserted into Recommendation 1 (4) (as well as in the commentary to Recommendation 1). This reference would not conflict with more general best practices on online auctions (as envisaged in Document 5 referencing the recent CEPEJ Guide on Judicial E-Auctions.),¹ because it involved special aspects: for example, using (or not using) an online auction could influence the measure of what was deemed commercially reasonable. The Commentary expanded on the advantages of opting for online auctions and on the factors to consider in evaluating commercial reasonableness (items 1 through 4).

70. In the ensuing discussion it was noted that though online auctions in the context of extra-judicial enforcement of security rights involved special aspects, there should be consistency between

¹ Available at: <https://rm.coe.int/cepej-2023-11-en-guide-on-judicial-e-auctions-1-/1680abb674>.

the commentary in the part on security rights and the part on enforcement by way of authority in relation to online auctions.

Annexe IV – Revised recommended best practices for the variation of the rules governing the realisation of collateral

71. *The Chair* noted that the recommendations of this section had been discussed and revised in multiple occasions by the Working Group and that the main open issue was how best to coordinate them with the structure of the entire part on enforcement of security rights. Working Group's discussion of Annexe IV focused on the more general question of whether a waiver of judicial enforcement by the secured creditor was admissible, and whether the best practices should expressly refer to such matter, providing for appropriate limitations. *The Chair* suggested that this discussion should continue intersessionally including the *Reporter* of Annexe IV of Document 4.

**(c) Revised draft best practices regarding enforcement on digital assets
(Study LXXVIB – W.G. 7 – Doc. 6)**

72. *The Reporter of Subgroup 3* explained that the latest draft of Document 6 had incorporated much of the feedback from the previous session of the Working Group, and that it also contained novel elements that were in need of refinement. In particular, she mentioned that references to case law or specific jurisdictions (useful as a shorthand within the Working Group) would be replaced with neutral illustrations in the next iteration.

73. The Working Group addressed the question of the scope of this section, discussing whether the term "digital assets" should be understood as controllable electronic record, as per the specific definition in the UNIDROIT Principles on Digital Assets and Private Law ("UNIDROIT DAPL Principles"), or should be wider and include the broader category of non-controllable digital assets (or "tokens"). The majority of participants including the *Reporter* of the section opined that the best practices, as they now stood, were tailored to the first category and did not provide much guidance for enforcement over other types of assets such as, for example, databases or data in general. It was suggested that this question might be less relevant than it appeared, since the prevalent point was that the general enforcement framework applied also in the case of digital assets, and this section just tried to provide more details about the additional difficulties involved in such enforcement. It was however countered that the commentary or the introductory note should state that most of the provisions applied to digital assets as defined by the UNIDROIT DAPL Principles but additionally referring to other possibilities of digital content developed by new technologies. Such reference could be inserted also in the general part of enforcement by way of authority.

BP1 – General enforcement rules [procedures and measures] apply to digital assets

74. *The Reporter* explained that the Drafting Committee had suggested a rewording of the first best practice, along the lines that that digital assets were susceptible to enforcement; that the general best practices applied to digital assets; and that some specificities or adaptations were necessary (at least under contemporary understanding of existing technology). She clarified that certain best practices were intended for legislators, whereas others were more intended for practitioners. In the following discussion it was noted that though the use of "combined" measures would be often helpful, in some cases the best remedy would not in fact be such combined application but a specific measure such as, for example, receivership.

BP2 – Effective enforcement measures against digital assets

75. As regards BP2, *the Reporter* highlighted that the first paragraph was addressed to practitioners while the second paragraph was more destined for legislators. Several drafting

suggestions were made regarding BP2, including to use the term “realisation” in the second paragraph of BP2.

BP3 – Duty to disclose of the debtor and effective information mechanisms

76. The Working Group considered several drafting suggestions as well as more substantive additions to BP3. In particular, the relationship with the corresponding part in Document 3 Section IV was discussed. It was agreed that this part could not avoid repetition of certain provisions and that it could simply be acknowledged in the commentary that repetition was being made in order to facilitate use. More specifically, it was noted that the phrase “subject to all recognised privileges of civil procedure” might be too broad, and third parties should also be considered. Other adjustments to the text were suggested (e.g., that proportionality referred to the sanction for non-disclosure and not to the disclosure).

77. It was further queried whether the issue of the difficulty of identifying the debtor itself, which was already mentioned in the commentary to BP1, deserved to be highlighted again later in this section, in order to underline practical solutions. *The Reporter* referred to the fact that cooperation of third-party operators might be necessary to identify the person behind a digital asset and therefore conceded the need to elaborate the challenge of identification more explicitly. *The Chair* confirmed that the Working Group agreed on such addition. It was noted that in the case of unknown third-party debtors, there already were provisions on search orders which could be applied accordingly.

BP 4 – Duty to disclosure of third parties; BP7 – Duty to cooperate of third parties for seizure and transfer

78. With reference to those provisions, the Working Group agreed to retain the list of third parties as a non-exhaustive enumeration within the black-letter recommendation. As to third parties having information relevant for the enforcement (e.g., intermediaries), it was recalled that there already was a third-party duty to cooperate in the general part on information regarding the debtor’s assets.

79. In response to concerns about the text growing obsolete too quickly if it referred to specific contemporary technologies, it was suggested to make such specific references solely in the comments and maintain the general reference to “services” in the black-letter recommendation.

BP9 – Valuation

80. The Working Group agreed that valuation should be covered in this section but suggested that the title of BP9 was limited to valuation while the provision itself was more general (especially paragraph 4).

81. *The Chair* invited the Working Group to review all of Document 6 while the foregoing conversation was fresh in mind and send any questions or comments to the Secretariat.

Item 5 Presentation of EBRD’s current work on enforcement law reforms

82. *The Chair* introduced Ms Veronica Bradautanu and thanked her for agreeing to present to the Working Group. *Ms Bradautanu, representative of the European Bank for Reconstruction and Development (EBRD)*, provided a presentation about the enforcement of commercial decisions within the framework of mixed systems involving both state and private entities. She began by explaining the context of EBRD’s technical assistance projects on enforcement and reform of enforcement systems. She highlighted ongoing projects in ten countries covering topics as varied as alternative dispute resolution, capacity building, core transformation, and online auctions. She discussed the concept of mixed or hybrid systems, admitting that there did not exist a very clear distinction in the

terminology, and she reviewed various examples of institutional frameworks and their impact on the enforcement process, appeals, and greater public trust.

83. The presentation elicited a lively exchange of views. The PPT's of the presentation are annexed to this Report as Annexe 3.

Item 6 Discussion on best practices on online auctions (Study LXXVIB – W.G.7 – Doc. 5)

84. The Working Group considered the new iteration of Document 5. *The Secretariat* cautioned that the purpose of Document 5 was to stimulate policy discussion and determine whether it made sense to introduce express provisions regarding online auctions into the section on enforcement by way of authority. There were two options laid out in the first Recommendation – the choice was between an explicit recommendation to promote the sale of assets through online auctions and a less prescriptive acknowledgement that making such option available could be considered. She explained that the end of the phrase ("in relation to all types of assets, including immovables") owed to the limitations or prohibitions that were still existing in domestic laws. She also made reference to the aforementioned CEPEJ Guide on Judicial E-Auctions which was referenced in Document 5.

85. The Working Group agreed that the first option was more in line with what the project wanted to achieve, though different terms were suggested (e.g., "make available" or "authorise"). Concern was however expressed by one participant that the project's treatment of auctions would appear naïve to those who had studied the economics of auctions, and that the most important distinction might not actually be whether the auction was online or in person.

86. One participant advised the Working Group to develop a special recommendation on online auctions regarding immovables, with particular reference to access to the land registry. In this regard, another participant referred to paragraph (e) of Recommendation 4 in Document 5, on the automation of the modification of public registries. It was suggested to add to Recommendation 1 some mention of the possibility of specific standards or requirements for certain types of assets. In particular, not all functionalities should be available for every kind of asset.

87. It was further suggested that an introduction would be very helpful to set out the bigger questions regarding online auctions, including the economic considerations that were omitted from the recommendations, as well as signal the areas in which recommendations would *not* be provided.

88. *The Chair* solicited the Working Group to submit any comments to the Secretariat.

Item 7 Organisation of future work and discussion on way forward

89. *The Deputy Secretary-General* announced that the eighth session of the Working Group would be held in hybrid fashion from 15 to 17 April 2024. It was envisaged that a full first draft would be submitted to the Governing Council in May 2024, and therefore a great deal of the preparation would have to be undertaken in the intersessional period, with the April meeting crucial for addressing open policy questions. She added that the initiation of a consultation period was also foreseen, but that timing depended on the state of the draft. She referred to the longer-term plan that the Governing Council would approve of the final instrument in May 2025.

90. As for the intersessional work ahead of the Working Group in the immediate future, she entreated the members of the Working Group to make themselves available for online meetings – not only of the various Subgroups, but also for inter-Subgroup discussions with various Working Group members on specific topics, and for the Drafting Committee. She acknowledged that the Drafting Committee was responsible not only for drafting but also for the general structure of the future instrument. Finally, she referred to the translation into French of the draft instrument, which

would be important for the consultation phase. *The Chair* stated that she would look into what could be done by the Government of Canada in that regard.

91. *The Chair* expressed her sincere appreciation for the efforts of the Working Group in having accomplished the work to date. She highlighted the importance of each participant prioritising his or her task list to make sure that what needed to be handled first would be handled first. As the 2024 session would be the first meeting of the new configuration of the Governing Council, she underlined the importance of demonstrating that the Working Group had done everything within its power to complete the draft. She urged the Working Group to consider the project within the broader work programme of UNIDROIT and its limited resources.

Items 8 & 9 Any other business. Closing of the session.

92. *The Deputy Secretary-General* warmly thanked the Chair and all participants, both online and in person.

93. In the absence of any other business, *the Chair* warmly thanked the Working Group and the Secretariat and declared the seventh session closed.

ANNEXE I**AGENDA**

1. Opening of the session and welcome by the Chair of the Working Group and the Deputy 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. 7 – Doc. 2)
4. Consideration of work in progress:
 - (a) Revised draft best practices regarding enforcement by way of authority (Study **LXXVIB** – W.G. 7 – Doc. 3)
 - (b) Revised draft best practices regarding enforcement of security rights (Study **LXXVIB** – W.G. 7 – Doc. 4) (Repossession of tangible collateral; Disposition of collateral; Enforcement of security rights on receivables; Party autonomy; Enforcement of security rights on immovable assets; Discussion on the interaction with technology developments; Discussion on the final structure of the part on enforcement of security rights)
 - (c) Revised draft best practices regarding enforcement on digital assets (Study **LXXVIB** – W.G. 7 – Doc. 6)
5. Presentation of EBRD's current work on enforcement law reforms
6. Discussion on best practices on online auctions (Study **LXXVIB** – W.G. 7 – Doc. 5)
7. Organisation of future work and determination on way forward
8. Any other business
9. Closing of the session

ANNEXE II**LIST OF PARTICIPANTS****EXPERTS**

Ms Kathryn SABO (Chair)	Deputy Director General & General Counsel Constitutional, Administrative and International Law Section Department of Justice (Canada) UNIDROIT Governing Council member
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Ms Carla L. REYES (<i>excused</i>)	Assistant Professor of Law SMU Dedman School of Law (United States)
Mr Fábio ROCHA PINTO E SILVA	Pinheiro Neto Advogados (Brazil)
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	Ms Melissa FORD (<i>remotely</i>) Diplomat Lawyer
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	Mr Joey-Zhou YI Chambers of Judge Zhu

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Deputy Secretary-General

Ms Alexandra LOGUE

Secretary

Ms Adrícia ROCHA FERREIRA

Intern

Ms Yujia ZHANG

Intern

ANNEXE III**Mixed (hybrid) enforcement systems and other key issues – lessons from EBRD
TC projects**

*(PowerPoint Presentation by Veronica Bradautanu,
Principal Counsel, European Bank for Reconstruction and Development)*

Mixed (hybrid) enforcement systems and other key issues – lessons from EBRD TC projects



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for Reconstruction and Development

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Veronica Bradautanu, Principal Counsel
29 November 2023

1

EBRD

The EBRD mission is **to promote transition to market economies and we currently operate in 36 economies across three continents.**

The Bank is owned by 71 countries as well as the EU and the EIB. EBRD investments are aimed at making the economies in its region **competitive, well-governed, green, inclusive, resilient and integrated.**

1991

EBRD established



More than 6,600
projects to date



Strong local presence
with 50 resident offices
in 36 economies



European Bank
for Reconstruction and Development

2

Legal Transition Programme: objective and key facts

Improve the investment climate in the Bank's countries of operations by helping create an **investor-friendly, transparent and predictable legal environment**

1995

Legal Transition
Programme
established



More than 500
country projects
to date



Currently
16 lawyers



Funded by Bank
budget and
donors (TC)



Over 100 Corporate
Governance Action
Plans over EBRD
investee companies

Dispute resolution: key focus areas

*Leveraging courts, dynamic dispute resolution,
and effective enforcement to build trust in commercial
relationship and foster sustainable prosperity*

**Building
judicial
capacity**

**Alternative
dispute
resolution**
(commercial mediation)

**Enforcement
of court
decisions**

**Court digital
transformation**
(online small
claims courts)

**Assessments
and standard
setting**

Since 2013, more than **69 projects in 21 countries across five regions**: Central Asia, Central Europe and Baltic States, Eastern Europe and the Caucasus, South-eastern Europe and Southern and Eastern Mediterranean. EBRD is an observer in the UNCITRAL and UNIDROIT working groups; and participant in CEPEJ events.

17 ongoing projects: one regional project and in **10 EBRD economies**: **Azerbaijan, Jordan, Kyrgyz Republic, Montenegro, Moldova, Mongolia, Tajikistan, West Bank & Gaza, Ukraine and Uzbekistan.**

Enforcement focus area: key facts



What is a mixed (hybrid) system?

- There is **no single definition** of a mixed (hybrid) enforcement system
- EBRD used (2014): *a system where enforcement officers employed by **the state coexist with private** enforcement officers (private entities entrusted with state powers) and the delimitation of competence is based on value of claims, type of creditors, type of claims or other criteria.*
- Delegation of enforcement function \neq transfer of the enforcement function
- Hybrid is when there are **4000 state officers and 200 private officers** (Ukraine)
- It is **also hybrid** when private officers enforce 99 % of cases while state officers enforce the remaining 1 % of cases (Kazakhstan)

Geography in EBRD CoOs

Total number:	12	10	15
%	32.5	27	40.5

	Private System	Mixed (Hybrid) System	Public (State) System
Albania			
Armenia			
Azerbaijan			
Bosnia and Herzegovina			
Bulgaria *			
Croatia			
Cyprus			
Czech Republic			
Egypt			
Estonia			
Georgia			
Greece			
Hungary			
Jordan			
Kazakhstan			
Kosovo			
Kyrgyz Republic			

Sources:

EBRD, LTT internal research, 2023

2021, CEPEJ-GT-EVAL(2021)7rev:
<https://rm.coe.int/cepej-specific-study-on-enforcement-agents-ujh-2018-data-en-version-2/1680a2a2d4>

7

Geography in EBRD CoOs

Latvia			
Lebanon			
Lithuania			
Moldova			
Mongolia			
Montenegro			
Morocco			
North Macedonia			
Poland			
Romania			
Serbia			
Slovak Republic			
Slovenia			
Tajikistan			
Tunisia			
Turkmenistan			
Türkiye			
Ukraine			
Uzbekistan			
West Bank and Gaza			

8

CEPEJ-GT-EVAL(2021)7rev:

- In summary, in EBRD economies enforcement agents have **private status** in **18 economies**; **public status** in **11 economies** and there is a **mix of statuses** in **17 economies**.
- In developed economies the mix of statuses comes in even more shapes and forms:
 - enforcement agents are registrars and assistant judges (Denmark)
 - legal secretaries (Spain).
 - In Switzerland, all systems exist and vary from canton to canton.
 - France (huissiers du Trésor, in charge of tax collection),
 - Germany (senior officers of the judiciary),
 - Ireland (sheriff/solicitor and revenue sheriff, in charge of tax collection),
 - In England and Wales (Certified Enforcement Officers and court enforcement officers)

Advantages of a private element (policy reasons)

- **introduction of a private element as an intermediary step toward a fully private system to address:**
- **higher enforcement rate** (in Ukraine private enforcement officers are five times more efficient than state officers)
- **better motivation for private enforcement officers compared to the state system** (the income depends on the enforced amount etc)
- **lower corruption risks**
- **private enforcement system contributes to the state budget in the form of tax** (approx. 10 million USD in a year in Kazakhstan and 9-12 million USD in Ukraine)
- **private system self-funding and possible attraction of external investments** (development of the CMS in Kazakhstan)

Case study: Kazakhstan (developed mixed system)

- the mixed system was **introduced in 2010** in Kazakhstan
- **by 2023: 99% of all cases** are in the private enforcement officers' portfolio
- **increased efficiency by 4 times**
- **introduction of comprehensive information system – AISOIP**
- **Republican Chamber, 20 regional chambers, Training Center (140 employees)**

Case study: Ukraine (developing mixed system)

- the hybrid system was introduced **in 2017**
- unenforced debt based on court judgments in 2020 amounted to **UAH 1055 billion (or USD 30 billion)**, while only **UAH 23.5 billion (or less than 1 USD billion)** were successfully enforced during that period which is **only 2.2%** of the annual enforcement rate
- in 2020, a single private officer collected **UAH 18.2 million**, while a state enforcement officer collected **UAH 3.69 million** during the same period
- as of 2023, the number of operational private enforcement officers stands at **250** in contrast to the **4500** of the state enforcement system
- private enforcement officers lack the authority **to act for or against state actors** (such as state-owned companies)


Case study: Kyrgyz Republic and Azerbaijan (mixed system as a policy option)

- **both jurisdictions consider the introduction of the mixed system**
- **Azerbaijan** to launch a **pilot project first** and, based on its results, to take a policy decision
- **introduction of a mixed system is envisaged** by the National Development Strategy of **Kyrgyz Republic** for 2018-2040 and the State Program for the development of the judicial system for 2023-2026
- **policy consideration in the Kyrgyz Republic:** citizens with insufficiently high income will not be able to use the services of private enforcement officers

Risks and lessons learned

- **Building trust in the private bailiffs** (Croatia example)
- **Persuading sufficient candidates to go private**
- **insufficient training, remuneration, and technical staff for effective functioning**
- **limited independence of private enforcement officers** (heavy control by the Ministry of Justice may impede PEOs' independence)
- **lack of fair competition between state and private enforcement officers** (potential conflicts of interest with the state authority serving as both regulator and competitor)
- **limited mandate of the private enforcement officers** (for instance, inability to enforce for or against state actors)

Institutional set up

- public system
 - mixed system
 - private system
- 
- enforcement and oversight function: executive or judiciary?
 - scope of the judicial control

case study: transfer of function from the Supreme Court to the Ministry of Justice before the introduction of the private element in Kazakhstan

Other issues

Mongolia:

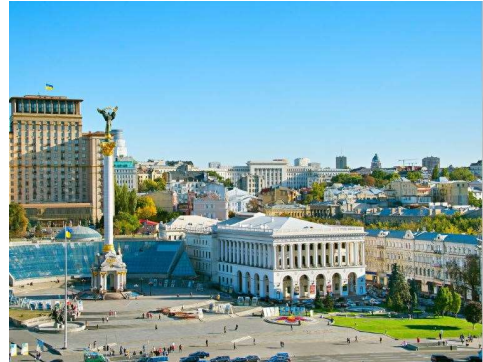
- **multiple complaints and appeals** against the enforcement process (enforcement agents) significantly delay enforcement
- there is no penalty for delay (the **concept of the statutory interest**)
- the enforcement officers have no interest or lack capacity to **defend their actions**
- **inefficiencies in search for assets and sale**



Other issues

Ukraine:

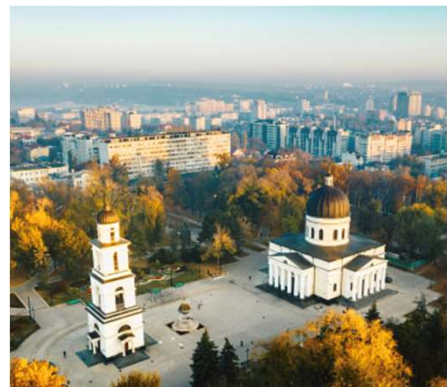
- Non-enforcement of court decisions is the most common complaint against Ukraine before the European Court of Human Rights, accounting for over half of all ECHR violations in the country.
- Approximately **UAH 1055 billion (or USD 30 billion)**, is currently locked as unenforced court-ordered debt in Ukraine = **more than ¼ of Ukraine's pre-invasion annual GDP**
- Many SOEs are in financial distress or insolvent **but fully exempt from debt enforcement or court decisions on enforcement and any insolvency/** bankruptcy proceedings – meaning their creditors cannot take action to recover debts (so-called **moratoria regime**).
- Removal of **moratoria** is complex and political but essential for Ukraine's long-term economic future, reputational standing among donors, and privatisation efforts.



Other issues

Moldova:

- Profession of private bailiffs has **little public trust** (nature of the profession, but also cases of very bad practice)
- One major factor is **deficient disciplinary process** (Disciplinary board consists of 7 members, only two are paid (per meeting), overload with complaints, ineffective sanctions)
- Members of disciplinary board require **training**, adequate remuneration, and a sufficient number of **technical** staff to assist its work and facilitate communication with the courts.



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