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

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Study LXXVIB – W.G. 8 – Doc. 7
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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 hybrid format – in person in Rome and remotely via Zoom – from 15 to 17 April 2024. The Working Group was attended by 23 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 Secretary-General and the Chair of the Working Group

2. *The Secretary-General of UNIDROIT* opened the session and welcomed all participants. He pointed out that the 103rd session of the Governing Council would be taking place less than a month later and reiterated that at this stage of the project it was important to work cooperatively in order to achieve substantive progress in the short time frame at disposal.

3. *The Chair* also welcomed all participants and expressed her appreciation to the Secretariat and to all the experts who had contributed to the work during the intersessional period. She expressed her gratitude for the time participants had dedicated so far and acknowledged the challenge posed by the short time frame, taking into account that a complete and final draft would have to be generated by the close of the next (ninth) session of the Working Group. She reiterated the importance of finding good solutions while considering the need to make compromises when necessary. She recalled that there had been early objections at the Governing Council that the scope of the project was too broad and asked WG participants to always keep in mind the target audience that the Working Group would have (legislative actors, members of the judiciary, as well as practitioners at global level).

4. *The Deputy Secretary-General* thanked the Chair and all participants and extended a warm welcome to Ms Anna Skrjabina, formerly of the Latvian judiciary, as an individual observer to the Working Group.

Item 2 Adoption of the agenda and organisation of the session

5. At *the Chair's* proposal, the Working Group unanimously adopted the revised agenda, available in [Annexe I](#).

6. *The Deputy Secretary-General* underlined that the Working Group would only be submitting drafts to the Governing Council which had been sufficiently developed and advanced, but that the

Governing Council would also need to have an idea of how the whole instrument would be structured, and therefore the Working Group would have to decide whether it accepted the proposal of the Drafting Committee in that regard. Finally, she explained that there would also be a consultation process taking place between the development of the final draft and the ultimate publication of the instrument, so this would need to be factored into the timeline.

Item 3 Update on intersessional work and status of the project (Study LXXVIB – W.G.8 – Doc. 2)

7. *The Deputy Secretary-General* referred to Document 2 and briefly summarised the intersessional work carried out by the Working Group and the Secretariat. She underlined that the approved detailed report of the prior (seventh) session of the Working Group had been added to the website, and she highlighted the intense work of the Drafting Committee that had taken place during the intersessional period. She pointed out that much progress had been achieved concerning procedures in the context of the extrajudicial enforcement of security rights, with the aim of fleshing out the general provision in the UNCITRAL *Model Law on Secured Transactions* (UNCITRAL Model Law) regarding expedited procedures. She noted that whilst the development of this draft had not yet become ripe for discussion in the wider Working Group, the Subgroups would continue to advance the work. Furthermore, the Deputy Secretary-General pointed out that the Secretariat had had the opportunity to meet with the World Bank Group in Washington, D.C. in January 2024, discussing, *inter alia*, the BPEE project. She emphasised that the input of the World Bank Group would be helpful not only in this deliberative phase of the project but also during the consultation phase. She also recalled the relevant (and previously reported) workshop with the European Bank for Reconstruction and Development which had been held in September 2023. Finally, she announced that the Drafting Committee had already met earlier that day and would be continuing its work in the days following this Working Group session.

Item 4 Consideration of work in progress:

(a) Revised draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G.8 – Doc. 3)

8. *The Chair* explained that Document 3 Sections III-V reflected numerous rounds of feedback from the Drafting Committee and the Working Group, while other parts of the document were at a more preliminary stage (Sections VI-XII). *The Deputy Secretary-General* suggested to discuss first the sections which had not been considered for quite some time, namely Section VI *et seq.* She confirmed that Subsection 1 lit. (a) and Subsection 2 of Section VI had been further revised following the input of the Drafting Committee, and that the Working Group would base its discussions on the revised drafts.

Section VI – Modes of Enforcement – Subsection 1 – lit. (a) - Recommendation 1

9. *The Reporter* noted that Recommendation 1 avoided the term “possession” in favour of the term “control” as a more modern description of seizure. He explained that paragraph (II) provided various kinds of such control and pointed out that sub-paragraphs (i) and (ii) set out traditional forms of control while the successive paragraphs introduced more modern conceptions of control, among which sub-paragraphs (v) and (vi) might be considered innovative for legal systems other than common law systems.

10. The Working Group discussed whether the best practices should incorporate a rule assigning a set sequence or priority to various types of enforcement measures, linked to the principle of proportionality. It was agreed not to introduce a set sequence of priority, though it was still present in some legal systems, the reason being that such sequence did not always reflect real value or the

severity of the measure vis-à-vis the debtor. It was further agreed that as this part was subject to the general principle of proportionality, its application in this context should be further clarified in the Commentary (which already referred to the principle of proportionality).

11. As to the list of means of control, it was asked whether the list in paragraph (II) was intended to be non-exhaustive, pointing to examples of less common forms of control (such as immobilisation of automobiles or taking possession of documents of title).

12. In reference to paragraph 4 of the Commentary to Recommendation 1, it was agreed not to mention a specific benchmark but to specify that the amount should be sufficient to cover enforcement value and costs.

13. The Working Group further discussed whether Recommendation 1 should be drafted in broader terms, as some of the forms of control listed in the recommendation would equally – and even more characteristically – apply to intangibles. It was clarified that this subsection only applied to tangible personal property, and that seizure of intangibles would be covered by a later subsection (lit. (b)). The Working Group remarked the importance of providing guidance on seizure of intangible property. As to the terminology used in lit. (a), it was agreed that “tangible personal property” should be substituted with another locution (“movable assets” was suggested), and that the Drafting Committee should review the terms used to refer to assets in the whole instrument (movable/immovable, tangible/intangibles) to ensure consistency. The Drafting Committee should also review the use of terms such as “security interests” or “security rights” to ensure consistent terminology throughout the instrument.

Section VI – Modes of Enforcement – Subsection 1 – lit. (a) - Recommendation 2

14. *The Reporter* explained that the effects of seizure are subject to diverging legal characterisations in domestic laws, and that the best practices should adopt an approach that would apply independently of such characterisation. In the ensuing discussion, it was suggested to draft the first paragraph of the recommendation in such general terms, instead of referring to the specific models which would be mentioned in the Commentary.

15. *The Reporter* further confirmed that priorities among different creditors would be determined according to the applicable law, as it was not possible to develop uniform guidance on priorities, while the enforcement registers envisioned by the Best Practices would provide a means to be informed of existing enforcement measures. In this regard, following ample discussion within the Working Group, *the Chair* noted that coherence was sought between Recommendation 4 of Section V and Recommendation 2 of Section VI, Subsection 1, lit. (a), so as to achieve the desired result. It was also noted that Recommendation 3 of Section VI, Subsection 1, lit. (a) referred to the “*ranking of interests in movables*” (emphasis added) and cross-referenced Section VI, Subsection 1, lit. (e). The latter did not, however, appear to clearly cross-reference the applicable secured transactions law which usually determines priorities. A suggestion was made to simplify the recommendations in lit. (e) and expressly request that states have clear laws setting out priorities.

16. An additional question regarded the possibility to allow the granting of a subordinate interest on the same asset without the enforcement organ’s consent, when the applicable priority system ensured that granting such a subordinate interest would not impair the creditor’s right to enforcement.

Section VI – Modes of Enforcement – Subsection 1 – lit. (a) - Recommendation 3

17. *The Reporter* underlined that the aim of the Recommendation was to ensure that a subsequent seizure be recorded in a note by the enforcement organ (a simplified mode of seizure).

The Chair clarified that this Recommendation would only apply where the value of an asset exceeded the value of the claim of the first seizure.

18. *The Chair* and the *Secretary-General* proposed making it clearer that such first-in-time ranking only applied to the extent that the claims ranked equally according to the applicable substantive law. A further question was whether the proposed “super-priority” among equally ranking creditors which was created by being the first in registering the seizure was an appropriate solution. *The Reporter* explained that this rule only applied to the creditors mentioned in the Recommendation (subsequent seizure of the same asset by the same enforcement organ). *The Chair* reiterated that this rule applied to unsecured creditors and did not interfere with priorities of secured or otherwise privileged creditors.

Section VI – Modes of Enforcement – Subsection 1 – lit. (a) - Recommendation 4

19. It was clarified that this Recommendation provided a short description of assets exempt from enforcement for various policy reasons generally recognised in most jurisdictions. *The Chair* confirmed the conclusion of the Working Group that while there was no disagreement on the underlying policy, the Recommendation would benefit from a revision. In this respect, the Working Group was in agreement on: substituting the term “goods” with “assets”; finding clearer language to express the “tools of the trade” concept in (I)(b) and clarifying its application to the individual debtor; and possibly reconsidering how to best render the policy underlying paragraph (II), which was a further expression of the general principle of proportionality, by using more impersonal language. *The Chair* also clarified that the Working Group agreed that assets otherwise falling under paragraph (I)(b) but subject to a repairer’s or mechanic’s lien would be excluded from this exemption.

Section VI – Modes of Enforcement – Subsection 1 – lit. (a) - Recommendation 5

20. Recommendation 5 was meant to introduce more clarity for the process of seizing assets in the control or custody of third parties. In the ensuing discussion, there was agreement that paragraphs (II) and (III) of the Recommendation could be summarised by stating that when seizing a movable in the hands of a third party, the third party should hand it over to the enforcement organ unless that third party has a right to remain in possession effective against the creditor, and in such case, the creditor can enforce against the same rights that the debtor had in relation to this third party. *The Reporter* however noted that it was crucial to distinguish between a third-party debt order where the entitlement of the debtor against the third-party debtor was not ripe for enforcement, and an executable or enforceable right. It was further queried whether the distinction between legal and equitable title should be retained in the black letter recommendation or only mentioned in the Commentary as a clarification for readers with a common law background. The meaning of “control” and “custody” was also discussed, with *the Reporter* clarifying that instead of defining such terms, it should be sufficient to merely describe the legal situations at hand. *The Chair* agreed that the Drafting Committee would have to ensure that the use of language was consistent and referred the entire provision to the consideration of the Drafting Committee.

Section VI – Modes of Enforcement – Subsection 1 – lit. (a) - Recommendation 6

21. The Working Group moved on to Recommendation 6 on realisation of the value of seized movables by enforcement organs. *The Reporter* explained that Recommendation 6 discussed public sale and other types of sale replacing a public sale, but which were still carried out by an enforcement officer, while Recommendation 7 referred to the exceptional situations where the method of sale was based on an agreement of the parties.

22. Some participants expressed doubts regarding paragraph (I) of Recommendation 6, which designated a public sale as the “default” choice, with the enforcement agent obliged to justify a

different choice based on the existence of mandatory rules or convenience. It was also asked whether the Recommendation should make reference to the possibility for enforcement agents to proceed, in appropriate circumstances, with other types of sales that did not involve a public bidding (other than a sale in a regulated market, which was already mentioned in the Recommendation). After a thorough discussion, the Working Group agreed that some restructuring of Recommendation 6 would be useful, with a suggestion that the Recommendation be opened by a more general reference to the possibility of enforcement agents to determine the most appropriate method based on the circumstances in context and the type of asset. While the Recommendation should avoid defining what is a public or private sale, a (non-exhaustive) list of usual methods was, however, considered to be very useful, starting with public sale as the most usual one.

23. In this regard, it was noted that the enforcement agent, according to the general principles, would have a duty to hear the creditor and the creditor could make an application for a specific method of realisation of the value of the asset.

24. It was also agreed that the reference to receivership as a potential method for realisation of the value of the collateral, which was contained in Recommendation 7, paragraph (III), would be moved to Recommendation 6. In this regard, it was noted that the term “rent” could be substituted by “lease”. It was also mentioned that other modes of realisation of value which would apply to intangibles should be considered in the relevant part of the instrument.

25. The Working Group further discussed whether enforcement organs may delegate responsibility for realisation of the value of debtor’s assets to neutral third parties who would be in the best place to do so, as this is something that had been introduced in some legal systems to ameliorate the efficiency of enforcement. In this regard, while the general idea met with favour, it was questioned whether there would be a shared understanding of what “neutral third parties” means, and it was noted that this issue would benefit from a cross-reference to the part of the instrument devoted to enforcement organs.

26. In relation to online auctions, some participants noted that e-auctions might entail risks and not only benefits and questioned whether the expression “whenever possible” in paragraph (III) should be nuanced, at least in the comments. In the ensuing discussion, it was clarified that Recommendation 6 assumed that a specific part of the instrument on technology would address online auctions, and that such a part would benefit from adequate references to the CEPEJ Guidelines that provided specific legal and practical guidance on online auctions (as suggested in former Document 5). It was recognised that while the structure of the instrument was still open, there would be the need to coordinate the part on public auctions in Part I with the best practice(s) on online or electronic auctions. Other paragraphs in the same Recommendation, such as paragraph (IV) on payment, would benefit from the same coordination.

27. With regard to valuation, it was clarified that it was addressed in paragraph 4 of the Commentary to Recommendation 1.

28. Paragraph (IV) elicited several comments from the Working Group. It was asked whether the expression “reasonable threshold” for the acceptance of the highest bid referred to a preset reserved price; otherwise, the application of a standard of reasonableness could introduce uncertainty and an element of subjective evaluation *ex post*. It was also suggested that the paragraph be drafted in a more general way, such as “using any kind of payment available depending on the asset and other circumstances”, and reference be made to specific examples in the Commentary, as there are, or there could be in the future, additional payment methods, which seemed to be excluded from the current draft. Another suggestion in the direction of adopting a more general terminology regarded the reference to the time and the conditions of acceptance of the bid (“when money is actually received” or “proper security is posted”). It was further suggested that there should be some language referring to the consequences of the first bid falling out for lack of payment or proper

security, so as to ensure the positive outcome of the auction. A final suggestion was based on the practical consideration that the enforcement organ could preset the terms of the auction, and that it would be pragmatic to defer to the discretion and judgment of the enforcement agent conducting the auction, under the general criterion that the auction should be conducted in a way so that payments are assured. The various practical possibilities to achieve this goal (such as, for example, requiring the advance payment of a percentage of the price) could be cited in the Commentary.

29. A similar comment was made in relation to paragraph (VI), with the suggestion to use the more general term “negotiable instruments” or refer to regulated or specialised markets.

30. As to paragraph (VII), the introduction of such flexibility was welcomed. It was queried whether transferring the asset to the creditor before a public sale at an expert-determined market price should require not only the creditor’s consent but also the debtor’s consent, as the debtor would be losing the market testing of the value of an auction or a private sale. To this, it was replied that such a transfer usually needed only the creditor’s consent. It was also asked whether the best practices should refer to the situation where the creditor is the State, which might raise questions as to the applicability of paragraph (VII).

Section VI – Modes of Enforcement – Subsection 1 – lit. (a) - Recommendation 7

31. The Working Group first discussed the relationship between Recommendation 6 and Recommendation 7. It was clarified that Recommendation 7 was aimed at introducing an element of party autonomy during enforcement procedures, as it was conditioned upon an agreement of the parties to proceed without direct involvement of enforcement organs for those situations where such an exception made sense. Party agreements, however, should not only be notified to the enforcement organ (to be registered or annotated); they would still require the enforcement organ’s consent to be binding, though such consent should only be denied in clear cases of undue realisation.

32. The introduction of flexibility and a degree of party autonomy was generally welcomed by the Working Group. Several issues were raised in the discussion, including: (i) whether the reference to the sale of goods of “minor value” was an appropriate threshold for the use of publicly accessible private internet platforms; (ii) whether the expression “publicly accessible private internet platforms” was not too limited; (iii) whether thought should be given, at least in the Commentary, to alert legislators/enforcement organs of the need to protect third parties from the consequences of the agreement of the parties, and to liability in case of violation of third parties’ rights; (iv) whether reference should be made, at least in the Commentary, to the lack of finality of such agreements, as opposed to realisation under the control of an enforcement organ, particularly in the situation where the sale is made to a consumer (and consumer protection rules including withdrawal rights might be applicable) or because the debtor becomes insolvent and avoidance actions might be exercised; (v) whether more guidance should be given to enforcement organs regarding the conditions under which consent should be denied, and the consequences of extending consent in relation to liability and third parties’ rights; (vi) whether the Recommendation was limited to tangible movables or would apply to other types of movables, for which methods of realisation of value other than a sale could be envisaged (e.g., licence).

33. After a thorough discussion, an agreement was reached on revising the title of the Recommendation as well as paragraph (I), and consolidating paragraphs (I) and (IV) to give more visibility to the role of the enforcement agent as a first threshold vis-à-vis the adequacy of the realisation. It was further suggested to expressly note in the Commentary that such an agreement is, in principle, not protected from opposition or avoidance actions in case it is determined that it was inadequate to reach the goal of maximising the value without negatively affecting other interested third parties (or alternatively, to expressly state that the enforcement organ, in giving its consent, should take into account other reasonably predictable stakeholders whose economic interest would be affected by the sale price). Doubts were however raised on whether in this case the

enforcement would be effected directly by the parties after receiving the enforcement organ's consent and the release of the seized asset, or by the enforcement organ upon request by the parties. This latter solution would be more akin to the situations already envisaged in Recommendation 6 but starting with an agreement of the parties on the method of realisation.

34. In relation to the exception for assets of "minor value", one suggestion was to include the value of the asset in the revised first paragraph, as one of the elements that the enforcement organ ought to consider in giving its consent. To this, it was opposed that the exception as it currently stood represented a pragmatic way to allow effective enforcement for assets of minor value, for which an enforcement agent might lack incentives to proceed with the realisation, also considering the costs of enforcement. Thus, for assets of minor value there should be a separate paragraph and a sort of "safe harbour", as the likelihood of oppositions would be low, and therefore the consent of the enforcement organ should be superfluous. It would be up to each legislator to implement rules or other guidance on the meaning of "minor value". Notice to the enforcement organ would however still be required. It was also remarked that the enforcement organ should lift the attachment on the asset before parties can proceed with the sale, which was more than just being informed of the decision of the parties, while it would not proceed with the sale itself nor would it receive payment.

35. As a separate point, it was discussed whether the Commentary (or a separate Recommendation) should clarify that parties have the possibility to reach an agreement on the method of realisation before the asset is seized by the enforcement organ, or as a means to amicably end the enforcement proceedings, provided that third parties' rights are protected.

Section VI – Modes of Enforcement – Subsection 2 – lit. (a) - Recommendation 1

36. The Working Group moved on to consider Subsection 2 on non-monetary enforcement, lit. (a), delivery of possession and eviction, as revised by the Drafting Committee, and in particular Recommendation 1. There was agreement on the policy of the Recommendation as well as its structure, while minor comments were made on language and terminology (replacing "shall" with "should" or "may"; considering consistency in the use of terms such as "possession", "control", and "custody", as well as with terminology used in Part II on enforcement of security rights (to the extent it would be appropriate); considering replacing "ask" the debtor to deliver with "order", as this is usually done contextually with the service of the enforceable title). The text was contextually revised by one of *the Reporters* and the Recommendation was referred to the Drafting Committee.

Section VI – Modes of Enforcement – Subsection 2 – lit. (a) - Recommendation 2

37. The Working Group agreed with the underlying policy, noting that the text would benefit from a slight restructuring and revision following the clear language of the Commentary, and that the language of the last sentence of the Commentary could be clarified regarding the representatives of the debtor as a legal person. In addition, clarification was sought with respect to what would happen in certain specific – but not uncommon – situations. One of them would be when the assets are stored in a warehouse which has issued a negotiable warehouse receipt. Another situation would arise when the third party is a creditor of the debtor with a possessory lien or equivalent right on the asset (e.g., a repairer). In the ensuing discussion it was clarified that the two situations would be adequately covered by the restructured Recommendation and that they could be mentioned in the Commentary as special examples. As regards warehouse receipts, it was noted that under the draft UNCITRAL-UNIDROIT Model Law the warehouse would be protected from liability if it surrenders the asset upon the request of court or otherwise by circumstances beyond its control. In relation to liens, it was explained that it would be up to the enforcement organ to decide whether the grounds for refusing to surrender are sufficient or not, and in the case of seizure the third party could make use of the means of recourse provided in the Subsection.

Section VI – Modes of Enforcement – Subsection 2 – lit. (a) - Recommendation 3

38. As to third parties and their belongings, it was clarified that the Recommendation should provide for adequate protection of third parties claiming a right, independent of the debtor's, to remain in the property. The Working Group expressed a preference that additional details on vulnerable third parties and their enhanced protection (e.g., tolerance rights) be mentioned but moved to the Commentary. In relation to movables stored in the immovable, the Working Group agreed that any movables not removed from the property following eviction should be stored for a specified period by the enforcement organ at the creditor's expense, and then, if not removed from storage within the specified period, should be disposed of by the enforcement organ to cover the costs of enforcement. The Recommendation was referred to the Drafting Committee.

Section VI – Modes of Enforcement – Subsection 2 – lit. (a) - Recommendation 4

39. The Working Group agreed on the policy of paragraph (I), noting that it could be broadened to encompass not only damages but also the general condition of the assets, which could be relevant for evidentiary purposes in various situations. It was also agreed to limit the Recommendation to this first item (record of the condition of the assets) and to mention that the record can be relied on in any proceedings before a competent court, without going into further details.

Section VI – Modes of Enforcement – Subsection 2 – lit. (b) - Recommendations 1, 2, 3 and 5

40. The Working Group agreed with the policy of Recommendation 1, noting that the text should better reflect the practice that an enforceable instrument should already contain both the order and the potential sanctions in case of non-compliance, to promote early voluntary compliance and reduce the need for creditors to seek mandatory orders. After thorough discussion, the Working Group further agreed that the Recommendation should contain a list of usual sanctions, including imprisonment for the failure to give effect to the proper administration of justice, which is present in many jurisdictions as a last-resort sanction, and which was also expressly mentioned in other sections of the draft instruments. The Commentary should reflect the need to proceed with caution in this respect. Moreover, it was agreed to spell out the circumstances that a court may take into account in determining a proportionate sanction with the aim of promoting compliance.

41. After a thorough discussion, the Working Group agreed to combine Recommendations 1, 2, 3 and 5 in one shorter Recommendation dealing with the orders requiring a party to do something or to refrain from doing something and the effects of non-compliance with such orders.

Section VI – Modes of Enforcement – Subsection 2 – lit. (b) – Recommendation 4

42. The Working Group agreed with retaining this Recommendation as Recommendation 2, as it would apply to the situation where the debtor fails to make a formal statement that has specified legal consequences (e.g., a statement that is part of the process for the conveyance of land). The Recommendation was referred to the Drafting Committee.

**(b) Revised draft best practices regarding enforcement of security rights
(Study LXXVIB – W.G.8 – Doc. 4)**

43. *The Chair* recalled that most of the content of Document 4 had been reviewed multiple times by the Working Group and approved in principle. There were, however, a few open points where substantive decisions still needed to be taken or where there was new material that the Working Group needed to consider. *The Reporter* explained that the Subgroup would be grateful for input, in particular, on the introductory Recommendations reflecting general issues that had already been discussed in specific Annexes, and on Annexe V on Enforcement on immovables. He also noted that Annexe III on the enforcement of security rights over rights to receive payment and credit

instruments had been substantially revised on the basis of the outcome of the seventh session of the Working Group but would not be discussed at the current session.

Doc. 4 - General principles

44. In relation to the “General Principles on Extrajudicial Enforcement of Security Rights”, *the Reporter* noted that the first two Recommendations clarified two issues: (i) that enforcement of a security interest comprises several steps including those specifically addressed in Part II, i.e., obtaining possession of tangible collateral, disposing of the collateral by various means, and collecting collateral consisting of receivables and other rights to payment; and (ii) that while Part II of the instrument would provide extensive guidance on extrajudicial enforcement, enforcement could be done either judicially or extra judicially at the creditor’s choice. No comments were voiced on these two points.

45. The issue of whether such general principles would apply to both enforcement on movables and enforcement on immovables was left open, pending discussion of Annexe V.

46. The Working Group discussed the third general Recommendation on the duty to exercise all rights and obligations concerning the enforcement of security rights in collateral in good faith and in a commercially reasonable manner. It agreed with the proposal to refer to both general standards and to move the recommendation on commercial reasonableness from the part on disposition of the collateral to the introduction. This would not only ensure a better alignment of the instrument with the UNCITRAL Model Law on Secured Transactions but would provide suitable guidance in the form of best practices, as the expectation would be that the mandatory nature of the application of such standards could be reserved for only one or the other depending on how legislators saw those general concepts working in their own legal systems. A few suggestions regarding changes in the terminology were made, particularly regarding the Commentary to Recommendation 3, (c) and (d) (i.e., avoid reference to “objective” and “subjective” good faith; shorten the Commentary under (d) and avoid the attempt to describe good faith with reference to moral standards in commerce).

Doc. 4 – Annexe V - Enforcement of security rights over immovables – general remarks and Recommendations 1 and 2

47. *The Reporter* suggested to start with Annexe V which had been substantially revised since the latest Working Group session. He recalled that for this section, the Working Group could not avail itself of global international models, unlike the parts on enforcement over movables. The drafters had implemented the request of the Working Group to simplify the Annexe but avoid excessive cross-references with the preceding sections, even if this entailed some repetition.

48. In relation to the structure of the Annexe, it was suggested that it could mirror the structure of Annexe I on movables and start with the general principle of the right to enforce without first obtaining a judgment on the secured obligation, and then proceed with the specific steps towards enforcement.

49. It was also recalled that the Drafting Committee would have to reconsider the terminology used throughout the instrument regarding “possession” or “control”, possibly avoiding the use of expressions such as “direct” and “indirect” possession. Further general drafting issues were raised in discussing specific Recommendations, in particular regarding the use of “title”, “property”, and “ownership”.

50. The Working Group considered the protections for vulnerable debtors or in the case of special types of immovable collateral (e.g., what was labelled “residential” immovables) contained in Recommendation 1, paragraphs 2 and 3 as well as in Recommendation 2, paragraphs 3 and 4. After a thorough discussion, it was decided that these recommendations, while reflecting common

approaches, should be either couched in more general terms (limitations determined by domestic law) or mentioned in the Commentary as possible options to reach the policy goal of protecting certain categories of people. Additionally, it was suggested that the Drafting Committee consider aligning the language used to refer to such vulnerable categories of debtors (“debtor of a special type”) with the more refined language used in Recommendation 4 paragraph 3.

51. In relation to Recommendation 2, paragraph 1, the Working Group agreed on the use of a more generic wording (“by means of an appointed third party”). It also agreed that it would be useful if the Commentary referred to the specific section in Part I on judicial receivership, which had not been drafted yet, to alert creditors of this additional possibility of availing themselves of a receiver or a custodian appointed by the court. More generally, *the Chair* reminded the Working Group that there would be parallels to the section on enforcement on immovables in the part on enforcement by way of authority.

52. It was also agreed that the Commentary to Recommendation 2 should more clearly spell out the difference between repossession and eviction on immovable collateral and repossession in the case of movable collateral: in the former case, it was implicit in the Recommendation that the creditor would be entitled to repossession upon default without the need to obtain a judicial decision, but repossession would either be done with the debtor’s cooperation, or would have to proceed through a public authority.

Doc. 4 – Annexe V - Enforcement of security rights over immovables –Recommendations 3 and 4

53. The Working Group suggested that Recommendation 3 be restructured to reflect the most common sequence of actions and notices, particularly in relation to the notice of sale and the appraisal mentioned in paragraphs (4) and (5). It was further suggested that paragraph 1 Recommendation 4 be revised by the Drafting Committee to better align it with the corresponding Recommendation 1 paragraph (9) of Annexe II.

54. After thorough discussion, it was further agreed that the means of extrajudicial disposal of immovable collateral available to the creditor should be expressly laid out in the security agreement.

55. The Working Group finally decided to postpone the decision on whether paragraph (8) of Recommendation 3 should be aligned to the corresponding, and more detailed, recommendation in Annexe II, or whether a different policy would be justified in the case of immovable collateral.

Doc. 4 – Annexe V - Enforcement of security rights over immovables – Recommendation 5

56. *The Reporter* explained that this Recommendation had been revised and restructured to implement the feedback received at the latest session of the Working Group. The policy of the Recommendation is to provide the basis for relief of a debtor or grantor, including limitations on the right to a stay of the proceedings except in specific circumstances, as well as to provide protections and the rights of the purchaser of the collateral.

57. In the ensuing discussion on paragraph (2), it was clarified that a stay of the enforcement proceedings should always be granted when the creditor has failed to comply with notice requirements, irrespective of whether the secured creditor provides sufficient evidence of being capable of paying damages as compensation after enforcement. It was also suggested that more thought be given interessionally to broadening the language of paragraph (2) and allow judges to include cases where the *ex-post* remedy in damages would not adequately compensate the debtor.

58. In relation to paragraph 4, it was suggested that more thought be given to whether the solution regarding priorities, which mirrors the one contained in Annexe II and in the UNCITRAL

Model Law, is adequate in respect to immovables, also considering the forthcoming corresponding recommendations for enforcement by way of authority in Part I.

59. Further suggestions included moving current paragraph (3) to the opening of the Recommendation in view of its importance [*on which however see also below, para. 78*], and to generally review the drafting of the whole Recommendation, including revising paragraph (5) to align it to any modifications to the preceding paragraphs.

60. *The Chair* closed the discussion on Annexe V, referring the drafting issues to the Drafting Committee and asking to leave bracketed language on the open policy points that would be taken up intersessionally.

**(c) Revised draft best practices regarding enforcement on digital assets
(Study LXXVIB – W.G.8 – Doc. 6)**

61. *The Chair* moved on to Document 6, noting that the Working Group would be asked to comment on the policy of the remaining black-letter Recommendations that had not been discussed during earlier sessions, in order to allow the Reporter to finalise the draft.

62. *The Reporter* introduced the document, explaining that it only consisted of the black-letter Recommendations, as the Commentaries were in the process of being revised on the basis of the outcome of the previous and the current Working Group session. She recalled the Working Group request that the court decisions mentioned in the Commentaries be presented in a neutral manner, as illustrations of cases, and noted that additional case law from civil law jurisdictions based on further research mandated by the Working Group and conducted by the Secretariat was in the process of being incorporated. She further recalled that the Working Group had decided to clarify the scope of this part of the instrument, which seemed to be tailored to those digital assets that are electronic records capable of being controlled according to the definition contained in the UNIDROIT Principles on Digital Assets and Private Law (DAPL Principles). For any other non-controllable digital asset, such as databases and other digital content, the general recommendations should apply. The introduction had been revised to clarify this point and other issues that had been flagged at the last Working Group session.

63. The Working Group sought further clarification on the scope of this part of the instrument, concerning two issues: (a) the limitation to digital assets that are controllable digital records, and (b) the extent to which instances of extrajudicial enforcement on digital assets should be covered, and if so, where. It was suggested that not addressing such questions would leave undesired gaps on topical issues.

64. Regarding the first point, it was noted that the Recommendations drafted in Document 6 were particularly suited to the type of digital assets that are controllable digital records as defined in the UNIDROIT DAPL Principles. It was suggested that enforcement by way of authority on other types of non-controllable digital tokens or values would be governed by the general recommendations and that suitable references or illustrations in the Commentary thereto would be helpful in this regard.

65. With respect to the second point, it was clarified that this part only addressed enforcement by way of authority and did not provide guidance on extrajudicial enforcement actions on the part of the creditor. It was suggested that Part II, Annexe III could contain some language to refer to the UNIDROIT DAPL Principles in relation to security rights and their enforcement, while instances of “automatic enforcement” could be considered in Part I, at least in the Commentaries. *The Deputy Secretary-General* suggested that in addition, the introduction to the section or part on enforcement on digital assets should provide an express clarification of, and justifications for, not only the limitation as to the type of digital asset, but also regarding the focus on enforcement by way of authority. *The Chair* proposed that the Working Group take note of these proposals and consider

them intersessionally, as they were connected with decisions regarding the structure of the instrument.

Doc. 6 – Recommendation 8 – Enforcement agents

66. The Working Group suggested that paragraph 1 be slightly rephrased to align it with the terminology used elsewhere regarding enforcement organs, and to avoid the impression that it was a mere repetition of Recommendation 1 paragraph 2. *The Reporter* noted that this provision had been inserted for clarification purposes, in order to emphasise the involvement of the enforcement organ even if it would need advice and support from IT experts or third-party action.

67. Another suggestion regarded the clarification of what was meant by “adequate ... contractual mechanisms” in paragraph 2. The outcome of the discussion was that the Recommendation itself could be streamlined along the lines of “For the purpose of Paragraph 1, adequate technological and organisational arrangements should be available”, to which additional wording could be added (e.g., “including the authorisation to conclude contracts for the purpose of ensuring adequate custody of the digital assets”); more explanations and illustrations could be added to the Commentary, regarding, in particular: the fact that such agreements would depend on the type of digital asset and the way it is held; illustrations of the most common situations (contract to open a wallet account, or a wallet service provision agreement with a third-party provider); and the need to ensure that bank accounts or wallet accounts created by enforcement organs are unseizable.

Doc. 6 – Recommendation 9 – Valuation, transfer as a way of payment and liability rules

68. *The Reporter* explained that this Recommendation covered three different issues: paragraphs (1) and (2) addressed valuation (by drawing the legislator’s attention to the importance of providing clear rules on valuation of digital assets and by referring to the situations where a market for digital assets is already in place, e.g., for cryptocurrencies); paragraph (3) dealt with the transfer of digital assets in payment; paragraph (4) considered the need to provide rules on the liability of enforcement agents that decide when and at what price to sell seized digital assets.

69. The Working Group was supportive of providing recommendations on all three issues, noting that they would be useful for legislators wishing to introduce rules in this new area. In relation to paragraph (1), it was suggested to delete the reference to “rules of enforcement”. Regarding paragraph (2), the Working Group proposed that the additional language on the timing of the valuation be placed in the Commentary, which might refer to emerging criteria in case law or legislation and/or common criteria for assets for which similar markets exist. It was also suggested to provide more details on the type of market (e.g., regulated or organised market) and to avoid reference to a deemed reasonableness of the valuation in this context (while such a reference might be useful in relation to the liability of the enforcement agent in paragraph (4)).

70. As to paragraph (3), it was confirmed that consent should be requested from the creditor. It was further suggested that the nature of the transfer would depend on the type of digital asset (e.g., alternative to traditional payment, or acquisition of the asset in satisfaction of the debt). It was also confirmed, on the basis of previous discussions regarding enforcement by way of authority, that creditor and debtor could agree on transfer by way of payment and request it from the enforcement organ. Moreover, depending on the way the asset is kept (with or without the existence of an intermediary), the cooperation of the debtor in effecting the transfer could play a fundamental role, which should be highlighted also in Recommendation 9.

Doc. 6 – Other issues

71. The Working Group went on to discuss the more general question of the sanctions for non-compliance of the debtor to the duty of cooperation at various stages of the proceedings, and the

appropriateness of using *in-personam* measures ordered by a court as a last-resort, exceptional remedy to coerce such cooperation. In this respect, *the Reporter* referenced the previous Recommendations, and particularly Recommendation 2, the Commentary of which expressly referenced *in-personam* measures, as well as Recommendation 3 paragraph (5) and Recommendation 4 paragraph (4), and asked whether more information should also be inserted in Recommendation 6 and Recommendation 9. It was suggested that this part would benefit from a streamlined presentation of sanctions, that were expressly provided in some recommendations but not in others. It was also noted that this section should be further coordinated with Part. I on enforcement by way of authority, including the draft Section VIII that had not yet been fully discussed within the Working Group.

72. With respect to the options available to the enforcement agent regarding the transfer of the assets (Recommendation 6) it was suggested that, as already discussed for the means of disposition of seized assets in Part I, it would be beneficial to consider receivership or other mechanisms to involve specialised intermediaries that would be entrusted with the transfer.

73. Finally, *the Reporter* went back to Recommendation 4 on the duty of disclosure of third parties, highlighting that such parties may be multiple actors located in different jurisdictions, or may be platforms managing very large numbers of transactions, which would pose additional challenges and may justify the possibility for an enforcement agent to issue a more specific request for cooperation.

**(b) Revised draft best practices regarding enforcement of security rights
(Study LXXVIB – W.G.8 – Doc. 4)**

74. *The Reporter* was asked by *the Chair* to present those parts of Document 4 that had already been approved as a matter of policy by the Working Group, but which had been enriched with additional Commentary and minor, though important, specifications in the Recommendations themselves. The Subgroup wished to provide information to, and receive confirmation from, the Working Group on such additional elements.

Doc. 4 – Annexe I – Recommendations 1 and 2

75. *The Reporter* drew the attention of the Working Group to the additional guidance provided on the definition of “default” in Commentary (b) of Recommendation 1, and to the cross-reference to judicial enforcement of security rights in Part I of the instrument that should be inserted in Commentary lit. (e) of Recommendation 2, if that Part were to provide specific recommendations on this point.

Doc. 4 – Annexe II – Recommendations 1 and 3

76. *The Reporter* for this section pointed to several slight modifications and more extensive additions, mostly to the Commentary, that did not elicit comments from the Working Group: (a) Recommendation 1, paragraph (4)’s last sentence contained an express reference to the need for legislators to remove impediments to and otherwise accommodate technological advances that may improve the efficiency and effectiveness of dispositions of collateral (such as online auctions); (b) the Commentary to Recommendation 1, paragraph (4) contained extensive rewriting and additions, elaborating more on the practice of online sales in extrajudicial enforcement, while at the same time cross-referencing the forthcoming recommendations on online auctions within judicial enforcement; (c) Recommendation 1, paragraph (5) now expressly referred to “written” notice, which was merely implicit in the previous version; (d) the Commentary to Recommendation 3 now specified that the senior creditor could either step into the shoes of the junior creditor or initiate new proceedings; (e) the former unnumbered Recommendations on commercial reasonableness and relief for non-compliance were moved to the beginning of Part II, while the comments and illustrations

specifically referring to commercial reasonableness in the disposition of collateral were still retained in Annexe II, under Recommendation 1.

77. *The Reporter* additionally referred to Recommendation 1 Commentary (b)'s third paragraph, which states that legislators should consider establishing expedited judicial proceedings for the enforcement of security rights (e.g., proceedings requiring only limited production of evidence and an abbreviated schedule for conducting discovery, filing pleadings and holding a hearing). He clarified that this form of expedited judicial proceedings should not be confused with the expedited process to resolve disputes concerning extrajudicial enforcement, for which the Working Group is considering providing some express guidance. The two situations address different needs. The Reporter noted that the UNCITRAL Model Law refers to both, without going into details, respectively in Art. 73 and Art. 74. He also recalled that this language had been present in Annexe II for quite some time, and it had now been placed in the Commentary of Recommendation 1. In the ensuing discussion, there was a suggestion to reconsider the placement of the second sentence of paragraph (3) of Recommendation 1, as it might engender confusion. It was additionally proposed not to use the same term ("expeditious" or "expedited") to refer to both situations, in order to clarify that the two situations were different. Finally, it was confirmed that under the Best Practices, the ordinary judicial route would need a registered enforceable instrument which could then be enforced via a provisional measure under Section IX of Part I.

78. The Working Group finally discussed whether the creditor should be allowed to change track and resort to judicial enforcement if it had already begun the extrajudicial path, which was clearly possible under Annexe II. It was noted that Annexe V on enforcement on immovables expressly stated the opposite (*see above, para. 59*). *The Chair* suggested that this point needed more in-depth consideration and referred it to intersessional work.

Item 5 Structure of the final instrument

79. *The Chair* opened the discussion on the structure of the future instrument, underscoring that a reasonable draft structure would have to be presented to the Governing Council on a confidential basis, together with the most advanced parts of the Best Practices. A draft structure would also help the Working Group focus on the remaining gaps and the extent and feasibility of the work ahead.

80. The Working Group agreed that the instrument would start with an Introduction containing substantive information on background, aim, proposed addressees and ways to use the best practices, and scope. It may also contain reference to issues not treated in the best practices but relevant to legislators to contextualise the proposed guidance. It would be followed by a Part I on enforcement by way of authority and Part II on enforcement of security rights.

81. The placement of two other topics, namely enforcement on digital assets, and the impact of technology on enforcement proceedings, was more thoroughly addressed by the Working Group. It was provisionally agreed to add them to the structure as Parts III and IV, respectively. It was also proposed that Part IV might end up being structured differently from the other parts, with a longer, more narrative introduction, explaining the growing impact and pervasiveness of technology on enforcement proceedings, cross-referencing the recommendations in the preceding parts of the instrument where technology was already taken into account, pointing to the advantages and risks, as well as proposals to minimise these risks. This narrative part would be completed by a specific recommendation on online auctions that had already been discussed by the Working Group. The Working Group agreed that further thought should be given to the general structure and to the content of proposed Part IV.

Item 7 Organisation of future work (timeline of conclusion of the project, interim submission to the Governing Council, consultation phase)

82. The Working Group agreed to submit to the Governing Council on a confidential basis: the draft Structure; Sections III to V of Part I; any other section in Part I that would be deemed by the Drafting Committee to be sufficiently developed; Annexes I, II, and IV of Part II; Document 6 as Part III.

83. *The Chair* recalled that the ninth session of the Working Group was scheduled to be held from 2 to 4 December 2024. She also recalled that the finalised instrument should be presented to the Governing Council for approval in May 2025, and that a consultation period should be scheduled between finalisation of the first completed draft and final submission. In view of this very challenging timeframe, she proposed to hold an intersessional extraordinary virtual session around the end of September to discuss policy issues and advance the project. Those not able to participate would be asked to provide written comments that would be considered at the session. The Working Group agreed with this suggestion.

84. *The Deputy Secretary-General* expressed her gratefulness, on behalf of UNIDROIT, for the extraordinary efforts of the Working Group members and observers and urged all participants to continue their work intersessionally. She thanked her colleagues at UNIDROIT for their cooperation and voiced the heartfelt thanks of the whole Working Group for the guidance provided by the Chair. The Secretariat would continue to provide support for the organisation of intersessional meetings of the Drafting Committee and Subgroups, and for *ad hoc* coordination. *The Chair* thanked all participants and the Secretariat for their hard work and in the absence of any other business, declared the session closed.

ANNEXE I**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 status of the project and intersessional work (Study LXXVIB – W.G. 8 – Doc. 2)
4. Consideration of work in progress:
 - (a) Revised draft best practices regarding enforcement by way of authority (Study LXXVIB – W.G. 8 – Doc. 3)
 - (b) Revised draft best practices regarding enforcement of security rights (Study LXXVIB – W.G. 8 – Doc. 4)
 - (c) Revised draft best practices regarding enforcement on digital assets (Study LXXVIB – W.G. 8 – Doc. 6)
5. Structure of the final instrument
6. Translation of the Best Practices into French
7. Organisation of future work (timeline of conclusion of the project, interim submission to the Governing Council, consultation phase)
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)
Mr Neil COHEN	Jeffrey D. Forchelli Professor of Law Brooklyn Law School (United States)
Ms Valeria CONFORTINI	Professor of Law Università degli Studi di Napoli "L'Orientale" (Italy)
Mr Fernando GASCÓN INCHAUSTI (<i>excused</i>)	Professor of Procedural and Criminal Law Universidad Complutense Madrid (Spain)
Mr LIU Junbo (<i>remotely</i>)	Professor of Civil Procedure Law School of Central University of Finance and Economics (Beijing, China)
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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HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) <i>(remotely)</i>	Ms Ning ZHAO Principal Legal Officer
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UNIDROIT

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Ms ZHANG Naifan	Intern
Ms ZHOU Yitong	Intern