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Item No. 4 on the agenda:

UNIDROIT Best Practices for Effective Enforcement: Approval of Final Draft of the Instrument

(prepared by the Secretariat)

<i>Summary</i>	<i>Submission of the final draft of the draft instrument for approval by the Governing Council</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to approve the draft UNIDROIT Best Practices for Effective Enforcement</i>
<i>Mandate</i>	<i>Implementation of the decision of the Governing Council in relation to the Work Programme 2023-2025</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<i>Linked within text</i>

I. BACKGROUND AND SUMMARY OF PROJECT ACTIVITIES UNTIL THE 105TH SESSION OF THE GOVERNING COUNCIL (MAY 2025)

A. History of the project

1. The project on Best Practices for Effective Enforcement, based on a proposal of the World Bank, was preliminarily included in the 2020-2022 Work Programme by the General Assembly ([A.G. \(78\) 12](#), paras 41 and 51, and [A.G. \(78\) 3](#)), confirming the recommendation of the Governing Council ([C.D. \(98\) 17](#), para. 245). Following the mandate received by the Governing Council at its 99th session (first meeting) in 2020, ([C.D. \(99\) A.8](#), paras 43-44) remote consultations with selected international experts and organisations and an internal workshop were organised to clarify the scope of the project. The Governing Council, at its 99th session (second meeting), held on 23-25 September 2020, approved the proposed guidelines regarding the scope of the project, confirmed the high-priority status assigned thereto, and authorised the establishment of a Working Group ([C.D. \(99\) B.3](#) and [C.D. \(99\) B.21](#), paras 57-58).

2. The Working Group, which held its first session in December 2020, was invited to consider current challenges for effective enforcement and the most suitable solutions (procedures, mechanisms) to overcome them. It was agreed that the goal of the project would be to draft best practices, accompanied by comments, designed to improve the effectiveness of enforcement,

combating excessive length, complexity, costs, and lack of transparency, while at the same time ensuring adequate protection of the rights of all parties involved. Such best practices should consider both enforcement by public authority and non-judicial enforcement of security rights, as well the impact of modern technology on enforcement, the latter as an enabler of suitable solutions and as a potential source of additional challenges to be addressed.

3. At its 81st session ([A.G. \(81\) 9](#), paras 55 and 67), the General Assembly endorsed the recommendation of the Governing Council at its 101st session ([C.D. \(101\) 21](#), para. 187) to keep the project in the 2023-2025 Work Programme, in order to ensure its completion within the next Triennium.

B. Working Group composition and plenary sessions until the 105th session of the Governing Council

4. The Best Practices for Effective Enforcement Working Group was composed of the following experts: Ms Kathryn Sabo (Chair) – former Deputy Director General & General Counsel, Constitutional, Administrative and International Law Section, Department of Justice (Canada) and Member of the UNIDROIT Governing Council; Ms Geneviève Saumier (Coordinating Expert), Dean of the *Faculté de droit, Université de Montréal* (Canada); Ms Valeria Confortini – Professor of Private Law and Head of the Department of Law, *Università Telematica Pegaso* (Italy); Mr Neil Cohen – 1901 Distinguished Research Professor of Law, Brooklyn Law School (USA); Mr Fernando Gascón Inchausti – Professor, Universidad Complutense de Madrid (Spain); Mr Liu Junbo – Associate Professor, China University of Political Science and Law (China); Mr Fábio Rocha Pinto e Silva – Pinheiro Neto Advogados, São Paulo (Brazil); Ms Teresa Rodríguez de las Heras Ballell – Professor, Universidad Carlos III Madrid (Spain); Mr John Sorabji – Associate Professor, University College London (UK); Mr Felix Steffek – Professor, University of Cambridge, and Co-Director of the Centre for Corporate and Commercial Law; and Mr Rolf Stürner – Emeritus Professor, Albert-Ludwigs-Universität Freiburg (Germany). For previous members, see the project’s [dedicated page](#).

5. The following organisations were also part of the Working Group as observers: the European Bank for Reconstruction and Development (EBRD); the Hague Conference on Private International Law (HCCH); the Secured Finance Network (Mr Richard Kohn, Goldberg Kohn Ltd.); the Supreme Court of China (Ms Zhu Ke, Judge); the *Union internationale des huissiers de justice* (UIHJ) (Mr Jos Uitdehaag, First Vice President); the United Nations Commission on International Trade Law (UNCITRAL); and the World Bank Group (WBG). The Working Group gratefully recognises input received in previous sessions by the International Association of Legal Science (IALS); the Kozolchik National Law Center (NatLaw); the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law; the Organisation of American States (OAS); and the Zemgale Regional Court - Latvia. The European Collection and Enforcement Network (CONNEX) was represented by Mr Massimiliano Blasone, Italian Partner. The Confecámeras (Colombia) was represented by Mr Carlos Riaño. The *Comité de Implementación de Garantías Mobiliarias* (Colombia) was represented by Ms Diana Lucia Talero, *Secretaria Técnica*.

6. Between its establishment at the end of 2020 and the 2025 Governing Council session, the Working Group met in plenary eleven times, with an additional extraordinary plenary session held in September 2024. At its first session (30 November and 1-2 December 2020), the Working Group mostly focused on precisely defining the project’s scope, methodology and organisational issues, and discussed a document prepared by a Working Group member on the impact of technology in enforcement. For more information, see the [report](#) of the first Working Group session. The following plenary sessions focused on the drafts produced by three Subgroups formed to make progress on the project (Subgroup 1 on “Enforcement by way of authority”, Subgroup 2 on “Enforcement of security rights”, and Subgroup 3 on “Impact of technology on enforcement”) and continued to thoroughly discuss the draft recommendations and commentary. The sessions were routinely enriched by *ad hoc* presentations by representatives of supporting organisations such as the World

Bank and the EBRD, as well as independent experts. For the reports of each of those sessions, see the project's [dedicated page](#). Finally, at its tenth session (10-12 March 2025), the Working Group considered a complete draft of the instrument consolidated into a single master copy. The outcome of the tenth session was workable feedback, on the basis of which the Drafting Committee proceeded to prepare a finalised draft for submission to the Governing Council in May 2025. For more information, see the [report](#) of the tenth Working Group session and below, Section E.

C. Intersessional work of the Working Group and Drafting Committee

7. Throughout the development of the project, the Working Group continued its activity in the intersessional periods with the support of the Secretariat, through the remote work of the three informal Subgroups as well as through several virtual coordination meetings with the focal points of the Subgroups, with the goal of advancing consideration of specific topics that had elicited discussion and diverging points of view during the formal sessions.

8. In addition, at its fifth session, the Working Group agreed that the Drafting Committee that had been set up at the previous session would start its task of reviewing the draft best practices for which an agreement on policy had been attained. The composition of the Drafting Committee was as follows: Chair Kathryn Sabo; Coordinating Expert Geneviève Saumier; Neil Cohen; Fernando Gascón Inchausti; Teresa Rodríguez de las Heras Ballell; John Sorabji; and Rolf Stürner. The Drafting Committee proceeded to work, for the most part, through email exchanges and meetings held remotely through videoconference. It also met in its full composition, including the Chair and the Secretariat, numerous times, both virtually and in-person around the Working Group sessions, with participation of other members of the Working Group when their input was considered to be necessary.

D. Informal consultations and awareness-raising activities

9. Throughout the development of the project, several consultation activities have been undertaken by the Secretariat to provide the Working Group with relevant information from various legal systems. In particular, the Secretariat, pursuant to the mandate received from the Working Group, and in cooperation with the EBRD, conducted consultations in the form of interviews and questionnaires in order to gather data on challenges, options, and practices for effective enforcement in diverse jurisdictions (among others, Egypt, Greece, Japan, Kazakhstan, Latvia, Mongolia, and Ukraine). Moreover, the Secretariat conducted background research in relation to other legal systems (among others, Brazil, China, Finland, France, India, Mozambique, Portugal, Russian Federation, Rwanda, and Singapore).

10. The Working Group sessions were routinely enriched by special presentations by experts from varied backgrounds, including representatives from the eBRAM (Electronic Business-Related Arbitration and Mediation) International Online Dispute Resolution Centre, Hong Kong; the EBRD; the World Bank; and the Council of Europe.

11. Furthermore, several workshops were organised by the Secretariat with the aim to encourage knowledge sharing in relation to enforcement practices and to coordinate the work with other UNIDROIT Working Groups, including: (i) a virtual workshop on enforcement on digital assets held on 19 January 2022, in which external participants discussed two papers provided by Working Group members, respectively on "Technology-Enhanced Enforcement: Issues Related to Digital Assets" and on "Illustration of Electronic Warehouse Receipt Enforcement"; (ii) a virtual workshop on "Technology in Enforcement: recent developments and opportunities" held on 8 March 2022, with participation of experts from Colombia, Latvia, Moldova, and the UAE; and (iii) a joint workshop with participation of the chairs and members of the Working Group on Digital Assets and Private Law and the Working Group on Enforcement, which shed light on various issues linked to enforcement on digital assets.

12. Additionally, the project was discussed by the Secretariat in many seminars and conferences with participation of representatives of governments, national experts, and international organisations, by way of example, at the following events, among others: (i) a workshop in the context of the 24th International Union of Judicial Officers (UIHJ) Congress on Cyber Justice on 23 November 2021; (ii) a workshop for governmental officials co-organised with the Government of India on 3-4 July 2023; (iii) the APEC ODR Workshop on International Instruments Landscape to Facilitate Trade, Contract Enforcement, and APEC Online Dispute Resolution Framework, held on 14-15 June 2023; (iv) during an institutional visit to Ulaanbaatar (Mongolia) on 23-24 November 2023; (v) a workshop organised by the EBRD Legal Transition Programme on 25 September 2023, where the project on enforcement was discussed with EBRD officials; (vi) the annual International Coordination Conference on Secured Transactions Reform, on 16-17 January 2024; (vii) within the framework of the cooperation with the World Bank Group (WBG), on 18-19 January 2024; and (viii) the Cape Town Convention Academic Project Annual Conference (Cambridge) on 11-12 September 2024. More information can be found [here](#).

E. Submission of preliminary drafts to the Governing Council at its 102nd and 103rd sessions, and of the finalised draft at its 105th session

13. Upon authorisation of the Chair and the Working Group, the Secretariat submitted to the 102nd session of Governing Council, on a confidential basis, and by way of example, the preliminary texts of two sections revised by the Drafting Committee, respectively the section of Part I on information regarding the debtor's assets, and the section of Part II on the secured creditor's right to obtain possession of collateral after default. The following year, the draft outline of the entire instrument and several sections of best practices and related commentary that had already been discussed and agreed upon by the Working Group were submitted to the 103rd session of the Governing Council. In particular, the Governing Council received drafts of the following Sections from Part I: Sections (now Chapters) III on enforceable instruments, IV on information regarding the debtor's assets, and V on digital registration of enforceable instruments and enforcement measures and their outcome. In relation to Part II on enforcement of security rights, the Governing Council received drafts of Section (now Chapter) I containing general principles on enforcement of security rights over movables and Sections (now Chapters) II on the secured creditor's right to obtain possession of collateral after default, III on the secured creditor's right to realise on collateral after default, and V (now renumbered VI) on the variation of the rules governing the realisation of collateral. Finally, the draft of Part III on enforcement on digital assets was also submitted to the Governing Council. The Secretariat received useful feedback that was reported back to the Working Group for consideration.

14. At its 105th session in May 2025, the Governing Council received the finalised draft of the future instrument, seeking comments and the authorisation to proceed with public consultation. The Governing Council endorsed the submitted draft in principle, appreciating the significant progress made in the project's development since the previous year's session. Additionally, the Governing Council authorised the Secretariat to proceed with a public consultation phase and, ultimately, to submit the draft instrument to the Governing Council for final approval, which was initially envisaged as a remote procedure.

II. PROJECT ACTIVITIES SINCE THE 105TH SESSION OF THE GOVERNING COUNCIL

A. Intersessional work after the Tenth Session of the Working Group and public consultation procedure

15. Following the tenth session of the Working Group, the Secretariat convened several remote meetings of the Drafting Committee, enriched by the participation of other members of the Working

Group, with a view to continue to revise the draft instrument based on the feedback received at the Governing Council's 105th session, through additional comments received from Governing Council members, and through targeted consultation with institutional partners in advance of the general public consultation.

16. From 1 July to 15 September 2025, the Secretariat carried out a public consultation for the draft BPEE instrument. The purpose of the consultation was to raise awareness about the draft instrument; ensure that the instrument was well-suited to application in various contexts, including different legal traditions and various types of enforcement systems; and seek feedback on whether the instrument sufficiently addressed the core issues that arise in civil enforcement of creditors' rights. To do so, the Secretariat created a dedicated webpage for the consultation and reached out to as wide a target audience as possible, sending out *Notes Verbales* to all UNIDROIT Member States and sharing the link to the public consultation page with partners and contacts and through social media.

17. A total of 472 comments were received from 19 submissions, in particular from the following member States and member State institutions, other organisations and institutions, and individuals: the Government of Canada; the Economic and Commercial Office of the Embassy of the People's Republic of China in Italy; the Ministry of Foreign Relations of Chile; the Ministry of Justice of Hungary; the Ministry of Law of Singapore; the Superintendency of Companies of Colombia; the Egyptian State Council (Mr Mohamed Sobhy Hassan Ali Mohamed); LABCODEX Study and Research Group (Brazil); the HCCH; UNCITRAL; the World Bank; the International Law Institute (ILI) (Mr Marek Duboveč); the UIHJ (Professors Frédérique Ferrand, Mathieu Chardon, Dimitrios Tsirikas, and Nicolaj Fischer); the Aviation Working Group (AWG); Prof. Eckart Brödermann; and Mr Mohamed Goma.

18. Additional feedback was received in the context of the presentation of the project at various events, including the 16th edition of the Transnational Commercial Law Teachers' Meeting held in Tübingen, Germany, on 9-10 October 2025, and the eighth Conference on International Coordination of Secured Transactions Reform held at the University of Hong Kong, People's Republic of China on 27-28 November 2025.

19. The feedback generated through the consultation phase was thoroughly addressed by the Drafting Committee, which met several times over the course of the summer and early autumn, in an enlarged composition comprising additional Working Group members. Suggested drafting and terminological changes that did not raise policy issues but were deemed useful to introduce clarifications and/or corrections were directly implemented, while several substantive points were discussed but set aside for decision by the wider Working Group at its eleventh session.

B. Eleventh Session of the Working Group (13-15 October 2025): consideration of the feedback received from the consultation

20. The eleventh session of the Working Group was held in hybrid format from 13 to 15 October 2025. The Working Group focused its deliberations on the revised master copy of the draft instrument and particularly on the comments received during the consultation phase. The Working Group was pleased to acknowledge that many commentators had expressed appreciation for the draft instrument, highlighting its usefulness in addressing common issues arising in enforcement proceedings around the world, and noting the efforts to achieve a balance between the predominant need to ensure effective enforcement of creditors' claims and considerations of affording due protection of all parties involved. At the same time, several formal and substantive modifications were introduced to implement comments received.

21. Among the general feedback considered, the Working Group discussed and implemented, where necessary, explanatory comments and/or more substantive changes addressing, in particular,

the following concerns: the need to strike an adequate balance in including references to the use of artificial intelligence in enforcement proceedings; the need to clarify the role and application of measures applying against the debtor personally, expressly stating that they were enforcement sanctions and not sanctions for non-performance of a debt, and that they remained subject to existing constitutional and treaty limits; the need to use consistent terminology or, where this was considered detrimental to the clarity of the text, an explanation of the use of the terms at hand; and adequate reference to relevant instruments of other organisations that were used as a point of reference or were complementary to the current draft instrument.

22. In relation to Part I (Enforcement by public authority), the Working Group focused, in particular, on refining the fundamental principles contained in Chapter I, and on clarifying the articulation between Chapter II (Organisational principles of enforcement) and Chapter XI (Enforcement organs), as well as the role of private documents in triggering the commencement of enforcement by public authority (Chapter III). It also clarified the exceptional nature of the exemptions and other limitations to enforcement introduced to protect vulnerable parties (with particular regard to enforcement over immovables) and the recommendations on the challenges to enforcement (Chapter X).

23. With reference to Part II, the Working Group thoroughly addressed several terminological points and a number of substantive ones regarding, in particular, Chapters IV (Enforcement of security rights over rights to receive payment and credit instruments), Chapter V (Expeditious relief in support of extrajudicial enforcement), and Chapter VII (Enforcement of security rights in immovables).

24. In relation to Part III, the Working Group discussed comments on the draft recommendations and commentary thereto on enforcement on digital assets, reaffirming a technologically-neutral approach and the decision not to include overly detailed guidance on asset tracing or public registration of digital assets. It also considered points on terminology and clarification, the potential role of third-party debt orders against custodians, and the structural limitations arising from the voluntary cooperation and fragmented nature of digital asset service providers.

25. Finally, the Working Group discussed the organisation of the final steps of the project, including a “fatal flaw” review procedure and the final submission of the instrument to the Governing Council.

26. For more details on the specific issues discussed, see the [report](#) of the eleventh session of the Working Group.

C. “Fatal flaw” review procedure (16 December 2025 – 7 January 2026)

27. Following the eleventh session of the Working Group, the Secretariat continued to support the Drafting Committee’s meetings, which were needed to coordinate the work undertaken for each Part of the instrument and to implement the revisions agreed upon by the Working Group.

28. In the period between 16 December 2025 and 7 January 2026, the draft instrument was submitted to the Working Group for a “fatal flaw” review procedure. This further step elicited additional comments related to the following issues in particular: clarification of the recommendations regarding priorities as among secured and privileged creditors and of the terminology referring to such creditors; further adjustment of fundamental principles in Chapter I; clarification of the references to service of documents and notifications in the course of the proceedings; limitation of challenges regarding the appraisal of assets in public sales; and clarification of the recommendations regarding enforcement on intangibles other than receivables.

29. The outcome of the discussions regarding such comments, held during online meetings, was implemented in the final draft of the instrument, which is submitted to the Governing Council for approval.

D. Promotional activities

30. The draft instrument was presented by the Secretariat in the context of UNIDROIT's work on access to credit and procedural law in various fora, including the following: the International Programme for Law and Development – Africa Plus, with participation of governmental experts, judges, and other legal professionals from 16 different African countries (June-July 2025); a webinar on "Enforcement against Digital Assets" hosted by the European Law Institute (ELI), where the intersections of ELI's Principles and Guidance for Enforcement Against Digital Assets (PGEADA) and UNIDROIT's Best Practices were highlighted (18 June 2025); the Transnational Commercial Law Teachers' Meeting held in Tübingen (Germany) on 9-10 October 2025; the Conference on International Coordination of Secured Transactions Reform held at the University of Hong Kong (People's Republic of China) on 27-28 November 2025. The project was also presented by Working Group member Prof. Neil Cohen at the UNCITRAL Colloquium on "Harmonizing law in the age of digital trade and finance – digital assets and platforms" in New York (USA) on 10-13 February 2026.

III. OVERVIEW OF THE DRAFT INSTRUMENT

A. Aim of the instrument

31. Effective enforcement of claims is an essential part of a developed credit market and is considered to be a necessary element for improved access to credit, increase in trade and investment, and overall economic development and sustained growth. It is also recognised, however, that most legal systems are seeking to improve the effectiveness of enforcement, combating excessive length, complexity, costs, and lack of transparency of such procedures. As noted above, the general aim of the Best Practices for Effective Enforcement (BPEE) is to develop a legal tool to address the current challenges to a well-functioning domestic law system for enforcement. The instrument seeks to offer national legislators a set of global standards and recommendations designed to improve the domestic normative framework applicable to enforcement of creditors' claims, both secured and unsecured. While enforcement is strongly influenced not only by the broader legal context and interconnection with other areas of the law, but also by the specific social and economic realities in each jurisdiction, many legal systems face common challenges, such as adapting traditional enforcement laws to the needs of modern economies, considering how to incorporate best practices on extrajudicial enforcement, and making the best of the opportunities offered by technological developments. Thus, the instrument is intended to provide helpful guidance for legislators wishing to improve their domestic law, while contributing to the emergence of common minimum standards and best practices for domestic procedures as a necessary basis for improvement of international cooperation in this area.

32. The importance of ensuring effective and adequate enforcement of claims is currently recognised in general terms in several existing international instruments dealing with either procedural law or secured transactions. The instrument therefore builds upon existing guidance already contained in various other UNIDROIT instruments (including the ALI/UNIDROIT Principles of Transnational Civil Procedure and the ELI-UNIDROIT Model European Rules of Civil Procedure, as well as the Cape Town Convention and its Protocols, and the Model Law on Factoring), in international instruments developed by UNCITRAL on secured transactions (the UNCITRAL Legislative Guide on Secured Transactions, the UNCITRAL Model Law on Secured Transactions, and related documents), and in other global instruments offering practical guidance (in particular, the Global Codes of Enforcement adopted by the International Union of Judicial Officers (UIHJ)). Only a few existing global and regional instruments, however, specifically address mechanisms and procedures for

enforcement, and there is no instrument setting out global standards (in a comprehensive, detailed, and practice-oriented manner) to achieve efficient, cost-effective, timely and fair (judicial and nonjudicial) enforcement of claims. The BPEE aim at filling this gap.

B. Format

33. Following the guidance provided by the Governing Council, the Working Group confirmed that it would be neither appropriate nor feasible to draft a binding international instrument (*i.e.*, a convention), a legislative instrument such as a model law, or detailed principles or rules structured as a comprehensive code. A guidance document containing best practices avoiding “one-size-fits-all” solutions was considered to be a better option. The following main reasons were cited for choosing this type of instrument: the close interconnection of enforcement with several areas of the law (property law, insolvency, constitutional law, etc.) where there is a divergence of national legal concepts and approaches; various national cultural, social and economic situations; and the dynamism of technological developments applied to enforcement.

34. The instrument was therefore developed in the form of recommendations of best practices with commentary and illustrations of particular scenarios, which point to relevant potential issues to be considered in reforming or further developing this area of the law, and/or suggest examples of best practices drawn from existing models. The BPEE do not purport to exhaustively regulate enforcement but rather offer guidance, where considered appropriate to do so. The comments explain the background and provide the reasons why one particular best practice was followed.

C. Scope and general structure of the instrument

35. The draft instrument is composed of three Parts: Part I on Enforcement by public authority, Part II on Enforcement of security rights, and Part III on Enforcement on digital assets. This structure implements the original proposal of the World Bank Group and the guidance initially provided by the Governing Council that the instrument should cover the enforcement of both unsecured and secured claims and should consider the impact of new technologies in enforcement. It was purposely chosen, after thorough discussions within the Working Group, also to underline the non-comprehensive character of the instrument.

36. Part I contains general recommendations on enforcement by public authority. Its recommendations focus on the issues that often create difficulties in enforcing creditors’ rights through public authorities and for which a harmonised legal best practice could be developed. The Working Group strove to present the recommendations in a more user-friendly way than the legislation in many legal systems, where the rules applicable to traditional enforcement procedures are scattered among different acts or laws and sometimes secondary regulations (for more information on the content of Part I, see below, paras 39-49). Part II, on the other hand, only covers enforcement of security rights specifically and focuses on facilitating the effectiveness of *extrajudicial* enforcement mechanisms, which are presented as a best practice for enforcement in this area. There are, undoubtedly, significant interconnections between judicial and extrajudicial enforcement, which the instrument acknowledges, including appropriate cross-references and *ad hoc* recommendations (for more information see below, paras 50-57). Finally, the last part of the draft instrument (Part III) is devoted to enforcement on digital assets. The reason why the Working Group decided to single out a separate part of the instrument for digital assets was to clarify some of the issues that had arisen in recent case law in various jurisdictions with respect to effectively enforcing creditors’ rights on assets that may have a significant economic value, but for which the application of general enforcement procedures and measures is often subject to challenges. Moreover, this Part was intended to offer additional guidance to legislators with respect to the general provisions on enforcement of the UNIDROIT Principles on Digital Assets and Private Law, which refer to “other” (*i.e.*, non-Principles) law to regulate this matter (see below, paras 58-59). With respect to other matters related to the impact of technology, the Working Group had initially considered it appropriate to

cover them in an additional Part IV. After thorough discussions, however, it was decided that the BPEE already incorporated multiple references to technology as a means to support the effectiveness of enforcement, and that therefore an additional separate part would be either too general or repetitive. The Introduction to the instrument as a whole highlights the importance of (new) technology for enforcement and mentions the relevant recommendations and comments for ease of reference.

37. In accordance with the mandate received by the Governing Council, the Working Group proceeded with caution in certain matters, agreeing to limit the number of best practices specifically addressing consumers, and not to address insolvency-related issues specifically but instead focus on developing guidance on general enforcement procedures and measures.

D. Overview of the content of the draft instrument submitted to the Governing Council for approval

General

38. The instrument is opened with an Introduction, which explains the aim of the project, addressees, and choice of format, and it elucidates the structure and scope of the instrument.

Part I - Enforcement by public authority

39. Part I is intended to provide guidance on general enforcement procedures that are carried out by public authorities. It is based on a number of general principles enumerated in Chapter I: the protection of the fundamental right to secure the effective enforcement of substantive rights, which is considered an integral aspect of the right of access to justice; the protection of a third party's or a debtor's fundamental rights as balanced with the effectiveness of the creditor's fundamental right to effective enforcement; the principle that enforcement should be effected through regular proceedings that have a clear legal basis; the importance of party disposition over enforcement proceedings; the parties' right to be heard; and the requirement that enforcement proceedings be managed effectively and proportionately by enforcement organs, which includes the need to implement effective and proportionate sanctions for non-compliance with obligations that arise in enforcement proceedings. The comments to the recommendations in Chapter I already contain some examples of the application of the general principles and how the interests of the parties and third parties that are protected by them are balanced throughout the instrument, considering the primary goal of ensuring the effectiveness of enforcement.

40. Chapter III contains best practices on the requirements for the commencement of the proceedings. It gives guidance to legislators on the advisable threshold for the requirements of form, content, and authenticity of the documents that can be used by the creditor to open an enforcement procedure ("enforceable instruments") (Recs 9-11), and presents as good practice that they be digitised and managed via individual registers or systems of registers that facilitate automated processing (Recs 12-14, plus Chapter V). It also implements the principle of party disposition, insofar as the opening (and continuation) of the procedure and the request for registration of the enforceable instrument are based on the creditor's initiative. These recommendations enumerate the types of enforceable instruments, introducing various options of expedited procedures to obtain such an instrument, drawn from identified good practices in different legal systems. The recommendations further cover other private documents (*e.g.*, invoices or similar documents) that some legal systems consider enforceable if no opposition is raised. Enforceability can be obtained through a warning notice procedure giving the debtor the possibility to either fulfil the claim or present opposition to the registration of the document as an enforceable instrument, failing which the court or competent enforcement organ may proceed with registration.

41. Chapter IV addresses the obligations of the debtor and third parties concerning disclosure, the enforcement officer's right to seek information, and what measures are advisable in case of non-compliance. Fundamental to the effective operation of these recommendations are both the duty of cooperation and the general duty of disclosure, owed by the debtor and also, depending on circumstances, by third parties. This Chapter underlines the importance of the enforcement officer's right to actively search for information about assets or conduct searches upon the debtor's consent or a court order, *e.g.*, by appointing an expert to access digital storage, provided that the measure is proportionate and appropriate and considering existing applicable civil procedure privileges.

42. An innovative feature of the BPEE is contained in Chapter V, which makes provision for the setting-up of registers or systems of registers where enforceable instruments against debtors of commenced enforcement procedures, results of disclosure, and records of all enforcement measures and their outcome should be stored in digital form, to ensure adequate coordination and efficiency of proceedings. The draft instrument recommends that such register or registers be supervised by a court or other public authority to ensure reliability and the protection of the interests of all parties involved. As legal systems are increasingly adopting digital platforms to manage civil proceedings, including the enforcement phase, it is envisaged that legislators may draw inspiration from Chapter V in regard to issues such as supervision options, content to be stored, accessibility, protection of data, and the need for adequate communication with registries set up for other purposes but which contain information on rights encumbering debtors' assets (*e.g.*, security interest registries, or even registries of liens).

43. Chapter VI on regular modes of enforcement represents the core of the recommendations in Part I. It is based on the assumption that enforcement measures should generally be those that secure the most efficient means by which an economic return from the seized asset can be realised. It also recommends a reasonably proportionate relationship between the value of the seized assets and the amount of the claim subject to enforcement, including interests and costs. The recommendations strive to be functional and are tailored to address problems that may arise in practice when enforcing different types of claims (monetary and non-monetary) on diverse types of assets (which may require different enforcement measures, an adaptation of the way measures are implemented, or a combination of enforcement measures to achieve the desired result). They attempt to strike an appropriate balance between fairness and efficiency, considering the need to ensure cost- and time-effective enforcement as well as proportionate protection of debtors in specific circumstances, in addition to third parties. Legislators are made aware of the potential coexistence of creditors interested in seizing and thus securing the proceeds of sale of the same asset, and the need to regulate this coexistence.

44. In particular, Chapter VI includes enforcement measures for monetary claims against the debtor's tangible movables (subsection 1.1) and immovables (subsection 1.4). For both types of assets, preference is given to seizure and subsequent public sale, but enforcement officers and parties are offered the flexibility to use alternative means to realise the value of the asset (Recs 28-29, 48); regarding immovables, the usefulness of receivership or analogous entrustment to a third party is recognised, particularly in those situations where the most advantageous solution is to lease or rent the asset or otherwise manage it with a view of applying the proceeds to the creditor's satisfaction (Rec. 50); and again regarding immovables, the recommendation on the extent to which a stay of eviction for a short period of time could be sought if the debtor and his or her family are particularly vulnerable and habitually reside at the property subject to seizure. Chapter VI also provides recommendations for third-party debt orders, which cover enforcement on bank accounts, earnings, and receivables (subsection 1.2), underscoring the desirability of introducing automated enforcement systems that are particularly effective for these types of assets and already used in many jurisdictions. In relation to other types of intangible assets, the recommendations single out a number of specific cases (see subsection 1.3), preceded by a more general recommendation that links enforcement to legal assignability or transferability (as opposed to contractual limits) as the only way to obtain an economic return where monetary enforcement is concerned (see Rec. 37).

45. Finally, the instrument contains a recommendation on the use of online auctions to sell seized assets, purposely placed in a separate section to ensure visibility and to underscore the advantages of their use (subsection 1.5). The draft instrument recommends their being made available for all types of assets, including immovables, a feature that represents an important innovation in respect to those legal systems still adopting a more restrictive approach.

46. The regular modes of enforcement in Chapter VI are complemented by Chapter VII addressing special modes of enforcement (considered to be useful in those situations where, in the interest of promoting cost-effective and efficient enforcement, there is a need to combine multiple, different modes or appoint a third party, such as a receiver, to fully realise the creditor's interest) and Chapter IX on provisional measures to protect a creditor's right to secure the effectiveness of future enforcement. Chapter VIII contains recommendations on the admissibility and scope of enforcement measures that apply to debtors personally. In those cases where public enforcement cannot work as an effective substitute for an action that can only be taken by the debtor, it is recommended to complement enforcement rules with effective measures to promote debtors' compliance with enforcement orders that either operate on the debtor's assets directly, or have an effect upon the debtor, including through fines or coercive measures that operate personally on the debtor. The draft instrument, however, also recommends that the use of any form of sanction should be a last resort (see Rec. 64), should always be subject to two fundamental principles that ensure their exceptionality (inappropriateness of a substitute action, and proportionality), and should be subject to existing treaty obligations or constitutional principles.

47. Chapter X covers the mechanisms that protect the rights of the debtor and third parties in those circumstances where an improper interference with such rights is alleged (opposition). As this is an area where legal systems vary considerably in their approach and are often excessively complicated, the Best Practices strove to introduce a simpler taxonomy to avoid overlapping procedures and measures, as well as overlapping competence of different organs. The Working Group discussed the extent to which such opposition would entail setting aside the enforcement procedure or granting a stay, reaching the conclusion that while such actions would be left to the discretion of the courts competent for the enforcement, the latter method should be preferred to the former, particularly in the case of the debtor's opposition, and granting a stay should, in any event, be exceptional (*e.g.*, where there is an actual risk that if enforcement proceedings continue pending the outcome of the opposition proceedings, irreparable harm will be done).

48. The draft instrument further contains a few general recommendations regarding enforcement organs in Chapter II, which allow a better understanding of the following Chapters, as well as a more articulated set of recommendations in Chapter XI on the organisation of the system of enforcement organs and the different options available to legislators for the setting-up of the general system and the specific organisation of the courts and the enforcement agents. The Working Group agreed that in view of the different legal, economic, and cultural approaches in legal systems, it was appropriate to avoid excessively prescriptive recommendations and offer alternative options, including the additional or alternative setting-up of enforcement agents from the private sector, as long as they were implemented consistently with the general principles contained in the Best Practices (such as impartiality and independence, consistent regulation and supervision, proper training and adequate appointment procedures – see in particular Recs 82-84). Effective coordination should be ensured through the implementation of registration, as provided for in Chapter V. The recommendations further recognise as best practice that enforcement agents should be permitted to promote the settlement of an enforcement process by seeking to mediate between the parties (Rec. 85).

49. Finally, Chapter XII addresses enforcement costs through a few recommendations intended to promote the development of a clear, simple, and predictable approach to the matter.

Part II - Enforcement of security rights

50. Part II covers enforcement of security rights over movables, including tangibles and receivables and other rights to payment. It also provides recommendations regarding enforcement of security rights over immovables. Its focus is on extrajudicial enforcement procedures that, as already mentioned, are recommended as a best practice for enforcement on collateral. For enforcement of security rights over movables, the Working Group recognised that existing international instruments approved at a multilateral level, including those developed by UNIDROIT and UNCITRAL, were to be considered as points of reference. At the same time, such instruments either apply to specific industry sectors or provide for general recommendations that needed further elaboration *vis-à-vis* enforcement. Moreover, the draft instrument is addressed not only to States that have enacted substantive secured transactions law in line with international recommendations (or of which the law was already aligned with those recommendations) but also to those States with substantive secured transactions law not aligned with such standards. Those States may consider reforming enforcement practices so that they better match the economic and social policies of secured transactions. To this end, the draft instrument, when appropriate, goes beyond those precedents to add detail or to address issues that had not been addressed. It also provides comments and enforcement-specific illustrations that clarify the application of the recommendations. In regard to immovables, on the other hand, the recommendations contained in the draft instrument (and specifically in Chapter VII of Part II) offer unprecedented international guidance informed by identified best practices in various legal systems and general principles established at international level (i.e., the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes), and do not reflect the results of any prior work by UNIDROIT or other organisations (though the Chapter does consider it appropriate to extend at least some of the international best practices applicable to movable collateral to enforcement on immovables).

51. All recommendations in Part II are based on the general principles contained in Chapter I, notably: that a State should allow secured creditors to enforce security rights not only by means of judicial procedures but also extrajudicially, subject to the recommendations of the following Chapters; and that all rights and obligations concerning enforcement of security rights be carried out in good faith and in a commercially reasonable manner (Rec. 92). The Working Group agreed on the application of those general principles to enforcement on all types of collateral, including immovables.

52. Chapter II focuses on the secured creditor's right to obtain possession of tangible collateral after default. It recommends that legislators grant to secured creditors the right to obtain possession of tangible collateral without first applying to a court or other authority, with a view to enhancing the economic value of secured credit. The recommendations, however, ensure that extrajudicial repossession may occur only if certain procedural and substantial limitations are present. An additional limitation applies when there are multiple items of collateral and the net amount that can reasonably be expected to be realised by disposition would be significantly in excess of the amount of the secured obligation, while the secured creditor without additional burden or expense could obtain possession of a smaller set of those items that would assure satisfaction of the secured obligation and any related costs, including expenses of repossession and disposition (see Rec. 98 and related comment). Finally, for those situations where the debtor resists relinquishing possession, an innovative recommendation on expeditious relief supporting nonjudicial enforcement is provided in Chapter V (see below, para. 56).

53. Chapter III deals with the secured creditor's right to realise the value of movable collateral after default. In line with emerging best practices in the field of secured transactions, the creditor is permitted to dispose of the collateral by any method that it selects, including sale, lease, license, or other method of disposition, and to select the manner, time, place and other aspects of the method of disposition, including whether the method of disposition will be public (such as by an auction) or private (such as by a negotiated sale to a third party), as long as those choices are reasonable under the circumstances and the requirements set out in Section 1 of the Chapter are met. The

recommendations expressly refer to the advantages of considering online auctions for the disposition of the collateral, both in the recommendations and in the comments, where the potential impact of adopting such a method in evaluating the commercial reasonableness of the disposition is discussed. The creditor is also entitled to acquire the collateral in total or partial satisfaction of the secured obligation after the occurrence of an event of default, subject to the conditions provided in Section 2 (see Recs 108-109). This regime is rounded out by recommendations on the right to take over enforcement from another secured creditor, and the grantor's right to terminate enforcement.

54. The Working Group agreed on the appropriateness of devoting a specific section (Chapter IV) to receivables and other rights to payment, in view of their economic importance and the need to provide specific guidance that would be sufficiently visible. The Chapter begins by addressing receivables as the benchmark for enforcement on intangible assets, extending some of its principles to other rights to payment used as collateral, whether monetary or non-monetary, and regardless of their source or form. This Chapter also explores the role of automation and digital technology, highlighting their potential to enhance efficiency and transparency in enforcement.

55. In regard to movable collateral, Chapter VI covers the role and limits of party autonomy in the variation of the rules governing the enforcement of security rights. The recommendations contained in this Chapter were subject to much discussion within the Working Group. In the end, a solution was agreed upon according to which legislators should provide for the right of a secured creditor to unilaterally waive or vary by agreement its rights as regards the enforcement of security rights in collateral, and to vary by agreement (not waive) its obligations owed to the debtor limited to the time after default. The obligations of good faith and commercial reasonableness, however, may not be waived unilaterally or be varied by agreement at any time (though parties may agree that a certain way of exercising rights and obligations conforms with those obligations unless this is manifestly not the case – Rec. 122).

56. Chapter V contains one of the most innovative recommendations, which was unanimously considered to be of great relevance to ensure the effectiveness of extrajudicial enforcement on movable collateral, but the content of which was ultimately agreed upon after much debate, namely guidance on the setting-up of expeditious relief to support extrajudicial enforcement (Rec. 120). In many legal systems, when a party raises opposition (particularly concerning repossession but also other enforcement actions by the creditor towards the debtor), the extrajudicial procedure is turned into an ordinary judicial one, thereby frustrating the very purpose of the former. The draft instrument recommends that legislators introduce expeditious relief to deal with such issues through a speedy, simple, and concentrated procedure. Both creditors and debtors can resort to this relief, the purpose of which is to offer support when it becomes clear that a party is unwilling to comply voluntarily with the rules governing extrajudicial enforcement of security interests or an order made or provisional measure granted under this process. It should generally be relied upon when facts relevant to an applicant's case are either undisputed or not the subject of credible dispute, though in other cases a court may still make orders or grant measures subject to relevant conditions. The recommendation does not purport to dictate a specific procedure but lists the typical situations where this speedy relief can be useful and the orders that a court could grant, including the possibility to take steps to promote settlement in so far as appropriate in the circumstances.

57. Finally, Chapter VII addresses enforcement of security rights over immovables. The draft instrument recognises that for immovable collateral, matters of creation and publicity, as well as issues of characterisation of the creditor's right, may vary extensively across jurisdictions. The Working Group, however, came to the conclusion that it was possible to agree on baseline best practices regarding enforcement (repossession and disposal), drawing upon the recommendations on enforcement on tangible, non-fungible movable assets to the extent they could be applied, and upon best practices found both in common law and civil law jurisdictions. In this Chapter, the most debated recommendations concerned the extent to which creditors' remedies should be limited to protect debtors when the collateral is residential property, and the relationship between the secured

creditor's rights and existing third parties' rights, such as leases or rental agreements (see Recs 126-127).

Part III - Enforcement on digital assets

58. As already mentioned, the Working Group agreed on the importance of including a separate part on enforcement on digital assets. As clarified in the introduction to this Part, while general enforcement measures will apply to these assets, there is a need to provide concrete additional guidance to legislators or enforcement officers on the obstacles that the application of the general enforcement regime faces when confronted with digital assets, and on possible solutions. Thus, for this Part of the instrument, the comments play a greater role than the codified Best Practices themselves. This Part contains a general recommendation (Rec. 131) and is then divided into two Chapters: the first, and more detailed, addressing enforcement by public authority, and the second consisting of a single recommendation on enforcement of security rights over digital assets.

59. Part III opens with the general recommendation that enforcement law should recognise that digital assets are susceptible to enforcement. This is based on a pragmatic approach and basic assumption (already embodied in Principle 18 of the UNIDROIT Principles on Digital Assets and Private Law, DAPL) that, irrespective of the specific legal characterisation of the asset in domestic law, the relevant factor is whether it has value that can be realised in the enforcement context. In the subsequent recommendations, emphasis is given to the proper selection of measures that should take into account and be suitable for the different types of digital assets, and the different ways they are held or transferred. In some cases, a combined application of various measures may be required, including those that apply to debtors personally when a substitute measure is ineffective. The relevance of the cooperation, not only of the debtor, but also of third parties (including custodians), to ensure effective enforcement is highlighted. Such cooperation is essential in various phases of the enforcement process, from obtaining information to seizing the assets and realising their value, as is the need for adequate measures to counteract a lack of cooperation. The Best Practices further address the issue of the valuation of the assets for the purposes of enforcement, and the extent of the enforcement officer's liability in the exercise of its function. In respect to enforcement of security rights over digital assets, for which both judicial and extrajudicial enforcement are addressed, the Best Practices suggest the application of the recommendations in Part II to the extent they can be effectively applied to the latter situation; consistently with Principle 17(2) DAPL, they also refer to the limits of a strictly extrajudicial action for those situations where the cooperation of a third party (*i.e.*, a custodian) is needed; finally, they provide examples of challenges in the application of the general principles of good faith and commercial reasonableness in this context.

IV. FUTURE STEPS

60. The Secretariat is submitting a complete English draft of the whole instrument to the Governing Council for approval. A French version is in the process of being prepared and will be submitted to the Governing Council in due course.

61. In relation to further steps and implementation, the Secretariat wishes to highlight the interest that the draft instrument has already sparked in relation to the activities of other organisations that participated in the development of the Best Practices, in particular the EBRD for its regional projects, and the UIHJ for the revision of their Global Code on Enforcement.

V. ACTION TO BE TAKEN

62. *The Governing Council is invited to consider and approve the draft UNIDROIT Best Practices for Effective Enforcement and to mandate the Secretariat to proceed with all necessary formal adjustments and corrections to enable the final publication of the instrument.*

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