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SUMMARY REPORT

1. The ninth 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 2 to 4 December 2024. The Working Group was attended by 25 participants, including members, observers from intergovernmental and other international and academic organisations, and representatives of the UNIDROIT Secretariat. A full list of participants is available in Annexe II.

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

2. *The Secretary-General of UNIDROIT* and *the Chair* opened the session, welcoming and thanking all participants, pointing to the meaningful progress which had been achieved for this session and to the approaching conclusion of the project, while at the same time warning that there was still much work to do in the next few months. *The Deputy Secretary-General of UNIDROIT* echoed the words of welcome and gratitude for the commitment shown by the experts in producing for the first time a complete draft of the future instrument.

Items 2, 3. Adoption of the agenda and organisation of the session; Update on the status of the project (Study LXXVIB – W.G.9 – Doc. 2)

3. *The Chair* recalled that the Working Group had envisaged to circulate a first draft of the instrument for consultations in January and that the purpose of the session was to cover as much ground as possible in order to achieve this goal. *The Deputy Secretary-General* updated the Working Group on the intersessional work done for the project, summarised in Document 2, and referred to the documents which had been submitted to the Working Group: Document 3, containing a first completed draft of Part I; Document 4, containing a first completed draft of Part II; Document 5, containing one recommendation on online auctions which had been redrafted on the basis of the input of the Working Group and specific input of one observer; Document 6, containing a completed draft of Part III; and Document 8, containing a recommendation on "Expeditious Relief to Support Extra-judicial Enforcement", developed by Subgroups 1 and 2 and already discussed at the Extraordinary Session of the Working Group in September 2024. She further recalled that Document 2 contained an outline of the instrument's development thus far. She finally noted that the placement of Document 5 was still undetermined, one option being to place it within Part I (should the Working Group so approve).

4. The Working Group unanimously adopted the revised agenda, available in Annexe I.

Item 4. Consideration of the work in progress

(a) Revised draft best practices on enforcement by public authority (Study LXXVIB – W.G.9 – Doc. 3)

5. *The Chair* stressed the importance of prioritising those recommendations that had not yet been discussed in the Working Group. She also noted that Chapters I and II had been considered at the Drafting Committee meeting held just prior to the start of the session of the Working Group, and she briefly summarised the revisions that had already been introduced in the draft.

Chapter I. Fundamental Principles; Chapter II. Organisational Principles of Enforcement

Recommendation 8 – Enforcement management by parties and by enforcement organs (as well as Recommendation 3 – Party Disposition)

6. The Working Group addressed the relationship and apparent discrepancy between Recommendation 8 and Recommendation 3. It was decided that the Recommendations be reformulated to clarify that while the enforcement organ would ultimately take the decision on the modes of enforcement and enforcement measures, it would be, in principle, required to follow a creditor's application absent any countervailing legal or factual circumstances. It was proposed to give more visibility to, and move to the text of the Recommendation, the content of paragraph 3 of the commentary to Recommendation 3, listing the examples of circumstances where the enforcement organ need not follow the creditor's application. The issue was deferred to the Drafting Committee.

7. Additional drafting suggestions were made regarding deletion of paragraph (2) (more specifically, striking out the first sentence and moving the second sentence to the Comments) and reformulation of paragraph (1) in a more concise way.

8. A question was raised as to the meaning of "concurrent measures" in paragraph (1). It was stated that this was not intended to refer to concurrent proceedings in relation to the same assets, but rather to circumstances where a debtor might have assets in different jurisdictions, or where concurrent measures in relation to separate assets were necessary. It was noted that the onus would be on enforcement organs to avoid needless recourse to concurrent measures and to determine the most pragmatic means of enforcing the debt. Placing this onus on the enforcement organ, and giving it the means to discharge this duty, was preferable to requiring debtors to seek a resolution through the execution court.

Recommendation 1 – Enforcement by way of Public Authority and the Rule of Law

9. The issue was raised that the phrase "a fair hearing" contained in paragraph 1 of the commentary was potentially misleading – while it might exist as a term of art in some jurisdictions, it might also be understood as entailing a fully-fledged hearing process, which might not be available to all parties in all circumstances. It was clarified that the term was intended to mean "access to justice". It was also noted that the phrase "enforceable instrument" was first used in this Recommendation with little explanation and might cause confusion. Some explanatory text in the Comment or adequate cross-reference could be helpful for readers. Other issues, such as the use of the plural for creditors and debtors, were deferred to the Drafting Committee.

Recommendation 2 – Enforcement Measures and Fundamental Rights Protection

10. It was clarified that Recommendation 1 dealt with the creditor's fundamental right to enforcement, while Recommendation 2 required enforcement measures to be consistent with (other) fundamental rights. In this respect, it was suggested that reference in the BLR to "fundamental

rights" without additional qualifications on how to balance the creditor's fundamental right to enforcement and the fundamental rights of the debtor or third parties might be construed by judges or other authorities so as to easily allow debtors to raise an opposition to enforcement or delay such procedure. It was clarified that this was not the intention of the Recommendation. The Drafting Committee was further asked to clarify the point that while most of the cases would involve fundamental rights of the debtor or other parties, enforcement measures should also respect creditors' (other) fundamental rights. The specific example of the right to confidentiality of information was made. It was proposed that additional illustrations to this effect be inserted in the Comments to Recommendation 2. It was further asked whether recommending against undue or excessive infringement of (the debtor's) rights might be more apt, as enforcement did entail a limitation of the debtor's rights in the interest of the general principle of the creditor's right to enforcement. In this respect, it was agreed that the Recommendation should underline the general aim of the best practices to foster effective enforcement, which was already contained in Recommendation 3, paragraph (2), expressly referring to the fact that enforcement did not depend on the goodwill of the debtor.

11. In respect to paragraph (3), it was suggested to limit the entire Recommendation regarding fundamental rights, or only the paragraph on exemptions, to individuals as opposed to collective entities. In this regard, it was noted that some jurisdictions did recognise certain fundamental rights of collective entities, but that the issue of exemptions was discrete and merited separate consideration, also in view of other recommendations in the draft expressly limiting exemptions to individuals. The matter was left open for later consideration. It was further agreed that the paragraph be revised to specify that any exemptions be determined by the legislator and not inferred with by judges based on general principles of equity. It was finally agreed to insert cross-references to the subsequent recommendations on exemptions.

Recommendation 3 – Party Disposition

12. It was suggested that defining "party disposition" in the body of the Recommendation might aid clarity, also in view of the potential difficulty in translating the term into other languages. The majority of participants, however, considered the expression sufficiently well known, also taking into account that Comment paragraph 1 contained an explanation of its meaning, and that the term had already been used in the ELI-UNIDROIT Model European Rules of Civil Procedure. The alternatives of referring to Party Autonomy and Party Initiative were not retained. The issue was deferred for final consideration by the Drafting Committee.

Recommendation 4 – Due notice and the right to be heard

13. It was suggested that the Recommendation might include a provision protecting creditors where debtors tried to avoid notice in order to prevent enforcement. In this regard, while the Working Group noted that the Comment to the Recommendation addressed this practice in paragraph 2, as did the Comment to Recommendation 3, and that the Recommendation referred to the process of providing notice, not to actual notice, it also considered the addition of a more specific mention of this practice for clarity.

Recommendation 6 – Organisation and operation of enforcement organs

14. "Registers to support enforcement" was proposed in Recommendation 6 paragraph (4). It was also suggested that this Recommendation be cross-referenced with the provision creating creditors' right to access the registers on the basis of a legitimate interest. A question was raised as to whether the list of individuals with a legitimate interest in accessing the registers should be treated as an open list, in light of the potential public interest in viewing such documents. As many jurisdictions did not publish the records of administrative decisions, it was concluded that the list should be treated as closed.

15. The need to reread the final recommendations in Chapter V on registers, in light of the completed instrument now being available, was also raised by the *Chair* and deferred to the Drafting Committee.

16. It was suggested that the phrase "private sector organisational legal forms" might be confusing and that it could be substituted with "organs using private infrastructure by delegation of public authority" or the like.

17. It was finally noted that Chapter XI dealt with organs of enforcement in more detail, and that the aim of Chapter II was to provide a general introduction for the benefit of the reader. Further consideration of the relationship between Chapters II and XI was deferred to a later time.

Chapter VI. Modes of Enforcement – Section 1. Monetary Enforcement – Subsection 1.1. Enforcement on Tangible Movables

Recommendation 24 – Seizure by Taking Control of Movable Assets

18. Paragraph (3)(a-c) was said to be repetitious, and it was suggested that these items be grouped together in the interest of brevity. On the other hand, it was noted that they dealt with different factual situations. The question was deferred to the Drafting Committee.

19. It was observed that the language of Recommendation 24 implied that methods of electronic tracking or taking control of assets and other uses of the Internet of Things in enforcement were merely a future perspective. It was suggested to add, by way of example, a reference to existing international legislation where systems of telemetric tracking were already envisaged (in particular, the Space Protocol to the Cape Town Convention to effect "repossession" of in-orbit satellites through remote control).

20. It was queried whether the requirement in paragraph (2) that a "reasonably proportionate relationship" be "demonstrate[d]" was redundant given the inclusion of proportionality in the general principles, and whether it placed an unduly burdensome onus of proof on the enforcement organ. It was clarified that "demonstrate" had not been intended to signify an active process of proof, but rather a reflection of proportionality – in other words, that proportionality need only exist. It was decided that "demonstrate" would be changed to "have".

21. The question of proportionality as a grounds on which enforcement might be contested by the debtor was discussed. While such a provision would benefit all parties insofar as it promoted the just and effective enforcement of debt, the argument was raised that it in practice it would offer debtors an undue opportunity to delay the enforcement process, depending on the length of the opposition procedure. It was clarified that both the reference to interests and costs in paragraph (2) of the Recommendation and Comment paragraph 4 at the end explained the intended policy, which was not to allow debtors to rely on lack of proportionality as a means to block or delay the procedure. The enforcement organ would not be forced to provide the debtor with an explanation of the choice of the assets that were seized. It was further noted that Recommendation 98 in Chapter X articulated the principle of proportionality in more precise terms, albeit in a distinct context, and might aid in interpreting Recommendation 24. The point was deferred to the Drafting Committee.

22. Finally, the Drafting Committee was asked to reconsider the relationship between subparagraphs (a) and (c) of paragraph (3).

Recommendation 25 – Legal Consequences of Seizure

23. The Drafting Committee was asked to check the reference to Recommendations 53 and 54 in paragraph (3), on the ranking of interests in all movables.

Recommendation 26 – Exempt Movable Assets

24. The point was raised that the current draft of Recommendation 26 contained the condition "[w]here the debtor is an individual", while that same condition had been questioned in other recommendations dealing with exemptions, in particular Recommendation 2 in Chapter I. It was, however, also noted that the prior discussion regarding Chapter I had been framed in more general terms and regarded fundamental rights that some jurisdictions extended to legal persons. It was agreed that Comment paragraph 1 already clarified that rules on exempted assets varied from country to country and were directly related to the culture and above all the socio-economic structure. Thus, the recommendations on exempt assets should indicate a policy that would be implemented differently in different legal systems but should be clearly specified in legislation, as agreed upon in relation to Chapter I Recommendation 2. Reference to paragraph 3 of the Comments was also made, which indicated that the enforcement authority would be authorised to apply the provisions flexibly and proportionally (the policy being to not unduly hinder enforcement and to provide the debtor with what was necessary and no more than that).

25. Upon a query regarding the exemption of a portion of the debtor's salary, it was clarified that it was covered in Recommendation 34. It was suggested that the Drafting Committee consider adding some language in the Comments and a cross-reference to that provision.

26. Several participants expressed concern on whether the recommendation could be interpreted as allowing exemptions to cover collateralised assets or assets subject to a right of retention. It was suggested that some language be added in the Comments to dispel such an interpretation. In response, it was noted that substantive law would determine the relationship between issues of priority and exemptions and that the two issues should not be confused.

Recommendation 27 – Seizure of Movable Assets in the Control of Third Parties

27. After a thorough discussion referring to the factual scenario of assets in the hands of a third party such as a custodian, and the meaning of "taking control" as applied to tangible movables, it was clarified that this Recommendation should not be read as impeding the seizure of assets that were subject to rights of third parties, subject to specific recommendations on custodial arrangements (e.g., Recommendation 72 on Provisional Custodial Orders) and that this Recommendation worked together with those on third-party debt orders where the third party did not voluntarily surrender the tangible asset and had a valid right to possession (paragraph (2)(b)). It was agreed that the Drafting Committee would consider the need to introduce clarifications.

28. Finally, it was agreed that in paragraph (3) the "promise to sell" should be indicated as one possible example, clarifying the point in the Comments, possibly with illustrations.

Recommendation 28 – Enforcement Organ Realisation of the Value of Seized Movable Assets

29. It was proposed adding to the comment to paragraph (5) of Recommendation 28 that the creditor could use its indebtedness as currency in making its offer, the practice referred to in Part II as "credit bidding" (Comment paragraph 14 to Recommendation 100 in Part II).

30. It was further noted that the standard regarding maximisation of recovery in paragraph (1) of Recommendation 28 was different than that contained in in Part II (in particular, paragraph 8 of the Comments to Recommendation 100 on Disposition of collateral). After a thorough discussion, *the Chair* summarised that the situations were different because Recommendation 28 was directed to enforcement agents while the recommendations in Part II were mainly directed to the creditor. The Working Group agreed to maintain the language as it stood but that there should be additional commentary (which would be better suited in Part II than here) to explain the difference in the standards.

31. The discussion clarified that Recommendation 28 was meant to authorise enforcement officers to implement both public and private means of disposition of tangible assets, recommending using public means as a first choice and public sales as a choice among other public means of disposition, subject to paragraph (1). The Working Group deferred to the Drafting Committee consideration of the need to define the meaning of "public" in this context. It was further noted that the second sentence of paragraph (1) and paragraph (7) expressed the same concept with a slight divergence in the wording. Also in view of the previous comment, it was suggested to turn paragraph (1) into a chapeau for the provision and to tweak its language correspondingly.

32. The Working Group finally considered the expression "regulated or recognised market" in paragraph (1), while paragraph (7) referred only to a "regulated market". In the ensuing discussion, it was queried whether there was a clear understanding of what "recognised markets" were and whether the example of e-Bay as a type of "recognised market" was fitting. It was noted that the same terminology was adopted in Recommendation 131 ("Valuation, transfer as a way of payment and liability rules regarding digital assets"), which provided a definition of "recognised markets" in the Comments, based on the Geneva Convention and on the UNIDROIT Principles on Digital Assets and Private Law ("DAPL Principles"). Such a definition would not include platforms like eBay. In view of the policy of Recommendation 28, which was to allow enforcement organs to find the most flexible and efficient way to enforce, it was suggested to keep the reference to eBay in the Comments among the available options, without connecting it to "recognised markets", which was a term of art already defined elsewhere in the instrument. Comment paragraph 1 and paragraph (1) of the Recommendation should be adapted accordingly.

Recommendation 33 – Third-party debtor opposition to the seizure of a claim and its enforcement

33. It was noted that the language used in paragraph (1) appeared to not leave room for the discretion of the execution court in conceding a stay when the third-party debtor opposed the enforcement ("the court should stay"). The Comments, on the other hand, clarified that abuse thereof should be prevented, expressly mentioning the need to fix a time limitation for the opposition ("third parties should only be given a short time limit") but making no reference to the evidence to be provided by the third party in raising the opposition (though the Recommendation did refer back to third-party declarations under Recommendation 31). The outcome of the discussion was that the court would not be obliged to concede a stay, but in practice it would tend to avoid prejudicing the decision of the competent court on the matter. There would be, moreover, a practical incentive for debtors to litigate against the third-party debtor to allow seizure. Should the debtor be passive, the Recommendation would allow the creditor to file a claim. It was decided that the Drafting Committee should consider clarifying this latter point, which was an innovative provision. It should also look at the terminology used in the Chapter on remedies (Chapter X) to align this Recommendation therewith.

Recommendation 34 – Exemptions from seizure

34. The outcome of the discussion was that the Drafting Committee should consider all Recommendations dealing with exemptions and align the language used in them with the policy goals discussed under Recommendation 26 (e.g., use of "and/or"; inclusion of the limitation to individuals, etc.), for reconsideration by the Working Group.

Recommendation 35 – Digitisation of third-party debt order procedure

35. *The Chair* asked whether "digitisation" was the right word in this Recommendation and in the next (*Recommendation* 36) and deferred the matter to the Drafting Committee in the context of deciding on the terminology to be used in the entire instrument. It was recalled that this provision should, in particular, consider alignment with the finalised Part III of the instrument. It was further

asked whether the Comments could refer to existing examples of electronic or automated procedures, in order to provide more guidance to legislators. *The Chair* solicited written comments by the Working Group, noting that this recommendation would benefit from input during consultations.

Chapter VI – Section 1 – Subsection 1.3. Enforcement on rights or legal positions in special cases

36. *The Chair* invited the Working Group to submit any comments regarding the Introduction to this Subsection in writing.

Recommendation 37 – No Seizure without Assignability or Transferability

37. The Working Group discussed various points regarding this Recommendation, including its role in the subsection and the relationship between paragraph (1) and the following paragraphs (2) and (3), in particular between the assignability or transferability of the rights or similar interests to be seized established by legislation (paragraph (1)), and the effects of non-assignment clauses agreed upon by the parties (paragraphs (2) and (3)). Moreover, the Working Group asked for clarification of the relationship between paragraphs (2) and (3) which both applied to contractual non-assignment clauses, particularly noting that paragraph (2) permitted seizure if the contractual non-assignability was "unjustified given the existence of prevailing interests" ("other overriding interests" in Comment paragraphs 2 and 3), while paragraph (3) posited that the only limitation to enforcement in the case of anti-assignment clauses would be that the right could not be seized. It was queried whether the latter referred back to the general rule of the legal assignability or transferability in paragraph (1). It was further asked whether Comment paragraph 3 covered issues of priority among competing interests on the same asset. It was finally noted that the modern approach in substantive law regarding anti-assignment clauses for commercial receivables was to limit their effect to the inter-partes relationship, which appeared to be in line with paragraph (3) of the Recommendation.

38. The outcome of the discussion was to clarify that Recommendation 37 paragraph (1) was a general rule applicable to Subsection 1.3 as a basic pre-requisite for seizure. This Recommendation should be read against the backdrop of the following, more specific, Recommendations which dealt with special cases where the creditor's right to enforcement was granted even when the debtor's right was non-transferable, its transferability was limited, or it was subject to special publicity or other rules regarding its transfer. In those cases, enforcement was more complex due to the nature of the assets or rights to be seized. It was agreed that this nature of the Recommendation be more clearly explained in the Introduction to Subsection 1.3, in the Comments to Recommendation 37, or even within the text of the Recommendation itself, leaving the matter to the Drafting Committee.

39. Regarding Recommendation 37, paragraphs (2) and (3), it was suggested that they be merged in light of the policy that contractual non-assignability of receivables would not, in principle, impede enforcement, except where seizure was not permissible by law. The example of family enterprises was made. It was also agreed to review Comment paragraphs 2 and 3 to better reflect the intended policy.

Recommendation 38 – Usufruct and Similar Beneficial Interests

40. The Working Group recognised that while the phrasing of the current black-letter recommendation was not entirely clear, the comments clarified that the recommendation's policy was to allow seizure of an interest that otherwise might not seem susceptible to seizure, such as income deriving from usufructuary property when the usufruct would not be transferable under substantive law. The Drafting Committee was encouraged to slightly amend the provision, considering deletion of the words "usufruct or other" at the end of the first sentence and the possible

addition of the specification that the beneficial interest be already accrued or agreed upon, to avoid imposing the obligation on the debtor to rent or lease the usufruct.

Recommendation 39 – Partners' Interest in Partnership; Recommendation 40 – Partners' Interest in a Limited Liability Partnership

41. The Working Group suggested that Recommendations 39 and 40 be revised to reflect the underlying policy, which was to address the peculiarities of enforcement regarding the debtor's interests in entities that commonly placed restrictions on transfer of membership or interests in the entity in order to maintain the "closed" nature of the entity. The concern was expressed that one of the most common forms of such entities, i.e., limited liability companies or "closed corporations" restricting transfer of membership, was not mentioned, while a less common form, i.e., limited liability partnerships, was the object of a specific recommendation. Several suggestions regarding potential redrafting were made. One suggestion was to merge the two provisions into one, redrafting it in more functional terms and mentioning relevant examples in the Comments, also in view of the fact that the terminology used in different legal systems might vary. To this it was objected that the examples would lose visibility if relegated to the Comments only. Another suggestion was to mention the examples in the single black-letter recommendation (language to the effect of "partnerships, limited liability companies, and other entities that are their functional equivalent" was suggested), making it clear that it was not an exhaustive list, and to reflect any peculiarities regarding the different structures in the Comments. This would give the opportunity to add other elements that might affect disposition, such as mechanisms used in limited liability companies to ensure that current members be offered the possibility to acquire the interest with priority. Yet another suggestion, which would maintain the two provisions as separate, was to add the example of the limited liability company in Recommendation 40. *The Secretary-General* announced that he would provide additional comments and that these Recommendations would benefit from consultations with experts specialised in company law.

Recommendation 41 – Intellectual Property Rights; Recommendation 42 – Copyright and Computer Software

42. The Working Group agreed that the two provisions be revised as follows: merging Recommendations 41 and 42, paying due attention to the special characteristics of the different rights (e.g., the general inapplicability of Rec 41, paragraph (2) to copyright); and moving the content of paragraph (3) of Recommendation 42 regarding computer software to the Comments, since it was severable from the other issues discussed, and it could be misinterpreted if kept as a stand-alone paragraph. Consultation with intellectual property lawyers was also suggested.

Recommendation 43 – Contractual common law trusts and similarly structured civil law trusts

43. Some concern was voiced in relation to the wording (in particular the expression "debtor could enforce their beneficial interest" in paragraph (2)) and more generally on the need to provide a Recommendation stating that enforceability would depend on the terms of the contractual trust and on the applicable substantive law. To this it was replied that these arrangements could be economically very relevant, and it might be advisable to raise the legislator's attention to them. *The Chair* concluded that the Drafting Committee would reconsider the formulation of the recommendation and the issue would be taken up intersessionally.

Recommendation 44 – Claims Secured by Collateral

44. The Working Group agreed that the reference to other accessory security obligations, such as guarantees or suretyships, now "hidden" in Comment paragraph 6, be moved to the text of the Recommendation itself.

45. More generally, it was agreed that the Drafting Committee should ensure coherence with Part II in relation to security rights, and that the language used in the Comments to Recommendation 44 be revised as to avoid general assertions on the substantive law of secured transactions that might be misinterpreted as contradicting Part II. Comment paragraph 5 should also be revised in order to avoid the misunderstanding that the utility of the functional approach to security rights for enforcement was undermined. It was also suggested by *the Chair* that since a completed draft of Part I was available for the first time, the Drafting Committee should take a second look at all the other best practices in Part I where reference to compulsory registration in existing secured transactions registries was mentioned, with particular regard to Chapter V. A more nuanced language was suggested if the policy decision of referring to the compulsory registration of liens or privileges was approved, to convey the message that while this might be desirable it was not (yet) common practice.

Chapter VI – Section 1 – Subsection 1.4. Monetary Enforcement on Real Estate

46. As a preliminary point, it was noted that the language would need to be adjusted to reflect the Working Group's preference for the term "immovable property" or "immovable(s)" in lieu of "real estate". It was also suggested that "legal cultures" be substituted with "legal traditions" to follow a more common terminology.

47. More generally, the Drafting Committee was entrusted with the task of reviewing the terminology used not only in relation to this Subsection, but to the whole instrument (in this Subsection, for example, by looking at terms such as "land registry", which could either be substituted or, if kept, be defined or described for the purposes of the instrument). The idea of providing a sort of glossary on how certain terms were used for the exclusive purposes of the instrument was flagged, one possibility being to introduce "definitions" or "descriptions" in the first recommendation mentioning them, another one to flag them in the general introduction to the instrument (e.g., in a narrative paragraph which would not purport to be exhaustive but provide examples).

Recommendation 45 – Types of Enforcement on Real Estate

48. In relation to the opening line of the Recommendation, the question was raised as to whether the term "legislator" was meant to refer to the need to adopt primary legislation (as in some other best practices), or generally to an "authority empowered to adopt binding rules according to domestic law" (which appeared to be the policy of this Recommendation). For clarification purposes, a reference in the commentary was considered to be sufficient.

49. It was reasoned that the list in Recommendation 45 was not intended to be exhaustive and that it would include other alternative forms of monetary enforcement (such as leasing, which was already mentioned in the Comments). This meaning should be better reflected in the text of the Recommendation, the idea being that the listed modes were those most common or useful.

50. The Working Group finally considered paragraph (3), referring to the fact that the seizure order should be registered with the "land register". The Drafting Committee was asked to check how best to convey this, which was considered important for the visibility of the seizure but would be innovative for many existing registries. The UNIDROIT Secretariat further noted that in view of the global reach of the instrument, consideration should be given to convey in the comments the fact that not all legal systems in the world have a (publicly accessible) registry for immovables or (agricultural) land, which is, however, recommended as a means to ensure transparency of rights, particularly on agricultural land, in several international instruments, including those adopted by UNIDROIT.]

Recommendation 47 – The Legal Effects of Seizure

51. The discussion clarified that the Recommendation did not cover questions of priority, effectiveness, or validity of rights created *before* the registration of the seizure order (e.g., a lease or rent already existing before seizure).

52. In relation to paragraph (2), the point was made that it would be better to substitute the term "invalid" with another expression aligning with the limitation expressed in the rest of the paragraph ("in so far as that is necessary to secure the creditor's enforcement rights"). The Drafting Committee was asked to find a more comprehensive expression (e.g., subject to…).

53. Upon requests for clarification as to the relationship between paragraphs (2) and (4), it was explained that paragraph (2) concerned transactions over the seized asset while paragraph (4) was more general (independently of whether the right was created on the specific asset). The Drafting Committee was asked to ascertain whether the relationship between (2) and (4) was clearly understood from the text, including the adoption of suggestions such as substituting "property subject to seizure" with "seized immovable", to avoid the use of the term "property". Moreover, Comment paragraph 4 addressed the situation of a right arising between the issuance of a seizure and its registration, deferring it to the regulation of "fraudulent conveyances" in the applicable substantive law. The point was made that the way "fraudulent conveyances" were addressed and regulated varied in legal systems and that the law of fraudulent conveyances might also play a role in paragraph (2). For this reason, the Drafting Committee was asked to consider whether any nuances or modification of language (such as the introduction of a reference to "fraud" in paragraph (2) as well) might be useful.

54. Regarding paragraph (3), it was noted that it only referred to the proceeds from a "public sale" and it was agreed to use the more general term "realisation".

Recommendation 48 – The Scope of Seizure

55. The discussion clarified that the purpose of Recommendation 48 was to determine the scope of the seizure on the immovable in enforcement. The scope of the seizure would be, in principle, determined by how substantive law defined "immovable" and how it characterised the relationship between the immovable and other assets connected to the immovable, or legal rights on resources connected to the land, which differed widely in legal systems. It was clarified, however, that the comments had had the additional purpose of enhancing the effectiveness of enforcement, recommending that where the substantive law either was not satisfactory or did not sufficiently regulate the matter, *enforcement law* should define the scope of enforcement and, in certain circumstances, should allow enforcement officers to fill in the gaps of the applicable substantive law.

56. The Working Group agreed that the Recommendation be revised to better clarify its purpose, using functional and more succinct language and providing examples in the Comments. It was recognised that it was not always possible to steer clear of substantive law, but that the best practices should not be read as providing guidance on the substantive law definitions of immovables and related assets and rights in general terms. One suggestion to this effect was to specify that for the purposes of enforcement, "seizure should encompass the fullest extent of value from which an owner would benefit at the time the seizure is registered" (or analogous language) and then, in the Comments, to address expectations as to what substantive law would include. In relation to the text of the Recommendation, the use of terms-of-art such as "fixtures" and "appurtenances" was deferred to the Drafting Committee, as was the placement of the examples provided in paragraph (1) subparagraphs (a) and (b) and their relationship with paragraph (2). It was also asked whether the Recommendation should refer to "fruits" and/or "crops" in the case of land. Concerning the Comments, there was agreement to delete the examples of definitions of immovables in domestic laws and use more succinct language, avoiding expressions such as "defects in substantive law".

57. As regards paragraph (3) on insurance claims, there was a proposal to delete it alongside its commentary, since it was drafted in terms of substantive law and not procedural law. It was also asked why enforcement law should treat insurance claims "deriving by natural forces" and insurance claims arising from the action of third parties differently.

Recommendation 49 – Realisation of the Seized Real Property's Value

58. It was noted that Recommendation 49 paralleled Recommendation 28 and that there would be benefit in aligning the language, including their titles, as well as in redrafting paragraph (1) as a chapeau. The chapeau would highlight the cross-reference to Recommendation 28 as the bottom-line provision, subject to the specifications contained in the remaining paragraphs, and clarify that Recommendation 49, among all potential means to realise the value of the seized property, focused on the (public) sale of the immovable. The reference to the recommendation on online sales, now contained in the Comments, could also be featured in the chapeau.

59. The Working Group further agreed that the text of paragraph (6) would be tweaked to conform to the Comments, without mentioning who was to bear the cost. In relation to paragraph (7), it was agreed that the goal was the protection of the third-party acquirer. The Working Group agreed that it would benefit from redrafting, both to avoid the use of the term "criminality" and in order to avoid inferring that the opening of criminal proceedings would impede or block civil enforcement. Moreover, it was flagged that paragraph (7) should also apply to paragraph (8). Concerning paragraph (8), it was noted that its content paralleled Recommendation 29 and that either it should be covered in a separate recommendation or its inclusion should be better clarified in the chapeau of Recommendation 49 or at its end. Finally, it was agreed to move paragraph (9) to the Comments.

Recommendation 50 – Debtor Eviction and Protective Measures – the Position of Third Parties

60. The discussion of Recommendation 50 elicited several comments. It was noted that the Recommendation, as it stood, covered different situations, i.e., a general rule on eviction following public sale of the immovable; special protection for the debtor and his family in specific cases; and what happened to the rental/lease contract or other pre-existing rights of third parties following the public sale of the immovable. *The drafters* clarified that the policy of paragraphs (1) and (2) was to allow eviction of the debtor from the immovable acquired at a public sale, subject to specific limitations provided for by legislators for the protection of vulnerable debtors. Paragraph (4), on the other hand, applied to pre-existing rights of third parties, again with a general rule that the new landlord or lessor would have the right to terminate the contract, subject to a period of reasonable notice which should depend on the "nature of the tenant or lessee" (to be determined by the legislator), while the protections applicable to the vulnerable debtor under paragraph (2) would also apply to third parties which were private individuals and their families.

61. In general, a modification of the title was suggested, as its current wording was potentially misleading. It was also generally suggested to look at the wording and structure of Recommendation 57 regarding movable assets (in particular Comment paragraph 3), and, especially in relation to third parties, at Recommendation 117 on enforcement of security rights over immovables.

62. In relation to paragraph (1), the Working Group agreed to correct a clerical mistake and add a "not" to "should permit" to conform with the policy of the Recommendation.

63. After discussion on the underlying policy of paragraph (2), the suggestion was accepted not to dictate a detailed provision to legislators for the exceptions to the debtor's immediate eviction, but to simplify the Recommendation including a more general reference to the need to consider exceptions, to be well circumscribed and determined by legislation, and the mention of examples of in the Comments. This was suggested because the scope of application of such protections as well

as their manner would depend on the economic and social dimensions taken into account in domestic laws, and their policy might be better served by using other means of protection of vulnerable individuals in the legal system. In the interest of the effectiveness of enforcement, however, it was asked by the drafters to retain the preference for a "stay" or grace period instead of an exemption, and to specify that it should be as short as possible. In this respect, it was agreed that the expression "reasonable period of time" was too broad, and reference was made to the corresponding provisions in Part II. In relation to the wording, a suggestion was made to substitute the term "stay" with "grace period" or an equivalent, to better specify that there was no stay of the enforcement process. Paragraph (2)(a) had raised concerns as it could be broadly interpreted by judges to impose on creditors a general duty to find alternative accommodation for the debtor. Finally, the expression "in all circumstances" in paragraph (2)(c) was deleted, and a question was raised as to the use of "human" together with "fundamental" rights (differently from Recommendation 2).

64. More generally, the Drafting Committee was again asked to review all Recommendations mentioning protection of the (individual?) debtor and "family", to ensure that there was no unintended linguistic inconsistency and that there was consensus as to the scope of the protection.

65. In relation to paragraph (4), the Working Group agreed that the salient point concerning third parties was information (of the third party and of the acquirer of the immovable at a public sale) while substantive law would determine any rights of third parties, including conditions thereof, to remain in the premises after the sale.

66. Finally, the placement of paragraph (5) referencing Recommendation 57 (1) and its application with all necessary adaptations was deferred to the Drafting Committee.

Recommendation 51 – Real Estate Receivership (also considering Recommendation 63 - Receivership)

67. The Working Group looked at Recommendation 51 in conjunction with Recommendation 63 in Chapter VII ("Combining modes of enforcement and agency and receivership") since paragraph (1), second sentence, of the former contained a cross-reference to the latter.

68. In relation to the policy underlying Recommendation 51, it was noted that there appeared to be a discrepancy between the language used in the black-letter text of paragraph (1) and the language of Comment paragraph 1 as to the factual situations triggering placement in receivership: paragraph (1) referred to a judgment on whether receivership would reasonably enable the creditor's claim to be satisfied, while Comment paragraph 1 reserved receivership for when other forms of enforcement were unavailable or inadequate. Moreover, it was asked whether the expression "upon application of a creditor" meant that an application of the creditor would always be needed. In this regard, it was noted that Recommendation 63, paragraph (1), differently from Recommendation 51, expressly considered receivership as a last-resort method and placed the choice within the enforcement authority's discretion.

69. In the ensuing discussion, it was clarified that Recommendation 51 would apply in relation to one specific immovable, while Recommendation 63 was more general and applied in complex situations, such as an entire going concern being subject to enforcement. Moreover, paragraph (1) of Recommendation 51 expressly stated that Recommendation 51 would prevail upon Recommendation 63. In any case, the drafters encouraged flexibility and submitted that receivership should not be conditioned upon an application by the creditor in either case. In conclusion, the Working Group asked that more clarity on these points be provided for the reader.

70. The Working Group suggested that the definition of receivership which was now in Recommendation 63 be placed in the Comment to Recommendation 51 (since the latter was the first provision dealing with receivership in some detail), or in an earlier part of Chapter VI. Some minor

terminological issues were also raised, e.g., whether to keep the reference to "fruits" which was not present in other recommendations, whether to refer to "crops" for agricultural land in the Comments, and the need to align the language referring to contractual remedies to the terminology contained in UNIDROIT's instruments (e.g., "terminate" a contract instead of "cancel" a contract).

71. In summing up the discussion, *the Chair* went back to the question of the placement of the recommendations on receivership, and asked the Drafting Committee to consider the reasons to place the general one separately in Chapter VII instead of Chapter VI on Modes of Enforcement. The matter was deferred to the Drafting Committee for intersessional consideration.

Recommendation 52 – Securing Enforcement by Judicial Mortgages or Liens

72. The Working Group suggested that the language in paragraph (1) of Recommendation 52 be better aligned with the policy expressed in paragraph 1 of the Comments. It was also recommended that this policy be first clearly expressed in both places, i.e., that legislators were encouraged to provide for effective measures to secure the creditor's enforcement. The Recommendation should specify that the three examples which were expressly mentioned were the most common useful measures in different legal systems (though not all legal systems were familiar with all of them, as explained in the Comments). This would ensure that the purpose of the Recommendation be clarified, i.e., to allow legislators to consider what avenues would be available, make any necessary or desirable modifications, and apply the Recommendation accordingly. To this end, it was suggested that the Recommendation itself be drafted in less prescriptive terms and that some of the details be explained in the Comments, to conform with its purpose. It was also suggested that the provision should better clarify that the three measures should be considered as functionally equivalent not in general terms, but "for the purposes of this instrument". Consideration should be also given to merge paragraphs (2) and (3), which provided more specifications for judicial mortgages, also to better reflect Comment paragraph 3.

73. As an outcome of this discussion, the Working Group proposed that the Recommendation be restructured to better explain both its purpose and the relationship among the three examples expressly provided in the text.

74. It was also asked to carefully consider the wording in paragraph (7), last sentence, since this provision cannot override substantive law on the enforcement rights of a secured creditor.

75. The Working Group then discussed the following paragraphs (4) and (5) recommending that "judgment liens should be recorded in the dockets of the court that issued the judgment and in the dockets of courts in those jurisdictions where enforcement on land is supposed to take place", and that both judicial mortgages and judgment liens be registered "within the land register" (as well as the register of enforcement measures, according to the general recommendations). It was explained that this second registration was required in order to ensure the functional equivalence of judgment liens and judicial mortgages in relation to their priority.

76. Several questions were raised regarding these paragraphs. A concern was voiced that, at least for some legal systems, this process could turn out to be cumbersome and could potentially worsen the current position of judgment lien holders. Registration in court dockets was often automatic, and thus quicker than registration in land registers, which might result in two distinct timestamps, complicating the process of determining priority. It was also noted that there might be a delay between an application being made to a land register and the interest being recorded, depending on the efficiency of the registries for rights in immovables, that varied considerably from jurisdiction to jurisdiction. In this regard, a provision stating whether an interest accrued from the point of application or the point of registration might be helpful. In response, it was stated that the time of application should determine the accrual of the interest, that this point could be incorporated

into the Comments, and that further provisions might be included to require lawmakers to empower land registries to document and publish the time at which applications were received.

77. It was further noted that paragraph (5) stated "[t]hey should expire" but did not clarify whether this referred to all registers or only to the land register. The expression "reasonable amount of time" in paragraph (5) was deemed potentially vague, and the question was raised as to whether indicating a maximum period would be a useful indication for legislators.

78. It was finally noted that paragraph (6) imposed a notice requirement but did not state to whom notice should be given.

Chapter VI – Section 1 – Subsection 1.5. Priority or Equality Governing the Satisfaction of Multiple Secured or Unsecured Creditors of Monetary Claims

Recommendation 53 – Privileged and secured third-party creditors

79. During the discussion, it was explained that this Subsection was not meant to subvert preferences and ranking determined by substantive law. It was also explained that Recommendation 53 dealt with the interplay between enforcing on a specific asset and the existence of general liens on the debtor's patrimony. If the debtor was solvent (in civil enforcement as opposed to insolvency), enforcement could continue on other assets. It was further noted that many issues could be clarified by reading Recommendation 53 in conjunction with Recommendation 22.

80. There was consensus that the language of the subsection be revised, taking the input of the discussion into account. Considering the explanations, concerns were expressed that the whole Subsection 1.5 could be misinterpreted. Particularly for Recommendation 53, the application of paragraphs (6) and (7) to a prior secured creditor appeared to force the acceleration of a senior secured creditor's claim by a junior creditor, notwithstanding the existence of other assets of the debtor beyond the collateral. This would be undesirable and should be avoided. In this respect, some concerns were raised also in regard to the consistency of this Recommendation with those in Part II. The Working Group asked that this point be further discussed and clarified, as the Recommendation expressly referred to issues of priority, and this might have unintended consequences.

81. Subject to the considerations above, the Working Group agreed that the terminology used in paragraph (1) be clarified (in particular regarding the meaning of "public and private creditors").

82. Considering the points raised and the clarifications given, and subject to the considerations under paragraph 79 above, the Working Group suggested that paragraphs (1) and (2) be merged, as they dealt with the same issue, and that the wording of paragraph (3) be refined to indicate that it would apply where the preceding paragraphs on registration did not.

83. A more general question was raised on the enforceability of security agreements. It was agreed that this issue merited further clarification in a dedicated intersessional meeting, in light of the whole draft instrument now being completed.

84. Recommendation 53 was deferred to the Drafting Committee and to intersessional work, in conjunction with Chapter V, Recommendation 22, and with Part II.

Recommendation 54 – Non-privileged and unsecured third-party creditors

85. The Working Group asked for a revision of the language of this Recommendation. Regarding paragraph 4 of the Comments, it was noted that while the innovative recommendation of registering liens in secured transactions registries for enforcement purposes could be accepted by the Working Group, the way it was explained in the Comments was potentially misleading, and there would be

merit in approaching this question in a more nuanced way. The reference to "limited issue registries" was unclear, not being intended to refer to special asset registries but rather secured transactions registries. The reference to the UNCITRAL Model Law on Secured Transactions (MLST) (and Article 9 of the U.S. Uniform Commercial Code) should be deleted, as it could be misinterpreted.

86. Moreover, there was some disagreement on the policy expressed in paragraph (4) and Comment paragraph 5, in that it appeared to allow courts to discretionally subvert priority rules when competing interests were registered at similar times. The removal of paragraph (4) was suggested, along with the revision of the Comments.

87. *The Chair* confirmed that Recommendations 53 and 54 would be taken up intersessionally, in conjunction with Recommendation 22, also to gain a better understanding of the intended policy of the two provisions.

(b) Revised draft best practices on enforcement of security rights (Study LXXVIB – W.G.9 – Doc. 4)

General points on the alignment of Parts I and II of the instruments

88. Before starting the discussion of Part II, Chapter IV, the Working Group addressed some general points which pertained to the coherence of the instrument and the alignment – when needed – of its Parts. All those issues were flagged as items to be reconsidered by the Drafting Committee and intersessionally.

89. It was noted that Part I contained several references (either in the comments or in the recommendations) to the protection of certain categories of debtors in enforcement (and, be it the case, their families or co-habitants) through various means (e.g., exemptions of certain assets or part of salary, special grace periods or stays for residential immovables, etc.). The question was raised as to whether these questions should be treated in the same way or differently in Part II of the instrument.

90. It was also noted that Part II referred to a right to cure after default (which appeared to be a contractual matter), in particular in Recommendations 116 and 117 in Part II, Chapter IV. The need to reconsider this issue was flagged.

91. Moreover, Part II, Chapter II, on the creditor's right to obtain possession, contained a recommendation on the protection of "consumers", merely referring to the fact that a State might introduce additional protections (Recommendation 99). This was not mirrored in other Chapters, and the Working Group expressed the need to reconsider this specific point in light of the entire draft instrument now being available.

92. Finally, *the Chair* updated the Working Group on the discussion within the Drafting Committee regarding the use of the terms "extra-judicial" and "judicial" enforcement in Part II, which had been called into question because it did not correspond to the language used in Part I ("Enforcement by public authority"). It had been pointed out that the terminology adopted in international instruments such as those of UNCITRAL had evolved over time, and that the most recent documents did not use the terms "extra-judicial" or "judicial" but stated that "the secured creditor may exercise its post-default rights by application to [a court or other authority to be specified by the enacting State] or without such an application" (Art. 73, MLST). Similarly, the Cape Town Convention did not rely on such terms. A proposal was made to explain in the Introduction to the entire instrument and/or in the Introduction to Part II what the scope of application of Part II was, without relying on the judicial/extra-judicial shorthand. *One member*, however, urged the Working Group not to enter into academic discussions on concepts and advocated that a clear explanation of the use of terminology in the Introduction would be sufficient. The matter was deferred to the Drafting Committee.

Chapter IV. Enforcement of security rights over rights to receive payment and credit instruments (including issues on automation)

93. A summary of the most recent revisions included in Part II Chapter IV was provided and the floor was opened for comments.

94. In relation to the Introduction to Chapter IV, the Working Group agreed that it would be shortened and revised in light of the revisions to the Chapter itself. The current Introduction had been drafted for purely internal purposes. The final version should contain an explanation of the structure of the Chapter and its relationship with the other Chapters in Part II, as well as of its scope, and indicate the sources. It was agreed that there would be no need to define "receivables" now that the title of the Chapter had been modified. It was also agreed to add the UNIDROIT Model Law on Factoring (MLF) to the sources.

Recommendation 110 – Enforcement with use of automation

95. The Working Group started by addressing Recommendation 110, which had been considerably revised after receiving the input from previous sessions. It was noted that expressly covering automation was particularly important in the context of this Chapter, as it was already applied in practice to enforcement on certain rights to payment.

96. It was agreed that paragraph (1) expressed a general principle that would be better placed elsewhere in the instrument. After discussion, the Working Group opted for including a sufficiently clear reference to the evolving impact of technology in enforcement in the general introduction to the instrument, and for inserting a more specific reference to automation in relation to enforcement of security rights as an additional paragraph (4) to Recommendation 92 ("General Principles"). It was further noted that such principle could refer to technology in general and to automation in particular. Paragraph (2) would become the first paragraph of Recommendation 110, adding the words "in this Chapter" at the end of the paragraph.

97. The Working Group further noted that paragraph (5) was also drafted as a general principle regarding automation in enforcing on the collateral judicially, and could be better placed in Recommendation 92 or moved to the Comments. Concerning judicial enforcement on third-party debt orders, Recommendation 35 in Part I already generally encouraged the use of technology including automation, and it could be usefully cross-referenced in the Comments.

98. In addition, an objection was raised as to the phrase "judicial enforcement procedure should be expeditious" in paragraph (5), as it would not be solely applicable to this Chapter. If "expeditious" was meant to highlight that automation might enhance the effectiveness of enforcement, including shortening the length of the process, it was suggested to mention this point in the Comments.

Recommendation 104 – Realisation on the collateral post-default

99. It was noted that it would lend the Recommendation greater clarity if it were specified whether "default" referred to default on the secured obligation or default on the receivable. The matter was referred to the Drafting Committee.

100. The Drafting Committee was also asked to consider whether the different terminology used in paragraph (1) ("realis[ing] on the collateral") and paragraph (2) ("dispos[ing]" of it) was justified.

Recommendation 105 – Collection on the collateral post-default

101. It was noted that the term "payment" was used in paragraphs (1) and (3), and a question was raised as to whether this included collection of non-monetary intangible or tangible assets. The

Drafting Committee was entrusted with finding a clearer term to communicate the range of assets to which the Recommendation applied. It was noted that this would necessitate rewording of paragraph 3 of the Comments.

Recommendation 107 – Defences of the obligor and of third parties

102. Concern was raised that paragraph (2) (a) might conflict with the solution recommended in the UNIDROIT Model Law on Factoring (MLF), by allowing third-party enforceability of an anti-assignment clause. There was debate as to the extent of the contradiction, but it was widely accepted that the latter part of paragraph (2)(a) could be deleted with corresponding adjustments to the Comments. It was also agreed to further consider whether the wider scope of application of the Best Practices as compared to the Model Law on Factoring might warrant a different treatment of some situations. Finally, it was noted that a similar change would have to be made to paragraph (5).

Recommendation 108 – Disposition of funds deposited in a bank account; Recommendation 109 – Disposition of intermediated securities

103. The Working Group recalled that the need to obtain a court order in the absence of prior consent or cooperation by the intermediary, covered in Recommendations 108, paragraph (2) and Recommendation 109, paragraph (3), had been discussed in relation to Part III, current Recommendation 122 (renumbered by the Drafting Committee as Recommendation 131) on security rights over digital assets. A closer look at the terminology used in those recommendations and the inclusion of appropriate cross-references, were agreed upon.

104. Additional minor terminological adjustments were suggested in relation to Recommendation 108 ("neither" should be added to the first dependent clause of paragraph (2) to accord with the later "nor").

Chapter VI. Enforcement of security rights over immovables

105. The drafting history of the Chapter was briefly summarised.

Recommendation 116 – Remedies available to the creditor upon default (also discussing analogous points in Recommendations 117 and 118)

106. The Working Group asked that the structure of Chapter VI and the relationship of Recommendation 116 with the following Recommendations 117 and 118 be reconsidered. It was suggested that this Chapter should mirror Chapters I and II in Part II, including how to refer to the judicial and extra-judicial routes, thus avoiding repetitions and potential confusion.

107. It was noted that the term "remedies" in the heading of Recommendation 116 was more general than the language used in other Recommendations and might be reformulated with greater specificity. This parallelism would lend greater consistency to the instrument. It was ultimately suggested that the Recommendation might be more appropriately titled "Commencement of Enforcement".

108. Other questions of terminology and accuracy were raised. In respect to paragraph (1) and to paragraph 1 of the Comments, it was suggested that obtaining possession (either directly or indirectly) would be a prerequisite to dispose of the asset or collecting rents or appointing a third party to manage the immovable on the creditor's behalf. The reference to "direct" or "indirect" possession, rather than "control", was appreciated and deferred to the Drafting Committee in the interest of consistency with other parts of the instrument. It was also noted that "foreclosure" (mentioned in Comment paragraph 4) was an ambiguous term which did not figure in the Recommendation itself – in many jurisdictions, it would be taken to refer specifically to surrendering

an asset to repay a debt rather than the intended process of enforcement. In the interest of clarity, it was suggested that it could be replaced with "enforcement".

109. A concern regarding the consistency of paragraph (2) of Recommendation 116 and paragraph (1) of Recommendation 118 with Recommendation 117, paragraphs (1) and (2) was raised, in relation to the "cure period" or "right of redemption". The former two referred to a "reasonable period of cure for the debtor after default", while Recommendation 117 gave the creditor the right to immediately proceed to obtain possession (except where a special "stay" for residential immovables was granted). The issue was raised as to whether Recommendation 117 referred to a time after a (first) cure period had elapsed. Moreover, Recommendation 116's Comment paragraph 4 offered reasons for the grace period which might be obsolete, at least if applied to all debtors. It was asked that the Comments provide a stronger policy justification. Finally, the more general point was made as to whether the cure period should be included as a recommendation for enforcement or was an issue left to the applicable substantive law. In this respect, reference was made to Comment paragraph 2 of Recommendation 93, which included any (contractual) "grace period" in the definition of "default". There was a need to clarify the nature of this "cure" or "right of redemption" (and whether it would be connected to enforcement).

110. A further question was raised as to whether the Recommendation should include reference to circumstances under which the creditor's right to enforce should be limited, but it was ultimately decided that the Comments already made adequate allowance for such circumstances.

Recommendation 117 – Receipt of possession post-default

111. Greater consistency was asked in the wording of the title of the Recommendation with previous Chapters in Part II and in particular Chapter II. It was further noted that the phrase "States may establish" was inconsistent with the rest of the instrument, in which reference was made to "legislators". Moreover, it was suggested that paragraphs (3) and (4) could be collapsed.

112. A question was raised as to whether reference to specific security arrangements was necessary in paragraph (6), given that this principle applied throughout the Best Practices.

113. In relation to the expeditious relief offered to creditors in paragraph (5), it was asked whether it referred to the Expeditious Relief currently addressed in Document 8, and whether such relief might be extended to purchasers stepping into the creditor's position under paragraph (7). It was clarified that the latter would be a good policy in order to provide an incentive to acquire the immovable during enforcement at a higher price, and it was suggested that a sentence might be added to paragraph (7) to state it more clearly. It was however queried whether such a provision for purchasers would really belong to enforcement law. In response, it was clarified that it was intended merely to convey to legislators to consider this pathway to facilitate or enhance enforcement. An analogy was drawn with national laws which allowed for an expedited right to injunctive relief where a purchaser acquired the position of a creditor. It was then suggested that the reference to the expeditious relief for paragraph (7) be mentioned in the Comments. The need to consider the relationship of this Recommendation with current Document 8 was flagged.

Recommendation 118 – Disposition of the collateral post-default and right of redemption

114. It was noted that the expression "right of redemption" was a term of art that did not apply in all jurisdictions and that the Working Group had previously decided to avoid it. It was agreed that it could be deleted from the title of the Recommendation.

115. The concern was raised again that Recommendation 118 seemed to replicate much of Recommendation 116 but imposed an additional condition of a prior judgment and introduced ambiguity regarding the starting time of the cure period, or at least a doubt as to whether there

might be two cure periods. It was suggested again to modify Recommendation 116 to better parallel Recommendation 93. It was suggested that the term "default" might be contributing to confusion. It was also suggested that "Monday to Friday" in paragraph 6 of the commentary be replaced with "working days".

116. A final question was raised as to whether cure periods should be treated differently based on whether judicial or extra-judicial enforcement had been undertaken, in light of the greater delays involved in judicial enforcement. It was clarified that this would be a matter of substantive law and depended on the terms of the specific credit agreement.

(c) Revised draft best practices on digital assets (Study LXXVIB – W.G.9 – Doc. 6)

117. *The Chair* noted that Document 6 (which embodied Part III of the draft instrument) presented significant revisions based on the input received at the preceding session of the Working Group and was now close to being completed. The revisions made to the text were briefly outlined and the floor was opened to comments. In the interest of time, *the Chair* proposed to address those two recommendations that had been significantly enhanced or newly drafted as a result of the discussions at the eighth session of the Working Group. She noted that the current Introduction, which was divided into two parts, was in need of revision and restructuring, and entrusted this task to the Drafting Committee.

Recommendation 122 – Enforcement of security rights in digital assets

118. After a discussion on whether a specific mention of the general principles on enforcement of security rights was necessary, it was agreed that the reference to "general rules applicable to enforcement of security rights" in paragraph (2) be amended to reflect that it referred only to the recommendations of the instrument on security rights in movables. It was also ultimately agreed to keep the reference to the obligations of "good faith and commercial reasonableness" even if, strictly speaking, it would not be necessary to do so, and to cross-reference Recommendation 93 in the Comments.

119. It was noted that this Recommendation made reference to extra-judicial enforcement of security rights over digital assets, while all other Recommendations in Part III focused on judicial enforcement. It was clarified that in relation to security rights over digital assets, Part III also covered extra-judicial enforcement. This point should be better clarified in the Introduction to Part III. A question arose as to whether a procedure akin to the expeditious relief for extra-judicial enforcement should apply, *mutatis mutandis*, to judicial enforcement. It was noted that Part II already suggested to legislators to consider it, consistently with the UNCITRAL Model Law, but did not provide further substantive guidance, and that it was a different issue from the one addressed in Document 8.

120. A question was raised as to whether the DAPL Principles and in particular Principle 17 thereof should be cross-referenced. A caveat was expressed that not all States would have enshrined all of the DAPL Principles in legislation. It was noted that an enhanced Comment might refer to Chapter IV and to the relevant components of Principle 17, and that Comments 17.5–17.7 of the DAPL Principles could be cross-referenced, or the examples provided therein could be mentioned in the Comments.

121. Finally, the placement of this Recommendation was briefly discussed, and the issue was deferred to the Drafting Committee. The suggestion was made to move it to the end of Part II in a separate section on "Enforcement [or extra-judicial enforcement] of security rights on digital assets" and renumber it as Recommendation 131.

Recommendation 128 – Duty to cooperate of third parties for seizure and transfer

122. Concerning paragraph (1), the Working Group suggested substituting "trading" with "transfer", aligning the text of the Recommendation with its title. It was also asked to state to whom the duty of cooperation was owed. It was clarified that it was owed to the enforcement organ.

123. Most of the discussion focused on new paragraph (2), which drew on the language of DAPL Principle 17. The Working Group agreed that this paragraph was better placed at the end of current Recommendation 122 (renumbered Recommendation 131), as it dealt with the enforcement of security rights.

124. The Working Group agreed on the suggested Recommendation in view of the fact that enforcement was usually physically impossible without the consent of the custodian and solutions to this issue were limited. It also noted that the same policy in regard to notice had been followed in Part II, Chapter IV, Recommendations 108 and 109, which derived from previous international instruments (including the DAPL, Article 82 of the MLST, and the Geneva Convention). It was, however, suggested that, consistent with DAPL Principle 17, paragraph (2) could be amended to reflect that it was conditioned upon the *custodian*'s agreement. It was further noted that the term "control" was specifically defined in the DAPL Principles and had a factual meaning, while the legal notion of "control" as a method for third-party effectiveness of a security agreement might vary depending on the laws of each State. While it was not in the scope of the Best Practices to provide a definition, the Comments could mention this point.

125. A concern was raised that the Recommendation was unduly verbose. It was agreed that the language could be streamlined, provided that it did not undermine its consistency with other instruments.

(d) Revised draft recommendation on online auctions (Study LXXVIB – W.G.9 – Doc. 5)

126. *The Secretariat* and *the Reporter for Document 5* introduced the revised document, explaining that it had been revised as a follow-up on the input received from the Working Group and consultations with the observer who represented the Working Group on Cyberjustice and Artificial Intelligence of the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, which had prepared the CEPEJ Guide on Judicial E-Auctions (CEPEJ(2023)11). It consisted of a single Recommendation, as yet unnumbered.

127. A general question was raised on the need to provide a definition of online auctions. It was flagged that while there was no definition, paragraph (2) of the Recommendation listed the common features/functions of such auctions and might be considered akin to a description. The issue was deferred for consideration by the Drafting Committee.

128. The Recommendation was generally well received, though a concern was raised that the distinction between the minimum standards set out in paragraph (3) and the further elements set out in paragraph (4) was unclear and potentially misleading. It could be argued that most of the elements contained in the two paragraphs constituted minimum requirements for efficiency. In response, it was clarified that the distinction was intended to relate to the level of detail of the recommendations rather than to a hierarchy of importance: paragraph (3) contained the general prerequisites that should be embedded in the design of the auction, and paragraph (4) set out more minute procedural details. The suggestion that paragraphs (3) and (4) be reformulated to make this distinction clearer was accepted.

129. In relation to paragraph (1), it was agreed that the part starting with "provided that" either be deleted and referenced in the Comments or otherwise adjusted, to avoid giving the impression

that it was a conditionality. It was confirmed that the sentence was meant to refer to the application of the subsequent paragraphs of the best practice. Furthermore, it was questioned whether the term "regulate" suggested the need to introduce specific legislation. It was clarified that "regulate" was meant to ensure that legislation be passed if needed to remove existing obstacles to the use of online auctions, and that special rules might be required in addition to the ones already applicable to traditional auctions, as specified in the subsequent paragraphs. The Working Group asked that this point be clarified in the Comments.

130. It was further asked to consider inserting a cross-reference to the application of the general best practices on public sale by auction, with all appropriate adaptations, so as to refer, for example, to elements such as reserve value, different types of bids, etc.

131. The placement of the Recommendation was then discussed. It was agreed that the best practice should be given sufficient visibility in the instrument. To achieve this purpose, it was suggested to include it in an additional subsection at the end of Chapter VI, Section 1 (Subsection 1.6), which would avoid changing the numbering of the main sections. It was also suggested that it might be made into a new Recommendation 55. These indications were passed on to the Drafting Committee.

132. Finally, there was a suggestion to enhance the Recommendation to include some guidance for legislators on the different designs/types of online auctions, which was now lacking. Legislators seeking to introduce sound rules on online auctions might benefit from more details. The issue was deferred to intersessional consultations.

(e) Revised recommendation on expeditious relief (Study LXXVIB – W.G.9 – Doc. 8)

133. The drafting history and content of Recommendation XX in Document 8 was briefly summarised.

134. A question was raised as to whether the phrase "tangible or intangible collateral" should be further defined and whether it was intended to refer to all collateral. It was clarified that Recommendation XX no longer related solely to movables. A question was also raised as to whether the options for enforcement listed in paragraph (3) were intended to be cumulative or mutually exclusive. It was stated that the punctuation would be revised, and in the interim it was clarified that it was intended to mean that (a) or (b) could be pursued, failing which (c) might be an option.

135. It was suggested that paragraph (5) might be read as converting extra-judicial enforcement into judicial enforcement, which was not the intention of the paragraph, and that some clarification might be necessary.

136. In the interests of clarity, it was suggested that the order of "proven, undisputed and not credibly disputed" in paragraph (6) be changed to reflect the intended purpose of the Recommendation. It was further noted that this lack of clarity in paragraph (6) contributed to a lack of clarity in relation to paragraph (2) with regard to the burden of proof and the role of the debtor in proceedings. It was stated in response that the issue of the burden of proof would vary across jurisdictions, and arriving at a consensus that would apply in all cases would be difficult. In the ensuing discussion, it was submitted that it was typically easier for a debtor to prove that a debt had been discharged or should not be pursued than for a creditor to prove non-payment, and that proceedings were typically initiated where a creditor made an application and continued unless a debtor could prove that they should not. It was noted that a Comment might be added to paragraph (6) clarifying this without imposing a burden of proof on any party.

137. A question was raised as to whether the reference in paragraph (8) to the fact that "any order or regulatory provisional measure granted may be enforced by the Court upon a party's application" was intended to open judicial proceedings. It was clarified that it was not intended to create judicial proceedings but merely to allow the court to put extra-judicial proceedings back on track.

138. Moreover, it was clarified that the expeditious relief was not intended to apply where it was argued that a secured creditor breached their duties of good faith and commercial reasonableness in the modalities of disposition of the collateral, or where an appeal was sought against the appointment of an evaluator.

139. Finally, the placement of Recommendation XX was considered. *The Reporter of Subgroup 2* was asked to provide a suggestion in light of the application of the Recommendation to all types of collateral, which would be discussed by the Drafting Committee.

Item 7. Organisation of future work (including preparation for the formal consultation phase, timeline for consultation, and tenth session of the Working Group)

140. *The Chair* underlined that it was now incumbent upon the Working Group to generate as complete a draft as possible within as short an amount of time as possible. The Drafting Committee would continue meeting during the intersessional period to further the work towards the final draft, and the decisions of the Drafting Committee would be circulated to the wider Working Group for input. *The Deputy Secretary-General* added that members of the wider Working Group might also be involved in upcoming intersessional meetings of the Drafting Committee. The need to subject the draft instruments to consultations before final approval was reaffirmed. It was further suggested to proceed more expeditiously with targeted consultations with specific organisations/experts.

Item 8. Any other business

141. *The Chair* referred to two UNCITRAL documents for the Working Group to take into consideration: the Report of Working Group V (Insolvency Law) on the work of its sixty-fourth session (New York, 13-17 May 2024) (A/CN.9/1169), specifically paragraph 32 thereof which referred to the BPEE project, and the Toolkit for expedited asset tracing and recovery in insolvency proceedings (Note by the UNCITRAL Secretariat, 9 October 2024). The Working Group appreciated the reference to the draft instrument and noted that the documents had a general content and did not appear to be inconsistent with the current draft.

Item 9. Closing of the session

142. The *Chair* and the *Secretariat* once again thanked all participants and *the Chair* 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 (Study LXXVIB – W.G.9 – Doc. 2)

4. Consideration of work in progress: Master Copy of draft instrument containing revised draft best practices on enforcement by public authority (Study LXXVIB – W.G.9 – Doc. 3), enforcement of security rights (Study LXXVIB – W.G.9 – Doc. 4), and enforcement on digital assets (Study LXXVIB – W.G.9 – Doc. 6), as well as a recommendation on online auctions (Study LXXVIB – W.G.9 – Doc. 5) and a recommendation on expeditious relief (Study LXXVIB – W.G.9 – Doc. 8)

5. Discussion on the structure of the draft instrument (subdivision in parts, role and content of the introduction, placement of technology-related recommendations)

6. French version of the draft instrument: way forward

7. Organisation of future work (including preparation for the formal consultation phase, timeline for consultation, and tenth session of the Working Group)

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 (USA)
Ms Valeria CONFORTINI	Full Professor Private Law at Pegaso University, Department of Law (Italy)
Mr Fernando GASCÒN INCHAUSTI	Professor of Procedural and Criminal Law Universidad Complutense Madrid (Spain)
Mr LIU Junbo *(remotely)*	Professor of Civil Procedure Law School of Central University of Finance and Economics (China)
Mr Fábio ROCHA PINTO E SILVA	Pinheiro Neto Advogados (Brazil)
Ms Teresa RODRIGUEZ DE LAS HERAS BALLELL *(remotely)*	Associate Professor of Commercial Law Universidad Carlos III Madrid (Spain)
Ms Geneviève SAUMIER	Dean School of Law Université de Montréal (Canada)
Mr John SORABJI	Associate Professor UCL
Mr Felix STEFFEK *(remotely)*	Professor of Law Faculty of Law University of Cambridge (UK)
Mr Rolf STÜRNER	Emeritus Professor of Law, Albert-Ludwigs-Universität Freiburg (Germany)

OBSERVERS

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (EBRD) *(remotely)*	Ms Patricia ZGHIBARTA Legal Consultant LTP Dispute Resolution Team
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH) *(remotely*)	Ms Ning ZHAO Principal Legal Officer Mr Minho DO Long-term secondment
INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE (IALS) (*remotely*)	Mr Sjef VAN ERP Emeritus President
SECURED FINANCE NETWORK	Mr Richard KOHN Goldberg Kohn Ltd.
SUPREME PEOPLE'S COURT OF CHINA (*remotely*)	Ms ZHU Ke Judge Fourth Civil Division
UNION INTERNATIONALE HUISSIERS DE JUSTICE (UIHJ) *[excused]*	Mr Jos UITDEHAAG First Vice President
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) *(remotely)*	Ms Samira MUSAYEVA Senior Legal Officer Secretary, Working Group V (Insolvency Law) International Trade Law Division Ms Maria-Angeliki GIANNAKOU Associate Legal Officer

UNIDROIT

Mr Ignacio TIRADO	Secretary-General
Ms Anna VENEZIANO	Deputy Secretary-General
Ms Cindy CHEUK	Legal Officer
Ms Alexandra LOGUE	Secretary
Ms Julia DUNCAN	Intern
Mr Emanuele TARTAGLINI *(remotely)*	Intern