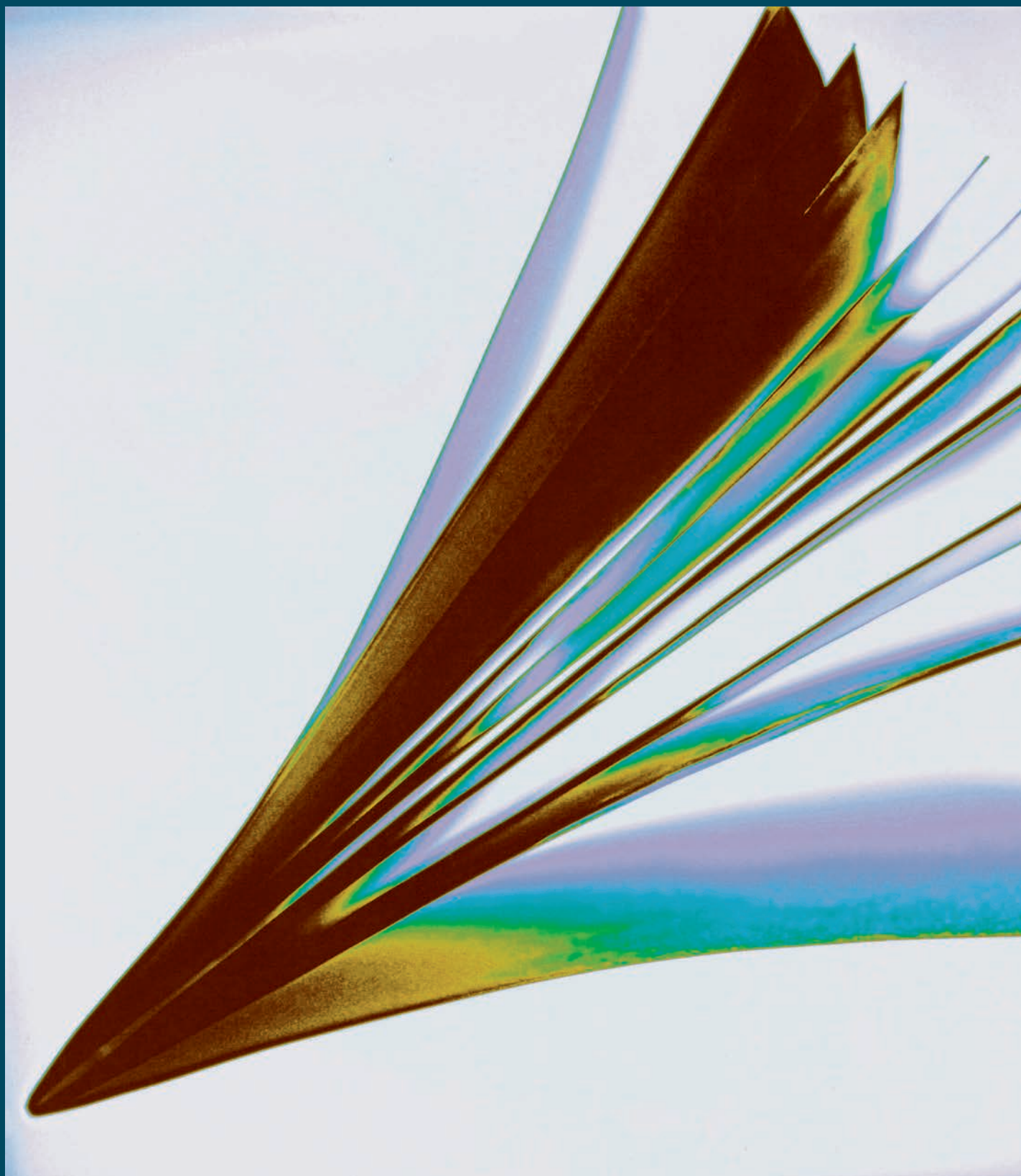


# Law in transition 2014



**European Bank**  
for Reconstruction and Development

Enforcing court decisions

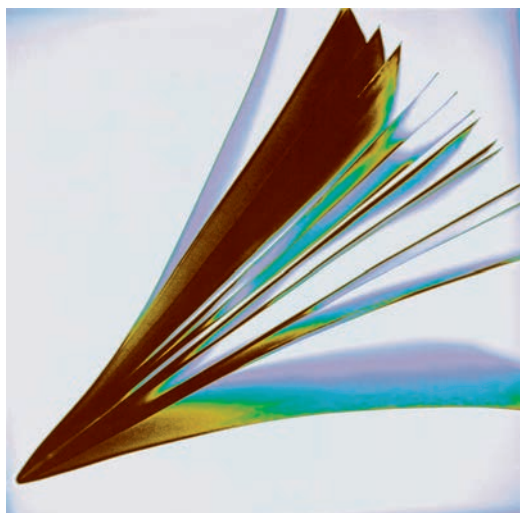


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The EBRD is investing in changing people's lives and environments from central Europe to Central Asia and the southern and eastern Mediterranean. Working together with the private sector, we invest in projects, engage in policy dialogue and provide technical advice that fosters innovation and builds sustainable and open market economies.

### **About this report**

Legal reform is a unique dimension of the EBRD's work. Legal reform activities focus on the development of the legal rules, institutions and culture on which a vibrant market-oriented economy depends. Published twice a year by the Legal Transition Programme, *Law in transition* covers legal developments in the region, and by sharing lessons learned aims to stimulate debate on legal reform in transition economies.



Foreword: Enforcing court decisions	2
Emmanuel Maurice	

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## General section

Through the looking glass: the role of the Extractive Industries Transparency Initiative (EITI) in sustainable resource development	4
Paul Moffatt and Vesselina Haralampieva	
Judicial activism in the courts of transition countries	14
Alan Colman	
Publishing decisions of the higher commercial courts in the SEMED region: current status and potential developments	24
Paul Byfield	

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## Focus section

### Enforcing court decisions: evolving law and practice

Enforcing court decisions in the Commonwealth of Independent States, Georgia and Mongolia: a comparative review	34
Alan Colman and Veronica Bradautanu	
Good practices for monitoring the effectiveness of enforcement actions and assessing the performance of bailiffs	52
Heike Gramckow	
Enforcement in times of crisis	62
Catherine Bridge and Frederique Dahan	
A new enforcement system in Serbia: one year on	68
Ljubica Pavlovic	
Strengthening enforcement of court decisions in Mongolia	74
Carlos Escudero and Altangerel Taivankhuu	
The bailiff profession in Poland	80
Rafał Fronczek	
Bailiffs in Tunisian law: structural aspirations and functional difficulties	86
Imed Memmich	
Abbreviations	92

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## Foreword

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### Enforcing court decisions

The EBRD has always recognised the key role of institutions in economic and legal transition. The role of courts has been well documented in academic literature. Studies have linked the pace of economic development and the cost of credit to the strength of a country's judiciary. Less well understood is the importance of an effective enforcement system to ensure that court decisions are fully implemented. The rule of law depends on public compliance with the decisions of lawful adjudicators. Such compliance can result either from social norms of behaviour or from the application of coercive measures. Indeed, the two are linked; the presence of an effective enforcement system, together with appropriate sanctions, shapes behaviour. Enforcement officers, often referred to as "bailiffs", perform a critical role.

Whereas there are numerous international standards relating to the judiciary, there are few in relation to enforcement agents. The Council of Europe has formulated useful recommendations on the regulation

of enforcement agents, and there is a growing body of academic work in the area. What is clear is that policy-makers, as in many areas, are presented with two competing overarching considerations: efficiency and fairness. The creditor's interests in expeditious realisation of judgment debt are to be balanced against the debtor's interests in a fair and transparent process. Enforcement must be quick, but thorough: it must permit seizure of assets, but with reasonable minimum exceptions; it must provide oversight of enforcement agents, but prevent obstruction of their work. How should these interests be balanced? And what benefits are offered by private enforcement agents over the public system?

Through its Legal Transition Programme (LTP), the EBRD has been studying the regulation and operation of enforcement agents in the countries where it invests. This work complements the LTP's efforts to strengthen judicial capacity and contract enforcement in the EBRD region. Well-trained judges in well-



structured courts should be supported by modern and effective enforcement agencies. In 2013 the EBRD conducted its first comparative assessment of enforcement agencies, focusing on the Commonwealth of Independent States, Georgia and Mongolia. The results bear out the claims of many court users and businesses in the region, which point to poor enforcement as one of the main problems affecting the justice system and the business climate. In many countries the challenges facing enforcement agents are similar to those confronting judges. Common problems include a lack of technical skills and practical experience, inefficiencies in management, and improper influences being brought to bear. Limited financial resources often contribute to these problems. However, in many areas, authorities can make great improvements if they are better equipped to monitor the performance of enforcement agents, provide appropriate training, seek better access to state property registries, and establish sound management systems. The EBRD supports the

efforts of governments in the EBRD region to address these concerns.

This edition of *Law in transition* is devoted to the role of enforcement agents in giving effect to judicial decisions. It highlights the assessment work and technical assistance projects of the EBRD and other international organisations in this area. It contains in-depth analysis of underlying causes of problems affecting enforcement agents, how these problems interrelate, and how they might be addressed. I hope this volume will be a useful tool for governments, international organisations and others active in promoting reform of enforcement mechanisms in transition countries.

**Emmanuel Maurice**  
General Counsel  
European Bank for Reconstruction  
and Development

# 1

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# Through the looking glass: the role of the Extractive Industries Transparency Initiative (EITI) in sustainable resource development

PAUL MOFFATT AND VESSELINA HARALAMPIEVA

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Many resource-rich countries have failed to convert their natural wealth into sustainable, broad-based and long-term prosperity. This article examines the Extractive Industries Transparency Initiative (EITI), as a global platform which aims to contribute to economic development in resource-rich countries through facilitating greater accountability for revenues from natural resources.



# General section



Globally, almost 70 per cent of people living in extreme poverty are in resource-rich countries, while almost 80 per cent of countries whose economies have historically been driven by resources have per capita income levels below the global average. Trend data show that in more than half of these countries per capita growth rates are failing to catch up with the rest of the world, despite having an abundance of resources.<sup>1</sup>

Many of these nations face a “resource curse”, which condemns them to having lower rates of economic growth and worse development outcomes than countries with fewer natural resources. Thus, the challenge for resource-rich countries facing such a curse is to translate revenues from resource endowments into structures and programmes which can promote stable economic growth. The existence of this curse has given birth to a number of initiatives

aimed at identifying the reasons for that phenomenon and, most importantly, mapping a path for converting the curse into a “blessing”.

This article will focus upon one particular initiative within the resources sector, which aims to contribute to broader and more sustainable economic development among resource-rich countries facing the resource curse, through facilitating greater accountability for resources sector revenues and their expenditure by the state. The Extractive Industries Transparency Initiative is founded upon the understanding that, by working in coalition, governments, companies and civil society can greatly improve the situation of citizens of resource-rich countries through more open and accountable management of revenues from natural resources. Greater openness around how a country manages its natural resources wealth is essential in ensuring that these resources can benefit all citizens.



Developing countries with an abundance of natural resources are often affected by the “resource curse”.

It has been estimated that the cumulative investment in resource infrastructure in resource-rich, lower-income countries to 2030 will surpass US\$ 2 trillion. If this investment is effectively managed, in a transparent, sustainable and accountable way, the revenue flows and returns from this investment have the potential to lift 540 million people in those countries out of poverty.<sup>2</sup>

### **Institutional governance and opaque revenue flows**

One of the main reasons for subdued economic development in resource-rich countries is poor institutional quality. A low level of development of state or local institutions is common to countries with an authoritarian form of government, with inadequate checks and balances to moderate competing claims on the state's wealth and power. Insufficient control in state administration (especially in the natural resources sector), a lack of transparency, and poor institutions often lead to corruption and the misallocation of public funds.

The Transparency International (TI) Corruption Perceptions Index 2013 reveals that countries that compromise on democratic governance and values rank poorly in the Corruption Perceptions Index, which indicates that their public sectors are perceived as highly corrupt.<sup>3</sup> In addition, the TI Bribe Payers Index 2011 portrays the natural resources sector as one of the sectors that is most susceptible to bribes (mining ranked 15th, and oil and gas 16th, out of 19 sectors).<sup>4</sup> This index explains that this is mainly because the extractive sector is characterised by high-value investment and significant government involvement and regulation, both of which provide ample opportunities for corruption. Administration and regulation of the sector require state officials to make decisions with respect to the use and ownership of a country's resources. When institutional control is poor, law enforcement is discretionary, and transparency is low, this can lead to rent-seeking practices, unethical behaviour and, ultimately, the failure of the benefits of exploitation of national resources to flow beyond a small elite group.

In order to address these concerns, many countries have introduced policies targeted at tackling corruption and increasing transparency of revenue flows to and from resource

companies operating locally or overseas. The advanced economies recently began to take this issue seriously, with the United States being among those at the forefront of the transparency initiative with the adoption of the 2010 Dodd-Frank Act (the Act),<sup>5</sup> which requires disclosure of payments made by oil, natural gas and mining companies to foreign governments. As envisaged by the Act, in August 2012 the US Securities and Exchange Commission (SEC) adopted rules that required each SEC-reporting resource extraction company to publish an annual report disclosing any payment made in connection to the company's commercial activities abroad.<sup>6</sup> However, the US resources industry filed a claim arguing that the proposed rules requiring such public disclosure were anti-competitive and would create detrimental consequences for investors. On 2 July 2013 the Washington DC District Court vacated the SEC Rules on the grounds that the SEC's interpretation of the Act, especially the requirement for public disclosure, was too onerous on US companies operating abroad. The Dodd-Frank disclosure requirement remains unaffected by this setback, although its implementation has been delayed. The SEC is currently revising the text of its Rules, which will determine the level of disclosure required of US companies in the future.

Europe has demonstrated its equal commitment to revenue transparency, with the adoption of far-reaching disclosure obligations contained in the 2013 European Union (EU) Accounting Directive,<sup>7</sup> which obliges companies to disclose payments made to foreign governments in excess of €100,000 in a financial year. Companies must disclose all material payments they make to governments (“country-by-country reporting”) as well as in relation to projects (“project reporting”). The Accounting Directive applies to all EU listed, and large unlisted EU-incorporated, companies that are active in the extractive industries.<sup>8</sup> Among the strengths of the Accounting Directive is that it allows for very limited exemptions and, in particular, disallows any exemption where such disclosure would amount to a breach of local law or of the underlying contract or licence.<sup>9</sup> Additionally, a draft EU Transparency Amendment Directive is expected to be adopted, which would complement the application of the Accounting Directive and require the resource industry to adhere to strict transparency standards.





Greater openness around how a country manages its natural resource wealth is essential in ensuring that these resources can benefit all citizens.

**Table 1. Extractive Industries Transparency Initiative countries**

Country	Status
<b>Countries where the EBRD invests</b>	
Albania	EITI Compliant Country
Azerbaijan	EITI Compliant Country
Kazakhstan	EITI Compliant Country
Kyrgyz Republic	EITI Compliant Country
Mongolia	EITI Compliant Country
Tajikistan	EITI Candidate Country
Ukraine	EITI Candidate Country
<b>Other countries</b>	
Afghanistan	EITI Candidate Country
Burkina Faso	EITI Compliant Country
Cameroon	EITI Compliant Country
Central African Republic	Suspended
Chad	EITI Candidate Country
Côte d'Ivoire	EITI Compliant Country
Democratic Republic of Congo	Suspended
Ghana	EITI Compliant Country
Guatemala	EITI Candidate Country
Guinea	EITI Candidate Country
Honduras	EITI Candidate Country
Indonesia	EITI Candidate Country
Iraq	EITI Compliant Country
Liberia	EITI Compliant Country
Madagascar	Suspended
Mali	EITI Compliant Country
Mauritania	EITI Compliant Country
Mozambique	EITI Compliant Country
Niger	EITI Compliant Country
Nigeria	EITI Compliant Country
Norway	EITI Compliant Country
Peru	EITI Compliant Country
Republic of the Congo	EITI Compliant Country
São Tomé and Príncipe	EITI Candidate Country
Senegal	EITI Candidate Country
Sierra Leone	Suspended
Solomon Islands	EITI Candidate Country
Tanzania	EITI Compliant Country
The Philippines	EITI Candidate Country
Timor-Leste	EITI Compliant Country
Togo	EITI Compliant Country
Trinidad and Tobago	EITI Candidate Country
Yemen	EITI Compliant Country
Zambia	EITI Compliant Country

Source: [www.eiti.org](http://www.eiti.org) (Countries' status as of 14 February 2014).

Notes: EITI Candidate Country: Implementing EITI, not yet meeting all requirements.

EITI Compliant Country: Meeting all requirements in the EITI standard.

Suspended: Compliant/Candidate status is temporarily suspended.



A country's reputation for having prudent governance policy is becoming increasingly important in a competitive world.

Further, the governments of France, Germany, the United Kingdom and the United States<sup>10</sup> have recently announced that they would adopt strict national regulations aimed at increasing transparency and accountability in state policies and in the extractive industries. Italy has declared that it will seek EITI candidacy status, while Germany is planning to implement the EITI in a pilot region. Japan and Russia have expressed support for EITI principles by encouraging national companies to become supporters of the initiative.<sup>11</sup>

### **Extractive Industries Transparency Initiative**

The groundwork for these transparency initiatives was laid with the launch of the EITI in 2003, at the Johannesburg G7 summit, placing transparency in the natural resources sector firmly in the global spotlight.

The EITI is a consensus-based platform, wherein governments, companies and civil society can work together to develop, promote and adopt in national environments, practices for increased transparency of and accountability for revenues derived from natural resources. The EITI provides an agreed international

standard for the regular publication of extractive companies' audited accounts of all material payments made to governments, and also of all material revenues received by governments from companies during their operations.

Improving financial transparency of revenues in the extractive industries, and ensuring that this translates into enhanced accountability of governments and companies, can make a crucial contribution to a broader campaign to combat corruption and redirect resources so that they benefit local communities and broader sustainable economic development. Openness in the use of proceeds is seen as a catalyst to holding public debates, and this can lead to more prudent decision-making, benefiting citizens and improving a country's economic development.

### **The EITI Principles and EITI Standard**

The cornerstones of the EITI are the EITI Principles, which were adopted at inception in 2003, and the EITI Standard, which was adopted in May 2013.<sup>12</sup> The EITI Principles are a set of 12 beliefs, affirmations and recognitions that underpin the EITI process, and which candidate countries are required to subscribe to and publicly endorse at the





Constructive community engagement, effective communication and broader awareness are areas in which the EBRD will look to provide further support.

outset of the EITI process. The EITI Standard incorporates the Principles, together with updated requirements and rules for the implementation and validation of the process.

This EITI Standard requires disclosure of payments and government accountability, and facilitates a growing public understanding of the management of natural resources. A key strength of the EITI model is that it operates through a tripartite, consensus-based governance model, involving civil society, together with government and industry, on an equal footing, in the process of policy development and transparency enhancement. In this way, civil society and industry can identify perceived deficiencies in the central and local administration and regulation, and contribute to remedying them, just as citizens can more effectively call government and companies to account for their actions. Such effective multi-stakeholder oversight is designed to contribute to openness in dialogue and to enable the presentation of revenue flow data in a publicly accessible and comprehensible manner.

### Prevalence of the EITI

The importance of the EITI has grown globally since its inception, while its role in facilitating extractive transparency is destined to expand, after new, more robust and demanding, rules and procedures were adopted at the EITI Annual Meeting in Sydney, in May 2013. The EITI model is growing in prominence in the EBRD region, with a number of countries either already compliant, candidates for validation, or indicating an interest in joining. Within the EBRD region, Albania, Azerbaijan, Kazakhstan, Kyrgyz Republic and Mongolia are already EITI Compliant Countries. Tajikistan and Ukraine have recently assumed EITI Candidate Country status and have publicly announced their intentions to meet the EITI requirements and become EITI compliant.

### The EITI implementation process

In order to initiate the EITI process, governments must first indicate their commitment to implement the EITI requirements, by making a public statement of their intention to join the EITI process and appoint a senior official to lead its implementation. More importantly, a multi-stakeholder group needs to be established, with adequate representation of all actors in the

natural resources sector, including the private sector, civil society (that is, non-governmental organisations and the media) and government representatives. The government must ensure that the members of the multi-stakeholder group are free from undue influence, and that they are able to speak freely on transparency and resource governance issues. The EITI International Secretariat must verify that these requirements have been met and guaranteed by the government. The multi-stakeholder group will then develop a working plan on how to implement the EITI requirements, including the budget. The institutional structure is clearly defined in the EITI rules, although countries are permitted to adapt the implementation of the EITI to their particular national characteristics.

Once an application for Candidate Country status has been submitted to the EITI Board, the EITI International Secretariat will work with the country and the multi-stakeholder group on the implementation of the EITI requirements. If the International Secretariat determines that the applicant country has successfully implemented the requirements, the EITI Board admits the applicant country as an EITI Candidate. From the date of becoming a Candidate, the country has 18 months to publish its first EITI report (which should contain audited payments between companies and governments, and receipts of governments from companies), and a maximum of two-and-a-half years to undertake a “validation” process. The validation verifies the fulfilment of 15 requirements, which prepare the government and companies to be able to disclose revenues audited to international standards and to disseminate the reports. Re-validation occurs every three years. Validation maintains the robustness and integrity of the EITI initiative by requiring all EITI Compliant countries to meet the same standards.

### Funding for the EITI

Funding for the validation process in developing countries has largely been met from a World Bank-administered multi-donor trust fund (MDTF). The cost of running local EITI secretariats, including the annual reconciliation exercise, has also been funded from the MDTF for a number of Candidate countries. Some of these countries' EITI processes continue to be funded from the MDTF, although alternative national funding has been accessed as well in



The effective implementation of the EITI can give voice to local and national populations, and manage the expectations of industry, governments and affected communities through multi-stakeholder mechanisms.

some cases. The expectation is that the EITI will become self-sustaining at the national level into the medium term, with domestic funding sources covering all expenses related to the process.

### Benefits in joining the EITI

Signing up to the EITI and implementing the requirements is a voluntary process, which: (a) requires governments to subject themselves to a significant degree of scrutiny; and (b) places a burden on governments to set up the relevant framework and to abide by the EITI standards in order to increase the transparency of their activities. Interestingly, an increasing number of countries that are perceived to be somewhat authoritarian in nature, and that are believed to have administrative corruption and a low level of accountability, have joined the EITI. Observations reveal that such governments are motivated to demonstrate their commitment to transparency, in seeking to improve their reputations internationally. A country's reputation for having prudent governance policy is becoming increasingly important in a competitive world, where international financial institutions (IFIs) condition their lending and aid on progress with anti-corruption reforms, while investors are under pressure from shareholders, consumers and the public to be more discriminating in their choice of investment destinations and partners. In addition, in times of crisis, taxpayers of donor nations demand more accountability from their governments in respect of the money spent on foreign aid or on technical assistance. Recent studies reveal that countries joining the EITI expect to enjoy the two-fold effect of increased levels of foreign direct investment (FDI), and increased revenues from the resources sector associated with a lower risk of these receipts being eroded through fraud or misappropriation.<sup>13</sup>

By publicly announcing its commitment to join the EITI, a government sends a positive signal to investors that it intends to implement reforms in the resources sector. Failure to honour this commitment could lead to international political or economic pressure, as well as local protest. Membership of international organisations or initiatives is an instrument through which countries can enhance their national standards in sectors vital to the economy, as well as improve the government's credibility.<sup>14</sup> It can also lead to an improvement of a country's risk rating. Risk rating is an important criterion in

determining investment decisions and has an impact on interest rates on government debt. Consequently, some countries from the EBRD region have articulated their intention to attract more investment in the resources sector through signing up to the EITI.<sup>15</sup> As seen above, the direct relationship between both resource development and increased accountability in its management, and sustainable economic development, makes the EITI a very important initiative globally, and for the EBRD region in particular.

### Support for the EITI from the international community

Based on the premise that the EITI is a global transparency and accountability initiative, which aims to contribute to sustainable economic development in resource-rich countries, many donors and IFIs actively support the EITI in their operations. World Bank support comes in the form of its administration of the MDTF.<sup>16</sup> In addition, the EITI is a core part of the World Bank Group's strategy for oil, gas, and mining, and of the Group's governance and anti-corruption strategy of 2007. The African Development Bank (AfDB) also provides support to its member countries for EITI implementation. The Asian Development Bank (ADB) and the Inter-American Development Bank (IDB) have both endorsed the EITI, and encourage its adoption in their member countries. The International Monetary Fund (IMF) has also intensified its efforts to help promote openness in the sector through the issue of recommendations on revenue transparency and technical assistance.<sup>17</sup>

### Relevance of the EITI to the EBRD

The EBRD is active in its commitment to promoting the EITI. For example, in its recently adopted Energy Strategy,<sup>18</sup> the EBRD declares its commitment to adhere to *"best governance, transparency and revenue management standards by requiring its clients to implement the principles and requirements of the EITI"*. As the mining sector is seen as a primary enabler of broad economic and social development, and therefore as critical to the transition process that is central to the EBRD's mandate, the EBRD's support of the EITI makes great sense. Additionally, since EITI implementation reflects an explicit commitment to enhancing accountability and improving the investment climate – which is an integral part of the





The EITI continues to expand, and could serve as a blueprint for a deepening and widening of transparency across extractive and non-extractive industries.

mission of most IFIs – it is logical that IFIs will continue to support the EITI and condition their aid on countries' implementation of the EITI or EITI-style transparency. There is also a growing trend for IFIs to require clients (that is, investee extractive companies) to adhere to the EITI reporting requirements in the countries where they invest.

In addition to promoting EITI standards in its investment and financing operations through requiring that its extractive sector clients comply with the EITI's requirements, the EBRD has also begun to support the practical implementation of the EITI in the countries where it invests. For example, the Bank's Legal Transition Team (LTT) is currently supporting the implementation of aspects of the EITI in Mongolia – one of the more advanced EITI Compliant countries – and will look to extend this practical implementation support to other Compliant, Candidate or prospective Candidate countries. This support will focus mainly on establishing national legal frameworks that implement the EITI standards and requirements, building robust institutional capacity to support the transparency initiative, and working with stakeholders to build effective communication and dissemination strategies.

### The EBRD and EITI in Mongolia

The EBRD is currently carrying out an EITI programme in Mongolia, which is an example of the EBRD's practical in-country support for the EITI's implementation. Through this programme, the Bank's Legal Transition Team has provided support to the Mongolian government in:

- the development of an EITI law
- a review of the institutional structure and the elaboration of an institutional development plan
- a review of the prospects for sustainability of the EITI in Mongolia, centering around sustainable funding following the reduction or elimination of MDTF funding
- the development and implementation of an EITI training programme for central and local government, sector companies, civil society and the media
- the development of a communications strategy for the EITI in Mongolia







The EBRD aims to continue supporting compliance with the EITI Standard, encouraging governments to endorse the EITI.

- the promotion and dissemination of the output of the EITI process at the general public level, both nationally and locally, as well as programmes aimed at raising awareness of the importance of public participation in the EITI process
- the development and piloting of an electronic reporting system for the EITI.

One of the main challenges in the EITI implementation process is to raise awareness of the availability of information on revenue and receipts from the extractive industries (which the reconciliation reports present) within local communities and civil society groups, and to provide the necessary facilities to assist these groups to understand the available information and to utilise it to fuel their participation in public debates on the resources sector. Such advocacy is crucial in the EITI process, and it is widely acknowledged that much of the success of the EITI today has been achieved through concerted advocacy by a number of civil society groups coming together within the framework of the EITI. Such constructive community engagement, effective communication and broader awareness, alongside legal and institutional assistance, are areas in which the EBRD will look to provide further support, as its EITI support programme evolves.

### **The role of the EITI as a platform for community engagement**

In addition to core EITI activities, the EITI framework also represents a key platform for engaging local communities on an equal footing with government and industry, in decision-making related to broader mining sector issues which affect these communities (such as the environment, health and safety, government revenue expenditure and local employment). The effective implementation of the EITI can give voice to local and national populations, and manage the expectations of industry, governments and affected communities through multi-stakeholder mechanisms. Better access to information and training can be provided to local communities through EITI mechanisms by strengthening local EITI processes, creating knowledge-sharing networks and learning platforms for rural communities, and working with local civil society organisations.

### **Conclusion**

Low-income countries which are rich in natural resources are often affected by the resource curse. By encouraging EITI-style transparency in these countries, some of the potential negative impacts can be mitigated and positive sector developments can be encouraged, leading to a reversal of the resource curse. If the effectiveness of the EITI and related globally influential initiatives – such as the US Dodd-Frank Act and the EU transparency-related directives – can be assured, this should represent the first major step towards genuine accountability for revenues that have the potential to transform the lives of hundreds of millions of people.

The EITI continues to expand, and, given its positive impact thus far, it could arguably serve as a blueprint for a deepening and widening of transparency, extending in the future to broaden its application from the chain of extractive industries to non-extractive sectors, such as the broader energy sector, telecommunications, and other sectors where governments receive revenues from exploiting natural and state-held resources.

Through its activities and operations in energy and natural resources, the EBRD is proud to be supporting this process, contributing to the better management of resources and helping to bring greater transparency to the resources sector, which makes up a significant part of the GDP of a number of countries where the Bank invests. The Bank aims to continue supporting compliance with the EITI Standard, encouraging governments to endorse the EITI, and engaging actively with the EITI International Secretariat to contribute to an evolving transparency movement.

## Notes

<sup>1</sup> Drawn from an analysis by the McKinsey Global Institute in their study: *Reverse the curse: Maximizing the potential of resource-driven economies*, December 2013.

<sup>2</sup> Ibid.

<sup>3</sup> TI Corruption Perceptions Index 2013, available online at: <http://cpi.transparency.org/cpi2013/results/>.

<sup>4</sup> TI Bribe Payers Index 2011, available online at: [http://issuu.com/transparencyinternational/docs/bribe\\_payers\\_index\\_2011?e=2496456/2293452#search](http://issuu.com/transparencyinternational/docs/bribe_payers_index_2011?e=2496456/2293452#search).

<sup>5</sup> The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) was passed in an effort to promote the stability of the US financial system following the global financial crisis. Section 1504, which envisages disclosure of payments by resource companies, was included in the Act in order to foster transparency about extractive activities in foreign countries.

<sup>6</sup> The SEC Rules required the resource company to provide, on an annual basis, information about the type and quantum of payments made for each project related to the commercial development of oil, natural gas and minerals, and the type and total amount of payments made to each foreign government to which the project relates. Exemptions from these requirements were not contemplated by the Rules.

<sup>7</sup> The Accounting Directive 2013/34/EU is yet to be transposed to the legislation of the EU Member States, but it is expected that it will apply to financial years beginning on 1 January 2016. The United Kingdom is likely to implement the directive even earlier.

<sup>8</sup> The Accounting Directive also applies to companies active in the logging of primary forests.

<sup>9</sup> The SEC Rules implementing the Dodd-Frank Act provisions originally contained a similar provision, prohibiting resource companies from claiming an exemption where disclosure would amount to a breach of local law or the underlying contract or licence, before the court set those aside. At the time of publication it is not yet clear if that provision will survive the revision of the SEC Rules.

<sup>10</sup> See “France and United Kingdom commit to global transparency standard”, available online at: <http://eiti.org/news/france-and-united-kingdom-commit-global-transparency-standard>.

<sup>11</sup> See “Italy to implement, Germany to pilot EITI”: <http://eiti.org/news/italy-implement-germany-pilot-eiti>; “UK and France join the Extractive Industries Transparency Initiative”: <https://www.gov.uk/government/news/g8-transparency-uk-and-france-join-the-extractive-industries-transparency-initiative>; “President Obama and Nordic leaders reaffirm support to EITI”: <http://www.whitehouse.gov/the-press-office/2013/09/04/joint-statement-kingdom-denmark-republic-finland-republic-iceland-kingdom>; “G20 reaffirms support for EITI”: <http://en.g20russia.ru/load/782795034>.

<sup>12</sup> The EITI Principles are available online at: <http://eiti.org/eiti/principles>; the EITI Standard can be found at: <http://eiti.org/document/standard>.

<sup>13</sup> Liz David-Barrett and Ken Okamura, “The Transparency Paradox: Why Do Corrupt Countries Join EITI?” (November 2013), University of Oxford; and Maya Schmaljohann, “Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI” (January 2013) University of Heidelberg, discussion paper.

<sup>14</sup> Songying Fang and Erica Owen, *International institutions and credible commitment of non-democracies*, *The Review of International Organisations* (2011).

<sup>15</sup> See the official statements/applications for EITI Candidature of Tajikistan and Ukraine. By expressing Tajikistan's commitment to the EITI Principles and Standards, the Tajik President stated the government's aims of improving the investment climate and attracting FDI (among other benefits).

<sup>16</sup> <http://siteresources.worldbank.org/NEWS/Resources/FormatResults2010-SDN-SB-New-EITI.pdf>.

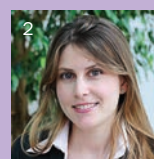
<sup>17</sup> <http://www.imf.org/external/np/exr/facts/fiscal.htm>.

<sup>18</sup> Available online at: <http://www.ebrd.com/downloads/policies/sector/energy-sector-strategy.pdf>. Similar support is expressed in the EBRD Mining Operations Policy, available online at: <http://www.ebrd.com/pages/sector/naturalresources/policy.shtml>.

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## 2

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# Judicial activism in the courts of transition countries

ALAN COLMAN

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In transition countries, public concerns about the courts tend to focus on perceived corruption and political interference from the executive. However, a recent EBRD study of judicial decisions suggests that judicial activism is contributing to the public perception of judicial bias in the region. This has policy implications for those engaged in legal and institutional reform.



### Judicial activism

The last 20 years has seen much debate in developed jurisdictions about the proper role of judges in interpreting the law. Such argument pits traditionalists, who maintain that judges should find meaning within the text of the law, against advocates of judicial activism, who favour interpretative creativity informed by moral and policy considerations.<sup>1</sup> Interpretation of law is not algebra,<sup>2</sup> and reasonable minds can be expected to differ on the meaning of a legal provision in a particular circumstance, especially when it involves abstract concepts such as “reasonableness” or the “public interest”. But, at the same time, it is a fundamental tenet of judicial responsibility that judges be impartial.<sup>3</sup> Judicial interpretation must involve a conscientious search for objective meaning. What drives concerns

about judicial activism is the impression of judges preferring a particular outcome to a legal dispute and employing lax interpretative techniques in order to accommodate their preference.<sup>4</sup> It is this manifestation of judicial activism with which the present article is concerned: situations in which judges appear to adopt a results-oriented approach to decision-making, focusing first on outcomes (who should win), rather than on judicial process (what the law means and how to apply it).

In the transition countries of eastern Europe and the former Soviet Union, relatively little attention has been paid to the question of judicial activism and interpretative methodology.<sup>5</sup> Public concerns about the courts tend to focus on the perceived high levels of corruption and political interference from the executive.<sup>6</sup> These problems are





Judicial interpretation must involve a conscientious search for objective meaning.

certainly real: academic studies and reports of international and non-governmental organisations have produced ample evidence of corruption and a lack of judicial independence in many transition countries. However, a recent study by the EBRD of judicial decisions in transition countries suggests that, in addition to corruption and political interference, judicial activism is contributing to the public perception of judicial bias in the region. This has policy implications for those engaged in legal and institutional reform.

### The EBRD's study of judicial decisions

The EBRD's Legal Transition Programme works with governments in the Commonwealth of Independent States (CIS), eastern Europe, and the southern and eastern Mediterranean (SEMED) region to strengthen commercial law, as well as legal and market institutions, with the objective of improving the investment climate. This work furthers the Bank's mandate to promote the development of the private sector, and the transition from planned to market economies. One of the LTP's focus areas is contract enforcement and judicial capacity in commercial law. Work in this field involves EBRD lawyers and consultants implementing

technical assistance projects with governments, directed towards such matters as court and legislative reform, judicial training in commercial law and market awareness, and promotion of alternative dispute resolution.

To provide an evidentiary basis for the Bank's policy dialogue with governments, the LTP undertakes analytical research on the quality of commercial legislation and institutions in its region. From 2010 to 2013, the EBRD and local legal experts from across the region conducted a qualitative assessment of judicial decisions in commercial law matters in the countries of the CIS, south-eastern Europe, Georgia and Mongolia. The study, the *EBRD Judicial Decisions Assessment*, focused on typical cases in three broad areas: creditor rights, property and shareholder rights, and dealings with regulators.<sup>7</sup>

### Inferences of partiality

One of the dimensions studied was the inferred impartiality of decisions, based primarily on the face of the record, but also taking into account the surrounding circumstances of the litigation. This was intended to probe corruption and lack of judicial independence.







Courts often appeared to favour natural persons in commercial disputes against legal entities, such as corporations and partnerships.

Impartiality is, of course, a difficult dimension to measure in any categorical way. Yet reasonable inferences can be drawn from reviewing judicial decisions, considering factors such as: specious reasoning; decisions giving the impression of striving for a particular result; special treatment being afforded to one of the parties; procedural irregularities evident in the decisions; and the political and social context of the relevant dispute.

Numerous cases exhibited these characteristics. In many instances there were strong inferences of “telephone justice”. For example, in one decision, a government claim against a business linked to an opposition party was listed for hearing within three weeks, while new matters are typically listed for trial only 12 months after filing. The study concluded that the courts of many countries, especially in the CIS, showed deference to state interests, particularly in relation to litigation in strategic sectors of the economy. Other cases, with no apparent link to government or political power structures, were suggestive of corruption; for example in instances where members of the business elite succeeded in commercial litigation despite the merits of the case being strongly against them. However, many cases of inferred bias were *not* believed to be associated with either corruption or political interference, but rather with results-based judicial decision-making, where courts’ sympathies were aroused by the social or economic profiles of the litigants.

### Categories of favoured litigant

Set out below are several categories of apparently “favoured litigant” that emerged from a review of the decisions studied in the Judicial Decisions Assessment, as well as associated research on jurisprudence in the countries concerned, including interviews with judges from the region. Clearly, it is not possible to prove the extent to which subjective considerations are affecting judges’ decisions, and therefore the following is necessarily somewhat impressionistic. Nevertheless, inferences can be drawn by lawyers, investors and the general public about the impartiality of judges’ decisions and the factors that influence them. The following categories do not represent uniform trends across all countries, but are offered as examples

of decisions where inferences have been drawn about judges’ outcome preferences determining the decisions. The cases referred to below are not cited, so as not to prejudice the position of the judges concerned.

### Natural persons

Courts often appeared to favour natural persons in commercial disputes against legal entities, such as corporations and partnerships. An illustration is provided by an Albanian case involving an individual investor who had signed an agreement with a property developer for an option to purchase an apartment off the plan. In order to obtain further financing, the developer granted a mortgage to a bank over the entire building structure. When the developer defaulted on payment, the bank sought to foreclose on the mortgage and take possession of the nearly-completed complex. The individual investor claimed that he had acquired title to the apartment, against which the mortgage was ineffective. The court agreed. Although the mortgage had been registered and conferred an indefeasible title on the bank over the entire complex, the court found that the option to purchase had “passed ownership” of part of the building to the individual investor. A spate of similar rulings followed, which were manifestly contrary to the mortgage law. This resulted in Albanian banks losing confidence in mortgages as a form of security for credit, which adversely affected the liquidity of the market.

### Mortgagors

Similarly, courts would sometimes strive to avoid foreclosing on a residential mortgage. Moldovan legislation allowed mortgagees to foreclose upon default by obtaining an ordinance from a court, confirming the mortgagee’s right to seize the property. Such ordinances, once granted, could only be set aside on the very limited grounds set out in the mortgage law. However, in a number of cases, mortgagors successfully petitioned the courts to overturn enforcement ordinances on grounds entirely unrelated to those in the mortgage law, such as on general considerations of hardship and injustice. Many decisions did not even refer to the relevant provisions of the mortgage law. The problem was compounded by the fact that, under Moldovan law, the decision to revoke an enforcement ordinance was not appealable. As in Albania, the approach of some judges to this issue



A lack of exposure to the commercial world and poor training can combine to hinder judges' ability to deal effectively with commercial cases.

contributed to the contraction in the mortgage market in the late 2000s, which had already been hit hard by the global financial crisis.

An alternative theory about the reasons for the apparent partiality of judges is that these instances of apparent "outcome preference" were rather the result of poor understanding of the relevant legislation. Indeed, in all countries in which judicial decisions were analysed there were instances of courts making mistakes about the application of commercial law, which is understandable given the uneven (and sometimes non-existent) training given to judges in these areas. It must be borne in mind that judges in civil law countries are appointed to the bench as young professionals, often with little experience. A lack of exposure to the commercial world and poor training combine to hinder judges' ability to deal effectively with commercial cases. Nevertheless, residential mortgages are not remote from the ordinary experience of most judges, and the particular provisions concerned were not complex. Further, it was known that in many proceedings the unsuccessful parties (banks) specifically pleaded and clearly explained the mortgage legislation.

#### **Other debtors**

Some judges appeared to show a predisposition towards debtors generally. A series of Ukrainian decisions were studied in which courts rejected claims by creditors for the repayment of simple debts, on spurious grounds. In one case the debtor claimed he had been absolved from his obligation to make certain monthly payments on leased equipment because he had not received invoices on time in respect of the months concerned. The court accepted this defence, despite the absence of any apparent basis for this in Ukrainian law or in the contract. In another case, a debtor successfully invoked central bank regulations limiting foreign currency loans in order to justify the non-repayment of a debt denominated in US dollars, even though the debt was below the relevant limit (the case was reversed on appeal). Local counsel pointed to a series of decisions apparently motivated by the court's sympathy for debtors during the financial crisis. Similarly, in Russia, experts noted reluctance on the part of creditors to initiate bankruptcy proceedings. This was attributed, in part, to their concerns about latent court sympathy for debtors and an

expectation that creditor-initiated bankruptcy proceedings – as opposed to those initiated by debtors themselves – might not receive an impartial hearing. In Tajikistan, a stark instance of pro-debtor sympathy involved a claim by a creditor for the repayment of a loan, where the debtor was a local charitable organisation providing training to blind people. The charity acknowledged the debt, but the courts at first and second instance found simply that it would be "unfair" in the circumstances to require repayment from an institution that was pursuing social and humanitarian aims. No reference was made to relevant law.

As noted earlier, these categories do not reflect uniform trends across all transition countries, and indeed the opposite was experienced in Armenia; financial institutions, rather than debtors, were perceived as enjoying the courts' favour. This was said to be a reflection of courts' deference to the executive, which had in recent years placed a great emphasis on strengthening the financial system. Courts in the Kyrgyz Republic were also perceived as having a more pro-creditor orientation.

#### **Local parties**

In some countries, courts in regional areas appeared to favour local parties against outsiders. For example, in the Former Yugoslav Republic of Macedonia, certain regional courts decided a string of cases against firms which had their head offices in the capital, Skopje, in circumstances where the merits of the case were considered to have been strongly in favour of such companies. The demonstration of regional sympathies by courts was also identified as an issue in Uzbekistan, where concern about the quality of justice usually focuses on a lack of judicial independence and the overbearing role of the state. In addition, the large number of property law cases in Kosovo, discussed further below, are an example of courts favouring locals against outsiders (in this case, ethnic Albanians over ethnic Serbs). This apparent regional bias could, in theory, be a manifestation of corruption, where local litigants were simply more likely to understand and use local channels and means of bribery than those from outside the region. However, it seems unlikely that such "local knowledge" could not be acquired by a party from elsewhere in the same country.



Judicial activism is antithetical to the rule of law, which posits, at a minimum, a body of rules being applied objectively.

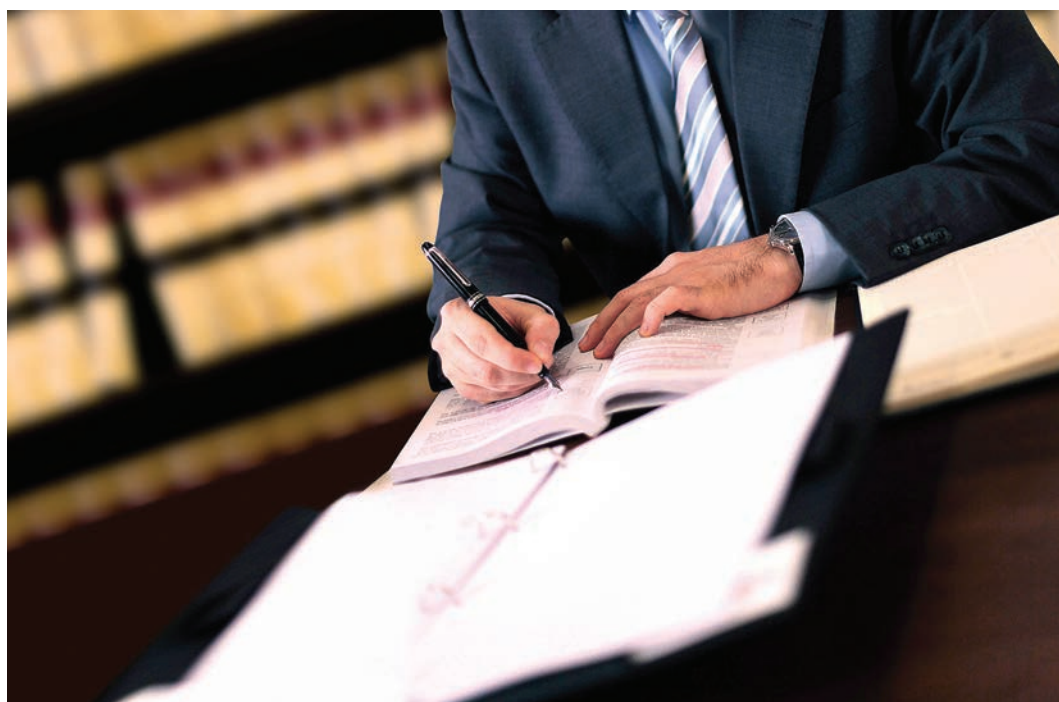
### **The state**

In many decisions, particularly in the CIS, judges were perceived as showing deference to the position of the state over that of private parties. Unlike the previous categories referred to, cases where the state prevails over private parties in dubious circumstances point, *prima facie*, to political interference. While such cases entail instances of results-oriented decision-making (the preferred result being the state's victory), the desired result is presumed to emanate from the state rather than from the judge. But this presumption may be erroneous.

On the one hand, there is little doubt that, in many transition countries, a lack of judicial independence accounts for a perceived pro-government bias in judicial decisions. An extreme case is Turkmenistan, where separation of powers, is, in practice, very weak, and judges are seen by many as an extension of the administration. The law does not serve as protection from state power, but rather as an instrument for wielding it. In other CIS countries there are, to varying degrees, concerns about a lack of judicial independence from the government, and about the ability of the state to dictate or influence judicial decisions. In some countries judges are appointed for initial

terms, and are subject to reappointment based on their performance. This has a chilling effect, whereby judges are reluctant to find against the state out of fear for their career prospects. Even once they are reappointed, judges remain wary about challenging state interests, and appear to internalise an unspoken rule that their job involves protecting state interests.

On the other hand, for some judges in transition countries, socialist perspectives linger. Privately, some judges candidly express the view that the role of the courts is to protect collective interests – personified by the state, as they were formerly by the Communist Party – against the private interests of capital, particularly in sectors which are a large source of government revenue. According to local experts, many judges in Belarus, Russia and Ukraine consider that it is not in the public interest to decide a case in a way which results in substantial losses from public funds. Similarly, cases in which the state seeks to challenge the privatisation of state assets are often perceived to receive a sympathetic ear from judges. A common phenomenon is for courts to apply the more lenient (general civil) statute of limitations, rather than the special, stricter limitation rules that typically apply to







Judges tried to get around the law to achieve a social objective, only to cause grave injustices.

privatisations. Local experts considered that some judges take this approach precisely to allow the state to reopen and challenge privatisations, which accords with the view of many judges that privatised state assets should, wherever possible, be reclaimed for the public good. It was believed that judges' outcome preferences play a significant role in the determination of these cases.

#### **Regulators**

Courts in many of the countries studied displayed deference to the arguments of regulators. In cases dealing with challenges to decisions of the tax or customs authorities, courts in some countries gave much greater weight to the arguments of the regulators. In a number of countries, including in south-eastern Europe, the competent court has never upheld a complaint from a private business against a decision of the competition authority. However, expert opinion was that these were not always necessarily instances of pro-state bias. In specialist areas, such as taxation and competition law, judges often have little background, experience or training. It was considered that, in such cases, judges often assumed that the decisions of expert regulators were based on a greater

understanding of the relevant law and practice than that held by either the private parties' lawyers or the judges themselves. Here, the unstated judicial position was not that the court should protect state interests or a vulnerable party, but rather that the regulator knows best, and should therefore prevail.

#### **The problems with judicial activism**

Judicial activism has been comprehensively dissected elsewhere.<sup>8</sup> It is sufficient to note three fundamental problems with results-oriented decision making. First, it is antithetical to the rule of law, which posits, at a minimum, a body of rules being applied objectively; activism is a form of bias and, accordingly, there must be an in-principle objection to it. Second, it leads to jurisprudential uncertainty, which undermines public confidence in the courts, which, in transition and developing countries, is already low. This adversely affects the investment climate, further deterring foreign and local investors from full participation in the relevant economies, and impeding economic development. Third, using a moral compass, rather than a legal text, as the touchstone for decision-making often has unintended adverse consequences. Courts





The EBRD's research suggests that, in many cases involving perceived bias in the judgments of transition courts, decisions are affected not by corruption or political interference but by judicial activism.

are not law reform agencies.<sup>9</sup> They cannot take into account the myriad of complex economic and social factors that need to be considered in relation to questions of social policy. History provides some stark examples of the collateral damage of judicial activism, such as the role of German judges in undermining the Weimar Republic by rewriting contracts during the hyperinflation of the early 1920s.<sup>10</sup>

A recent illustration of such unintended consequences from the EBRD region is the approach of courts in Kosovo to applications seeking confirmation of title to immovable property, in the years following the conflict with, and eventual independence from, Serbia. The courts regularly accepted such applications in cases where no written contract of sale was produced, in clear breach of Kosovo's land law. Judges were motivated by a desire to deal practically and (presumably) fairly with the consequences of systematic discrimination against ethnic Albanians that occurred during the Milosevic era, when there had been a prohibition on inter-ethnic property transfers. Many such transfers had taken place informally, without written documentation; a bona fide purchaser thus might not ever have had documentary proof of sale. Further, the ethnic conflict leading to NATO intervention in the late 1990s had resulted in large numbers of records being destroyed. In the 2000s many landowners sought court orders confirming their title to property for the purposes of obtaining credit or various licences, but lacked the required evidence for courts to properly issue decisions confirming their title.

Sympathetic judges devised two solutions to the problem. They would base their decisions confirming title either on a new doctrine of "substantial performance", backed by oral testimony of a sale transaction, or they would loosely apply principles of adverse possession, extremely favourably to occupiers, confirming title to premises in the existing occupier. A study of this phenomenon undertaken by the Organization for Security and Cooperation in Europe (OSCE) exposed a pattern of flawed reasoning and incorrectly evaluated evidence, as well as unsafe practices, such as appointing temporary representatives for absent respondents to property claims.<sup>11</sup>

In their desire to find creative judicial solutions to problems, and to assist the parties whose position they believed was just, judges flagrantly ignored the law, resulting in many landowners being dispossessed. Typically, these were people from the ethnic Serb minority, who were ultimately on the losing side of the conflict in Kosovo. But ethnic Albanians also suffered; many were absentee landowners, having moved to new areas during conflict. They returned to find their family properties had been appropriated by fraudsters. All of this wrought havoc on the economy and poisoned the investment climate. Judges tried to get around the law to achieve a social objective, only to cause grave injustices. Fixing the legal problems surrounding title to real property in Kosovo should have been (and ultimately was) dealt with by the legislature, drawing on the resources available to it, such as a law reform commission and a public service which could properly consider and weigh all of the policy options. Claims which did not satisfy the requirements of Kosovo's land law should have been rejected, even if many of them had "moral" merit. The OSCE report concluded:

*The OSCE does not ignore the reality that, in some cases, parties belonging to different communities could not enter into a written contract due to the discriminatory legislation in force at the time. However, the preferred solution is for the legislative authorities to address the problem directly and offer a solution, rather than for judges or lawyers to employ legal doctrines that do not exist. This judicial creativity can be especially counterproductive, for it not only damages the rule of law but also allows for abuse.<sup>12</sup>*





The EBRD is working with courts and tribunals in the region to support training in commercial law and judicial skills.

### Conclusion

The EBRD's research suggests that, in many cases involving perceived bias in the judgments of courts in transition countries, decisions are affected not by corruption or political interference but by judicial activism: they appear to be decided by reference to judges' outcome preferences. Much more research would need to be undertaken on this topic to understand the extent of the problem. However, it is already clear that this is an important consideration in approaching policy dialogue and reform in the region. The failure to take into account judicial activism in analysing concerns about bias in the judiciary may be resulting in the problems of corruption and political interference being overstated, and to insufficient reform measures (such as enhanced training) being taken to improve judicial method. Unlike their counterparts elsewhere, judges in transition

countries who incline towards results-oriented decision-making are less adroit at crafting a reasoned framework through which to deliver their preferred outcomes. The quality of decisions can therefore be particularly poor, which is corrosive of public confidence.

The EBRD is working with courts<sup>13</sup> and tribunals<sup>14</sup> in the region to support training in commercial law and judicial skills. It is not easy being a judge in a transition country. Since the fall of communism, commercial legislation has developed very rapidly, often in an uncoordinated and desultory fashion. This has often left large gaps and inconsistencies for judges to deal with in attempting to resolve commercial disputes. Even so, the better judgments in the region convey to the parties an earnest judicial quest for an objective and rational answer to the dispute, unaffected by improper influences or outcome preferences.

## Notes

## Author

<sup>1</sup> Contrast: Antonin Scalia (2009), “Mullahs of the West: Judges as Moral Arbiters”; and Michael Kirby (2004), “Judicial Activism”, Hamlyn Lectures, available at: [http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Judicial\\_Activism.pdf](http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Judicial_Activism.pdf).

<sup>2</sup> Robert French, (10 November 2009), “Judicial Activism – The Boundaries of the Judicial Role”, Lawasia Conference 2009, p4.

<sup>3</sup> See article 14(1), International Covenant on Civil and Political Rights: Everyone is entitled, in criminal and civil matters alike, to “a fair and public hearing by a competent, independent and impartial tribunal established by law”.

<sup>4</sup> See Antonin Scalia and Bryan Garner (2012), *Reading Law: The Interpretation of Legal Texts*.

<sup>5</sup> There has been some discussion. For example: “The limits of freedom of contract in foreign and Russian law”, Karapetov A G and Savaliev A I, 2012.

<sup>6</sup> See for example data on business confidence in the courts in the *Business Environment and Enterprise Performance Survey* (BEEPS) conducted by the EBRD and World Bank: <http://www.ebrd.com/pages/research/economics/data/beeps.shtml>.

<sup>7</sup> A detailed description of the methodology and the results of the assessment have been published elsewhere: Alan Colman, “The EBRD Judicial Decisions Assessment”, *Business Law International*, Vol. 12 No. 2, May 2011; Alan Colman, *Commercial Courts in Transition*, EBRD *Transition Report*, Legal Annex.

<sup>8</sup> See: Dyson Heydon, “Judicial Activism and the Death of the Rule of Law”, (2003) 47 *Quadrant* 9 at 15.

<sup>9</sup> See: *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*, High Court of Australia (1988) 165 CLR 107, per Dawson J (dissenting), noting in relation to an invitation to make up new rules about privity of contract, that a court is “neither a legislature nor a law reform agency” and that it “would do more harm than good to attempt to reach a right result by the wrong means”.

<sup>10</sup> In the early 1920s, German courts began revaluing commercial contracts in response to hyperinflation. They based this on the concept of “good faith” in the Civil Code, which was interpreted as importing concepts of “decency” and “equity”. This approach was described by one contemporary lawyer as completely “extra-legal but given a legal hairstyle”. The legislature had decided not to adopt revaluation as policy, because of the effect this would have had on the economy, and the government’s own debt. But judges sympathised with ordinary creditors (many judges were themselves creditors) whose repayments were wiped out by inflation. They abandoned their long tradition of interpretative rigour, and created a fictitious solution to help their category of favoured litigant. This led to judicial confrontation with the government, resulting in a government back-down on private revaluations, which undermined the political legitimacy of the Weimar Republic. See: Michael Hughes, “Private Equity, Social Inequity: German Judges React to Inflation 1914-24”, *Central European History*, Vol. 16, No. 1 (Mar 1983), pp. 76-94.

<sup>11</sup> See: *Litigating Ownership of Immovable Property in Kosovo*, OSCE Department of Human Rights and Communities, OSCE Mission in Kosovo, March 2009.

<sup>12</sup> *Op. cit.*, p. 12.

<sup>13</sup> Commercial law judicial training programmes have been run in recent years in Albania, Bosnia and Herzegovina, Bulgaria, the Kyrgyz Republic, Moldova, Mongolia, Montenegro, Russia, Serbia and Tajikistan.

<sup>14</sup> For example, the EBRD has worked with newly established public procurement review commissions in Albania and Ukraine on approaches to the exercise of discretion in determining complaints about tenders for public contracts.



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# 3

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## Publishing decisions of the higher commercial courts in the SEMED region: current status and potential developments

PAUL BYFIELD

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Public access to court decisions helps to build trust in the courts and foster a healthy investment climate. Investors are keen to see how commercial rights are protected in practice. This article examines the availability of public access to judicial decisions in the southern and eastern Mediterranean (SEMED) countries where the Bank operates: Egypt, Jordan, Morocco and Tunisia.



A stable and flourishing investment climate can be assisted by having consistency in the publication of court decisions and in the availability of information about the outcome of contractual disputes. Some jurisdictions, historically those with mature market economies, adhere to this practice regularly. As the financial markets have undergone a process of globalisation over the past 20 years this practice has become more widespread, to include some of those countries with developing economies.

There is also a link between the transparency of a court system and the level of confidence that exists for domestic and foreign investors, the legal community and the general public. In particular, investors are keen to see that their contractual rights are being upheld in a court of law.

This demand can therefore be addressed by having systems in place to publish court

decisions and make them easily accessible to the public, investors and the legal community. In previous editions of *Law in transition* this issue has been discussed in the context of the Commonwealth of Independent States and south-eastern Europe. The purpose of this article is to explore the situation with regard to the publishing of judgments in the countries where the EBRD has begun to invest most recently, in the SEMED region.

### Is an international standard needed?

When assessing the function of a legal system it is important to benchmark best practice against an international standard, which serves to quantify any improvement over time, and to assess the measures that remain to be taken. With specific reference to the publication of judgments and decisions, there are three recognised international standards, emanating from different organisations (Council of Europe,



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Organization for Security and Co-operation in Europe [OSCE] and the American Bar Association Rule of Law Initiative [ABA ROLI]).

The Council of Europe has in place a “recommendation” relating to this subject:

*Recommendation Rec(2001)3E on the delivery of court and other legal services to the citizen through the use of new technologies<sup>1</sup>*

This recommendation is a reflection of the importance of the availability and use of technology to the system of justice. The recommendation establishes an important link between democracy and the ability of technology to improve democratic participation:

*Considering that access of the citizens of Europe to laws, regulations and case law of their own and other European states and to administrative and judicial information should be facilitated through the use of modern information technology in the interest of democratic participation.<sup>2</sup>*

This link between democracy and the implementation of technology is an important one to establish, as it provides impetus to court systems in the region to make improvements, where necessary, in order for those court decisions to be made more accessible to a wider audience.

Section 3 of the appendix to the recommendation goes on to state the following points:

*It should be as easy as possible to communicate with the courts and other legal organisations (registries, etc.) by means of new technologies.*

*the possibility of having access to any information pertinent to the effective pursuance of the proceedings (statute law, case-law and court procedures).*

*The information should be disseminated using the most widely available technologies (currently the internet).*

Section 4 of the appendix to the recommendation also sets out, very clearly, what categories of legal

information should be made available:

*The term “legal information” includes all official texts of laws, regulations and relevant international agreements binding on the State, together with important court decisions.*

Some observers have stated that this last part of section 4 does not go far enough, as all court decisions should be reported. This is clearly an ambitious proposal, considering some of the challenges that some countries face in reforming their judicial systems.

The ABA Judicial Reform Index (JRI)<sup>3</sup> has been in use since 2001, and the most significant factor in the Index is Factor 24:

*Factor 24. Publication of Judicial Decisions: Judicial decisions are generally a matter of public record, and significant appellate decisions are published and open to academic and public scrutiny.*

The JRI clearly sets out a requirement for transparency. However, the JRI is open to interpretation, as it does not specify where and how court decisions should be published. But its assertion that judicial decisions should be accessible to the public is a strong indication of the requirement to publish these decisions, even without specifically setting out the mechanism for doing this.

A more recent set of standards is found in the OSCE Kiev Recommendations on Judicial Independence in eastern Europe, Central Asia and the south Caucasus<sup>4</sup> (the Kiev Recommendations). Part III, Section 32 states:

*Transparency shall be the rule for trials. To provide evidence of the conduct of judges in the courtroom, as well as accurate trial records, hearings shall be recorded by electronic devices providing full reproduction. Written protocols and stenographic reports are insufficient. To enhance the professional and public accountability of judges, decisions shall be published in databases and on websites in ways that make them truly accessible and free of charge. Decisions must be indexed according to subject matter, legal issues raised, and the names of the judges who wrote them.*





The publication of court decisions in Egypt is improving, particularly in respect of the range of decisions available in the higher courts.

The proposals in the Kiev Recommendations are more detailed than those of the Council of Europe and the ABA, indicating specifically that web sites should be the preferred medium to make decisions public. This is perhaps indicative of the fact that the Kiev Recommendations were adopted very recently (in June 2010), in an era where there is an acknowledgment that the web-based dissemination of many types of information is standard.

The three sets of standards listed above are instrumental in setting guidelines, and are useful indications of best practice in transparency among OSCE member states.

### Can these standards be applied in the SEMED region?

The next question relates to whether any of the three standards can be applied to the SEMED countries. The Council of Europe is Europe's leading human rights organisation; it has 47 member states and 6 observer states. It is therefore regarded as an international organisation. However, in the Statute of the Council of Europe, chapter 1, article 1(a) Aim of the Council of Europe, states:

*a. The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.*

With this definition in mind, the question that arises is whether the Council of Europe can claim to have any influence over states which are not within its membership; and if not, the further question is whether those states can be assessed against standards that the organisation has set. A possible answer to the first question is that the Council of Europe has in fact been very active in neighbouring regions outside of the original scope of the Council's mandate, specifically in the region referred to as the "southern neighbourhood" (which includes the four SEMED countries). This activity has been initiated under the umbrella of the European Commission for Democracy and Law (the Venice Commission).<sup>5</sup> The Commission's aim is to foster democratic and legal development and, in particular, to help states

wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.

Given the scope of the Council of Europe's work in the continent and neighbouring regions, recommendation R (2001) 3 can be referred to and applied as a relevant international standard for the purposes of any assessment of the publication of court decisions in the SEMED region.

The OSCE has a similar regional focus to the Council of Europe, but its 16 field offices in eastern Europe, Central Asia and the south Caucasus, indicates its strong focus on those regions. Its mandate is different to the Council of Europe, in that it is a forum for dialogue on crisis management, security and post-conflict resolution. Despite this difference, it also focuses its resources on democracy and political stability, which is the basis for the Kiev Recommendations. It is questionable whether the OSCE has the mandate to operate outside of this region. However, the OSCE does have partnership agreements with countries in the SEMED region. Whether its experience in its existing member countries can be transferred to the SEMED region has been the subject of some debate, both within international organisations and in the academic community.

The ABA ROLI programme has a global reach, working in 60 countries across four continents. Its work involves assessing the legal and judicial framework, and promoting the rule of law and transparency, in public institutions. As such, its standards are used to promote reform in all areas of the world.

### Publication of court decisions in SEMED countries

#### EGYPT

The Egyptian legal system is a combination of Islamic (*Shariah*) law and Napoleonic Civil Code (based on French law), which was introduced during the 18th century – a period of French influence in the region.

Egypt's civil law system limits the influence of appellate court decisions on lower courts. Consequently, Egypt cannot necessarily be said to have a fully established system of precedents or "judge-made law" (as exists



The “e-Justice” portal in Tunisia provides free access to over 12,000 Tunisian cases dating back to 1959, judicial conventions, codes, and other legal authorities.

within common law or pseudo common law legal systems). An exception to this general rule is the Court of Cassation, the highest court in Egypt. The Court of Cassation decisions have the force of law and, as in common law courts, its decisions applying and interpreting the codified law are binding precedents on other cases involving similar issues. However, complete and accurate records are not kept of decisions issued by the first instance courts.

Unlike the situation in common law countries, Egypt does not have dedicated periodicals or reports in which cases and court judgments are published. Verdicts and decisions of the Supreme Constitutional Court are published in the Official Gazette, and the Court also has a web site available in Arabic, English and French, where some useful information and documents can be viewed, including decisions of the Court. Also, the Court of Cassation Judgments (in addition to the Constitutional Court Judgments) are published in book format in what are known as “Collection of Awards”. Electronic copies of these decisions are now available, as well as databases, such as Tashreaat,<sup>6</sup> which publishes court decisions in Arabic as well as some in English. Legal opinions are also available and published in a monthly bulletin. However, the bulletins are not complete, so a manual search through the Collection of Awards is still the most comprehensive method of finding references to court decisions.

The publication of court decisions in Egypt is improving, particularly in respect of the range of decisions available in the higher courts. However, more of these records need to be available in electronic format in order to make them more accessible both inside and outside of the country.

#### **TUNISIA**

The “e-Justice” portal<sup>7</sup> in Tunisia is a project of the Ministry of Justice. It provides free access to over 12,000 Tunisian cases dating back to 1959, judicial conventions, codes, and other legal authorities. The database can be searched by free text, date and reference number, in both French and Arabic. The portal is therefore a very good platform for providing access to legal information. The portal was set up to provide a comprehensive reference point. It provides a good historical record of cases, including some decisions of the Cantonal

(district) courts, which demonstrates recognition of the importance of decisions outside of the central, higher courts, but it could still do more in respect of publishing details of decisions of the lower courts, such as adding a decision summary. Through the success of this project there is less of an imperative to provide access to cases through the relevant court sites.

A recent EBRD report<sup>8</sup> on the need for legal reform in Tunisia – Commercial Laws of Tunisia – An Assessment by the EBRD, published in 2013 – observed that there is still a need for a fully computerised system to manage court records for court staff. The present court system relies heavily on a paper-based system, thereby making access to decisions for court staff problematic.

With this in mind, and despite recent improvements, the Tunisian court system needs to be updated, and must provide more depth in the types of decisions that are made accessible to the public.

#### **MOROCCO**

In Morocco there is no systematic publication of court judgments. This situation is improving, but some further effort is still required to change this. The judicial system in Morocco is based on a combination of Islamic law and European civil law. The judicial system generally lacks external transparency, as there is no legal requirement to publish case decisions. In contrast, the sittings of the chambers of the parliament are public. In fact a complete record of these debates is published in the *Bulletin Officiel* of the parliament. To counter the lack of transparency, and to address international concerns, a public information and dissemination campaign had previously been implemented by the Ministry of Justice, with a multi-media public awareness campaign around basic rights and the means to implement them. A short information programme had been broadcast on television to publicise citizens’ rights and duties.

Unfortunately this programme was discontinued due to a lack of domestic funding, but the ministry continued to publish a variety of information brochures. Most courts in major cities now have information booths at the building entrance to facilitate access to information for the general public. However, until relatively recently, there was little written information available. In the Commercial Court in Casablanca, a booth



An EBRD report – Commercial Laws of Tunisia – An Assessment by the EBRD – found that the country needs a fully computerised system to manage court records for court staff.

containing a publicly accessible computer provides immediate access to key information. With the registration number of a given case, any person can discover the stage of the proceedings of a court case. This information is updated in real time, and an attendant is present to assist as needed. This is a progressive step, but it needs to be complemented by other initiatives.

The Ministry of Justice has its own web site ([www.justice.gov.ma](http://www.justice.gov.ma)), which is currently not available in English. It was hoped that the MEDA programme<sup>9</sup> – which was a counterpart of the PHARE<sup>10</sup> programme implemented by the EU – would result in an improvement in the ministry's communication with the public and its ability to disseminate legal information. However, this programme was abandoned in 2006, and was replaced by the creation of the European Neighbourhood and Partnership Instrument (ENPI), which commenced on 1 January 2007. Since then the Moroccan government has been working with international development agencies and other international organisations to improve access to public information, including court decisions.

A legal assessment conducted by the EBRD in 2013 stated:<sup>11</sup>

*Public access to judicial decisions needs to be improved as the public currently has no access to judicial decisions. Systematic publication of case law is required.*

To counter this lack of access to judicial decisions, in early 2013 the Moroccan government announced that it had launched a new information and communication technology (ICT) digital court project across its entire judicial system, commencing with a pilot project at the Court of Cassation in Rabat. This move should result in improved court proceedings, as it will allow court staff to access court records quickly and easily. The Ministry of Justice has said that the experiment covers areas such as electronic legal document archives, management systems, remote forensic evaluations and online case files shared in real time through in-court notebook computers. The pilot will be extended to all chambers of the court in the next five years, and the court's strategic plan for 2013-17 refers to "digital courts using new technologies to facilitate procedures, unify judicial interpretations and increase the quality of decisions." According to the Ministry, members of the public will now be able to file complaints electronically and "...case management will be improved through online communications between the court and users." These modernisation programmes are urgently needed in order to improve transparency in the court system.

#### **JORDAN**

The Jordanian legal system is based on civil, Sharia and customary (local) law. The legal system also has some common law influence, due to the period when Jordan was a British protectorate, between the end of the First World War and the end of the Second World





Journalists have highlighted concerns about the extent of their right to access information about court cases in Jordan.

War; 1918-1946). The Constitutional Court was only established in 2012, following the enactment of the Constitutional Court Law (2010). The Jordanian court system is structured to allow for appeals from the lower to the appellate courts. However, there is little domestic confidence in the Jordanian court system. When Jordan achieved World Trade Organization (WTO) accession (11 April 2000) this should have been a watershed moment in the transparency of the legal system, as from that date all legislation, judicial decisions and administrative rulings relating to trade should have been published, according to WTO requirements. Final judicial judgements of the highest courts should be published in the Journal of the Jordanian Bar Association. However, as this is primarily a publication for legal professionals rather than the general public, access and dissemination is not widespread.

As of January 2013 Jordan was one of only three countries in the region to have enacted a law governing access to information (the others are Tunisia and Yemen). However, there remain many challenges to the implementation of these types of laws in the SEMED region.

Journalists have highlighted concerns about the limited extent of their rights to access information, but they are aware that if they challenge this too openly they may lose the rights that they do have. They are particularly concerned about the right to access information about corruption cases. The international development community (USAID) has responded by partnering with the Jordanian Bar Association to modernise and develop the court system, initially by upgrading the information technology platform to provide all 74 courts with an automated case management system. This initiative would appear to satisfy the Council of Europe's recommendation R (2001) 3, however before this can be confirmed, the extent to which court decisions are publicised outside of the court system needs to be analysed.

Special commercial courts were established in 2010, in order to enhance contract enforcement. Nevertheless, the 2012 Index of Economic Freedom refers to a lack of transparency as a factor which undermines the fairness of dispute settlement in Jordan. Observers have stated that efforts to improve access to information should not impact on sensitive areas that would raise the government's concerns, such as anti-corruption

#### Appendix 1. Access to court decisions in the SEMED region

Country	Is there a legal requirement for court decisions to be published?	Does the country have a dedicated periodical/ website publishing court decisions?	Are commercial court decisions published regularly?	Does the country have a strategy to improve the use of technology in the court system?
Egypt	No	No – but decisions of the Constitutional Court are published in the Official Gazette. <sup>12</sup>	No – some higher court decisions are published, both in paper copy and on a website. <sup>13</sup>	Yes – a joint project between the Court of Cassation and Ministry of Communications and IT was recently initiated. <sup>14</sup>
Jordan	No	No – but court decisions of the highest courts are supposed to be published in the Journal of the Jordanian Bar Association. <sup>15</sup>	No – but the commercial courts were only established in 2010.	Yes – USAID is partnering with the Jordanian Bar Association to upgrade the ICT systems.
Morocco	No	No	No – but information booths are available in Casablanca Commercial Court to check the status of cases.	Yes – in 2013 the government announced an ICT project for the courts.
Tunisia	No	Yes – the E-Justice portal contains 12,000 + cases. <sup>16</sup>	Yes – the E-justice portal contains the text of some commercial cases. <sup>17</sup>	No – the court system currently relies on a paper-based system.

Source: EBRD.



## Notes

or national security issues, or those with political implications. Rather, priority should be placed on using access to information to help citizens, businesses and civil society organisations access information about development, economic growth and the environment.

### Conclusion

Each of the four countries discussed in this article have demonstrated an inconsistent approach to the publication of court decisions. Undoubtedly, some have adopted some systems and mechanisms to improve the dissemination and publication of judgments, but none are comprehensive in their approach. However, this should be placed in context, as access to public information is generally limited across the SEMED region.

Most of the constitutional courts in the SEMED region make only summaries of the decisions of the courts freely available on court web sites. The publication of Supreme Court, Cassation Court and other appellate level decisions varies within the region. It can generally be said that there is some publication of summaries of court decisions in higher courts and very little publication of decisions of middle tier or lower-ranking courts, especially in the commercial sector. This can be perceived as detrimental to the economic environment in the region, as investors can lose confidence in a less-than-transparent judicial system.

While these countries do not currently meet international standards for access to court decisions by court staff and the general public, each of them have made improvements. Undoubtedly, the assistance of civil society groups, international agencies and donors within the region will have a positive effect on the access to court decisions provided in judicial systems in the SEMED countries. However, reform must also be driven by the respective government agencies. This process of reform to provide greater levels of access to judicial decisions will inevitably lead to greater confidence in the legal systems of these countries by investors and the general public.

<sup>1</sup> [http://wcd.coe.int/ViewDoc.jsp?Ref=Rec\(2001\)3&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](http://wcd.coe.int/ViewDoc.jsp?Ref=Rec(2001)3&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6).

<sup>2</sup> See note 1.

<sup>3</sup> [http://www.americanbar.org/advocacy/rule\\_of\\_law/publications/assessments/jri.html](http://www.americanbar.org/advocacy/rule_of_law/publications/assessments/jri.html).

<sup>4</sup> <http://www.osce.org/odihr/KyivRec>.

<sup>5</sup> [http://www.venice.coe.int/WebForms/pages/?p=01\\_Presentation](http://www.venice.coe.int/WebForms/pages/?p=01_Presentation).

<sup>6</sup> <http://www.tashreaat.com/Pages/default.aspx>.

<sup>7</sup> <http://www.e-justice.tn>.

<sup>8</sup> <http://www.ebrd.com/downloads/sector/legal/tunisia.pdf>.

<sup>9</sup> A programme of the European Institute for Research on Mediterranean and Euro-Arab Cooperation, and which is the main financial instrument for the implementation of the Euro-Mediterranean Partnership: <http://www.medeabe/en/themes/euro-mediterranean-cooperation/meda-programme/>.

<sup>10</sup> The programme of community aid to the countries of central and eastern Europe.

<sup>11</sup> <http://www.ebrd.com/downloads/sector/legal/morocco.pdf>.

<sup>12</sup> <http://www.alamiria.com/>

<sup>13</sup> <http://www.tashreaat.com/Pages/default.aspx>

<sup>14</sup> [http://www.mcit.gov.eg/Media\\_Center/Press\\_Room/Press\\_Releases/2863](http://www.mcit.gov.eg/Media_Center/Press_Room/Press_Releases/2863)

<sup>15</sup> <http://www.jba.org.jo/> (Arabic only)

<sup>16</sup> <http://www.e-justice.tn>

<sup>17</sup> <http://www.e-justice.tn>

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## Enforcing court decisions: evolving law and practice



Effective courts are critical for a healthy investment climate. But, to be effective, courts must be supported by a strong enforcement framework: a sound court judgment is of little use if it can be ignored with impunity. Enforcement agents (sometimes called bailiffs) play an essential role in the administration of justice and the rule of law.

In the EBRD region, poor enforcement of judgment debt remains a major concern. Governments have been responding to this challenge. Yet tackling reform presents complex policy choices, which centre on the need to balance efficiency for judgment creditors and fairness for debtors.

The Focus section of this edition of *Law in transition* considers the role of enforcement agents and key policy challenges facing governments across the EBRD region. The first article, by Alan Colman of the EBRD and Veronica Bradautanu, EBRD Consultant, explains the results of the EBRD Enforcement Agents Assessment. This was the Bank's first legal assessment dedicated to the role of enforcement agents, examining their work in the Commonwealth of Independent States, Georgia and Mongolia. The assessment focused on seven dimensions of enforcement, ranging from the supervision and oversight of agents to the seizure and sale of property to satisfy judgment debt.

# Focus section



In the second article, Heike Gramckow, Lead Counsel at the World Bank, considers the important question of how to monitor and measure the efficiency of enforcement agents, and reviews reform experience in a number of transition and other countries.

Broader debt enforcement trends in the financial sector are then discussed by Frederique Dahan, a secured transactions specialist, and Catherine Bridge, an insolvency and restructuring specialist, both from the EBRD's Legal Transition Programme, Financial Law Unit.

A country-specific focus is provided in the following four articles, each from a different EBRD sub-region. Ljubica Pavlovic,

Project Manager from GRZ/LRP, explains the experience of Serbia's recent introduction of private enforcement agents, noting both improvements and concerns. Mongolia is studied in the next article, in which EBRD consultants, Carlos Escudero and Altangerel Taivankhuu, consider the need for legislative reform and measures to strengthen enforcement agents' professional capacity. Professor Imed Memmich, of the Faculty of Law at the University of Sousse and Tunis, presents the current situation of the enforcement of judgment debt in Tunisia. And Rafał Fronczek, President of the National Council of Bailiffs in Warsaw, explains the evolution of, and current issues facing, the bailiff profession in Poland.

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## Enforcing court decisions in the Commonwealth of Independent States, Georgia and Mongolia: a comparative review

ALAN COLMAN AND VERONICA BRADAUTANU

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One of the main challenges in commercial litigation in transition countries arises after the court proceedings have concluded, and a party seeks to enforce the court's decision. Enforcement processes are slow, and success is uneven. This article discusses the findings of the recent EBRD Enforcement Agents Assessment, which examined the functioning of enforcement agencies in the Commonwealth of Independent States, Georgia and Mongolia. It identifies legal and institutional problems, as well as recent improvements in the enforcement systems, in the region.



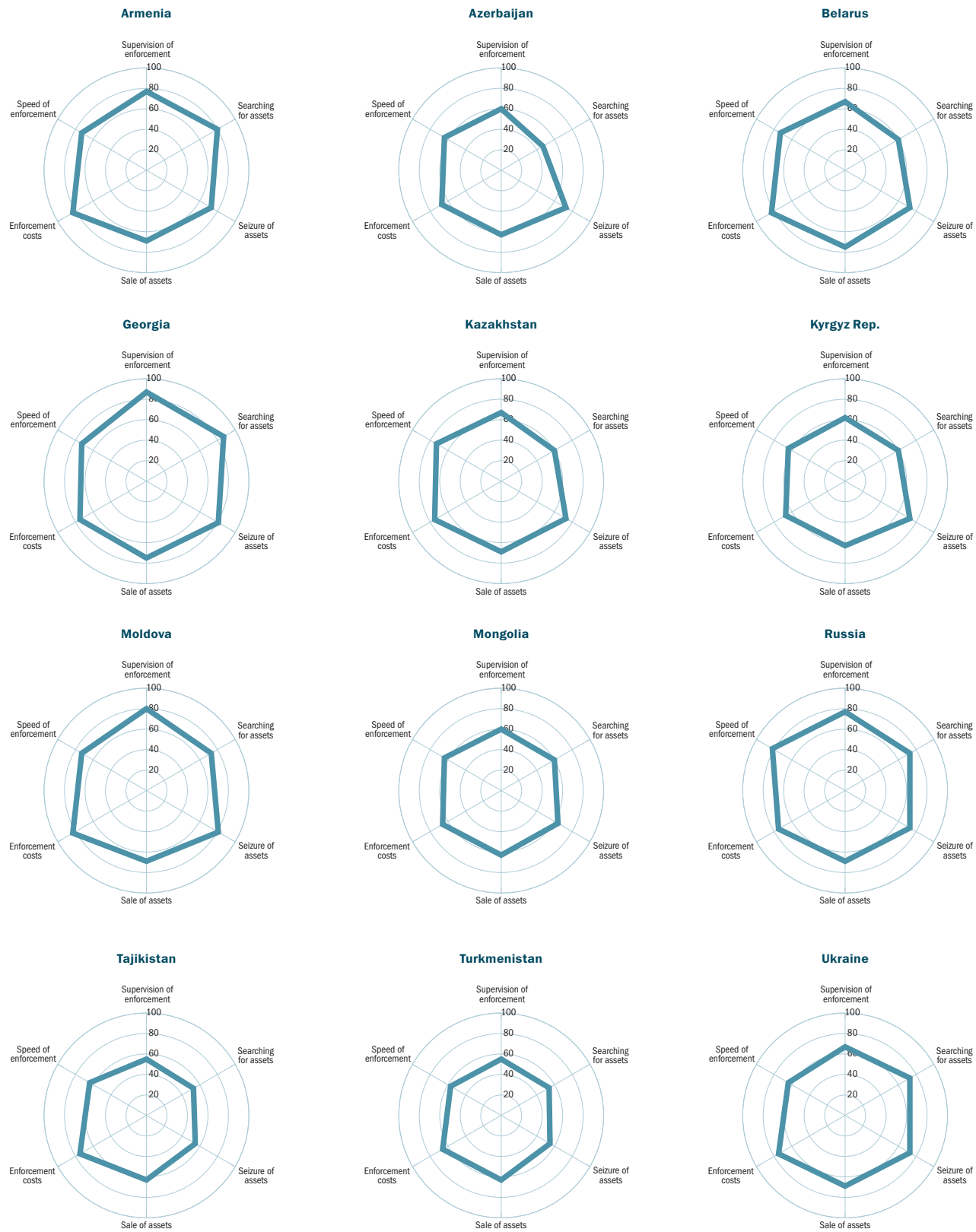


A healthy investment climate requires that businesses trust the courts to protect their legal interests. But just as important is their confidence in being able to enforce court decisions and recover judgment debt. A lack of effective enforcement mechanisms has a corrosive effect on the investment climate and the rule of law, deterring local and foreign investment. In the countries where the EBRD invests, poor enforcement of court decisions is a substantial problem. The EBRD's *Judicial Decisions Assessment 2011-2012* found poor implementation of decisions to be the most problematic of seven areas studied, outranking even corruption. The *Business Environment and Enterprise Performance Surveys (BEEPS)*, conducted by the EBRD and the World Bank, has shown that most business respondents in the region believe court decisions are implemented only "seldom" or "sometimes", while a substantial

minority believed they are "never" enforced. The EBRD has also heard directly from governments about the problems they face in implementing court decisions, and the Bank's dialogue with the business community in the EBRD region has echoed these concerns.

In response, the EBRD, through its Legal Transition Programme, is devoting greater attention to the role of enforcement agents<sup>1</sup>. In 2013, as part of these efforts, the Bank initiated its first study of the law and practice surrounding the role of enforcement agents in the EBRD region. Analytical assessments have been a pillar of the LTP's legal reform work in its various sectors, providing a firm evidentiary foundation for its policy dialogue on legal reform with governments in the region. This article sets out the key results of the *EBRD Enforcement Agents Assessment 2013* (the Assessment).

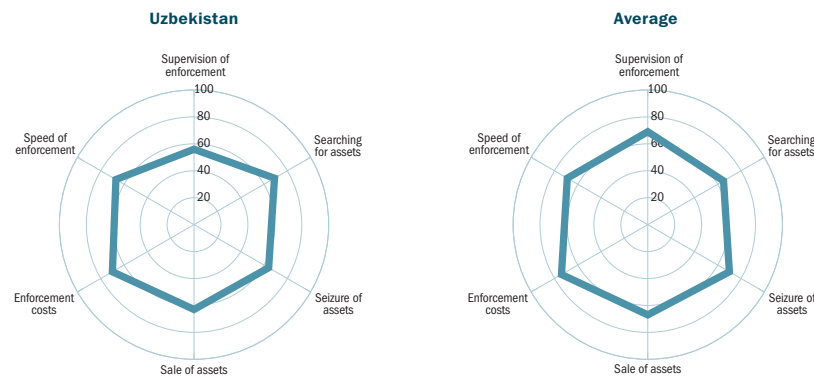
Chart 1. Regulation and function of enforcement agents in the CIS, Georgia and Mongolia





A lack of effective enforcement mechanisms has a corrosive effect on the investment climate and the rule of law.

**Chart 1. Regulation and function of enforcement agents in the CIS, Georgia and Mongolia (continued)**



Source: EBRD Enforcement Agents Assessment 2013.

Note: The country diagrams depict the score given to the dimensions reviewed. The extremity of each axis represents an optimum score of 100 per cent, reflecting strong standards and high efficiency in relation to the relevant dimension. The larger the web, the better the position. The final diagram depicts the regional average for all dimensions. See Box 1 for an explanation of each dimension.

### The EBRD Enforcement Agents Assessment 2013

The Assessment studied the regulation and functioning of enforcement agents in 13 countries, comprising the Commonwealth of Independent States,<sup>2</sup> Georgia and Mongolia. The objectives of the Assessment were to provide investors (including the Bank) with an insight into how enforcement agents work in practice, and to provide data which can be used to encourage and assist reform in the area. A comparative perspective was considered to be a useful method of highlighting common difficulties and thematic issues, as well as policy responses. The study was based primarily on information derived from a survey sent to government agencies responsible for the enforcement of court decisions<sup>3</sup>, as well as law firms, in each country. Information was also obtained through a desktop review of legislation and publicly available information on enforcement of court decisions, and discussions with government officials, lawyers and businesses in the region. The survey contained 64 questions, directed at seven dimensions of the functioning of enforcement agents (see Box 1). The survey questions focused on the enforcement of court decisions dealing with business disputes.

The role of enforcement agents is not the subject of extensive regulation at international law, or of standard-setting amongst international

organisations.<sup>4</sup> At the European level, standards exist in the form of the Council of Europe's Recommendation (2003) 17 of the Committee of Ministers on the question of enforcement, adopted on 9 September 2003.<sup>5</sup> More recently, the European Commission on the Efficiency of Justice (CEPEJ) has developed guidance to assist members in improving their enforcement systems.<sup>6</sup> These were taken into account in developing the seven dimensions studied in the Assessment and the various considerations pertaining to each of them.

A tentative scoring system was used, based on the considerations in Box 1. Assigning values to the strength of the various dimensions was considered useful in order to underscore important reform challenges and highlight broad differences and similarities between countries. Scores are not presented as a categorical grading of the efficiency of each country's enforcement system, although we believe they provide a good indication of the overall position.

### Results of the review

The results of the Assessment in each of the 13 countries examined are set out in Chart 1. The most positive picture emerges in Georgia, which has a well-developed state enforcement service running alongside a private system, both of which enjoy a high level of public trust. Moldova's exclusively private system also



The EBRD, through its Legal Transition Programme, is devoting greater attention to the role of enforcement agents.

### **Box 1. Dimensions studied in the EBRD Enforcement Agents Assessment 2013**

#### **Resources and framework**

Do enforcement agents have adequate resources? Are they qualified and trained? What is a bailiff's salary as a percentage of the average wage? Is there a clear procedure? [Not scored]

#### **Searching for assets**

Do enforcement agents have good access to property registries and information on bank accounts? Are debtors and third parties required to cooperate? How often do agents succeed in finding assets (rarely, sometimes, often, usually)?

#### **Seizure of assets**

How are assets selected for seizure? What protections are provided to debtors? Must notice of seizure be given to debtors? Can there be reasonable use of force? How often do agents succeed in seizing assets (rarely, sometimes, often, usually)?

#### **Sale of assets**

Are auctions used to good effect? Is property fairly valued? Are sales well advertised? How often is good value obtained (rarely, sometimes, often, usually)?

#### **Speed of enforcement**

What is the typical speed of enforcement? Are rights of appeal clearly delineated? Are there penalties on debtors for obstruction or non-compliance? What is the average time taken to complete enforcement?

#### **Cost and fees**

Are costs borne by the debtor? Are they reasonable? Does interest continue to accrue on judgment debt until payment is made? Can debtors appeal unreasonably incurred costs?

#### **Supervision and integrity issues**

Is there a supervisory body? Are there professional standards of conduct and complaint mechanisms? Does the government monitor and report on enforcement processes? Is there public access to information about enforcement results and other statistics?

Source: EBRD Enforcement Agents Assessment 2013.

presented well, generating competition between agents for new cases, which appears to drive better performance. State enforcement systems in Armenia and Russia showed good results, particularly in the use of innovations in access to information. Kazakhstan – which, like Georgia, has a hybrid public-private system – performed strongly in the private stream, but not as well in the public system. The most challenging situation overall is found in Turkmenistan (lack of transparency) and Tajikistan (limited resources, lack of training). The results are broadly consistent with the *EBRD Judicial Decisions Assessment 2011-2012*<sup>7</sup>, where the implementation of judicial decisions was found to be easiest in Georgia – with Russia and Armenia also performing well – and most difficult in Tajikistan. The Assessment revealed different levels of efficiency and capacity in the countries reviewed, which partly reflect their respective levels of economic and legal development. A number of underlying themes emerge from a review of the individual dimensions and their interrelationships. These are discussed below.

#### **Resources and framework**

The resources available to enforcement agents vary substantially between countries. Several metrics were used as proxies to gauge resources available. One was the number of people per enforcement agent in the country (see Chart 2). In Russia, there is one enforcement agent for every 1810 residents; in the Kyrgyz Republic, the figure is one agent for every 28,608 residents. Another dataset was the number of cases per enforcement agent, expressed as a weekly figure (Chart 2). A comparison of these data indicates that a higher number of enforcement agents will not always correlate with lower caseloads. For example, in Georgia there are 29,000 people per enforcement agent, yet the number of cases per agent per week (11) is lower than in some countries with proportionately many more agents. This discrepancy is an indication of how efficiently resources are used, and perhaps of a greater culture of compliance in Georgia, fostered by an efficient enforcement system posing a credible “threat” deterring non-compliance.

Another metric employed to gauge resources was to compare the typical salary of an enforcement officer with the average annual wage (see Chart 3). In Georgia the average salary





The most positive picture emerges in Georgia, which has a well-developed state enforcement service running alongside a private system.

of state agents is twice the average salary in the country, while in Russia state agent salaries are slightly less than half of the average wage. This affects the attractiveness of working in the profession and the profile of applicants seeking to become enforcement agents. In Ukraine, where enforcement agents earn approximately 80 per cent of the average wage, there are over 1000 vacancies for positions in the enforcement service, which represents nearly 14 per cent of the total target number of agents. Paradoxically, in Azerbaijan, where agent salaries are well above the average wage, nearly 20 per cent of

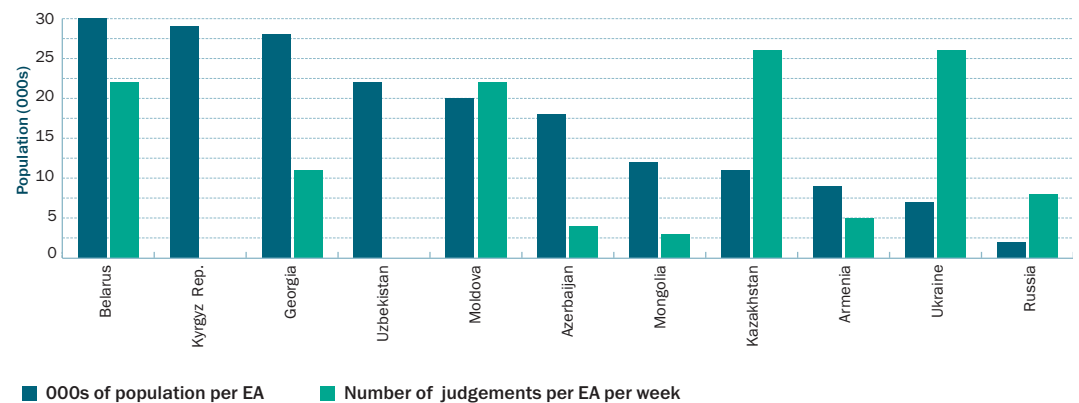
bailliff positions are vacant, apparently reflecting the low status of the profession in the country.

#### Procedure

While procedural structures vary between countries, most include the following key steps:

- The enforcement process is initiated by the judgment creditor.
- A court issues a writ of execution.
- The enforcement matter is allocated to an

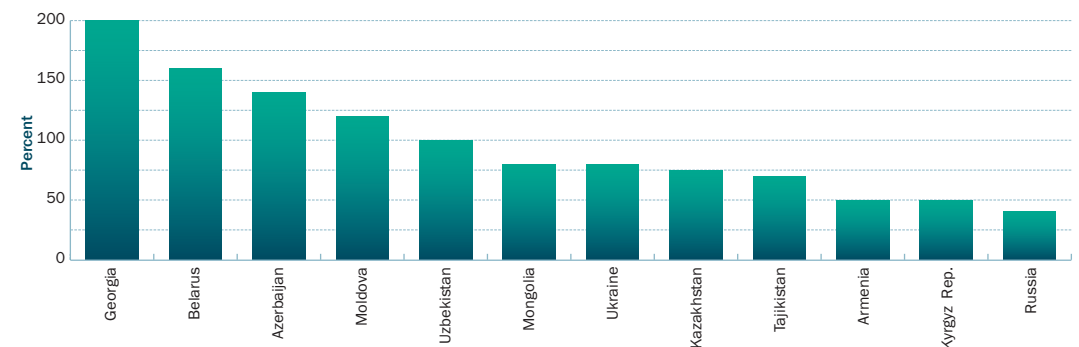
**Chart 2. Population (000s) per enforcement agent (EA); number of cases per agent per week**



Source: EBRD Enforcement Agents Assessment 2013.

Note: Data were not available for Tajikistan or Turkmenistan. For Georgia, Kazakhstan and Moldova figures refer to all agents, both state and private. For Belarus figures for cases per week (second column) refer only to agents enforcing commercial decisions.

**Chart 3. Enforcement agents' salary as a percentage of average wages**



Source: EBRD Enforcement Agents Assessment 2013.

Note: Data were not available for Turkmenistan. The chart does not reflect any additional pay to enforcement agents through various bonus schemes out of the enforcement fee. For Georgia and Kazakhstan figures reflect only state agents.

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The EBRD Assessment revealed different levels of efficiency and capacity in the countries reviewed, which partly reflect their respective levels of economic and legal development.

**Box 2. Public and private enforcement systems**

**Public enforcement only**

Armenia	Russia
Azerbaijan	Tajikistan
Belarus	Turkmenistan
Mongolia	Ukraine
Kyrgyz Republic	Uzbekistan

**Private enforcement only**

Moldova

**Public and private**

Georgia (private 20%)

Kazakhstan (private 5%)

Source: EBRD Enforcement Agents Assessment 2013.

agent by the responsible body (in private systems the creditor can choose the agent).

- Notice is given to the debtor to comply with the writ of execution.
- If the debtor does not comply a search is conducted for assets to seize or attach.
- Seized property is sold either at auction or directly.
- An amount is retained to cover enforcement costs.
- Sale proceeds are paid to the creditor in satisfaction of the judgment debt, with any remainder remitted to the debtor.

Across the countries reviewed, the overall procedural frameworks – and indeed the Russian language version of the relevant laws which exists in most of the former Soviet Republics – are very similar, reflecting the region’s recent history. High-level differences in the enforcement processes are discussed further below, in relation to search, seizure and sale.

**Public and private systems**

The main structural difference in the enforcement frameworks across the target region is the distinction between those countries

(the majority) which have only government enforcement agents, and the three countries which recognise private enforcement agents (see Box 2). In Georgia – which introduced private bailiffs in 2009 – it is estimated that private enforcement agents now account for approximately 20 per cent of enforcement work in the country. Private enforcement agents are precluded from working on matters where the state is a party, and where the relevant sum sought to be realised is more than lari 500,000 (€220,000). Kazakhstan introduced private bailiffs in 2011, which currently handle only five per cent of enforcement cases. The government’s target is for the private sector to ultimately account for half of all enforcement actions. Moldova’s exclusively private enforcement system commenced operation in 2010. In some countries the private sector plays an indirect role in the enforcement of judgments. For example, in Russia judgment debt can be sold in a manner akin to factoring; it is sold at a discount to private firms which are then responsible for collecting the debt. In Uzbekistan it was reported that private firms often assist state bailiffs in the performance of their duties. However, private bailiffs are not recognised as such under the laws of these particular countries.

One of the major conclusions of the Assessment project was that the three private enforcement systems in the region are functioning well. The two highest-ranked countries in the review are Georgia and Moldova. Kazakhstan ranks less highly overall, however lawyers attest that Kazakhstan’s small but growing private enforcement sector generally performs to a high standard. Competition and greater incentives appear to be driving better performance in this country, underpinned by enhanced training and organisation.

**Training and specialisation**

Generally, the level of formal professional training of enforcement agents in the region is low. In most countries some level of initial training is provided to enforcement agents on commencement of employment, although the extent of the training varies markedly. In Moldova agents are required to undergo a one-year apprenticeship at an enforcement agent’s office. By contrast, in Mongolia new agents undertake an apprenticeship of only two weeks. Ongoing training for enforcement agents is relatively



One of the major conclusions of the EBRD assessment project was that the three private enforcement systems in the region are functioning well.

**Table 1. Perception of effectiveness in searching for assets**

Country	How often do agents succeed in finding assets?	Country	How often do agents succeed in finding assets?
Armenia	Often	Mongolia	Sometimes
Azerbaijan	Rarely	Russia	Sometimes
Belarus	Often	Tajikistan	Rarely
Georgia	Usually	Turkmenistan	Often
Kazakhstan	Sometimes	Ukraine	Sometimes
Kyrgyz Republic	Often	Uzbekistan	Often
Moldova	Usually		

Source: EBRD Enforcement Agents Assessment 2013.

rare, and occurs systematically only in Armenia, Georgia, Kazakhstan (private) and Moldova.

In relation to specialisation, most enforcement agencies have separate sections dealing with enforcement of civil and criminal judgments, with the latter including matters involving custodial sentences. However, enforcement agencies tend not to promote specialisation through formal internal structures. There are some exceptions, such as Mongolia, where the agency has a debt liquidation department comprising 24 bailiffs who deal with the enforcement of judgments involving banks and non-bank financial institutions. In the Kyrgyz Republic a commercial unit of the bailiff service is attached to the Interregional Bishkek Court. Generally, however, specialisation is informal, and is facilitated (if at all) through the system of allocating agents to new matters. For example, in Georgia's state system, cases are allocated first on a territorial basis, then at the discretion of the head of the local office, who takes into account the skillsets of available agents. In the private systems creditors are able to choose the agent they wish to use, creating an impetus for specialisation in particular types of enforcement matter.

### Searching for assets

The Assessment found that searching for assets poses the greatest difficulty for enforcement agents in the region. Lawyers in half of the assessed jurisdictions indicated that enforcement agents succeed in finding sufficient assets for seizure and sale only "rarely" or "sometimes" (see Table 1). There are two principal reasons for the difficulties in searching for assets. One is that debtors fail to cooperate in the enforcement process, or indeed actively

hinder it by hiding assets. The other is limitations on agents' access to relevant databases of registered property and bank accounts.

In most assessed countries there is a formal legal obligation on the debtor to cooperate with enforcement officers and to provide information. For example, in Georgia, the debtor must provide an enforcement agent with a list of his or her property, including receivables, property held by third parties and claims against third parties, within five days of the writ of execution being issued. Similar obligations apply to debtors in Armenia, Kazakhstan, Moldova, Russia and Ukraine. Violation is a criminal or administrative offence, carrying penalties including fines or even imprisonment.

Legal obligations on debtors to cooperate with bailiffs extend to legal entities, such that directors and employees of a debtor firm would be required to comply. However, in practice it appears that debtors often do not cooperate, or actively seek to frustrate the enforcement process, by moving or hiding property, or siphoning money from bank accounts.

A problem identified in Belarus, Georgia, Russia and Turkmenistan was the ability of debtors to open parallel accounts in different names into which they transfer funds. In Russia courts were said to be reluctant to grant freeze orders on bank accounts until a judgment had entered into legal force, which occurs several weeks after it is handed down. In the procedural laws of the countries studied this "grace period" is designed to afford parties a window of time in which to appeal the decision, before they are bound to comply with it. However, debtors can abuse this by using



Searching for assets poses the greatest difficulty for enforcement agents in the region.

**Table 2. Registers and databases most commonly accessed by enforcement agents in searching for assets**

Cadastre of immovable property	Visa and passport office
Register of legal entities/enterprises	Register of pledges of movable property
Tax service	Central depository/registers of shareholders
Register of citizens	Commercial banks' databases
Road police	Notaries' databases
Customs authority	Mining register (common only in Mongolia)
National/social insurance service	

Source: EBRD Enforcement Agents Assessment 2013.

the time to siphon money out of accounts,

A related problem is tunnelling, whereby assets are sold or transferred to a third party after legal proceedings are initiated but before enforcement proceedings commence. The law in this area does not always provide for “claw-back” of assets, as it does in insolvency law. Consequently, claimants must seek to obtain freeze orders from courts at the commencement of litigation to secure their potential judgment moneys. However, as was noted in the *EBRD Judicial Decisions Assessment 2011-2012*, such orders are not always possible or readily granted; judges are reluctant to deprive a person of the use of their funds or property before the merits of a case are determined. Further, although in most countries a debtor concealing assets or resisting the enforcement agent may be committing a criminal or administrative offence, such sanctions are rarely applied. This may be due to the relatively high standard of proof required for convictions. In some cases, as reported in Ukraine, the amount of the fines is so insignificant that it is not an effective deterrent.

#### **Access to property registries and bank accounts**

The search for assets usually entails enquiries of banks, and of state registries of land, securities, movable property (usually vehicles) and state collateral registries, as well as other databases (see Table 2). Access to registries – either directly or through requests – is available in all countries, but with varying degrees of efficiency. Some countries' enforcement systems do not link well with regulation governing registries, leaving enforcement agents in little better position than the general public in seeking information. Thus, in Mongolia, enforcement agents have no special rights to access

information from the General Authority for State Registration, the Land Registration Office or the Mineral Resources Authority. In order to obtain access, agents must file a formal written application, in the same manner as any other private citizen, which delays the enforcement process. Similar problems were identified in the Kyrgyz Republic. Other countries confer enhanced access rights on enforcement agents, but many still impose a system of official paper-based requests, which can create delays (for example, Azerbaijan, Belarus, Kyrgyz Republic and Tajikistan).

Enforcement agents' access to information about bank accounts is often frustrated by banking and privacy laws. In the Kyrgyz Republic a court must specifically order a bank to disclose information about a debtor's accounts; otherwise banking confidentiality laws apply. Obtaining such an order entails separate court proceedings, resulting in delays. In Azerbaijan agents are said to spend a lot of time going from bank to bank inquiring about accounts of debtors. The position is much better in Russia, where enforcement agents can obtain access to information about private bank accounts through a system of enquiry set up with the tax authorities, as a matter of policy. While enforcement agents should not be able to trawl through the particulars of debtors' accounts, they should be able to identify if a debtor has an account and whether sufficient funds exist in the account to cover the debt.

Electronic request systems greatly facilitate efficient access to both property registries and bank accounts. In Armenia an automated electronic tool has recently been created, through which enforcement officers can send requests for information to all state property





Incentive payments are seen as a stimulus to the enforcement process, potentially reducing the high turnover of public enforcement agents and encouraging greater professionalism.

**Table 3. Perception of success in seizing assets**

Country	How often are agents successful in seizing identified assets?	Country	How often are agents successful in seizing identified assets?
Armenia	Often	Mongolia	Often
Azerbaijan	Often	Russia	Often
Belarus	Often	Tajikistan	Sometimes
Georgia	Usually	Turkmenistan	Often
Kazakhstan	Often	Ukraine	Often
Kyrgyz Republic	Often	Uzbekistan	Often
Moldova	Usually		

Source: EBRD Enforcement Agents Assessment 2013.

registers. Similarly, Armenian enforcement agents can send a request to all commercial banks and deposit-taking institutions through a special electronic channel provided by the Central Bank of Armenia, which is operated jointly by the Central Bank and the Ministry of Justice. Georgia is working to establish a similar system. Both of these systems could serve as useful models for other countries.

### Seizure of assets

While searching for assets is difficult, the Assessment revealed that, once they are found, the actual seizure of assets does not present major difficulties (see Table 3).

Once assets have been identified, the first question to arise is which of the assets found should be seized. Some countries, such as Georgia, Belarus and Mongolia, afford enforcement agents discretion, however most prescribe an order. Cash is usually to be seized first, with other assets only seized where cash is unavailable or insufficient. Next to be seized should be other movable property, with real estate seized in the last instance. Many jurisdictions prescribe separate orders of seizure for natural persons and businesses; for the latter, seizure commences with assets that are not involved in the production process.

### Protected items

All countries impose limitations on the assets that can be seized from individuals. These limitations prevent bailiffs from taking items which are necessary to support the debtor's basic livelihood. This is similar to the principle that applies in personal bankruptcy. Protected items include salary in the amount of the

minimum wage, professional tools and basic equipment necessary for a person to make a living, and minimum food and fuel. In Belarus, not more than 50 per cent of a debtor's salary can be taken – this is also the case in most other jurisdictions – and not more than 20 per cent of a pension. In a number of countries the prescription is very detailed. For example, legislation in Georgia regulates small agricultural assets: a debtor may choose to keep one milk cow, or two pigs, sheep or goats, if they are necessary for feeding debtors and their families.

### Notice of seizure

A period of notice is usually given to the debtor before assets are seized, typically through service of the writ of execution. Where there are grounds to suspect that debtors will attempt to move or hide particular assets, some jurisdictions (Armenia, Belarus and Russia) allow agents to enter a debtor's premises without a court order and seize assets. However, this requires the involvement of the police or a witness. To enter third party premises or a residence the enforcement agent will usually need a court order. In Ukraine enforcement agents can obtain *ex parte* orders, allowing them to enter premises to seize property, including premises of a third party. Such applications are said to be determined relatively quickly, without any requirement for a hearing.

### Use of force

If a debtor physically resists the seizure of property, enforcement agents can employ or enlist force. In some countries, such as Kazakhstan and Russia, specialised units within the enforcement agency are entitled to use force. In Armenia and Azerbaijan enforcement officers are themselves authorised to use



Effective supervision of state and private enforcement agents is crucial in establishing public trust in the profession.

force, including weapons, as a last resort. In other countries enforcement agents must request the involvement of officers from the ministry of internal affairs or the police. In most countries a separate court order is required to effect the eviction of a debtor from residential premises. In Tajikistan enforcement against the residence of the debtor is prohibited, except for enforcing mortgage rights. Evictions are particularly problematic in the Kyrgyz Republic, where the court order will invariably specify the particular person to be evicted; it is common in practice for other persons (friends and relatives of the debtor) to appear at the premises, who cannot be evicted unless they also become subject to an eviction order.

#### **Enforcement against government bodies and state assets**

It might be thought that the enforcement of court decisions against government bodies would be easier than against private parties, as the state should be expected to comply expeditiously with orders of its own courts. In Belarus this was indeed reported to be the case. Yet in many countries enforcement against the state is more difficult than against private parties. Enforcement problems are often linked to public sector budget legislation, which regulates the kinds of payments that

can be made from line item budgets. In some instances no provision is made for payments to be made in satisfaction of judgment debt, with the result that the state body is effectively prohibited from complying with the court's judgment. In other cases it is unclear from which sources of government funds the payment should be made. The situation in Mongolia illustrates these problems: if the funds available in the account of the debtor agency are insufficient the agency must seek an additional allocation from the state budget, which is often not forthcoming until the following year (if at all). In Moldova the enforcement law affords state agencies an additional six months to comply with court orders for payment, apparently recognising the budgetary problems that can arise, but also thereby formalising the preferential treatment of government over private debtors.

An interesting solution introduced in Armenia in 2006 sees the obligations of the state as a judgment debtor substituted for interest-bearing bills of exchange. This applies in any case where the judgment debt is not covered by a relevant budget line. In Georgia a dedicated unit within the enforcement agency deals with enforcement against government entities. Enforcement actions should be completed within one





The ability of judgment debtors and creditors to bring appeals and reasonable complaints is a critical component of the enforcement system.

**Table 4. Perception of effectiveness of enforcement agents (EAs) in selling seized property for good value**

Country	How often EAs obtain good value for seized assets	Country	How often EAs obtain good value for seized assets
Armenia	Sometimes	Mongolia	Sometimes
Azerbaijan	Sometimes	Russia	Rarely
Belarus	Sometimes	Tajikistan	Sometimes
Georgia	Sometimes	Turkmenistan	N/a*
Kazakhstan	Rarely	Ukraine	Sometimes
Kyrgyz Republic	Sometimes	Uzbekistan	Rarely
Moldova	Sometimes		

Source: EBRD Enforcement Agents Assessment 2013.

\*Note: No responses to this question were received from Turkmenistan.

month of their commencement, which reflects the higher expectations the public should have of government compliance. In Russia, where budgetary problems have previously posed significant barriers to enforcement, state treasury officials are now responsible for enforcement against state agencies, and requests for payment are directed to the Ministry of Finance, treasury departments of municipalities or departments of the federal treasury. This has achieved better outcomes.

Special problems arise in Ukraine, where the law presently prohibits enforcement against the property of any business in which the state holds a stake of 25 per cent or more. Moreover, enforcement cannot be effected against over-indebted energy suppliers listed in a government register, or against privatised coal mining businesses for the first three years following sale.

### Sale of assets

The Assessment concluded that the sale of seized assets was the second-most problematic area for enforcement agents in the region reviewed (see Box 3, below). The rules regarding the sale of seized property are complex. Their ultimate economic objectives are to liquidate assets, realise maximum value, satisfy the judgment debt and return as much excess as possible to the debtor. Yet there is a certain tension between the objective of high success rates in selling assets and doing so for good value, as higher prices will limit bidders. And the interest of debtors (maximum value), creditors (debt value) and

bailiffs (recouping fees) are not well-aligned.

Enforcement agents' effectiveness in realising value through the sale of seized property is perceived to be low, with respondents in most countries indicating that agents only "sometimes" or "rarely" obtain good value (see Table 4). However, the set of cases where there was a "failure to sell assets for good value" includes instances where assets were not sold *at all*, possibly because the rules promoting high-value sales are too strict. Another factor that must be considered is that seized assets are often impugned in some way, whether physically (for example, seized vehicles sold without keys and papers) or socially (in some countries a certain stigma is associated with purchasing seized goods). Accordingly, it is usually appropriate to consider some discount against the usual market price of the relevant assets.

### Reserve price and valuations

Most countries' laws require some form of valuation of seized property, which then becomes the marker for a reserve price. This is usually lower than the valuation (for example, 80 per cent in Moldova and 75 per cent in Armenia) in order to facilitate sale, although in Mongolia the price is set at market value plus enforcement costs, which deters buyers. The lowest reserve price is in Kazakhstan and Tajikistan at 50 per cent of the valuation price.

In Ukraine, problems have arisen with the role of valuers, whereby a small group of firms has assumed a quasi-monopoly. It was said that in 2012 only four firms were approved for formal valuation of immovable property, and that



Few countries  
publish reports on  
the operation of their  
enforcement agencies.

### Box 3. Most problematic dimensions of enforcement, in descending order

- Searching for assets.
- Sale of assets.
- Speed of enforcement.
- Supervision.
- Seizure of assets.
- Cost of enforcement.

Source: EBRD Enforcement Agents Assessment 2013.

Note: Ranking derives from the regional average scores for each of the six scored dimensions reflected in Chart 1, above. The dimension “resources and infrastructure” was not scored.

they charged up to 15 per cent of the property price for their advice. Greater competition is needed in this field. Similar issues have been identified in several countries concerning the selection of consignment shops.

Having a reserve price does not just have positive effects; it can be an impediment to sale in depressed markets. In Mongolia property cannot be sold at auction unless the reserve price is reached: a bid just under the reserve cannot be accepted, and a new auction must be conducted. There is policy tension between the interests of the creditor, who may be inclined to realise the property even at a sub-optimal price, and those of the debtor, who will demand the highest possible price in order to maximise the excess above the debt, plus costs, which he or she is entitled to receive back.

#### Auctions

In most countries reviewed, higher-value property must be sold at an advertised auction. Armenia and Georgia have developed dedicated auction websites which have proved useful in generating interest in and value for auctioned property. Advertising requirements set minimum periods that must elapse between the advertisement and the auction, which in most countries is 10 days. It is important that auction rules be transparent, as auctions are vulnerable to rigging, through collusion between the enforcement agent, the auctioneer and the purchaser, resulting in property being sold at under the real market value. Advertising widely and requiring inspections

of auction procedures, together with strong complaint mechanisms, are critical components in minimising such abuse. Online auctions have proved very effective in this regard. In Armenia all auctions take place on the website of a private company, Smart-Tech, which includes detailed descriptions and photographs of property being sold, as well as information on relevant legislation. This process has minimised the degree of contact between bidders and auctioneers, and has reduced the incidence of corruption, while at the same time facilitating the involvement of bidders from outside the capital. Similar systems exist in Russia and Kazakhstan, and such a system is under consideration in Moldova.

#### Speed of enforcement

The lengthy period of time involved in enforcing a court judgment remains a major concern in the minds of businesses and court users in the region. Overall, however, this issue ranked behind searching for assets and the sale of assets in assessments of the most problematic dimensions of enforcement (see Box 3). Procedural legislation in most countries imposes time limits on various stages of the enforcement process, and sets the overall time frame, which is often two months (for example, in Azerbaijan, Kazakhstan, Kyrgyz Republic, Russia and Tajikistan).

In practice, enforcement takes much longer. In survey responses the typical average time taken to effect enforcement, from the date of court judgment to final recovery, ranged from four months in Georgia to 12 months in Ukraine. In Mongolia there were reports of cases where banks waited two to four years for the enforcement of some decisions. Views on typical enforcement duration tended to be impressionistic, as many variables affect time frames, such as case complexity and the behaviour of debtors. The speed of the enforcement system can potentially be gauged by reference to clearance rates, however government statistics often present only net data on cases entering and leaving the system each year: for example, a 50 per cent clearance rate in one year might include many old cases that have been backlogged from previous years. Specific data about the average time taken to enforce cases of particular kinds would be very useful, but unfortunately these data are not available.





Reports of corruption were encountered in many of the countries reviewed, and there were various means by which corruption was allegedly practised.

**Table 5. Enforcement fees and duties in CIS, Georgia and Mongolia**

Country	Amount of fee (percentage of debt/ amount recovered)	Fee calculated from value of debt, or from actual recovered amount?
Armenia	5	Debt
Azerbaijan	7	Debt
Belarus	5	Recovery
Georgia	7	Debt
Kazakhstan	10	Recovery
Kyrgyz Republic	10	Recovery
Moldova	3-5-10 (scale varying by amount recovered)	Recovery
Mongolia	10	Recovery
Russia	7	Debt
Tajikistan	7	Debt
Turkmenistan	0	N/a*
Ukraine	10	Recovery
Uzbekistan	0; approx. US\$ 500 fine	N/a*

Source: EBRD Enforcement Agents Assessment 2013.

\* Note: No data on this question were available from Turkmenistan and Uzbekistan.

The extent to which judgment debtors are able to file appeals against the various stages in the process is a factor that affects the duration of enforcement proceedings. Administrative and procedural law often grant wide rights of appeal, allowing any stage in the enforcement process to be challenged. Appeals can take months to resolve. The apparent ease of obtaining adjournments without a sound reason is a problem that affects civil litigation generally in the region;<sup>8</sup> it also presents difficulties in the enforcement context. In this context many applications are made simply for more time to study a case file. In Armenia a large number of applications are made seeking court interpretations of enforcement orders, apparently in order to delay the enforcement process. In Mongolia appeals to courts are often filed against the valuation of property. In Russia, a staggering 222,337 appeals were filed in 2012 in relation to enforcement actions.

A key issue is whether appeals by judgment debtors against actions taken by enforcement agents suspend the enforcement process pending a final determination by a court. Ukrainian law expressly provides that the enforcement process is not halted by the filing of an appeal by a debtor unless the court otherwise orders. Similar rules exist in Armenia, Georgia, Moldova and (fortunately, given the huge number of appeals) Russia. In these

countries the court has the power to suspend the proceedings if it deems it appropriate for a particular case. This is a sound approach.

### Costs and fees

Enforcement costs are largely borne by the debtor. They were highest in Kazakhstan, Kyrgyz Republic, Mongolia and Ukraine, where up to 10 per cent of the recovered debt can be levied or withheld from excess sale proceeds. The lowest-cost regimes were reported in Turkmenistan and Uzbekistan, where no enforcement fees are charged, either to the debtor or the creditor (although fines and criminal consequences can be expected for non-compliance). The amount of the fee in each of the countries studied, together with the basis for its calculation (either the value of the judgment debt or the amount actually recovered), is set out in Table 5. In terms of the basis of calculation, the latter method provides a greater incentive for enforcement agents to sell property for a higher value.

The cost regime must be seen in the context of the need to provide adequate incentives for enforcement agents to perform to a high standard. In the three private systems, agents have incentives to seek higher prices through the higher percentages they receive from the amounts recovered. For private bailiffs in



Efforts to reform the enforcement systems in the region must include – but also go beyond – legislative measures.

Kazakhstan this can be up to 10 per cent of either the recovered debt or the actual sale price. This appears to account for a notable difference in the perceived success of private and public agents in the country. A leading Kazakh bank has expressed the view that the major problem affecting the public enforcement system is the absence of incentives for government enforcement agents, whose pay is not linked to their output. Incentive payments are seen as providing a stimulus to the enforcement process, potentially reducing the high turnover of public enforcement agents and helping to instil a greater level of professionalism in enforcement agents. At the same time, it was noted that private agents tend not to be as interested in smaller matters, as they do not consider the returns (even at 10 per cent) worthwhile. Accordingly, a role for state enforcement agents must always be considered in relation to cases which may not be attractive to private operators.

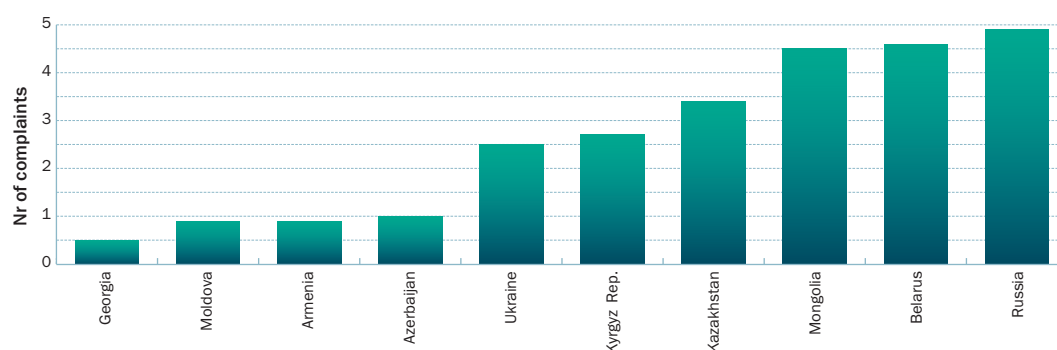
It is also important that the overall financial burden on the debtor for wilful non-compliance with court orders is significant, as this burden should affect debtors' behaviour. In addition to enforcement fees and fines in appropriate cases, it is reasonable to expect a debtor to pay interest to the creditor in respect of the period during which the judgment debt has not been repaid. Surprisingly, in most countries interest ceases to accrue when the decision of the court is handed down. Only in Armenia, Belarus and Moldova does interest on judgment debt

continue to accrue. In a number of countries it was noted that a separate action to recover interest in relation to the enforcement period could be brought, however in practice this rarely occurs, presumably because the cost involved in recovering the interest render such action uneconomic. The principle should be that the debtor pays interest, at readily identifiable commercial rates, until the debt is extinguished.

### Supervision, complaints and integrity

Effective supervision of state and private enforcement agents is crucial in establishing public trust in the profession. All surveyed countries have in place systems to monitor and control the enforcement process. In the state systems supervisory bodies are typically departments within ministries of justice or agencies of the ministries, led by a chief enforcement officer. Most enforcement agencies have also promulgated professional standards of conduct formally prohibiting conflicts of interest, the breach of which can lead to administrative or criminal sanctions. Private enforcement agents are also subject to supervision. In Kazakhstan private agents are supervised by regional collegiums (professional associations) and by the state enforcement agency. In Moldova all agents must be members of a country-wide union of enforcement agents, which is a self-regulatory organisation, reporting to the Ministry of Justice. In Georgia the Ministry of Justice supervises private agents.

**Chart 4. Number of complaints/appeals per enforcement agent in 2011**



Source: EBRD Enforcement Agents Assessment 2013.

Note: Columns indicate the number of complaints and appeals filed against the actions of enforcement agents. The data must be approached with caution as some countries' data record a wider scope of complaints and appeals than others (for example, Russia records complaints about enforcement cases that are closed without success – many countries do not record such complaints).



The need for enforcement of court judgments should ultimately be the exception, rather than the rule.

### Complaints and appeals

The ability of judgment debtors and creditors to bring appeals and reasonable complaints, both in relation to compliance with the enforcement process and the adherence of agents to professional standards, is a critical component of the enforcement system. All countries in the region provide both administrative and court-based complaint mechanisms. However, the overuse of court-based procedures, such as that which occurs in Moldova and Ukraine, clogs the justice system and can result in lengthy processes and delays. An efficient administrative complaints system is preferable.

Data from most countries studied reveal the existence of a functioning complaints system, with regular appeals being brought against enforcement agents (see Chart 4). For example, in Kazakhstan 4023 appeals were brought against state bailiffs in 2012, of which 3247 were upheld (only 53 were brought against private bailiffs). Notably, most of these claims were said to have been from creditors concerning inaction on the part of enforcement agents. This is also common in Russia, where many complaints relate to agents who close enforcement proceedings due to a lack of identifiable assets. Breaches of the enforcement procedure – such as the failure to provide adequate notice, or issues relating to the valuation of property – is another major ground for complaints and appeals.

### Access to information

Few countries publish reports on the operation of their enforcement agencies. In Armenia, Georgia, Russia and Ukraine, the enforcement agencies publish quarterly reports online. However, only Russia's enforcement agency publishes detailed information and data about the number of complaints brought against bailiffs, the number of prosecutions for criminal conduct, and the overall success rate of enforcing court decisions. For the purposes of the Assessment, information was gathered from law firms, and from academic and other available sources. In the Assessment's evaluation of the supervision and integrity safeguards, the level of transparency around such issues was taken into account, and was used as a proxy for the robustness of the system.

Another positive feature of the Russian enforcement agency is its creation of an online public register of enforcement cases. The

### Box 4. Summary of measures promoting efficient enforcement

- Initial and ongoing training for enforcement agents.
- Adequate pay and incentives.
- Easy access to information in property registries and databases.
- Efficient sale and auction arrangements, including online procedures.
- Robust financial deterrents for debtors who hinder enforcement.
- Consistency of legislation on enforcement, property registries, privacy and banking.
- Clear, consistent and publically available statistical data on past and present cases.
- Strong oversight of agents' conduct.
- Wide dissemination of reports into allegations of corruption.
- A role for the private sector in providing enforcement services.

Source: EBRD Enforcement Agents Assessment 2013.

publicly available information includes the name of the debtor, the allocated case number, the type of enforcement action, the amount and type of the debt, and the responsible enforcement department and enforcement officer.<sup>9</sup> Debtors are able to pay their debt through various payment services directly from this web site. It is possible to search for information about an individual debtor by name (including the names of legal entities) and to search matters by reference to various keywords. Although caution is needed in relation to privacy concerns, this is a laudable effort to increase transparency, and to facilitate the payment of debt. Data of this kind are of particular interest to credit rating agencies. Accordingly, the new system generates an additional pressure point for recalcitrant debtors by raising the prospect that non-compliance will affect their credit rating.

### Corruption

Reports of corruption were encountered in many of the countries reviewed, and there were various means by which corruption was



The EBRD will continue to support the efforts of transition countries to improve the mechanisms for enforcing the decisions of their courts.

allegedly practised. One common technique is reportedly for an agent to delay, or temporarily suspend, the arrest of property, so as to allow the debtor to hide it or otherwise frustrate the enforcement process. Another was for agents to delay enforcement in order to induce the creditor to offer a bribe to effect enforcement. In Belarus, Turkmenistan and Uzbekistan there were said to be no significant corruption issues. Perhaps in those countries the fear of government authority is a deterrent. Thorough supervision, investigation, and the publication of reports on alleged corruption must be stepped up in order to create a climate of accountability which deters potential bribe-takers and their “clients”.

Georgia’s state-wide anti-corruption efforts have included reforms that affect the enforcement agency. The planned new case management scheme envisages that different stages of the enforcement process will be under the control of different enforcement agents, thereby reducing opportunities for engaging in corrupt behaviour, and increasing the likelihood of such behaviour being detected. Further, only the agency’s mediation team will be allowed to have direct contact with stakeholders (debtors and creditors), thereby curtailing potential avenues for the occurrence of improper influence.

Lastly, some concerns were raised about the perceived immunity of government and municipal bodies from enforcement of court judgment. On its face, this presents as a serious integrity concern, as it suggests government interference in the enforcement process. However, the non-compliance of government bodies with court decisions can arise through budgetary problems of the kind mentioned earlier.

### Conclusion

While the enforcement of court orders remains a significant challenge in many countries in the surveyed region, progress is being made. But reform efforts must continue. The most problematic area is searching for assets. Robust measures are required to prevent debtors from hiding assets, along with stiffer penalties for

non-compliance with the enforcement process. Enforcement agents need better access to property registries and information about funds held in bank accounts. Technology offers efficient solutions to some of these problems.

Efforts to reform the enforcement systems in the region must include – but also go beyond – legislative measures (see Box 4). They must build the institutional capacity of enforcement agencies, such as systematic professional training. They must involve courts and judges having powers to limit spurious appeals and to penalise unreasonable behaviour. They must include the reform of registries of property ownership to make them both more comprehensive and accessible. And they should entail greater government attention to statistical data which can be used to measure efficiency and identify problems. Consideration should be given to the potential role of the private sector in providing enforcement services to the community.

The need for enforcement of court judgments should ultimately be the exception, rather than the rule. Enforcement of judgments would not be so problematic in the region if more judgment debtors voluntarily complied with court decisions. Policy must seek to instil a compliance culture in the population at large. In order for this to occur, however, a credible threat of effective enforcement must exist, as well as adverse financial consequences for non-compliance. These should include the accrual of interest on unpaid judgment debt, the obligation to pay costs, more significant fines, and the prospect of affecting the debtor’s credit rating. In this regard, Russia’s public database of enforcement cases may prove to be an effective catalyst for behavioural change. The EBRD will continue to support the efforts of transition countries to improve the mechanisms for enforcing the decisions of their courts. Better enforcement of court decisions can only improve the investment climate and advance the process of economic transition.



## Notes

- <sup>1</sup> “Enforcement agent” is used in preference to the term “bailiff”, which in some countries is a “term of art”, carrying a narrower meaning connected specifically to court-supervised enforcement.
- <sup>2</sup> CIS member states are Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Ukraine, Tajikistan, Turkmenistan and Uzbekistan.
- <sup>3</sup> Substantive responses were received from all government agencies except those of Tajikistan, Turkmenistan and Uzbekistan.
- <sup>4</sup> Article 14 of the International Covenant on Civil and Political Rights encompasses the right to have civil judgments implemented, as does article 6 of the European Convention on Human Rights (ECHR). Belarus, Moldova and Russia, the three countries covered by the Assessment which are party to the ECHR, have all been found to be in breach of article 6 by the European Court of Human Rights for failing to guarantee effective enforcement of court judgments. Businesses have been applicants in these proceedings.
- <sup>5</sup> <https://wcd.coe.int/ViewDoc.jsp?id=65531>.
- <sup>6</sup> European Commission on the Efficiency of Justice Guidelines for a better implementation of the existing Council of Europe’s Recommendation on Enforcement; adopted by the CEPEJ at its 14th plenary meeting. Strasbourg, 9-10 December 2009), at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2009\)11&Language=lanEnglish&Ver=original&BackColorIntranet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2009)11&Language=lanEnglish&Ver=original&BackColorIntranet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6).
- <sup>7</sup> See A. Colman, “The EBRD Judicial Decisions Assessment”, *Business Law International*, Vol. 12 No. 2, May 2011; and in *Law in transition*, EBRD, Spring 2011, p. 20.
- <sup>8</sup> See “The EBRD Judicial Decisions Assessment 2011-2012”, footnote 7, above.
- <sup>9</sup> See Russian online database: <http://www.fssprus.ru/iss/ip/>.

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# Good practices for monitoring the effectiveness of enforcement actions and assessing the performance of bailiffs

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How can governments evaluate the effectiveness of their enforcement mechanisms? This article looks at international best practice and explains the different approaches to this question. It emphasises the importance of sound monitoring systems and statistics in identifying strengths and weaknesses in an enforcement system.



Effective enforcement of civil judgments is essential in engendering public trust in courts, and their credibility depends significantly on successful enforcement, even when the courts are not in control of the enforcement process. Many countries have been looking for more effective solutions to improve their often-ineffective court decision enforcement systems. Privatisation has been one trend that can be observed over the last decade in eastern Europe.<sup>2</sup> This trend towards private or quasi-private enforcement agents, who are well regulated, well qualified, and operate according to quality standards, recognises that professionalism, entrepreneurship and flexibility are needed to ensure that the highest value is achieved through a timely enforcement process that considers all interests.<sup>3</sup> In order to ensure that enforcement agents can operate well, it is equally important to devise monitoring systems that assist in understanding which processes work well, or where adjustments

are needed, and to assess the performance of individual enforcement officers, different agencies and the system overall.

This article addresses some of the issues that should be considered in devising an effective monitoring system, and some of the experiences with such systems across different countries. These are very important considerations for transition countries, many of which are in the early stages of strengthening and professionalising their enforcement systems. Well-informed policy choices taken in these early stages can lay a solid foundation for long-term institutional effectiveness.

### **The need for performance measurement systems for court enforcement agents**

Independent of their organisational status, court enforcement agents have a broad range of responsibilities that are a mix of administrative



Solid systems for measuring court enforcement processes, and for ensuring quality enforcement systems, are still evolving in many European and other countries.

tasks and enforcement actions, which allow for and require relatively broad discretionary powers.<sup>4</sup> Such discretion necessitates clear regulation, competent agents and an organisational structure and performance management and monitoring system that not only support effective operations but also limit abuse of discretion. In order to provide guidance about how to develop such a system, in 2003 the Council of Europe (CoE) issued recommendations, that outline core requirements for the establishment, organisation, operation, and supervision of enforcement agencies, including suggestions for monitoring and measuring performance.<sup>5</sup> These recommendations, and the experiences of well-performing bailiff agencies in the EU countries and other states, provide guidance to identify approaches that may be helpful and that could be adjusted to the needs of a particular country.

Establishing quality standards for all enforcement-related operations is essential for an effective performance measurement system. These standards help to ensure a common understanding of what is required and what must be measured in order to achieve the desired efficiency of enforcement services and equality before the law. They also foster the harmonisation of services across the country and establish clear performance measures that can be reflected in the education, management and review of enforcement agents. By 2007, 25 EU states had established some quality standards for enforcement agents.<sup>6</sup>

A good example of such standards can be found in the United Kingdom. In 2002 the Lord Chancellor's Department issued National Standards for Enforcement Agents, to enable agents to share, build on, and improve existing good practices, and raise the level of professionalism across the whole sector. These standards are intended for use by all enforcement agents (public and private), the enforcement agencies that employ them and the major creditors who use their services. High standards of business ethics and practice are especially critical for improving the public's perception of enforcement agents and their actions.<sup>7</sup>

Lessons for establishing comprehensive monitoring and performance measurement systems include the following:

- Systems for monitoring and measuring performance must be established to assess the effectiveness of the entire system (that is, the enforcement processes involving courts, enforcement agents and others), of enforcement agency performance (that is, state and private bailiffs), and of the performance of individual agents. Each level of assessment requires slightly different measures, but these should be linked in order to better understand how the operations of one agency influence the other, and where in the processing chain problem tends to occur.
- There should be a link between how "effectiveness of enforcement actions" is defined, how it is monitored, and how bailiffs' performance is assessed.
- Performance information should be collected for both state and private agents (where both exist), not only to allow for performance monitoring of both approaches but also to provide a basis for comparing the effectiveness of each and to identify cost savings to the government.
- The assessment of the effectiveness of overall enforcement actions and bailiff performance is independent from, but complementary to, the supervision and monitoring of the ethical performance of bailiffs, regular audits of bailiff operations, and other measures to assess whether professional standards and codes of practice are followed.<sup>8</sup>
- Different levels of data and results require different access and dissemination approaches. For example, while information about the overall enforcement process and agency effectiveness should be publicly available, the performance of individual enforcement agents should not be. Individual agents and agencies should have access to up-to-date performance information for self assessment and adjustments.

### The measurement of effectiveness

As mentioned above, in order to create an interrelated system of monitoring and performance measurement of the effectiveness of enforcement agencies and agents, effectiveness first needs to be defined. The effectiveness of individual agents or offices in enforcing court decisions is generally defined<sup>9</sup> by:





Good communication is essential to a well-functioning, cross-agency data gathering and reporting approach.

- the time it takes to complete the enforcement process, ideally distinguishing between different enforcement actions and including information about how often proceedings are postponed and for what reasons
- the cost of the enforcement process to the bailiff and the creditor
- the success rate of the enforcement actions by type, and possibly considering other factors such as value and creditor type
- the degree of satisfaction of the creditors, debtors and their respective lawyers with the enforcement process.

Precisely how each of these categories is measured, and how the required data are collected, will depend both on the country context and on what data can be collected with existing resources.

**Measuring these elements of effectiveness can raise the following issues:**

- **Timeliness of enforcement processes.** This is measured by the percentage of cases in

which enforcement proceedings were initiated and completed within an established average or maximum timeframe. The maximum timeframe should be established for different case types, and should consider regional differences (that is, rural, urban and local legal cultures). It should also be based on a realistic assessment of the time required for various enforcement processes. It is essential to distinguish between initiation of processes and their completion, especially when a more modern understanding of successful enforcement outcomes is applied that allows for flexibility in choosing enforcement processes and timelines to ensure the highest level of creditor satisfaction, while considering greatest debtor fulfilment capacity.<sup>10</sup> Any assessments of this type must also take into account the volume and quality of activities.<sup>11</sup>

- **The cost of the process to the government/ bailiff agency and the creditor.** This includes a range of cost elements, including agency processing costs, the use of experts, advertisement and maintenance; these costs elements are offset against the value of fees and assets collected.<sup>12</sup> Some court enforcement agencies have simply looked at







The ministry of justice is the most common supervision and control authority for enforcement agents in EU member states.

the average cash or debt value collected by an enforcement agent or office. This is one measure that can be collected to explain the return value of investment in enforcement actions, but is not a good measure of agency effectiveness, since collection of just one large debt will skew the results. Similarly, using only cash collection amounts as a performance measure tends to provide an adverse incentive to focus on the generally easier collection processes (such as cash, bank accounts and cars), instead of on enforcing real property and other asset classes that are more difficult to manage and sell.

■ **The success rate of enforcement actions.**

This measure needs to be considered in context. The overall success rate should not be the only measure used to assess the performance of offices or agents, since enforcement involving cash and bank accounts tends to be easier than enforcement involving other assets, and since the willingness and liquidity of the debtor will be a significant factor influencing success. Consequently, this value needs to be multi-faceted, reflecting the country context.

■ **The satisfaction of creditors, debtors and their respective lawyers with the process.**

The timeliness, cost and success of enforcement processes are indicators that also influence user satisfaction, but they only partially reflect the quality of decisions and services. Quality of services tends to be the most difficult indicator to measure across most justice sector operations. At the same time, experience from work on measuring the quality of court operations has shown that the satisfaction of court users is a good proxy for at least the subjective perception of quality and fairness. Consequently, user surveys have been designed and conducted to assess user satisfaction with court services, while to a lesser degree, the same assessment has been applied to enforcement processes and services. A good example can be found in the United Kingdom,<sup>13</sup> while many positive experiences of user surveys of court operations that have been applied in several European countries provide more examples that are useful in designing meaningful user surveys of enforcement processes and agencies.<sup>14</sup>

## Mechanisms for measuring performance and implementing quality control

Establishing a system for collecting and analysing the necessary performance measurement information requires significant time, resources and agreement among the agencies involved (ministry of justice, bailiff association and, to some extent, the courts and others, such as expert associations). It is interesting that, in the EU, all states that have introduced quality standards have a central body that is responsible for gathering statistical data, and in almost all of these states the courts are tasked with preparing an annual enforcement activity report (24 states of 25; the only exception is Germany).<sup>15</sup> Having a central data collection point means that more comprehensive data can be collected across agencies in a uniform manner. Making the courts responsible for at least the annual reporting of enforcement activities helps to ensure that information about enforcement outcomes can be contextual, that is, related to the court's operations and decisions. This allows courts to see how effective their decisions are, and may provide a good basis for the courts, the ministry of justice and bailiff association to come together to track and analyse the data, with the aim of enhancing performance across the entire process. Also, having the courts compile and report on these data is generally viewed as less intrusive to private bailiff associations than when this is the responsibility of the ministry of justice.

However, the existence of a central reporting mechanism does not negate the need for performance data to be a part of each agency's own efforts to monitor performance and address performance issues, nor does it imply that other agencies involved should not disseminate vetted performance information. In the United Kingdom, for example, private bailiff agents regularly use performance information on their web sites and other publications as a marketing tool to develop trust and gain new clients.

Good communication, involving all key agencies, about performance goals, realistic measurement approaches and performance assessments and their implications, is essential to a well-functioning, cross-agency data gathering and reporting approach. Establishing a regular communication schedule does not have to wait until a sophisticated measurement process is



Introducing private bailiffs in Estonia has proven to be effective in speeding up the system – within just one year the number of closed files doubled.

in place. A constructive and ongoing agreement about performance standards and review of performance among the main stakeholders – the ministry of justice, state and private bailiff representative, courts and users of the system (lawyers and litigants) – is the most important part of making the enforcement system work.

Such regular meetings and communications are conducted successfully in several countries. One of the more successful examples can be found in the United Kingdom. The relatively recent privatisation of enforcement services there has led to a very active engagement and communication effort, especially at the regional level. For example, in Manchester, quarterly meetings are held of all councils under the Association of Greater Manchester Authorities, at which performance issues of private bailiff agencies are discussed and addressed. At every other meeting (once every six months) representatives from the bailiff companies attend and issues of joint concern are raised with them. Statistics on the collection performance of the private enforcement companies are compiled centrally and shared amongst all group members, and with the bailiffs themselves, so that everyone is aware of how each enforcement company is performing in each location. The aim of this is to enhance performance according to standards so that all group members can make better informed decisions as to which companies are likely to perform best for them.<sup>16</sup>

In the international context this is an advanced and unusual approach to performance measurement and assurance, but it is also quite a successful example. It was developed after many problems of ineffective and even abusive and corrupt bailiff services had been uncovered, leading to a strong commitment to provide more responsible enforcement services.

Another effective approach to performance monitoring is to assess enforcement agents' working methods (problem solving skills, communications skills, courtesy, and similar). This is a more subjective approach, and requires that good process standards are available against which to measure performance, but it nonetheless addresses important skills of enforcement agents. This information can be collected through surveys of clients, by observation, by reviewing complaints filed,

or through a combination of these methods. Another interesting example is employed in the Netherlands, where bailiffs are required to develop and follow a business plan that is then reviewed in order to assess the achievement of the objectives outlined in the plan.<sup>17</sup>

### Who should be responsible for performance measurement and management?

Since enforcement processes in civil cases are generally the responsibility of the courts and bailiff agents (state and private where they exist) at different stages of the process, and since both courts and state bailiffs can be under the authority of the ministry of justice, all three institutions have a role to play in measuring and managing performance. How this role is defined and shared depends on the scope of responsibility. The role has evolved over time, and did not necessarily develop based on what would be most effective.

Among EU countries, 15 states have chosen the professional bailiff body to be responsible for the enforcement process. This is a low percentage, considering that 40 EU member states have a professional bailiff body. Twenty states in the EU have opted for judges to be responsible for the supervision and control of the activities of enforcement agents. Still, the ministry of justice is the most common supervision and control authority for enforcement agents in EU member states: 25 states with such an authority have chosen this option.

Some counties have chosen to give this responsibility to other institutions that may appear more neutral: for example, the state Supreme Court in Cyprus, court managers in Germany, and a parliamentary commission linked with the civil or judicial administration in Sweden. Albania required annual evaluation of agents by an Enforcement Council. The evaluation there is based on quantitative and qualitative quality criteria (including the quality of enforcement, the volume of work, the speed of enforcement, and the agent's moral reputation) that are assessed on a scale (very good, good, satisfactory, and inadequate).<sup>18</sup>

The authorities responsible for supervision and/or control of enforcement agents have an important role in also guaranteeing



EU recommendations are that member states should ensure that enforcement activities are assessed on an ongoing basis.

the quality of enforcement services. EU recommendations are that member states should ensure that enforcement activities are assessed on an ongoing basis. This assessment should be performed by a body external to the enforcement authorities (that is, by a professional body) and control procedures should be very clearly defined.

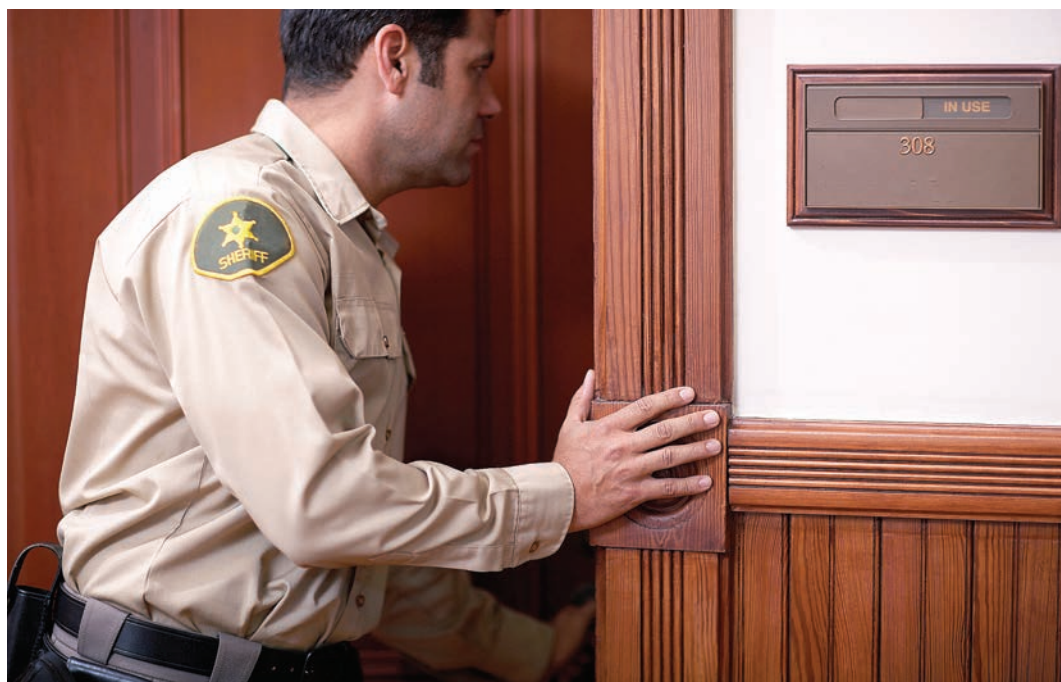
Examples of effective monitoring and performance measurement approaches from other countries include:<sup>19</sup>

**Netherlands:** The professional bailiff organisation supervises the court bailiffs and is responsible for preservation of the quality of the bailiffs. Currently, the organisation is considering creating a system of peer review of the bailiffs to promote quality. The ratio of successful enforcement of court decisions is not monitored by the professional organisation. However, some court bailiffs publish their success ratios on their website and advertisements with a view to attracting more clients. Here, entrepreneurship seems to be the driver and incentive for assessing and publishing performance information.<sup>20</sup>

**United Kingdom:** In the United Kingdom the High Court Enforcement Officers are

responsible for ensuring that all agents, employees and contractors are performing according to the relevant legislation and standards. The information that is currently collected to assess performance includes the amount of money collected on enforceable warrants, the number of writs successfully cleared and new writs received, the number of writs cleared by obtaining payment in full, and the amount of money collected on behalf of creditors. Equally important, user satisfaction is collected, assessed and results used to enhance user satisfaction. High Court Enforcement Officers are trained to recognise and avoid potentially hazardous and aggressive situations and to withdraw when in doubt about their own or others' safety or about the necessity and timing of the intervention.

**Bulgaria:**<sup>21</sup> The first private enforcement agents began their work in Bulgaria in early 2006. Performance assessment was an important component of the reforms. Measuring the effectiveness of enforcement processes meant the "calculation of duration, expenses and impact of the enforcement to the Parties' social and economic sphere".<sup>22</sup> Data currently collected include the costs of enforcement, including fees and expenses, and these are all published regularly.<sup>23</sup> Supervision and





Developing more comprehensive information would be important in assisting transition countries to create effective enforcement systems.

control regulations are outlined throughout both the Law on Enforcement Agents<sup>24</sup> and the Code of Ethics.<sup>25</sup> Control is exercised through inspectors of the Ministry of Justice, the Chamber's Council and the Bulgarian courts.<sup>26</sup>

**Estonia:** Introducing private bailiffs in Estonia has proven to be effective in speeding up the system – within just one year the number of closed files doubled.<sup>27</sup> Here, a joint professional organisation, the Chamber of Bailiffs and Trustees in Bankruptcy, has been in operation since January 2010. The role of the Chamber includes monitoring bailiffs' compliance with good official and professional practice.<sup>28</sup> The introduction of private bailiffs has not been without challenges. For example, not all bailiffs can operate cost-effectively, and several corruption scandals have shaken the system. However, the Chamber, in cooperation with the Ministry of Justice, is managing these challenges. In order to create greater incentives for good performance, the Ministry recently introduced a bill under which claims against debtors of public organisations will be distributed to bailiffs based on their past performance in collecting the money owed.<sup>29</sup>

### European suggestions for good practice in performance measurement of enforcement processes

The above examples indicate that solid systems for measuring court enforcement processes, and for ensuring quality enforcement systems, are still evolving in many European and other countries. Consequently, in late 2009 the European Commission on the Efficiency of Justice provided some additional guidance to EU member states that reflect broader international experience.<sup>30</sup>

The CEPEJ recommended that, in order to establish reasonable control mechanisms for enforcement proceedings, each member state should establish quality standards and criteria to assess the efficiency of enforcement services annually, through both an independent review system and random, on-site inspection.

These standards should generally be based on:

- a clear legal framework of the enforcement proceedings, establishing the powers, rights and responsibilities of the parties and third parties

- respect for all human rights (including for human dignity, by not depriving the defendant of a minimum standard of economic subsistence, and by not interfering disproportionately with third parties' rights)
- compliance with all defined procedures and methods (specifically, the availability of legal remedies to be submitted to a court within the meaning of article 6 of the European Convention on Human Rights)
- a definition of the necessary competences of enforcement agents
- a definition of the performance requirements of enforcement agencies and agents.

The monitoring and performance measurement process for both enforcement agencies and individual agents should be based on:

- clear definitions for timeliness, effectiveness and reasonable cost of the proceedings (and other performance measures that may be established, such as user satisfaction)
- standardised data collection processes and forms
- the creation of a national statistics and a data collection system, which ideally takes into account the CEPEJ data collection system.<sup>31</sup>

The CEPEJ also recommends that the performance of enforcement agencies and agents should be assessed and reported at least annually. This assessment should be based on representative sample data, and should include:

- the number of pending cases
- the number of incoming cases
- the number of executed cases
- the clearance rate
- the time taken to complete the enforcement
- the success rates (including the recovery of debts, successful evictions and remittance of amounts outstanding)



A good approach to monitoring enforcement systems and their agents is still evolving in most countries.

- the services rendered in the course of the enforcement (including attempts at enforcement, time input and decrees)
- the enforcement costs incurred and how they are covered
- the number of complaints and remedies in relation to the number of cases settled.

The CEPEJ also stresses the importance of publishing all of this information, and the value of aligning assessment criteria at the European level, in order to strengthen trust in the system within a country and internationally. The latter is growing in importance, not only for countries with significant EU trade relations, but for all countries, considering the growing number of international enforcement cases across the region.

### Conclusion

The trend towards creating private or quasi-private enforcement agents who are well-regulated and well-qualified, and operate according to quality standards, is based on good examples and lessons learned in many countries around the world. At the same time, a good approach to monitoring enforcement systems and their agents is still evolving in most countries. Comparative experiences and data are rarely used to identify efficiency or effectiveness outcomes, address performance shortcomings or support policy changes.

Considering the importance of effective enforcement to a functioning court system, and in developing and maintaining public trust, as well as the need to develop enforcement systems that are cost-effective, a greater emphasis on effective monitoring systems should be a part of any reform effort. The 2012 CEPEJ report, for example, indicates that states with only private bailiff agencies and those with mixed public/private systems tend to have lower ratios of bailiffs per 100,000 population than those systems with only public agents.<sup>32</sup>

However, using clearance rates and enforcement duration data alone to assess efficiency is not conclusive in determining whether the lower ratios of bailiffs in private and mixed systems are bringing about improvements in timeliness and efficiency. Furthermore, overall cost information is not readily available to assess whether moving from a purely public bailiff system should be a recommended policy decision, or to assess what the implementation requirements and conditions should be. To date, successful implementation of private bailiffs has been demonstrated in some middle- and upper-income countries. Lower-income countries may prove to be no less amenable to the privatisation of bailiffs. Developing more comprehensive information is important in assisting transition countries to create effective enforcement systems.



## Notes

- <sup>1</sup> This article was written by Heike Gramckow, Ph.D., Lead Counsel, LEGJR, at the World Bank's Legal Vice Presidency. The opinions expressed here are those of the author and do not reflect official World Bank policies.
- <sup>2</sup> See, for example, European Commission for the Efficiency of Justice, 2012, *European Judicial Systems*. Strasbourg, 4th edition, figure 13.6.
- <sup>3</sup> See Heike Gramckow, "Court Auctions: Effective Processes and Enforcement Agents", Justice and Development Working Paper Series, vol. 20, July 2011.
- <sup>4</sup> In Estonia, for example, the bailiffs' responsibilities include standard administrative acts, such as informing a debtor of the procedure, explaining to the parties their rights, the seizing of property and entry of notations concerning prohibition in registers, the receipt and delivery to the claimant of money from the debtor or of the sales proceeds of property, and keeping a record of receipts. The bailiff also makes decisions about some issues that involve a significant range of discretionary powers: determination of the order of seizure of property, appraisal of seized property, determination of ownership in certain cases, determination of the method of sale of property outside of auction, identification of the debtor's dependents and economic status, preparation of a distribution plan for received money, and decision about the necessity of suspension of proceedings. See Alekand (2008).
- <sup>5</sup> See Council of Europe 2003. Recommendation Rec (2003)17 du Comité des Ministres aux Etats membres en matière d'exécution des décisions de justice (adoptée par le Comité des Ministres le 9 septembre 2003, lors de la 851e réunion des Délégués des Ministres).
- <sup>6</sup> See European Commission for the Efficiency of Justice, 2007, "Enforcement of Court Decisions in Europe", Report prepared by the Research Team on enforcement of court decisions, CEPEJ Studies No. 8, p.122, ft.31.
- <sup>7</sup> See HM Courts and Tribunal Service. National Standards for Enforcement Agents. Available online at: <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/enforcement/agents02.htm>.
- <sup>8</sup> For an example see the website of the High Court Enforcement Officers Association in the UK. Available online at: <http://www.hceoa.org.uk/code-of-practice.html>.
- <sup>9</sup> See, for example, Manchester City Council Resources and Governance Overview and Scrutiny Committee, March 2010. Available online at: [http://www.manchester.gov.uk/egov\\_downloads/5\\_Bailiff\\_scrutiny\\_report\\_8.2.10.pdf](http://www.manchester.gov.uk/egov_downloads/5_Bailiff_scrutiny_report_8.2.10.pdf).
- <sup>10</sup> See CEPEJ 2007, p. 61f.
- <sup>11</sup> See CEPEJ 2007, p. 47.
- <sup>12</sup> In order to more fully understand the cost and success of different enforcement processes, more sophisticated assessments are needed which review the time required for particular enforcement actions and the loss of value over this time. This is best done when the enforcement system has reached a certain maturity and multi-year data are available.
- <sup>13</sup> See David Carter, 2010, *The Sheriffs' Office Survey*. Available online at: [http://www.thesheriffsoffice.com/articles/the\\_sheriffs\\_office\\_survey/](http://www.thesheriffsoffice.com/articles/the_sheriffs_office_survey/).
- <sup>14</sup> For examples see CEPEJ, 2010, *Handbook for conducting satisfaction surveys aimed at Court users in Council of Europe's member States*. See also Her Majesty's Courts Service Court User Survey. Available online at: [http://data.gov.uk/dataset/her\\_majestys\\_courts\\_service\\_court\\_user\\_survey](http://data.gov.uk/dataset/her_majestys_courts_service_court_user_survey).
- <sup>15</sup> See CEPEJ, 2007, p. 46.
- <sup>16</sup> See Manchester City Council. The Council's use of bailiff companies to recover debts owed to the Council. March 2010 Report. Available online at: [http://www.manchester.gov.uk/egov\\_downloads/5\\_Bailiff\\_scrutiny\\_report\\_8.2.10.pdf](http://www.manchester.gov.uk/egov_downloads/5_Bailiff_scrutiny_report_8.2.10.pdf).
- <sup>17</sup> See article 5, section 6 of the Bailiffs Act of 26 January 2001.
- <sup>18</sup> See CEPEJ 2007.
- <sup>19</sup> See Wim Timmermans, 2010. "Comparative Overview of Important Issues Concerning the Functioning of Court Bailiffs in Various European Countries." *Execution and Efficiency of Justice in the Russian Federation*. The Administration of the President of the Russian Federation, Moscow.
- <sup>20</sup> See Timmermans, 2010, p. 14.
- <sup>21</sup> International Union of Judicial Officers. 3rd General Meeting of the National Chamber of Judicial Officers of Bulgaria. Available online at: [http://www.uihj.com/en/3rd-general-meeting-of-the-national-chamber-of-judicial-officers-of-bulgaria\\_1017071.html](http://www.uihj.com/en/3rd-general-meeting-of-the-national-chamber-of-judicial-officers-of-bulgaria_1017071.html).
- <sup>22</sup> See Art. 13 of the Code of Ethics. Available online at: [http://www.bcpea.org/uploads/pdf/etichen\\_kodeks\\_en.pdf](http://www.bcpea.org/uploads/pdf/etichen_kodeks_en.pdf).
- <sup>23</sup> Available online at: [http://www.bcpea.org/uploads/pdf/tarifa\\_en.pdf](http://www.bcpea.org/uploads/pdf/tarifa_en.pdf).
- <sup>24</sup> See Art. 67 ff, Art. 74, Art. 75 ff of the Law on Enforcement Agents. Available online at: [http://www.bcpea.org/uploads/pdf/zakon\\_en.pdf](http://www.bcpea.org/uploads/pdf/zakon_en.pdf).
- <sup>25</sup> See Art. 56 of the Code of Ethics.
- <sup>26</sup> See The Judicial Officer in the European Union. Bulgaria. Available online at: [http://www.uihj.com/en/ressources/21493/84/presentation\\_bcpea\\_eng.pdf](http://www.uihj.com/en/ressources/21493/84/presentation_bcpea_eng.pdf).
- <sup>27</sup> See Anneli Alekand. 2008. *The Estonian Universal Enforcement Procedure and the Bailiff as the Taker of Procedural Decisions*. In *Juridica International*, vol. 15, pp. 115-124. Available online at: <http://www.juridicainternational.eu/the-estonian-universal-enforcement-procedure-and-the-bailiff-as-the-taker-of-procedural-decisions>.
- <sup>28</sup> Available online at: [https://e-justice.europa.eu/content\\_legal\\_professions-29-ee-en.do?member=1](https://e-justice.europa.eu/content_legal_professions-29-ee-en.do?member=1).
- <sup>29</sup> See Kristopher Rikken. *It's a Free Market for Bailiffs*. Published: 18 November 2011, Estonian Public Broadcasting. Available online at: <http://news.err.ee/society/61120acf-4a9d-4e3b-8595-c6814ee647ae>.
- <sup>30</sup> European Commission on the Efficiency of Justice. Guidelines for better implementation of the existing Council of Europe Recommendation on Enforcement; adopted by the CEPEJ at its 14th plenary meeting, Strasbourg, 9-10 December 2009. Available online at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2009\)11&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2009)11&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6).
- <sup>31</sup> Aligning the data collection with CEPEJ measures is also helpful for non-EU countries, as it allows them to assess how they are performing in comparison with EU member states. More importantly, it allows them to communicate to key users where the country stands in relation to EU member countries. This is an important way to build trust and confidence in the system within a country, and is especially important for building the confidence of foreign investors.
- <sup>32</sup> See CEPEJ 2012, figure 13.6.

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## Enforcement in times of crisis

CATHERINE BRIDGE AND FREDERIQUE DAHAN

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In the recent economic downturn, there has been an increasing recognition among financial sector participants of the need for robust debt enforcement and restructuring systems. In this article Frederique Dahan, a security transactions specialist, and Catherine Bridge, an insolvency and restructuring specialist, both from the EBRD's Legal Transition Programme Financial Law Unit, discuss some key questions concerning debt enforcement trends and practice in the EBRD region. Drawing on data from the EBRD's recent Banking Environment and Performance Surveys (BEPS), they provide insights into the challenges of enforcement in times of economic and financial crisis in the EBRD region.

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What do we know about enforcement practices in the region where the EBRD operates?

**Frederique Dahan:** Unfortunately, it is not easy to get a clear overview of how financial institutions are handling non-performing loans and resolving issues with defaulting debtors. Data are typically not publicly available, and of course there is some sensitivity around these issues, especially during times of capital constraints and stress testing from regulators and parent banks. Nevertheless, the EBRD has developed a survey that provides a very interesting (and, to our knowledge, unique) insight into banks' lending policies and practices, as well as banks' perceptions of the legal system in their respective jurisdictions.<sup>1</sup>

When the 2008-09 financial crisis hit the region, how well developed were the legal frameworks, especially with regard to the enforcement of creditors' rights?

**Frederique Dahan:** It is difficult to generalise, but by this point a good deal of reform to secured transactions systems had taken place in central Europe and Central Asia, so the legal frameworks for secured transactions were relatively advanced in many jurisdictions as far as creditors' rights were concerned. The basic premise of the reforms introduced was that security should reduce the risk of credit, and increase the availability of credit on improved terms. Consequently, the enforcement of security should allow for the

<sup>1</sup> Developed and run in 2005, and again in 2012, the BEPS survey was conducted through face-to-face interviews with senior bank officials. The BEPS survey covers a broad spectrum of topics, including data on credit and deposit activities, risk management techniques and perceptions of the regulatory environment. Full results of the BEPS survey are available online at: [www.ebrd.com/pages/research/economics/data/beps.shtml](http://www.ebrd.com/pages/research/economics/data/beps.shtml).

prompt realisation of assets at market value. Because the judiciaries in the countries where EBRD operates are typically over-stretched, and judicial enforcement means can be inflexible, legislators in the EBRD region displayed an increasing willingness to permit out-of-court enforcement (either by creditors or with the oversight of quasi-public institutions or professionals, such as notaries). Surveys conducted by the Legal Transition Team on security enforcement, in 2003 and 2007, found that these new out-of-court modes of enforcement were working. But these surveys were conducted in benign times. From 2009 onwards the landscape was radically different.

**Catherine Bridge:** By the time of the financial crisis, the majority of insolvency law systems in the EBRD region provided for a moratorium on the enforcement of security following the opening of insolvency proceedings, and often also for any secured assets to be sold within the course of the proceedings. Interestingly, no real distinction appears to have been drawn in respect of the nature or type of insolvency proceedings, and whether such proceedings were aimed at restructuring (reorganisation) or liquidation. Furthermore, the recognition of insolvency as a (temporary) barrier to creditor-led security enforcement appears to have strengthened in the period before the financial crisis. A 2003 EBRD insolvency assessment found that just over half (16) of the countries assessed extended the moratorium on insolvency to include secured creditors. Yet by the time of the 2009 EBRD insolvency assessment, in over two-thirds of countries surveyed, an automatic moratorium or stay arose on the opening of the insolvency proceedings, preventing the enforcement of security. Enforcement in a distressed, insolvency scenario can be highly value-destructive, and many insolvency law frameworks during the financial crisis have proved to be particularly ill-equipped insofar as judicial restructuring is concerned. Consequently, many commercial insolvency law reforms over the last five years have focused on improving the prospects for business rescue in insolvency by encouraging early debtor and creditor action, and widening access to existing procedures for debtors that are at risk of insolvency.

### How effectively have banks been able to enforce their security interests during the financial crisis?

**Frederique Dahan:** The BEPS surveys shed very interesting light on the overall perception by banks of the effectiveness of the security enforcement system in their respective jurisdictions, especially when the results for 2011 are compared with those of 2004. In 2011, banks in a majority of countries either disagreed, or neither agreed or disagreed, with the statement that the law provides for an efficient enforcement of pledges – exceptions to this were in Belarus, Estonia, Georgia, FRY Macedonia, and Turkey, where banks were generally more positive. The same picture emerged regarding the enforcement of mortgages, with the exceptions of Estonia, Georgia, Jordan, FRY Macedonia, Slovakia and Turkey. However, pledge enforcement was already perceived as problematic in Albania, Belarus, Bosnia, Croatia, Serbia, and Russia in 2004. Similarly, banks were quite positive about mortgage enforcement in 2004, in Estonia, Latvia and Ukraine, but had a negative opinion of the law concerning the enforcement of mortgages, in Albania, Belarus, Bosnia, Bulgaria, Croatia, Czech Republic, Hungary, Lithuania, Romania and Russia. So, it seems that banks' perceptions of the enforcement system has worsened since the financial crisis, probably because of the bad experiences that banks had when trying to enforce their security interests. However, the awareness of banks of problems with enforcement existed before the crisis. Countries where we see a real shift in the perception of pledge and mortgage enforcement, from positive to negative are: Moldova, Poland, Slovenia, and Ukraine, and to a lesser extent in Kazakhstan and Slovakia. Therefore, the reforms of secured transaction regimes do not seem to have delivered the efficiency that was expected, although, of course, we cannot be sure that banks' lack of confidence in the legal mechanisms revealed by the BEPS survey for 2011 was not also due to other, non-legal, flaws, such as the lack of markets for assets and general depreciation in asset values.



Catherine Bridge,  
Principal  
Counsel  
EBRD



“In most countries banks appear to attempt first a restructuring of the loan before going down the enforcement route, since enforcement is often neither straightforward nor efficient.”

**Catherine Bridge:** Although this varies greatly from case to case, in most countries banks appear to attempt first a restructuring of the loan before going down the enforcement route, since enforcement is often neither straightforward nor efficient. Enforcement still requires a certain level of court involvement in many countries where the EBRD invests, and these proceedings can, of course, precipitate insolvency proceedings, which can then block the entire enforcement process. As alluded to by Frederique, market conditions are a significant concern for banks at present, and these conditions may have reduced the appetite of certain banks for enforcement – where the market for the relevant secured asset is illiquid or depressed, it is, of course, less likely that banks will be able to find willing buyers and realise the full value of their security in order to cover their exposures and any related sale costs. In the BEPS survey for 2011, all 611 banks surveyed across 32 countries where the EBRD invests confirmed that they would seek a consensual restructuring as a first resort. This was in the context of a hypothetical case study, in which banks were asked to consider a restructuring scenario where the borrower had lost one of its largest clients and, as a result, was not able to make any of the required monthly interest payments under the loan agreement. The responses from banks surveyed in the EBRD region are not significantly different from the responses of many banks in western Europe – rather than pulling the enforcement trigger and realising an immediate loss of value, many banks have simply amended and extended their loan facilities and have waited for the crisis to pass.

## What has been the impact of the financial crisis on banks' lending?

**Frederique Dahan:** Bank lending has been affected by a number of factors, starting with more stringent capital requirements. But there may also have been a retreat by banks from lending because of the way in which poor enforcement mechanisms have undermined the value of collateral. Although we do not have hard data to support this hypothesis, the BEPS survey shows that the rate of rejection of loan applications for lack of acceptable collateral increased between 2004 and 2011. In 2004 the most frequent reason cited for rejecting a loan application was a lack of cash flow or profitability of the borrower. The lack of acceptable collateral was cited as the most-frequent reason for rejecting a loan application by Belarus, Bosnia, Latvia and Russia, while it was also cited as a frequent reason by Bulgaria, Croatia, Kazakhstan, Lithuania and Serbia. However, by 2011, the lack of adequate collateral was cited as a frequent reason for rejecting a loan in all countries where the EBRD invests, with the exception of only Egypt, Mongolia and Tajikistan. In other words, banks seem to have reverted to a more conservative lending approach, which is collateral- rather than cash flow-based.

**Catherine Bridge:** Lack of liquidity and therefore low levels of bank lending is certainly a critical issue in most countries where the EBRD invests at present, particularly in the context of restructurings, where, without liquidity or fresh money, many borrowers find it very difficult to make the necessary investments in their businesses to generate profit. Sometimes, the reluctance to put in fresh money can be driven by legal impediments, such as claw-back or avoidance provisions in insolvency laws that would place that fresh money at risk, notwithstanding a valid underlying commercial purpose. To date, we have not seen significant steps in the EBRD region towards the statutory recognition of the priority of fresh money in insolvency proceedings of a reorganisation nature. Such recognition has been seen as important in jurisdictions such as the United States, in terms of encouraging the entry of fresh money at this difficult juncture.





Frederique  
Dahan  
Lead Counsel  
EBRD



“ There may also have been a retreat by banks from lending because of the way in which poor enforcement mechanisms have undermined the value of collateral.

Has the crisis affected the kind of security or collateral taken by banks? Do you see any regional differences or trends?

**Frederique Dahan:** Indeed, the BEPS survey shows an unequivocal trend. In 2011, in all countries surveyed, banks most-frequently require real estate and personal guarantees as security. The only countries to report a slightly different lending approach were Belarus (where collateral over equipment and vehicles and inventory is more common), Egypt (where banks take a more diverse range of collateral, and are frequently prepared to lend to small and medium-sized enterprises unsecured), and Lithuania (which also has a more diverse range of collateral). This is to be contrasted with 2004, where the range of collateral taken by banks was much wider. For instance, in Poland, banks frequently took security over all types of assets, while in Hungary and Lithuania, banks reported less-frequent collateral taking. We see a shift of banks towards more traditional types of security. Whether this a permanent change or a mere swing of the pendulum is too early to say.

To what extent are banks willing to negotiate the terms of a financial restructuring with distressed borrowers? What kinds of measures will they typically consider?

**Catherine Bridge:** Financial restructurings typically take the form of a rescheduling of principal and/or interest payment dates; that is, pushing out the overall term of the debt. In cases where the borrower is significantly overleveraged, restructurings may also look to lower the overall debt burden to a sustainable level, either by cutting interest or, more radically, reducing principal (the so-called “haircut”). Additionally, in an illiquid market, banks are also looking to debt for equity swaps, frequently as an alternative to a haircut on their loan, as

this enables them to benefit from any future equity upside when the market recovers. In the EBRD region it appears, unsurprisingly, most common for banks to extend the overall term of the loan when restructuring. There is a general unwillingness among banks in many countries where the EBRD invests to agree to any voluntary reduction in principal; often there are internal constraints within the bank, as well as potential accountability of employees. In the BEPS survey for 2011, only in very few countries (six out of 32) did a majority of banks say that they would consider a voluntary reduction of principal. Banks in most countries said that they would either not agree to a voluntary reduction of principal (14) or that a voluntary reduction of principal was non-applicable (nine). Extension of loan maturities and reduction of interest margins – both of which still can make the loan much more expensive for the bank to carry on its books – are not perceived to be as problematic as a reduction in debt principal.

How aware are management of banks of judicial reorganisation or restructuring within the context of insolvency proceedings?

**Catherine Bridge:** Management awareness appears to depend very much on the country and the prominence of judicial reorganisation or restructuring, and how widely this mechanism is used. In some countries – specifically Morocco and Tunisia, which have French law-inspired judicial reorganisation procedures – banks appear to be fully aware of reorganisation in insolvency, perhaps since many such procedures favour debtor reorganisation and limit creditor rights, particularly in respect of enforcement of security. In countries where the BEPS survey revealed a low level of awareness of judicial reorganisation among senior bank officials (such as in Russia), this may be due to the fact that this is rarely used in practice. A number of countries where the EBRD invests still have very liquidation-focused insolvency systems. Judicial reorganisation procedures may exist on paper but for a number of reasons – including cultural, legal and, often, institutional – there is a failure to

encourage reorganisation or restructuring within insolvency. Of course, judicial reorganisation is often very difficult to achieve because of the vulnerabilities of the business within insolvency proceedings. Judicial reorganisation is also a developing area, and stakeholders in a number of countries have been required to familiarise themselves with completely new reorganisation-type insolvency procedures, including those aimed at pre-insolvency reorganisation, such as the recently introduced Croatian Pre-Bankruptcy Settlement Act or the Serbian Consensual Financial Restructuring Act.

handle the growing volume of insolvency cases. Consequently, some countries have attempted to develop restructuring frameworks outside of the courts. For example, in Serbia, the National Chamber of Commerce and Industry was used as an institutional mediator in restructuring cases; while in Croatia, regional “Financial Agencies” (administrative agencies that deliver a wide range of services to corporate and retail customers) were used as a first stage for pre-bankruptcy settlement proceedings. These initiatives are relatively new and, with time, may be helpful, but they cannot replace existing insolvency procedures and the need to strengthen the capacity of the courts.

### Were any lessons learned from the EBRD's perspective?

**Frederique Dahan:** Yes. Banks' perceptions of legal enforcement mechanisms were already negative in some cases in 2004, but it has worsened in some countries. Thus, more work will be needed in this respect. Furthermore, negative perceptions exist even in countries that have adopted out-of-court enforcement mechanisms, demonstrating that these mechanisms are not always viable and may need re-visiting. The financial crisis also appears to have had an impact on the acceptance of loan applications and supporting collateral and, more generally, on the collateral requirements for SME lending. It is difficult to counteract this retreat when financial institutions become bearish, but this also points to the need to develop other sources of capital for SMEs – perhaps private equity or, for the larger medium-sized enterprises, even capital markets.

**Catherine Bridge:** As mentioned earlier, the financial crisis has revealed real weaknesses among many EBRD countries regarding reorganisation/restructuring within insolvency, and also in the capacity of the courts, and these issues can undermine attempts to introduce more flexible legislation, which would require a certain element of court discretion; for example, determining creditor classes and the overall fairness of a reorganisation plan. Insolvency tends to be a judicially driven process in the EBRD region, and courts have struggled to

### How will these lessons shape EBRD policy dialogue and technical assistance?

**Catherine Bridge:** The financial crisis has brought insolvency and restructuring, as well as security enforcement, to the fore, and has shown how important it is to have proper insolvency and secured transaction legal frameworks. These frameworks form part of the overall investment climate, and are likely to be considered by every prudent investor undertaking a transaction in a particular jurisdiction. The Bank's focus continues to be two-fold: providing technical advice and assistance on the legal framework itself; and strengthening the institutional players and professionals at the heart of the proceedings. In respect of insolvency matters, the Bank is taking a particular interest in pre-insolvency, out-of-court, initiatives, given the need to act early to resolve financial distress and preserve value. This opens up the possibility of new partnerships with central banks and other players, aimed at promoting out-of-court reorganisation.



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# 7

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## A new enforcement system in Serbia: one year on

LJUBICA PAVLOVIC

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One of the key policy choices for governments is whether to introduce private enforcement agents. Serbia adopted a private system in 2011. This article examines the success of Serbia's private enforcement agents system, as well as some of the difficulties that have arisen. It provides a useful insight for other countries considering the potential advantages and disadvantages of private enforcement agents.



Throughout its history the Serbian judicial system has had to contend with radical legislative reform, and the area of enforcement law is no exception. Special legislation pertaining to enforcement of judicial decisions and legal titles dates back to the time of the Kingdom of Yugoslavia (1930). The newest piece of legislation is the Law on Enforcement and Security (LoES), adopted in 2011. The LoES introduced private enforcement agents into the judicial system, as an independent, judicial profession.

Enforcement agents commenced activities under the regulation of the LoES in 2012. The intention of the legislature was that private enforcement agents, vested with powers of the state, should contribute substantially to the establishment of the rule of law, and increase the levels of accountability and effectiveness in enforcing judgments and protecting people's rights. Indeed, most countries which introduce private bailiffs do so for reasons of efficiency,

with state-employed bailiffs being seen as too slow or lacking in incentives to perform to a high standard. However, such considerations must be balanced against fairness for debtors. After only one year of operation it is difficult to draw firm conclusions about the success of the legislation, due to the lack of official statistical data and any comprehensive analysis of the new enforcement system in Serbia. However, some preliminary conclusions can be drawn, and these are presented here.

### **Inadequate legislative framework**

While the introduction of private enforcement agents promises greater efficiency, there are a number of concerns related to perceived deficiencies in the LoES. These concerns relate to the fields of both legal practice and legal theory, and to their impact on the general public. The Serbian Minister of Justice and Public Administration asked for the Council



In regional parts of Serbia there appears to be little interest or incentive for those with legal training to take up the profession of enforcement agent.

of Europe's legal opinion on the planned amendments to the LoES. In the Council of Europe Opinion of May 2013,<sup>1</sup> the following was concluded in relation to the LoES:

*Only a year has passed since the introduction of the Law on Enforcement and Security. Already from the start, it became clear that some of the changes in the structure of the enforcement process were too ambitious (e.g. no possibility to postpone enforcement, no expert testimony, limited grounds to object to an enforcement ruling, breach of judicial duty in case a judge did not meet a deadline).*

The Serbian legal profession emphasises the following shortcomings of the LoES:

- The inability to delay enforcement even in a case of obvious shortcomings in proceedings. The Ministry of Justice and Public Affairs (MoJPA) and the Ombudsman have received a number of citizens' complaints in relation to this shortcoming.
- The inability to formally exempt (or disqualify) an enforcement agent (for example by reason of conflict of interest).
- The absence of the application of the principle *restitutio in integrum*<sup>2</sup> (that is, the reinstatement of the status quo ante for certain prescribed reasons is not permitted).
- However, the most serious concerns relate to the lack of appeal as an effective legal remedy, and the absence of two-tiered decision-making (appeal to an administrative body, then to a court), which can seriously compromise the basic human rights guaranteed by the Constitution of Serbia<sup>3</sup> and the European Convention on Human Rights, such as the right to access to justice, the right to an effective legal remedy and the right to a fair trial within a reasonable time. Many objections related to the monopolisation of enforcement agents' jurisdictions, which in some cases led to speculation about possible corruption in utility companies (refer to the section below, *Private enforcement agents – pros and cons*).

It should also be mentioned that important questions of regulation and status, such as

election, dismissal, liability, and rights of association of enforcement agents, should be regulated by special legislation, as is the case in other legal professions. This is particularly relevant for private bailiffs, who, unlike state-employed bailiffs, are not otherwise regulated by public service legislation. Respected lawyers have commented that the legislature's failure to address the issue of ethics on a legislative level is a major concern, and that this should be addressed through legislative amendment of the LoES, or through a new, separate enactment covering these issues.

### Professional profile of an enforcement agent

The profession of private enforcement agents is an independent legal profession. However, despite the concerns about under-regulation just mentioned, enforcement agents are still under the supervision of the state – that is, the MoJPA – which reflects the prevailing European enforcement model.

Under this system, private enforcement agents are persons vested with public authority who, in addition to having a law degree and passing an examination for obtaining the certificate for enforcement agents, have some work experience in enforcement activities. They must also meet a number of other terms and conditions,<sup>4</sup> which relate to organisational requirements (for example, they must work in properly equipped premises and hold mandatory professional indemnity insurance). The enforcement agents are responsible for the professional standard of their work and – to the extent of all of their personal assets – for possible damages to third parties. Enforcement agents are appointed and dismissed by the Minister of Justice.

There are presently approximately 130 enforcement agents in Serbia, roughly one-third of the anticipated number of 334. The Rulebook on the Number of Enforcement Officers<sup>5</sup> stipulates that one enforcement agent shall be appointed per 25,000 inhabitants. The majority of enforcement agents have been appointed for the areas of the four major cities in Serbia – the capital, Belgrade, Novi Sad, Nis and Kragujevac. However, in other, more regional parts of Serbia, there appears to be little interest (and perhaps incentive) for those with





Competition between the courts and enforcement agents (and between enforcement agents) should lead to increased quality and efficiency in the protection of individuals' rights.

legal training to take up the profession of enforcement agent. The new enforcement system has not even “touched” those areas of Serbia. In these regions parties have no avenue for the enforcement of their claims other than through the courts. This shows the potential limitation of market forces in the profession, and the need for an ongoing role for the state to cover the gaps.

### Competitiveness in the service of efficiency

As is evident from the above discussion, the government has opted for a dual system of enforcement, meaning that enforcement within the courts still exists parallel with the private enforcement agent system. However, the two jurisdictions are differentiated, in the sense that there are some exclusive competences of the courts, such as enforcement in family cases and in labour cases related to the return of an employee to work. On the other hand, private enforcement agents have some exclusive competences, such as the enforcement of certain monetary claims; for example, utility fees. In all other areas of enforcement creditors may choose the way the enforcement will be conducted: either by the courts or through private enforcement agents. Competitiveness between the courts and enforcement agents (and between enforcement agents) should lead to increased quality and efficiency in the protection of individuals' rights. Through the direct impact of the enforcement agents system on the reduction of the backlog of cases in the courts, the system should also improve the efficiency of the judiciary overall.

There are great discrepancies in qualifications between the court enforcement officers and enforcement agents.<sup>6</sup> Court officers are generally educated only to secondary school level, and are generally seen to be demotivated due to low salaries and significant workload. They do not usually receive any training, and have no possibilities for professional improvement. Conversely, enforcement agents have advanced professional qualifications, and consequently may provide a higher level of quality in their work than court officers.<sup>7</sup> Furthermore, they have better financial motivation due to substantial awards available for successful execution, which are considered attractive given Serbia's uncertain financial situation.

### Private enforcement agents – pros and cons

The abovementioned exclusive competences of enforcement agents have been subject to public debate. One focus of concern was the potential that utility companies' rights to choose an enforcement agent might lead to corruption. Media have reported on some suspicious situations in which directors of utility companies assigned thousands of cases to only one enforcement agent, thereby placing other enforcement agents in an unequal and less competitive position, rendering them jobless for extended periods of time (monetary claims – especially regarding utility bills – are by far the most numerous enforcement cases). Despite the significant probability of abuse in such cases, the conduct of utility companies' directors cannot be challenged on legal grounds because there appears to be no tangible evidence of their corruption.

Some respected Serbian lawyers<sup>8</sup> contend that, despite the alleged problems of corruption, the assigning of a case to a particular enforcement agent should not be done on a random basis, as judges are allocated to cases in the courts. The intention of the legislature was not to provide random allocation of bailiffs, but rather to introduce fair and professional competition between enforcement agents, striving to achieve permanent improvement in their quality and performance. These lawyers' opinions support the position that competition, and the possibility of choosing an enforcement agent according to their qualifications, is productive and healthy for the entire enforcement system, and that any move by the state to curtail this would be contrary to the legislative purpose of introducing private enforcement agents.

It appears that competition between enforcement agents should exist on the basis of improving the quality of their work, professionalism, efficiency and effectiveness. However, if that possibility is abused, including through corruption, the reputation of this young profession may be seriously undermined.



The European Union allocated €1.8 million through its Instrument for Pre-Accession Assistance to support Serbia's new enforcement system.

### Ongoing capacity building of the main stakeholders in the Serbian enforcement system

The Chamber of Private Enforcement Agents (the Chamber) was formed in May 2012 as the new professional body for private enforcement agents. The LoES stipulates mandatory membership of enforcement agents in the Chamber. It is still a young professional association, which was supported from its establishment both by the state and the international community. Capacity building within this institution is an ongoing process, which is strongly supported by the GIZ Legal Reform Project in Serbia (GIZ LRP)<sup>9</sup>. The EU allocated €1.8 million through its Instrument for Pre-Accession Assistance (IPA) to support Serbia's new enforcement system. These funds were for the introduction of the private enforcement system, where a contract was awarded to GIZ LRP for the implementation of the project, "Support to the Rule of Law System in Serbia – Enforcement of Civil Claims" (the IPA Project). The IPA Project has a 27-month duration, and will be implemented until the end of 2015.

The focus of the IPA Project will be on building the capacity of the MoJPA (the unit responsible for monitoring the new professions in the justice sector – enforcement agents and notaries), the Chamber and enforcement agents individually. In respect of the latter, the IPA Project will focus on improving enforcement agents' legal and professional expertise in enforcement and on their related skills. Special attention will be given to developing ethical standards in the profession. In addition, the IPA Project will support the capacity development of the Disciplinary Commission responsible for conducting disciplinary procedures against enforcement agents. At the time of writing, two procedures against enforcement agents were pending before the Disciplinary Commission, which were based on findings of the MoJPA supervisory unit. This is an early indication that oversight mechanisms are functioning well.

### Strategic national approach to enforcement agents

Support to enforcement agents was recognised as one of the priorities within the country's main, strategic judiciary-related national

document – the National Judicial Reform Strategy 2013-2018 (NJRS)<sup>10</sup>, adopted by the government in July 2013. The Strategy envisaged a set of reform measures which should improve the independence, transparency, competency, accountability and efficiency of the Serbian judiciary, including support to the new professions: enforcement agents and notaries. However, this document is vague and general in relation to finances; there is no specified budget for any of the envisaged activities, so it is difficult to determine a sufficient budget for achieving an efficient and accountable enforcement system in Serbia. Although the absence of a financial section in the NJRS indicates a somewhat superficial and inadequate approach to this policy area, the adoption of the NJRS does clearly indicate the government's good intentions – notwithstanding the limited state capacity for supporting enforcement agents – and the strategy explicitly calls for urgent support from the international community. Fortunately, donors – particularly the EU and GIZ LRP – have responded to these calls.

The budget-related deficiency of the NJRS is also reflected in the Action Plan for Implementation of the NJRS,<sup>11</sup> adopted in September 2013. Nonetheless, that document has developed a number of activities for the improvement of the enforcement system, which could serve as a roadmap for interested donors. Considering the backlog of 3 million unenforced cases in the Serbian judiciary at the beginning of 2013,<sup>12</sup> it is not surprising that enforcement agents were afforded such a prominent place in national strategic documents.

### Enforcement agents and European integration

Serbia was granted EU candidate status on 1 March 2012, and the process of membership negotiations started on 28 June 2013. The review of the alignment of national legislation with the EU *acquis communautaire* (screening) started in September 2013. The EU's screening report is expected in the second quarter of 2014, and should define opening benchmarks as a precondition to further steps in the European integration of Serbia. It is expected that action plans for the judiciary, including enforcement agents, will be the opening benchmarks, and their proper implementation will be an essential pre-condition for Serbia's further progress

under Chapter 23 – Judiciary and fundamental rights. The screening report is likely to raise the importance of an effective and accountable system of private enforcement agents. This will place Serbia's enforcement agents firmly in the spotlight of European integration.

## Conclusion

As mentioned, it is too early to draw firm conclusions about the success of the LoES, or about the future of the newly-introduced enforcement system in Serbia. The main objectives of the regulation of enforcement agents should be improving the Serbian legal system through the effectiveness and efficiency of enforcement agents, improving legal certainty and trust in the Serbian legal system (for both citizens and investors), and, as an indirect outcome, increasing foreign and domestic investment in the national economy.

It is not an easy task to build a new legal institution, but there is reason for confidence that Serbia's EU integration will inspire common efforts between Serbia and the international community to make enforcement agents a successful example of transitional justice.

## Notes

- <sup>1</sup> Council of Europe, Opinion of the Directorate General Human Rights and Rule of Law; Justice and Legal-Co-operation Department – Draft Amendments and Supplements to the Serbian Law on Enforcement and Security. DGI (2013)7 of 24 May 2013.
- <sup>2</sup> F. Rudić, Ristić J. "Privatni izvršitelji: Prvih godinu dana rada", available at: <http://www.euractiv.rs/vladavina-prava/5979-privatni-izvritelji-prvih-godinu-dana-rada-.html>, accessed on 26 November 2013.
- <sup>3</sup> The Constitution of the Republic of Serbia, "Službeni glasnik RS" No. 98/2006.
- <sup>4</sup> N. Šarkić and Nikolić, M. (2006), "Sudski izvršitelj – bailiff: da ili ne?", *Pravni život*, No. 12, pp. 227-42.
- <sup>5</sup> Rulebook on the Number of Enforcement Officers, "Službeni glasnik RS" No. 16/2012.
- <sup>6</sup> N. Planojević (2013), "Private bailiffs as partners of the Serbian state", *International Journal of Public Sector Management*, Vol 26 No. 2, pp.127-34.
- <sup>7</sup> M. Milosevic (ed.) (2010), "Priručnik za izvršitelje: odabrane teme za praktičnu primenu propisa o izvršenju", USAID – Program za reformu stečajnog i izvršnog postupka, Beograd, 2010.
- <sup>8</sup> M. Milosevic and Šarkić, N. "Analiza efekata Zakona o izvršenju i obezbeđenju". GIZ LRP, October 2013.
- <sup>9</sup> The Project is funded by the German Federal Ministry for Economic Cooperation and Development (BMZ), and supported by its political partner, the Serbian European Integration Office (SEIO).
- <sup>10</sup> The National Judicial Reform Strategy, available at: <http://www.mpravde.gov.rs/en/vest/3394/the-national-judicial-reform-strategy-for-the-period-2013-2018-.php>, accessed on 29 November 2013.
- <sup>11</sup> The Action Plan for Implementation of the National Judicial Reform Strategy, available at: <http://www.mpravde.gov.rs/en/vest/2906/action-plan-for-the-implementation-of-the-national-judicial-reform-strategy-for-the-period-2013-2018-.php>, accessed on 30 November 2013.
- <sup>12</sup> Supreme Court of Cassation, "Analysis of the Work of Courts in 2012", available at [http://www.vk.sud.rs/assets/files/izvestaji/godisnji\\_izvestaj\\_o\\_radu\\_2012.pdf](http://www.vk.sud.rs/assets/files/izvestaji/godisnji_izvestaj_o_radu_2012.pdf), accessed on 28 November 2013.

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# 8

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# Strengthening enforcement of court decisions in Mongolia

CARLOS ESCUDERO AND ALTANGEREL TAIVANKHUU<sup>1</sup>

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This article examines the enforcement of court decisions in Mongolia through the prism of recent efforts to improve the legislative framework and the institutional capacity of the Mongolian enforcement agency. The EBRD is collaborating with the Mongolian authorities in their response to these challenges.



As in many transition countries, in Mongolia the non-enforcement of court decisions remains a key obstacle to investor confidence. Litigants and lawyers attest to lengthy delays, a large number of unenforced judgments and debtors who hide assets and evade court orders. Research shows that strong institutions are especially important in managing a resources boom, such as that presently being experienced in Mongolia. Commodity-rich countries with weak institutions are at risk of being caught in an “institutional trap”, which is characterised by a vicious cycle of weak institutions and a lack of incentives for improving them. This underscores the importance of Mongolia building strong institutions, including in relation to the implementation of court decisions.

The General Executive Agency of Court Decisions (the Agency) is the Mongolian government bailiff service, which has been responsible for the enforcement of court decision since 1996. The Agency has powers to search for, seize and

sell at auction the assets of judgment debtors, in accordance with the Law on Enforcement of Court Decisions (the Enforcement Law). The Agency’s staff of 270 has a very large workload, and although the enforcement rate has improved marginally in recent times, each year sees over fifty per cent of court decisions remaining unenforced (see Chart 1). While limited resources are certainly one factor affecting the Agency’s capacity, legislative and institutional issues play a significant role.

In February 2013, in response to a request from the Mongolian authorities, the EBRD undertook an assessment of the organisational and institutional needs of the Agency, and critically reviewed the Enforcement Law and other legislation affecting the enforcement of judgments, focusing in particular on enforcement of judgment debt in commercial cases. In September 2013 the Bank submitted a report (the report) to the Agency on legislative reform and institutional





In Mongolia the non-enforcement of court decisions remains a key obstacle to investor confidence.

development measures that could enhance the effectiveness of the Agency. This article sets out some of the key issues identified in the report.

### Improving the legal framework

#### (a) Limiting appeals

The Mongolian enforcement system is plagued by a large number of appeals brought by judgment debtors at various stages of the enforcement process. Limitations on the rights to challenge the enforcement process need to be clarified and strengthened in several ways. First, appeals to courts should only be available once the existing administrative dispute resolution process – which involves a simple and relatively quick process of submitting a complaint to the Chief Enforcement Office – has been exhausted. Second, a large number of appeals relating to valuations are made under section 34.5 of the Enforcement Law. Many of these appeals also ask the court to reconsider the validity of the underlying enforcement order, and can result in the entire enforcement process starting again. The ambiguity in the legislation – stemming from section 143, which seems to confer an open-ended right of appeal to a court – needs to be addressed. In addition, the report recommended that courts be given express powers to strike out vexatious claims and to award costs against those who bring them.

#### (b) Accrual of interest

Currently, while interest on a substantive legal claim can be awarded by a court and included in the court's judgment, such interest ceases to accrue on the date the decision is handed down. The Civil Procedure Code does not recognise the accrual of interest on unpaid judgment debt

(s63.1.1). Thus, there is no financial incentive for voluntary compliance with court orders. The report recommended that the Civil Procedure Code be amended to provide that interest continue to accrue from the date the court's decision comes into force and cease to accrue when the judgment debt is satisfied. This would discourage dilatory practices by debtors. Interest would be fixed at an easily identifiable default rate. At the same time, in cases where a debtor issues an appeal against the Agency in relation to a step in the enforcement process, and such an appeal is upheld, no interest would accrue during the period of the delay caused by the Agency.

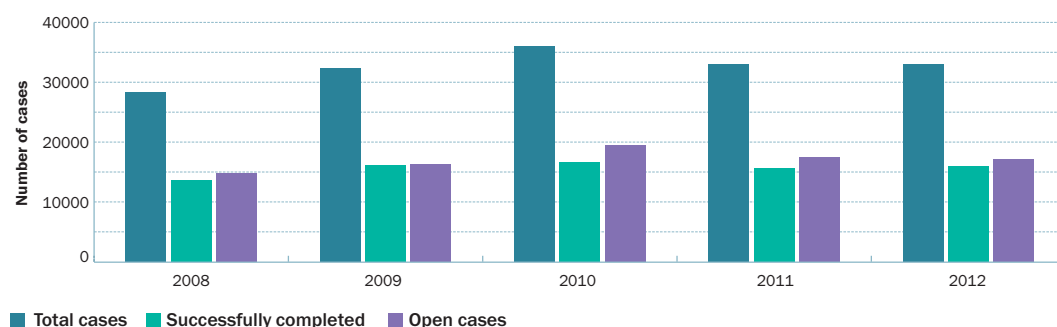
#### (c) Agency access to registries

Under the current regulatory regime bailiffs do not have direct access to key registers which record details of ownership rights that are needed by bailiffs seeking to identify and seize assets. These include, for example, the General Authority for State Registration (GSAR) established under the Ministry of Justice, the Land Registration Office (LRO) and the Mineral Resources Authority (MRA). To obtain access to these registers, bailiffs must file a written application, like any other citizen. Easy access to this information would speed up the process of obtaining information on judgment debtors' property. This is currently possible in the case of the movable property register under the Ministry of Transport. Recommendations were made to provide the Agency with expedited access to these electronic registers, through appropriate amendments to the Enforcement Law.

#### (d) Access to bank accounts

Similarly, bailiffs require prompt and effective access to information about bank accounts held

Chart 1. Rates of enforcement of court decisions by the Mongolian Enforcement Agency, 2008-12



Source: General Executive Agency of Court Decisions, Mongolia.



The Mongolian enforcement system is plagued by a large number of appeals brought by judgment debtors at various stages of the enforcement process.

by judgment debtors. Presently, access to such information is frequently denied on the basis of confidentiality rules set out in the banking legislation. Discussions with banks and financial institutions suggested that the legal position was unclear at best, and institutions feared breaking the law by cooperating with bailiffs. The report recommended that the Banking Law be revised to expressly allow bailiffs access to appropriate information. Furthermore, banks and other financial institutions should have an obligation to cooperate with the Agency, and in particular to provide the relevant information promptly when required. It was also suggested that failure to provide the information within 24 hours of being requested should give rise to the possibility of penalties being imposed by the Bank of Mongolia.

The report suggested that, in order to safeguard public confidence in confidentiality of information, the Agency be required to prepare a formal written request to the relevant institution, signed by the CEO of either the Ulaanbaatar City office, or the relevant provincial (*Aimag*) office, of the Agency, according to the location of the matter. This formal request would be required to indicate the court case number, the enforcement order date and the number issued by the bailiff, as well as the name of the defendant/debtor. The form of request for information would need to be capable of being served on all banks and financial institutions operating in Mongolia.

#### **(e) Issues with mining licences**

There is a need to establish procedures for bailiffs to seize and sell mining licences. This is not currently possible. First, the Mining Law does not expressly allow for the transfer of a mining licence, as licences are granted to specific entities and individuals which satisfy certain legislative requirements. This problem could be overcome by amending the Mining Law to permit the transfer of licences, subject to the Mineral Resources Agency approving or confirming the transferee's eligibility to hold a licence. Amending the Mining Law in this way could also facilitate the pledging and realisation of mining licences outside the context of enforcing judicial decisions. Amendments could also confirm the Agency's right to seize and sell mining licences at auction in accordance with the usual auction practices.

#### **(f) Improving the auction procedures**

The current rules concerning the auction procedure for seized property are very restrictive

in three important respects. First, they require that the reserve price be no lower than the creditor's claim under the court's judgment, plus enforcement costs. Second, the property cannot be sold unless the reserve price is reached. Third, the rules require more than one bid in order for the auction to be valid. These arrangements are not sufficiently flexible to take into account weak demand.

The report recommended that article 177(4) of the Civil Code be amended so that property being auctioned can be sold at the best offered price. If the price offered is not sufficient to cover the costs related to organising the auction and meeting the creditor's demand, the creditor would have the right to take possession of the property, in which case the debtor's obligation would be considered satisfied. In addition, the report suggested that article 197 of the Civil Code be amended to provide that an auction with a single bidder be considered valid. Of course all efforts must always be made to advertise an auction with sufficient notice and in an appropriate manner so as to attract a large pool of bidders.

### **Strengthening the Agency**

While the legislative concerns identified above certainly contribute to the difficulties experienced by judgment creditors in obtaining payment, they do not tell the whole story. Institutional impediments at the Agency must also be taken into account. In large measure these are connected to the historically low levels of material and human resources available to the Agency. Low salaries and limited facilities and equipment make a bailiff's job very difficult, particularly in remote areas. For example, in the Dornod Aimag, in far eastern Mongolia, the Agency has only two vehicles, neither of which is presently in running order.

Nonetheless, despite the material constraints, certain institutional changes could be made, and these could make a big difference to strengthening certain aspects of enforcing judgments.

#### **(a) Training**

The Agency does not have a systematic programme of training, which results in an uneven level of professional skills in its staff. In each of the past two years the Agency has organised its own, ad hoc, training, in cooperation with other government agencies and departments. However, with no international



Low salaries and limited facilities and equipment make a bailiff's job very difficult, particularly in remote areas.

input, and with a limited budget, the training sessions have not produced high quality results. The Agency recently conducted a human resources study and survey of its staff, and the results confirmed inadequate levels of professional training. A key recommendation in the report was to systematise compulsory initial and ongoing training for Agency staff, and the creation of a pool of dedicated trainers who could assist in the delivery of such training.

Training is particularly needed to develop professional skills in seizing real and movable property, including livestock, and similar skills in seizing intangible property, such as securities. In addition, greater understanding is needed in relation to dealing with issues of joint ownership of property and third party interests. Training also needs to take into account the profile of enforcement case files, and the different enforcement practices, techniques and skills required of different case types. The vast majority of cases relate to civil court cases, but significant numbers of cases concern child support payments and criminal matters (see Chart 2).

#### (b) Organisational structure

The Agency is organised as a single state entity with jurisdiction for both criminal and civil matters, with separate criminal and civil divisions. The criminal division of the Agency tends to dominate, in terms of both resources and prestige. In terms of prestige, enforcement agents working in the criminal division wear uniforms and have ranks with military equivalents, culminating in “general”, which carries a high status in Mongolian society. The Ministry of Justice has been considering a proposal to formally split the Agency's two

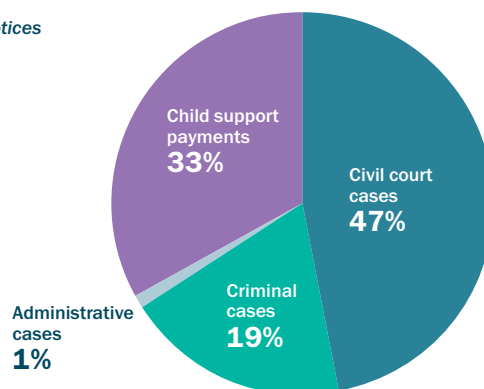
divisions into separate entities. This idea has a lot to recommend it. It could strengthen the effectiveness of each new organisation by instituting distinct areas of work and specialisation of functions, which could contribute to more timely and effective enforcement of court decisions. However, having separate bodies could erode economies of scale, which might disproportionately affect remote areas, which are served by a small number of bailiffs, each responsible for entire regions. Special allowances would need to be made for such areas.

#### (c) A role for private enforcement officers?

An important reform question is whether the enforcement of civil court decisions should remain under a state body or should be managed (wholly or partly) by a private entity or entities, perhaps under the supervision of the Ministry of Justice or the Judiciary. The reform experience of a number of transition countries indicates that there is merit in allowing the private sector a role in the enforcement of court decisions. It can be questioned, philosophically, whether the state should have a role in enforcing the result of a private dispute between private parties. The limited academic literature on this issue expresses support for some level of private bailiff function in relation to the enforcement of civil matters, in order to provide competition and incentives for good performance. Equally, there are some types of enforcement matters which would not be profitable, and therefore the state would need to retain a role in ensuring the provision of services. This is also likely to be the case generally in the Aimags. Accordingly, the introduction of private operators in the Mongolian context would need to be approached cautiously.

Chart 2. Case profile of Mongolian enforcement notices, 2012

33,031 enforcement notices were issued in 2012



Source: General Executive Agency of Court Decisions, Mongolia.

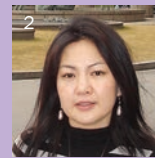
## Notes

<sup>1</sup> The authors acknowledge the contribution to this article by Alan Colman, Principal Counsel, EBRD.

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### (d) Performance evaluation

The Agency does not have established criteria for evaluating the performance of bailiffs, and in the civil division there is no structured process, nor are there any criteria, for assessing bailiffs for promotion and other professional reward. The report suggested that criteria be established, and that statistical data, as well as qualitative dimensions, be incorporated into the evaluation process. This would assist the Agency to review individual performance, and to analyse how case mix and geographical considerations affect the performance of bailiffs. Certain types of matters are more challenging than others, which may affect the opportunity for bailiffs handling these matters to earn bonuses (see below) or other reward. These factors may also affect professional motivation. As a response to these issues, a formal matter allocation system may need to be developed, which incorporates rotation through different categories of matter. Rotation within an Aimag and between Aimags might be more difficult to manage due to the small number of bailiffs assigned to each Aimag.

### (e) The bonus system

The present bonus system is an economic incentive established under the Enforcement Law. It is paid by the judgment creditor to the Agency as a percentage of the amount recovered from the defendant. There is a consensus among officials at the Agency that the bonus system has been ineffective as a motivational tool for enforcement agents. This is because a large percentage of the bonuses collected is applied to financing the Agency's regular operational and maintenance costs, which depletes the amount available for distribution to enforcement agents as incentive awards. There is no suggestion that the present arrangements are extra-legal; the application of bonus funds for general budgetary purposes has been sanctioned by a government decree. However, the remaining funds are insufficient to satisfy bailiffs' expectations. A new approach is needed in creating incentives, which could embrace non-monetary incentives, such as additional leave. A further complication is that the paying of bonuses to bailiffs, who are public servants, has attracted public criticism; the suggestion is that public employees should not receive additional benefits in reward for merely doing their job. This has perhaps dampened official enthusiasm for rectifying the problems with the bonus system. If this is the case, it may be another argument in favour of allowing the private sector a role in the enforcement of judgments.

## Conclusion

Bailiffs and enforcement agents have, until recently, received relatively little attention from international organisations that support development in the justice sector. In Mongolia, while donors were quick to commence engagement with the courts after the fall of communism, the Agency received no outside support until the early 2000s. However, this is an area that is now beginning to receive greater prominence in transition countries. In Mongolia an EBRD project to assist the Agency to implement institutional reforms, and to work with the government on the suggested legislative amendments, is expected to commence in 2014.

# 9

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## The bailiff profession in Poland

RAFAL FRONCZEK

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The role of enforcement agents in Poland is both highly professionalised and highly regulated. It is subject to rigorous training and entry requirements, as well as supervision at the government, court and industry levels. Reforms to the profession, which started in the 1990s, are continuing.





The bailiff's job is difficult – and often unrewarding – but it is a necessary job nonetheless when a debt needs to be enforced. The profession of a bailiff plays a huge role in the judiciary system, since stable enforcement of judicial decisions guarantees economic stability. Efficient enforcement of judicial decisions, especially those pertaining to business activity, is a warranty of economic safety, but most of all a warranty of the state under the rule of law, because a bailiff's work implements decisions contained in a verdict of a court.

In Poland, the profession of court bailiff has been continuously evolving. Until 1989, court officials supervised the enforcement of the court's judicial decisions. From the fall of communism until 1997, court bailiffs were full-time employees of the court, responsible for enforcement activities. Court bailiffs would receive remuneration from the court, while being responsible for the organisation of enforcement

activities; bailiffs would hire employees and incur the running costs of enforcement.

The Court Bailiff and Enforcement Act of 29 August 1997 (the Act) introduced a new organisational model for the profession of court bailiff in Poland. These reforms arose from the necessity to improve the efficiency of enforcement activities in the country's dynamically developing economy. The Polish Ministry of Justice considered two possibilities for regulating the bailiff profession: adopting the German system, where court bailiffs are state officials and employees of the court, whose decisions they implement; or the French system, where court bailiffs perform a public function, but are not officials – they perform activities on their own account.

The French concept prevailed, and so today in Poland a court bailiff is a public officer. A bailiff enforces judicial decisions, but is not a full-time



The bailiff's job is difficult – and often unrewarding – but it is a necessary job nonetheless when a debt needs to be enforced.

employee of the court or of any other public body. Bailiffs are public officers, running their own bailiff office – a professional practice, similar to a notary. Every court bailiff is registered in one district court, but can perform enforcement activities across the entire country, excluding the execution of real estate. Court bailiffs only perform executions of real estate for judicial decisions regarding the geographic area in which they have been registered by the district court (the area in which a bailiff has been registered by the district court is called a bailiff's district). A court bailiff in Poland performs a profession of public trust and, as a public officer, exercises powers similar to the state administration, within the scope of enforcing courts' decisions. A court bailiff carries an identity document, similar to state service employees and inspectorates, and uses a round official stamp.

However, these are the extent of the similarities. Court bailiffs receive a decision to enforce and run enforcement proceedings based on that judicial decision; they are not authorised to check the legitimacy of a verdict or the maturity of the debtor's obligation. The law stipulates that court bailiffs shall carry out procedures personally and on their own account under the performed activities. This means that, within the

scope of taxes and social security contributions, the same regulations apply to bailiffs as to entrepreneurs – that is, as people operating businesses. The same applies in respect of responsibility for enforcement activities; as bailiffs operate on their own account, rather than on the account of the court whose decisions they enforce, they bear full civil liability for the performed enforcement activities. Because of this, the court bailiff has the obligation to enter into professional indemnity insurance in relation to enforcement activities, undertaken by the bailiff, as well as those resulting from the actions of any employees hired by the bailiff's office.

### How to become a bailiff in Poland

In order to practise in the bailiff profession, higher education and relevant work experience is required. The legal basis for this is the Act. The procedure for appointing and dismissing court bailiffs is regulated by the Act, which is why court bailiffs in Poland – public officers – practise a regulated legal profession. Becoming a bailiff in Poland requires the completion of higher education in law and a two-year traineeship, during which the trainee is introduced to the profession.





As bailiffs operate on their own account, rather than on the account of the court whose decisions they enforce, they bear full civil liability for the performed enforcement activities.

In order to begin bailiff traineeship, the candidate must pass a competitive exam with high marks. Upon completing the first year of the traineeship a court bailiff may authorise the bailiff trainee to independently perform certain enforcement activities. Upon completing the second year of the traineeship, the trainee must pass the final bailiff examination. Bailiff trainees passing the exam are appointed to the position of assistant bailiff, and are entered onto the list of assistants. Appointments to the position of assistant bailiff are made by the president of the appeal court. The work period in this position is two years. After that period, the assistant bailiff may apply for the position of a court bailiff.

Representatives of other regulated legal professions are exempt from the requirement to complete bailiff traineeship. These professions include judges, prosecutors, lawyers, legal advisors, notaries and persons who have completed court, prosecutor, legal, legal advisor's or notary training, as well as persons with a doctorate degree in legal sciences.

The court bailiff is appointed by the Minister of Justice, and the appointment is submitted through the president of the appeal court in whose district the candidate will practice. Before appointing the bailiff, the Minister of Justice consults the bailiff association about the candidate.

The Minister of Justice also has the power to dismiss a bailiff in cases of disciplinary offences arising from breaches of the law or from a failure to maintain professional indemnity insurance, and in connection with substantiated complaints about the bailiff's professional conduct.

### How does a court bailiff operate in Poland?

In order to perform enforcement activities all newly appointed court bailiffs open an office in the district in which they have been registered. A bailiff's office can most often be found in cities where a district court sits. The size of the office – the number of hired employees – varies significantly, and depends on the number of cases run by the bailiff. In Polish practice, a bailiff's office will hire several employees, but in big economic centres a bailiff may employ over 100 people.

Bailiffs' offices must possess means for obtaining information about debtors and their property – both movable and real estate – in order to enforce judicial decisions. For the purpose of enforcement, a bailiff has the right to demand information about the debtor's property from state administration bodies, tax offices, pension agencies, banks, brokerage houses and other institutions that may be in possession of information regarding the debtor's property. In Poland there does not yet exist full, online access to office, bank and financial data. However, "e-government" services are developing, and bailiff offices are generally equipped with modern instruments for obtaining information about a debtor's property.

In Polish practice a court bailiff has access to the national on-line register of all natural persons in the country. A bailiff also has online access to the database of bank accounts, as well as online access to the database of the Social Insurance Institution, which enables identification of the debtor's employer (as the payer of social security contributions). In addition, bailiffs have access to an online database that registers all cars and mechanical vehicles. Currently, bailiffs have no access to the cadastral databases, which register real estate throughout Poland. Such access would allow bailiffs to establish all real estate in which a debtor holds legal title, in the entire country, based on their personal data.

During their professional practice court bailiffs run different types of cases of monetary and non-monetary claims. In Poland a bailiff most often handles cases of monetary and non-monetary claims regarding business obligations, as well as cases in which the Treasury is the creditor. The latter cases typically relate to fines and court fees. A separate category of enforcement cases are those of "repeated" claims – generally, these are financial maintenance payments towards children, spouses and elderly people, which are unpaid by the debtor.

In order to enforce monetary claims, bailiffs will attach (seize) bank accounts, salaries, annuities and pensions, as well as other monetary receivables. They will also attach movable property, including mechanical vehicles, and sell this property by public auction. A bailiff may also perform enforcement in relation to shares and companies' stocks, as well as to real estate. The sales of shares, stocks and



The Minister of Justice also provides general supervision over the activities of bailiffs and public officers.

real estate occurs by way of public auction, and the bailiff credits the proceeds obtained from such sales towards the enforced debt.

As part of the performed enforcement, a bailiff collects execution fees from the debtor. The system of fees is dependent on the amount of the enforced debt and the manner of performing the enforcement. In the case of enforcement from bank accounts, annuities, pensions and salaries, the bailiff collects an execution fee in the amount of eight per cent of the enforced debt from the debtor. In other cases bailiffs collect 15 per cent of the amount of the debt. From the fees obtained, bailiffs must cover the costs of maintaining their office, seizing the property, ensuring necessary personal protection, insuring office property, professional indemnity insurance, and fees for membership of the bailiffs association.

### Supervision over court bailiffs' activities

#### **Bailiff professional self-government**

Court bailiffs in Poland have established a system of self-governing professional associations, called Bailiff Chambers, and membership of these is obligatory. There are 11 Bailiff Chambers, which are organised by court districts.

Every Bailiff Chamber selects its Chamber Council, with its president, as well as the auditing committee, through a vote at the general meeting of the members of the Bailiff Chamber. The Chamber Council and the auditing committee manage the current activities of the Chamber. The general meeting of the Bailiff Chamber selects two members of the National Bailiff Council, which is the representative of all bailiffs in the country.

Positions in the Bailiffs Chambers are for terms of four years. The bailiff self-government is managed by the National Bailiff Convention, which appoints the President of the National Bailiff Council and the National Auditing Committee, and adopts resolutions regarding the most important matters for the profession, particularly in relation to good practices and professional ethics.

The bailiff self-government system monitors the professional practice of bailiffs, checks whether all bailiffs running bailiff offices are covered by the obligatory professional indemnity insurance, and issues opinions on bailiffs' work upon the request of public bodies.

The National Bailiff Council supervises the activities of bailiffs, conducts inspections in bailiffs' offices and, when necessary, takes disciplinary action against bailiffs who breach professional or legal standards. Every bailiff's office in Poland is inspected by bailiff inspectors appointed by the National Bailiff Council at least once every three years. The subjects of review during office inspection are timeliness, reliability and efficiency of enforcement activities performed by the bailiff. If the bailiff inspectors ascertain irregularities in the running a bailiff's office, the bailiff bears disciplinary responsibility.

The bailiff is responsible for faulty acts or omissions in the performance of their activities, in particular, for:

- undermining the seriousness and dignity of the profession
- offences against the rules of law
- failure to fulfil post-inspection orders
- misusing the proceeds of execution fees
- undertaking actions with an unjustified delay
- performing enforcement activities outside their own district in circumstances not provided for by law.

The disciplinary commission appointed by the National Bailiff Council makes decisions concerning penalties for infringements, which may include warnings, reprimands, fines of up to 20 times the average national monthly salary, and dismissal from office

Should a court bailiff be penalised by a fine or a reprimand, the bailiff is simultaneously deprived of the right to stand for election to the bailiff self-government bodies for three years from the date of the disciplinary decision becoming final.

#### **Supervision by the Minister of Justice**

The Minister of Justice also provides general supervision over the activities of bailiffs and public officers. In order to exercise this supervision the Minister is assisted by the presidents of the district courts and judges.

Direct supervision over bailiffs' activities is exercised by the district court in which the



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bailiff has been registered. The court provides judicial and administrative supervision. Judicial supervision is exercised through dealing with complaints about the bailiff's actions by the common court, in civil proceedings. According to the regulations of the Polish Code of Civil Procedure, a complaint about a bailiff's actions may be submitted by the parties whose rights have been allegedly been violated, to any enforcement proceeding. A complaint may be submitted on the basis that a bailiff has performed improperly and violated the rights of a party (whether a creditor or a debtor), or on the basis of a failure to act.

Administrative supervision is exercised by the president of the district court. This supervision focuses on the efficiency of the bailiff's activities – the promptness, effectiveness and reliability of enforcement proceedings. According to the maxim, "time is money", the president of the district court evaluates whether any unjustified delays have occurred in the bailiff's activity. The administrative review also includes checking the proper maintenance of records relating to enforcement proceedings, as well as proper accounting practices. In order to analyse the correctness of financial documentation of enforcement proceedings, the president of the district court appoints an accountant from the district court to review the correctness of financial records and the timeliness of transferring recovered money to the creditor. In this area the applicable deadlines for court bailiffs in Poland are very short – a bailiff is obligated to transfer the successfully recovered money from the debtor to the creditor within four days of receiving it. Following a change in the regulations in August 2013, such reviews of bailiffs' offices should now occur every four years.

## Conclusion

Poland has an established a well-regulated bailiff profession. However, as in many policy areas, efficiency and regulation need to be balanced, and resources must be optimally utilised. This requires constant review and analysis. For example, in 2013 the court supervision of bailiffs' offices discussed above was changed, so as to require formal reviews only once every four years, thereby freeing up valuable time for the courts. Further changes are mooted to take effect in 2014, including in relation to the fees which bailiffs can charge for their services.



# 10

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## Bailiffs in Tunisian law: structural aspirations and functional difficulties

IMED MEMMICH

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To complete this edition, this article examines the enforcement of court decisions in Tunisia. As in other counties in the EBRD region, delicate questions arise about the status of enforcement agents, and the need to balance the interests of judgment debtors and creditors.



The etymology of the word “bailiff” in Arabic (*Adil Al Tanfeed*) connotes “man of justice undertaking the task of execution”. It alludes to the value of justice in the execution process. This explains why the bailiff in Tunisia is considered a public official (article 1 of the law dated 13 March 1995 Organising the Profession of Bailiffs; the Bailiffs’ Law) who is subject to the requirements of a public system, with all of its privileges and limitations. Similarly, and according to article 42 of the Bailiffs’ Law, when bailiffs are performing their tasks, they are like public employees, in the sense defined in article 82 of the Penal Code.

In order to ensure the greatest degree of compliance with the necessities of justice throughout all stages of litigation, and to facilitate bailiffs becoming better specialised and focused on realising this objective, Tunisian legislation has transferred the task of notarisation (previously part of a bailiff’s duties) to another type of judicial official. In

this context, the effectiveness of the judicial system in terms of executing judgments is fundamentally tied to the effectiveness of the role undertaken by the bailiff.

As bailiffs act in the capacity of assistant to the judiciary, it is natural for the desired objectives of their tasks to be embodied in and firmly linked to the judicial establishment. This necessitates integrity, impartiality and autonomy, in return for the entitlement to the privileges of public authority. Similarly, it requires that bailiffs organise the various operational frameworks and powers towards facilitating the execution process.

The task of execution calls for both transparency and integrity; initially, in dealing with the petitioner and the respondent in the early stages, and also in the final stages, in dealing with the executor and the debtor. Perhaps it is these duties, with the constraints they



The etymology of the word “bailiff” in Arabic alludes to the value of justice in the execution process.

bear, that explain bailiffs’ need for protection, and their right to seek assistance from the police, in the performance of their duties.

As with those who belong to other auxiliary judicial professions and structures,<sup>1</sup> and other public bodies, bailiffs<sup>2</sup> have strongly expressed the need to introduce a number of amendments to the Bailiffs’ Law. Many have called for measures to overcome the most important obstacles facing this profession, including the nature of relations with the Ministry of Justice as an executive authority and with the Public Prosecutor’s office as a judicial body, and procedural hindrances that complicate notification and execution tasks and result in the failure to properly grant people their rights.

Such calls may lead to a variety of actions, from a diagnosis of the existing situation, to an outline of the solutions called for. Such a process will involve dealing with two primary issues: 1) the structure of the profession; and 2) proposals to remove substantive obstacles affecting bailiffs.

### **The profession: legitimate structural aspirations**

Bailiffs consider that their tasks fall within the rubric of the actions performed by the judicial system and that, within this system, these tasks aim to grant people their due rights. Nevertheless, bailiffs remain insistent on the need for significant autonomy from the Ministry of Justice. Therefore, they dislike the strict monitoring which they are subjected to by the Ministry of Justice and the Public Prosecutor. They would prefer to be under the supervision of the National Bailiffs Organisation (NBO), through its various chambers. In addition, there is a proposal to expand the scope of intervention and to reconsider the resolution for setting wages.<sup>3</sup>

Bailiffs have emphasised their right to this legitimate demand of greater autonomy by insisting that the head of the NBO be given sole authority to issue dismissals and to receive resignation letters instead of such tasks being assigned to the Minister of Justice as stipulated by current provisions of the Bailiffs’ Law.<sup>4</sup> Such demands are inseparable from the context of the current situation in Tunisia, which is witnessing a transitional political and social movement that focuses prominently on justice in all of its dimensions, and in a variety of specific realms

(whether related to the legislative system or the execution framework). The grievances raised by bailiffs can be understood better in the context of Tunisian judges’ demands for the same level of freedom enjoyed by attorneys; that is, for autonomy<sup>5</sup> from the executive authority, and from the Public Prosecutor in particular.

Like lawyers, bailiffs enjoy a significant degree of freedom in their profession (they are not paid by the state, but rather earn wages from clients, and belong to independent organisational structures). Hence, they have a natural and legitimate motive to demand greater autonomy from state structures. However, consideration must be given to the delicacy of the task entrusted to them, which requires impartiality and fairness in fulfilling the requirements of justice in the execution of judicial rulings. Such impartiality requires that bailiffs maintain the same distance between themselves and both the monitoring officer and the debtor.

The trend in this context is to emphasise that the demand for more autonomy could ultimately result in transferring the task of monitoring the bailiff’s ledger from the Public Prosecutor to the head of the NBO. The same issue applies to clients’ accounts. If the NBO were to undertake these tasks, however, this would not remove all intervention by the Public Prosecutor. Rather, as bailiffs themselves state, it would be preferable for monitoring by the Public Prosecutor to be treated as a follow-up action, to be undertaken as needed, subsequent to the NBO head’s action. Moreover, to avoid this option being exploited as a loophole that enables violators of the law to escape punishment, communication and transparency must be guaranteed between the NBO and the judicial system that supervises the proper execution of judicial rulings.

These demands appear to have arisen out of the pressure that some bailiffs have long complained of in their direct dealings with the Public Prosecutor. Some bailiffs complain, for example, of being made to feel inferior, and even of being bullied or humiliated by the Public Prosecutor on the pretext of the exercise of legal powers.

The procedure that most angers bailiffs is the direct inspection of their offices, which, in their view, disregards confidentiality and disrespects personal data and the sanctity of the workplace.



Bailiffs have a natural and legitimate motive to demand greater autonomy from state structures.

The effectiveness of the law and the efficacy of judicial rulings are linked, to a large extent, to bailiffs' tasks. Hence, recognising bailiffs' autonomy is not, of itself, objectionable. However, such autonomy does need to be subject to safeguards. Consideration should be given to the optimal formula for preserving the autonomy of bailiffs, while providing for the minimal required level of direct monitoring by the NBO and follow-up by the Public Prosecutor. To this end, it is necessary to expand and diversify representation within the NBO so that its membership is not limited to bailiffs, which could cause a monopoly of power within the NBO and therefore provide opportunities for breaches of professional standards to be concealed.

The safeguards required in granting freedom and autonomy are to be found in transparency and accountability. Once it is recognised that serving the public good requires accepting responsibility for providing information to those who request it – and this principle is enshrined in law – the autonomy of bailiffs should not engender reservations. Bailiffs' objections to the invasive nature of the Public Prosecutor's periodic monitoring of their ledgers and client accounts<sup>6</sup> will dissipate if a legal provision requires them to place such ledgers and accounts at the disposal of those who have a legitimate interest in them, and prescribes penalties for refusal to do so, and for the misuse of such information for personal gain.

In addition to their concerns about autonomy, bailiffs maintain the right to actively participate – as competent, effective parties – in the process of making major decisions that are required in the phase through which Tunisia is passing, particularly those having to do with the new constitution. They also assert their right to be consulted and involved in legislating for their own profession. This is precisely what is required by a democratic philosophy, and by the participatory approach adopted in advanced democracies. After all, the professionals in this field are most aware of, and familiar with, their own concerns, what is needed to address these concerns, and the mechanisms needed for improving their profession.

### Obstacles facing bailiffs

An examination of the tasks assigned to bailiffs reveals some of the serious obstacles that hinder their work. Considering their multiplicity

### Box 1. Key difficulties confronting enforcement in Tunisia

- **Lack of clarity in notifying debtor of enforcement action.**
- **Formalities associated with seizing movable assets.**
- **Ambiguity about when property must be valued.**
- **Bailiffs' broad discretion to reduce the sale price of seized assets.**
- **Obtaining information about debtors' wages.**
- **Enlisting the support of the police.**

and their impact on the various phases of the execution process, these obstacles have led to a significant number of bailiffs<sup>7</sup> proposing a single judicial body dedicated to solving disputes and overcoming the execution-related difficulties that are a potential barrier to delivering people their rights.

The legal and material difficulties facing bailiffs occur in numerous situations and tasks. However, they can be summarised in the following key points.

The process of notification and summoning leads to many problems arising in litigation, due to the complicated and imprecise procedures detailed in article 8 of the CCPC, governing summons notifications. Bailiffs often resort – either by necessity or lack of diligence – to giving the summons to local authorities, expecting such authorities to serve the notice on the actual respondent. Such a procedure does not guarantee that the summons will be delivered. Consequently, this practice does not respect the principle that a person must be aware of legal proceedings brought against them, including enforcement proceedings. These issues explain the frequency of rulings that are issued in absentia.

Difficulties related to execution seizures, particularly those that deal with movables,<sup>8</sup> are prominent concerns and obstacles for bailiffs. The common denominator among the various difficulties is some formalities that



Bailiffs encounter significant difficulties in enlisting the assistance of the police and in obtaining information about debtors' earnings.

could be discarded, as in the last clause in article 392 of the CCPC, which indicates that the minutes relating to seizure of movables must carry the signature or thumbprint of the person officially assigned to safeguard the property pending seizure for the purposes of sale (the custodian). The problem arises when the custodian is also the debtor and happens to be absent when the bailiff comes to take the property. The debtor's absence means no signature can be obtained, delaying the process.

A further problem arises under article 394 of the CCPC, which obliges the bailiff to request the court to appoint an expert to determine the value of "important movable assets". The problem arises in relation to the lack of a definition of "important movable assets". A further issue is the fate of the execution process when the judge decides not to appoint an expert upon an application under this article, which arguably further undermines the execution process.

As a time-saving measure, bailiffs often authorise the enforcement officer to reduce the initial sale price of seized assets by up to 20 per cent. This is often done simply when bailiffs consider it advantageous to do so – a low price is more likely to result in a sale, avoiding the time and expense of further sales processes. However, this results in items being sold at under value, to the detriment of the debtor.

Further technical difficulties arise under article 55 of the Finance Law of 2006. This article requires the debtor's value added tax (VAT) code or identity card number to be provided when making notarisation arrangements (of a consensual nature). This applies even to judicial sales of seized

property. Bailiffs are responsible for obtaining this information and bear the consequences of financial mistakes in this process. Such consequences include tax penalties imposed on the bailiff. However, the sale will not be invalidated as a result of such errors.

Bailiffs also encounter significant difficulties in enlisting the assistance of the police and in obtaining information about debtors' earnings. These are perhaps among the most important issues raised in the execution process, and relate to the underlying objectives of the legislation: to demonstrate concern for the rights of both judgment creditor and debtor, and to avoid arbitrary or random execution.

The issue of seeking the assistance of the police<sup>9</sup> arises in cases where debtors hinder the process of executing civil judicial rulings. The police and public authorities are required by law to assist bailiffs (see article 253 of the CCPC). However, in practice, the Public Prosecutor often asserts a requirement that the Public Prosecutor authorise the involvement of the police. Bailiffs do not see any justification for having to seek the Public Prosecutor's permission to request the assistance of the police and public authorities, believing that this impedes their work. Indeed, bailiffs contend that the law requires public authorities, and the Public Prosecutor, to assist bailiffs in their work. Bailiffs therefore expect more from the Public Prosecutor, and other public authorities with a role in the enforcement process, than simply responding to requests for assistance. They believe that these authorities should proactively summon and warn the defendant that the verdict is executed and should be obeyed.





## Notes

Concerns have also been raised by bailiffs about their need for protection, and they argue for stiffer punishments for those who infringe the enforcement law, particularly infringements that involve rioting and resistance, and attacking a public officer in the course of their duty.

Bailiffs are striving to overcome one of the most serious execution-related obstacles: the lack of information on debtors' property and what can be sequestered. It appears that the current political and legislative trend in Tunisia towards reforming the legal, judicial and administrative systems will assist bailiffs on this issue. This is because the draft laws that seek greater transparency and affirm people's right to information and access to administrative documents will help to effect bailiffs' right to obtain information about the income of debtors, whose earnings are subject to an execution order at the time a judicial ruling is issued.

### Conclusion

All of the procedural obstacles and difficulties discussed above, which result in the failure to secure people's rights during enforcement processes, explain bailiffs' growing insistence on the need to establish a specialised judicial structure which is capable of addressing all of the difficulties and disputes that may arise in the execution of a civil ruling. The person designated to lead such a structure would be called an execution judge, or a civil rulings execution judge.

The institution of an execution judge is not a new notion. Such a concept is being applied in some countries, and its viability has been demonstrated. Reliance on a single body that is qualified to resolve all execution-related disputes would avoid the time-wasting that occurs with many of these obstacles, and which results in a consequent loss of rights. This would, in turn, reflect positively on the economic cycle. Properly protecting creditors equates to protecting financial rights, which are fundamental to the economy. Indeed, legislators recognise the advantage of a judicial presence in the many processes that affect creditors, such as those in bankruptcy rulings or debt distribution.

Through unifying efforts towards resolving execution-related disputes, and enabling bailiffs to obtain the assistance of the police, it is hoped that the effectiveness of judicial rulings will be improved, and the rule of law will be strengthened.

<sup>1</sup> Such as experts, notaries and court clerks. Lawyers are considered assistants in establishing justice.

<sup>2</sup> This is in the framework of the draft law presented to competent authorities, which the Ministry of Justice's Center for Legal and Judicial Studies has commented on.

<sup>3</sup> This is consistent with the national consultancy report on reform of the judicial system, presented in Tunisia, on 19 December 2013.

<sup>4</sup> Articles 16 and 18 of the Bailiffs' Law.

<sup>5</sup> In accordance with the report presented at the National Consultancy Seminar on Judicial Reform, in Tunisia, on 19 December 2013.

<sup>6</sup> According to article 22 of the Bailiffs' Law.

<sup>7</sup> See Walid Al-Zuwari, "Execution Judge", *Legal News Magazine*, No. 90-91, May 2010, p. 18.

<sup>8</sup> Walid Al-Zuwari, "Sequestration and Selling of Movables", *Legal News Magazine*, No. 100-101, November 2010, p. 18.

<sup>9</sup> See Muhammad Al-Majari, "Seeking Public Force Assistance and the Call to Unify Procedures", *Legal News Magazine*, No. 90-91, May 2010, p. 14.

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## Abbreviations

<b>ADB</b>	Asian Development Bank
<b>AfDB</b>	African Development Bank
<b>BEEPS</b>	Business Environment and Enterprise Performance Survey
<b>BEPS</b>	Banking Environment and Performance Surveys
<b>BMZ</b>	German Federal Ministry for Economic Cooperation and Development
<b>CEPEJ</b>	European Commission on the Efficiency of Justice
<b>CIS</b>	Commonwealth of Independent States
<b>CoE</b>	Council of Europe
<b>EAs</b>	Enforcement agents
<b>EBRD</b>	The European Bank for Reconstruction and Development
<b>ECHR</b>	European Convention on Human Rights
<b>EITI</b>	Extractive Industries Transparency Initiative
<b>ENPI</b>	European Neighbourhood and Partnership Instrument
<b>EU</b>	European Union
<b>FDI</b>	Foreign direct investment
<b>GDR</b>	Global Depositary Receipt
<b>GDP</b>	Gross domestic product
<b>GIZ LRP</b>	GIZ Legal Reform Project in Serbia
<b>GSAR</b>	General Authority for State Registration, Mongolia
<b>ICT</b>	Information and Communication Technology
<b>IDB</b>	Inter-American Development Bank
<b>IFIs</b>	International Financial institutions
<b>IMF</b>	International Monetary Fund
<b>IPA</b>	Instrument for Pre-Accession Assistance, Serbia
<b>JRI</b>	American Bar Association Judicial Reform Index
<b>LoES</b>	Serbian Law on Enforcement and Security
<b>LRO</b>	Land Registration Office, Mongolia
<b>LTP</b>	Legal Transition Programme
<b>MDTF</b>	Multi-donor trust fund
<b>MoJPA</b>	Ministry of Justice and Public Affairs
<b>MRA</b>	Mineral Resources Authority, Mongolia
<b>NBO</b>	National Bailiffs Organisation, Tunisia
<b>NJRS</b>	Serbian National Judicial Reform Strategy 2013-2018
<b>OSCE</b>	Organization for Security and Cooperation in Europe
<b>PHARE</b>	The programme of community aid to the countries of central and eastern Europe
<b>SEC</b>	US Securities and Exchange Commission
<b>SEIO</b>	Serbian European Integration Office
<b>SEMED</b>	Southern and eastern Mediterranean
<b>SMEs</b>	Small and medium-sized enterprises
<b>TI</b>	Transparency International
<b>VAT</b>	Value added tax
<b>WTO</b>	World Trade Organization

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