PUBLIC AND PRIVATE JUSTICE: DISPUTE RESOLUTION IN MODERN SOCIETIES

Enforcement, Enforceability and Effectiveness of Legal Protection

COURSE MATERIALS

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May 25 – May 29, 2009
Inter-University Centre
Dubrovnik, Croatia

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Public and Private Justice:
Dispute Resolution in Modern Societies

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Programme – Public and Private Justice Course 2009

In collaboration with

Sunday, May 24	*Meeting of participants (Stradun, Gradska kavana, 19,30-20,00)* *Informal joint dinner*
Monday, May 25 Topic 1: **Enforcement - Fundamental Issues** **Book promotion** Topic 2: **History of Enforcement Systems** **Postgraduate students: Prize-winning presenters**	**Registration** (8,30 - 9,00) **Opening Remarks and Addresses** (9,00 – 9,30) **Morning Session:** (9,30 – 13,00) *Burkhard Hess* (Heidelberg): Enforcement Systems in Europe *Paul Carrington* (Duke University): Private Enforcement of Public Law: The Problem of Transnational Corruption **Break (11,00-11,30)** *Mirjam Freudenthal* (Utrecht): Attitudes of European Union Member States towards harmonisation of civil procedure *Third PPJ Book Presentation – An Introduction by the Reviewers and the Editors* **Lunch** (13,00 – 15,00) **Afternoon Session:** (15,00 – 18,00) *Paul Oberhammer* (Zürich): General principles and policies underlying the European Enforcement Order *Remco van Rhee* (Maastricht): The history of enforcement of judgments and other official documents (16th-20th c.) **Break (16,30-16,45)** *Marko Petrak* (Zagreb): Public and private enforcement in European legal tradition *Panel: Non-formalistic alternatives to enforceability rules in civil law systems* *Bob Assink; Marc Dekkers; Niels Pepels* (Maastricht University)
Tuesday, May 26 Topic 3: **National Enforcement Systems in Europe** Topic 4: **Enforcement and the Process of European Intergration**	**Morning Session:** (9,00 – 12,30) *Robert Turner* (Gloucester): Effective Enforcement of Civil Judgments in England *John Stacey* (London): Effective Enforcement for Small Claims in England **Break (10,30-11,00)** J*ohn Marston* (Walsall): A comparative study of the various different business models employed by the bailiffs of England and Wales *Elisabetta Silvestri* (Pavia): The devil is in the details: remarks on Italian enforcement procedures **Lunch Break** (12,30 – 14,30) **Afternoon Session:** (14,30-18,00) *Jon T. Johnsen* (Oslo): The Norwegian system for adjudicating and collecting the victim's compensation *Vesna Rijavec* (Maribor): European Enforcement Order in Slovenia **Break (16,00-16,30)** *Xandra Kramer* (Rotterdam): Enhancing enforcement in the EU: the European Payment Order and the implementation in several Member States *Fokke Fernhout* (Maastricht): Enforceability of arbitral decisions in the Europen Union

Wednesday, May 27 Topic 5: **Enforceability and Effectiveness of Legal Protection**	**Morning session** (9,00 – 12,30) *Peter Gilles (*Frankfurt*)*: Efficiency of oral, written and electronic court procedures in civil justice *Remme Verkerk* (Maastricht): Fairness and Compliance **Break (10,30-11,00)** *Nina Betetto* (Ljubljana): Implementation of EU civil procedural regulations, particularly with regard to enforcement, in the Slovenian case law *Branka Rešetar* (Osijek): Enforcement of decisions on contacts regarding children **Reception and introduction to the IUC (**12,30 – 13,30) **Study Trip: Excursion to Boka Kotorska – Perast and Kotor** (14,00 – 19,00) **Dinner** (19,00 – 23,30)
Thursday, May 28 Topic 6: **Basic Principles of Enforcement on European Level** Topic 7: **Comparative Experiences: Enforcement Systems of Western Europe** Topic 8: **Enforcement Systems in Countries in Transition**	**JOINT PPJ AND BERP CONFERENCE ON JUDICIAL REFORM** **Registration (9,00-9,30)** **Conference Opening** Opening addresses by the Ministry of Justice, International Union of Judicial Officers, World Bank, European Commission, the CEPEJ; Address by the Dutch Ambassador **Morning Session** (10,00-13,00) *Eric Vincken* (Hague)*:* The BERP – aims, background, and objectives *Jos Uitdehaag* (Etten-Leur): The CoE Recommendation – Basic Principles of Enforcement **Break (11,00-11,30)** *Panel: Enforcement – New Developments in various European countries* **(11,30-12,30)** France; Netherlands; England; Germany **Lunch Break** (13,00 – 15,00) *Experience of Reforms in Countries in Transition* **(15,00-16,00)** *Panel: Russia; Serbia; Albania; Montenegro; Kosovo* **Break (16.15-16.30)** **Continuation: (16.30-17.30)** *Slovenia; Croatia; Macedonia; Bosnia*; Working Dinner hosted by the World Bank
Friday, May 29 Topic 9: **What should be the features of an accessible and efficient enforcement system?** Topic 10: **Prospects for reforms in Croatia and the region**	**Morning Session** (9,30 – 13,00) *Mathieu Chardon* (Paris): Training of bailiffs *John Marston* (London): Fee system *Jos Uitdehaag* (Etten-Leur): Complaints vs. quality standards **Break (11,00-11,30)** *Panel: The future of enforcement systems in Croatia and the region* **11,30-14,00** *Alan Uzelac* (Zagreb): Privatization of Enforcement Services – A Way Forward for Croatia and the Region? Representatives of the Croatian Ministry of Justice and Croatian Judiciary: Future plans for reforms in Croatia Lunch (13,00-15,00) Findings of the EU expert mission for the reform of Croatia's Enforcement System (EU expert mission) (15,00-17,00) *Mathieu Chardon* (Paris): How to implement common standards of enforcement? General discussion *Remco van Rhee* (Maastricht): Conclusion and recommendations **Closing**

LIST OF SPEAKERS

1.	ASSINK, BOB	Student, University of Maastricht, The Netherlands
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Van Rhee is also one of the directors of the research programs "Foundations of European Private Law" and of "Foundations and Principles of Civil Procedure in Europe" of the Ius Commune Research School. He is chairman of the Working Group on the History of Civil Procedure sponsored by the German Gerda Henkel Foundation. Additionally, he is general editor of the Civil Procedure Casebook of the Ius Commune Casebooks for the Common Law of Europe. Extensive more information can be found at http://www.personeel.unimaas.nl/remco.vanrhee/.

Prof. Alan Uzelac, University of Zagreb - Professor Uzelac teaches courses on Civil Procedure, Alternative Dispute Resolution, Arbitration and Organization of Judiciary at the Universities of Zagreb and Osijek. Apart from academic duties, Dr. Uzelac is an expert who collaborated in the number of projects for the assistance to law reforms. As national delegate in the European Commission for the Efficiency of Justice of the Council of Europe he is elected to be Member of the Bureau of this organization, where he currently presides over the work of the Task Force on Timeframes of Proceedings. He spent ten years working as the Secretary General of the Arbitration Court at the Croatian Chamber of Commerce where he was also editor of the international law review (Croatian Arbitration Yearbook) and organizer of international conferences. Further biographical data and other relevant information could be found at http://alanuzelac.from.hr.

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Different Enforcement Structures in Europe

Prof. Dr. Burkhard Hess

University of Heidelberg

Enforcement Structures in Europe

I. Enforcement in a comparative perspective

II. Different structures of enforcement organizations

III. Correlations between enforcement structure and procedure – some examples

IV. The impact of enforcement cultures

V. Concluding Remarks

I. Enforcement in a comparative perspective

1. Enforcement and Debt Collection
2. Constitutional requirements pertaining to enforcement

   The application of Article 6 ECHR implies that the creditor can claim a right not only to recovery within reasonable time, but also that the procedures for recovery and seizure should be efficient .

   The debtor‘s human dignity and his privacy are protected by Article 8 ECHR.

II. Different structures of enforcement organizations

1. Centralized and Decentralized systems
2. Different enforcement organs
   a) Bailiff-oriented systems
   b) Court-oriented systems
   c) Mixed systems
   d) Administrative systems
3. Regulation and qualification of enforcement agents

III. Correlations between enforcement structure and procedure – some examples

1. The prerequisites of enforcement
2. The gathering of information for enforcement purposes
3. Remedies and control of enforcement agents

IV. The impact of enforcement cultures

1. Different concepts of enforcement: Debt collection or mediation
2. The role of the creditor and the enforcement organ
3. Incentives for speeding up enforcement proceedings

V. Concluding Remarks

Thank you for your attention !

Prof. Dr. Burkhard Hess *University of Heidelberg*

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V. Concluding Remarks

Paul Carrington

PRIVATE ENFORCEMENT OF LAWS AGAINST CORRUPT PRACTICES

Dubrovnik, May 24, 2009

The United States has had much experience with corruption. Ben Franklin, observed that "[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government."

This is so because to most of us our government is a distant nobody.

Mindful of corruption in the Continental Congress, Franklin's contemporaries in the very first Congress of the United States recognized and addressed the impediments to effective public enforcement of laws forbidding corrupt practices.

Borrowing from an ancient English practice allowing the king's subjects to initiate criminal proceedings in the king's name and rewarding them if they should prove the accused guilty, the United States undertook to reward private citizens having the fortitude to initiate a lawsuit and pursue a claim in the name of the United States against any person or firm defrauding the government.

This practice gained importance in the 19th century. During the Civil War, the Secretary of War Simon Cameron was dismissed by President Lincoln for paying his friends twice the going rate for 1,000 cavalry horses that turned out to be afflicted with "every disease horse flesh is heir to." Such scandals led to the enactment in 1862 of the False Claims Act, then known as "Lincoln's Law."

That law required the offender guilty of defrauding the government to pay double damages, half of which would be paid to the relator, that is, the citizen who maintained the case on behalf of the United States.

Thereafter, numerous relators came forward to enforce the public law by pursuing semi-private claims against contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall.

By the 1980s, most of the largest defense contractors were under investigation for defrauding the Department of Defense. The Department of Justice had more cases than it could handle, leading public interest lawyers and the Department of Justice to propose revisions of the False Claims Act.

The 1986 version of the Act provides for the recovery of treble damages for defrauding the United States, with fifteen to twenty-five percent of the recovery to be paid to the private plaintiff-relator.

Proceedings under the Act are not criminal proceedings and so, as with other civil actions proof "beyond a reasonable doubt" is not required; a "preponderance of proof" will, if credited, suffice to support a judgment against the defendant.

Complaints in such cases are filed in confidence for sixty days; the Department of Justice is notified and may then exercise its right to intervene and take control of the proceeding.

But even if it does, the case continues as a civil action and the relator remains a party. And if the Department of Justice does not intervene, the relator is entitled to maintain the action in the name of the United States.

Whether it is the government or the relator advancing the claim, the plaintiff is empowered to compel disclosure of possible documentary evidence from the defendant or from non-parties.

Parties may also compel witnesses to testify and be subject to cross-examination. And much of the government's files are

exposed to private investigation as a result of the Freedom of Information Act.

If a relator is successful in proving a case, he or she is then entitled to receive at least twenty five percent of the treble damages proceeds, plus reimbursement for costs including attorneys' fees.

This scheme serves to assure the availability of private legal counsel for plaintiffs with credible claims based at least in part on some bit of personal knowledge. The relator is also provided with rights safeguarding him or her from retaliation by an employer.

By 2008, over 10,000 false claim cases had been filed pursuant to the 1986 statute. While historically the bulk of the false claims actions were directed at those who provide goods or services to the military, other industries have become frequent targets for qui tam claims. Now, four out of five false claims cases are brought against health care providers accused of overpricing goods or services paid for by the Department of Health and Human Services.

In 2006, Congress enacted a provision rewarding states for enacting similar laws applicable especially to health care providers. At least thirty states have now enacted such laws and have begun to receive significant proceeds.

In just three cases in the last three years, as reported by the National Law Journal, over a billion dollars has been recovered for state as well as federal governments in only three cases.

In addition, many American lawyers have prospered by handling these cases. And from advising their business clients that it is not a good idea to cheat the government.

Might not some form of private enforcement be employed to deter corrupt practices in Croatia?

Firms engaged in corrupt practices in Croatia and subject to the jurisdiction of American courts are exposed to civil liability in suits brought by the United States government.
They may also be sued by a business competitor who lost business opportunities as a result of a defendant's corrupt practices.

But perhaps courts in other nations should be receptive to private enforcement of corruption law. Might such a reform work in other countries, such as Croatia?

I assume that the government could proceed with a civil suit for fraud based on the advice of a relator. But it would as a minimum need to reward the relator for coming forward, and protect him or her from retaliation by an employer.

To complete the adoption of the scheme, it would also be important to provide the relator-plaintiff with access to a lawyer paid only if they win the case.

And to empower that plaintiff and his lawyer with the powers needed to conduct an effective investigation.

I do not doubt that these reforms would impose culture shock on many legal systems and traditions. Quite possibly too much shock to bear.

As an alternative, consideration might be given by the World Bank to the establishment of an arbitral forum in which proceedings of this sort might be conducted.

These are radical thoughts. But the corrupt practices that so disable many governments around the world are a very serious problem that has now earned the attention of many international organizations.

And the criminal laws forbidding such practices are, for diverse reasons, often weakly enforced. What the world seems to need is a million well-rewarded and well-represented relators empowered to investigate their allegations of fraud.

Public and Private Justice Course – Dubrovnik 25 – 29 May 2009

Attitudes of European Union Member States towards the harmonisation of civil procedure

Dr. M. Freudenthal
Utrecht Law Faculty

Basis of the EU-legislation in civil procedure

- Article 65 European Convention

- Tampere Conclusions 1999:

“ … the principle of mutual recognition should become the cornerstone of the judicial cooperation in both civil and criminal matters within the Union” (No. 33)

“ … further reduction of intermediate measures … “(No. 34)

- Third Scoreboard on the Hague Programme for 2007:

“ A satisfactory level of achievement occured mainly in … Civil Matters …” (No. 7)

“ … Significant developments were made in … civil judicial cooperation.”(No. 92}

cooperation based on mutual trust

- Art 6 European Human Rights Convention
- “Rule of Law”

ways of reticence

- The reticence towards harmonisation of civil procedure appears at three different stadia:

  - 1. during the process of legislating the envisaged measure

  - 2. at the time of the coming into force of the measure, and
  - 3. after the entering into force of the measure.

all cases or only cross-border cases

The Commission stated that an Order for Payment-Regulation applicable to cross-border and internal cases was necessary …

> “ to avoid a situation where in each Member State there are two separate legal regimes, one relating to the disputes with a cross-border implication and the other to purely internal disputes.”

concept of ”uncontested claim” (1)

Article 3, Para. 1 sub c, EEO:

“ …

A claim shall be regarded as uncontested if:

…

the debtor has not appeared … at a court hearing … after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission … under the law of the Member State of origin”.

minimum standards for review

Article 19 EEO-Regulation

“ …

a judgment may only be certified as a European Enforcement Order if the debtor is entitled under the law of the Member State of origin, - to apply for a review of the judgment where…

… (some exceptional cases indicated) … “

concept of “uncontested claim” (2)

Art. 3 Para. 1, sub b, EEO-Regulation:

“ ….

A claim shall be regarded as uncontested if:

a) …

b) the debtor has never objected to it … in the course of the court proceedings; …”

Public and Private Justice Course – Dubrovnik 25 – 29 May 2009

Attitudes of European Union Member States towards the harmonisation of civil procedure

by
Dr. M. Freudenthal, Utrecht Law Faculty, The Netherlands

HAND-OUT

Basis of the EU-legislation in civil procedure

- Amsterdam Treaty Article 65

- Tampere Conclusions 1999:
  - " … to facilitate access to justice …" (No. 29)
  - " … to establish … common procedural rules for simplified and accelerated cross-border litigation on small … claims …" (No. 30)
  - " … the principle of mutual recognition should become the cornerstone ofthe judicial cooperation in both civil and criminal - matters within the Union" (No. 33)
  - " … further reduction of intermediate measures … "(No. 34)

- Third Scoreboard on the Hague Programme for 2007:
  - " A satisfactory level of achievement occured mainly in …Judicial Cooperation in Civil Matters …" (No. 7)
  - " … Significant developments were made in those areas where political priority is high, such as … civil judicial cooperation."(No. 92}

Measures on civil procedure (in general)

REGULATIONS

I. Brussels-I Regulation (44/2000)
   → Chapter 3: Recognition and Enforcement, (Introducing a simplified exequatur procedure)
II. Brussels-IIa Regulation (2201/2003)
III. Regulation on the service of documents (1393/2007)
IV. Regulation on a European enforcement order for uncontested claims (805/2004)
   → Introducing an special enforcement order abolishing the exequatur procedure
VI. Regulation on the taking of evidence (1206/2001)
VII. Regulation creating a European Order for Payment (1896/2006)
   → Introducing a Europe-wide enforceable judgment
VIII. Regulation establishing a European Small Claims Procedure (861/2007)

DIRECTIVES

V. Directive on combating late payments in commercial transactions (35/2000)
   Directive on legal aid (8/2002)
   Directive on mediation (52/2008)

ACTIVITIES

European Judicial Network (470/2001)

Principle of mutual trust

The recognition and enforcement of foreign decisions is based on the principle of mutual trust of the Member States in each other's administration of justice. 'Mutual trust' relates to the general principles of a proper civil procedure as laid down in Article 6 of the European Convention on Human Rights, or, more general, to the principle that decisions should be rendered according to the principles of the 'rule of law'.

Attitudes of Member States towards harmonisation

The Council and its Member States show reticence towards harmonisation of civil procedure which appears on three different occasions:

- 1. during the process of legislating the envisaged measure
    - by disputing the need for the proposed measure
    - by challenging its subsidiarity and proportionality

- 2. at the time of the acceptance and coming into force of the measure,
    - by trying to model the new measure to their domestic procedural laws, when collateral domestic legislation is needed

and

- 3. after the entry into force of the measure
    - by means of interpretation of the new instrument

Examples

Ad IV (enforcement order)

- vague definition of "undefended claims"
- disputed definition of "decision"
- complicated rules on the service of documents
- introduction of the "remedy" of review

Ad VII (order for payment)

- introduction of the remedy of review
- strictly cross-border

Ad VIII (small claims)

- introduction of the remedy of review

Conclusion

A number of gaps between the wishes and promises of the European Council as laid down in the Tampere Conclusions of 1999 and the results of their crystallisation.
Too utopistic Tampere dreams of an ideal harmonisation of civil procedure?
Reticence by Member States to a piecemeal introduction of rules of procedure for cross-border and (sometimes) even for domestic cases into the national system.

The Commission's statement that in judicial cooperation in civil matters the results are satisfactory and that substantial progress is being made, is disputable since it does not seem to reflect reality.

Even in the field of European harmonisation of civil procedure much still has to be done.

Prof. Dr. *Paul Oberhammer*, Zurich

General Principles and Policies Underlying the European Enforcement Order

- Introduction
- Starting Point
    - The European Justice Area
    - Uniform Law and Mutual Trust
    - Article 34 (2) Regulation 44/2001
- Abolition of Exequatur Proceedings
    - "Title Import"
    - "Control with Regard to Grounds for Refusal of Recognition"
- Grounds for Refusal of Recognition and their Fate under the Enforcement Order Regulation
    - Abolition of Exequatur Proceedings and Grounds for the Refusal of Recognition
    - Art 34 (2) Regulation 44/2001
    - Art 35 (1) Regulation 44/2001
    - Art 34 (3) and (4) Regulation 44/2001
    - Art 34 (1) Regulation 44/2001
- Conclusion

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.

2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.

3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

Article 3

Enforcement titles to be certified as a European Enforcement Order

1. This Regulation shall apply to judgments, court settlements and authentic instruments on uncontested claims.

A claim shall be regarded as uncontested if:

(a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or

(b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or

(c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or

(d) the debtor has expressly agreed to it in an authentic instrument.

2. This Regulation shall also apply to decisions delivered following challenges to judgments, court settlements or authentic instruments certified as European Enforcement Orders.

Article 5

Abolition of exequatur

A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Article 6

Requirements for certification as a European Enforcement Order

1. A judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the court of origin, be certified as a European Enforcement Order if:

(a) the judgment is enforceable in the Member State of origin; and

(b) the judgment does not conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001; and

(c) the court proceedings in the Member State of origin met the requirements as set out in Chapter III where a claim is uncontested within the meaning of Article 3(1)(b) or (c); and

(d) the judgment was given in the Member State of the debtor's domicile within the meaning of Article 59 of Regulation (EC) No 44/2001, in cases where

- a claim is uncontested within the meaning of Article 3(1)(b) or (c); and
- it relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession; and
- the debtor is the consumer.

2. Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.

3. Without prejudice to Article 12(2), where a decision has been delivered following a challenge to a judgment certified as a European Enforcement Order in accordance with paragraph 1 of this Article, a replacement certificate shall, upon application at any time, be issued, using the standard form in Annex V, if that decision on the challenge is enforceable in the Member State of origin.

Article 10

Rectification or withdrawal of the European Enforcement Order certificate

1. The European Enforcement Order certificate shall, upon application to the court of origin, be

(a) rectified where, due to a material error, there is a discrepancy between the judgment and the certificate;

(b) withdrawn where it was clearly wrongly granted, having regard to the requirements laid down in this Regulation.

2. The law of the Member State of origin shall apply to the rectification or withdrawal of the European Enforcement Order certificate.

3. An application for the rectification or withdrawal of a European Enforcement Order certificate may be made using the standard form in Annex VI.

4. No appeal shall lie against the issuing of a European Enforcement Order certificate.

Article 12

Scope of application of minimum standards

1. A judgment on a claim that is uncontested within the meaning of Article 3(1)(b) or (c) can be certified as a European Enforcement Order only if the court proceedings in the Member State of origin met the procedural requirements as set out in this Chapter.

2. The same requirements shall apply to the issuing of a European Enforcement Order certificate or a replacement certificate within the meaning of Article 6(3) for a decision following a challenge to a judgment where, at the time of that decision, the conditions of Article 3(1)(b) or (c) are fulfilled.

Article 21

Refusal of enforcement

1. Enforcement shall, upon application by the debtor, be refused by the competent court in the Member State of enforcement if the judgment certified as a European Enforcement Order is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:

(a) the earlier judgment involved the same cause of action and was between the same parties; and

(b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and

(c) the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin.

2. Under no circumstances may the judgment or its certification as a European Enforcement Order be reviewed as to their substance in the Member State of enforcement.

THE ‘HUISSIER DE JUSTICE’ IN THE NETHERLANDS

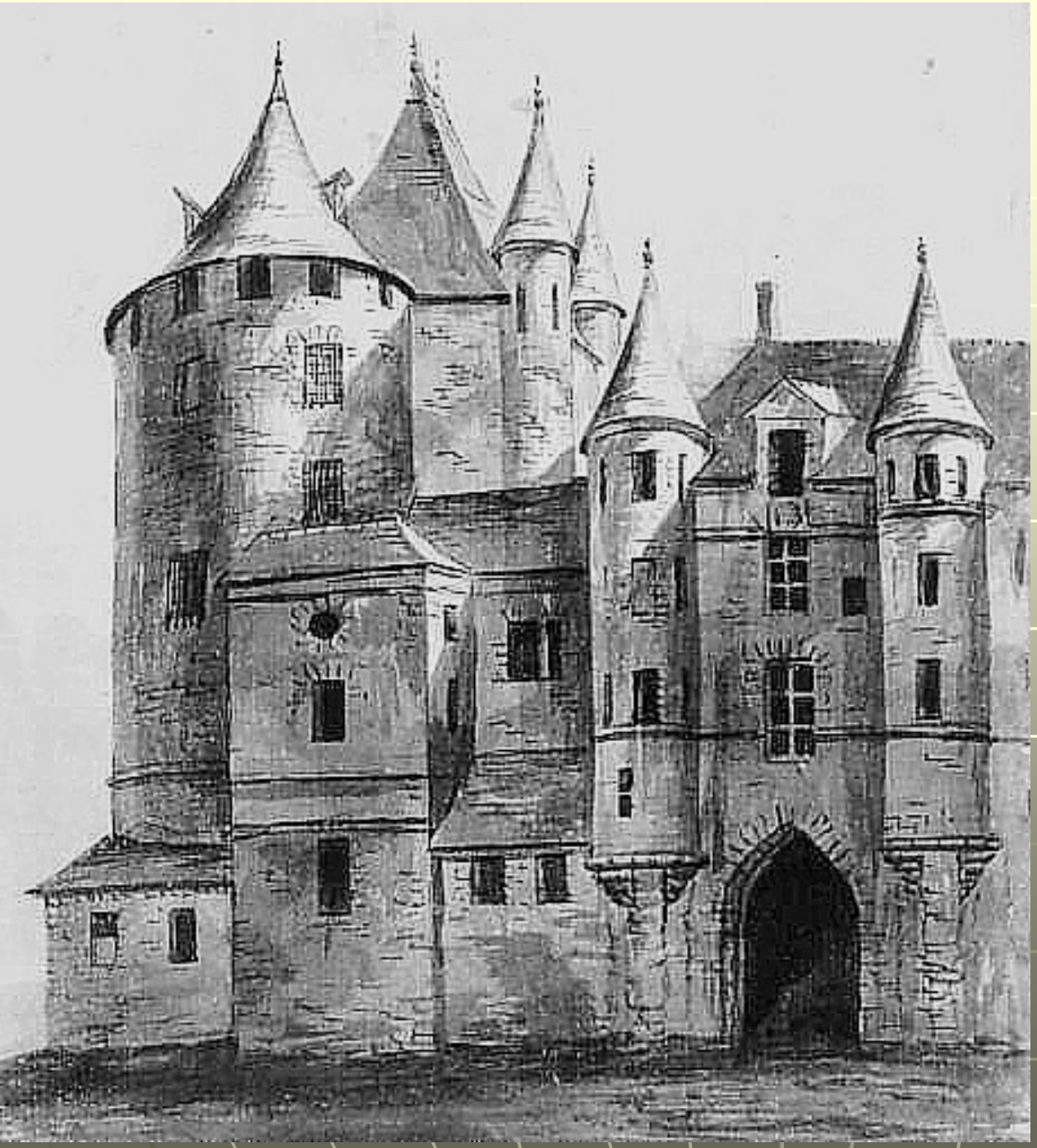
AN HISTORICAL INTRODUCTION

REMCO VAN RHEE

MAASTRICHT

Summary

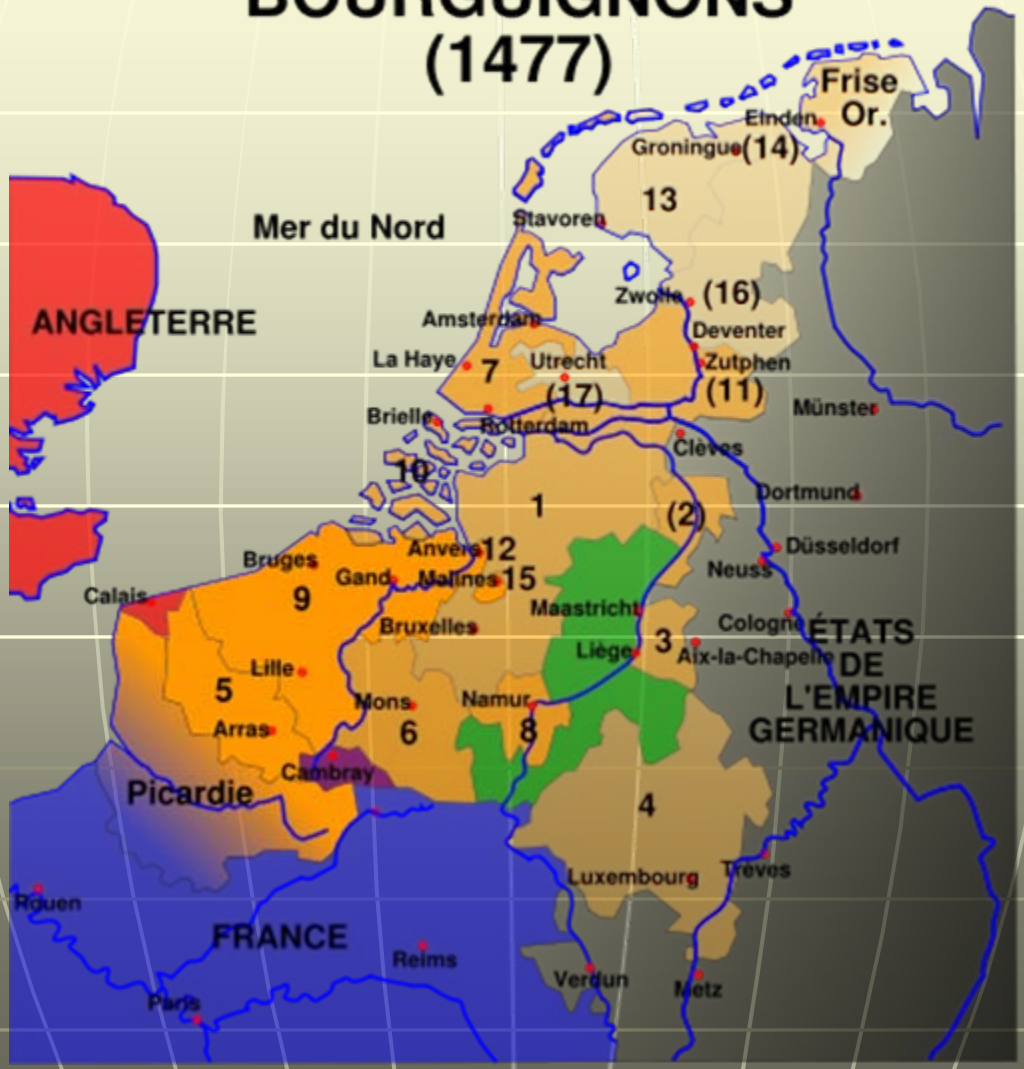
- Introduction
- Origins of the Dutch huissier de justice
- Lack of popularity and Duty to Assist
- Tasks of the (historic) huissier
- Professional qualifications
- Conclusion



Châtelet (Paris)

‘il aura oudit chastelet quatre-vingts sergens à cheval et non plus’ (1302)

PAYS-BAS BOURGUIGNONS (1477)



61. Deurwaardersroede

Hout, zilver, 17e eeuw, 15,5 cm lang, 2,7 cm diam.
Museum Mr Simon van Gijn, Dordrecht

61. Process-server's Rod

Wood, silver, 17th century, 15,5 cms, 2,7 cms diam.
Museum mr Simon van Gijn, Dordrecht

THE END

PUBLIC AND PRIVATE ENFORCEMENT IN EUROPEAN LEGAL TRADITION

IUC, DUBROVNIK

MAY 25, 2009

INTRODUCTION

- Vertical comparative analysis
- Not pure history, but models of enforcement
- Roman legal tradition from 753 BC to modern times: universality

ARCHAIC ROMAN LAW

- The earliest time
- Private justice and private enforcement outside the authority of state
- Rituals of private vengeance ruled by customs
- Execution at the person of the debtor

THE *LEGIS ACTIO* PROCEDURE
(XII Tables – 2 cent. BC)

- Public justice and private enforcement
- Rituals of creditor against the debtor before the magistrate (*praetor*)
- *Legis actio per manus iniectionem* ("by laying on the hand")

THE *LEGIS ACTIO* PROCEDURE
(XII Tables – 2 cent. BC)

- *Manus iniectio iudicati*: judgment or confession of liability
- *Manus iniectio pura*: other enforcement titles
- Execution at the person of the debtor: *partes secanto* or slavery *trans Tiberim*
- *Legis actio per pignoris capionem*: Execution at the property of the debtor

THE *FORMULA* PROCEDURE
(2 cent. BC – 3 cent. AC)

- Public justice and private enforcement
- *Actio iudicati*: execution at the person or the property of the debtor
- Old system: *missio in bona* → *venditio bonorum* (public auction) → *bonorum emptor* (universal successor)

THE *FORMULA* PROCEDURE
(2 cent. BC – 3 cent. AC)

- New system*:* execution at the property of the debtor
- *missio in bona* → *distractio bonorum* (public auction) → singular successor
- *Argentarii*: operations of venditio (1. cent. BC – 3. cent. AC)

THE *COGNITIO* PROCEDURE
(3 cent. AC - Justinian)

- Public justice and public enforcement
- *manu militari* execution: *apparitores*: court-oriented enforcement: reasons
- execution at the property of the debtor: *missio in bona* → *distractio bonorum* (public auction) → *in re ipsa* → singular successor

IUS COMMUNE

- Public justice and public enforcement
- court-oriented enforcement: central role of *magistratura togata*
- Enforcement titles: judgments and other official documents (*extra iudicium et sine causa cognitione*: acts of public notaries, bank documents); cases of *fuga*
- execution at the property of the debtor: *bannum* → *possessio per fortiam* (or even imprisonment in the house of creditor) → *distractio bonorum*

CONCLUSIONS

- Public justice and private enforcement again?
- “Degiurisdizionalizzazione del processo esecutivo”
- Privatization of enforcement? Question of *fides publica*
- Alarmant cases → sociology of law: private justice and private enforcement? Back to the archaic Roman Law?

Public and Private Justice course 2009

Dubrovnik, Croatia

25th of May 2009

Civil imprisonment

Bob Assink
Marc Dekkers
Niels Pepels

Maastricht University

The practical "Leitmotiv"

Three objectives

- train legal skills (writing, reading, pleading, research, teamwork, presentation)
- get acquainted with basics of civil procedure
- learn about the history of civil procedure

The practical "Leitmotiv"

		Judge	Plaintiff	Defendant
Formula procedure	Rome 160 AD		x	
Act 1875	London, 1878	x		
Bill-Gratama	Netherlands, 1923			x

Writing a paper comparing an aspect of civil procedure according to Dutch law with the three historical legal systems

Definition of civil imprisonment

Definition:

- depriving a debtor
- of his liberty
- on the demand of or by the creditor
- at the creditor's expense
- in the case of non-fulfilment of his "civil obligations"
- until the obligation is fulfilled or the period allowed by law has expired

History

- Civil imprisonment quite common till 20th century, although limitations set by codifications
- England
  - 1969: Sir Jack Jacob & Payne Committee proposed to abolish civil imprisonment for almost all debts
- Netherlands
  - 1920: Gratama-draft for a new Code of Civil Procedure
  - Bill too much ahead of its time, therefore rejected
  - Civil arrest limited to cases in which non-compliance presupposes wilful failure (ill faith), thus excluding money debts
  - Debtor is allowed to prove his inability to comply

Netherlands 20th century

- 1932: civil arrest for money debts restricted to

  - damages caused by a criminal offence to a maximum of fl 150,-

  - any money to be paid by anybody charged with the administration of someone else's assets (guardians, curators in bonis, trustees in bankruptcy etc)

  - all money debts of foreigners;

  - all debts arising from securities and bonds
- 1948: extended to alimony debts
- 2002: exclusion of all money debts accept maintenance orders; civil arrest otherwise allowed, even in case of restraining orders

Dutch procedural framework

- Civil arrest to be claimed by plaintiff in civil lawsuit
- Court orders civil arrest as ultimate remedy; in case of a restraining order it fixes its duration
- Creditor can refrain from executing civil arrest
- Bailiff sole authority to apply civil arrest
- Detention in remand centre; costs to be advanced by creditor
- Maximum of 1 year or the duration fixed by the court
- Creditor decides on release

Grounds for release

- Creditor's consent
- Fulfilment of the obligation concerned or sufficient guarantees that the obligation will be fulfilled
- Debtor's health
- Inability to comply
- Creditor's interests outbalanced by debtor's interests
- Probable efficacy of other means of enforcement

- Court control on demand of debtor

Margins afforded by international law

- Art. 11 ICCPR: No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

  - insolvency due to ill faith falls outside the scope of this prohibition

- Art. 4 s. 1 Protocol 4 to the ECHR: No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Analysis ECHR case law

31 decisions, no judgments: narrow interpretation

No appearance of violation	7
Complaint in reality about other article	7
Struck out	6
Outside of competence *ratione temporis/loci*	2
Inadmissible for non-exhaustion	2
Manifestly ill-founded	7

- Conclusion: international law leaves much room for civil imprisonment

Civil imprisonment

- Ultimate remedy
  - It is only to be used if other coercive measures don't have any effect
- Wilful failure
  - It is only to be used if it is certain that non-compliance is due to ill faith
- No involvement of third parties
  - It is only to be used if the result will not be that a third party will feel compelled to fulfil the obligation

Practice and use

- Barring orders
- Journalists
  - Controversial but common way to make journalists tell their sources
  - Too drastic?
  - ECHR: journalist has legal privilege depending on the circumstances
  - Dutch state violated art. 10 ECHR
- Maintenance obligations

Conclusions

- Drastic, but effective
  - Civil law does not punish
  - More drastic than any other coercive measure, therefore very effective
  - Psychological preventive effect
- Allowed by international law
- Guarantees against abuse can be incorporated in Code of Civil Procedure

- Even if you think you can do without, you shouldn't

A Model for an Enforcement Regime
The High Court Enforcement Officers of the Supreme Court of England and Wales.

by

Professor Robert Turner

"Evolution is always preferable to revolution and the preservation of such Offices as mine is an example of the strength of the Common Law which is at the heart of so many jurisdictions world wide."[1]

1. Introduction.

For over twenty years I was involved with the enforcement of judgments of the High Court, Court of Appeal of England and Wales and the House of Lords. In 1996 I became responsible as the Senior Master of the Supreme Court for the appointment of the Sheriffs who as Officers of the Court had the day to day task of the enforcement of judgments. My involvement included hearing disputes between creditors and debtors and advising on the conduct of the enforcement officers.

I made it a point to see how sheriff officers were organised and on occasions "rode shoot-gun" with them to see how enforcement worked in practice, inspecting the offices of the different enforcement firms and working with the staff of the High Court who were my direct responsibility and the staff at the Ministry of Justice on all practical aspects of the enforcement regimes of not only England but also those of Scotland and Northern Ireland which are separate jurisdictions within the United Kingdom.

In 2004 the model of High Court enforcement was radically changed and I was appointed by the Lord Chancellor to supervise the introduction of the new regime based on the Courts Act 2003. Thus I am perhaps one of the few judges with experience of having had the direct responsibility for introducing a new enforcement regime into a jurisdiction.

It was a very exciting task and due to the commitment of a number of former Under Sheriffs and Sheriff Officers – now called High Court Enforcement Officers (HCEO's) – it has been a great success.

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[1] My preface to a collection of judicial photographs in a book entitled "Faces of Law" by James Hunkin – Wildy, Simmonds and Hill 2009.

Thus I offer this direct and recent experience in creating an enforcement regime as a model which may be both of interest and of use to the Conference members.

2. The Historical Provenance.

The High Court Enforcement Officers are responsible for the enforcement of the Orders of the High Court and Court of Appeal, which is currently known collectively as the Supreme Court of England and Wales.

These Orders are known as Writs, a description of the form of command issued by the King or on his behalf since the earliest days of the evolution of our central national administration in the tenth century.

These Officers are the successors to the Sheriffs and their Officers who were charged with the administration of the Shires or counties into which Anglo Saxon England was divided prior to the Norman Invasion in 1066 AD.

Even that invasion which was the last successful invasion of our island by a foreign state, did not interrupt the steady growth of the national administration of justice throughout England and subsequently in Wales. Civil disturbances, the latest of which were the Civil Wars of 1642 – 1649, did not inhibit the steady evolution of our justice system.

On 1st April 2004, after the shortest elapse of time from the making of the Regulations[2] setting up the new system – a mere six weeks before the commencement date – some sixty High Court Enforcement Officers (HCEO's) took over the responsibility for High Court Enforcement from the Sheriffs and their Officers of the sixty or so counties of England and Wales.

In reality the sixty HCEO's were all former Under Sheriffs or Sheriff Officers who had elected to stay within the new enforcement system. So far as the Public were concerned the transition was seamless. The entire operation was engineered by a very small team consisting of Mr John Marston, the long standing Chairman of the former Sheriff Officers Association and now the chairman of the newly formed High Court

[2] High Court Enforcement Officers Regulations 2004 – They were made by Parliament on 19th February 2004, came into force on 15th March 2004 and the full regime was introduced on 1st April 2004.

Enforcement Officers Association; Mr Chris Bell, a civil servant with a wealth of experience of enforcement in the Ministry of Justice[3] and myself as the Senior Master of the Supreme Court and to whom the Lord Chancellor, the then head of the judiciary[4] had delegated his powers for the creation and supervision of these new enforcement officers under the 2003 Courts Act. Throughout I was greatly assisted by the staff of the Central Office of the High Court for whom I was responsible and my PA, Miss Maxine Fidler.

This group were keenly aware of the historical basis upon which High Court enforcement was grounded. The practices of the past and the decisions of the courts over the previous generations enabled us to obtain guidance as to the introduction of a new regime which retained many of the existing features whilst changing some well established practices.

The importance of this background material is that it essential that the Executive are constantly reminded that the evolution of our justice system, known as the Common Law, owes its steady development and evolution to its historical roots and that it is dangerous to ignore these origins and to seek to impose new forms which are not strongly rooted in the past.

The High Court is but a development of the concept that the Sovereign is the fountain of justice. The Norman kings in the century following the Conquest in 1066, personally administered justice and held "court" to try cases brought before them until it became necessary to delegate this task to Justices acting on behalf of the king. The High Court judges of today are the direct successors to those Justices appointed by the King in the 1200's to travel the country and to sit at Westminster to hear cases on his behalf.

Equally it was to the Sheriffs of the individual counties that the Writs of the High Court were addressed with the Orders for enforcement. The Sheriff was not the agent of the party who had "won" a judgment of the court even though it was the winning party who would apply for the Writ. The Order which the Sheriff enforced was that of the Court as he was the "Officer of the Court". The Writs were addressed to "*The Sheriff of Blankshire….*" .

[3] Then known as the Department for Constitutional Affairs

[4] The Lord Chancellor ceased to be a judge and head of the judiciary in 2006 and reverted to the role of a politician who was a Cabinet Minister with the responsibility for the Ministry of Justice. The Head of the Judiciary is now the Lord Chief Justice. The Senior Master remains the "delegated" person responsible for the overall management of the enforcement system in the High Court.

This is still the case under the new system with the Writs being addressed to a particular HCEO by name.

As I will seek to show, it is this "historical provenance" with which the work and duties of the HCEO's are imbued that sets them apart from other enforcement agencies in England and Wales.

3. The Reforms of 2004

In 1994 a major exercise in the reform of our civil procedures for the trial of civil actions in both the superior and lower courts of England and Wales was commenced under the leadership of Lord Woolf, a judge in the House of Lords. I was fortunate in being the judge from the High Court who formed a small team working with Lord Woolf to devise this new system. These reforms did not include any consideration of the means for the enforcement of judgments of the civil courts[5]. The Government through the Ministry of Justice[6], said that it wished to deal with the issue of the reform of civil enforcement at a later stage.

In 1998 the then Lord Chancellor, Lord Irvine, announced he wanted to review the enforcement of civil court judgments partly as a result of a research paper coming out from Warwick University in which Professor John Baldwin boldly stated that litigants were not satisfied with the service they received from the civil courts in the enforcement of their judgments and orders.

This research confirmed what many had said for years; it was one thing to achieve a judgment from the court, but it was another to get it paid. This paper was the catalyst to the Government reviewing all the court based methods of enforcement. In 2000 the Lord Chancellor decided to widen his review to include the enforcement of all types of enforceable orders both in the civil and criminal jurisdictions as well as the work of the "certificated" bailiffs. These are generally employees of private bailiff firms who seek from the lower courts an appointment to undertake enforcement work on behalf of those courts and are granted an annual certificate to do so.

[5] The term "civil court" means in our jurisdiction a court which does not deal with criminal or family matters and is usually referred to in the rest of the EU as a commercial court.
[6] Then known as the Lord Chancellor's Department.

Fifteen years and innumerable conferences, working parties, consultations and enquiries later that reform has yet to take place other than in respect of the very small body of men and women responsible for enforcing the judgments of the High Court, the HCEO's.

The reform of the county court staff in the lower courts, through their own enforcement arm known as county courts bailiffs and the very large body of privately employed bailiffs employed in private enforcement firms and agencies had to await the provisions for their reform and regulation which were to be introduced under the terms of the Tribunal, Courts and Enforcement Act of 2007. By March 2009 the enforcement provisions of the Act had not been implemented and in just the last month, notification has been given by the Ministry of Justice that this legislation been put on hold and will be the subject of further consultation with a date for its introduction presently set for April 2012.

Such consultation and the imposition of a carefully regulated regime for the large number of private bailiffs and the bailiffs directly employed by the lower courts reflects the Government's response to the serious concerns expressed in our society regarding the conduct and probity of these bailiffs.

However the "reform" of the High Court Sheriffs was a very simple matter largely undertaken by the sheriffs themselves. In place of the system which gave a sheriff a monopoly for a particular county for the receipt and enforcement of writs against individuals or firms situated in "his" county, this monopoly was removed and instead the country was divided into 105 districts and the HCEO's were permitted to bid for the right to receive writs for enforcement for any or all of these districts.

It was for me as the Senior Master to whom this work had been delegated by the Lord Chancellor to decide the extent of the franchise of each HCEO based on my assessment of his or her ability to undertake this work.

Initially most of the newly appointed HCEO's restricted their cover to the immediate area within they were accustomed to work but one group of these HCEO's bid for and obtained a nationwide franchise and over the past five years most HCEO's now offer similar nationwide service.

To obtain their appointment from me as an HCEO, the former sheriffs and sheriff officers had to submit a very comprehensive application with details *inter alia* of:

1. Any criminal convictions, outstanding judgments against them or unpaid fines or taxes.
2. Any proceeding for bankruptcy, insolvency, disqualification as a director of a company and other related matters with which they might be involved.
3. Their insurance cover, licences under the Consumer Credit Act, details given under the Data Protection Act.
4. Their bank details, tax returns and financial standing.
5. Their knowledge of the law and practice of High Court enforcement.
6. Their business plan and their policies for training their staff.
7. And a host of other related matters.

Such regulation is not as yet required of the bailiffs employed in the county courts nor of the multitude of private bailiffs who seek work from the various government ministries and agencies who have a responsibility for collecting revenue and fines and are known as "*certificated bailiffs*".

This degree of regulation of the HCEO's in this small sector of the enforcement industry has been turned to the advantage of the HCEO's who can justly claim to be the best qualified and most regulated part of the regime. There are certainly no other enforcement agents who are so carefully accredited.

The HCEO's own association are actively seeking an independent academic training body to provide a degree style course for aspiring HCEO's, in place of the existing training scheme run by the Association. This is the only enforcement body that is seeking to do this.

The Association has also agreed with the Government a transparently fair complaints procedure for those members of the public who seek to complain about the conduct of individual HCEO's.

4. Integrity

If a justice system is not perceived by those which it serves to be utterly honest and free from corruption then, in my view, there is no reason to have a justice system.

I have travelled in Africa and the Middle and Far East and in many of these jurisdictions, the justice system is not free from corruption of their judges and their court officials. Bribery is seen as a means by which "justice" can be bought. The public regard going to law as a lottery. This is also the perception that some people have in some European states.

I come from a jurisdiction where there is wide spread concern of a lack of financial and moral integrity by some politicians both in national and local government and in industry and a culture that there is no shame in seeking financial reward which is undeserved nor genuinely earned.

5. The Honest Judge.

It is thus essential to have honest judges and court staff who are seen as free from outside influence especially that of the Government. Unlike some jurisdictions where the judiciary is drawn from a government judicial service where young lawyers join the judicial civil service at an early age, our judges have all been in private practice for about 20 years as solicitors (attorneys) and barristers (advocates) before they seek appointment as full time judges.

They take up office when they are in their 40's and without a perception on the part of the public that they are "government appointees". They are expected to act in terms of their oath "*to do right to all manner of people , according to the laws and usages of this realm, without fear or favour, affection or ill will"*.

They are generally well paid and provided with a reasonable retirement pension after 20 years in office especially in the lower courts though the salaries of the most senior judges do not match the income of leading lawyers in private practice in London and on the international scene. But they on the other hand enjoy the intellectual challenge and respect for their work in the superior courts.

After 17 years of practice as a barrister and 25 years of sitting in the High Court, I am not aware of any judge in the superior courts every having been offered or indeed accepting any form of bribe or improper reward or having tempered their judgments to favour the Government or those with long purses. I am sure that similar standards of probity exist in our lower courts

I was once written to by an ex-Cabinet minister and sitting MP telling me how to find in a particular case. I reported him to the Lord Chief Justice. But it was the reaction of the parties which I found interesting. Having shown them the letter, I suggested that I should step down and not hear the case. They would have nothing of my suggestion insisting that I continue to hear the case with the comment *"The man must have been mad to have made such an approach to one of our judges!"*.

Any form of enforcement system depends on the judges who give the decision which it is sought to enforce being totally free from corruption and the Officers of the Court who are charged with the task of enforcing the same must themselves be above suspicion.

Neither the judgment creditor must think that he can influence the way the Officers go about their work nor should the judgment debtor imagine that he can bride them to desist from carrying out the command of the Court.

If this level of probity cannot be achieved in a jurisdiction, there is frankly no point in having a enforcement regime in the first place.

6. Who is the Client?

Any one with a judgment in their favour of £600 or more in a county court can apply to have the same collected by the HCEO's. The bulk of money judgments are entered in the two hundred or so county courts in the country. However most HCEO's will arrange for the judgment to be transferred into the High Court and for a Writ of execution to be issued out of the High Court addressed to an individual HCEO.

It is this latter practice which makes the HCEO so different. Throughout the enforcement process it is the HCEO to whom the Writ is addressed who is responsible for the proper enforcement of the Writ. He is responsible not to the judgment creditor but rather to the High Court for the entire conduct of

himself and his staff during the recovery of the money or land to which the judgment relates.

If a bailiff in the county court or a private bailiff misbehaves in the course of his work then the court staff can be discipline one of their own staff or have the private bailiff removed from the work. The latter individual might be dismissed by the firm for which he works but the directors or partners of that firm do not bear any direct responsibility for the execution of the Warrant of the county court and will thus not suffer directly. They can simply recruit new staff and apply to the court for them to be made certificated bailiffs.

In stark contrast to these loose measures for regulating the conduct and discipline of the majority of bailiffs, an HCEO is at risk of losing his appointment and his livelihood not only as a result of his own conduct but also due to the conduct of his staff. This degree of responsibility sets the HCEO's apart from all others in the enforcement industry.

The difference is that the private bailiffs have the judgment creditor as their client but the HCEO though initially instructed by a judgment creditor is carrying out the task as an Officer of the Court and under the terms of a Writ addressed by the Court to him personally.

7. The Services offered to the Public

Soon after the start of the new system of High Court enforcement in 2004, it became evident that the most effective system would involve a few firms each consisting of a small number of HCEO's working in partnership. Each firm has chosen to offer a variety of different services to the public – something which cannot be found within the scope of the courts.

A firm of HCEO's may offer to the public a range of services consisting of:

1. Execution of writs of possession and of recovery of money judgments.
2. Commercial rent arrears recovery.
3. Removal of goods taken into possession in the course of the enforcement process and arranging for their storage and in the event of non payment, their sale by auction.
4. Pre-legal reports, tracing and investigations.
5. Providing security for repossessed premises.

6. Investigating the status of vehicles.
7. Transfer up of judgments from the county courts for enforcement in the High Court.
8. Transfer of orders for enforcement to the two other jurisdictions in the UK, namely Scotland and N. Ireland and increasingly across Europe as a result of the European Enforcement Order. The global trend for commerce means that HCEOs must have a working knowledge of foreign judgment enforcement and indeed the Association has created a cab rank of members who are prepared to take on this type of instruction so that judgments from Europe and beyond can be sent to HCEOs for handling rather than to lawyers.

8. Specialist Services offered by the HCEO's

From time to time there arises a need to enforce orders made against mass demonstrators or protest groups who for example may object to the building of an addition runway at an airport, the construction a motorway through a sensitive part of the countryside or the development of an area in a way which they regard as unsuitable. The "protest groups" can be very well organised and resourced.

If an order of the Court is made for their removal, the execution of the same can present a variety of difficult decisions for the Court and thus it is normal for the Courts and government agencies involved to turn to the HCEO's for solutions. The HCEO's have a wealth of experience of dealing with such situations. Working on complex instructions from the claimant who wants land or property recovered, HCEOs have developed systems and procedures which enable them to work at Emergency Service levels of Health & Safety with the police and senior stakeholders in both the law and in the public sector.

HCEO's must be able to respond to protestors who put themselves in jeopardy both at high levels, often in tree tops or suspended in nets, or who dig themselves into makeshift tunnels underground.

New risks emerging in the protestor area of HCEO business include protestors climbing 600ft chimneys at power stations, or chaining themselves to power station infrastructure to disrupt power production. HCEOs must have the internal capability and the relationships with sub-contractors to tackle these very real risks to health and safety, not only to

themselves and their operatives, but to the protestors themselves and anyone involved in the site.

I am not aware of any other civil enforcement agency in Europe today which can operate at the level of the English and Welsh HCEOs in delivering these highly specialised services to the civil courts. And sadly it is a growth area of business which ultimately has to be paid by the British taxpayer!

9. HCEO's and the Police in the maintenance of Law and Order.

HCEO's acknowledge the tremendous support they receive from the police across England and Wales. The civil orders of the High Court cannot be enforced by the police, their role is to support the HCEO to prevent the HCEO being obstructed in carrying out his duty under the Writ of Possession to recover the land or property[7] . The HCEO's access to the police in a supporting role was based on the centuries old right to "call upon the county" known as "*posse comitatus*" which requires anyone called upon by the sheriff to come to the aid of the Court. In the 2004 changes this right was codified into the Courts Act 2003[8], and has been embraced by HCEO's and police as a practical solution to a difficult situation. No doubt equally demanding tasks will arise in the future which will benefit from this unique relationship.

10. Independence and Discretion.

Throughout the enforcement process it is for the HCEO to decide how best to act in carrying out the command of the court. He cannot be ordered by the judgment creditor to take one particular course rather than another though he may discuss with the judgment creditor the mode of enforcement.

If the HCEO is in any doubt as to any matter relating to the enforcement of the Writ which he has received from the court, he can and often does return to the judge to seek guidance and instructions.

Often debtors can be divided into those who "*won't pay*" and those who "*can't pay*".

[7] Section 10, Criminal Law Act 1977.
[8] Sch 7,para 5, Courts Act 2003.

The HCEO must use his judgment in deciding into which category a debtor may fall and decide the best means to achieve a successful enforcement.

With those who have got themselves into debt but wish to clear the outstanding monies provided they can be given the time and means to do this, the HCEO will try his best to negotiate a sensible arrangement which allows the debtor to raise the money or to trade himself out of the debt.

With the *"won't payers"*, more drastic means are required. The sight of his favourite BMW or Merc being lifted onto the back of a low loader will often be enough to bring the business man with means to pay quickly to the scene with the monies needed to release the car.

The HCEO will have to judge the best and most effective means that he needs to employ to achieve a successful return of the Writ. But in making his decision he must never adopt a mode or practice which is against the Law.

The command on the Writ addressed to him or her is to seize and sell and it is within that command that the HCEO must decide whether to remove goods or to allow the judgment debtor to pay monies to avoid sale. HCEO's today in England and Wales are in my view the only agency which are willing to remove goods to produce payment, having developed networks of sub-contractors to carry out removals, along with national panels of auctioneers who will sell the goods.

But despite what may be seen as a tough approach, HCEO's can pride themselves on having the lowest levels of complaints in the enforcement industry with judgment debtors accepting that the legal system will eventually catch up with them if they fail to pay their debts. Where a member of the public wants to pay but needs time the HCEO will listen and weigh up the likelihood of being paid either by removal or by instalments. For debtors who have nothing then the HCEO will simply provide a good quality report for the creditor on the prospects of recovery and draw the execution of the Writ to a close.

The strong arm tactics which the public perceive are adopted by some bailiffs are not in the armoury of the HCEO.

11. Conclusion.

The model set by the English and Welsh High Court Enforcement Officers has proved over the past five years to be able to provide a top quality professional enforcement service which can be summed up as follows:

i. They belong to a profession which has a sound historical provenance which traditionally has been seen to be fair but firm in the enforcement of the Writs of the High Court.
ii. They are a carefully regulated body which is answerable to a judge and not to the Government or to private interests.
iii. They are professionals who can be trusted not to receive bribes or inducements to effect a recovery by dishonest means.
iv. They offer to the public a comprehensive package of services which cover all aspects of the enforcement regime.
v. They can be trusted to use their discretion to act in the best interests of the Law and the Public.
vi. They are simply the Best.

Robert Turner MA, LLD, FICM.
The Senior Master of the Supreme Court and the Queen's Remembrancer
1996-2007
Visiting Professor of Law to the University of Gloucestershire
President of the Association of High Court Enforcement Officers

Effective Enforcement - Speaking Notes

1. Introduction.

I am currently a professor of law at the University of Gloucestershire and an occasional lecturer at the University of Cambridge where I hold a degree of Master of Arts.

I was a judge in the High Court of England for 24 years and as the Senior Master of the Supreme Court responsible for all enforcement of the judgments of that court and for the Officers of the Court who carried out the enforcement.

I am probably the only person present who has been responsible for introducing an entirely new enforcement regime into a national jurisdiction. In 2004, I was responsible for the introduction of the new High Court Enforcement Regime with the able assistance of just one civil servant from the Ministry of Justice; John Marston, the chairman of the HCEOA and two members of my own staff in the High Court. It was a task which we completed in 6 weeks.

2. Submitted Papers

I have submitted two papers to this Conference.

The first is a joint paper with my very good colleague and friend Neil Andrews, Reader in Civil Law at the University of Cambridge entitled "*The System of Enforcement of Civil Judgments in England.*"

And my own paper entitled " *A model for an Enforcement Regime – The High Court Enforcement Officers of the Supreme Court of England and Wales.*"

3. The Remedies and the Means

Once a Court has given a judgment, there must be available a battery of remedies available to the winning party to enforce the same and a reliable and effective means for doing so.

4. The English Remedies and Means.

Where a Court orders something to be done or not done, the remedy is to seek an Injunction. The party against whom an injunction is made will be in contempt if it fails to comply and the consequence will be either Imprisonment for up to two years or a Fine.

If the Order is for the recovery of land or possessions then a Writ of Possession will be issued and the Officer of the Court will either take possession or seek further instructions if necessary.

If the Order is for payment of a sum of money –either as repayment of a debt or compensation for some wrongdoing, then the Court has a range of remedies which can be sought against the "debtor's" land or securities, money held by or due from others and the personal possessions of the debtor.

5. Recovery of a money judgment.

In reverse order of ease of recovery, these remedies are:

i. The sale of the land or securities initiated by a Charge on the debtor's interest followed by an Order for Sale if the debt is not satisfied.

ii. A Third Party Debt Order against a person or institution (usually a bank or trade creditor) to pay

iii. Seizure of the personal goods of the debtor – subject to the exclusion of necessities for living or the tools of his trade. These Orders are commonly known in the High Court as Writs of Fi Fa. These latter Writs are the most common and most effective in terms of immediacy. In the High Court all Writs are addressed to the High Court Enforcement Officers (formerly known as the Sheriffs).

6. The Structure of an Enforcement Regime.

Any regime must be fair, honest and free from corruption if it is to have the respect of the public in general and the parties in particular.

The judge who gives the judgment and makes the orders for its enforcement must seen to be honest and incapable of being bribed if the public are to respect his decision and to comply.

The Officers of the Court – the Enforcement Officers equally must be seen to be honest and incorruptible. The creditor must not be able to dictate how he seeks to enforce the judgment and the debtor must not be able to avoid compliance by bribing the Officer.

7. High Court Enforcement Officers.

Though HCEO's are private individuals employed in the main by small firms with a national cover who initially receive the request for enforcement from the creditor, they remain at all times, Officers of the Court, appointed and regulated by a very strict regime supervised by a judge in the High Court and required to meet very high standards of probity and performance.

They are not answerable to the creditor as a client but to the Court as an Officer of the same – the Writ is addressed to the individual officer and remains valid until satisfied unless the Officer certifies that he has used his best endeavours and cannot complete recovery.

In these respects they are unique within our system and to be distinguished fro the private bailiff companies who approach their tasks in a very different manner and in respect of a few of whom the Public have cause for complaint. In the 12 years that I was responsible for High Court Enforcement I do not recall a single complaint of malpractice nor of an illegal act made against an HCEO.

Although a closely regulated body of no more than 60 Authorised Officers (who can employ others on an operational basis) they at all times remain responsible to the Court for the Writ addressed to them.

Since the introduction in 2004 of this new regime in the High Court, it has bedded down to become a remarkably effective form of enforcement which I trust will be the model for the enforcement regime for the lower national and local courts in our country.

The HCEO's have developed a service which includes

i. Seizure or recovery within days.
ii. Removal and sale where necessary
iii. Investigating, tracing and reporting
iv. Security of recovered premises
v. Provision of specialist teams for difficult tasks
vi. Calling in others authorities – the police or the fire brigade –whilst remaining in overall charge. An ancient power known as *posse comitatus.*

8. The qualities needed of a good enforcement regime.

Utter integrity and honesty at all levels from the judge at the top to the officer at the door.

Independence from pressure of the creditor or debtor or indeed the Government.

Discretion to exercise an impartial and independent judgment as to the means and manner of compliance of the Order of the Court.

Professor Robert Turner MA, LLD, FICM
May 2009

MARSTON GROUP

A comparative study of bailiff business models in the UK

Principles of enforcement.

- The state provides the machinery for effective enforcement.
- It does not underwrite or guarantee the outcome.
- The claimant is primarily liable for the costs with a remedy against the debtor.

How do we apply these principles?

- By the creation of a bailiff service.

- The possible models for this service are: -
  - Public bailiffs (civil servants)
  - Private bailiffs (self employed)
  - A mixture of both.

Ingredients of a business model.

- Public bailiffs – underwritten by the state.
- Private bailiffs –
  - Competition
  - Remuneration
  - Regulation.

Public bailiffs

- Civil servants employed by the state.
- Directly funded from state resources.
- Seek to recover the costs of enforcement from stakeholders.

Private bailiffs

- Competition
- Remuneration
- Regulation.

The types of competition on offer.

- Geographical monopoly.
- Internal competition model.
- Competition by tender.

A closer look at UK-England and Wales.

- County Court Bailiffs
- High Court Enforcement Officers.
- Certificated bailiffs.
- Private bailiffs.

The importance of the fee scale.

- No genuine contractual consent.
- The construction of the fee scale will determine the culture of the bailiff model
- The architect of the fee scale will bear a heavy responsibility for the level of corruption in the model

Examples of common mistakes in fee scales.

- In public bailiffs-provision of generous salaries and expenses but not paying them.

- In public bailiffs-misdirecting the money recovered to support the state.

More Examples

- In private bailiffs-making overcharging of fees by bailiffs difficult for parties to counter.

- In private bailiffs-designing fee scales that encourage corrupt practice.

What are the ingredients of a successful fee scale.

- Simplicity.
- Consistency.
- Transparency.
- Certainty.
- Proportionality.
- Fairness.

A focused look at one business.

- 370 Certificated bailiffs.
- 111 other bailiffs.
- 6 High Court Enforcement Officers.
- Approximately 600 people employed.
- Ten income streams.
- 1.4 million warrants enforced per year.
- Turnover £25,000,000.00.

In Conclusion

- Nationally test.
- Corporate involvement in enforcement.
- Educational requirements.
- Competition.
- Delegation to unqualified parties.
- A single remedy system.

John Marston

A comparative study of the various business models employed by bailiffs in England & Wales.

Principles of Enforcement

It is a fundamental duty of every state to ensure that judgments, fines penalties and all payment orders sanctioned by it within its borders are capable of enforcement. The state does not however guarantee or underwrite the judgments or orders handed down by its courts and other executive agencies.

One obligation of the state within a justice system is to provide a fair, transparent, effective and inexpensive procedure whereby those claimants who go to court and obtain a judgment can have their judgement enforced and receive legal redress in reasonable time within the framework of the legal system.

A claimant has a legitimate right that everything that can reasonably be done within the legal framework will be done towards enforcement. The claimant also has the right to expect that where enforcement becomes necessary and is successful then the defendant is the person who must pay for the enforcement steps taken against him.

We should start from the assumption that it is the defendant who causes enforcement to become necessary, and the defendant is primarily responsible for the cost of the resources of the state when it is necessary for these resources to be employed against him.

On the other hand, although the state will make provision for various enforcement methods to exist, where these are unsuccessful then the claimant, being the person seeking a remedy, must expect to pay for the costs of a failed enforcement.

To define the financial relationship precisely the claimant is primarily liable for the costs of enforcement but has a remedy against the defendant.

The costs of enforcement should be added to the Judgment debt and recovered in full from the defendant where payment is recovered in full. Where enforcement is partially successful then the claimant will receive the balance of any money recovered after deduction of the proportionate costs of execution. Where the enforcement fails then the whole (proportionate) cost of the execution is the responsibility of the claimant.

These are the duties of the state.

How do we apply these principles?

Essentially there are two possible models for bailiffs; these are public (civil servant) bailiffs, or private (self employed) bailiffs. A state therefore has three options to choose from. It can have public bailiffs, private bailiffs or a mixture of both. Whatever choice a country makes in terms of private or public bailiffs or a mixture of both, there is then almost an infinite number of business models to employ.

[Out of the 47 member states of the Council of Europe, 25 have said that they have public bailiffs. These states are: Albania, Austria, Azerbaijan, Bulgaria, Croatia, Czech Republic, Denmark, Finland, Georgia, Germany, Greece, Iceland, Italy, Liechtenstein, Malta, Moldova, Norway, Portugal, Russian Federation, Turkey, Ukraine, UK-England Wales, UK-Northern Ireland, and UK-Scotland.

11 say that they have strictly private bailiffs. These are: Estonia, Hungary, Latvia, Lithuania, Luxembourg, Monaco, Netherlands, Poland, Romania, Slovakia, and Slovenia.]

Two examples of states with a mixture of both private and public bailiffs are England and France. In France the French Treasury bailiff is a civil servant, whilst the Judgments and Orders of the civil courts are enforced by the Huissier de justices who are private. In England those civil judgments with a value under £600.00 are exclusively enforced by the County Court Bailiff who is public whilst those judgments above £5,000.00 are exclusively enforced by High Court Enforcement Officers who are private. These public and private bailiffs compete for those judgments between £600.00 and £5,000.00. There is another distinction of note in England and Wales, and that is that consumer debt judgments can only be enforced by public bailiffs.

The trend is for countries to move from public status bailiffs to either mixed status or private status. Sometimes a mixed status is transitional and states intend to move to a fully private status for their bailiffs.

Many countries also draw a distinction between the different types of activity undertaken by bailiffs. The obvious example is between civil enforcement and criminal enforcement. Civil enforcement is usually the enforcement of the judgments and orders of the civil courts (contract disputes, arguments between spouses etc) whilst criminal enforcement is usually comprised of the fines and punishments handed down to offenders by criminal courts. In England it is notable that criminal enforcement is being “de-criminalised” – transferred into the civil courts to be enforced by private bailiffs.

In the case of criminal enforcement states are far more conservative and 39 states have public bailiffs enforcing criminal sanctions, 2 have private bailiffs and 2 have mixed status bailiffs performing this function. It will be interesting to see if the UK example of de-criminalisation is followed by others and if so will states migrate from public bailiffs to private bailiffs for criminal enforcement as has been the trend in civil enforcement.

Having chosen which of the three options a state prefers for its bailiffs the next task is to design a business model for them. For example if public bailiffs are the preferred route then the bailiffs will be civil servants employed by the state, they will be managed by other civil

servants and operate out of state owned buildings and use state resources (cars computers desks etc) to do their work. They will be directly funded by the state and very probably the state will seek to recover the running costs of the bailiffs from the fees charged to stakeholders for their services.

It is when one of the other possible options is chosen that life becomes more complicated. Focusing on a private bailiff option for example there are extra ingredients to consider. For example, competition, remuneration, regulation.

Competition.

Does the state want competition between bailiffs? Is it desirable? If so how will it work? Well these are important questions. Clearly a state does not want to hand a lucrative monopoly to one person or the favoured few so if bailiffs are to be private then competition between them is desirable.

Competition normally delivers cost savings and higher service levels. The more efficient a business is the cheaper it is to run and these savings can be passed on to clients so more business is attracted that in its turn can be done more cheaply and so on. But what type of competition is suitable for bailiffs? There are three types operating at present in Europe: Geographical monopoly, internal competition model and competition by tender.

Geographical monopoly; this is the most conservative and oldest of the models. Bailiffs are given an area and are both entitled and responsible for all the enforcement necessary within their bailiwick (area). It is not true competition in the sense that no other bailiff can trespass in another bailiffs area but some pressure to compete (in service levels at least) can be brought to bear by comparison with what is being accomplished in other bailiwicks.

Internal competition; in this model the country is divided up into areas (often postal districts or court areas) and the individual bailiffs are assigned to at least one area and possibly to all of them. A bailiff cannot refuse to accept a warrant against a debtor in an area where he is assigned but can choose to accept or decline warrants in those areas where he is not specifically assigned. All bailiffs have to operate to the same fee scale so they are competing on service levels only. As they out perform their colleagues their market share increases and that of the poorly performing bailiffs reduces. Market forces in action.

Competition by tender; is where enforcement work is parcelled up and put out to tender in "batches". Businesses (and they are not necessarily bailiffs) are therefore invited to tender for this work within the guidelines of the tender process set out by the awarding body. Tenders can be national (work across the entire country), within areas (as is normally the case), or specific to certain types of work (for example arrest and deliver to prison contracts). Tenders normally operate for a set period of time (say three years) with an option for the awarding body (usually the state) to extend the period if they judge an extension prudent.

Let us now turn to how we in UK-England and Wales have approached these matters, over millennia. One distinction we have in the UK (I would not necessarily call it an advantage) is

that our bailiffs laws and practices have evolved over many hundreds of years (over one thousand years in fact). One could say that we have invented a new bailiff model for each new type of debt.

In this comparative study of the different bailiff business models employed in England and Wales I intend to look at four models. These are: County Court Bailiffs, High Court Enforcement Officers, Certificated Bailiffs and Private Bailiffs. There are others.

County Court Bailiffs.

The County Court is a creature of statute and came into being in 1846, in the County Court Act of that year. The Act was passed after considerable public debate, to provide a cheap and simple system for the recovery of small debts which were disproportionately expensive and therefore uneconomic to collect in the Queen's Bench or Court of Common Pleas. County Court Bailiffs were created to enforce the judgments of this new court.

County Court Bailiffs are individual civil servants. They are men and women who are often on a second or third career and typically were police officers or members of the armed forces before joining the court service (as it is called). They operate out of County Courts and have geographical areas where they are competent to enforce judgments in. These Districts are determined and changed by the Lord Chancellor as and when this is deemed necessary. These bailiffs have a number of responsibilities (in addition to enforcing judgments), for example evictions, serving documents, policing the courts etc.

The County Court has a limited jurisdiction (and so too therefore does its bailiffs).Essentially the bailiffs enforce civil judgments for small debts up to £600.00. They also have an exclusive jurisdiction over consumer debts and over domestic evictions where (for example a house owner has fallen into arrears with a mortgage). They compete with High Court Enforcement officers for civil debts (not being consumer debts) for between £600.00 and £5,000.00.

County Court Bailiffs are managed and regulated by more senior civil servants and to some extent by first instance Judges. They are paid a salary, receive a state pension. Financial support in terms of car allowances, computers, desks and offices etc are provided by the court service from its budget which is in turn provided by the state.

High Court Enforcement Officers.

High Court Enforcement officers came into existence in April 2004 and evolved from Sheriffs who had existed (and still do exist) for over 1,000 years. They derived their authority and power directly from the Sovereign and common law and were in effect private bailiffs who operated under a geographical monopoly but were reformed by statute, namely The Courts Act 2003, Section 99.

High Court Enforcement Officers are individual men and women who are personally authorised and appointed by the Lord Chancellor on advice from his officials once they have shown a sufficient knowledge of the law, theory and practice of enforcement. They demonstrate this by joining a professional association named in Schedule 2 of the High Court Enforcement Officers Regulations 2004 No. N 400 (there is currently only one association listed) and succeeding to full membership by passing appropriate examinations and serving an apprenticeship with a qualified Officer. They then apply to the Lord Chancellor for authorisation and they are supported in their application by their professional body.

Each appointment is for life subject to good behaviour and each Officer must commit to (inter alia) on-going training.

England and Wales is divided up into 104 postal areas and the geographical size of these areas differs depending on the density of the population. Every Officer must accept assignment to at least one of these areas and can apply to be appointed to as many as they choose. They must however submit with their application for assignment a business plan which will be scrutinised to see if their plans are sufficiently robust enough to meet the commitment that assignment to the desired areas requires.

Claimants who wish to enforce a judgment can either choose an Officer themselves (advertising by Officers is permitted) or they can send their writ (a name for an enforcement title) to a central office who will send it to an officer assigned to the area where the debtor is resident on a cab rank basis. Officers cannot refuse to execute a writ in an area where they are assigned but they may decline a writ if it is in an area where they are not assigned. Officers may also delegate enforcement to another Officer but the first Officer will remain responsible and liable for the execution of the writ. Officers may even delegate their functions to those who are not Enforcement Officers but if they do so they so do at their peril as the Officer named on the writ is primarily responsible for the acts and omissions of whomever they engage to assist them in the execution of the writ.

<u>Certificated Bailiffs.</u>

A Certificated Bailiff is also a creature of statute, namely The Distress for Rent Rules 1988 (SI 1988 No 2050). Certificates are granted following a successful application to the County Court. The process is fairly straight forward but does involve an appearance in open court before a Circuit Judge (a Judge of second instance) who will question applicants and if satisfied will grant a certificate.

A certificate is only technically required for distress for rent but because of a paucity of regulation in the private bailiff sector a certificate has become, almost by default, a qualification or evidence that the holder is a suitable person to able to act as a bailiff. Not only has the certificate migrated into other enforcement arenas but so to have the Distress

for Rent Rules which have been pass ported into other legislation (with varying degrees of success) to facilitate the collection of other types of debt.

Private Bailiffs.

There is no single definition of a private bailiff. The word “bailiff” is Anglo Saxon in origin and means “a bound man”. The usage was prevalent in the middle ages when Sheriffs ruled counties in the UK on behalf of their sovereign and employed their own private armies of bound men.

In modern times it is generally accepted that a Private Bailiff derives his authority to act from his employer. For example HM Customs and Revenue Legislation may authorise duly appointed officers (be they employed or self employed) to enforce execution under the terms of their legislation.

Local authorities involved in collecting local taxes or parking fines may be authorised under legislation to delegate enforcement powers and may issue contracts for collection of fines etc to limited companies whose employees may act as private bailiffs under those delegated powers.

Table (1) showing some forms of enforcement in the UK-England and Wales and those empowered to execute them.

Creditor	Sum Due	Type of Bailiff
County Court Judgment Creditor	County Court judgment	County Court bailiff
High Court judgment Creditor	High Court Judgment	High Court Enforcement Officer
Commercial Landlord	Rent arrears	Landlord personally or a Certificated Bailiff
Local Authority	Local Taxes	Private Bailiff or Local authority duly authorized Officer
HM Customs and Inland Revenue	Income Tax and VAT arrears	HM Collector of Taxes. High Court Enforcement Officer Certificated Bailiff Private Bailiff
Magistrates Courts	Criminal Fines and sanctions	Police Private Bailiffs
Child Support Agency	Child support maintenance	Certificated Bailiffs Private Bailiffs
Local Parking Authority	Road Traffic Penalties	Certificated Bailiffs

The importance of the fee scale.

The contract between a bailiff and a claimant and a debtor is perhaps unique. This is because there is no genuine contractual consent. A claimant has to use a bailiff if he wants his remedy enforced and a debtor certainly has no choice.

The amount of fees that a bailiff can charge and the way a bailiff's fee scale is constructed will determine the culture that develops in a bailiff service. It will also determine the level of corruption that will come to exist in that service. Put simply (and excluding downright dishonesty) the architect of the fee scale in operation bears a heavy responsibility for the culture and levels of corruption found in the bailiff service that operates that scale.

Examples of common mistakes in fee scales:

In public bailiffs – providing for generous salaries and expenses – but not paying them.
In public bailiffs – misdirecting the money recovered from debtors to support the state.

In private bailiffs – making overcharging of fees by bailiffs difficult for parties to counter.
In private bailiffs - designing fee scales that encourage corrupt practices.

What are the ingredients of a successful fee scale?

Simplicity.	Easy to calculate and easy for debtors to understand.
Consistency.	Similar structure and principles to other fee scales that may exist.
Transparency.	No scope for different bailiffs to charge different amounts for the same actions.
Certainty.	Fees applied per enforcement stage and not per action taken by the bailiff.
Proportionality.	Debtors charged a proportionate amount compared to the amount of the debt.
Fairness.	The structure of the scale must incentivise bailiffs to recover the money and debtors to pay at the earliest stage.

A focused look at one business.

The Marston Group Limited (note its status as an incorporated company with limited liability), has five offices nationally although it communicates with many of its employees over the internet. Many of the "outside" employees almost never attend at a company office.

The business employs some 370 bailiffs including 6 High Court Enforcement Officers who are all directly employed. A further 111 bailiffs (some certificated and others private) are also directly employed whilst 252 bailiffs (some certificated and others private) are self employed. Approximately 600 people are employed in total.

The business has ten income streams within the enforcement arena (it also trades in other areas) and these are: -

Income Stream	**Type of Bailiff**	**Competition source**
HMCS Magistrates Courts Warrants	Certificated	Tender
Road Traffic Warrants	Private	Tender
HMCS Inland Revenue.	Private HCEO	Tender Claimants choice
High Court writs.	HCEO	Claimants choice
Council Tax recovery.	Certificated	Tender
Child Support Agency.	Private	Tender
Parking Fines.	Certificated	Tender
Commercial Rent Recovery.	certificated	Claimants choice
ANPR.	Private	Tender
Arrest Warrants.	Private	Tender

In volume terms the approximate number of warrants executed by the business per annum amount to 1.4 million cases.

The approximate turnover of the business per annum is currently £24,000,000.00. (Twenty four million pounds).

In conclusion.

What are some of the differences between bailiff business models in the UK and elsewhere?

1. Nationally test.

In the UK there is no stipulation for bailiffs to be UK nationals. Anyone entitled to work is entitled to seek employment as a bailiff.

2. Corporate involvement in enforcement.

It is interesting to note that the largest businesses in the enforcement arena in the UK are limited companies that either directly employ bailiffs or sub-contract their work to independent bailiffs or indeed to each other.

3. Educational requirements.

The educational requirements of those individuals involved in enforcement are surprisingly light (with the exception of High Court Enforcement Officers). Often bailiffs are trained by their employers (as in the case of the County Court and many private companies.

4. Competition.

The fact that different types of competition exists not only between bailiffs and the fact that there are different types of bailiff, but also in the way they source their work, i.e. the different income streams. Some work is by tender, other work is by area whilst some is sourced directly by claimants.

5. The power to delegate to "unqualified" parties.

One feature of many of the business models of bailiffs is the ability to sub-contract their responsibilities to third parties.

6. A single remedy system.

A surprising feature of UK bailiffs is that they are a "single option remedy" in that they cannot (for example) arrest bank accounts or take a portion of a debtor's salary. A UK bailiff's sole power is to seize moveable property and sell it if the sum owed is not paid.

Note.

Some data used has been drawn from a process of evaluation exercise of judicial systems (2004 – 2006), commissioned by the CEPJ. Those countries that participated are: -

Albania, Andorra, Armenia, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, HUNGARY, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Spain, Sweden, Turkey, UK-England and Wales, UK-Northern Ireland, UK-Scotland, Ukraine.

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The Devil Is in the Details: Remarks on Italian Enforcement Procedures

Elisabetta Silvestri

Sources of the law on enforcement

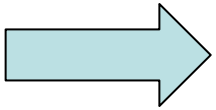
- Civil Code
- Code of Civil Procedure, Book III
- Statutes governing the so-called special enforcement procedures (e.g., tax collection)

An outline of enforcement

- Enforcement must be based on judgments or other legal instruments collectively known as ‘enforceable instruments’ (*titoli esecutivi*):

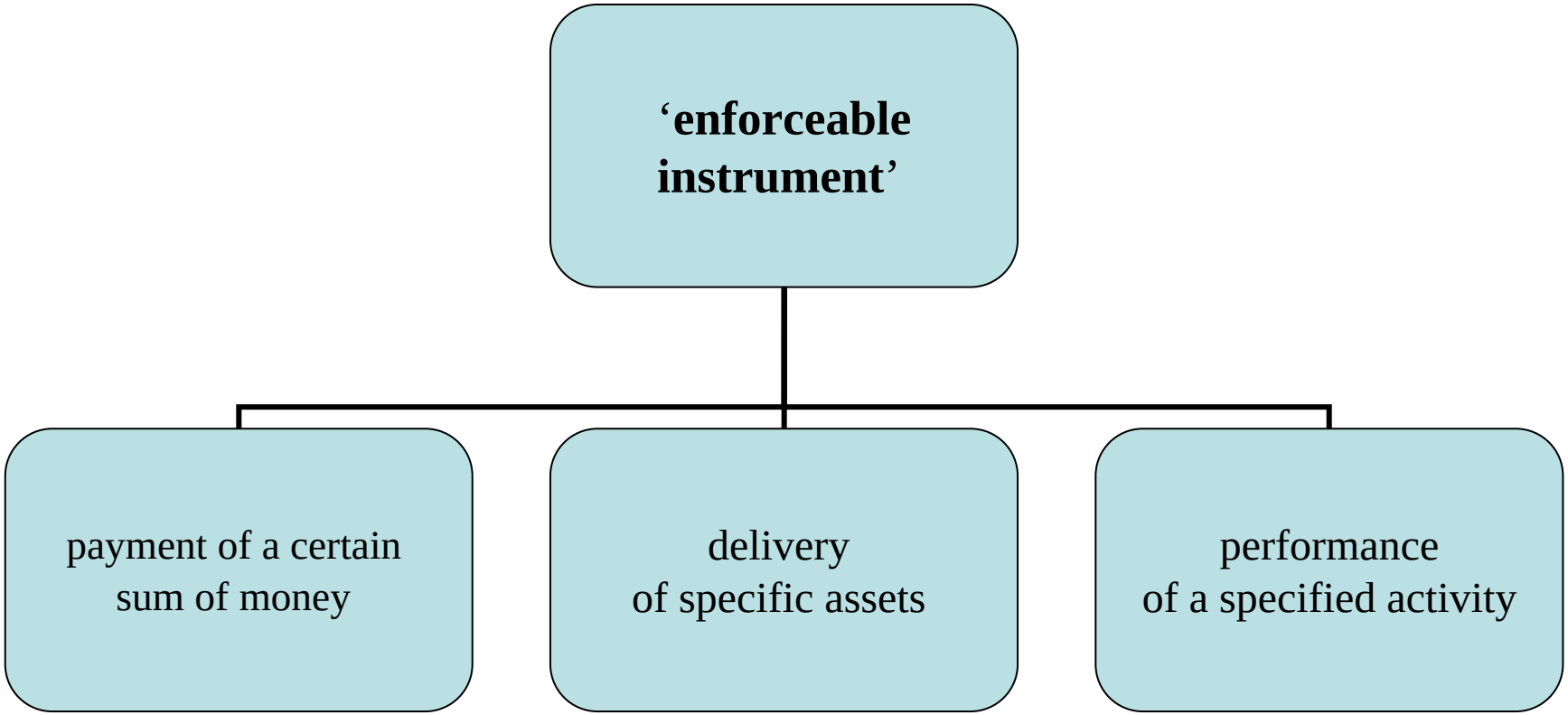
  - judicial ‘enforceable instruments’: final judgments and other court orders (e.g., eviction orders);

  - non-judicial ‘enforceable instruments’: public deeds and negotiable instruments (e.g., bills of exchange).



FORMULA ESECUTIVA: ‘It is hereby commanded that any marshall so requested and whoever is entrusted with the duty to do so enforce that instrument, that public prosecutors grant their assistance, and that all police officers aid in the enforcement upon lawful request to do so’

Main types of enforcement



Dramatis personae: the actors of enforcement procedures

- The judge (always a single judge)
- The parties (the judgment creditor and the debtor; formal intervention of other creditors)
- The court clerk and the bailiff (both public servants)
- Public notaries, lawyers, registered accountants (at the stage of assets' liquidation) supervised by the judge

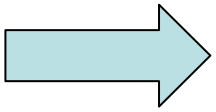
Italy adopts a system of court-controlled enforcement

Critical aspects

- Excessive legal formalism: a labyrinth of judicial procedures for the enforcement of money judgments and orders
- The difficulties related to the identification and location of assets
- Trials and tribulations of the enforcement of non-money judgments

A labyrinth of judicial procedures for the enforcement of money judgments and orders

- Basic pattern: attachment of assets; liquidation of assets; distribution of proceeds.



Variation on the theme according to the target of attachment:

- movable property owned by the debtor and in his possession
- movable property owned by the debtor and in the possession of a third party
- credits owed to the debtor by a third party
- immovable property owned by the debtor
- property owned jointly by the debtor and third parties as well
- property owned by a third party, but attachable since it was given as collateral for the money the debtor borrowed from the judgment holder (e. g., a bank)

- The difficulties related to the identification and location of assets

→ **No duty for the debtor to disclose his assets**

- Trials and tribulations of the enforcement of non-money judgments

→ **No coercive measures (e.g., French *astreintes*), but only ‘surrogate performance’**

Evaluation of Italian enforcement procedures

- No recent hard data
- In 2004, the average length of public auctions for the liquidation of attached real estate was 90 months (7.5 years)

Enforcement procedures are one of the many aspects of the deep crisis affecting Italian civil justice

ECHR caselaw: Cases of *Immobiliare Saffi v. Italy*, 28 July 1999; *Capitanio v. Italy*, 11 July 2002; *Magherini v. Italy*, 1 June 2006

Conclusion

- **Long and cumbersome procedures**
- **High costs**
- **Defective enforcement of non-money judgments**

Urgent need for radical reforms

Adjudicating and collecting the victim's compensation in Norway

Jon T. Johnsen

What is combined proceedings?

- **Combined proceedings**
  - Criminal charge (*Criminal proceedings*)
  - Compensation claim (*Connected proceedings*)

- Civil claim (*Civil proceedings*)

Interesting features

- ★Borderline between criminal proceedings
- ★Unorthodox legal aid scheme
- ★Special enforcement scheme

Connectivity

- Compensation claim must arise from the same act as the criminal charge
- Evidencial overlap the main point
- Parts of the proceedings might only be relevant for one of the claims
- Everyone affected can use connected proceedings

Counsel in connected proceedings

- Victim
  - Prosecutor
  - Victims' lawyer scheme
  - Hired lawyer

- Accused
  - Public defender
  - Hired defender

Filtering

- The prosecutor for claims forwarded by the prosecutor
- The court for claims handled by the victim's lawyer or the victim's hired lawyer

Statistics

1999

- Compensation awarded in 8 400 of the 58 000 criminal convictions - or one case per seven convictions.
- New claims registered on 3 228 wrongdoers
- Largest: 750 000 euro, smallest: 5 euro
- Average:5 400
- Total: 20 mill

Statistics

2008

- New claims registered on 6 000 wrongdoers
- Claims collected within 3 years: 85 percent

Same direction principle

- Possible outcomes in combined proceedings:
  - **Conviction both for the criminal charge and the damage claim;**
  - Conviction for the criminal charges, rejection of the damage claim;
  - *Acquittal of the criminal charge, approval of the damage claim;*
  - **Acquittal of the criminal charge, acquittal of the damage claim.**

drafting European Union legal instruments

Shiite jurists

Gauke f.

drafting a EU instrument on civil procedure since Amsterdam

- system of competences changed with Treaty of Amsterdam
  - civil law went from third to first pillar
  - instead of intergouvernmental activity now community activity
    * Parliament and Commission became players equal to Council
    * Council decides (mostly) by qualified majority instead of unanimity
    * Commission entitled to make proposals

- Amsterdam Treaty entered into force on 1 May 1999
  - joint revision of the Brussels and Lugano Conventions ready
    - based on Austrian 1993 proposal to revise Art. 5 (1)
    - previsaged explanatory report by Fausto Pocar
  - draft of convention on jurisdiction in marriage and divorce cases ready
    - with explanatory report by Alegria Borras

Agenda of proposals (1)

- Commission prepares proposal
  - proposal sometimes preceded by green and white papers
    - e.g. Green Paper on the revision of Bxl-I, April 2009
  - proposal sent to Council and Parliament
  - discussion of proposal in Council
    - in working party
    - proposals for revision (with dissentings) sent to JAI-Council of Ministers
      - » via Coreper
  - JAI-Council decision sent to Commission

Agenda of proposals (2)

- Commission prepares proposal
  - proposal sometimes preceded by green and white papers
  - proposal sent to Council and Parliament
  - discussion of proposaal
  - proposals for revision (with dissentings) sent to JAI-Council of Ministers
  - JAI-Council decision sent to Commission

- After a revision of the proposal by the Commission
  - second round of discussion in JAI-Council; provisional decision
  - discussion of remarks made by Parliament;
    - revised provisional decision
  - decision on compromises with Parliament (codecision procedure)

(in case of disagreements)

Agenda of proposals (3)

- Commission prepares proposal
  - proposal sometimes preceded by green and white papers
  - proposal sent to Council and Parliament
  - discussion of proposal
  - proposals for revision (with dissentings) sent to JAI-Council of Ministers
  - JAI-Council decision sent to Commission

- After a revision of the proposal by the Commission
  - second round of discussion in JAI-Council; provisional decision
  - discussion of remarks by Parliament
  - decision on compromises with Parliament

- Instrument accepted if Council and Parliament accept result
  - Interpretation by recitals, not by explanatory report, and sometimes by notes annexed to JAI-meeting minutes

problems of interpretation

- interpretation by national courts
  - “acte clair”, “acte éclairé”
  - lack of clarity
    - e.g. “civil and commercial” ⇒ lack of harmonised terms of reference
      - see: “acta iure imperii”; cf. Bxl-I, Art. 1 and EEO Art.2
  - lack of explanatory report
    - historical interpretation (Borras report)
    - comparative interpretation (Pocar report?)
  - interpretation by recitals
  - sometimes notes annexed to JAI-meeting minutes
- preliminary judgment by Court of Justice EU
  - autonomous interpretation
  - (often) timetaking

PUBLIC AND PRIVATE JUSTICE

Enforceability of arbitral awards in the European Union

Dr. Fokke Fernhout
Associate professor of law
Dubrovnik 26 May 2009


AERO LLOYD

REGULATIONS EC (No) 261/2004, 2111/2005 & 1107/2006

- Regulation on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (261/2004)
- Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air (1107/2006)
- Complemented regulation establishing list of air carriers (2111/2005)

SUMMARY CONTENT OF THE REGULATIONS

If the airport of departure or arrival is within the EU:

- In case of cancellation of a flight or denied boarding:
  - right to re-imbursement or rerouting (art. 8)
  - right to compensation (art. 7)
- In case of delay of a flight:
  - right to care (art. 9)
  - right to re-imbursement or rerouting (art. 8)
- In case of denied embarkation disabled persons:
  - right to re-imbursement or rerouting (art. 4 1107/2006)
- In case of lost or damaged wheelchairs:
  - right to compensation (art. 12 1107/2006)

RIGHT TO COMPENSATION (ART. 7)

- In the case of cancellation:
  - € 250 for flights of less than 1500 km;
  - € 400 for flights between 1500 and 3000 km and all intra-Community flights
  - € 600 in all other cases
- unless the air carrier can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

AVIATION CONCILIATION BOARD

- Air carriers unwilling to apply these regulations - looking for loopholes like gap between delay and cancellation
- Many procedures before all kind of courts within the EU with conflicting case law (and sometimes preliminary ruling of ECJ)
- November 2008: agreement between Dutch Ministry of Transport and BARIN (Board of Airline Representatives in the Netherlands – 80 air carriers) to establish Aviation Conciliation Board in The Hague

AVIATION CONCILIATION BOARD

- Dispute settlement by means of arbitration in spite of the name (offering more guarantees than conciliation)
- Strictly electronic
- Arbitration agreement only *after* start of dispute
- Small fee for plaintiff (passenger)
- No costs orders against plaintiff
- Starting July 2008 for disputes over flights from a Dutch airport
- To be upgraded to all disputes within the EU

ENFORCEABILITY ARBITRAL AWARDS

- Questions asked by Aviatian Conciliation Board:

  1. Are the arbitral awards thus given enforceable in the European Union (using the means of enforcement the domestic systems of civil procedure have to offer)…

  2. … against a reasonable price and effort in proportion to the interests of the passenger?

- Matter of recognition and enforceability, not of substantive enforcement law

TWO DIMENSIONS

- General framework common to all member states
- Domestic rules: treaties, constitution, acts and decrees, practices

GENERAL FRAMEWORK

- EU law (Van Gend & Loos and Costa-Enel with only Germany and possibly Denmark and Ireland as exceptions; other states with dualistic system made exception for EU law)

- Purely contingent: New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958

EU LAW

- EU takes a somewhat conflicting stand on arbitration in general and in consumer disputes in particular:

  - the member states are encouraged to agree on easier ways of recognition and enforcement of arbitral awards;

  - but there are no plans to harmonize arbitration and it is excluded in art. 1 of the European Execution Regulation and the European Service Regulation;

  - however, arbitration is recommended and encouraged as a means of ADR for consumer disputes;

  - but agreeing on arbitration *before* a conflict has arisen, is void (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts).

CONFLICTS BETWEEN ARBITRAL AWARDS AND EU LAW

- Benetton v. Eco Swiss (ECJ 1 June 1999, C-126/97):

  - arbitration agreement was void under art. 81 EC but upheld by the arbitrator

  - suspension demanded by Benetton on the public policy ground

  - fundamental provision essential for the functioning of the internal market, since

  a) free competition is referred to in art. 3 EC (fundamental objectives)

  b) agreements in violation of art. 81 EC are void

  - falls under the scope of public policy of art. V New York Convention and may be stayed ex officio under this treaty

  - therefore, these arbitral awards must be stayed under EU law

CONFLICTS BETWEEN ARBITRAL AWARDS AND EU LAW

- Claro v. Milenium (ECJ 20 Octobre 2006, C-168/05)

  - consumer did not object to arbitration in a dispute with a telephone company, but demanded suspension of the award on the public olicy ground afterwards

  - fundamental provision essential for the functioning of the internal market, since

  a) consumer interests are referred to in art. 3 EC (fundamental objectives)

  b) agreements in violation with the directive void

  - falls under the scope of public policy of art. V New York Convention and may be stayed ex officio under this treaty

  - therefore, these arbitral awards must be stayed under EU law

CONFLICTS BETWEEN ARBITRAL AWARDS AND EU LAW

- Applied to the air travelling regulations:

  - fundamental provisions essential for the functioning of the internal market, since

  a) consumer interests are referred to in art. 3 EC (fundamental objectives)

  b) agreements in violation with these directives void (art. 15 Regulation EC 261/2004; art. 13 Regulation EC 1107/2006: rights cannot be waived)
- Arbitral awards of the Aviation Conciliation Board can not be recognized and enforced if they infringe on consumer rights guaranteed by the air travelling regulations
- European law does not facilitate enforcement, it only hampers it

NEW YORK CONVENTION 1958

- New York Convention on Recognition and Enforcement of Foreign Arbitral Awards
  - successful (ratified by more than 140 states)
  - sharp (only one Recommendation regarding one slip of the pen and an outdated provision; no complaints at 40th anniversary)
  - simple
  - short (seven articles on subject matter)
  - supplemented by UNCITRAL Model Law on International Commercial Arbitration

- Ratified by all EU member states without relevant reservations
- De facto harmonization

HARD PART

- Low budget research with the help of Google translations
- Art. 956 of the Spanish Code of Civil Procedure
- *Against this car will not appeal further.*
- Contra este auto no habrá ulterior recurso.

IMPACT

- Provisions of Convention are of a nature to be self-executing

- Monistic:

  - AUS, BEL, BUL, EST, FRA in case of reciprocity, LAT, LUX, NTL, POL, POR, SPA, SLV, UKD

- Dualistic:

  - DEN (Model law), FIN (Arbitration Act), GER (1061 ZPO: NYC to be applied), HUN (Enforcement Act, too difficult for Google), IRE (Arbitration Act 1980), ITA (art. 840 Codice di Procedure Civile), LIT (Model Law), SLW (Model law), SWE (Model law), TSJ (Arbitration Act, but not in accordance with NYC)

- No data: CYP, GRE (but NYC has precedence over national rule, art. 905/906 CCP), MAL (NYC part of Act on the Recognition and Enforcement of Foreign Awards), ROU (looks suspicious)

SYSTEM

- No other reservations allowed than reciprocity and commercial disputes (art. I (3))
- Subsidiarity (art. VII (1)): the treaty does not replace more favorable provisions in domestic law or treaties

  - relevance ACB: Netherlands-Belgium Execution Treaty

  - not relevant: European Convention on International Commercial Arbitration (no international trade, not signed by The Netherlands)
- Any arbitration agreement in writing (art. II (1) & (2), Recommendation 2006: letters and telegrams not exhaustive)
- Compulsory referral to arbitration if the agreement is invoked (art. II (3), outside scope of NYC)
- Principle of non-discrimination in domestic procedure (art. III): no conditions more onerous than the conditions for recognition of domestic awards

SYSTEM

- Limitation on documents to be filed with the request (art. IV):
  - authenticated original award or certified copy
  - original agreement or certified copy
  - certified translation (official or sworn translator, diplomatic or consular agent)

- Translation relaxations:
  - FIN (court discretion), GER (court discretion), HUN (English), NTL (court discretion), SWE (court discretion)

TWO GROUPS OF REFUSAL GROUNDS

- Grounds of refusal ex officio (art. V (2)):
  - *ratione materiae* (in fact included by second ground)
  - public policy

- Grounds of possible ("may") refusal at a party's request (art. V (1)) (due process):
  - agreement not valid
  - no possibility of defence
  - matter not submitted to arbitration by the agreement
  - composition arbitral authority not lawful
  - award not yet binding, set aside or suspended (alternative: adjournment of the decision (art. VI))

SUBJECTS OF INTEREST

- Two stage procedure, e.g. applied by:

  - BEL, FRA, IRE (probably), ITA, MAL (registration only), NTL (unless the court decides otherwise), UKD (probably)
- Relaxation of refusal grounds, e.g. applied by:

  - BEL (no control composition, competence, *ratione materiae*), BEL/FRA/SLV/EST (enfoceable if not yet binding)
- Legal representation not required, e.g. in:

  - DEN, LAT, NTL
- Costs and recoverability
- Irregularities, as in:

  - BUL, EST, LAT (supplementary documents)
  - LUX (extra grounds ex officio)

NICETIES & PROBLEMS

Niceties

- Little formalities
- Exhaustive list of grounds of refusal
- Distinction between ex officio grounds and grounds to be invoked by the party against whom the award is being relied upon
- Spirit of NYC (recognition unless…) pushed national courts towards narrow interpretation of refusal grounds
- Domestic procedure sometimes even more elegant and simpler for foreign awards
- Easier to enforce arbitral awards than court judgments

Problems

- No superior court for uniform interpretation (esp. public policy)
- Procedure according to domestic law

FURTHER RESEARCH

- Details of procedure
- Public policy case law
- Party's refusal grounds case law
- Legal representation and costs

- E-mail any information to

- fokke.fernhout@maastrichtuniversity.nl
- renzo.bloemink@maastrichtuniversity.nl

Zwangsvollstreckung zivilgerichtlicher Entscheidungen nach deutschem Recht, ihre mangelnde Effizienz der Zwangsvollstreckung und ihre sonstigen Probleme

Dubrovnik 2009

Peter Gilles

I. Vorbemerkungen

Wenn es denn bei dem Thema um das deutsche System des Zwangsvollstreckungsrechts und zudem noch um die Effizienz der Zwangsvollstreckung in meinem Land und schließlich auch noch um die involvierten normativ-theoretischen wie faktisch-praktischen Probleme geht, ist diese auf die deutsche Rechts- und Sachlage bezogene Thematik nicht nur von enormer Dimension und hoher Komplexität, sondern auch von einer ausgeprägten rechtswissenschaftlich-methodologischen Interdisziplinarität.[1]

Das Thema lässt sich deshalb schriftlich wie mündlich angesichts der Limitierung auf lediglich zwölf Textseiten und der Begrenzung der Redezeit auf lediglich zwanzig Minuten – wenn überhaupt – nur ganz unvollständig und oberflächlich behandeln. Ich vermag deshalb hier nicht mehr als eine grobe Skizze oder gar nur bloße Stichworte zum deutschen Zwangsvollstreckungssystem zu liefern, die Effizienzfrage nur kurz zu streifen und angesichts der Masse existierender wissenschaftlicher wie faktischer Probleme –nur einige derselben - mit den hieraus resultierenden Reformfragen – lediglich anzudeuten. Sollten deshalb bei dem hier versammelten sachkundigen Publikum weitergehende Erwartungen bestehen, bitte ich diese auf das gerade Gesagte zurückzuschrauben.

II. Zum System des deutschen Zwangsvollstreckungsrechts

Die „*Zwangsvollstreckung*“ ist im Wesentlichen in der aus dem vorvorigen Jahrhundert stammenden deutschen Zivilprozessordnung (ZPO), einem früheren Reichsjustizgesetz von 1877, – heute in der Fassung der Bekanntmachung von 2005, – im Achten Buch in den Abschnitten 1-4 (§§ 704-915h ZPO) geregelt, denen in einem Abschnitt 5 ebenfalls unter der Überschrift„Zwangsvollstreckung“ verorteten Regelungen des einstweiligen Rechtsschutzes (Arrest und einstweilige Verfügung) nachfolgen. Dieses hier normierte Zwangsvollstreckungsrecht hat im Laufe der Zeit zahlreiche punktuelle Veränderungen erfahren, ist jedoch in seinen Grundzügen unverändert geblieben, und dies trotz seiner weithin zugestandenen Überalterung und Mangelhaftigkeit an allen Ecken und Enden. Die dringend erforderliche Generalrevision dieses Rechtsgebiets steht mithin nach wie vor aus. Neben diesem Normpaket von ca. 250 Vorschriften in der ZPO existiert eine Fülle von

Nebengesetzen wie Organisations-, Verfahrens-, Personal- und Kostengesetzen, die unmittelbar oder mittelbar ebenfalls die Zwangsvollstreckung betreffen, wie insbesondere das Gesetz über die Zwangsversteigerung und Zwangsverwaltung resp. das Zwangsversteigerungsgesetz (ZVG). Hinzukommen eine Menge weiterer für die Zwangsvollstreckung einschlägiger Regulierungen, die hier nur in ihren Abkürzungen zitiert werden können: GG, MRK, GVG, DRiG, GBO, RflG, InsO, AnfG, GKG, GVGA, etc. Daneben ist selbstverständlich auch das Erste Buch der ZPO mit den „Allgemeinen Vorschriften“, die grundsätzlich auch für die weiteren Bücher gelten, für das Zwangsvollstreckungsrecht und seine Auslegung und Anwendung von erheblicher Bedeutung.

Wie bei den deutschen im 18. und 19. Jahrhundert entstandenen Großkodifikationen und ihrer damaligen Gesetzgebungstechnik und Regelungssystematik üblich, enthält auch der Regelungskomplex der Zwangsvollstreckung im Achten Buch in seinem Abschnitt1 „Allgemeine Vorschriften“ (§§ 704-802 ZPO), die freilich leider ein wenig strukturiertes Sammelsurium unterschiedlichster und keineswegs nur „allgemeiner“ Vorschriften bilden. Das verlangt von einem Rechtsanwender aus der Überfülle der im Gesetz präsentierten verstreuten Regulierungen, die wirklich allgemeinen und tragenden Vorschriften mühsam zusammen zu suchen.

In dem hier angesprochenen Abschnitt 1 findet sich zunächst in der Eingangsnorm die Erwähnung der - mit oder ohne Sicherheitsleistung vorläufig oder endgültig- „vollstreckbaren Endurteile“ (§ 704 ZPO) als den normativ wichtigsten *Vollstreckungstiteln*, während die „weiteren Vollstreckungstitel“ (§ 794 ZPO) im Folgenden erst sehr viel später aufgelistet werden. Neben einem Vollstreckungstitel sind weitere Basisvoraussetzungen jeder Zwangsvollstreckung des Weiteren die *Vollstreckungsklause*l (§ 725 ZPO) sowie ein im Gesetz nur ganz nebenbei angesprochener und außerdem missverständlich formulierter „Vollstreckungsauftrag“ (vgl. § 753 ZPO), der als *Vollstreckungsantrag* des Gläubigers zu verstehen ist und der als Basisvoraussetzung eine eindeutigere Hervorhebung verdient hätte. Was es alles sonst noch an allgemeinen und spezifischen Zulässigkeitsvoraussetzungen der Zwangsvollstreckung zu beachten gilt, muss sich ein Rechtsanwender ebenfalls erst einmal mühsam aus verstreuten Einzelregelungen erarbeiten, soweit sich hierzu überhaupt irgendwelche Regelungen finden. Es erscheint deshalb als ein erhebliches Manko, dass sich innerhalb der allgemeinen Vorschriften kein kompletter Katalog mit sämtlichen Zulässigkeitsvoraussetzungen der Zwangsvollstreckung befindet.

Des Weiteren behandelt der Abschnitt1 – und auch dies nur unvollständig – die staatlichen *Vollstreckungsorgane* und deren Zuständigkeiten und hier zunächst den Gerichtsvollzieher (§ 753 ZPO) Dieser ist dort gefragt ist, wo für die Vollstreckung ein körperlicher Einsatz und tatsächliche Handlungen nötig sind, wie bei einer Mobiliar- und Bargeldpfändung, also bei der Pfändung beweglicher Sachen (§ 808 ZPO) oder der Zwangsvollstreckung zur Erwirkung der Herausgabe von Sachen (§ 883 ZPO). Die Pfändung von Rechten oder sonstiger Immaterialgüter resp. nicht körperlicher Gegenstände fällt hingegen in den Aufgabenbereich des Vollstreckungsgerichts (§ 764 ZPO), also jene Pfändungsmaßnahmen, die richterliche Beschlüsse oder Verfügungen erfordern .In der Praxis spielt hierbei die Lohn- und Gehaltspfändung eine besonders große Rolle spielt. Das Vollstreckungsgericht als solches ist eine Abteilung des grundsätzlich mit einem Alleinrichter besetzten Amtsgerichts, wobei freilich bei Vollsteckungssachen der Richter selbst nur in Ausnahmefällen tätig wird, weil an seiner Stelle grundsätzlich der Rechtspfleger (§ 20 Nr. 17 RpflG zuständig ist. Als weitere Vollstreckungsorgane kommen neben den beiden genannten wichtigsten Vollstreckungsorganen noch weitere in Betracht wie bei der Vollstreckung zur Erwirkung bestimmter Handlungen das Prozessgericht (§§ 887 ff. ZPO) sowie das Grundbuchamt, als ebenfalls eine Abteilung des Amtsgerichts, in Fällen einer Grundstückspfändung (§ 1 GBO).

Was die allgemeinen Vorschriften zum Zwangsvollstreckungsrecht im Abschnitt1 neben vielen weiteren Vorschriften ganz unterschiedlichen Inhalts noch enthalten, ist insbesondere eine hypertrophe Anhäufung von Gesetzesregeln zu *Vollstreckungsschutzbehelfen* unterschiedlichster Art wie sie wohl nirgends ihresgleichen hat. Mehr als eine pure Aufzählung dieser Behelfe ist hier nicht möglich:

- Vollstreckungsschutzantrag bei sittenwidriger Härte von Vollstreckungsmaßnahmen (§ 765a ZPO)
- Vollstreckungserinnerung gegen Art und Weise der Zwangsvollstreckung oder der Gerichtsvollziehermaßnahmen (§ 766 ZPO)
- Vollstreckungsabwehrklage bei Einwendungen gegen den durch das Urteil festgestellten Anspruch (§ 767 ZPO)
- Klage gegen Vollstreckungsklausel bei Erteilungsmängel (§ 768 ZPO)
- Drittwiderspruchsklage bei die Vollstreckung hindernden Rechten Dritter am Zugriffsgegenstand (§ 771 ZPO)
- Anträge auf einstweilige Einstellung der Zwangsvollstreckung (§§ 707, 732, 769, u.a. ZPO)

Daneben gibt es Rechtsbehelfe gegen Entscheidungen des Rechtspflegers wie insbesondere die Erinnerung (§ 11 RpflG) Hinzukommen ferner die sofortige Beschwerde gegen Entscheidungen innerhalb eines Zwangsvollstreckungsverfahrens ohne mündliche Verhandlung (§793 ZPO) sowie die Klage auf vorzugsweise Befriedigung bei bestehenden Pfand- und Vorzugsrechten Dritter am Zugriffsobjekt (§ 805 ZPO). Doch damit nicht genug. Die Rechtsprechung hat nämlich- teils unterstützt durch die Wissensschaft – mit Hilfe extrem extensiver Auslegungen oder freier Rechtsschöpfungen diesen gesetzlichen Wust an Behelfen noch um weitere bereichert wie etwa umGegenvorstellungen, Anhörungsrügen oder Sonderbeschwerden wegen greifbarer Gesetzeswidrigkeit.

Und nicht nur das: Denn schon das Reichsgericht und ihm folgend der Bundesgerichtshof haben in ständiger Rechtssprechung dem Schuldner mit dogmatisch höchst problematischen Begründungen und unter Überschreitung der Grenzlinien zwischen Privatrechtsschutz und Prozessrechtsschutz eine Klage nach § 826 BGB in Fällen einer sittenwidrigen Titelerschleichung oder rechtsmissbräuchlichen Titelausnutzung durch den Gläubiger zugestanden. Nach den heute hierzu vertretenen Meinungen. oll sich mit dieser Klage nicht nur mit dem normierte Ziel eines Schadensersatzes (Ersatz des Vollstreckungsschadens) oder auch einer Unterlassung des Zwangsvollstreckungsgesuchs des Gläubigers verfolgen lassen, sondern auch mit dem Ziel einer Rücknahme des bereits erfolgten Vollstreckungsauftrags oder der Herausgabe des Vollstreckungstitels.

Die freilich spektakulärste Weiterentwicklung des vollstreckungsrechtlichen Schuldnerschutzes ist durch das deutsche Bundesverfassungsgericht erfolgt. Im Zuge einer fortschreitenden sog. „Konstitutionalisierung“ (Verfassungsverrechtlichung), ja „Hyperkonstitutionalisierung“ einfachen Verfahrensrechts und hier insbesondere des Zwangsvollstreckungsrechts hat nämlich das Bundesverfassungsgericht auf Grund von Verfassungsbeschwerden (vgl. Art 93 I Nr.4a GG, §§ 13 Nr.8a, 90ff Bundesverfassungsgerichtsgesetz (BVerfGG) wegen Grundrechtsverstößen durch Vollstreckungsorgane als Träger öffentlicher Gewalt eine ganze Batterie von - unter Umständen mit Gesetzesskraft ausgestatteten- Entscheidungen zu Vollstreckungsfragen(z.B .Zuschlag, Wohnungsdurchsuchung, Wohnungsräumung, Grundstückversteigerung, Haftanordnung, Unterlassungsvollstreckung, Prozesskostenhilfe) Verfassungsbeschwerden wegen Grundrechtsverstößen durch Verfassungsorgane erlassen Dies hat mittlerweile die Verfassungsbeschwerde zum Bundesverfassungsgericht zu einem „Superrechtsbehelf“ des Vollstreckungsrechts werden lassen.[2]

Angesichts dieser Entwicklung einer sozialstaatsorientierten fortschreitenden Zurückdrängung von Gläubigerinteressen und einer ausgesprochenen

Schuldnerfreundlichkeit des deutschen Zwangsvollstreckungsrechts kann es nicht verwundern, dass ausländische Beobachter die Bundesrepublik Deutschland geradezu für eine „Schuldneridylle“ halten. Auch unter den deutschen sog. „Schuldneranwälten“ gilt Deutschland als ein „Paradies für Schuldner“. Es erscheint deshalb wieder einmal an der Zeit, eine rechtspolitische Neujustierung des Interessenausgleichs innerhalb des im Zwangsvollstreckungsrechts allgegenwärtigen Konflikts zwischen Allgemeinheits-, Schuldner- und Gläubigerinteressen zu versuchen.

Im Zusammenhang damit sollte man von einem modernen Zwangsvollstreckungsgesetzesrecht auch erwarten dürfen, dass es auch neueren wissenschaftlichen Erkenntnissen , wie insbesondere solchen zu der Einschlägigkeit allgemeiner zivilprozessualer *Verfahrensgrundsätze* (resp. –prinzipien oder –maximen)im Zwangsvollstreckungsrechts, sowie der wissenschaftlichen Erarbeitung von spezifisch vollstreckungsrechtlichen Grundsätzen Rechnung trägt, und diese als Rechtsorientierungs-, Rechtsauslegungs-, Rechtsfortbildungs-, Rechtsreform-, Rechtsvergleichungs- und Rechtsangleichungshilfe den Detailregelungen voranstellt.

Zu diesen zumindest innerhalb der Prozessrechtswissenschaft mehr und mehr diskutierten Grundprinzipien des heutigen Zwangsvollstreckungsrechts zählen etwa der Prioritätsgrundsatz, der Formalismusgrundsatz, der Verhältnismäßigkeitsgrundsatz, der Beschleunigungsgrundsatz oder der Effektivitätsgrundsatz...[3]Hinzukommen die vom Bundesverfassungsgericht angemahnten Prinzipien der Geeignetheit, Bestimmtheit, Erforderlichkeit, Zumutbarkeit und Angemessenheit vollstreckungsrechtlicher Zugriffe Was diese und andere Prinzipien angeht, lassen sich diese innerhalb des einfachen Zwangsvollstreckungsrechts als solchem bislang lediglich an normativen Einzelausprägungen und Regelungssplittern festmachen wie etwa an § 803 ZPO (Verbot der Überpfändung), § 806b ZPO (gütliche und zügige Erledigung) §§ 811,812,850, 850a,850c,850d ZPO (Unpfändbarkeiten, Pfändungsbeschränkungen, Pfändungsgrenzen, Verbote zweck- und nutzloser oder unterwertiger Vollstreckung).

Im Brennpunkt der Diskussionen steht auch wieder einmal das grundlegende Verhältnis von Privatautonomie und Staatsmacht, Parteiherrschaft und Amtsautonomie, auf dem Gebiet der Zwangsvollstreckung und damit auch die Frage nach Geltung und Umfang des Dispositionsgrundsatzes auf der einen und des Offizialprinzips auf der andern Seite, sowie neuerlich verstärkt auch die Frage nach Geltung und Umfangs des Beibringungsgrundsatzes im Gegensatz zum Amtsermittlungs oder Untersuchungsgrundsatz. Letzteres steht teilweise in einem jetzt vorliegenden „Entwurf eines Gesetzes zur Reform der Sachaufklärung in der Zwangsvollstreckung“ (Stand:

1.1.2006) zur Debatte, der allerdings bereits vom Deutschen Gerichtsvollzieherbund in einzelnen Punkten kritisiert und mit Änderungsvorschlägen versehen wurde.

Was den weiteren Inhalt des deutschen Zwangsvollstreckungsrechts, vor allem der Abschnitte 2 (§§ 803-882a ZPO) und 3 (§§ 883-898 ZPO) angeht, gliedert sich der mit „Zwangsvollstreckung wegen Geldforderungen“ benannte Abschnitt 2 hauptsächlich in die Sektoren „Zwangsvollstreckung in körperliche Sachen“, „Zwangsvollstreckung in Forderungen und andere Vermögensrechte) sowie „Zwangsvollstreckung in das unbewegliche Vermögen“, während der Abschnitt 3 mit „Zwangsvollstreckung zur Erwirkung der Herausgabe von Sachen und zur Erwirkung von Handlungen oder Unterlassungen“ keine weitere Untergliederung erfährt. Die hier geregelten unterschiedlichen *Vollstreckung(verfahrens)sarten* lassen als dominantes Unterscheidungs- und Strukturierungskriterium erkennen, dass es vorrangig um die beiden Fragen geht, *wegen welcher titulierter Ansprüche* die Zwangsvollstreckung betrieben wird (Zahlungsansprüche, Herausgabeansprüche, Handlungsansprüche, Unterlassungsansprüche) und *in welche Vermögenswerte* des Schuldners („bewegliches Vermögen“ wie „körperliche Sachen, „Forderungen und andere Vermögensrechte,“ „unbewegliches Vermögen “vollstreckt werden soll. Nehmen sich diese Vollstreckungsarten auch nach Voraussetzungen, Zielen und Verlauf recht unterschiedlich aus, so ist ihnen doch ein grundsätzlich zweitstufiges Verfahren in dem Sinne gemeinsam, dass zunächst eine Sicherstellung bzw. Beschlagnahme der Vermögensgegenstände durch Pfändung erfolgt und alsdann ggf. eine Verwertung durch Versteigerung, Verkauf, Übertragung, Verwaltung oder sonst wie und speziell bei der Grundstückpfändung durch Zwangshypothek, Zwangsversteigerung und Zwangsverwaltung. Dabei spielt in der Praxis heutzutage längst nicht mehr die Pfändung und Verwertung von Mobiliar des Schuldners durch den Gerichtsvollzieher die beherrschende Rolle wie es früher vielleicht einmal der Fall war und deshalb vom damaligen Gesetzgeber im Gesetz in den Vordergrundgerückt ist, sondern die Pfändung und Überweisung von Geldforderungen wie namentlich von Lohn- und Gehaltspfändung durch den Rechtspfleger

In diesem Zusammenhang ist bemerkenswert, dass sich der Deutsche Gerichtsvollzieherbund derzeit mit dem Argument „Effizienzsteigerung“ um eine gesetzliche Übertragung auch der Forderungspfändung auf die Gerichtsvollzieher bemüht, um – wie es heißt – wie bislang bei der Sachpfändung künftig auch bei der Forderungspfändung einen „direkten und schnellen Zugriff ohne Zeitverlust“ zu ermöglichen. Freilich fehlt es in vielen Fällen gegenwärtig gerade an diesem direkten und schnellen Zugriff ohne Zeitverlust gerade bei der Sachpfändung.

Im Abschnitt 4 schließlich (§§ 899-915h ZPO) geht es um „Eidesstattliche Versicherung und Haft“, also um einen Regelungsgegenstand von außerordentlicher praktischer Bedeutung deshalb, weil der Schuldner oft die einzige Informationsquelle ist um seitens des Vollstreckungsorgans und des Gläubigers durch eine „Offenbarung“ des Schuldners über dessen vorhandenes Vermögen etwas zu erfahren (vgl. §§ 807, 836, 883 ZPO).

Das mir gesetzte Zeitlimit verbietet, auf weitere Einzelheiten des deutschen Zwangsvollstreckungsrechtssystems einzugehen. Ein Punkt freilich soll noch kurz erwähnt werden, nämlich der *Charakter* und die Machart des deutschen Zwangsvollstreckungsrechts und die mit ihr verbundenen Schwierigkeiten seiner rechtswissenschaftlichen Erfassung und juristenberuflichen Handhabung, was auch mit der verloren gegangenen Kunst der Gesetzgebung in unserer Zeit zu tun hat Wie viele andere Rechtsgebiete auch, leidet nämlich auch das deutsche Zwangsvollstreckungsrecht unter einer offenbar unaufhaltsam wachsenden Übernormierung, Überkomplexität und Überdogmatisierung., welche durch die massenhaften punktuellen legislativen Neuerungen stetig gesteigert werden. Mit diesen Entwicklungen gehen mancherlei die Gesetzessystematik gefährdende Fehlplatzierungen einzelner Vorschriften innerhalb überkommener Gesetzesgliederungen einher und mancherlei Formulierungsschwächen, Textunklarheiten und selbst logische Brüche, durch welche die Operationalität und Praktikabilität des Zwangsvollstreckungsrechts in Mitleidenschaft gezogen sind. Zudem stehen im Gegensatz zu den heutigen realen Verhältnissen nicht nur im deutschen Sachenrecht als „dingliches“ Recht des Bürgerlichen Gesetzbuchs (BGB) , sondern ebenso im Zwangsvollstreckungsrechts bei den pfändbaren Gegenstände nach wie vor „Sachen“ als Gegenstände und Zugriffsobjekte der Zwangsvollstreckung im Vordergrund, während Forderungen und sonstige Rechte, sog. „geistiges Eigentum“ (property rights), Erfindungen, Software, Know how , Namen, Marken und andere Immaterialgüter mehr jedenfalls innerhalb des Zwangsvollstreckungsrechts eine bisher nur klägliche Berücksichtigung erfahren.

Hinzu kommt als schwerwiegendes rechtshistorisches Relikt und Defizit der Umstand, dass bis zum heutigen Tag im Gesetz und in der Wissenschaft die „Befreiung“ des formellen Prozessrechts und insbesondere des Zwangsvollstreckungsrechts aus den „Fesseln“ des materiellen Zivilrechts noch immer nur unvollständig gelungen ist. Das zeigt sich unter anderem bereits an einer ganzen Reihe im Zwangsvollstreckungsrecht vorfindbarer einstmals vorwiegend zivilrechtlich-materieller Termini und Institute (z.B. „Anspruch“, „Einwendung“, „Einrede“, „Pfandrecht“, „Auftrag“, etc.), wobei diese vom heutigen Standpunkt aus mehrdeutigen Einsprengsel bis zum heutigen Tag unzählige

Theoriestreitigkeiten zur Folge haben. Gestritten wird nach wie vor mit Vorliebe um das „Wesen“ und die „Rechtsnatur“, einschließlich „Doppelnatur“ oder „Zwitternatur, dieser oder jener zwangsvollstreckungsrechtlichen Erscheinung, wobei die verschiedenen Meinungen mal einer zivilistischen, mal einer publizistischen oder einer gemischt zivilistisch-publizistischen Theorie den Vorzug geben. Die nicht enden wollenden Diskussionen um die Natur des Pfändungspfandrechts sind hierfür ein besonders abschreckendes Beispiel. Nach wie vor ist auch die Ansicht weit verbreitet, dass ein vorprozessual gegebener materiell-rechtlicher Anspruch im prozessualen Erkenntnisverfahren durch das hier allein interessierende Leistungsurteil festgestellte und für vollstreckbar erklärt und hierdurch zu einem vollstreckbaren, materiell-rechtlichen Anspruch werde, den es nunmehr im Vollstreckungsverfahren zwangsweise durchzusetzen bzw. zu verwirklichen, zu befriedigen oder in einem materiell-rechtlichen Sinne zu erfüllen gelte statt anzuerkennen, dass es der „prozessuale“ Anspruch ist, der hier in Frage steht, womit sich für die vorherrschende Meinung ein Bogen vom materiellen Recht über das Erkenntnisprozessrecht und Zwangsvollstreckungsverfahren wieder bis zum materiellen Recht spannt. Dabei wird ignoriert, dass es der richterliche Leistungsbefehl ist, der für vollstreckbar erklärt und alsdann vollstreckt wird.[4] Jedenfalls im Zwangsvollstreckungsrecht scheint es, als sei die Vermischung und Verquickung von materiellen und formellen, zivilistischen und publizistischen, privatrechtlichen und öffentlich-rechtlichen Betrachtungen unüberwindbar.

Endlich sei auch noch einmal an dieser Stelle auf die schon erwähnte Überkonstitutionalisierung des Zwangsvollstreckungsrechts insbesondere durch teilweise heftig kritisierte Entscheidungen des Bundesverfassungsgerichts zu Einzelerscheinungen des Zwangsvollstreckungsrechts im Sinne einer Materialisierung des als noch formalistischer als das Erkenntnisverfahrensrecht eingeschätzten Zwangsvollstreckungsrechts hingewiesen. Zusammen mit den daraus folgenden wissenschaftlichen Debatten zum Thema „Vollstreckungszugriff als Grundrechtseingriff“[5] zu erheblichen Verunsicherungen hinsichtlich des Systems und des Charakters des Zwangsvollstreckungsrechts geführt hat. Mittlerweile das gesamte einfachgesetzliche Zwangsvollstreckungsrecht bereits als einen „einzigen Schauplatz“ für massenhafte Grundrechtsverletzungen oder zumindest -gefährdungen erscheinen lässt.

III. Zur Effizienz der Zwangsvollstreckung in Deutschland

Was den zweiten Aspekt des mir vorgegebenen Themas angeht, nämlich die Frage nach der Effizienz des deutschen Zwangsvollstreckungsrechts, lässt sich diese Frage nur sehr

schwer beantworten. Auch wenn man unter dem Stichwort „Effizienz“ hier lediglich eine Erledigung der den Vollstreckungsorganen obliegenden Aufgaben, d.h. des Geschäftsanfalls in der gesetzlich gebotenen Weise und des möglichst geringen Kostenaufwands in möglichst kurzer Zeit versteht. Insoweit nämlich fehlt es – jedenfalls soweit ersichtlich - an umfassenden und soliden empirischen Untersuchungen und selbst an ausreichendem statistischem Material, da selbst die Bundesjustizstatistik in ihren Statistischen Jahrbüchern für die Zwangsvollstreckungsverfahren keine Zahlen ausweist, die freilich auf mehrere Millionen Angelegenheiten geschätzt werden dürften, die für den Gläubiger erfolgreich oder auch nicht erfolgreich bearbeitet worden sind.

Was den Geschäftsanfall bei der staatlichen Justiz insgesamt, d.h. die Nachfrage nach gerichtlichem Schutz angeht, ist diese fraglos immens, weshalb auch die Überlastung der Staatsjustiz als ihr „Hauptübel“ angeprangert wird. Bereits im Jahr 2004 betrugen allein in der Zivilgerichtsbarkeit die Neuzugänge in erstinstanzlichen Verfahren bei den Amtsgerichten rund 1,5 Millionen (gewöhnliche Prozesse), denen in einer etwa gleich hohen Erledigungsziffer. Wie viele dieser Zivilprozesse in einem stattgebenden Leistungsurteil als Vollstreckung endeten und alsdann tatsächlich zu einem Vollstreckungsverfahren führten, ist unbekannt. Dies gilt ebenso für die zu anderen Vollstreckungstiteln führenden Verfahren und Verfahrenserledigungen, wie insbesondere Vergleiche und aus Mahnverfahren resultierende Vollstreckungsbescheide. Die Zahl der Mahnverfahren bei den Amtsgerichten darf auf jährlich rund 12 Millionen geschätzt werden. Leider finden sich auch keine Angaben über Zahlen und den Verlauf von Zwangsvollstreckungsmaßnahmen, die im Bereich des einstweiligen Rechtsschutzes (Arrest und einstweilige Verfügung, vgl. §§ 917, 918, 928 und insbesondere 930, 933, 940 ZPO) liegen. Offenkundig sind allerdings die vielzähligen und vielfältigen Klagen, vor allem aus der Anwaltschaft und aus Unternehmerkreisen auf Gläubigerseite über die Ineffizienz der deutschen Zwangsvollstreckung im Allgemeinen und die Zwangsvollstreckung durch Gerichtsvollzieher im Besonderen. Mit Schilderungen zu Fällen, in welchen Gerichtsvollzieher überhaupt nicht greifbar waren, oder falls greifbar viel zu langsam agierten, von massenhaften Fällen wiederholter vergeblicher Vollstreckungsversuche, der Unauffindbarkeit irgendwo versteckter pfändbarer Gegenstände oder mit Hinweisen auf Schränke voller nicht durchsetzbarer Vollstreckungstitel, deren Durchsetzung die Gläubiger nach mehrfachen – immer wieder neue Kosten auslösenden – Vollstreckungsversuchen schließlich aufgegeben haben. Aus all dem lässt sich jedenfalls so viel sagen, dass es um die Effizienz des deutschen Zwangsvollstreckungsrechts wie der deutschen Zwangsvollstreckung nicht sonderlich gut

bestellt ist, was die Beschlagnahmeverfahren ebenso wie die Verwertungsverfahren gleichermaßen betrifft.

IV. Zu den Problemen des deutschen Zwangsvollstreckungsrechts

Was nun den dritten und letzten Aspekt des mir aufgetragenen Themas angeht, nämlich die Frage nach den rechtlichen wie faktischen Problemen des deutschen Zwangsvollstreckungsrechts, wurde schon eine ganze Menge derselben im Vorausgegangenen angesprochen. Diese betreffen zunächst die schon erwähnten und schwersten Mängel des geltenden Gesetzesrechts, wie sie abgemildert bemerkenswerterweise selbst von Gesetzgeberseite beispielsweise in dem schon angesprochenen Entwurf eines Gesetzes zur Reform der Sachaufklärung der Zwangsvollstreckung „Unzulänglichkeiten“ eingeräumt werden, wenn es dort wortwörtlich heißt: „Das geltende Recht der Zwangsvollstreckung ist noch maßgeblich von den wirtschaftlichen und sozialen Verhältnissen des 19. Jahrhunderts geprägt. Seither hat sich die typische Vermögensstruktur der Schuldner grundlegend gewandelt. Insbesondere die Regelungen zur Zwangsvollstreckung wegen Geldforderungen erweisen sich in Bezug auf Vollstreckungsziele, Verfahren, verfügbare Mittel sowie vorgesehene Sanktionen als nicht mehr zeitgemäß.“ Aber auch die Verarbeitung dieses Rechts durch die Prozessrechtswissenschaft und seine Handhabung durch die Rechtsprechung (paper law, law in the books) einschließlich jener des Bundesverfassungsgerichts ist in vieler Hinsicht problembeladen wie schon geschildert. Aber auch die Zwangsvollstreckungspraxis (law in action, law in operation) mit ihren neuerlichen beklagenswerten Auswüchsen der Realität oder mit anderen Worten die Rechtswirklichkeit (living law, legal facts) ist problembeladen. Hier seien lediglich diesen Beitrag abschließend nur noch zwei diskutierte Problemschwerefelder angesprochen und ?gesprochen. Es ist zunächst als Kernstück des vorliegenden Gesetzesreformentwurfs unter dem Stichwort „Sachaufklärung“ behandelte Problematik der Verheimlichung, Verschleierung, Verschiebung oder Beiseiteschaffung von Vermögenswerten durch den Schuldner, welchen gegenwärtig weder mit sog. eidesstattlichen Offenbarungsversicherungen noch mit Haftandrohungen, mit den beim Vollstreckungsgericht geführten Schuldnerverzeichnissen (§§ 899 ff. ZPO) hinlänglich beizukommen ist, was auch für die Instrumente des Gläubigeranfechtungsgesetzes (AnfG) gilt oder auch die Maßnahmen der privat organisierten Schutzgemeinschaft für allgemeine Kreditsicherung (Schufa) oder auch andere Auskunftstellen über die Bonität von Schuldnern. Eine besonders „heiße“

Problematik, welche die staatliche Justiz und ihre Prozessuren ganz allgemein betrifft, lässt sich mit dem Schlagwort einer Privatisierung vormals ureigener justizieller Aufgaben bezeichnen. Diese fortschreitende Entwicklung lässt sich beispielsweise und vor allen Dingen an Erscheinungen wie der nichtstaatlichen und außergerichtlichen Alternative Konfliktbehandlung und Konfliktlösung (alternative dispute resolution, adr) als Formen einer Selbsthilfe der gegnerischen Parteien oder einer Hilfe zur Selbsthilfe seitens dritter Personen oder Unternehmen festmachen. Ein weiteres Indiz für jene Privatisierungstendenz ist auch die verschiedentlich diskutierte Frage, ob man nicht die Gerichte von der gesamten Sachaufklärung und Beweisermittlung entlasten sollte nach U.S. amerikanischem (pretrial discovery) oder anderen Vorbildern, was sich auch für die Sachermittlung im Zwangsvollstreckungsrecht fragen lässt (aftertrial discovery). Auch selbst mancherlei vormals polizeiliche Aufgaben werden inzwischen durch Private erledigt und auch die Übertragung des Gefängniswesens in private Hand wird mittlerweile diskutiert. Was speziell die Zwangsvollstreckung angeht hat sich mittlerweile eine sehr schlimme Form von „Privatisierung“, eine „alarmierende Form der Privatisierung der Rechtsdurchsetzung“[6], nämlich „eine solche mit Hilfe der Mafia“ oder sog. „schwarzer Männer“, welche die Schuldner auf Schritt und Tritt verfolgen und mit kriminellen Machenschaften wie insbesondere Drohungen oder Gewaltanwendungen Schuldner zur Aufdeckung ihres Vermögens oder zu Zahlungen oder zu freiwilligen Befriedigungen des Gläubigers zu veranlassen suchen. Auch im Bereich des privaten Inkassowesens bzw. der „Schuldbeitreibung“, welches auf Grund von Forderungsabtretungen (Inkassozessionen) oder Einziehungsermächtigungen (Inkassomandate) Gläubigerforderungen einzutreiben sucht, finden sich mittlerweile bedenkliche Entwicklungen. Inzwischen nämlich gibt es seriöse Unternehmen, aber auch Mafiabanden, die sich auf den Ankauf, so genannter fauler vollstreckbarer Titel für ca. 50% oder sogar unter 50% der titulierten Forderungssummen spezialisiert haben, um diese alsdann mit kriminellen Methoden durchzusetzen.
Damit bin ich am Ende dieses Berichts angelangt.

V. Nachbemerkungen

Eine Nachbemerkung muss ich mir ersparen.

[1] Zur näheren Information vgl. aus der insbesondere neueren Literatur Jauernig/Berger, Zwangvollstreckungs- und Insolvenzrecht, 22. Auflage 2006; Rosenberg/Gaul/Schilken, Zwangsvollstreckungsrecht, 11. Auflage 1997; Baur/Stürner/Bruns, Zwangsvollstreckungsrecht, 13. Auflage

2006; Lüke, Zivilprozessrecht. Erkenntnisverfahren und Zwangsvollstreckung, 9. Auflage 2006; Musielak, Grundkurs ZPO, 7. Auflage 2004; Paulus, Zivilprozessrecht. Erkenntnisverfahren und Zwangsvollstreckung, 3. Auflage 2004; Prütting/Stickelbrock, Zwangsvollstreckungsrecht, 2002; Lackmann, Zwangsvollstreckungsrecht, 7. Auflage 2005; Brox/Walker, Zwangsvollstreckungsrecht, 7. Auflage 2003; Lipross, Vollstreckungsrecht, 9. Auflage 2003; Prinz von Sachsen Gessaphe/Neumaier, Zwangsvollstreckungsrecht, 2006 sowiedie neue Monographie von Fischer, Vollstreckungszugriff als Grundrechtseingriff, 2006.

[2] Vgl. Fischer in 1; auch Gilles, „Thesen zu einigen der rechts- und verfassungs-, verfahrens- und justizpolitischen Aspekte des Themas: Grundrechtsverletzungen bei der Zwangsvollstreckung“ in: Beys (Hrsg.), Grundrechtsverletzungen bei der Zwangsvollstreckung, Athen 1996, S. 111 ff.

[3] Hierzu besonders Baur/Stürner/Bruns (in 1), S. 56 ff. Auch Lücke (in 1), S. 481 ff.

[4] Vgl. mit weiteren Nachweisen Gilles, „Vollstreckungsgegenklage, sog. Vollstreckbarer Anspruch und Einwendungen gegen die Zwangsvollstreckung im Zwielicht prozessualer und zivilistischer Prozessbetrachtungen“, in: ZZP 83 (1970). S. 61 ff.

[5] Vgl. Fischer in 2; Gilles in 2; Vollkommer „Zwangsvollstreckungszugriff als Grundrechtseingriff“, RPfleger 1981, S. 1 ff.

[6] Paulus, „Privatisierung der Zwangsvollstreckung – oder: Wie der Rechtsstaat an seinem Fundament erodiert“, in: ZRP 2000, S. 296 ff.

Fairness and Compliance

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Dubrovnik, May 2009

Fairness and Compliance: A short Overview of this Presentation

1. Introduction
2. Why do People Comply?
3. Procedural Fairness
4. The Relationship between Fairness and Compliance
5. Conclusions

1 Introduction

1. Voluntary compliance: A preferred enforcement procedure
2. Procedures affect the compliance with judgments, arbitral awards and (mediated) settlements
3. Example: McEwen & Maiman (1984)

1 Introduction

Maine Small Claims Courts, Forum Type, Perceived Fairness and Compliance, McEwen & Maiman (1984)

Forum Type	Perceived Fairness	Full Compliance	Partial Compliance	No Compliance
Mediation	Defendant Perceives Fair Settlement (n=52)	83	11	7
	Defendant Perceives Unfair Settlement (n=28)	75	18	8
Adjudication	Defendant Perceives Fair Settlement (n=33)	63	19	18
	Defendant Perceives Unfair Settlement (n=46)	46	14	40

2 Why do People Comply?

General Theory on Compliance with the Law:

Tyler (1990) asked citizens whether they often, sometimes, seldom or never violated six distinct rules. The study showed that compliance was strongly correlated with 1) peer disapproval of violating rules, 2) personal morality, 3) sex and 4) the perceived legitimacy of the police and courts.

2 Why do People Comply?

Reasons given for Compliance, Small Claims Court, Long (2003)

	Mediated Cases	Adjudicated Cases
Gave their word	57%	0%
Obey and respect the law	0%	50%
To end conflict	24%	14.3%
Outcome was fair	0%	21.4%
Other	19%	14.3%
Total	100%	100%
Sample Size (n=35)	n=21	n=14

If liability is admitted, compliance rates are higher (Wissler 1995)

2 Why do People Comply?

Why do people not comply?

One of the Main Reasons: They cannot pay (Wissler 1995)

1) compliance rates are low in defaulted cases and considerably higher in contested cases. (Vidmar 1984)

2) factors, such as i) a low award size, ii) a business or government as a defendant, iii) high income of the defendant (if the defendant is an individual) all are significantly and positively correlated with higher rates of partial or full compliance. (McEwen and Maiman 1984)

3 Procedural Fairness

What procedures are perceived to be fair by litigants?

Adversarial Procedures? (Thibaut & Walker, 1975)

Non-Adjudicative Procedures? (McEwen & Maiman, 1984)

3 Procedural Fairness

Active Judges: the Dutch Preparatory Hearings

Van der Linden (2008) measured, on a five point scale, procedural justice (i.e. whether or not the judge was biased and treated the parties equally), interpersonal justice (i.e. whether the judge treated the parties respectfully), and informational justice (i.e. whether or not the judge provides information about the procedure) as distinct dimensions of justice

Perceived Fairness, Average Scores per Category

	Parties	Lawyers
Procedural Justice (5 questions)	3.98	4.14
Treatment by the Judge (3 questions)	4.23	4.32
Information given about the hearing (6)	3.78	3.88

3 Procedural Fairness

Adjudicative and Non-Adjudicative Procedures (Lind et.al. 1990)

Perceptions of Fairness and Outcome Satisfaction

	Fairfax County		Bucks County		Prince George's County	
Mode of Disp. Res.	Trial	Settle-ment	Arbitr ation	Settle -ment	Conferen ce	Settle-ment
Procedural Justice Index	2.70	2.21	3.01	2.53	2.61	2.94
Outcome Satisfaction	2.24	2.23	2.27	2.17	2.12	2.63

3 Procedural Fairness

Conclusion: it is hard to make general remarks concerning certain modes of legal process.

Literature however has consistently shown that participants rate a procedure as fair if:

- *litigants could voice their opinion,*
- *litigants were treated with respect and dignity and*
- *the decision maker was neutral.*

Lind (1998), Tyler & Lind (1988), Tyler & Lind (2001), Welsh (2003)

3 Procedural Fairness

Perceived Procedural Fairness Matters as it:

- *Enhances the degree in which people accept the outcome of litigation.*
- *Enhances the support for institutions that administer these procedures.*
- *Enhances compliance with the outcome of the process.*

see Lind (1998), Tyler & Lind (1988), Tyler & Lind (2001), Welsh (2003)

4 Fairness and Compliance

Unfortunately there seem to be no recent, large scale, empirical studies on the relationship between fairness and compliance in the area of civil litigation. Studies, in many different settings however showed that perceptions of fairness and compliance rates are correlated.

Chan Kim and Mauborgne (1993), for example, showed on basis of a survey under subsidiary top managers of 25 multinationals, that procedural justice and the attitudes of commitment, trust and outcome satisfaction exercise overall positive effects on the willingness of managers to comply with the strategic decisions made by the head office of a multinational

4 Fairness and Compliance

Literature suggests that the effect of fairness on compliance is mediated by how people perceive institutions.

Procedural Fairness

1. Parties can voice their opinion
2. A neutral and unbiased adjudicator
3. The parties are treated with dignity

→

How Institutions are Perceived

1. Perceived Legitimacy
2. Trust in Institution
3. Emotions (i.e. anger with the institution)

→

Compliance

Compliance with the judgment,(mediated) settlement agreement, or arbitral award.

4 Fairness and Compliance

Fairness and the Perception of Courts in Civil Cases

- Many American studies have shown that the perceived legitimacy of the courts is strongly correlated with littigants perceived fairness of court procedures. See for instance Benesh (2006), and Lind & Tyler (1988).
- Mein, Verberk & Vos (2008), a survey showed that 96% of the litigants believed that preparatory hearings before the Dutch court were conducted fairly. The same survey revealed that the trust that litigants had in the judiciary was larger after the hearing than before the hearing.

4 Fairness and Compliance

Sunshine and Tyler (2003)

Compliance was measured by asking people whether they obeyed seven rules. The legitimacy of the police was considered to be a combination of the perceived obligation to obey directives of a the police, trust in the police and affective feelings towards the police. Procedural fairness was measured by asking people whether the police treated people fairly and with dignity and whether decision-making by the police was unbiased.

The study revealed that perceived legitimacy of the police positively affected compliance with the law. Compliance was also influenced by other factors, such as age, ethnicity, gender and income.

The study further showed that procedural fairness is the primary factor shaping perceived legitimacy of the police. The effect of procedural justice on compliance was mediated by perceived legitimacy.

4 Fairness and Compliance

Murphy and Tyler (2008)

Context: Australian taxpayers that had a conflict with the ATO after they were required to pay back taxes.

Procedural justice and anger had been measured in 2002. Anger and self reported compliance with tax laws were measured in 2004.

The study revealed that anger in 2002 and perceived procedural justice in 2002 significantly predicted anger in 2004. The study further showed that both anger and procedural justice in 2002, as well as anger in 2004, all (separately) significantly affected self reported compliance with tax obligations in 2004. When anger in 2004 was entered into the model, the effect of procedural justice on compliance was no longer significant (i.e. the effect of procedural justice on compliance was mediated by anger).

5 Conclusions

1. Perceived fairness probably explains a small part of the variance in compliance with judgments, arbitral awards and settlements.
2. Normative issues are important to understand compliance.
3. Dispute resolution and enforcement should not be treated as unrelated policy area's.

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Implementation of EU civil procedural regulations (particularly with regard to enforcement) in Slovenian case law

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European civil procedural law

- Cross border taking of evidence
- Service of documents in Europe
- International jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters (Brussels I)
- Jurisdiction, recognition and enforcement in matrimonial matters and matters of parental responsibility (Brussels II bis)

- Insolvency proceedings
- European enforcement order
- European small claims procedure
- European payment order
- Jurisdiction, applicable law, recognition and enforcement of decisions in matters relating to maintenance obligations

Legal nature of EU civil procedural regulations (article 249/2, Treaty establishing the EC)

- generally applicable
- binding
- directly applicable in all MS
- courts are bound by *iura novit curia* principle
- “avoidance strategy” of Slovenian (civil) courts not to apply EU law??

EU regulations in Slovenian case law – Brussels I

- National law (PILPA) : “enforcement of foreign judgements”. The creditor has two possibilities: recognition in a separate proceeding or the question can be raised as an incidental question in any court proceeding.
- Brussels I: recognition **and** declaration of enforceability (*exequatur*)
- A judgment given in a MS and enforceable in that State shall be enforced in another MS when, on the application of any interested party, it has been declared enforceable there. (Brussels I, article 38/1).

Temporal validity of Brussels I (articles 66, 76)

- Article 66

  1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.

  2. However, if the proceedings in the MS of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,

  (a) if the proceedings in the MS of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the MS or origin and in the MS addressed;

  (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the MS of origin and the MS addressed which was in force when the proceedings were instituted.

- Article 76

  This Regulation shall enter into force on l March 2002.

Temporal validity of Brussels I (articles 66, 76)

- Cp 8/2003: an Austrian judgement from 1998 was recognised, Brussels I was applied???
- Cpg 2/2005: Proceedings in a matter relating to a monetary claim started in Italy in 1999. The judgement was given after 1. 3. 2002. The defendant – a company was not sued in the courts for the place where it was domiciled. Defendant was served with the documents, but he did not enter an appearance before the court. Does Brussels I apply to proceedings?

Grounds for non-recognition of a foreign judgement – “manifestly contrary to public policy ”

- Cp 10/2005: Only judgement **manifestly** contrary to public policy constitutes grounds for non-recognition. Notion of public policy is limited by principles of EU law and ECHR! – clearly *controle limité*

- Cp 16/2006: Recognition of a German judgement by default , which contained decision, but no statement of ground, was sought. Can recognition be denied because it is “manifestly contrary to public policy”?

- Constitutional Court: to safeguard the right to appeal a judgement by default should contain a statement of ground.
- BUT: the constitutional right to appeal cannot be violated in spite of the fact that a German judgement by default is without a statement of ground. According to German law the defendant has a right to file a simple objection against the decision in the judgement by default (without stating grounds of objection). If the objection is admissible the case is transferred to ordinary adversarial proceeding and the judgement by default is set aside (§ 338, 342 ZPO).

- VSC Cpg147/2006: Enforcement proceedings of an Italian payment order took place. Debtor objected that creditor should obtain a declaration of enforceability in a separate proceeding at a district court (*exequatur)*. The court of second instance dismissed the objection stating that a judgment given in a MS shall be recognised in the other MS without any special procedure being required (Brussels I, article 33/1)??

- II Ip 533/2008: A creditor filed a motion for enforcement producing an original of a foreign judgement and a certificate on a standard form V of Brussels I. There was no preliminary declaration of enforceability proceeding.
- Upon the debtor's objection the court annulled the warrant for execution on the grounds that the creditor should obtain a declaration of enforceability in a separate proceeding at a Slovenian district court???

- Brussels I: certificate (annexes V and VI), issued by the court in the state of origine AND declaration of enforceability in the state of enforcement

  - certificates to Brussels I AND EU Enforcement Order certificate

Legal nature of EU civil procedural regulations (article 249/2, Treaty establishing the EC)

- generally applicable
- binding
- directly applicable in all MS
- BUT regulation of certain aspects of regulations is left to the national law of individual MS
- EC (C-119/84): regulations leave the matter of resolving any question not covered by specific provisions to the procedural law of the court hearing the proceedings. It must nevertheless be made clear that the application of the requirements of the national procedural law must not in any circumstances lead to frustration of the principles laid down in regulations.

Implementation of EU regulations in German law

- Recognition and enforcement of foreign judgements – special act was adopted
- Certain aspects of international family law – special act was adopted
- Cooperation between the courts of the MS (service of documents, taking of evidence, free legal aid, European payment order, European enforcement order, small claims procedure) is incorporated into a special chapter of ZPO (§1068 – 1109).

Implementation of EU regulations in Slovenia???

- A partial approach prevails
- The chosen method of implementation on case-by-case basis
- Users' options:

  - application of the provisions of the national law in matters not covered by regulations

  - recourse to notifications contained in Brussels I

  - recourse to notifications

Notification of Slovenia pursuant to European Payment Order, article 29/1 (a)

- Notification: “The courts that have jurisdiction are county courts (CPA, article 30)”.
- County courts have jurisdiction in pecuniary matters where the value of the claim amount at stake is not higher than EUR 20.000 (CPA, article 30/1).

Enforcement of Decision on Contact Concerning Children

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CROATIA

Contact Concerning Children

- App. 10% of cases are solved at court (Hönig, 2004; Casals, 2005, Masson and Wallbank, 2005, Rešetar, 2008)
- Highly conflicted are followed by enforcement
- The most difficult court proceedings

- Right to contact – human right protected by Art. 8 of the ECHR
- Failure to enforce contact order – infringement of the human right

Outline

- **1. Enforcement of Decision on Contact Concerning Children under the Croatian Legal System**
  - **Law and Research**
- **2. Differences between Some European and Croatian Enforcement Systems**
- **3. A ECtHR Lesson to the Croatian Legislation by :** *Case Karadžić v. Croatia*
- **4. Conclusion**

1.1. Croatian Enforcement System: Law in Book

Family Law Act 2003 (FLA 2003)
Enforcement Act 1996 (EA 1996)

The provisions on return enforcement order (EO) have to be applied (Art. 355 FLA 2003)

Judicial jurisdiction according to:

a) child's habitual residence
b) child's actual residence
c) habitual residence of the resident parent
d) habitual residence of the non-resident parent (Art. 340 FLA 2003)

Enforcement proceedings can be instituted by:

a) non-resident parent
b) persons with a contact order e.g. grandparents (Art. 343 FLA 2003)

1.1. Croatian Enforcement System: Law in Book

- Enforcement title: a court contact order which can be technically precise in enforc. proceedings (Dika, 2003)

- Application: can be applied without formal elements such as “coercive enforcement measures” (CEM) (Art. 346 FLA 2003)

- CEM: a) fine
  b) imprisonment
  c) physical removal

Enforcement can be carried out without formalities.

E.g. There is no duty to serve the party with an EO, presence of the opposite party – non-resident parent - is not necessary, an appeal does not have a suspensive effect. (Art. 347, art. 338, art. 339 FLA 2003)

1.2. Enforcement of Contact Orders in Croatia: Law in Action

Municipal Court of Split: 6 proceedings in 2006
15 proceedings in 2007

9 proceedings were carried out successfully
12 still pending in January 2008

The factors which delayed the enforcement:

- parallel criminal proceedings regarding domestic violence and sexual abuse,
- mother and child moved far away,
- contact between grandparents and a very young child,
- children's disease and
- children's refusals of contact.

1.2. Enforcement of Contact Orders in Croatia: Law in Action

Municipal Court of Osijek: 4 proceedings in 2006
2 proceedings in 2007

Just one was successfully finished
Others were unsuccessful and after 2 to 24 respectably months they were suspended.
Factors which caused failure of the EP:

- legal challenges according to the EA 1996 causing circumstance change by the time,
- mother and child moved far away,
- children's refusals of contact.

1.2. Enforcement of Contact Orders in Croatia: Law in Action (conclusion)

- Opposite to legal challenges, caused a stay and failure of EP at the court in Osijek, the court in Split does not have such problems.
- Despite the fact that ADR in EP is not foreseen by the FLA 2003 as well as by EA 1996, the judge in Split makes in every case a special effort to reach an amicable solution and voluntary compliance – the results were as follows: 9 proceedings were carried out successfully
- The objection of an older child: a global problem in case of which the law still has not found a successful legal instrument!

2. Differences between a Few European and Croatian Enforcement National Systems

- Convergences between the European and Croatian enforcement system:
  - CEMs (fines, imprisonment or physical removal of the child) exist, but they are not often used, based on consideration of the child's best interests. (Shulz, 2006)
- Differences:
  - Financial compensation on the person who has broken CO (English, Italian, German systems)
  - An unpaid work requirement on the person who has broken CO (English system)
  - Ability or duty of ADR (e.g. mediation, conciliation, cooperative discussion)

3. A ECtHR Lesson to the Croatian Legislation: *Case Karadžić v. Croatia*

- Case Karadžić v. Croatia (2005):

  father wrongfully kept the child (5) in Croatia for the first time in 2000 and prevented mother from taking him to Germany for 4 years. There were a few unsuccessful attempts to return the child under the Hague Convention (1980) as well as by means of Croatian enforcement instruments (fine, delivery of the child, imprisonment), but father hid the child and refused to hand him over and, second, the court did not enforce a fine or detention order.

ECtHR: Croatian court as well as the police and SWC failed to make adequate and effective efforts to reunite mother with the child, according to which there was a violation of Article 8 of the ECtHR.

4. Conclusion

A) Despite the fact of a strong connection between contact and return orders there is a necessity to make a legal distinction between return and contact enforcement orders since a return order presents an act opposite to contact orders which have to cause a long term relationship between the child and a person with contact order.

B) Accordingly, ADRs have to be an essential part of enforcement proceedings.

C) Consistent implementation of CEM.

D) Last but not the least:

"High respect of principle of no delay, which is more important for children than for adults!"

Thank you for your attention!

Click to add a subtitle

ENFORCEMENT OF DECISIONS ON CONTACTS CONCERNING CHILDREN[1]

Summary

Out of all the relationships between separated parents concerning their children after divorce or separation, app. 10 % of them is solved at court.[2] Within the above mentioned 10% of disputes, there is a certain percentage of those highly conflicted which are followed by enforcement of a decisions on contact concerning children (hereafter contact order). Enforcement of decisions on parental responsibility, child residence as well as contact orders are the most difficult court proceedings full of high emotions of parents as well as of the child.[3] Contact concerning children presents a human right protected by the European Convention of Human Rights and Fundamental Freedoms (ECHR), within the framework of protection of family life according to Article 8. Thus, a failure to enforce contact order could cause infringement of the human right to protection of family life. Effectiveness of enforcement proceedings depends on some subjective factors such as child's will and (or connected with) parents' behaviour as well as, on some objective factors based on organization of a legal system.

The aim of this paper is an introduction into the Croatian legal system regarding enforcement of contact orders, firstly presenting the existing legal instruments and secondly presenting their (in)efficiency in practice.

A short overview of some European comparative enforcement systems, particularly the overview of a variety of the legal instruments and of the coercive enforcement measures, will discover the main differences regarding Croatian enforcement proceedings.

Finally, a recent case of the European Court of Human Rights – *Karadžić v. Croatia,* primarily referring to enforcement of return order under the Hague Convention on the Civil Aspects of International Child Abduction - will confirm the thesis on the necessity of changes under the Croatian enforcement system in the area of contact concerning children.

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[2] (Germany) Hönig 2004, p. 2, (Sweden) Casals 2005, p. 36, (England and Wales) Masson 2005, p. 4 and Wallbank 2007, p. 191 and (Croatia) Rešetar 2008, p. 311.

[3] "Disputes relating to contact are often long and painful for the parties concerned." Council of Europe (Summary of the Convention on Contact concerning Children), http://conventions.coe.int/Treaty/en/Summaries/Html/192htm (last consulted 05. May 2009).

CENTER FOR INTERNATIONAL LEGAL COOPERATION

Balkans Enforcement Reform Project (BERP)

- Background
- Objectives
- Organization
- Other issues

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Background of BERP (I)

- Initiative of CILC and UIHJ
- CILC: organization and mandate, involvement in Western Balkans as of 2001: general and in area of enforcement
- Dutch experts in enforcement law in Albania, Croatia, Macedonia and Bulgaria
- Enforcement in focus of donor community and national authorities

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Background of BERP(II)

- Membership of Council of Europe / ECtHR jurisprudence

(*Hornsby/Greece*, BERP case-law report)

- EU accession process (Progress Reports)

- Judicial Reform strategies / Accession Strategies / Government Programs

- Conclusion: present enforcement systems do not meet the criteria of efficiency and effectiveness

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Background of BERP (III)

- Start of process of change
- BERP to assist national authorities and other stakeholders in this process
- First phase: Inception Missions (July/August 2008): Inception Report and Project Document
- Implementation phase as 1 January 2009. 32 Months

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Objectives of BERP (I)

- Project purpose: "... a more efficient and effective functioning of enforcement law in civil and commercial cases in the countries of the Western Balkans (Albania, Bosnia-Herzegovina, Croatia, Kosovo, Macedonia, Montenegro and Serbia) through the strengthening of their national systems of enforcement law and through the strengthening of regional cooperation in enforcement law".

- Divided in 5 results

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Objectives of BERP (II)

- Result I: Regional cooperation among countries of the Western Balkans in enforcement law is strengthened
  - Network organization (to be integrated into UIHJ)
  - Joint training events (like participation in Dubrovnik course)
  - Transition Road Map
  - Manuals with standards for the profession and the functioning of the systems: quality management, monitoring & control, performance measurement, transparency of assets, cooperation with other authorities

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Objectives of BERP (III)

– Result II: Legislative framework in the area of enforcement is harmonized with international standards and best practices:

- Enforcement codes / Civil Procedure Codes, laws on enforcement agents, by-laws (e.g. regulating examinations, disciplinary issues, etc.)

- Recommendations for better legislative framework concerning transparency of assets (based on regional manual) + training

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Objectives of BERP (IV)

- Result III: Professional competences and behaviour of bailiffs, enforcement judges and judicial officers dealing with enforcement cases and of professionals entrusted with supervision over enforcement procedures and structure enhanced:
  - Training (TNA, curriculum development, T-o-T, training courses and Practical Manuals)
  - Ethics (Code of Ethics, seminars, dissemination)
  - Implementation of Manual on M&C (seminars, courses)

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Objectives of BERP (V)

- Result IV: National Professional organisations and structures dealing with enforcement are established and strengthened:

  - Basis for national organization
    - Office
    - Regulations and structure of the national organization
    - Advice on public relations, etc.

  - Computer networks / IT development

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Objectives of BERP (VI)

- Result V: General public and other legal professionals are better informed about enforcement law:

  - Public awareness campaigns (brochures, posters, etc.)
  - Relations with other authorities (roundtables based on regional manual)

Results are to be achieved though tailor-made country action Plans, depending on actual need, and the regional cooperation program.

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Organization

- CILC in cooperation with UIHJ and GTZ/ORF for Legal Reforms

- Structure:
  - Project director, key expert, national coordinators
  - Partners in the countries: ministries, courts, judicial councils, professional organizations of enforcement agents and other stakeholders, training institutions, media, etc.
  - Partners in donor community: EU, USAID, etc.

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Other issues

- Website (as of June): www.berp.info

- Publications: Inception Report, Manuals, co-funding of PPJ publication 2009

- Contact:

  BERP project

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The Rule of Law

The rule of law brings order to society

Article 6 ECHR

“ … When determining civil rights and obligations, or deciding the validity of criminal proceedings against one, everyone has the right to a fair and a public trial of one’s case, within a reasonable period, by an independent and impartial legal body as instituted by the law…”

Transformation of 6, 13 ECHR

- Rights of the debtor:

a fair trial, humanity and privacy

- Rights of the creditor:

adequate, effective, efficient way, within a reasonable period and at reasonable cost.

Recommandations

- Introduction:

Moscow 2001
Strasbourg 2003

Role of UIHJ

Rec 1B: enforcement agent

“Enforcement agent” :

a person authorized by the state to carry out the enforcement process irrespective of whether that person is employed by the state or not;

Rec 1A: enforcement

“Enforcement” :

the putting into effect of judicial decisions, and also other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged;

Rec II1 II2: application 1

*It does **not** apply to administrative matters.*

- *Administrative matters: Rec 16(2003) on the execution of administrative and judicial decisions in the field of administrative law*

  (adopted by the Committee of Ministers on 9 September 2003)

Rec II1 II2: application 2

Civil matters, including commercial, consumer, labor and family law, criminal matters which are not concerned with the deprivation of liberty

the enforcement of judicial decisions, as well as of other judicial or non-judicial enforceable titles.

Rec 16: application 3

16(2003):

any individual measure or decision which is taken in the exercise of public authority and which is of such nature as directly to affect the rights, liberties or interests of persons, either physically or legally.

Rec III 1a/b: framework 1a

- *a. a clear legal framework, setting out the powers, rights and responsibilities of the parties and third parties*

- *b. in compliance with the relevant law and judicial decisions:*

  sufficiently detailed legislation to provide legal certainty and transparency to the process, as well as to provide for this process to be as foreseeable and efficient as possible;

-

Rec(16): Ia: framework 1B

- an appropriate legal framework to ensure that **private** persons comply with administrative decisions that have been brought to their knowledge in accordance with the law, notwithstanding the protection by judicial authorities of their rights and interests.

Rec III 1c/d: framework 2A

- *c. the parties should have a duty to co-operate appropriately in the enforcement process; in addition, and, in particular, in family law matters, the relevant authorities should facilitate this co-operation;*

- *d. defendants should provide up-to-date information on their income, assets and on other relevant matters;*

Rec 16: 2A.iii: framework 2B

- iii. the use of and the justification for enforcement are to be brought to the attention of the private persons against whom the decision is to be enforced;

Rec III 1e/f: framework 3

- *e. states should set up a mechanism to prevent misuse of the enforcement process by either party which should not be considered as a re-adjudication of the case;*
- *f. there should be no postponement of the enforcement process unless there are reasons prescribed by law. Postponement may be subject to review by the court;*

Rec III 1g: framework 4

- *g. during the enforcement process, a proper balance should be struck between claimants' and defendants' interests, bearing in mind, in particular, the provisions of both Articles 6 and 8 of the ECHR.*

Where appropriate, the interests of third parties should also be taken into account.

Rec III 1h: framework 5

- *h. certain essential assets and income of the defendant should be protected, such as basic household goods, basic social allowances, monies for essential medical needs and necessary working tools.*

Rec III2a/b: Procedure 1

- *2. Enforcement procedures should:*
- *a. be clearly defined and easy for enforcement agents to administer;*
- b. *prescribe an exhaustive definition and listing of enforceable titles and how they become effective;*

Rec III2c: Procedure 2

- *2. Enforcement procedures should:*

c. clearly define the rights and duties of defendants, claimants and third parties, including, in the two latter cases, their rankings and entitlements to monies recovered and distributed amongst claimants;

Rec III2d/e: Procedure 3

- *2. Enforcement procedures should:*

- *d. provide for the most effective and appropriate means of serving documents (for example, personal service by enforcement agents, electronic means, post);*

- *e. provide for measures to deter or prevent procedural abuses;*

Rec III2f/g: Procedure 4a

- *2. Enforcement procedures should:*

- *f . prescribe a right for parties to request the suspension of the enforcement in order to ensure the protection of their rights and interests;*

Rec III2f/g: Procedure 4a

- *2. Enforcement procedures should:*

- *f . prescribe a right for parties to request the suspension of the enforcement in order to ensure the protection of their rights and interests;*
- *g. prescribe, where appropriate, a right of review of judicial and non-judicial decisions made during the enforcement process.*

Rec III2f/g: Procedure 4a

- *2. Enforcement procedures should:*

- *f . prescribe a right for parties to request the suspension of the enforcement in order to ensure the protection of their rights and interests;*
- *g. prescribe, where appropriate, a right of review of judicial and non-judicial decisions made during the enforcement process.*

Rec 16(2003)1b: Procedure 4b

- *1b*. Where it is not provided for by law that the introduction of an appeal against a decision entails automatic suspension, private persons should be able to request an administrative or judicial authority to suspend the implementation of the contested decision in order to ensure the protection of their rights and interests.

Rec III2f/g: Procedure 4c

- *2. Enforcement procedures should:*

- *g. prescribe, where appropriate, a right of review of judicial and non-judicial decisions made during the enforcement process.*

Rec III3: the fees 1

- *3. Enforcement fees should be reasonable, prescribed by law and made known in advance to the parties.*

Rec III4/5: fees 2

- *4. The attempts to carry out the enforcement process should be proportionate to the claim, the anticipated proceeds to be recovered, as well as the interests of the defendant.*

- *5. The necessary costs of enforcement should be generally borne by the defendant, notwithstanding the possibility that costs may be borne by other parties if they abuse the process.*

Rec III.6: assets

- *The search and seizure of defendants' assets should be made as effective as possible taking into account relevant human rights and data protection provisions. There should be fast and efficient collection of necessary information on defendants' assets through access to relevant information contained in registers and other sources, as well as the option for defendants to make a declaration of their assets.*

Rec III.7: efficiency 1a

- *7. Assets should be sold promptly while still seeking to obtain the highest market value and avoiding any costly and unnecessary depreciation.*

Rec III.7: efficiency 1b

IIa. Member states should ensure that where administrative authorities are obliged to pay a sum of money, they comply with this obligation within a reasonable period of time.

Iib. Interest payable by an administrative authority, due to non-implementation of judicial decisions entailing an obligation to pay a sum of money, should be no less than interest payable by a private person to an administrative authority in a similar situation.

Rec 16.2: efficiency 1c

2-II c It should be ensured that the administrative authority has appropriate provision to avoid a situation whereby a lack of funds would prevent it meeting its obligation to pay a sum of money.

2-II d In the case of non-implementation by administrative authorities of judicial decisions entailing an obligation to pay a sum of money, member states should also consider opening up the possibility to seize the property of the administrative authorities within the limits prescribed by law.

Rec 16: liability and compensation 1a

- *The State and other administrative authorities should execute, voluntarily with fairness and within a reasonable period of time*

- *16-c Member States should ensure that administrative authorities will be held liable where they refuse or neglect to implement judicial decisions. Public officials in charge of the implementation of judicial decisions may also be held individually liable in disciplinary, civil or criminal proceedings if they fail to implement them.*

Rec 16: liability and compensation 1b

- *1-b In cases of non-implementation by an administrative authority of a judicial decision, an appropriate procedure should be provided to seek execution of that decision, in particular through an injunction or a coercive fine.*

Rec 16: liability and compensation 1c

- *The ECHR considers that the State should even be liable for the debts of a state owned company regardless of its formal classification under domestic law when this company doesn't enjoy suffisient institutional and operational*
- *It's not open to a State authority to cite lack of funds as an excuse (Burdov v. Russia, May 7th, 2002)*
- *However, the Court admits that a delay may be justified in particular circumstances. But the delay may not be such as to impair the essence of right to a fair trial (Burdov v. Russia)*

Rec IV.1: status 1

- *1. Where states make use of enforcement agents to carry out the enforcement process, they should comply with the principles contained in this recommendation.*

Rec IV.2 status 2

- *2. Enforcement agents' status, role, responsibilities and powers should be prescribed by law in order to bring as much certainty and transparency to the enforcement process as possible. States should be free to determine the professional status of enforcement agents.*

Rec IV.3: recruitment

- *3. In recruiting enforcement agents, consideration should be given to the moral standards of candidates and their legal knowledge and training in relevant law and procedure. To this end, they should be required to take examinations to assess their theoretical and practical knowledge.*

Rec IV.4: profile

- *4. Enforcement agents should be honorable and competent in the performance of their duties and should act, at all times, according to recognized high professional and ethical standards. They should be unbiased in their dealings with the parties and be subject to professional scrutiny and monitoring which may include judicial control.*

Rec IV.5: powers

- *5. The powers and responsibilities of enforcement agents should be clearly defined and delineated in relation to those of the judge.*

Rec IV.6: Abuse

- *6. Enforcement agents alleged to have abused their position should be subject to disciplinary, civil and/or criminal proceedings, providing appropriate sanctions where abuse has taken place*

Rec IV.7: state employed

- *7. State-employed enforcement agents should have proper working conditions, adequate physical resources and support staff. They should also be adequately remunerated.*

Rec IV.8: training

- *8. Enforcement agents should undergo initial and ongoing training according to clearly defined and well-structured aims and objectives.*

Conclusions

- independency
- transparency
- efficiency
- effective
- the role of the Government and other (State) authorities
- the role of national Chambers

Enforcement procedure in Russia

Prof. Dr. Vladimir Yarkov
Dr. Vadim Abolonin, LL.M. Eur.

Urals State Law Academy (Russia)

Dubrovnik, 2009

Main topics developed in the presentation

- Sources of enforcement law and its characteristics
- Brief summary of enforcement procedure in Russia
- Future developments in enforcement procedure in Russia

Stages of the enforcement procedure reform

- End of the 80's / beginning of the 90's– A necessarily reform
- 1997 – Creation of the Federal Service of enforcement officers
  – First enforcement procedure statute
- 2007 – New enforcement procedure statute
- Since 2007 – work on the Executive code

Sources of the enforcement law

1.National sources
-The Constitution of Russia (1993) -Art. 46 - Right of fair trial
-Federal statute on enforcement officers (1997)
-Federal statute on enforcement procedure (2007)
-Civil procedure code (2002) and Arbitral procedure code (2002)

2. International sources
-3 Conventions on enforcement procedure (1 UN, 2 CIS)
-29 Bilateral agreements
-3 Hague Conventions (1961, 1965 and 1970)

No mutual recognition and enforcement of judgments between EU – Russia
Only specific bilateral agreements with some EU members states

Russian enforcement system – statistical dates

- Federal Service of enforcement officers (FSEO)

  Civil servants, payment does not depend on volume of the executed decisions and the collected sums

In 2008

- about 24 thousand enforcement officers
- almost 36 million enforcement cases
- about 203 billion RBL (5,6 billion Euro) have been collected
- 182 million RBL (4 mil. Euro) have been collected as penalties imposed by enforcement officers.
- were collected over 85 billion RBL (2 billion Euro) in the federal and regional budgets
- 64 % of judgments are successfully enforced

Competences of enforcement officers of FSEO

- Execute private and public collectings, except collectings from the budget
- Do not deliver judicial summonses, it is done by courts
- Do not provide the proof
- Have right to limit the departure abroad of a debtor, even if the debtor is a foreign citizen

The basic lines of enforcement procedure

- The enforcement law is an integral part of the right to fair proceeding
- The enforcement process provides equal rights either for foreigners and for nationals
- FSEO – exclusive body on compulsory enforcement, except collecting of means of budgets
- There is a legal amount of time for enforcement process, generally it is about 2 months

Main problems of Russian enforcement process

- Low enforcement on monetary collecting from physical persons (10-15 %)
- Too many types of enforcement documents: prevalence of administrative bodies' documents (approximately 70 %) that leads to slow down the work of enforcement officers
- Lack of motivation of enforcement officer in work end results
- High degree of a cash monetary turn
- Beginning of creation of a common national register of real estate
- Large Russian firms organized as offshore companies, allow money escape out of Russia
- Low legal culture of the population (the society does not condemn debtors)

Private enforcement in the former Soviet Republics

- It is entered into Estonia, Latvia and Lithuania
- Kazakhstan – a bill is considered in Parliament
- Russia – discussion since the middle of the 90’s

Private enforcement: pro's and con's

- The different relation to model of private enforcement
- For: the Highest Arbitration Court, the Ministry of Justice, the Ministry of economic development and trade, commercial organizations
- Against: Federal Service of Enforcement Officers

Arguments for private enforcement

The Supreme Arbitration Court, the Ministry of economic development and trade, commercial organizations

- High percentage of default of judgments
- High congestion of enforcement officers
- Low wages and, consequently, low motivation of enforcement officers

Arguments against private enforcement

The FSEO

- Low level of legal awareness in Russia
- Absence of interest of the private bailiff in work with small collecting, for example, the alimony
- Impossibility to provide private enforcement in low economic activity regions
- Expectations of high cost of private enforcement

Private enforcement bill in the Republic of Kazakhstan

- 2 alternative systems of enforcement: state and private
- State regulate the access to the private bailiff position, organization and tariffs
- Creation of chambers of private bailiff
- «Clausus numerus» of private bailiff
- Property accountability of the private bailiff

Future developments for enforcement procedure in Russia

- Studying of experience of the states of the former USSR which have entered system of private enforcement
- Studying of experience of transition of Kazakhstan into a private enforcement system
- Improvement of the Russian economic wealth and legal system as a condition to a successful enforcement procedure

Thank you for your attention!

Effectiveness of Serbian enforcement procedure

1) **Facts**
2) **Origins of problems**
3) **Dilemmas**
4) **Possible solutions**

Facts

- Only 15 % of initiated enforcement proceedings are successfully completed
- Lawsuits filed against Serbia for violation of article 6 ECHR
- There is no significant relationship between Law on Enforcement and other relevant laws

Origins of problems

- Serbian courts are overcrowded with enforcement cases
- Lack of coordination between courts and other state bodies and organizations implementing public authorities
- Serbian Law on Enforcement is biased towards enforcement debtors

Dilemmas

- Judicial enforcement vs. private enforcement
- Legal remedies in enforcement procedure
- Only final judgments as executive titles?
- Special rules for enforcement in commercial matters?
- Introducing new security measures that requires transforming of legal milieu

Possible solutions

- Redefining basing principles of Serbian Law on Enforcement – civil enforcement shouldn’t be reserved only for courts
- Improving transparency of enforcement– establishing public registries for enforcement objects
- Reduction of legal remedies and possibilities for postponement of enforcement

REPUBLIC OF ALBANIA
MINISTRY OF JUSTICE
GENERAL DIRECTORATE OF BAILIFF

Albania’s experience in the direction of Reforms in the Enforcement Service

1. **The functioning of the Enforcement Service in a dual system (State and Private).**

- What do this Law consist of?
- Innovations in implementation of this Law
- Challenges, Risks of this System

1. **Amendments to Civil Procedure Code.**

- What do these changes consist of?
- Innovations in the amendments to Civil Procedure Code
- Other Legal initiatives in function of Implementation of the New
- Private Enforcement Agents,
- Implementation Measures to be taken

THE REFORM CONCERN THE FUNCTIONING OF THE JUDICIAL ENFORCEMENT SERVICE IN A DUAL SYSTEM(STATE AND PRIVATE)

a. Private Enforcement Service aims to regulate in detail the creation of Private Enforcement Service, bailiffs status, the criteria for licensing of Private Enforcement Service, ways of organizing, duties, fees for services performed, responsibilities and disciplinary measures.

a. The tasks that Private Enforcement Service will practice will be considered as a delegated public function, given the importance the procedure of enforcement of executive titles.

❑ What does this Law consist of?

- Exercise of Private Enforcement Agents function independently in all the country's territory, by privat or legal entities.
- Provision of service of the private enforcement agent only by licensed persons who practice exclusively this profession.
- Determination of responsibilities by the Minister of Justice in monitoring the private enforcement agents' function, award of licenses, issuance of by-laws, relating to well-functioning of private enforcement agents' activity, organization of the examination, start of procedural measures.
- Determination of criteria for exercising the activity of private enforcement agents.
- Organization of the qualification exam for private enforcement agents .
- Exclusion from performing enforcement procedures of the persons employed by a legal entity, if they are not licensed under this law or if the license was removed earlier.

- Deregistration of the enforcement agents from the register. When he/she is appointed in a state or public function, his license is suspended until the end of the office.

- Organization and functioning of the National Chamber of Private Enforcement Agents, which is conceived in the similar form as the other legal professions. It consists of two executive bodies: General Meeting, with has decision making powers and General Council, with has steering powers.

- Obligation of maintaining the confidentiality on the data that a Private Enforcement Agents receives during his activity, except in cases, when the data is required by state bodies, or upon of the party.

- Sanctioning relations with parties in the enforcement process and with third parties. Relations between Private Enforcement Agents and creditor party are foreseen to be regulated on the basis of contract terms concluded between them.

- Obligation of state institutions or private entities (State Police, private police, administrative police) to facilitate enforcement procedures.

- Fees (prices for Private Enforcement Agents Services) to be applied by Private Enforcement Agents are controlled, they will be determined by a joint normative act of the Minister of Justice and Minister of Finance.

- Disciplinary proceedings against Private Enforcement Agents. The right to initiate proceedings against them for committing violations to the law is attributed to the Minister of Justice, upon request or complaints of the parties in the enforcement process.

- A disciplinary measure is given for each disciplinary violation. From fine, suspension of license, removal of the license to deregistration from register of Private Enforcement Agents.

❑ Innovations in implementation of this law consist of:

- Private Enforcement Agents, Service is expected to bring a positive impact towards increasing the quality of Enforcement Service, through offering a service more motivated with logistical tools, financial and human resources.

- This service will easily identify the incompetent Private Enforcement Agents, who will give up their duty if they will not meet the requirements.

- Motivation of bailiffs through income to be obtained from their services.

- Introduction of new operators in the market, in terms of a free competition, which will deal with the enforcement of executive titles.

❑ Challenges, risks of this system :

- Coverage of all expenses from private service will bring the increase of the tariff rates for the parties in the enforcement process, which probably can not financially meet the raising fees, making it impossible to resolve their rights.

- Probably, by not feeling the states coercive power , the different subjects in the execution process, will create a serious problem to self-employed bailiffs.

- Social Issues, mainly regarding "custody and child support obligation," can be neglected by bailiffs because of the prolonged procedures, negotiations with the parents require a lot of time and bring few monetary benefits.

AMENDMENTS TO CIVIL PROCEDURE CODE
WHAT DO THESE CHANGES CONSIST OF?

- Establishment of central registry at the Ministry of Justice, where bailiffs can enter data of the cases under enforcement procedure.

- Defining the terms of review of a enforcement agents request by the court to determine the legal representative of the debtor, when the nullity of the executive title is required, when parties in the execution process oppose the bailiff's actions. Defining the terms of the procedures for the
- auction of immovable and movable assets through a quicker and more flexible auction process while respecting the rights of debtor

❑ Innovations in the amendment to the Civil Procedure Code consist of:

- It is anticipated that these changes will significantly improve the performance of Enforcement Service, through increasing the quality and efficiency of Enforcement Service to citizens and legal entities through the establishment of strict deadlines and clear- cut definition of procedures, either for the courts or the Enforcement Service, which will allow to avoid at maximum level the delays or excessive delays in the execution.

LEGAL INITIATIVES IN THE IMPLEMENTATION OF THE NEW ENFORCEMENT LAW.

- Adoption of the Ethics Code of Judicial Bailiffs (Private and State), (adopted on 08.05.2009)
- Adoption of regulation "for the composition of the evaluation commission, rules for its operation, selection process, criteria and procedures of the organization and announcement of examination results for private judicial bailiffs" (adopted on 08.05.2009).
- Improvement of the Law no. 8730 dated 18.01.2001 "On organization and functioning of the state judicial bailiff service" (draft is prepared).
- Some additions and changes to the Internal Rules of the Judicial Bailiff Service; approved by Order no. 6508, dated 07.10.2004 of the Minister of Justice; (in process)
- The application of private fee system (Ready for approval).

Thank You !

Enforcement in Bosnia and Herzegovina

Simone Ginzburg
HJPC – Backlog Reduction Project

Dubrovnik, 28 May 2009

Bosna i Hercegovina
Srbija
Crna Gora
Hrvatska
SARAJEVO
Mostar
Tuzla
Banja Luka
Dubrovnik
Split

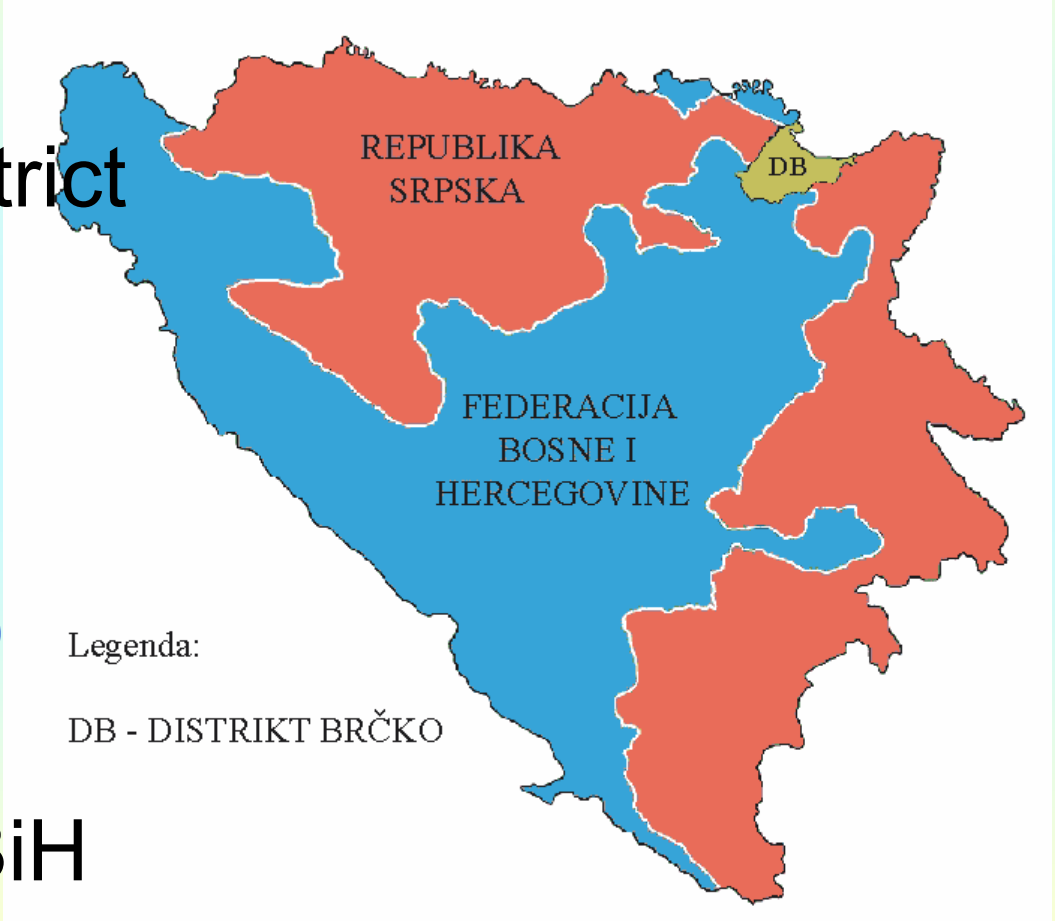
We are HERE

4 Laws on enforcement procedure

2000 – Brčko District

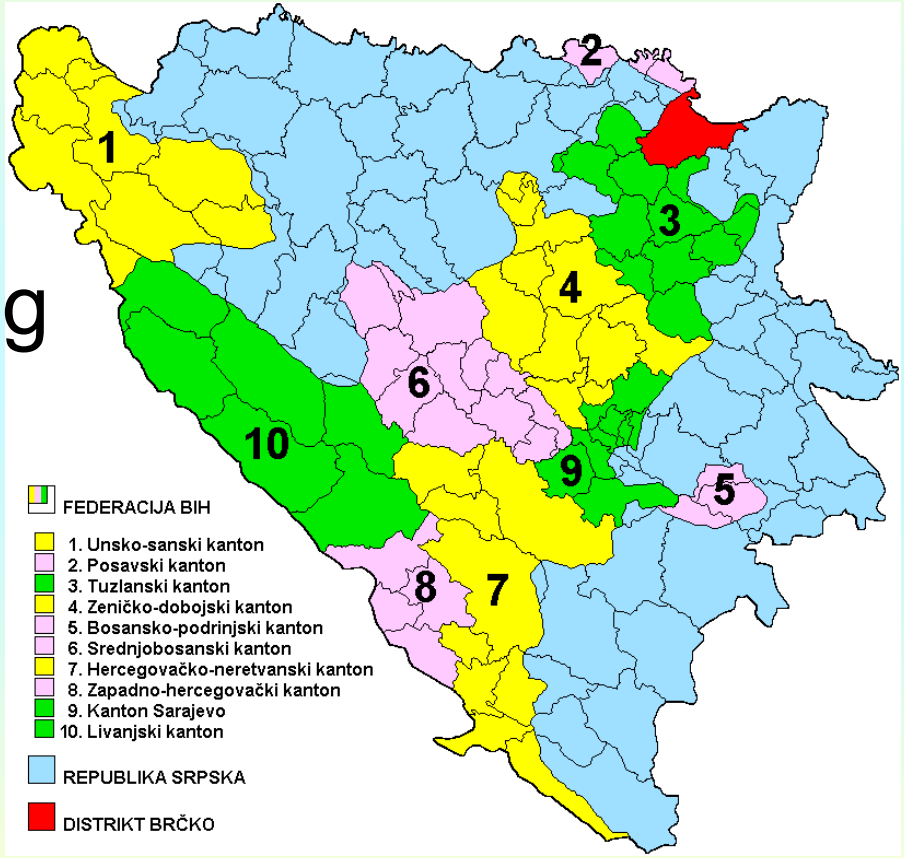
2003 – Entities:
FBiH and RS
(99.9 % of cases)

2003 – Court of BiH



14 Ministries of justice

- Judicial budgets
- Hiring and regulating judicial staff
- Court fees
- ...



1 High Judicial and Prosecutorial Council of BiH

- Appointing of judges, prosecutors and judicial associates
- Leaves and transfers
- Decides on discliplinary proceedings
- Education standards
- ICT
- ...
- Providing opinions on draft laws, regulations, or issues of importance that may affect the judiciary

Visoko sudsko i tužilačko vijeće Bosne i Hercegovine
Visoko sudbeno i tužiteljsko vijeće Bosne i Hercegovine
Високи судски и тужилачки савјет Босне и Херцеговине
High Judicial and Prosecutorial Council of Bosnia and Herzegovina

... More on www.hjpc.ba

Enforcement law – The Yugoslav heritage / 1

Motion for enforcement

+

->enforceable document

- Court decisions / settlements
- Administrative decisions / settlements
- Enforceable notary act
- Any other document so defined by law

->authentic document (vjerodostojna isprava)

- Promissory note or cheque
- Bill or extract of business registers for
  - Water
  - Garbage removal
  - Central heating
  - RTV taxes... ?

Enforcement law – The Yugoslav heritage / 2

Exclusive Court Enforcement

Judge :

decides on any substantial or procedural issue, on objections, deals alone with bank account, employers, real property

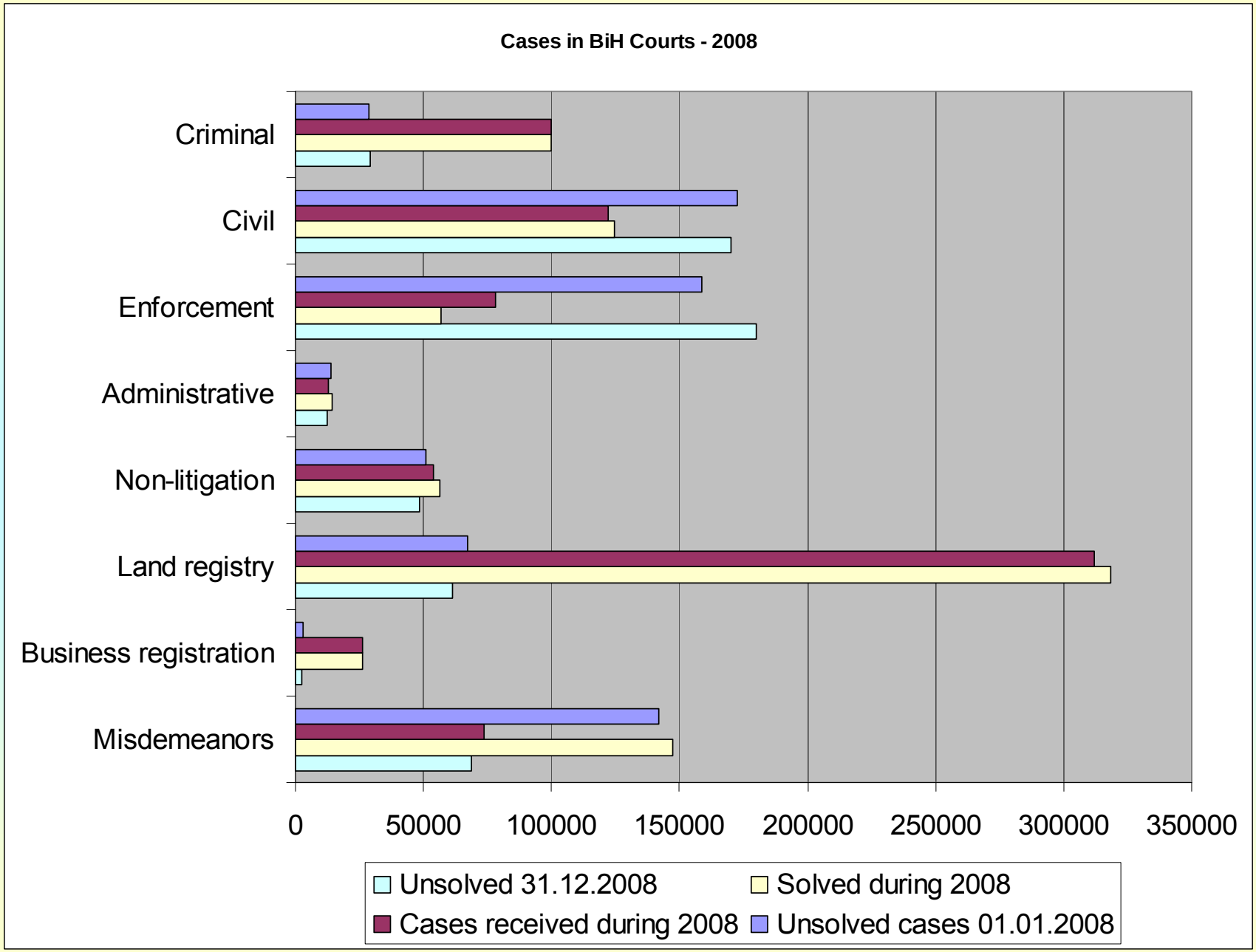
Judicial associate: All of the above except for decisions on objections

Bailiff:

Makes inventory, seizes and can sell movable properties, repossession, evictions and other procedural actions mandated by the judge

2003 Entity enforcement laws: more creditor oriented

- Objections do not suspend enforcement
- Postponement only upon creditor's request
- Possibility to sell a whole real property even if the debtor is only co-owner
- Third sale without lower limit to sale price


Cases in BiH Courts - 2008
Criminal
Civil
Enforcement
Administrative
Non-litigation
Land registry
Business registration
Misdemeanors
0
50000
100000
150000
200000
250000
300000
350000
Unsolved 31.12.2008
Solved during 2008
Cases received during 2008
Unsolved cases 01.01.2008

Plus, the so-called “utility cases”:

1.464.464 cases at the end of 2008

485.023 received during 2008

192.785 closed during 2008

Wrong trend!

Virtually all are requests for enforcement on movable properties!!!

HJPC BiH:

Backlog reduction Project (BRP)

Working groups established by HJPC in consultation with BiH Ministry of Justice: for the improvement of the enforcement procedure and for the solution of the problem of utility cases.

Purpose: Propose, with the contribution of all interested stakeholders, the necessary legislative, normative and organizational changes

- Improve access for creditors to data on debtors
- Improve service of documents
  - Harmonization and standardization
  - Competition!
- “Electronification” of the small claims proceedings:
  - Serve the decision to debtor ASAP
  - Identify cases with the same debtor
  - Reduce costs (paper,human resources, €, …)
  - Best balance of data-protection and Court-time
- Introduction of non-documentary payment order?

- Requalification of the bailiffs:
  - Entrance exam
  - Continuous education
  - Reorganization and autonomization of the bailiff service (avoid ping-pong)

- Improve sales procedures

  (“the best way to achieve the horse speed is to ride a horse”)

- ... ? ...

Thank you for your attention!

CEARM

CHAMBER OF ENFORCEMENT AGENTS OF THE REPUBLIC OF MACEDONIA

EXPERIENCE OF REFORMS

IN ENFORCEMENT PROCESS IN THE REPUBLIC OF MACEDONIA

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CHAMBER OF ENFORCEMENT AGENTS OF THE REPUBLIC OF MACEDONIA

OLD LAW

The Law on Enforcement Procedure since 1978 that was adopted as federal regulation and till the declaration of independence by the Republic of Macedonia this law underwent 4 amendments in:

-1982,

-1989,

-1990 and

-1991

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OLD “NEW” LAW

In October 1997, the Republic of Macedonia adopted its new Law on Enforcement Procedure. Amendments to this law were adopted in July 2000.

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ANALYSIS OF THE PROBLEMS

- Most of the unsettled court cases come from the area of enforcement of the decisions (about one million cases)

- Before the International Court of Human Rights in Strasbourg, the Republic of Macedonia was mostly prosecuted due to the duration of the court proceeding, and this duration was result of the long enforcement of the decisions that in certain cases took for more than 10 years

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TO WORK AND PROPOSE ADEQUATE CHANGES

- Recommendations by the Council of Europe
- Resolution no. 3 from the 24th Conference of European Ministers of Justice

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CHAMBER OF ENFORCEMENT AGENTS OF THE REPUBLIC OF MACEDONIA

THE WORKING GROUP

Was composed of representatives of:

-The Ministry of Justice,

-Judges from

-the Supreme Court,

-the Appellate Court,

-the Courts of first instance in Skopje,

- Lawyers – representatives of the Bar Association,

-Notaries public – representatives of the Chamber of Notaries Public and

-Representatives of the banks and insurance companies

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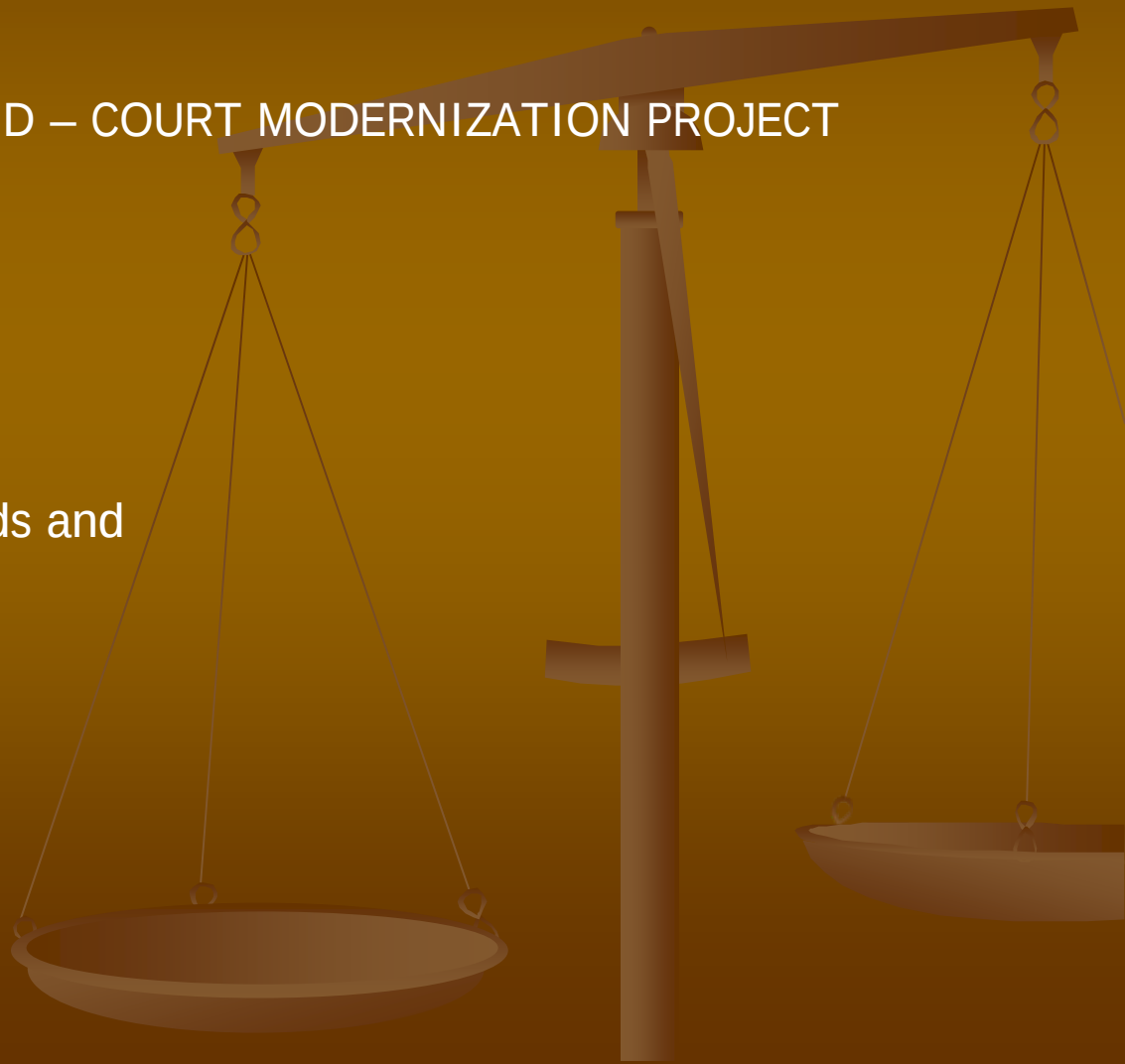
COOPERATION WITH USAID – COURT MODERNIZATION PROJECT



15 days visit to

- the Kingdom of Netherlands and
- the Republic of Lithuania

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NEW LAW ON ENFORCEMENT

In May 2005, the Assembly of the Republic of Macedonia adopted the new Law on Enforcement

An enforcement agent was introduced in the legal system as a person with public competences defined under a law

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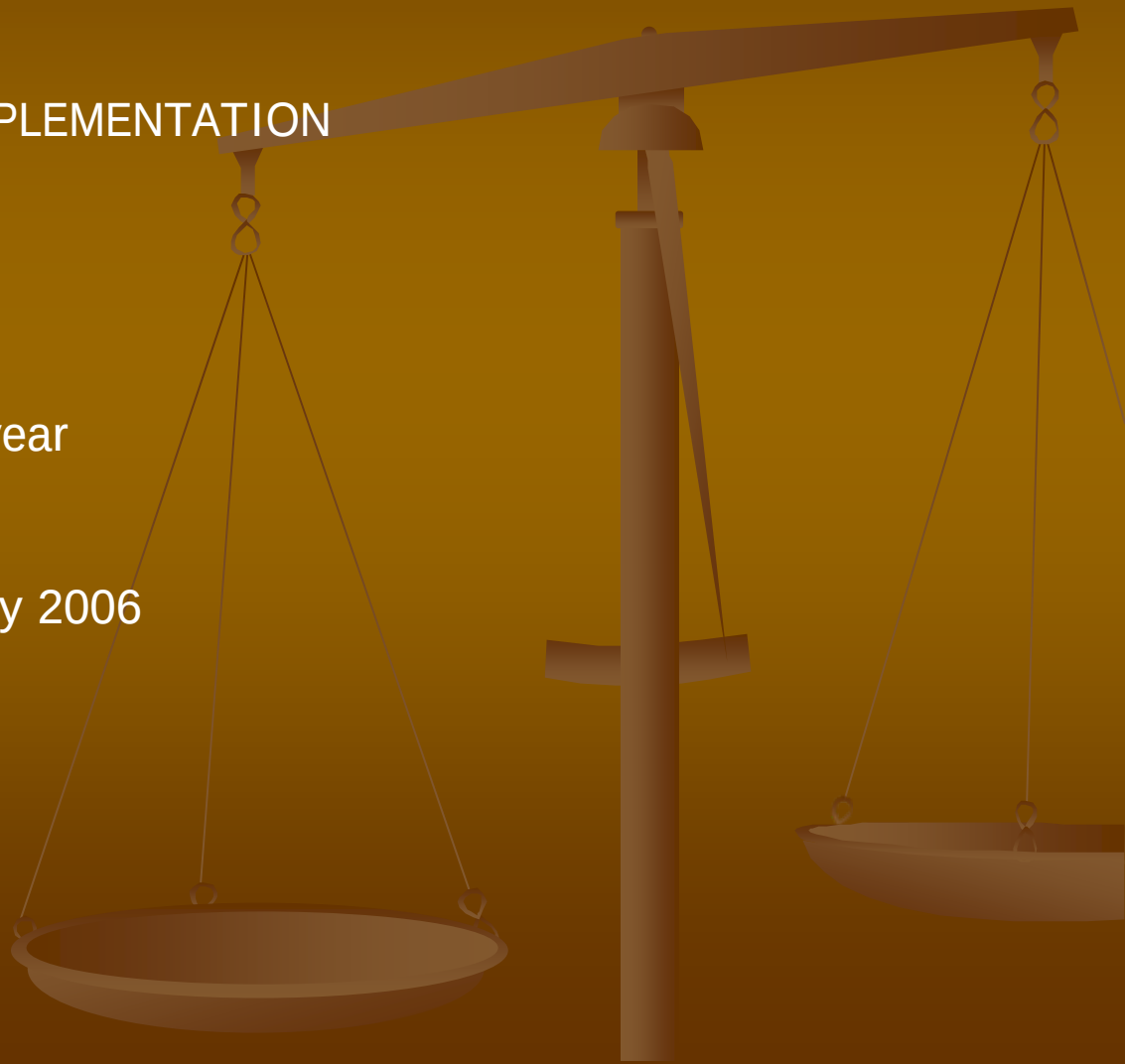
IMPLEMENTATION

A postponed action of one year

Adopted in May 2005

Was implemented on 26 May 2006



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THE NUMBER OF ENFORCEMENT AGENTS

Initially a total number of 69 appointed enforcement officers

In December 2007, the Minister of Justice increased the number of agents to 132 enforcement agents in the Republic of Macedonia

Currently a total of 67 enforcement agents conduct enforcement in the Republic of Macedonia, 14 of which have started their job this April

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CHAMBER OF ENFORCEMENT AGENTS OF THE REPUBLIC OF MACEDONIA

THE CHAMBER OF ENFORCEMENT AGENTS

Was established on 7 June 2006

In accordance with the Law on Enforcement, the enforcement agents and the deputy-enforcement agents must join the Chamber of Enforcement Agents

They shall execute their rights through the Chamber, and the Assembly of the Chamber shall protect the reputation and honor of the enforcement agents within the period they perform their profession - enforcement agents and shall observe whether the enforcement agents use their competencies conscientiously and in accordance with the law

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CHAMBER OF ENFORCEMENT AGENTS OF THE REPUBLIC OF MACEDONIA

ORGANIZING SEMINARS AND TRAININGS

FOR CONTINUOUS EDUCATION OF THE ENFORCEMENT AGENTS

On annual level, the Chamber organizes 4 – four seminars

The attendance of the enforcement agents on these seminars - training is obligatory

As trainers for these seminars the Chamber engages distinguished legal theoreticians and practitioners, professors from Law Faculties, judges ….

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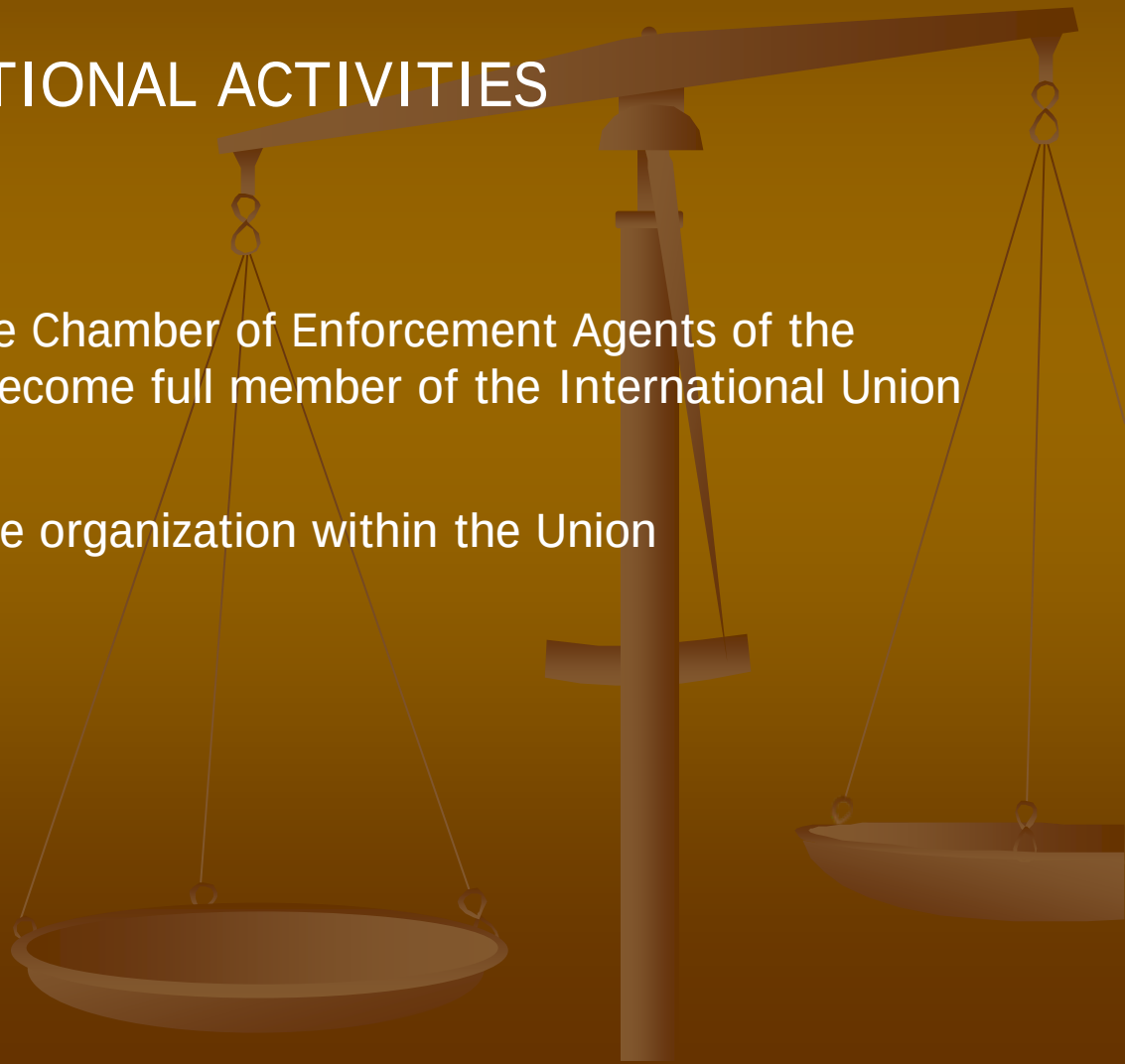
CHAMBER OF ENFORCEMENT AGENTS OF THE REPUBLIC OF MACEDONIA

INTERNATIONAL ACTIVITIES

From 29 November 2007, the Chamber of Enforcement Agents of the Republic of Macedonia has become full member of the International Union of Judicial Officers

A member of the EuroDanube organization within the Union

Bilateral cooperation



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DATA BASE

for registration and processing of monthly reports that are regularly submitted by the enforcement agents on a monthly basis to the Ministry of Justice, as well as to the Chamber

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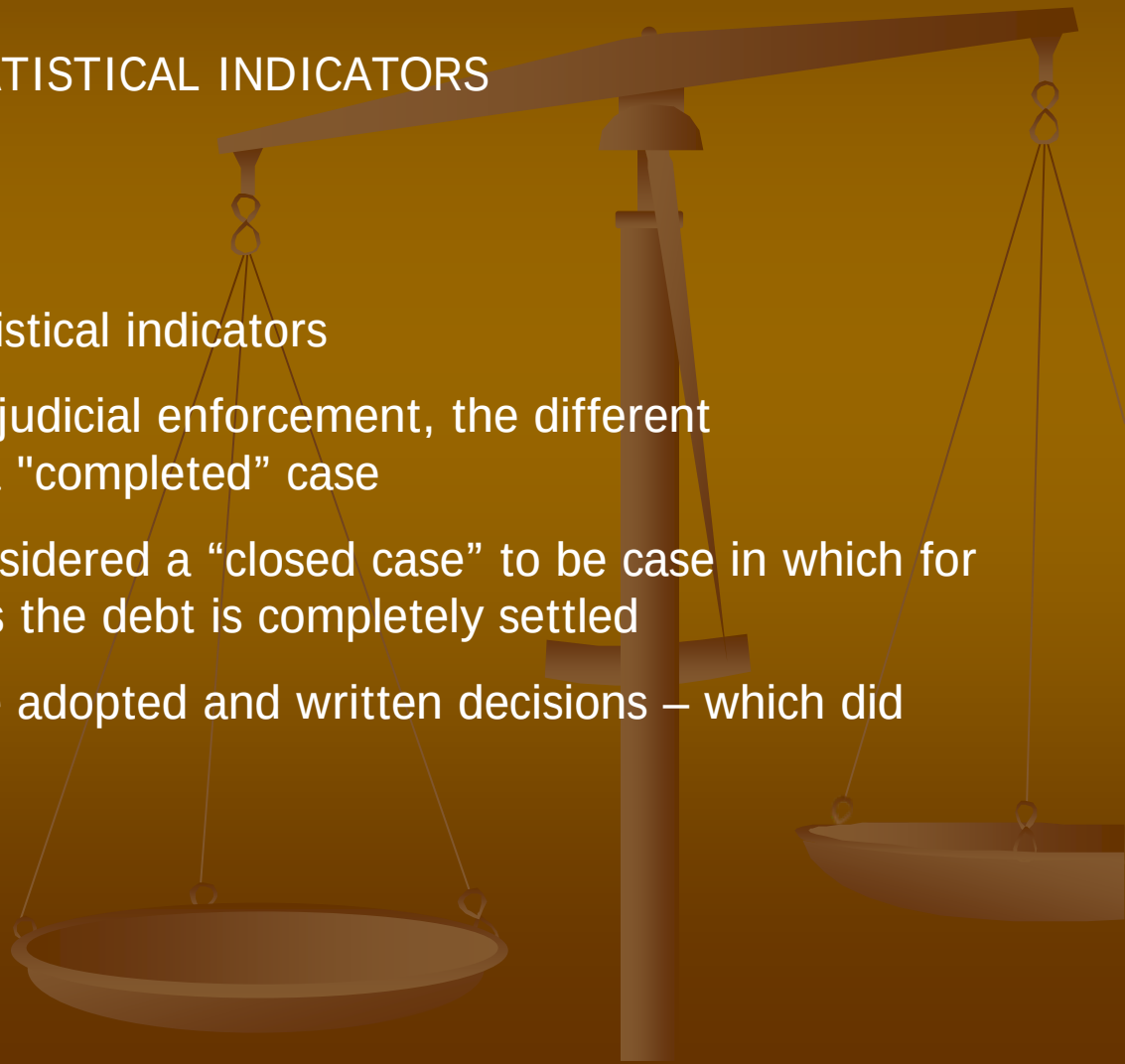
SOME STATISTICAL INDICATORS

For 2008 we have some statistical indicators

From the previous period of judicial enforcement, the different methodology of presenting a "completed" case

The enforcement agents considered a “closed case” to be case in which for example for monetary claims the debt is completely settled

The court that presented the adopted and written decisions – which did not include settlement



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STATISTIC FOR 2008

A total of 55 enforcement agents acted during the period of 2008

Received a total of 73.474 cases for work

17.618 cases, in other words 28,78% were completed

33.333 cases were received from the Public Attorney's Office for enforcement - does not behave as good creditor and does not finance the enforcement

If we consider only 40.141 cases in which the creditors are active in financing the expenses for enforcement

The realization percentage is 43,89%

Total amount of funds collected for enforcement of monetary claims by the enforcement agents in the Republic of Macedonia is MKD 3.675.309.580 or around 60 million Euros

CEARM

CHAMBER OF ENFORCEMENT AGENTS OF THE REPUBLIC OF MACEDONIA

STATISTIC FOR 2008

The total number of employees (excluding the enforcement agents) is 231

out of which 147 are graduated lawyers

62 have passed the legal exam

33 have passed the enforcement exam

the total number of assistant enforcement agents is 37

the number of deputy-enforcement agents, employed at the enforcement agents' is 8

enforcement agents have total of 256 computers, connected in a network

MINISTRY OF JUSTICE OF MONTENEGRO

THE LAW ON ENFORCEMENT PROCEDURE AND DIRECTIONS OF ITS REFORM

DUBROVNIK, MAY 2009

LEGISLATIVE FRAMEWORK

- Background and contents
- Initiation of procedure
- Enforsable Document and Authentic Document
- Principle of Formal Legality

NOVELTIES IN LAW

- The right to appeal
- The right of the debtor to initiate the procedure
- The possibility for a third party to initiate the dispute
- Delay of enforcement on a motion of the debtor and a third person

ANALYSIS OF THE IMPLEMENTATION

ON DECEMBER 2008 GOVERNMENT OF MONTENEGRO HAS ADOPTED AN ASSESMENT OF THE IMPLEMENTATION OF THE LAW ON ENFORCEMENT PROCEDURE

WORK OF BASIC AND COMMERCIAL COURTS

- Number of pending cases
- Number of disposed cases
- Number of undisposed cases
- Duration of procedure
- Number of Authentic Documents

NUMBER AND STRUCTURE OF ENFORCEMENT CASES IN BASIC COURTS IN 2007

- Total number of pending cases: 58 114
- Of all pending cases 128 797 or 82% were Authenitic Documents

OVERVIEW OF DURATION OF PROCEDURES ON ENFORCEMENT CASES IN BASIC COURTS

THE MAJORITY OF CASES, OR 8531, LASTED FOR UP TO 3 MONTHS AND 8532 FOR OVER ONE YEAR, WHILE THE FEWEST, OR 1458, LASTED FOR UP TO 1 YEAR.

OVERVIEW OF WORK OF COMMERCIAL COURTS IN 2007

- Total number of cases: 5 262
- Total number of disposed cases: 5 097 or 96.8%
- Total number of undisposed cases: 165 or 3.2%

OVERVIEW OF DURATION OF PROCEDURE IN COMMERCIAL COURTS

- In Commercial Court of Bijelo Polje the procedure in all the cases lasted up to 3 months
- In Commercial Court of Podgorica, in 3217 cases or 64% the procedure lasted up to 3 months, and in 74 cases or 1.4% the procedure lasted over one year

TOTAL NUMBER OF JUDGES AND COURT ENFORCEMENT OFFICERS ACTING ON ENFORCEMENT CASES IN BASIC AND COMMERCIAL COURTS

- Total number of judges: 26
- Total number of court enforcement officers: 41

PROBLEMS

PROBLEMS IN CONDUCTING ENFORCEMENT OVER PROPERTY OF LEGAL PERSONS AND ENTREPRENEURS FOR SETTLEMENT OF CLAIMS, THE VIEW OF THE CENTRAL BANK OF MONTENEGRO

THE MOST IMPORTANT QUESTIONS

TWO BASIC DIRECTIONS

BAILIFF

BAILIFF: “YES OR NO?”

MINISTRY OF JUSTICE OF MONTENEGRO

THANK YOU FOR YOUR ATTENTION

MARINA MIRANOVIC
Email: marina.miranovic@gov.me

Rec 17(2003): Enforcement procedures

In order for enforcement procedures to be as effective and efficient as possible there should be an enforcement process:

•that has a clear legal framework, setting out the powers, rights and responsibilities of the parties and third parties

•that is efficient, foreseeable and proportionate to the claim

•that is set up by as a mechanism to prevent misuse of the enforcement process

•that forms a proper balance between claimants' and defendants' interests, and where appropriate, the interests of third parties

•which legislation is sufficiently detailed to provide legal certainty and transparency to the process

Rec 17(2003): Enforcement is carried out be enforcement agents:

Whose status, role, responsibilities and powers should be prescribed by law

Who have high professional and ethical standards, sufficient legal knowledge and training in relevant law and procedure

Who are honorable and competent in the performance of their duties

Who are subject to professional scrutiny and monitoring which may include judicial control

Who in case of abuse are subject to disciplinary, civil and/or criminal proceedings, providing appropriate sanctions where abuse has taken place

Who undergo initial and ongoing training according to clearly defined and well-structured aims and objectives.

From a European perspective there seems to be a need for a legislative framework:

- On more ethical values, such as honour, dignity and honesty when practising a profession, e.g. a Code of Behavior
- On a system of control to avoid misuse
- On a prescription of the moral standards
- On a definition of powers and responsibilities of the ea
- On training

Disciplinary proceedings need to meet certain requirements such as:

- *Independency*
- *accessibility*
- *efficiency*
- *Transparency*
- *predictability*

Private enforcement agents:

the introduction of market forces and competition presents an inevitable risk of misbehavior by the enforcement agent

State enforcement agents:

a system of state enforcement agents presents a risk of corruption

Control mechanisms are necessary:

1. Appointment criteria for enforcement agent designed to minimize future monitoring problems

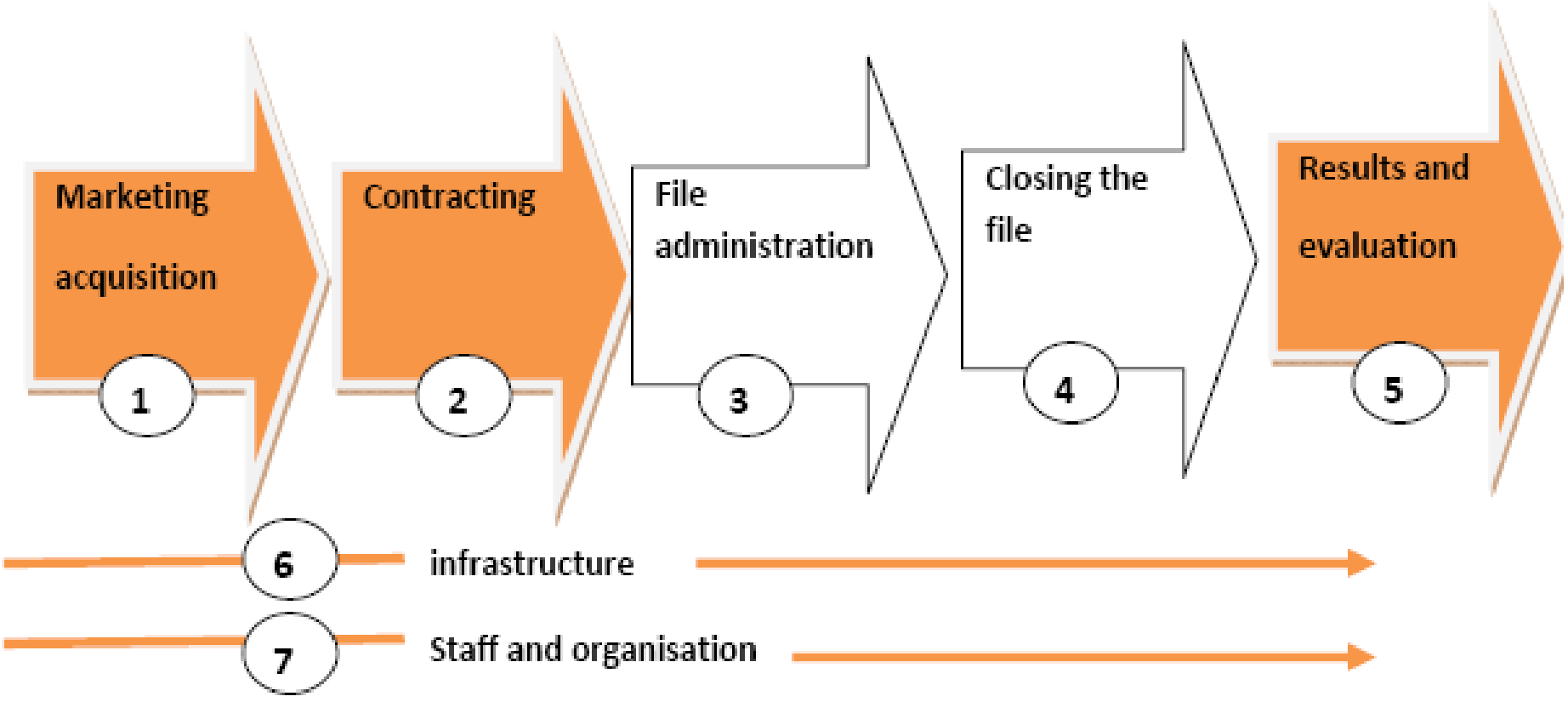
2. Examination of the personal assets of the EA

3. An effective system of supervision

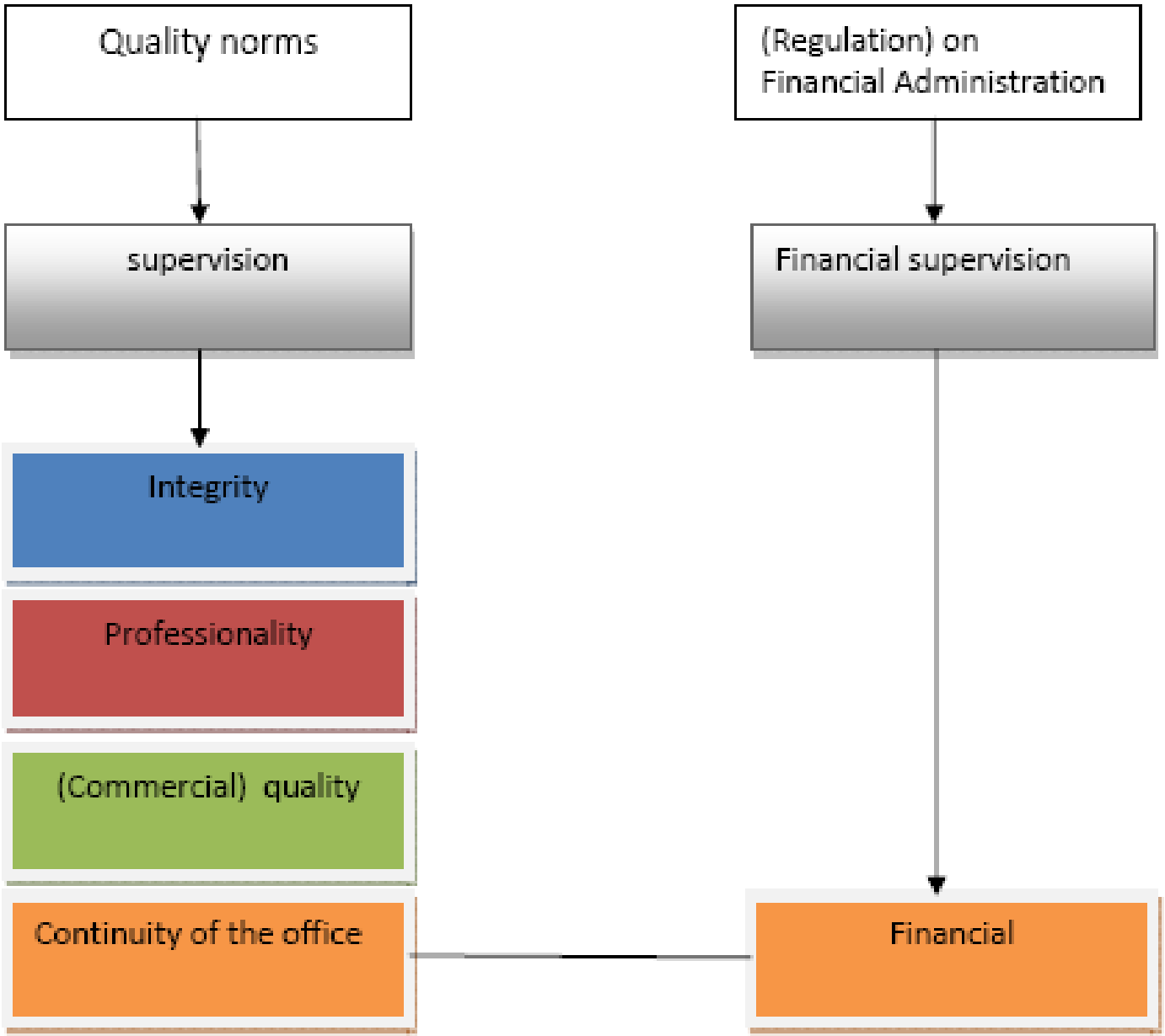
4. Effective regulation of special accounts

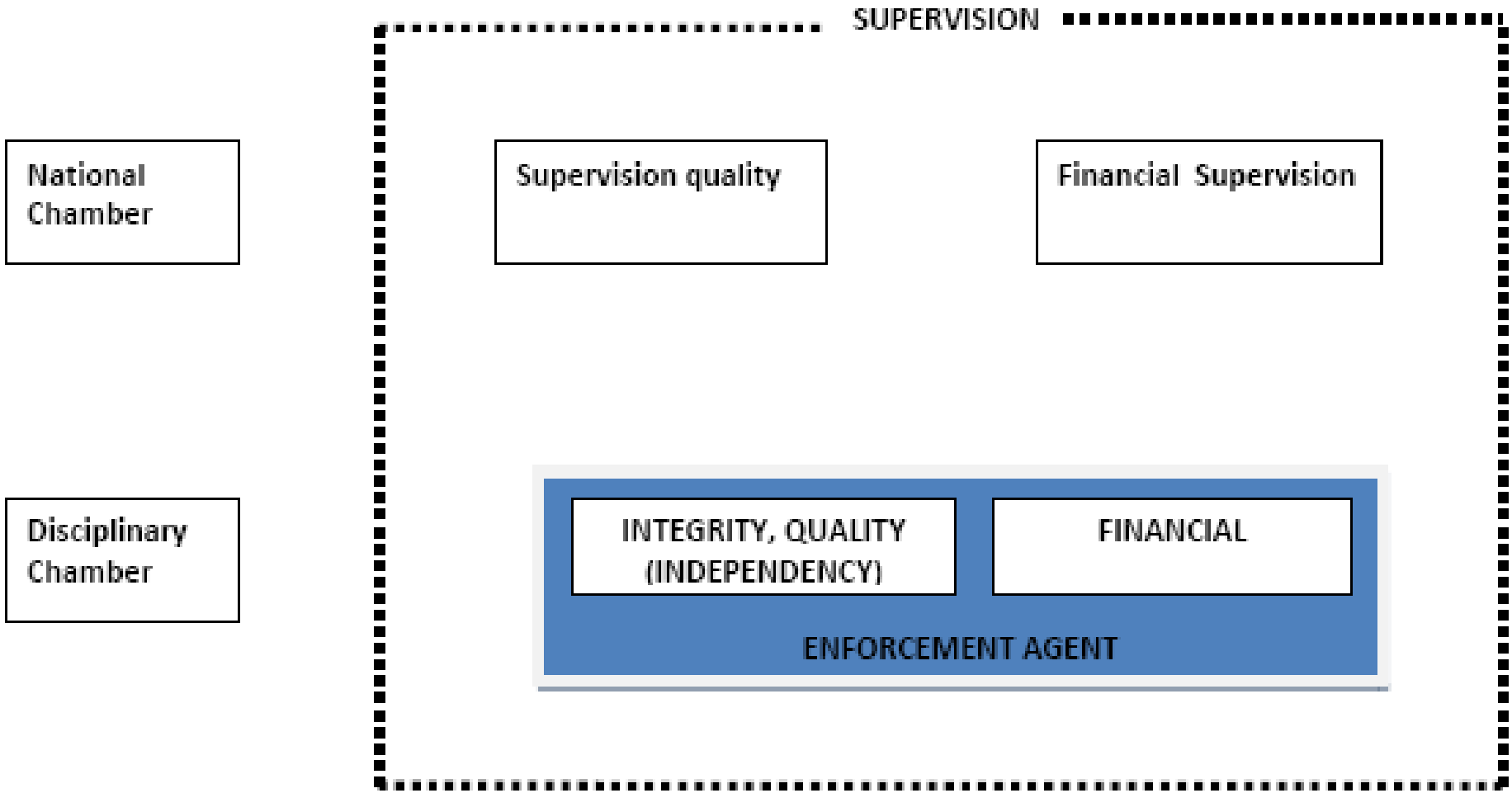
5. An effective system of financial bookkeeping and auditing

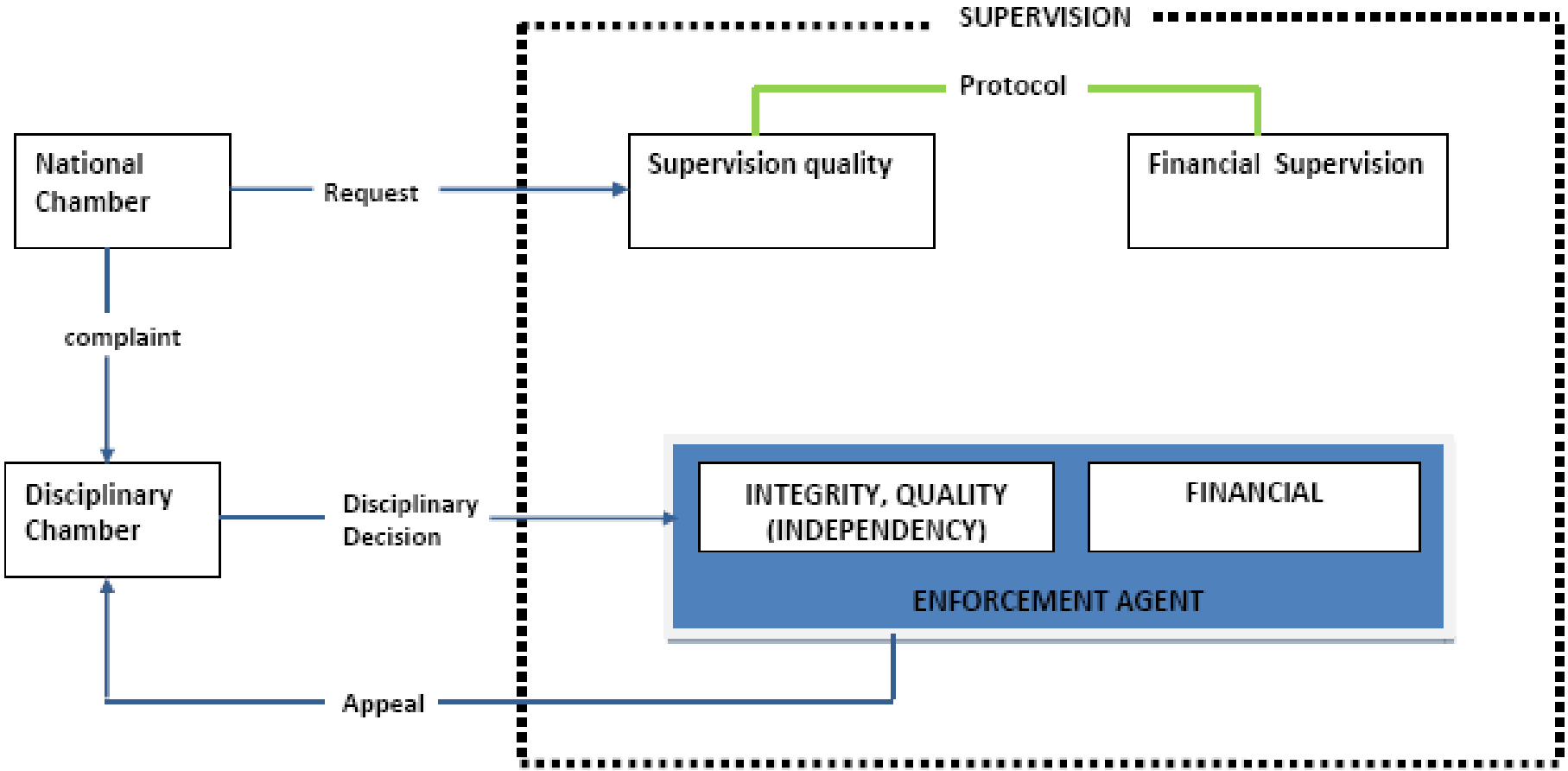
quality standards

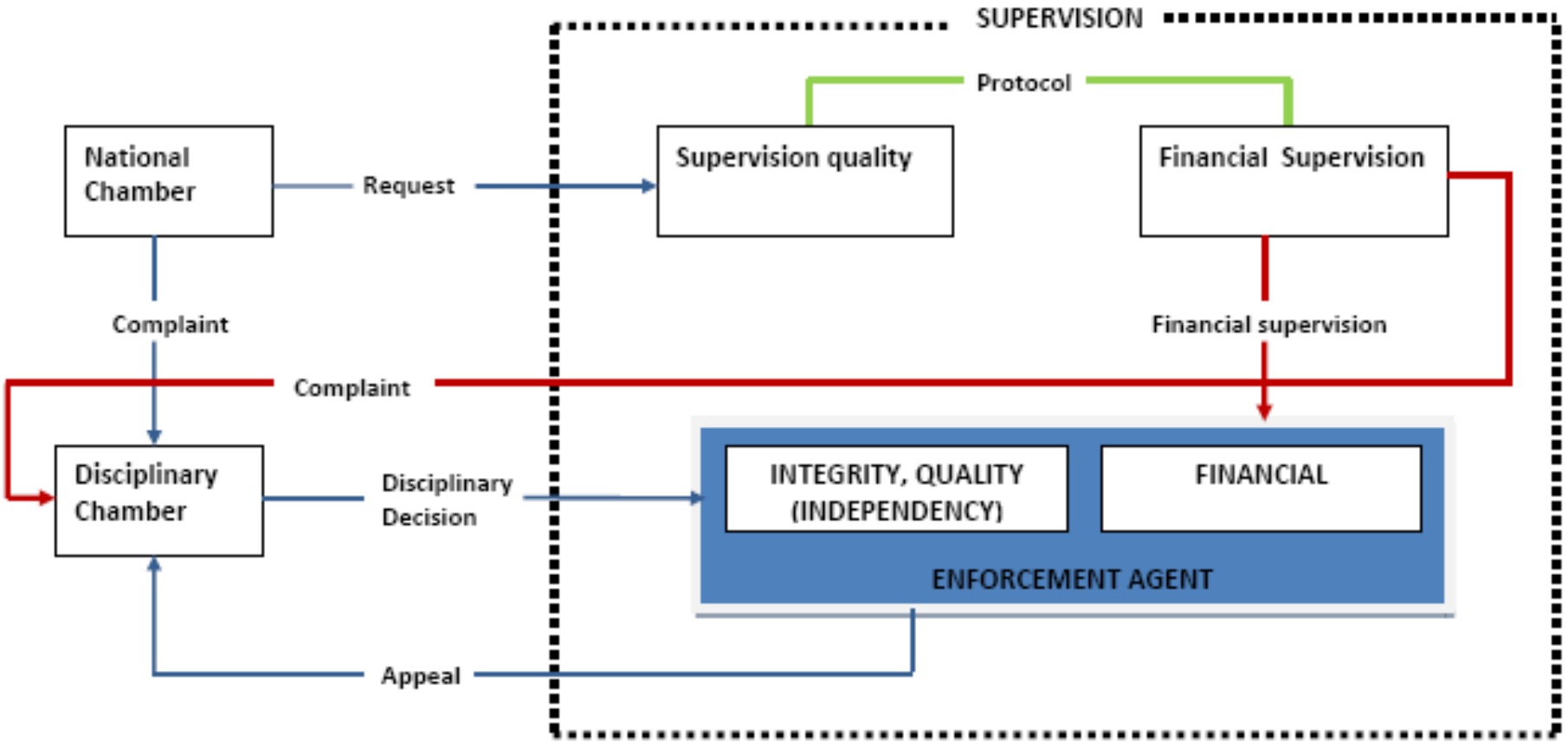


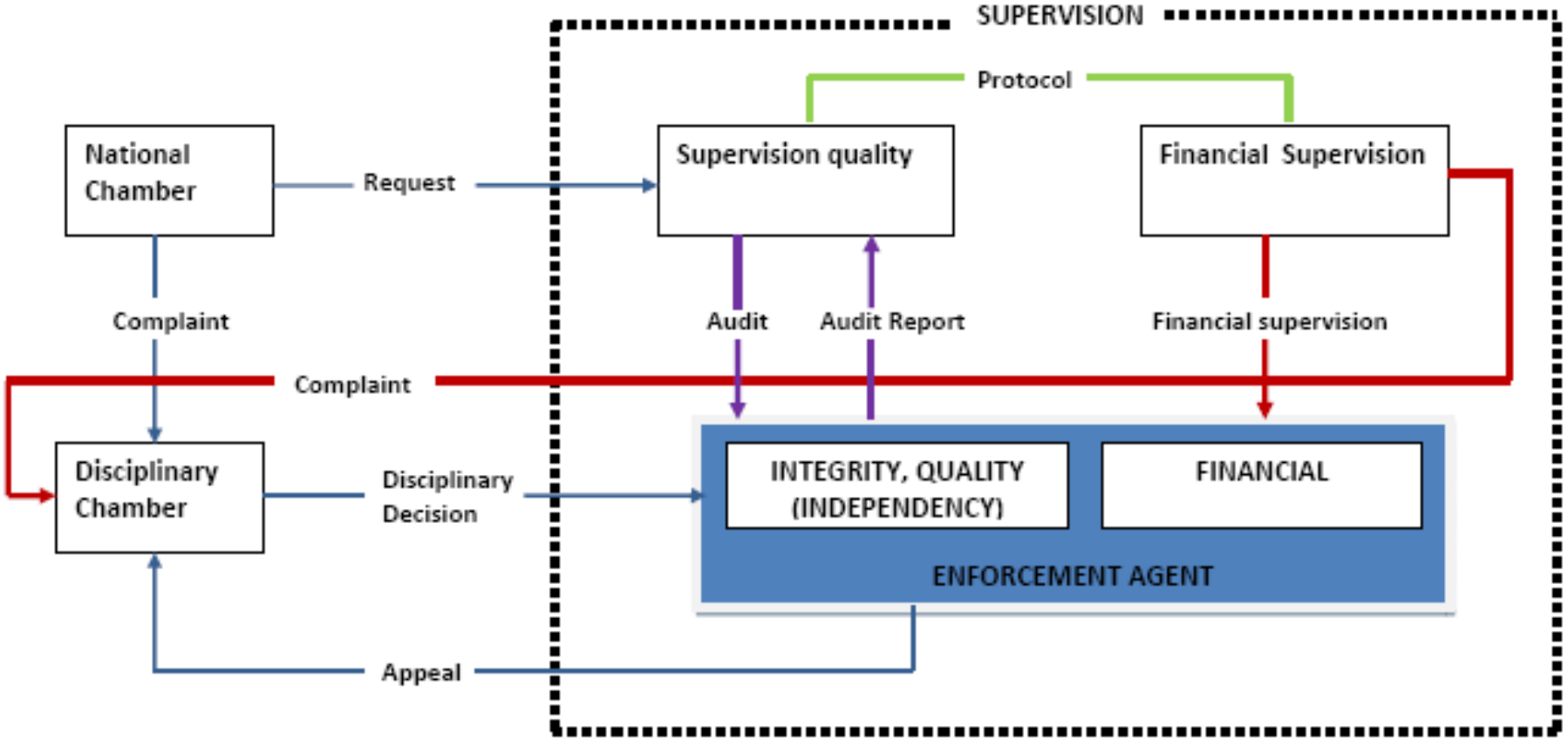

Integrity
Professionality
(Commercial)
quality
Continuity of the office


Quality norms
(Regulation) on Financial Administration
supervision
Financial supervision
Integrity
Professionality
(Commercial) quality
Continuity of the office
Financial


SUPERVISION
National Chamber
Supervision quality
Financial Supervision
Disciplinary Chamber
INTEGRITY, QUALITY (INDEPENDENCY)
FINANCIAL
ENFORCEMENT AGENT


SUPERVISION
Protocol
National Chamber
Request
Supervision quality
Financial Supervision
complaint
Disciplinary Chamber
Disciplinary Decision
INTEGRITY, QUALITY (INDEPENDENCY)
FINANCIAL
ENFORCEMENT AGENT
Appeal


SUPERVISION
Protocol
National Chamber
Request
Supervision quality
Financial Supervision
Complaint
Financial supervision
Complaint
Disciplinary Chamber
Disciplinary Decision
INTEGRITY, QUALITY (INDEPENDENCY)
FINANCIAL
ENFORCEMENT AGENT
Appeal


SUPERVISION
Protocol
National Chamber
Request
Supervision quality
Financial Supervision
Complaint
Audit
Audit Report
Financial supervision
Complaint
Disciplinary Chamber
Disciplinary Decision
INTEGRITY, QUALITY (INDEPENDENCY)
FINANCIAL
ENFORCEMENT AGENT
Appeal

Complaints and sanctioning

1.The EA does not have a valid audit report

2.The EA does not agree with the audit report from the auditor

3. There are serious doubts that the EA does not meet the audit criteria, although there is a positive audit report.

4. Other parties involved have doubts whether the EA meets the quality standards (legislative framework)

Privatization of enforcement services

A way forward for Croatia and the region?

Not if, but how, where and when!

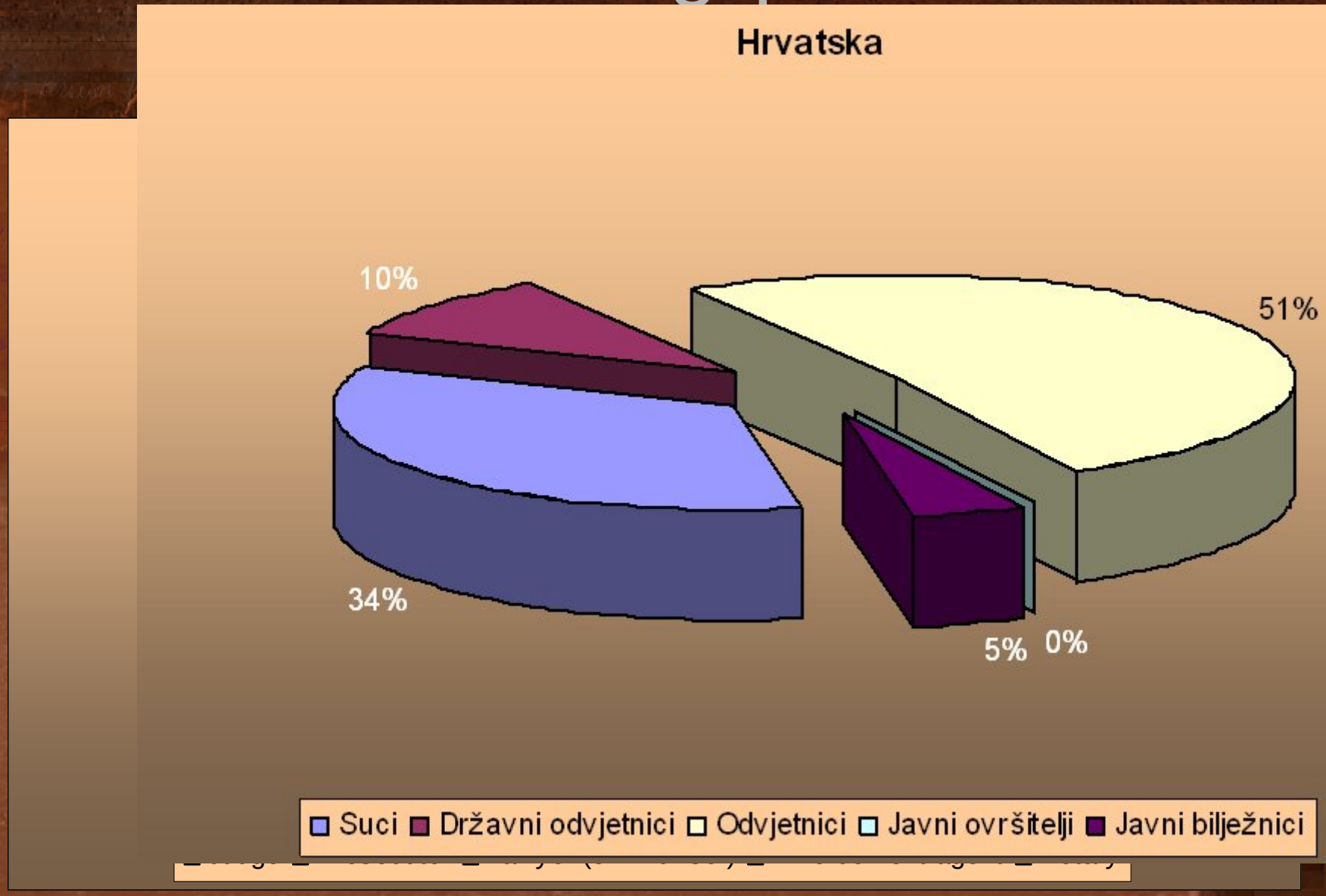
Court-based system is outdated

- Ex-Yugoslavia: tentative reception of the Austrian model
  - ZPO and EO
    - Less precise following of the model in the enforcement than in the litigation legislation.
  - Court-based administrative process
    - Massive involvement of judicial work;
      - Austria: mass claims, automated processes.
    - Reformed in Austria.
- Croatia: one of the very rare remaining countries in Europe that have a court-based system.
  - „Facit: as an inefficient and non-standard system, it has to be abandoned.

Organization, not procedure

- The way forward is in the change of organization, not in the change of procedural legislation
  - 6 amendments of the Croatian Enforcement Code, little substantive change;
  - Tradition of the past (federate origins)
- Necessary changes
  - Organization of services;
  - Automatization;
  - Creation of the specialists – professional enforcement agents;

Bailiff – a missing profession

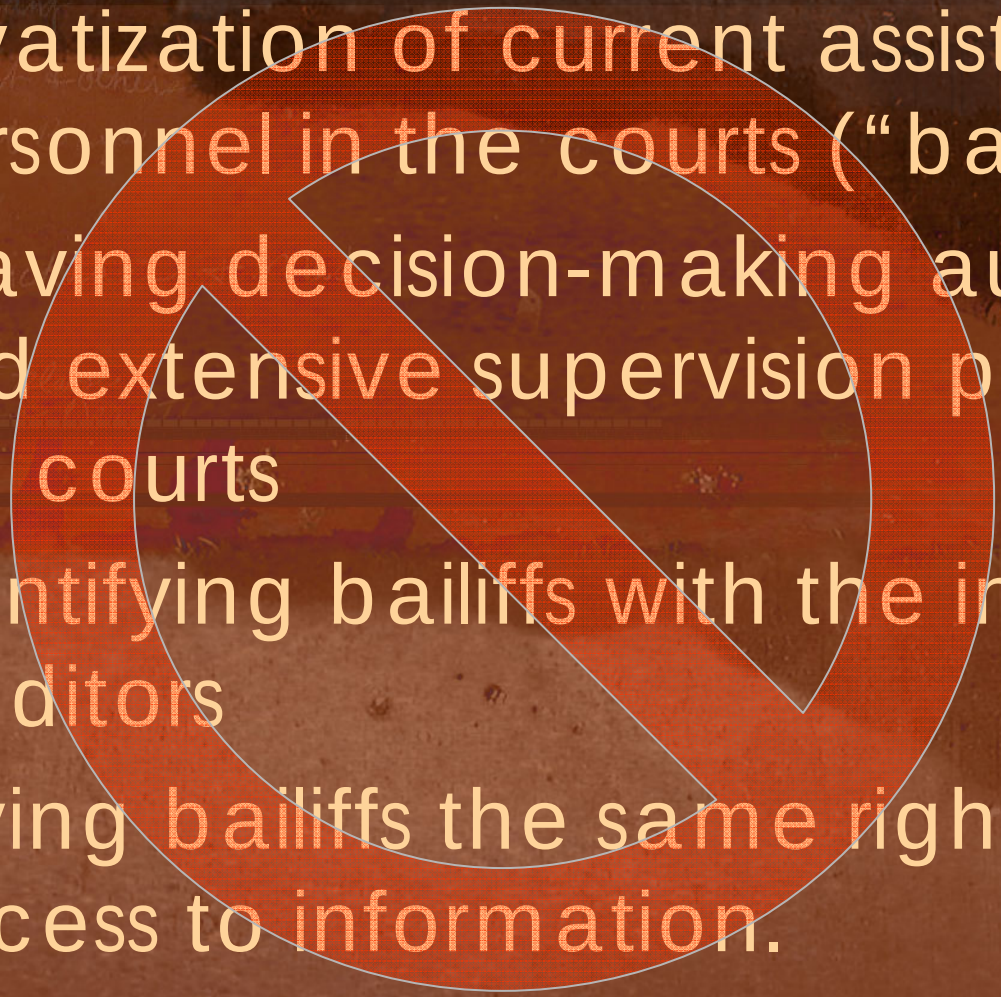


Public or private bailiffs?

- Wrong question: it depends on the needs, aims and perspectives
  - Some types of enforcement better for privatization than the other;
  - Social needs can be different;
  - Mixed systems are also an option.
- Model solutions have to be clear and consistent
  - Slovenian failure due to a half-way solutions.
    - Good lesson for prospective reformers!

What should NOT be done

1. Privatization of current assisting personnel in the courts ("bailiffs")
2. Leaving decision-making authorities and extensive supervision powers in the courts
3. Identifying bailiffs with the interests of creditors
4. Giving bailiffs the same right of access to information.



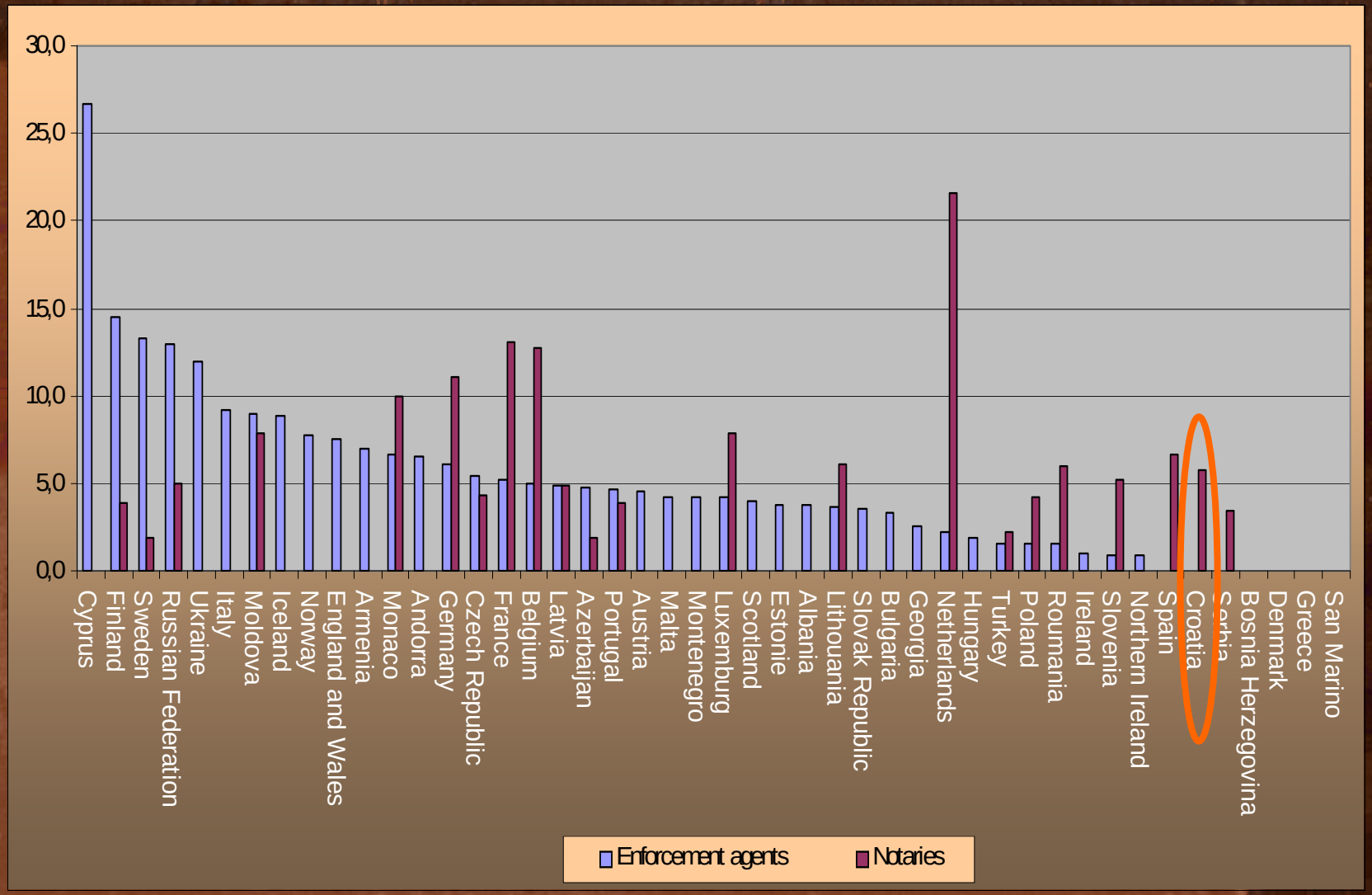
Who should become a bailiff?

- Bailiffs need to be among the most elite legal professionals
  - Training is not enough!
- Most respected legal professionals have to be motivated to become bailiffs
- Necessary requirements: cumulative
  - Law degree
  - Professional school
  - Specialist exam
  - Personal reputation and moral qualities.

Who should NOT be an enforcement agent

- Can enforcement be successfully outsourced to present private legal professionals?
  - Lawyers as enforcement agents
  - Public notaries as enforcement agents
- Systemic difficulties
  - Lawyers: one-sided approach, lack of checks
  - Notaries: different aim and profile of the job.
- Comparative disparity: lawyers, bailiffs and notaries are distinct professions in Europe

Enforcement agents and notaries



Risks in the privatization process

- Poor implementation
  - Typical South-European issues:
    - Half-way solutions
    - Lack of systematic approach and expert support in design and monitoring of the system
    - Oscillations due to changes in political elites
      - Examples of Slovenia, Croatia
- Corruption and nepotism
  - Weaknesses in the selection and appointment process
- Irreversibility (?)

Aborting failed experiments

- Croatia: need to change the direction of current developments
  - Two most significant experiments of Yugoslav and post-Yugoslav enforcement reforms have to be gradually scaled down and abandoned:

"Authentic instruments" enforcement writs

Outsourcing of enforcement to notaries ("notarial enforcement")


Thank you for your attention!

Public and Private Justice Course - Dispute Resolution in Modern Societies

PPJ 2009: Enforcement, enforceability and effectiveness of legal protection
IUC Dubrovnik, May 25 – May 28, 2009

PRIVATIZATION OF ENFORCEMENT SERVICES A WAY FORWARD FOR CROATIA AND THE REGION?

Prof. Dr. Alan Uzelac
University of Zagreb

Short outline

1. The court-based enforcement system that was typical for former Yugoslavia and which still exists in Croatia today is antiquated, inefficient and cannot guarantee the effective enforcement of civil judgments. As such, it does not exist any more even in the country that was used as the model for enforcement legislation (Austria). Therefore, the court-based system of enforcement has to be reformed and gradually abandoned.
2. The Croatian enforcement legislation has been changed and amended in the recent period six times, without reaching the desired level of effectiveness. This is a proof that the problem cannot be solved by the sheer change of procedural legislation. The reforms have to be undertaken at the organizational level, by establishment of adequate organizational network and by creation of competent enforcement personnel. It has to be a change of paradigm.
3. The two currently dominant global systems of enforcement both derive their success from the existence of highly competent and motivated professionals who are specialized for the enforcement of court judgments – the bailiffs. Only Croatia and several other post-Yugoslav states still do not have professional bailiffs in the proper sense. Therefore, the profession of bailiff only has to be established.
4. The bailiffs can successfully operate either as state employees, paid e.g. by the ministry of justice or finance, or as private professionals – as a liberal profession. In the past decades, we witness the growth and expansion of the private bailiffs, but there are also other examples of relatively successful enforcement processes conducted by the state-employed bailiffs. Both systems have their strength and weaknesses. Ultimately, it is most essential to introduce them in a clear, consistent and logical way, following the global and the European models and standards.
5. As to the option of privatization, it is not sufficient to privatize a job or service in order to make it effective. As demonstrated by the failures of Slovenian reforms, the bailiffs in the private sector may be equally ineffective unless additional conditions are fulfilled. The most important are: first, that the bailiffs have proper qualifications and training; second, the bailiffs need to be authorized and empowered to make most of the essential decisions in the enforcement process; and third, that they are entrusted both with protection of creditor's interest as well as with the task to ensure the proportionateness of their actions and protection of the interests of debtors; fourth, that bailiffs have a coordinated network, and privileged access to information; and fifth, that adequate safeguards against abuse are built into the system.
6. As to the qualifications and training, to conduct enforcement successfully it is crucial to have highly competent and motivated professionals. In our tradition, it is not customary to have confidence in private entrepreneurs, unless they are at the peak of the respective professions. Therefore, the new profession of bailiffs has to be

preferably at the same level of social and professional status as the most elite legal professions – judges, lawyers and notaries. It can be achieved only by setting requirements and expectations for bailiffs which are analogous to these professions, and also by attracting some (preferably: the best) of them to transfer the new profession. By not having done that, Slovenia has secured the failure of its reforms. In addition, attracting judges to apply for bailiffs posts could resolve some structural problems, ensuring that no surplus of legal professionals occur in the system.

7. If no essential decision-making powers are outsourced to new private professionals, the privatization of enforcement as a method of reducing the court backlogs becomes pointless. The discharge of courts can happen only if the majority of judicial tasks, such as the choice of means and methods of enforcement, disclosure of information, timing of the process etc. are transferred to bailiffs. After the privatization of the enforcement services, the court involvement in the enforcement process has to remain minimal, reduced to only very exceptional cases.

8. The transfer of functions from the judges to the bailiffs can only be complete if the bailiffs take some of the controlling and mediating functions that are presently exercised by the courts. The bailiffs cannot and should not become the sole agent of the creditor's interests, as the debtor would in such a way be left unprotected, which would in turn require more court involvement. Also, the bailiff as a neutral professional who has to keep an eye on both interests of creditors and the interests of debtors can be more effective, as he is in the better position to propose agreeable solutions, or even to mediate between the parties.

9. As highly competent professionals of public confidence the bailiffs could be entrusted with the insight into the data and information that would otherwise have to be confidential. The broad access to information might serve two purposes: first, to prevent the abuses which might happen if the parties or their representatives would have the access to information of equal or similar scope; second, to reduce further the need for court involvement in the process of obtaining information necessary for the conduct of enforcement.

10. From the very beginning, the integrity of the privatization process has to be impeccable. Every spot on the process of selection, recruitment and training of bailiffs could jeopardize the success of the whole process. The old Balcanic habits of corruption and nepotism are the principal enemies of this process. In addition, the strongest safeguards against abuses in the individual enforcement processes have to be built into the system.

11. Some of the previous experiments of socialist and post-socialist enforcement legislation, especially the issuance of enforcement writs on the basis of "authentic documents" (*ovrha na temelju vjerodostojne isprave*) and the involvement of notaries public in the enforcement process (*javnobilježnička ovrha*) have to be gradually abandoned. In particular, the certification of uncontested claims and the issuance of payment orders has to be separated from the enforcement of court judgments and the other enforceable documents. For establishment of the enforcement titles related to massive, mostly uncontested debt, the best solution is a centralized, automated IT-system of issuing payment orders. On the other hand, the proper enforcement on the assets of individual debtors require individual approach and skilled professionals such as bailiffs. As the skills required from bailiffs are rather different from the skills of notaries public, the mixture of these two professions is not possible. Notaries and bailiffs have to be kept as two separate bodies of professionals, just as in the rest of the world.

NOTES FOR SCHOLARSHIPS, TRAVEL AND ACCOMMODATION

If your scholarship covers **travel expenses,** please note that these will be reimbursed during the program. In order to get your travel cost refunded, please give your tickets to the Course organization team members so that they can be copied. Upon return home, you are obliged to send in your ticket in the envelope.

If your scholarship covers **accommodation expenses**, please note that everyting will be taken care of directly with the Dormitory or the Hotel.

SOCIAL ACTIVITIES

Sunday, May 24

Meeting of participants (Stradun, Gradska kavana.)

Note: Drinks in Gradska Kavana are not paid by the organisers; participants cover they own expenses.

After the meeting (from 19,30 to 20,00) an informal gathering for a dinner in one of the restaurants in the center of the old City of Dubrovnik (everyone pays his own expenses).

Monday, May 25

Lunch provided by Croatian Ministry of Justice (Restaurant Mimoza)

Wednesday, May 27

Excursion to Boka Kotorska

Transportation and the dinner is provided by the courtesy of the PPJ Course.

Note: the meals are covered, while participants pay their own drinks.